



**ACN**

Anti-Corruption Network for  
Eastern Europe and Central  
Asia



National Anticorruption Directorate,  
Romania

OECD Anti-Corruption Network for Eastern Europe and Central Asia

## EXPERT SEMINAR

# “EFFECTIVE MEANS OF INVESTIGATION AND PROSECUTION OF CORRUPTION”

**Held** in Bucharest, Romania on 20 – 22 October 2010

**Hosted** by the National Anti-Corruption Directorate of Romania

## PROCEEDINGS OF THE SEMINAR

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Participants in the expert seminar “Effective Means of Investigation and Prosecution of Corruption”, 20 – 22 October 2010, Bucharest, Romania

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## Introduction

The expert seminar “Effective Means of Investigation and Prosecution of Corruption” took place from 20 to 22 October 2010 in Bucharest, Romania. This seminar was organised as part of the work programme of the **Anti-Corruption Network for Eastern Europe and Central Asia (ACN)** of the **Organisation for Economic Co-operation and Development (OECD)**. It was organised by the ACN Secretariat and hosted by the **National Anticorruption Directorate (DNA)**.

**ACN** is a global relations initiative of the OECD Working Group on Bribery. ACN aims to support anti-corruption reforms, promote exchange of experience and elaboration of best practices in fighting corruption in Eastern Europe and Central Asia. ACN operates through general meetings, thematic and analytical activities and sub-regional initiatives.

The seminar was hosted by the **National Anticorruption Directorate (DNA)**, the specialized anticorruption prosecution agency of Romania, set up in 2002 and, at present, integrated in the Prosecutor’s Office attached to the High Court of Cassation and Justice. DNA focuses on high and medium level corruption cases and concentrates specialization, training and technical resources in this area. 145 prosecutors, 170 judicial police officers, 55 specialists, as well as 200 auxiliary, administrative and economic personnel are employed by the DNA. During the last 5 years, more than 2700 defendants have been sent to trial and approximately 650 defendants are already convicted with final decisions. Half of the convicted persons are public officials with leading, control or decision positions.

The **Istanbul Anti-Corruption Action Plan** is the main ongoing sub-regional initiative of the ACN. It focuses on reviews of legal and institutional framework to fight corruption, implementation of recommendations and monitoring of their implementation in participating countries through a “peer review”. Since the second round of monitoring under the Istanbul Action Plan equally important as monitoring are a series of “peer learning” activities, mainly training seminars, for practitioners.

Since 2001, the ACN has already carried out several thematic and analytical activities in selected areas of anti-corruption reforms. A project on **criminalisation of corruption** started in 2005 and resulted in a publication “Corruption: A Glossary of International Standards in Criminal Law” and two expert seminars – on International Anti-Corruption Standards in Kiev, Ukraine in February 2005 and Criminalisation of Corruption: Liability of Legal Persons for Corruption, Confiscation of the Tools and Proceeds of Corruption and Mutual Legal Assistance in Corruption-Related Cases in Almaty, Kazakhstan in March 2007.

For more information on ACN activities, see the ACN web site [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn).

The **aim** of this expert seminar was to encourage sharing of experience and good practice on **investigation and prosecution of corruption** and encourage networking of practitioners: investigators, prosecutors and specialised anti-corruption units investigating and prosecuting corruption crimes.

The seminar covered the following **issues**: methods of detection and investigation and prosecution of corruption crimes, experience in investigation of high level corruption, foreign bribery and corruption in health sector, role of independence and specialisation of police and prosecutors and asset tracing, forfeiture and confiscation in corruption cases.

This seminar brought together around 50 practitioners from police, prosecution and specialised anti-corruption bodies investigating and prosecuting corruption-related crimes from Eastern European and Central Asian countries and OECD Working Group on Bribery countries. Experts from Basel Institute on Governance, European Partners against Corruption and the Romanian Academic Society also took part.

The seminar included a variety of presentations, discussions and work on hypothetical corruption cases in working groups. Presentations were delivered and seminar was moderated by practicing and experienced prosecutors, investigators and anti-corruption experts from OECD Working Group on Bribery countries – Austria, Finland, Germany, Italy, Slovenia, US and Switzerland – and ACN countries – Albania, Croatia, Latvia, Lithuania, Romania and Ukraine – who shared their experience and good practice in investigating and prosecuting corruption.

The seminar was made possible thanks to voluntary contributions provided to the ACN by the United States, Switzerland and the United Kingdom.

This report contains a summary of discussions, as well as presentations delivered during the seminar, its agenda and list of participants.

## Summary of Discussions

The seminar discussed practical experience of investigators and prosecutors working on corruption cases and tracing assets gained through corruption.

Several common issues emerged from the discussion and common challenges faced by practitioners in detecting, investigating and prosecuting corruption that are summarized as follows:

### Detection of corruption

- A variety of sources of information can trigger a corruption investigation. Reports by supreme audit institutions, information from Financial Intelligence Units (FIUs) and intelligence services were mentioned as useful information sources. Articles in mass media have helped to trigger investigations too. Reports from citizens/whistleblowers are useful, but less if they are anonymous. Valuable information can be provided by banks, especially in form of information sent to FIUs, MLA requests. Internet is becoming a valuable source of information. Difficulties faced by prosecutors to obtain information from FIUs were highlighted.
- Undercover operations and special investigative means remain a powerful tool to detect corruption. Some countries argued that it is still the most efficient method, as best cases are detected with the use of undercover means. This also provides very solid evidence, for instance, filming or wiretapping giving of a bribe. The main challenge in this area is the increasing use of information technologies, such as calls over the Internet (e.g. *skype*), communication by email (wiretapping becomes less efficient).
- Law enforcement intelligence analysis (“intelligence led policing”) is increasingly recognised as a tool to timely identify threats and assist law enforcement. It can also provide a more comprehensive analysis of situations involving corruption. It was recognised at the seminar that the number of experts/analytical personnel in bodies fighting corruption through law enforcement should increase.
- Difficulties to convince whistleblowers to report corruption were discussed. People are less eager to report corruption, than, for example, crimes that involve physical threats. Also the fact that this report can bring about negative consequences in terms of their professional career prevents them, and this represents a serious concern in some countries.

### Investigation of corruption

- An important and effective tool in detecting and investigating corruption is analysis of information and documents of business entities involved in corruption or related to defendants. It is especially useful in cases when corruption has already been committed and in cases involving allegations of systematic corruption. Analysis of accounting and payment documents, conditions in contracts and other corporate documents can provide very useful evidence. It is important to look at how decisions are taken within the company. Information from registers of enterprises on shareholders and belongings needs to be analysed. This may require more efforts and time as, for

example, wiretapping a phone conversation. Specialised knowledge is also not always available in law enforcement bodies to analyse these documents. However, it is worth investing in this, as it helps to acquire very valuable evidence.

- Skills and personal qualification of anti-corruption investigators and prosecutors is key to successful and unbiased anti-corruption investigations. In some countries criteria such as reputation, ethical and moral values are used in recruitment of anti-corruption prosecutors. Incentives to help to keep good specialists remain a challenge for many countries (competitive salaries, etc.). Anti-corruption law enforcement officers must have basic skills in areas where corruption is committed (privatisation, EU funds, taxes, customs, etc.). They should also have a basic level of knowledge in accounting, public procurement procedures, tax and other relevant fields where corruption takes place. In the area of undercover operations, not only good technical equipment, but mostly skilled and experienced personnel is needed. More training also is needed.
- Specialists in different areas (accountants, economists, auditors, etc.) can take part in anti-corruption investigations and play a very useful role. Accountants and economists can be involved in particular in investigating foreign bribery cases. Specialists need to be involved from the early stages of the investigation. Can be in-house or external (other institutions, hired private experts, for example, private sector auditors). In some countries, accounting specialists and economists are staff members and allowed to testify in courts, but can also be hired as external experts.
- Inter-institutional task forces/investigating teams in many countries are used as effective tools to conduct pre-trial investigation into corruption. These task forces are led by a prosecutor and involve police, tax and other specialists and direct access to registers and tax information. Task forces allow investigating corruption cases in a team and obtaining information and necessary expertise faster and without exchange of official letters.
- International joint investigation teams (JITs) is an efficient method to investigate trans-border corruption cases, involving episodes of corruption crimes committed in several countries. European Union countries use the European Union Council Framework Decision of 13 June 2002 on Joint Investigation Teams for setting up such teams. Countries beyond the European Union can also be involved. EUROPOL and EUROJUST can provide support. Mutual trust, taking decisions together and informal exchanges were highlighted. The JITs represent a source of new resources and can offer an additional impetus in form of external, international pressure to carry on an investigation.
- Effective investigations should respect persons' rights and freedoms. It is important to respect human rights, as set out in the European Convention on Human Rights and supported by the case-law of the European Court of Human Rights. When using undercover techniques adequate and sufficient legal and internal safeguards against abuse should be in place.

### **Prosecution of corruption**

- Prosecutors should play a leading role in investigating corruption. In some countries the importance of this role is increasing. Prosecutor should lead the pre-trial investigation. His early



involvement, since receipt of information in some countries, allows increasing quality of cases referred to the court.

- Corruption cases are particularly difficult to prove due to existence of a tacit (silent) agreement. In addition, it is often an oral agreement, which is also difficult to prove. Such pieces of evidence can be useful: hand written notes, electronic messages on seized computers, valuable gifts offered, and company accounts.
- Indirect evidence (circumstantial evidence) may prove useful to prove corruption that often goes beyond a simple bribe. As example was mentioned linking a decision taken by a public official in favour of a company and an action done later by the company in favour of the public official.
- Use of deferred prosecutorial agreements was discussed. Plea bargaining is widely used in such countries as United States and has allowed to prosecute corruption effectively. Similar tools (prosecutorial agreements, written judgements, etc.) are available in continental countries. However, their use is less developed.
- Many examples of complex corruption cases were discussed, often involving political life, high level officials and influential business interests. Prosecuting political officials remains an important challenge for many countries, either due to lack of legislation and evidence. Besides, significant pressure is exerted on anti-corruption investigators in such cases. In one such complex corruption case 63 persons were convicted.
- Foreign bribery cases are often cases involving significant amounts of bribes, heads of states and important bribes (three Heads of States, 6 billion US dollars worth project and a 180 million US dollars bribe were involved in one foreign bribery case involving several countries).
- Discussions also addressed such common challenges as political pressure or pressure by powerful defendants, mainly through mass media, but could also be through influence on employees by a powerful official or businessmen (potential witnesses), as well as extent of immunities for judges, politicians and defence lawyers, as well as diplomatic immunities, bank secrecy, how sanctions reflect the seriousness of crime committed and difficulties for courts to understand the nature of corruption crimes, lack of specialisation of courts, compared to more developed specialisation in police and prosecution.
- It is important that anti-corruption investigating and prosecuting institutions proactively inform mass media. The latter play an important role in prevention, raising awareness and building public trust in law enforcement. The use of media by defendants to influence public opinion and put pressure on anti-corruption investigations was often mentioned as an important concern.

### **Tracing and confiscating assets**

- It was highlighted that corruption is committed by persons willing to gain a benefit from this crime, therefore depriving them from their assets is key to successful anti-corruption investigations. When possible assets should be returned to their victims. How to determine the victim appears to be an issue for further discussion. A key to success is to link corruption investigations to assets gained through corruption/money to the criminal activity. This is particularly challenging in cases involving indirect evidence. Following steps are important in

tracing assets effectively: monitoring bank accounts, blocking parts of the account, providing analysis of money flows by analysts. It was highlighted that it is important to integrate the asset tracing in the investigation and seeking of MLA.

### Specialisation and independence

- Three main ways to ensure specialisation of anti-corruption institutions were discussed:
  - Specialisation of law enforcement and judicial bodies (police, prosecution, courts);
  - High level corruption cases vs. low and medium level corruption cases;
  - Limiting material competence to a narrow set of offences.

Many advantages of specialisation were outlined, such as possibility to gain public trust easier in countries with generally low trust in law enforcement, more motivation for the head of the specialised body to deliver results, more flexibility to make operational changes, less need to share classified information, reliability of persons working in specialised body, possibility to select own objectives and priorities.

- During the discussions participants outlined the following parameters to ensure independence of anti-corruption bodies and units:
  - Separation of powers in the country;
  - Allocation of cases is random and the case remains with the same prosecutor till the end of prosecution;
  - Right to challenge any interference;
  - Directing of police by prosecutor;
  - Effective procedure for appointment of prosecutors, including the Prosecutor General, including involvement of Parliament in it;
  - Transparent and effective procedure for recruitment of personnel in anti-corruption units (for example, there should be a clear and transparent set of criteria and documents to be presented by each candidate and how it is assessed);
  - Role of head of anti-corruption body in preserving independence of anti-corruption investigations;
  - Strong motivation of the head of anti-corruption body to fight corruption (as he does not have any other tasks and needs results to keep the position and gain trust);
  - Cooperation with the civil society and participation in international networks.

### Issues for follow-up

- Participants in the seminar identified a number of issues for follow-up, either in form of another seminar or a reference material on these topics:
- Establishing links between **corruption and money laundering crimes**<sup>1</sup>;
- Investigating links between corruption and organised crime;
- Using financial disclosure forms in investigating corruption;
- **Cooperation between FIUs and law enforcement bodies**;
- In-depth discussion of successful corruption investigations and methods used;
- JITs, successful use of JITs to investigate corruption;

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<sup>1</sup> In bold are issues outlined by several participants.

- Relationships with mass media;
- Corruption in judicial system, corruption by high level officials;
- Mutual legal assistance and **informal international cooperation and exchange of information** in investigating and prosecuting corruption;
- **Financial investigations** and asset tracing (could be a joint seminar for FIUs, anti-corruption prosecutors and investigators);
- Surveillance operations;
- Use of indirect evidence to prove corruption, use of illicit wealth provisions.

## Topic 1. Effective Means to Detect and Investigate Corruption Crimes

### MEANS OF DETECTING AND INVESTIGATING BRIBERY OFFENCES AND JOINT INVESTIGATION TEAMS

**Mr. Juuso Oilinki,**  
Detective Chief Inspector,  
Finnish Police, National Bureau of Investigation,  
Finland

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#### **What should an investigator / accounting specialist do to support a bribery investigation?**

- To obtain all official data on the company in question: Trade Register, Stock Exchange
- To obtain organisational charts for an adequate period of time
  - Location of the sales / marketing department
  - Job descriptions, liabilities and executive powers in the company during the time in question and in the area in question
    - Corporate liability



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## **To make bank inquiries, especially on the suspects (incl. the company)**

- Money flows from private persons or customers
- To go through sales agreements / contracts made by the marketing department possibly key figures
- Great sales income / great marketing expenses may serve as a sign of unhealthy working methods
- Business analysis
  - To estimate how much similar companies have e.g. marketing / sales expenses



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## **To collect / to seize the accounts**

-investigators or accounting specialist

- In respect to the nominal ledger, it is interesting to see how much expenses have been recorded - and what kinds of expenses?
  - For example, by going through all receipts of the marketing department, an investigator may find one single receipt showing how significant consultancy fees have been integrated with marketing expenses.
  - The original plan (agenda) may show e.g. that a trip planned for an extensive interest group has been in the end only entertaining representatives of one particular buyer.



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## Investigating accounts continue...

- Performances of the sales and marketing staff are significant in respect to these expenses:
  - To whom they have sent invitations?
  - What kinds of hotel bills, parking tickets, lunch receipts, flight tickets or bus tickets have been entered in the accounts?
    - This information can provide important information about people involved?
- Cross checking the receipts with agents' and other suspects' receipts might provide you good evidence
- Financial crime analyst!



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## What to consider when companies use intermediaries / agents

- Many companies openly report that in certain situations they use either companies or private persons as agents.
- Dates and parties in agent contracts may assist in concluding possible suspects and in evaluating awareness of the parties.
  - Sometimes there may be two contracts drafted with the same agent for the same work: one public and one confidential. The reason for a confidential contract may be that the same agent works also as the customer's agent or to hide the money.
- Back dating the contract



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## Warning signs in using agents include :

- Company is hiding the agent-relation
- Agent does not operate in the target country of the products, but in some third country
- Agent wants payments to be paid through some other company
- Agent's fees are significantly high
- There is no official entries on the agent's fees or the fees are very small e.g. monthly fees (actual commissions considered as bribes e.g. in confidential contracts)



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## Joint Investigation Team (JIT)

**-as an effective mean of investigating  
foreign bribery case**



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## What is Joint Investigation Team?

- The competent law enforcement authorities (police, customs and border guard) together with the competent authority of another country may establish a JIT for the investigation of specific offence(s) (JIT Act 1 §).
- Objective to enhance cooperation in pretrial investigations in order to combat international OC and other cross border crime affecting several countries.
- JIT Act is not restricted to only EU MSs but could also be applied to JITs with third countries.



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## When to consider a joint team?

- When another state(s) has a common investigative interest,
- On-going OC or other serious criminal activity which would require investigations to be conducted on the territory of more than one country,
- The need to commit sufficient resources to an investigation domestically (in Finland linked to Target Process) and abroad - possibly also involving Europol and Eurojust,





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## Operating a JIT

The member of a JIT (JIT Act 4 §):

- *Has the right* to participate in the investigation process,
- *Has the right* to ask questions of the person being interviewed,
- *May* assist in a house search,
- *May* inspect (read) private documents (e.g. sealed letters) as instructed by the officer in charge of the investigation,
- *May* conduct an interview as instructed by the officer in charge of the investigation under his supervision and in accordance with Finnish law.



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## Initial experiences

- Not more expensive than when applying traditional forms of law enforcement cooperation,
- Faster in the actual co-operation concerning the criminal investigation despite possible delays in the establishment phase,
- Faster due to the reduced need for requests for mutual legal assistance,
- Facilitates use and coordination of coercive measures applied to on-going criminal activity,





### **Initial experiences**

- **May cut translation/interpretation costs due to easier access to foreign investigators,**
- **Provides support for the officer in charge as JITs will most often have a higher priority and thus be better resourced,**
- **Requires that parties are equally committed to the JIT,**
- **Excellent tool for real-time investigation,**
- **Should be seen as an instrument also for prosecutorial cooperation (i.a. process economy)**



## EFFECTIVE DETECTION AND INVESTIGATION OF CORRUPTION

**Mr. Jure Rus,**  
Head of the investigation,  
National Bureau of Investigation,  
Slovenia

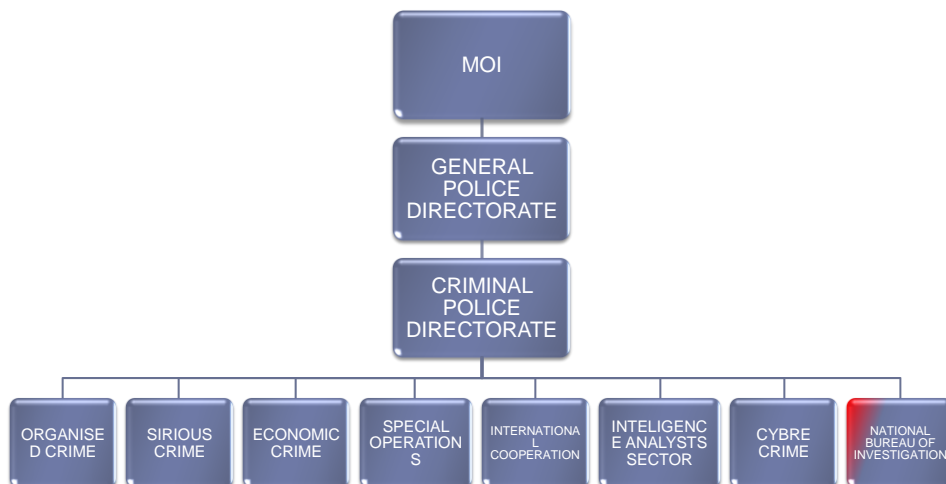
### POLICE DIRECTORATES IN SLOVENIA



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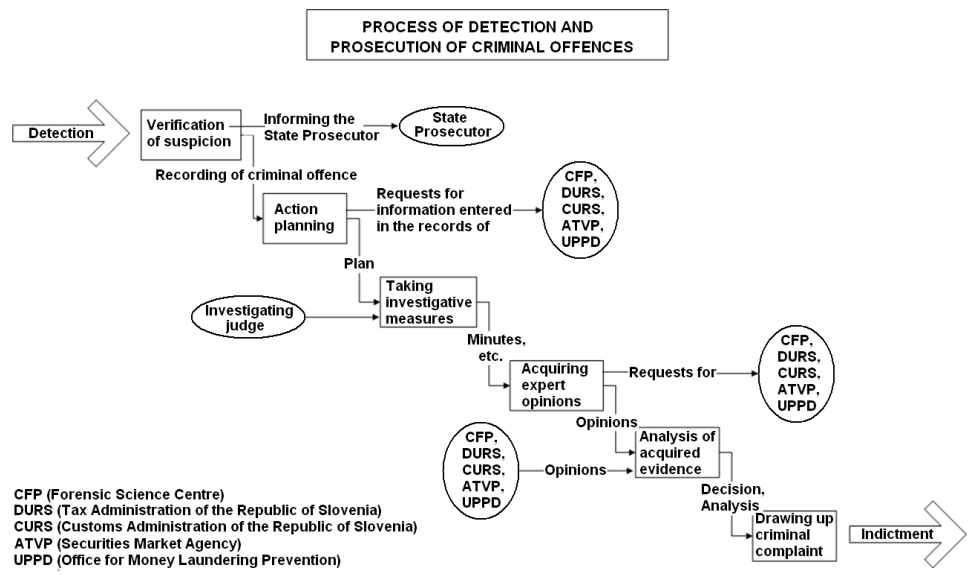
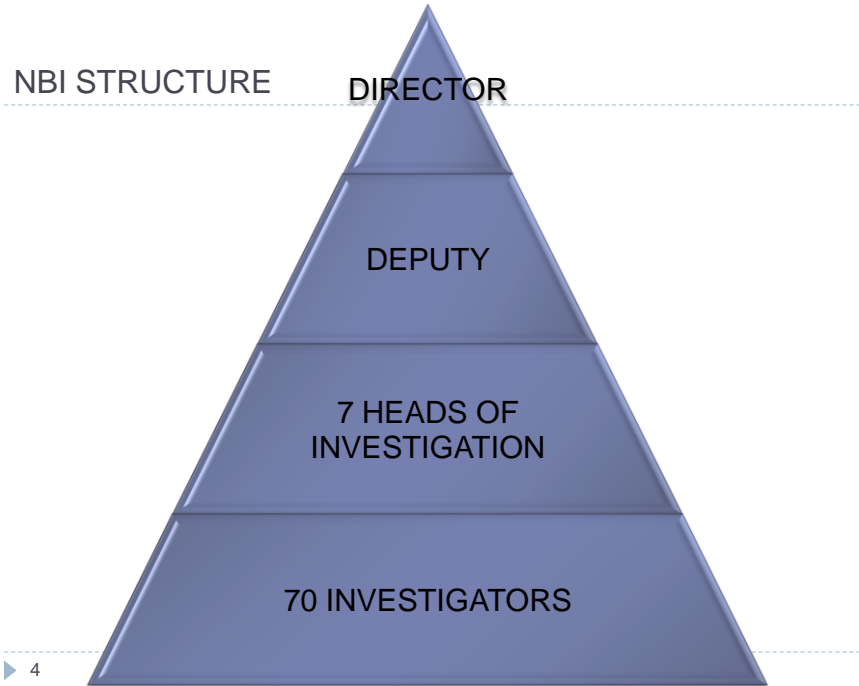
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### CRIMINAL POLICE CHART



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- Anti-Corruption Commission
- Money Laundering Prevention Agency
- Tax Administration
- Customs Administration
- Security Market Office
- financial experts
- etc...

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- ▶ *"Just as it is impossible not to taste the honey or the poison that finds itself at the tip of the tongue, so it is impossible for a Government servant not to eat up at least a bit of the King's revenue". Katyla, 300 BC*

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## THE MOST CORRUPT AREAS

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- ▶ PUBLIC PROCUREMENT
- ▶ CONSTRUCTION INDUSTRY
- ▶ HEALTH SECTOR

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## DETECTION

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- ▶ INFORMATION OR OFFICIAL REPORT
- ▶ OTHER CRIME INVESTIGATION
- ▶ ANONYMUS TIP (080 1200 / [www.kpk-rs.si](http://www.kpk-rs.si))
- ▶ PRO-ACTIVE POLICE WORK
  - ▶ Seminars / trainings for LEA
  - ▶ Co-operation with NGO / government agencies
  - ▶ Public Awareness
- ▶ MEDIA
- ▶ INDICATIONS
- ▶ ASSESSMENT & ANALYSING
  - ▶ Police / open database, records, indications,...
- ▶ *DECISION & NOTICE TO THE PROSECUTOR OFFICE*

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## SOME INDICATIONS

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- ▶ ASSOCIATED COMPANY
- ▶ WITHOUT REQUIRED REFERENCE
- ▶ AGREING CONTRACTS NOT FAVORABLE TO THE STATE BUDGET
- ▶ HIGH COMMISSION (SPLIT ACCOUNTS)
- ▶ INCREASED COSTS, ADVANCED PAYMENT THROUGH 3. PARTY
- ▶ AGREED INVOICES WITHOUT REASNOBLE CAUSE
- ▶ BAYPASSING CONTRACTORS PROCEDURE
- ▶ DEADLINE EXTENDED
- ▶ LOBBYING
- ▶ POLITICAL IMPACT

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## PRE-TRAIL INVESTIGATION

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### PROSECUTOR GUIDED PRE-TRAIL PROCEDURES

- ▶ TASK FORCES / JOINT INVESTIGATIONS
  - ▶ Changed Criminal Procedure Act
- ▶ INFORMATION & EVIDENCE GATHERING
- ▶ OPEN AND COVERT MEASURES
  - ▶ Interviews, bank information, tracing assests abroad, linked/associated persons and/or company, shares, real estate,
  - ▶ Surveillance, wire tapping, "money-flow" monitoring, feigned purchase/ acceptance/ giving of bribes (UCO)
- ▶ FINANCIAL INVESTIGATION (OUT SOURCES, EXPERTS...)
- ▶ HOUSE SEARCHES, INTERROGATIONS
- ▶ **ANALYSING** ( information, money-flow, phone records,...)
- ▶ ARREST & TEMPORARY SEIZURE OF THE PROCEEDS
  
- ▶ CRIME REPORT TO THE PROSECUTOR OFFICE

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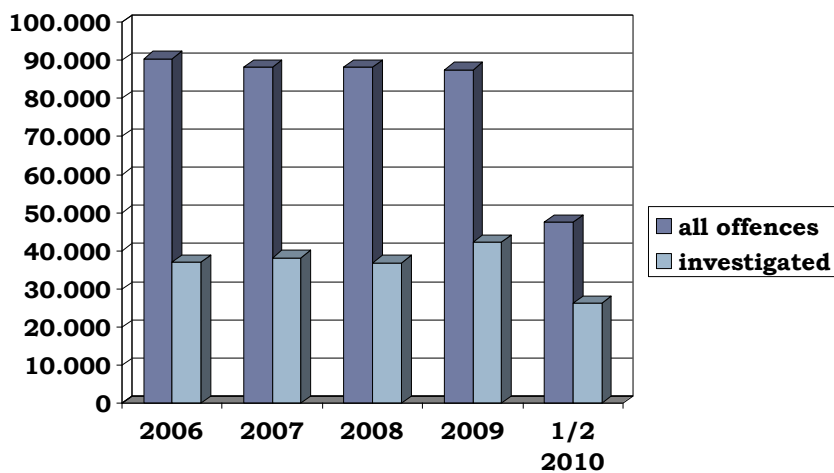
## PROTECTIVE MEASURES

### ▶ INFORMANT / CHIS / UCA = WITNESS

- ▶ deletion of all or certain data from the criminal file;
- ▶ the marking of all or some of the data from the preceding point as an official secret;
- ▶ the issuing of an order to the defendant, his counsel and the injured party or his legal representative and counsel to keep certain facts or data secret;
- ▶ the assignment of a pseudonym to the witness;
- ▶ the taking of testimony using technical devices (protective screen, devices for disguising the voice, transmission of sound from separate premises and other similar technical devices).

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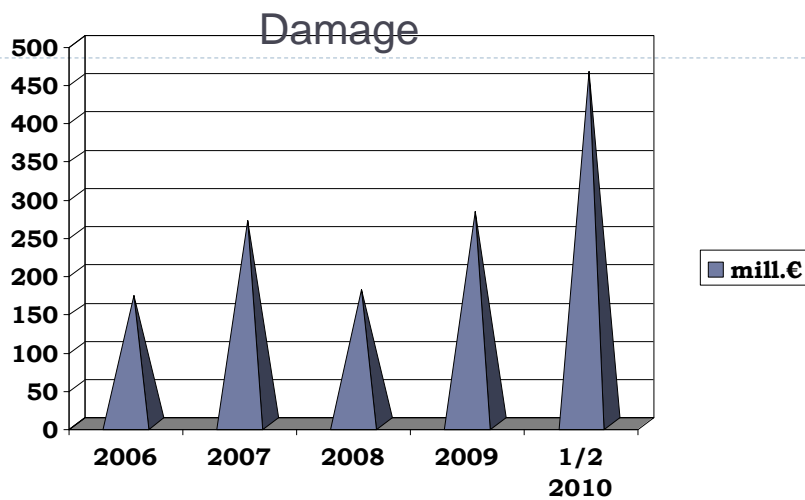
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## Corruption Offenses

- ▶ (Article 151) Obstruction of Freedom of Choice
- ▶ (Article 157) Acceptance of Bribe during the Election or Ballot
- ▶ (Article 241) Unauthorised Acceptance of Gifts
- ▶ (Article 242) Unauthorised Giving of Gifts
- ▶ (Article 261) Acceptance of Bribes
- ▶ (Article 262) Giving Bribes
- ▶ (Article 263) Accepting Benefits for Illegal Intermediation
- ▶ (Article 264) Giving of Gifts for Illegal Intervention

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## CORRUPTION OFFENCES 2008 - 2010

	Offences 2008	Offences 2009	Offences 2010	Suspects 2008	Suspects 2009	Suspects ½ 2010
Obstruction of Freedom of Choice	1	0	0	1	0	0
Unlawful acceptance of gifts	2	2	5	3	2	11
Unlawful giving of gifts	4	1	3	8	1	6
Acceptance of bribe	4	59	5	4	61	5
Giving of bribe	6	55	6	6	55	8
Acceptance of gifts for illegal intermediation	1	66	4	1	74	6
Giving of gifts for illegal intermediation	0	48	0	0	53	0

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# EUROPEAN CONVENTION OF HUMAN RIGHTS: STANDARDS IN INVESTIGATING CORRUPTION

**Mr. Dmytro Kotliar,**  
Anti-Corruption Network for Eastern Europe and Central Asia,  
OECD

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- I. Right to Privacy: Special Investigative Means
- II. Entrapment
- III. Burden of Proof and Self-Incrimination
- IV. Prejudicial Media Publicity

Dmytro Kotlyar, OECD

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## I.

### Special Investigative Means and Human Rights Standards

- **Special Investigative Means:**
  - Interception of telecommunications, listening devices, tracking devices, physical surveillance, video observation, monitoring of bank accounts, monitoring of computer activities, etc.
  - Undercover operations, imitation of a crime (e.g. controlled sale/delivery, controlled bribery)
- **The use of special investigative means cannot in itself infringe the right to a fair trial. However, their use must be kept within clear limits.** (*Ramanauskas v. Lithuania*)
- **The right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience.** (*Teixeira de Castro v. Portugal*)

Dmytro Kotlyar, OECD

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I.

## European Convention on Human Rights

### Article 6 of the Convention:

1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

### Article 8 of the Convention:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Dmytro Kotlyar, OECD

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I.

## Court's analysis of Article 8 complaint



Dmytro Kotlyar, OECD

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## Investigating links between

I.

### 'In Accordance With The Law'

- **Interference must have a legal basis that is accessible** (*Malone v. UK, Halford v. UK*)
- **The law in question must be sufficiently clear and precise** (*Khan v. UK, Kopp v. Switzerland*).
- **Regulatory regime must provide guarantees against the arbitrary use of powers it confers** (*Kruslin v. France, Valenzuela Contreras v. Spain, Weber and Saravia v. Germany, Niedbala v. Poland*):
  - Definition of the categories of people liable to have their communications monitored
  - The nature of offences which may give rise to such an interception order
  - A limit on the duration of the monitoring
  - Procedure for examining, using, and storing the data obtained
  - Precautions to provide recordings intact and in their entirety for possible inspection by the judge and defence
  - Provisions for destructing recordings or erasing the data in event of discharge/acquittal
  - Independent judicial oversight
  - Scrutiny by defence

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I.

### 'Necessary In A Democratic Society'

- State should demonstrate a pressing social need that the right to privacy should be interfered with in the particular public interest identified by the state.
- Interference proportionate to the aim (go no further than is strictly necessary to achieve legitimate aim) – striking a fair balance between the protection of individual right and the interests of the society at large:
  - whether relevant and sufficient reasons have been advanced in support of the covert measure
  - whether a less restrictive alternative was available
  - whether there has been procedural fairness in the decision-making process
  - whether adequate safeguards against abuse exist
  - whether the interference destroys the very essence of the Convention right

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## II.

### Distinguishing entrapment from permissible conduct (*Bannikova v. Russia*, Judgment of 4 November 2010)

1. **Substantive test of incitement** – Would the offence have been committed without the intervention of the authorities
  - A. *Reasons underlying the covert operation and the conduct of authorities*
    - Objective suspicion that the applicant had been involved in criminal activity or was predisposed to commit a criminal offence
    - B. *At which point the authorities launched the undercover operation*
      - Whether the undercover agent merely “joined” the criminal act or instigated it
    - C. *Whether applicant was subjected to pressure to commit the offence*
2. **The procedure for consideration of the plea of incitement**

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## II.

### ‘Adequate and sufficient safeguards’

- Undercover techniques are acceptable only if adequate and sufficient safeguards against abuse are in place, in particular a clear and foreseeable procedure for:
  - 1) authorising,
  - 2) implementing and
  - 3) supervising the investigative measure in question.
- *Ramanauskas v. Lithuania* (Violation)
  - Police employee “in private capacity”
  - “Privatisation” of covert measures leads to possible abuse
- *Miliniene v. Lithuania* (No violation)
  - Initiative by private individual; the police “joined” the crime
  - Role of the police not determinative – “on balance, the police may be said to have “joined” the criminal activity rather than to have initiated it. Their actions thus remained within the bounds of undercover work rather than that of *agents provocateurs* in possible breach of Article 6.1 of the Convention”.

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### III.

#### Burden of Proof and Self-Incrimination

- The right to a fair trial (Article 6) includes **freedom from self-incrimination** in criminal cases, which is not absolute – “**improper**” **compulsion is prohibited**.
- Compulsion is ‘**improper**’ if the ‘**very essence of the right**’ not to incriminate oneself is destroyed (*Murray v. UK, Telfner v. Austria*): whereas it was contrary to the right not to self-incriminate to base a conviction ‘solely or mainly’ on the accused’s silence, this should not prevent that silence being taken into account in situations ‘which clearly call for an explanation’ provided that safeguards apply.
- There should be a *prima facie* case against the accused that justified the drawing of ‘common sense’ inferences in the absence of explanation by the accused.
- Burden of proof may be transferred to the accused when he is seeking to establish a defence. Presumptions of fact or law may be used against the accused, if confined ‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’ (*Salabiaku v. France*)

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### IV.

#### Prejudicial Media Publicity

- ‘Fair hearing’, ‘impartial tribunal’ (Article 6.1), ‘presumption of innocence’ (Article 6.2)
- ‘In certain cases a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and consequently the jurors called upon to decide the guilt of an accused’ (*Craxi v. Italy*)
- Article 6.2 may be violated by public officials if they declare that somebody is responsible for criminal acts without a court having found so. This does not mean, of course, that the authorities may not inform the public about criminal investigations. They do not violate Article 6.2 if they state that a suspicion exists, that people have been arrested, that they have confessed, etc. What is excluded, however, is a formal declaration that somebody is guilty. (*Krause v. Switzerland*)
- Declaration of the person’s guilt, which, firstly encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority (*Alenet de Ribemont v. France*)
- *Butkevicius v. Lithuania – Daktaras v. Lithuania*

Dmytro Kotlyar, OECD

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## JOINT INVESTIGATIVE TEAMS: A SUCCESSFUL TOOL TO INVESTIGATE CORRUPTION

**Mr. Dritan Rreshka,**  
Head of the Joint Investigative Unit in Tirana,  
Prosecutor General's Office,  
Albania

### Establishment of Tirana Joint Investigative Unit

Memorandum of Cooperation signed on May 22,  
2007 between:

1. the Prosecutor General,
2. the Minister of Interior
3. the Minister of Finance
4. the head of the State Intelligence Service

### Establishment of Tirana Joint Investigative Unit





## The goals

- To enhance the collaboration among different law enforcement agencies engaged in combating corruption;
- To increase the number of financial crime and corruption cases being referred and investigated;
- To improve the quality of investigations and prosecutions;
- To increase the number of defendants being prosecuted and convicted;
- To increase the number of crime proceeds being sequestered and confiscated;

## Establishment of Tirana Joint Investigative Unit



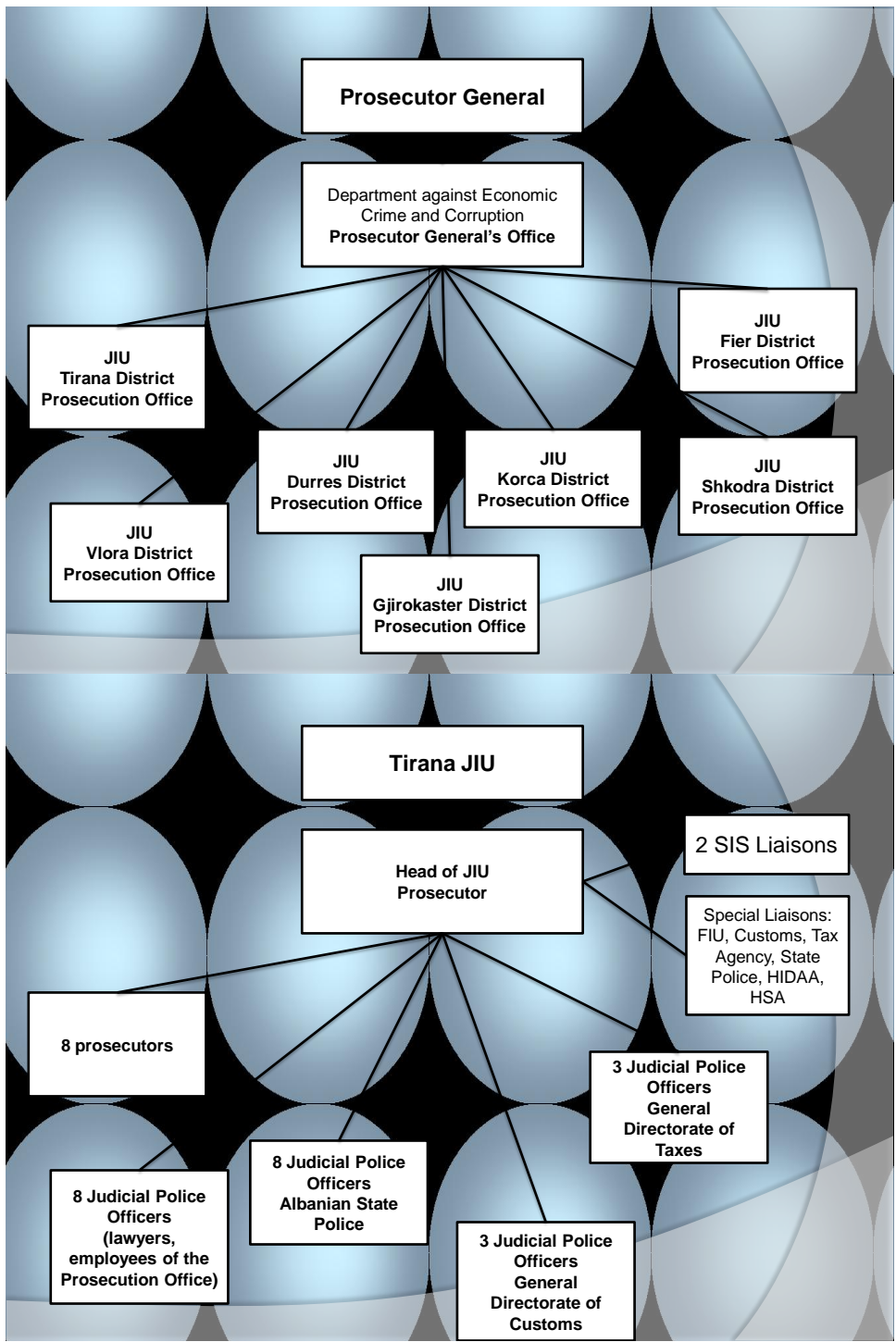
## Establishment of 6 Regional Investigative Units in Durrës, Vlorë, Shkoder, Lezë, Gjirokastra, and Shkoder

Memorandum of Cooperation signed on May 7, 2009 between:

1. the Prosecutor General,
2. the Minister of Interiors,
3. the Minister of Finances,
4. the head of the State Intelligence Service,
5. the Chief Inspector of the Inspectorate for the Declaration and Audit of Assets,
6. the Head of the High State Audit.

## Establishment of 6 Regional Joint Investigative Units





# OPDAT Embedded advisor to the Tirana JIU

**EMERIMI NGA DEPARTAMENTI I DREJTËSISË**

**NJË PROKURORE AMERIKANE PËR "TASK FORCE"**

**Prokurorja Cynthia Eldridge mësohet se do t'i bashkëngjitet strukturës më të re antikorrupsion në Shqipëri**

**Ina Rama; Zyrtarë të lartë nën hetim**

**LEONARD BAKILLARI**

... (text continues) ...

# OPDAT Embedded advisor to the Tirana JIU

Albanian Daily News

PRESS REVIEW

NOVEMBER 27, 2007

**IPan rama**

**US Prosecutor Comes to Tirana to Fight Corruption**

Daily Panorama cited on Monday the officials of Albanian Prosecution saying an US prosecutor will be attached close to the Task-Force against Economic Crime and Corruption at Tirana Prosecution in the role of an adviser in investigating into files of corruption, economic crime, money-laundering and terrorism financing

General Prosecutor's Office

The arrests of corrupt officials and the investigations into the abuses of state employees are expected to be held under "the direction" of a special US prosecutor.

He will be attached close to the Task-Force against Economic Crime and Corruption at Tirana Prosecution. The news was confirmed by the official sources of Prosecution which said that an US prosecutor, specialized in the investigation and the fighting of corruption cases and economic crime will advise the Albanian judicial officers and prosecutors to be part of the "Task-Force" staff. The latter has arrested so far over 22 high officials, accused of corruptive affairs and bribery.

The results achieved so far in this respect are expected to recognize a qualitative upgrade due to the involvement of a US prosecutor who is attached close to Task-Force in the framework of the assistance of the US Department of State to this special structure of investigations in Albania.

According to the officials of the Albanian Prosecution, the US prosecutor will have an advising role towards his Albanian colleagues who are investigating into files of corruption, economic crime, money-laundering and terrorism financing.

So far, the Task-Force against Economic Crime and Corruption at Tirana Prosecution has registered some 30 penal files. Warrants of arrest have been issued against six of the accused. The latter are officials of various levels including deputy-minister or secretary generals. The other part of the investigations is going on away from the media echo through the collection of evidences and documentation of suspected cases for corruption.

Sources from the General Prosecution said that the US Prosecutor will not directly take part in the investigation of the Task-Force files. But it will help in the documentation of crimes. He will advise the Albanian prosecutors to apply the special methods of investigations effectively in order that the investigations are effective in respect of issuing punishments against the arrested officials.

Another direction towards which the US prosecutor will be committed is the fight against the money laundering and the financing of terrorism.

The US expert will make familiar his Albanian colleagues with the ways of investigating these penal offenses while will advise regarding the approaches to be followed for the presentation of strong evidences in the court.

Corruption has been previously regarded a difficult crime to be investigated, however the establishment of this Task-Force seems to have changed this mentality.

## Recruitment of U-s Members

- Human factor – most important (you can have the best laws, but it's more important to have the best people);
- Prosecutors and judicial police officers with experience in investigation and prosecuting financial crime and corruption;
- People with high professional and moral ethical integrity of them through a filtering and a procedure;
- Most of the prosecutors coming from the Magistrate School (some of them with an economic degree);

## Characteristics of U-s investigations

- Extensive use of special investigative means and methods (electronic surveillance, wiretapping, surveillance, undercover operations, cooperating defendants etc);
- Using “pro-active” rather than “post – factum” investigations (tackling corruption while it is taking place);
- The use of intelligence information both from SIS and FIU to generate corruption cases (transforming the information from intelligence into prosecutable information);
- The involvement of the prosecutor at the initial stage of the investigation (instructing the police officers how to initiate/build the case, preliminary steps and how to carry out the investigations);
- Collaboration with media to increase the awareness of public (making them believe that we are serious);

# TIRANA JIU CASES

## Deputy Minister of Transportation

**Albanian Daily News**  
Vol. 13, N° 219 (2207) Wednesday, September 19, 2007 Price: 500 Lek, 2 € (RO)

**DAY'S BRIEFING**

- **Albania Signs Visa Facilitation Agreement with the EU**  
"The signing of the agreements is a further proof of the EU's commitment to the region's European perspective," Commissioner for Enlargement Rehn said.  
see on page 2
- **SP Forwards Request on Establishment of Commissions**  
"Socialist Party requests establishment of parliamentary commissions on Albtelcom, public procurements and concessions," deputy head of parliamentary group Brace said.  
see on page 3
- **Construction of New Bridge in Tirana Starts**  
Works for the construction of the new bridge over Lana river have started with a fund of about Lek37.2 million from the Municipality of Tirana.  
see on page 4
- **Albania's Q2'07 Sales Index Rises 16.2% Q/Q**  
Albania's sales index, which covers sales in the industrial and services sectors, rose in the second quarter of the current year by 16.2% from the previous quarter.  
see on page 5
- **Vodafone Albania Provides Gifts to Tirana Schoolchildren**  
"Today I do represent not only Vodafone Albania, but also myself as a parent," said Director-General of Vodafone Albania Thomas Pappaspyrou.  
see on page 9

### Police Arrest Senior Officials On Corruption Charges



Deputy transport minister Nikolin Jaka was arrested on Monday night on charges of corruption and misuse of office.

**TIRANA** - Albanian police arrested on Monday night seven officials and two businessmen on charges of bribery and abuse of office in a police operation, code-named "Clean Hands" after a two-month investigation.  
see on page 2

# Deputy Minister of Transport

## Albanian Daily News

Vol. 15, N° 232 (3320) Thursday, October 4, 2007 Price: 300 Lek, 2 EURO

### DAY'S BRIEFING

- Albania and Italy on Same Wavelength on Kosovo**  
 Italian Ambassador to Albania, Saba D'Elia has told President Bamir Topi that Italy and Albania shared the same interest regarding the solution of Kosovo's status.  
*see on page 2*
- SP Official Relinquishes Immunity**  
 "Foreign Minister Lulzim Basha should be transparent and not hide behind his immunity, because all should be equal in front of the law," said Erjon Braçe.  
*see on page 3*
- PM Urges for Transfer of Water Utilities to Local Govt**  
 Prime Minister Sali Berisha requested that the process of transferring water supply and sewerage enterprises under the administration of the local gov't finish by the year-end.  
*see on page 4*
- Albbelec's Shares Transferred to Turkish Calik Group**  
 Turkey's Calik Group took over Albania's fixed-line telephone operator Albbelec and the country's GSM operator Eagle Mobile, Calik said in a statement on Tuesday.  
*see on page 5*
- Albania, EC Boost Cooperation on Education**  
 "Our universities must take the necessary steps to guarantee quality which is a pillar of making the Albanian diplomas equivalent with the European ones," Pollo said.  
*see on page 5*

## Corruption Sweep Nets Six Other Albanian Officials

Police arrested six former officials of oil company Alpetrol and oil distribution firm Armo accused of misuse of office and illegally favoring companies in tenders



Deputy Minister of Transport Nikolin Jaka (front) and several other officials from his ministry were arrested on charges of corruption in a police operation codenamed "Clean Hands" two weeks ago. Wednesday's operation was codenamed "Clean Hands 2".

TIRANA - The police codenamed operation "Clean Hands" has reached its third stage and some other alleged corrupt officials were arrested late Tuesday night after a three-month police investigation. Police forces handcuffed four former officials of Albania's state-owned oil company, Alpetrol in the southern city of Fier.

## Corruption Case Public Procurement

**AKTUALITET**

### Korrupsioni "mbërthen" dy zyrtarë dhe një biznesmen

"Në përgjime rezultojnë emrat e disa politikanëve"

**NË SHKURT**  
 Një hetim i korrupsionit në sektorin e punëve publike ka rezultuar në arrestimin e dy zyrtarëve dhe një biznesmeni. Hetimi i korrupsionit në sektorin e punëve publike ka rezultuar në arrestimin e dy zyrtarëve dhe një biznesmeni. Hetimi i korrupsionit në sektorin e punëve publike ka rezultuar në arrestimin e dy zyrtarëve dhe një biznesmeni.

**ISË PRANËSHUR**  
**Sherifmehmet Spahiu, Luan Xhepa dhe Fiqiri Paçi**

... (text continues) ...

**KONTROLI**  
 ... (text continues) ...

**WELLS**  
 ... (text continues) ...

**METODAT**  
 ... (text continues) ...

**PELLE**  
 ... (text continues) ...

**ARRESTIMI**  
 ... (text continues) ...

**"Kafeja e hidhur" për 10%-shin e tenderit të Ministrisë së Punës**

Policia kreu arrestimet, kur zyrtarët po falënderonin biznesmenin për shpërbëimin

... (text continues) ...

**FESTIVALI DON BOSKO**  
**Festiviti i Këngëve i Zëraut të Rinj**

Qendra Sociale Don Bosko, sponsorizuar nga CONAD, më datë 23 Janar 2008, ora 11.00, organizon edicionin e 9'th të FESTIVALI DON BOSKO, Festiviti i Këngëve i Zëraut të Rinj. Këngët (teksti/CD) duhet të dorëzohen brenda datës 15 Janar 2008.

# Tax inspectors

PRESS REVIEW

TIRANA OBSERVER

## "Tax Gangs" Asked Euro 5,000 From Companies, No Other Taxes to Pay

The interceptions of Tirana police have unraveled the scheme how the officers of Tax Police fine the private companies. Sources from Tirana Police told daily "Tirana Observer" that this scheme functioned in this way: the broker contacted every company saying in case they paid Euro5,000, they won't pay taxes. In face of such a bargain, the companies were allured by falling into the trap.

The broker shared the money with the Tax Police officers and no money was encased to the state budget. The peak of this scheme was that if the companies were not acting this way, they would be under intensive controls. Now everything has been closed and at least, the businessmen at Tirane-Durres highway will be calm now.

The Tirana police have provided all the necessary evidences which implicate four tax officers and their former director and the economist of private company "Tar Tenda" in corruption. Though only three months in the post of Tax Police director, Flamur Mallkuqi had managed to create his own group to "design the bribery scheme." Four tax officers, led by their chief and assisted by a broker, who was economist of a private company, had prepared the ground for making a lot of money. They chose to "punish" the businessmen alongside Tirana-Durres highway.

The economist of "Tar Tenda" company, Klodian Myftari was responsible to make contacts with the private companies. He informed them of the "penalty" in order not to pay taxes.

After coming to the bargain with the businessmen, the "penalty" (Euro5000) was divided among six persons involved. They were the head of Tax Police, Mallkuqi, the inspectors, Migen Katroshti, Genet Murthi, Dritan Metani and Aurel Cenolli, and the economist Myftari. This scheme has functioned until one of the businessmen was not convinced of the bargain and addressed to Tirana Police. After the denouncement of the businessman, the Anti-Economic Crime agents have received the permission to intercept the suspected.

This method has lasted for one month and after collecting all the necessary evidence.



# KESH officials

## Albanian Daily News

Vol. 14, № 58 (3452)      Wednesday, March 12, 2008      Price: 300 Lek, 2 EURO

### DAY'S BRIEFING

- **EU Urges Electoral Reforms in Albania**  
Albania must reform its electoral laws so it can move forward with European integration, European Union representatives told Tuesday Foreign Minister Lulzim Basha. *see on page 2*
- **DP Says Small Parties' Reaction Emotional and Aggressive**  
Patosi said DP and SP had agreed to amend the Constitution to put to an end all the problems evidenced till now regarding the electoral processes in Albania. *see on page 3*
- **Tender for Sale of Energy Distribution Operator in April**  
Albania will open next month an open international tender to sell a majority stake in the electricity distribution arm of the KESH, Energy Minister Gene Ruli said on Tuesday. *see on page 4*
- **Annual Inflation Rate Reaches 3.6% in February**  
Consumer Price Index (CPI) in February of the current year rose by 1.6% from previous month, the official data released on Tuesday by INSTAT showed. *see on page 5*
- **Spain Assists Albanian Prisoners' Integration**  
Spanish Ambassador Montebello said the project's implementation will transform the country's prison system bringing it closer to international standards. *see on page 8*

## Corruption Drive Detains Four Former High KESH Officials



View of the Albanian central city of Durres where police codenamed operation "voltage" was conducted

TIRANA - Four ex-high officials of the Albanian Power Utility (KESH) in the branch of the coastal city of Durres have been arrested because they are suspected of abusing with their duty by favoring the tenders which the corporation conducted during the time they were on duty.

Lambert Karamani, former director of Durres KESH branch in the years 2003-2004, Dritan Lakina, former director of the same institution in the period 2005-2006, *see on page 2*

The four former officials will face the charges with the tenders on energy purchasing they conducted during the time they were on the duty



# Corruption Case / Prosecutor



# The Least Procurement

- Procurement corruption re: procurement of new police uniforms
- 6 arrested, including Interior ministry chief



# REGIONAL JIUs CASES

## Vlora

on member states ratify it. | Hotel. Klaus will also the foreword.

### Chairman of Vlora Real Estate Registration Office Arrested

*Other arrests are expected in the coming days*

TIRANA - The director of the real estate registration office in the southern city of Vlora and the former jurist of the institution have been arrested on charges of misuse of office and forgery of official documents by the Albanian police.

Edmond Banushaj, 48 and Viktor Kulaj were cuffed on Saturday during the codenamed operation "The Start of Fall" by he agents of the Vlora police directorate as lengthy investiga-

tions proved that they overlapped private lands by forging documents.

Police have also arrested the local businessman, Oart Begaj.

Police said that the arrested people had illegally benefited lands in the coastal areas, while other arrests are expected in the coming days.



View of Vlora town

Human Trafficking in Albania

# Shkodra

## Head of Velipoja's Urban Planning Office Arrested

TIRANA - The head of the urban planning office of the commune of Velipoja, northern region of Shkodra, was arrested early Tuesday on charges of bribery and passive corruption. Police reported that Leke Marku, 37, was caught red-handed in a local hotel while he was taking Lek 25,000 from a citizen to issue him a permit to start a seasonal business activity in the Velipoja beach.

# F

their countries' contribution to cope as efficiently as possible with the emergency situation created in northern Albania after the severe floods of the last days.

A press statement released by the foreign ministry said that Meta, accompanied by the Minister of Economy, Trade and Energy, Brian Prifti and deputy interior

critical but not dramatic

Minister Predmoret Peqi, informed on Thursday the Ambassadors on the situation and the measures taken by the government to face and overcome with the least damages the situation which he called as critical but not dramatic.

On behalf of the Albanian government, Meta asked the Ambassadors of their countries for the management of the situation, assuring them for a continuous and transparent communication as well as for coordination of the expected assistance.

In the meantime, Meta had a pleasant conversation with his Italian counterpart Franco Prattini when he informed on the current grave situation and the assistance.

Prattini expressed the solidarity of the Italian government holding out that it stood by the side of the Albanian people and government in these difficult moments.

Also, Prattini expressed the readiness of his government to do for any necessary aid for the so-called overcoming of the situation, something which was appreciated by Meta calling it as an expression of the solidarity and support offered by the Italian government.

View of Thursday's meeting between T.M. to Meta and representatives of the opposite camp

HCJ Strips Judge of His Immunity

TIRANA - The High Council of Justice (HCJ) held an urgent meeting on Thursday where it stripped the judge of the Vloza District Court, Thona Nika of his immunity and paving way to the start of the legal action against him.

HCJ decided during the meeting headed by its deputy chairman Kreshnik Spahiu to accept the request presented by the general prosecution, authorizing it to level charges of passive corruption against Nika.

HCJ's decision was taken unanimously and this is the fourth time the Council has accepted the request of the prosecution to strip a judge of his immunity within a one-year period. Based on the laws in force, Nika is immediately suspended from duty till the court proves he is guilty or not for the charges.

HCJ also discussed during Thursday's meeting about the trainings to be conducted in the Magistrates School and the annual analysis of work that are going to be held in all courts.

Islamici Says He Will Enter Parliament After March 6

TIRANA - The deputies of the "Different Thought Movement" in the Socialist Party (SP) will enter parliament after March 6.

Klodian Islamici, one of the members of the movement declared on Thursday that they would expect for the SP congress, which is going to be held next spring to be expressed on the issue and then decide.

"March 6th is the last deadline when we stay out of the parliament. This means that there are possibilities of reflection in the SP if the SP parliamentary group does not enter parliament. Personally and some other deputies do not 'burn' the mandate so we cannot include our selves in such a constitutional interpretation if the mandate exists or not. Furthermore, according to me, this is a failed spirit," said Islamici.

On the other hand, Islamici criticized the stance taken by his party regarding the situation created in the northern flooded areas, saying that SP was going out of its character because it had a copy of the DP. "I would say that SP is going out of its character. I am concerned that decisions, which belong to an opposition are not being taken in the SP. Now I am seeing the Berisha syndrome even in the SP. Every time there are such events, they try to do the same thing," Islamici underlined.

Opposition Postpones Protests

TIRANA - The left-wing leaders have decided to postpone the protest of their protests following the situation created in northern Albania due to the flooding.

The Socialist leader Edi Hama called on Thursday evening all the heads of the opposition forces and official sources from the Socialist Party said that the protests would begin only after the normalization of the situation.

"The people should get solidified with the inhabitants of the flooded areas," said the chairman of Union for Human Rights Party, Vangel Dule after the meeting.

Dule said that in these difficult moments the humanitarian priority remained the top priority.

For his part, the chairman of the Social Democrat Party, Skender Gjinushi blamed the government for the created situation, saying that however now it was time for responsibility and the real responsibilities would be drawn after the conclusion of the emergency.

The headquarters of the High Council of Justice in central Tirana

## Challenges/Difficulties

- Political pressure/efforts influence the investigations;
- More political support toward General Prosecution Office and JIU-s in particular (not just declarative support);
- Need to grant protection/immunity to whistleblowers/ victims of corruptions;
- The “immunity issue”; the need to lift immunity to address political and judicial corruption;
- Need to train prosecutors and judges to deal with financial crime and corruption;
- Closer collaboration with the media, public and NGO-s to increase the trust in law enforcement;

## Topic 2. Prosecution of Corruption

### PROSECUTION OF CORRUPTION: THE BADEN-WURTTENBERG (GERMANY) EXAMPLE

**Dr. Rainer Hornung,**  
Public Prosecutor,  
Public Prosecutor's Office at Freiburg,  
Economic Crime Division,  
Germany

#### Introduction

According to the Transparency International Corruption Perception Index in 2009, Germany has occupied the 14<sup>th</sup> place out of 180 countries with 8.0 points on a 10 points scale (whereas Romania has occupied the 71<sup>st</sup> place with 3.8 points). It has to be underlined that the Transparency International index is of course the result of a collection of subjective perceptions, and it mixes up prevention aspects (such as preventive training for public officials, networking, etc.) and prosecution aspects (on which this presentation is focused). The index should thus not be given a scientific value which it indeed does not have (and, as I understand it, does not intend to have). Still, the index gives a first insight into a country's effectiveness and efficiency in preventing and fighting corruption. Germany's 14th place is rather satisfactory, but it is of course not a top position, and the leaders such as New Zealand with 9.4 points or Denmark with 9.3 points are far ahead.

This indicates clearly that Germany has some corruption fighting work to accomplish and still a way to go. For example, Germany has, as will be shown in-depth below, a very weak rule with a very small scope of practical application on bribery of members of parliamentary bodies (section 108e of the German Criminal Code).

Consequently, the following presentation of my home region Baden-Wurttemberg's practical ways of fighting corruption and of Germany's statutes on specific criminal offences in this area is not intended to teach lessons to readers from other OECD member states. But it could perhaps give a little insight into our best practice of prosecuting the very complex and very diverse criminological phenomenon of corruption.

The first part of the presentation (I.) will show you how we coordinate and prosecute corruption cases in Baden-Wurttemberg (Germany's third biggest region with nearly 11 million inhabitants and an area of 35,000 km<sup>2</sup>). It will deal with the judicial and police organization in this field of criminal law on the one hand (A.), and the course of events - including interventional measures - in the prosecution of a typical corruption case on the other hand (B.). The second part of my presentation (II.) will then be dedicated to the legal definition of the major criminal offences in the field of corruption. It will begin with some words on two rather specific statutes on extraordinary types of corruption (A.) before giving a thorough insight into the basic ideas of defining punishable corruption in Germany (B.).

## **I. The Baden-Wurttemberg example of coordinating and prosecuting corruption cases**

### **A. Judicial and police organization**

#### 1. Specialised jurisdictions for high level and complex corruption

One feature of Germany's written procedural law specifically on fighting corruption is that it is virtually inexistent. There is indeed one single regulation in the Judicature Act - section 74c par. 1 n° 5 and 6 - which makes an explicit reference to bribery and corruptibility and which allows to implement specialised high level and complex economic crime chambers at chosen district courts (Wirtschaftsstrafkammern bei den Landgerichten). Correspondingly, the public prosecutor's offices at those district courts also have specialised high level and complex economic crime divisions (Schwerpunktstaatsanwaltschaften Wirtschaft). In Baden-Wurttemberg, this is the case for only two of our 17 district courts, Mannheim and Stuttgart. The prosecutor's offices in these two districts each have 20 to 25 prosecutors which are specialised in fighting serious economic crime.

#### 2. The common jurisdictions prosecuting corruption cases

But the 15 other public prosecutor's offices also have their specialised economic crime prosecutors, the bigger ones even entire economic crime divisions. For example, my hometown Freiburg's court district has some 750,000 inhabitants and four economic crime prosecutors united in one division. Our division's practice is to give only the very big and very complex economic crime cases to the specialised prosecutor's office in Mannheim (at most two or three files per year). That means that our "normal" small and medium level corruption cases - and be it with sums paid to the bribed public officer that go beyond 100,000 or 150,000 € - always stay in Freiburg. Each of the four specialised economic crime prosecutors has an average of 35 to 40 new files per month (attributed according to the first letter of the surname of the suspected person), among which there is perhaps one case of alleged corruption each second month.

#### 3. The criminal investigation departments in corruption matters

As to the police organization in Baden-Wurttemberg in the area of fighting economic crime, there are specialised economic crime investigators within each Local Criminal Investigation Department (LCID) - for example roughly 15 investigators and two accounting specialists in Freiburg LCID. Concerning the high level and complex economic crime cases, the four Baden-Wurttemberg Regional Criminal Investigation Departments (RCID) each have two specialised divisions (one of which normally deals almost exclusively with corruption cases). The German Federal Bureau of Investigation (Bundeskriminalamt) only has a very minor (coordinating) role to play when it comes down to fighting high level corruption (its main task being fighting against terrorism).

In adequate economic crime cases, the LCID's may form temporary "joint investigation teams" for example with customs investigators, tax fraud investigators, representatives of the labour administration, and so on. But all this is of course done under the control of the prosecutor's office. Indeed, as well section 152 par. 2 of the German Judicature Act as section 161 of the German Code of Criminal Procedure stipulate in slightly varying terms that the prosecutor's office is the so-called "master of the investigation". Let us now see how the practical cooperation of prosecutor and investigator works in a typical corruption case.

## B. Prosecuting a typical corruption case in Baden-Württemberg

### 1. The beginning of the investigation: Anonymous complaints, “whistle blowers” and covert pre-investigations

The German (and Baden-Württemberg) reality for most types of common criminal offences is that the police investigates autonomously for several weeks or even months before it finally hands over an almost complete file to the prosecutor’s office. However, this never happens with corruption cases. First of all, as a matter of fact corruption matters almost never begin as overt cases. Very often, anonymous but very detailed complaints are directly addressed to the prosecutor’s office. Sometimes, an insider - a “whistleblower” - is brave enough to personally give relevant information on a specific corruption case inside his / her own administration. And in a few cases, the media report on bribery allegations unknown to the prosecutor’s office prior to the publishing of the report. In addition to the fact that the prosecution of corruption cases, as shown, often has its starting point in the prosecutor’s office - and not in a police service -, as well prosecutors as investigators understand that fighting against corruption offences always demands for a very close and thorough cooperation among themselves from the very beginning.

In all new cases, the prosecutor in charge has to examine whether there is a so-called “initial suspicion” (*Anfangsverdacht*) as to the realisation of a specific criminal offence. Indeed, section 152 par. 2 of the German Code of Criminal Procedure obliges the prosecutor’s office to intervene in any case of initial suspicion. That means that the German criminal procedure is governed by the principle of mandatory prosecution of offences (*Legalitätsprinzip*).

The problem in corruption matters is that in a number of cases, especially with anonymous complaints, the information given is too indefinite to affirm a concrete initial suspicion against a specific person on the one hand, but it reveals certain internal knowledge which indicates that the allegations might be true on the other hand. In these cases without a sufficient initial suspicion, it is of course impossible to ask the investigation judge (*Ermittlungsrichter*) to order interventional measures such as searches and seizures or phone interceptions. That is why the Freiburg economic crime prosecutors have adopted the practice to ask the Freiburg LCID or the Freiburg RCID to accomplish so-called “covert pre-investigations” (*verdeckte Vorermittlungen*). This means for example gathering information on the potential briber’s enterprise, gathering (confidential) information as to the functioning of the concerned administrative authority, hearing witnesses with no direct personal contact with the potential briber and / or the potential bribed person, and so on.

If the police pre-investigations remain fruitless - meaning that a concrete initial suspicion can still not be affirmed - or if the anonymous complaint is altogether confused from the very beginning (which is not too seldom the case because charging someone with corruption allegations seems to be a popular technique for a personal vendetta!), the prosecutor dismisses the case by a written decision.

### 2. Investigation measures when a concrete initial suspicion is affirmed

But if there is an initial suspicion - either because the covert pre-investigations have made the charges plausible, or because the (anonymous) complaint is very detailed and plausible from the very beginning and reveals obvious insider’s knowledge, the prosecutor’s first real investigation step regularly is to ask the investigation judge for search and seizure warrants concerning firstly the personal domiciles of the suspected persons (briber and bribee), secondly, if necessary, the enterprise of the briber, and thirdly the seat of the administration for which the bribee works. The aim is of course to find important amounts of

cash money, valuable gifts, handwritten keynotes on oral agreements, unmasking e-mail correspondence, etc.

Parallel, and sometimes even prior to the contacting of the investigation judge, the prosecutor in charge asks for detailed information on the banking accounts of the suspected persons. This has to be done by the prosecutor himself / herself, because section 161a of the German Code of Criminal Procedure allows the banks not to answer written requests of the police investigators. The practice shows that the bank secret is indeed jealously guarded by the contacted credit institutions.

Since January 2008, section 100a par. 2 n° 1 lit. t) of the German Code of Criminal Procedure also allows the use of phone interceptions (ordered by the investigation judge on the demand of the prosecutor) in serious bribery and corruption cases. The first experience shows that this measure can be very effective in corruption matters, because often the so-called "immoral pact" between briber and bribee is not written down on paper. Nevertheless, search and seizure measures statistically remain much more relevant in corruption matters, simply because they are much easier to realise than phone interceptions.

### 3. Corruption files and the importance of circumstantial evidence

The major problem of nearly every investigation on corruption charges has already been touched upon in the last paragraph: It is often very difficult to prove the tacit "immoral pact" between the giver and the public official. In my professional career as an economic crime prosecutor, I have not lived a single corruption case in which a suspected person had openly admitted the facts. That means that circumstantial evidence is of vital importance in corruption files. It is often difficult to find pertinent witnesses, because the relevant persons are often themselves collaborators of the concerned administrative authority and fear bad consequences for their future professional life (one of the reasons for the large number of anonymous complaints in this field). Hence all comes down to collecting sufficient material proof which in sum is conclusive evidence. As our criminal courts often put it: "One inculpatory indicator might be a coincidence, a series of coherent and fitting indicators is conclusive."

I want to give you a current example of my own practice, which gives you a good idea of the practical difficulties of proving modern "German-type" corruption cases:

The case which not surprisingly started with an anonymous complaint and which is actually pending in criminal court (the indictment was brought into court some 13 months ago, and there is still no decision as to the fixing of the date of the court hearing ...) played in the health sector and was related to questions of public tender. The highly indebted chief of the Freiburg University Hospital's laboratory section (he had about 3 million € of personal debts!) was the main decision taker as to the purchase of laboratory material within public tender procedures or on the free market (according to the value of the purchase). His asset manager arranged a meeting with the two CEO's of an important Northern German laboratory material manufacturer who had a vital interest in entering into the Freiburg market. So the two CEO's started to give the laboratory section chief four or five so-called "credits" varying from 2,000 to 14,500 €. In reality, it was a question of gifts that were never repaid. In re-turn, the laboratory section chief gave his benefactors precious secret information, for example as to the price calculation of the laboratory material manufacturers which at the time had contractual relationships with Freiburg University Hospital. Finally, the four accused - the laboratory section chief, his asset manager, and the two CEO's of the Northern German manufacturer - even founded a company the only goal of which was bringing the enterprise into the Freiburg laboratory material market at low costs and by circumventing



the applicable rules of public tender. The laboratory chief was a covert stakeholder in the company and was paid another 80,000 € of benefits within six months.

During the pre-trial phase, all of the four defence lawyers had written briefs - of at least 100 pages each - denying all the charges. They claimed, firstly, that the credit contracts were intended to be real credit contracts with an existing repayment obligation, secondly, that the credits were given for mere personal reasons (from friends to a friend) with no link whatsoever with the professional situation of the accused, thirdly, that the laboratory section chief had not divulged any secret and market-relevant information concerning the immediate business rivals of the Northern German manufacturer, and fourthly, that the contracts were legally concluded outside the public tender rules.

The outcome of this case is still unknown, but it shows in any way the difficulties in proving a corruption case and the mighty position of the accused who can afford very expensive defence lawyers. So it is no surprise that the named factual difficulties combined with the presumption of innocence lead to the prosecutor's final dismissal of an important percentage of corruption files for lack of sufficient evidence.

#### 4. Addressees of indictments in corruption cases: A glance on the German criminal courts system

Fortunately, the German prosecutor's offices also bring in accusations in a significant percentage of corruption cases. In little cases - when a fine or a prison term of two years at most is expected by the prosecutor - the indictment is addressed to a single criminal judge (Strafrichter) sitting in the local court. When the expected prison term in the concrete case is from two to four years, the criminal court at the local court level composed of one professional judge and two lay judges (Schöffengericht) is competent to decide.

And in cases of high level corruption - that means in our system that the expected prison term in the specific case goes beyond four years - it is a chamber at the district court composed of three professional judges and two lay judges (Große Strafkammer) to which the indictment is addressed.

It is important to underline that these rules - which all focus on the expected sentence in the concrete case - apply not only to criminal offences in the area of corruption, but to the vast majority of criminal offences. It has to be said once again that there are almost no specialised jurisdictions in the field of corruption.

## **II. The legal definition of the major criminal offences in the field of corruption**

After having given you an idea of our Baden-Württemberg concept of fighting and prosecuting corruption, I want to show you how the German Criminal Code defines the most important criminal offences in this area. First of all, I want to illustrate two specialties of the German law when it comes down to fighting corruption. The last part of my presentation will then be dedicated to the German "common" law of corruption.

### **A. Two specific rules: The bribery of members of parliamentary bodies and the bribery in non-public commerce**

#### 1. Bribery of members of parliamentary bodies

As already mentioned in my introduction, the rule on bribing members of parliamentary bodies - section 108e of the German Criminal Code - has a very narrow scope. Indeed, the general rules on bribery and corruptibility (see below B.) are not applicable, because the German criminal law differentiates between the office of a "normal" public official on the one hand and the mandate of an elected member of a parliamentary body or an administrative body on the other hand. Thus, it was necessary to introduce a specific regulation into the Criminal Code concerning the giving of gifts to MP's. The new rule was finally adopted as late as in 1994, and it is not exaggerated to say that it has remained "dead law" ever since. My head of division within the Freiburg Prosecutor's Office has told me recently that he has not seen one single successful investigation file on a section 108e basis in the last 15 years.

The reason for this development is easy: The definition of the criminal offence is so narrow that it is almost impossible to prove! As a matter of fact, the regulation only covers the giving of advantages which are directly linked to a specific vote or election behaviour. By that, the lack of evidence is of course pre-programmed.

I will give you a concrete example from our practice in the Freiburg Prosecutor's Office: The leader of the conservative group in our Regional Baden-Wurtemberg Par-liament (Landtag) lives in a constituency (in our district) which was one of five or six potential places for the implementation of an important gravel producer. The Landtag had to take the final decision on the location. Some weeks before the decisive vote, the CEO of the gravel producer who had a vital interest in the choice of the "right place", meaning the place within the constituency of the leader of the conservative group, had paid an important sum to him, a sum which was declared to be a "party funding". It was of course a mere coincidence that all the members of the conservative group finally voted for the implementation of the industrial facility in the constituency of the group's leader... But still, the case was finally dismissed for lack of evidence as to the direct influence of the "party funding" on the vote.

The Council of Europe has indeed already criticised Germany for its inefficient regulation on the bribing of members of parliamentary bodies. And the truth is that the vast majority of the Council of Europe's younger member states have much more efficient rules in this area!

## 2. Bribery in non-public commerce

Another specific corruption offence within the German criminal law system is laid down in section 299 of the Criminal Code: This section provides for the punishment of bribery in non-public commerce. The regulation seems to be an adequate reaction to two developments, the ongoing privatization of important sectors of public infrastructure on the one hand, and the discovery on the other hand that the manipulation of a specific market to the detriment of competitors is not exclusive to public tender procedures.

Indeed, he who, as a non-public employee of an enterprise, accepts benefits of a third person for in return favouring a certain client over other competitors, risks a fine or a prison term up to three years. The same sanctions can be applied to the private briber.

One intensively covered case covered by section 299 of the German Criminal Code which happened in Baden-Wurtemberg kept the Karlsruhe Prosecutor's Office busy some years ago: A number of private cleaning contractors were trying to get access to the very disputed and profitable market of cleaning in a privately-held nuclear power plant in the Karlsruhe district. One of the employees of the nuclear power plant took advantage of the situation and asked several cleaning contractors to pay him important sums

of money for in return being favoured to the detriment of other competitors. The accused was finally sentenced to a very important criminal fine.

But the possible sanctions are even more severe in the “classical” field of corruption in a narrower sense, meaning corruption necessitating the participation of a public official.

## **B. Bribery and corruption / Giving and accepting a benefit**

### **1. The understanding of the term “public official”**

First of all, it is important to underline that the General Part of the German Criminal Code provides for a legal definition of the term of “public official”:

Section 11 par. 1 n° 2 states that public officials are not only appointed civil servants and judges, but also those persons who are charged in any other way with the execution of tasks of public administration.

This definition’s aim is to prevent the so-called “escape into private law”. As a matter of fact, many German municipalities have delegated important parts of their tasks in the area of public procurement on companies which are organized on a private law basis. But of course, most of these companies are held entirely by the municipality itself. And in any case, private stakeholders do never hold the majority in a municipal company. Consequently, the Chairman or CEO of such a municipal company is considered to be a “public official” in the sense of the legislation on corruption, even though he / she works for a privately organized enterprise.

In one Baden-Wurttemberg case, for example, the mayor of a small town near Karlsruhe was at the same time the CEO of the town’s power supply company, a company entirely owned by the municipality. This mayor - who had to decide within 18 months on the conclusion of a new contract with his actual energy supplier - was invited by another privately-owned supra-regional energy supplier to a three-days luxury trip to the Norwegian town of Bergen. The trip cost 1,800 € and included two nights in a five-stars hotel, a feast dinner with Bergen’s mayor, a helicopter trip to an oil rig, and so on. Both the first instance court and the appellate court held that the accused was a “public official” in the sense of the legislation on corruption, not because of his mandate as mayor, but because of his position as CEO in the municipal company.

### **2. Bribery and corruption**

As many other national law systems, the German law distinguishes between bribery (section 334 of the Criminal Code) and corruptibility (section 332 of the Criminal Code) on the one hand, and the less serious giving and accepting a benefit (sections 333 and 331 of the Criminal Code) on the other hand. In both cases, a criminal conviction is only possible when the above-mentioned so-called “immoral pact” is proven. Indeed, any corruption case requires an at least tacit understanding between two persons who want to link the giving of a benefit to a specific behaviour of a public official within his professional exercise.

In addition to this requirement, bribery and corruptibility need the commitment, or the promise of the commitment, on an illegal act by the public official. The latter not only demands a benefit for a specific professional behaviour, but for a concrete act which constitutes, as he / she knows, a breach of his / her professional duties.

Under section 332 of the German Criminal Code on corruptibility, the bribed public official risks a prison term from six months to five years in a “normal case”. In presence of aggravating circumstances - for example if the benefit is of a particularly high value or if the public official is convicted of the continuous accepting of benefits for future breaches of duty (section 335 of the German Criminal Code) - the bribee can be condemned to one - ten years of imprisonment.

The same rule (section 335 of the German Criminal Code) applies to aggravated bribery, meaning that as well the briber as the bribee risk prison terms from one year - ten years. In “normal cases”, the briber can be condemned to an imprisonment from three months to five years. So there is a slight favour for the briber as to the minimum sentence (three months instead of six months for the bribed public official).

### 3. Giving an accepting a benefit

If no specific breach of duty is linked to the “immoral pact” between the donator and the public official, the range of punishment is inferior to the ranges of the named sections 332, 334, and 335 of the German Criminal Code on bribery and corruption. Indeed, he / she who gives a benefit (section 333 of the German Criminal Code) and he / she who accepts a benefit (section 331 of the German Criminal Code) both risk a criminal fine or a prison term up to three years.

It has to be underlined that the maximum prison term is elevated to five years when the accepting public official is a judge or an arbitrator (section 331 par. 3 and section 333 par. 2). But I have to add that I myself have never investigated against a corrupt judge throughout my whole career as economic crime prosecutor. And I dare to say that the problem of judges open to bribery seems to be virtually inexistent in Baden-Wurttemberg. One of the reasons for this phenomenon is that the payment of judges and prosecutors in Germany is rather appropriate (but far from spectacular compared to the wages of judges and prosecutors in many other Western European states!).

### **Conclusion:**

As the presentation has shown, the German system and the German practice of prosecuting corruption have strong points and weak points. And the examples I have mentioned seem to show that our phenomenology of corruption is perhaps slightly different from the phenomenology of corruption in the member states of the Anti-Corruption Network for Eastern Europe and Central Asia. The blunt offer of a lump sum of money to a policeman (who is known to earn a poor wage) for “closing both eyes” in a speeding situation surely occurs, but our actual German corruption cases are in their vast majority much more complex. They mostly touch questions of public tender and public procurement, and the actors often find very sophisticated ways to conceal the “immoral pact”. In addition to this, expensive but clever criminal defence lawyers stand at the side of the suspected persons and sometimes contribute to “muddying the waters”.

Despite of the named differences, the German example of not creating a central - federal - body for the prosecution of high level and complex corruption and of locally tracking the cases on the field can surely be one of several equally efficient systems when it comes down to fighting a criminological phenomenon which is not only in-eradicable in our societies, but which annually causes drastic budgetary losses.

One thing is for sure: The techniques of fighting the evils of corruption might vary from one OECD member state to another, but the common aim must be to give corruptible public officials no playing field whatsoever, and this at all levels of public administration.

## **ROLE OF USKOK IN COORDINATING AND PROSECUTING CORRUPTION IN CROATIA**

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### **I. WHY WAS USKOK ESTABLISHED**

In October 2001 Act on USKOK (Croatian acronym for the Office for the Suppression of Corruption and Organized Crime) entered into force and in December 2001 the Office began to work.

USKOK was established within the framework of the existing State Attorney's Organization (State Attorney's Office of the Republic of Croatia, County State Attorney's Offices, Municipal State Attorney's Offices).

USKOK was founded because the existing State Attorney's network and competence in fighting criminal offences related to corruption and organised crime were not adequate since those kind of criminal offences present a harmful social phenomenon, which undermines the fundamental values of society. Due to the serenity of such criminal offences there was a need for more efficient solution, such as the establishment of a specialized body.

At the same time, by establishing USKOK, Croatia has fulfilled obligations taken by ratification of Criminal Law Convention on Corruption and UN Convention against Transnational Organized Crime.

#### Organisation of USKOK

USKOK is a special State Attorney's Office established for the territory of the Republic of Croatia. Headquarter of USKOK is in Zagreb.

USKOK consists of Research and Documentation Department, Anti-Corruption and Public Relations Department, Prosecutor's Department, International Cooperation and Joint Investigation Department, Secretariat and Supporting Services.

Prosecutor's Department has Sections in Osijek, Rijeka and Split.

#### Staff

Head of the Office manages the work of the Office. He is appointed by the State Attorney General, with the prior opinion of the Minister responsible for judicial affairs and the opinion of the collegiate body of the State Attorney's Office of the Republic of Croatia.

Head is appointed for the period of four years; after the term for which he was appointed has expired, the Head may be reappointed.

Deputy Heads may be state attorneys or deputy state attorneys who after passing the bar exam have spent a minimum of eight years working as a judge, state attorney, deputy state attorney, attorney-at-

law or as a police officer working on the suppression of crime and who has particular aptitude and competence to investigate the most difficult and most complex criminal offences.

Deputy Heads are assigned to work in the Office for the period of four years; they are assigned by the State Attorney General on a proposal of the Head of the Office. After the expiration of this term, a deputy head may be reassigned to work in the Office.

In exceptional cases, provided that there are particularly good reasons for so doing, the State Attorney General on the proposal of the Head of the Office, may assign to work in the Office, a state attorney or deputy state attorney, to work on a particular case or for a limited period. The assignment in these cases lasts for a maximum period of one year.

Currently there are 28 Deputy Heads working in the Office.

Besides Deputy Heads, there are Legal Advisors and Expert Associates (Criminal Science Expert, Political Science Expert, Journalist and Interpreter) working in the Office. There are 51 persons in total employed in the Office.

All USKOK employees, prior to employment, must pass security checks and report their assets.

## **II. LEVELS AT WHICH USKOK EXISTS**

In 2009, so called, USKOK vertical was established.

Besides USKOK, Police National Department for the Suppression of Corruption and Organized Crime (PN USKOK) and special USKOK departments at competent County Courts were established.

Police National Department for the Suppression of Corruption and Organized Crime (PN USKOK) was established within the Criminal Police, Police Directorate and it conducts complex inquiries in cooperation with USKOK.<sup>2</sup>

Four County Courts (Osijek, Rijeka, Split and Zagreb) have subject-matter and territorial jurisdiction of cases concerning the criminal offences under USKOK's competence. Specialised departments have been established at those courts which consist of judges with experience in working on more complex cases. The judges in these departments are appointed through the annual schedule by the court president after having obtained the opinion of the council of judges. All judges within USKOK departments also passed security checks.

## **III. USKOK'S MAIN FUNCTIONS**

USKOK, as a special State Attorney's Office, primarily has a repressive role. In the field of the fight against corruption, USKOK has a preventive role as well.

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<sup>2</sup> There are four regional Departments, in Zagreb, Split, Rijeka and Osijek and also: Organized Crime Department, Drug Department, Economic Crime and Corruption Department, Criminalistic-intelligence Analytic Dep., Crime Intelligence Affairs Dep. and Special Criminalistic Affairs Department

Prosecutor's Department performs state attorney tasks pursuant to the Criminal Procedure Act and other regulations; and in particular:

1. directs the work of the police and other bodies in detecting the crime offences and requests the collection of data in these offences,
2. proposes the application of the security measures of seizure of instruments, income and assets which are the proceeds of crime
3. performs other tasks according to the schedule of work in the Office

*a) Jurisdiction of the Office (prescribed by the Act on USKOK)*

### **Corruption**

Performs tasks in cases involving following criminal offences:

- malpractice in bankruptcy
- unfair competition in foreign trade operations
- abuse in performing governmental duties
- illegal intercession
- accepting a bribe
- accepting a bribe in economic business operations
- offering a bribe
- offering a bribe in economic business operations
- abuse of office and official authority when committed by an official person
- 

### **Organized Crime**

1. If following criminal offences have been committed as a member of a group or criminal organization:

- unlawful deprivation of freedom
- kidnapping
- coercion
- trafficking in human beings and slavery
- illegal transfer of persons across the state border
- robbery
- extortion
- blackmail
- money laundering
- illegal debt collection

2. Abuse of narcotic drugs

3. Association for the purpose of committing criminal offences referred to in At. 333 CC, including all criminal offences committed by this group or criminal organization, except for criminal offences against the Republic of Croatia and the armed forces.

4. Criminal offences committed in relation to the activity of a group of people or criminal organisation for which a prison sentence for a period exceeding three years is prescribed and if the criminal offence was committed in the territory of two or more states or a significant part of its preparation or planning was done in another state.



The Office has jurisdiction to conduct criminal proceedings against the organisers of a group of people or criminal organisation for the commission of the criminal offences of pandering illicit trade in gold, avoiding customs control.

The Office also has jurisdiction over criminal offences of money laundering, obstruction of evidence, duress against a judicial official, obstructing an official in the performance of official duty, attacking an official and the criminal offence of disclosure of a protected witness's identity if these offences have been committed in connection with the commission of the criminal offences aforementioned.

*b) Securing instruments, income or assets which are proceeds of crime*

The Act on USKOK also contains provisions that regulate the procedure by which the Office and courts through preliminary or provisional measures (security measures), secure the seizure of instruments, income or assets resulting from the criminal offences.

This procedure does not constitute criminal proceedings and the provisions of the Execution Act are accordingly applied.

The seizure of the secured instruments, income and assets are executed pursuant to the provisions on the seizure of proceeds of crime specified in the Criminal Procedure Act.

The procedure concerning the mandatory securing of the seizure of instruments is instigated ex officio by the Office, the procedure is urgent and may be instigated prior to criminal proceedings.

The procedure of securing the seizure of instruments, income or assets is led by the judge of investigation, and after criminal proceedings are initiated the jurisdiction to implement the security measure is on the court before which the criminal proceedings are conducted.

Upon a proposal by the Office, the Court will prescribe the security measure of seizure of instruments, income or assets which are the proceeds of crime if it determines that:

- there are grounds for suspicion that the natural or legal person has committed a criminal offence described in Article 21,
- there are grounds for suspicion that the total instruments, income and assets of that person are proceeds of crime,
- the value of these instruments, income or assets of that person are the proceeds of crime,
- the value of these instruments, income or assets exceeds the total amount of 100.000 HRK,
- there are grounds for suspicion that the perpetrator of a criminal offence in Art. 21. before the initiation of criminal proceedings or in their course will thwart or render significantly difficult the seizure of instruments, income or assets by means of the measure referred to in Art. 82 par. 2. of the Criminal Code.

Security measures that court may prescribe are:

- a note in the land registry concerning a statutory lien against defendant's property or a registered title on property,
- some of the security measures of attachment of property not recorded in the land of registry through the attachment or safekeeping of management of chattels, monetary claims, income

- under an employment or service contract and all other property or material rights and the attachment of the defendant's documents with regard to shares and other securities,
- an injunction to a bank or legal person performing the activities of money transactions prohibiting payments being made to the defendant or a third person authorised by him, from his account to the amount for which the security measure was ordered. This amount cannot be transferred from the account during the valid period of the injunction.

#### **IV. HOW INVESTIGATION AND PROSECUTION IS COORDINATED AND CARRIED OUT IN CROATIA**

New Criminal Procedure Act is being applied from 1<sup>st</sup> July 2009 for criminal offences under USKOK competence. All other regular State attorney's Office will apply the new CPA in Sept. 2011.

Passing of the new Criminal Procedure Act abolished court investigation and introduced prosecutor's investigation. According to the prevailing view in theory in comparative legislation, structure in which a defendant opposed a prosecutor and not a court (an investigative judge) is more appropriate to contradictory proceedings. State Attorney is a subject conducting an investigation. He becomes *dominus litis* of the pre-trial stage of proceeding. Such structure imposes significantly different and more complex tasks before the State Attorney.

Prior to entering into force of the new CPA, education was organised via 5-days workshop jointly attended by the police, prosecutors and judges. Since interrogation of suspects is recorded, USKOK is equipped with audio-visual recording equipment.

Due to changes introduced by the new CPA, other laws referring to the new CPA were passed (so-called "adjoining laws"). Therefore, from July 1 2009, new Act on the State Attorney's Office, Act on USKOK<sup>3</sup> and Act on Police Activities and Competences are in force.

##### *Inquiries into Criminal Offences (Pre-investigation)*

Inquires are divided into inquiries conducted by the police and inquiries done by the State Attorney.

When making inquiries into criminal offences the police authority act according to the provisions of the special law, Police Authority Act. When police gathers all data on the crime, files a crime report to the State Attorney. The police has to notify the State Attorney on the inquiries into criminal offences immediately, and not later than 24 hours from the moment the action was conducted.

State Attorney can undertake criminal inquest (inquiry) by himself or order the police to conduct the inquiry.

If the State Attorney is unable to establish from the crime report whether or not allegations in the report are credible, or if facts stated in the report do not suffice for a decision on whether he should order opening of an investigation, or if only rumours reach the State Attorney that a criminal offence has been committed, the State Attorney shall, if he cannot do this himself or through other authorities, order the

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<sup>3</sup> New Act on the Office for Suppression of Corruption and Organised Crime has no significant novelties, since provisions regarding the pre-trial authorities of the State Attorney are part of the Act on State Attorney's Office which applies to USKOK as well.

police authorities to obtain necessary information by making inquiries and undertaking other measures for collecting data necessary or a decision on the opening of the investigation.

The State Attorney has the right and duty to constantly supervise the conducting of the inquiries ordered to police. The police is bound to execute the order or request of the State Attorney in performing supervision of the inquiries and responds for their action to the State Attorney (supervising authority over police when State Attorney ordered a police to make an inquiry).

Upon request of the State Attorney, the police authority, ministry responsible for finance, the State Audit Office and other state authorities, organizations, bank and other legal entities shall deliver to the State Attorney required information, except the information that is a lawfully protected secret.

Also, the State Attorney may request from the aforesaid authorities to control the operations of a legal entity or natural person, and according to appropriate regulations, to seize temporarily, until a judgment is rendered, of money, valuable securities, objects and documentations that may serve as evidence, to perform supervision and delivery of data that may serve as evidence on the committed criminal offence or property gained by the criminal offence and to request information on collected, processed and stored data regarding unusual and suspicious monetary transactions.

According to Act on State Attorney's Office, State Attorney performs inquiries by himself, when deems it necessary in view of consolidating operations and measures of pre-trial proceedings, faster and more effective performance of pre-trial proceedings and effective resolution of the issue. Simplified, when he can conduct it without difficulties..

Police and other bodies delivering data requested by the State Attorney, as well as police when performing investigations requested by the State Attorney, can request from the State Attorney to convene an advisory meeting.

During the work on complex cases in which inquiries are performed by the police, at least once, State Attorney has to convene an advisory meeting. The purpose of the meeting is to identify and check operation methods, exchange collected data and identify direction of uniform inquiry operations of the police and other state bodies.

### Investigation

The investigation is conducted by the State Attorney.

The Investigation must be conducted for criminal offences for which a punishment of long term imprisonment is prescribed, and may be conducted for other criminal offences for which a regular criminal proceeding is conducted (offences under the capacity of county courts).

The order for investigation is to be delivered to the suspect within eight days from the date of issue, together with the instructions of rights.

After issuing the order for investigation, State Attorney undertakes or orders actions he deems necessary for a successful conduct of proceedings.

The State Attorney may, by an order, entrust the performance of particular evidence to the investigator.<sup>4</sup> In the order, State Attorney designates the investigator, the actions to be undertaken and may also issue other orders which the investigator has to observe. The investigator is bound to act pursuant to the State Attorney's order.

The State Attorney concludes the investigation when the actions prescribed by law are conducted and when he finds that the case has been sufficiently clarified so that the indictment may be brought or the proceedings discontinued.<sup>5</sup>

Actions in the course of the investigation are secret; the persons participating in evidence collecting action<sup>6</sup> are to be warned that revealing of the secret is a criminal offence.

Experience in application of the new CPA acquired up to now, indicate that primary goal of that legislative change is being accomplished in practice since prosecutor's investigation is conducted more expediently (duration of investigation is much shorter).

## **V. MAIN RESULTS OF USKOK**

USKOK is competent for two fields of crime – organised crime and corruption. Approach to work in these two fields is different. In organised crime field, as a rule, police files a criminal report, and prosecutors process the cases and accomplish high percentage of convictions.

In the field of criminal offences of corruption USKOK applies proactive approach which resulted in initiation of criminal proceedings in different areas that are recognised as risky areas, that is areas subject to corruption.

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<sup>4</sup> According to Act on State Attorney's Office, annual list of investigators that can be entrusted with collecting evidence in pre-trial proceedings is determined by the County State Attorney having jurisdiction at the corresponding State Attorney's Office.

<sup>5</sup> The Investigation has to be over within a term of six months, if is not concluded in this term, the State Attorney is bound to notify the higher State Attorney of the reasons which hinder its conclusion. The higher State Attorney will undertake measures in order to conclude the investigation. In complex case, the higher State Attorney may, upon a motion with a statement of reasons of the State Attorney, prolong this term for another six months. In specially complex and grave cases, the State Attorney General may upon the motion with a statement of reasons of the State Attorney, prolong the term for the conclusion of the investigation for 12 months. After the conclusion of the Investigation, the State Attorney has to, within a term of 15 days bring an indictment or discountinue the investigation. Upon a motion of the State Attorney, the higher State Attorney may prolong this term for another 15 days at the longest and for another 2 months in special, complex cases. If the indictment has not been submitted to court even after the expiry of the prolonged date, it shall be deemed that the State Attorney desists from prosecution. In any case, it shall be deemed that the State Attorney desists form prosecution if the indictment has not been brought six months after the conclusion of the investigation.

<sup>6</sup> Evidence collecting actions are: Search, Temporary Seizure of Objects, Interrogation of Defendand, Examination of Witnesses, Identifiacion, Judicial Viex (Reconstruction), Taking Fingerprints and Prints of other Body Parts, Expert Witness Testimony, Documentary Evidence, Recording Evidence, Special Collection of Evidence.

In Maestro case, which refers to corruption in privatisation, vice-presidents of the Croatian Privatisation Fund were indicted. The first indicted received a final judgement of conviction, 11 years imprisonment.

Further on, in cases Dijagnoza corruption connected to illegal acquiring of pensions for the disabled persons and other rights of the Croatian military veterans was processed.

In Index cases corruption in university education was tackled (8 judgements in investigation were passed and also convictions against 63 persons including deputy Dean of Zagreb Faculty of Transport and Engineering and nine professors, as well as the former president of Committee for deciding on conflict of interest issues who received first instance prison sentence in the duration of 1.5 years).

In Dubai case corruption within Tax Administration was processed.

Also, indictments have been raised against two former Ambassadors of the Republic of Croatia (for abusing office or official authority), in cases Five stars (corruption in construction building), Gruntovec (corruption in land registry departments of Municipal Courts), Ipsilon (association of a well-known lawyer with police, customs and tax officers and a Municipal State Attorney).

Indictments have been raised in several cases against state attorneys and judges including a president of the High Commercial Court of the Republic of Croatia.

In a case Military Trucks former Minister of Defence and Deputy Minister of Defence were indicted for corruption in public procurement. In three cases indictments have been raised against a former Minister of Economy and vice-president of the Government of the RoC.

It is important to emphasize that there are several cases processing illegal activities in the work of public companies such as Agit (Croatian Railways), Bankomat (Croatian Postal Bank), cases referring to the Croatian Electrical Utility etc.

It is obvious from the before-mentioned that USKOK processed middle and high level corruption.

“Zero-level of tolerance to corruption” is applied. USKOK is working on complex cases, while less significant cases are assigned to prosecutors from regular State Attorney’s Offices, so USKOK caseload in regard to cases of petty corruption is lessened.

Team work is applied in all complex cases (teams are formed and they consist of prosecutors, police, other LEA representatives such as Tax Administration and so on, representatives of Intelligence Services etc.)

The best results are accomplished when corruption cases are reported *pro futuro*. Then, special evidence collecting actions are applied (using of informants, interception of telephone conversations, simulated bribe giving etc.) and by doing so material evidence valid before court are being collected.

In more complex cases, as a rule, USKOK immediately start with conducting financial investigations with the aim of freezing assets and thus securing permanent confiscation of pecuniary gain later.

It is important to mention an important legislative change of the Criminal which entered into force on 1<sup>st</sup> January 2009 and refers to so-called extended confiscation of pecuniary gain. According to that change, if

a criminal offence from USKOK's competence has been committed, it is assumed that all perpetrators' assets were acquired as pecuniary gain unless the perpetrator can prove that it was acquired legally. Confiscation refers to relatives of the perpetrators and other natural and legal persons if the assets were not acquired in good faith.

Since State Attorney's Office, and therefore USKOK as specialised State Attorney's Office, is primarily prosecution body and a body of detection, efficient cooperation with detection bodies is of extreme importance.

Therefore USKOK concluded Agreements of Understanding with Tax Administration (giving USKOK direct access to tax administration data), Police Directorate on the exchange of information in pre-investigative stage of proceedings (access to crime-intelligence data and IT system of the Ministry of Interior Affairs of the RoC) and Public Procurement administration (exchange of information, mutual assistance and education in public procurement area).

Of course, very important area is the area of international cooperation which is successfully achieved on the basis of several Memoranda of Understanding which State Attorney's Office of the Republic of Croatia signed with several international Prosecutors' Office.

In USKOK's work a lot of attention is given to the cooperation with non-government organizations (NGOs) fighting against corruption and relations with the media. USKOK has a web site where press releases are published regarding all more important cases USKOK is working on.

### Topic 3. Investigation and Prosecution of Corruption Cases

#### INVESTIGATION AND PROSECUTION OF HIGH LEVEL CORRUPTION

**Mr. Cristian Anghel,**  
prosecutor,  
National Anti-Corruption Directorate,  
Romania

#### **D.N.A. STRUCTURE G.E.O. 43/2002**

##### ➤ **Central structure**

- ✓ **The Section for fighting corruption offences**
- ✓ **The Section for fighting crimes connected to those of corruption**
- ✓ **The Section for fighting corruption offences committed by the military personnel**
- ✓ **The Judicial Section**
- ✓ **The Service for International Cooperation**
- ✓ **The Technical Department**
- ✓ **Administrative Departments**

##### ➤ **Territorial Services – 15 services -**

## D.N.A. TERRITORIAL SERVICES



Alba
Bacau
Brasov
Bucuresti
Cluj
Constanta
Craiova
Galati
Iasi
Oradea
Pitesti
Ploiesti
Suceava
Tg. Mures
Timisoara

## D.N.A. PERSONNEL

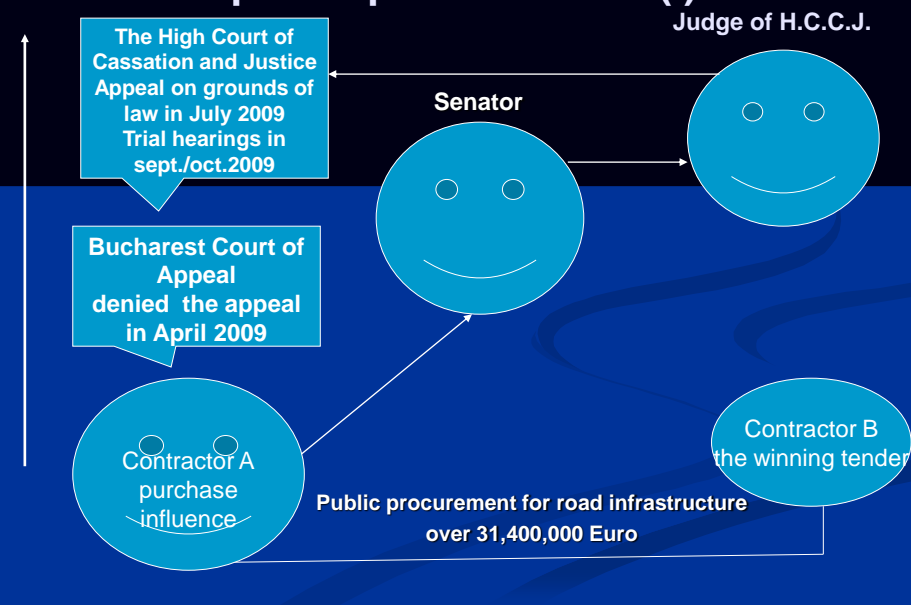
- Prosecutors
- Judicial Police
- Specialists
- Auxiliary personnel
- Administrative personnel



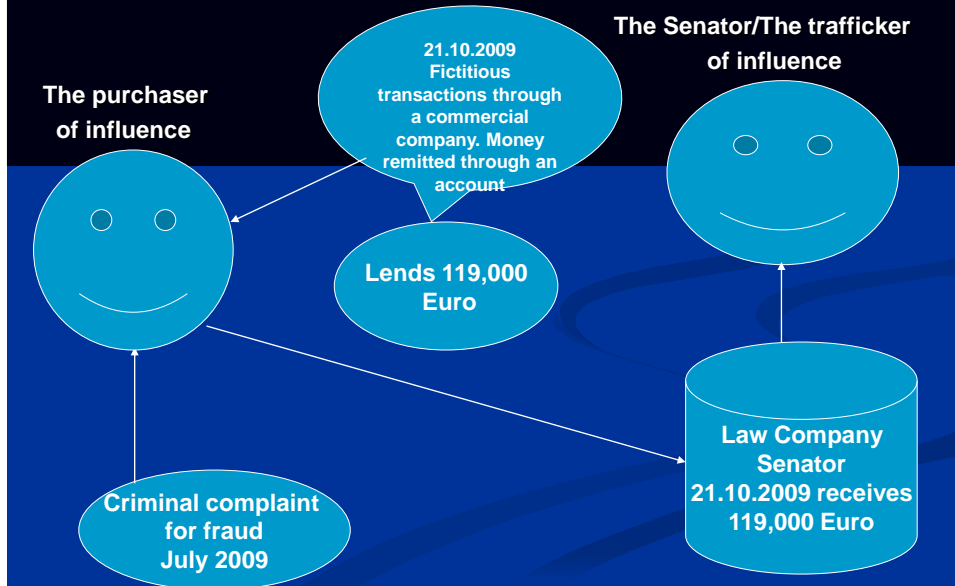
## D.N.A.JURISDICTION G.E.O. 43/2002

- The value of the object of the corruption offence, the offence assimilated to/in connection with the corruption offence
- The quality of the person
- Economic/financial/customs/duty related crimes with the prejudice of over 1,000,000 Euro
- The crimes against the European Communities financial interests

### The sale/purchase of influence in the public procurements (I)



## The sale/purchase of influence in the case of the criminal proceedings (II)



## CRIMINAL INVESTIGATION

- Notification of D.N.A.- ex officio/severance –
- Parliamentary immunity in the case of temporary custody/the duration of the proceedings/disclosure of the evidence/presenting the case to the public – senator under temporary custody for 7 months -
- The evidence - recordings/30 witnesses/documents
- The duration of the criminal investigation – 6 months – 4 defendants/3 traffic offences, 2 offences of trading in influence, 3 forgeries
- Ensuring measures for the 260,000 Euro (delivered only 200.000 Euro)- seizure of the amount of 200,000 Euro belonging to the purchaser of influence
- Expenses incurred within the criminal investigation – 50,000 Euro

## CONCLUSIONS

- The specialization of the criminal investigation body/ own judicial police/investments
- Limited and well defined competence
- Notification of the criminal investigation body
- Inter-institutional cooperation/media communication
- The immunity of the public officials

## INVESTIGATION AND PROSECUTION OF FOREIGN BRIBERY

**Mr. Fabio de Pasquale,**  
Prosecutor,  
Court of Justice of Milano,  
Italy

### 1. What is foreign bribery

Corruption is a very old practice, as shown by the Latin origin of the word. The structure of the crime has not changed very much in the course of the time. To pay money to obtain an undue advantage, from the side of corruptor. To accept money to commit something against his official duties from the side of the corrupted.

Within this category there are various types of corruption. It is important to determine where international corruption must be exactly placed.

Let's start saying that, by Law, international corruption is corruption of public officials.

The 1997 OECD Anti-Bribery Convention<sup>7</sup> regards *“bribery of foreign public officials in international business transactions”* as defined in the article 1: *“to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business”*

Corruption of public officials is generally much more difficult to detect than private corruption. It is true that corrupted people always act in a secretive manner. However when corruption occurs within a public body, although the public interest is seriously damaged, it is very uncommon that corrupt practices are denounced by the colleagues (or even the superiors) of the corrupted officials.

Unfortunately the public interest has no advocates. When corruption occurs within a public body it is very likely that most of its employees have been familiar with gifts and bribes for decades, and the superiors have tolerated or directed such practices. So this means that corruption of public officials is particularly difficult to detect. Foreign bribery, I repeat, regards foreign public officials.

The cases of foreign bribery are very often cases of grand corruption.

This is the form of corruption where the public officials involved are generally of very high rank, even heads of states, and the size of the bribes is very significant.

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<sup>7</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, see at [www.oecd.org/corruption](http://www.oecd.org/corruption)

In the cases of grand corruption there are further obstacles to the inquiries : political interferences and collusion between people under investigation and the investigators.

So, bearing in mind these 2 aspects – foreign bribery is corruption of public officials and, generally, grand corruption – it is time now to speak about how to investigate foreign bribery.

## **2. Investigation of foreign bribery - The two sides of international bribery cases**

The cases of international corruption are necessarily transnational cases and, at least, two-side cases.

In fact, not considering at the moment the various intermediaries who often play an important role in the plot, in a case of foreign bribery the concerned jurisdictions are at least:

- the corruptor's state (e.g. US, UK, France, Germany, etc); and
- the corruptee's state (e.g. Nigeria, Pakistan, South Africa).

The corruptee's side is the most important because practically the whole story is over there. On the corruptor's side you generally see only improper and/or suspicious payments.

It must be stressed that a thorough and successful investigation in this matter should require a combined approach. Investigators of the developed countries and of the developing countries should work together but this generally doesn't happen.

So let's examine the two aspects separately.

### **The corruptee's side**

Until recent years it would have seemed pure fantasy to discuss about investigation of grand corruption in developing countries.

However things are changing and there are brave investigators all over the world.

It is clear that seen from the side of the developing countries international corruption has a different shape and seriousness. We can make reference to the preamble of the OECD Convention. Seen from the point of view of the State to which the corrupted public official belongs, international bribery is without any doubt a *“phenomenon ... which raises serious moral and political concerns, undermines good governance and economic development”*.

It is something which directly affects democracy. When bribery of public officials is considered customary it is sure that the selection of the political elites is very strongly connected to dirty money flows.

It affects the integrity of the entire public administration. Under corrupted politicians you generally find thousands of dishonest civil servants and this is true in all the links of the chain. From the head of the state to the customs officer at a remote border and the policeman in the street.

International corruption means illegal exploitation of resources (think of illegal logging in Africa) or selling a country's resources at a very low price (think of oil) or paying at inflated prices for weapons, technology etc.

I am fortunate to belong to an eclectic international group that calls itself the Corruption Hunters Network. It is funded by the Norwegian government as part of its contribution to international corruption combating measures. We meet twice a year. The members have a loose commonality. There are Europeans, Africans, people from Asia and South America.

Talking with them, I have understood how difficult the task of combating corruption in a developing country can be. It is not only a matter of having well trained police forces and sufficient technology.

The biggest problem lies with the lack of independent prosecution. If the prosecution has a pyramidal structure and the Attorney General - who is generally a member of the Government and well acquainted with top officials - is free to decide whether to bring a case to court or simply dismiss it, it is clear that there is very little space for any effort to investigate and prosecute grand corruption.

### **The corruptor's side**

This is the point of view of investigators and prosecutors in developed countries – including Italy.

Let's come back to the initial definition of foreign bribery. I repeat that it is the corruption public officials and, generally, grand corruption.

Grand corruption means high rank officials involved, substantially sized bribes and big deals.

There are only few actors who deal with high rank officials in relation to big deals. These are the big companies.

And thus, because officials generally don't denounce themselves (or their colleagues) and the acts of the public officials are generally well-constructed and don't reveal sign of law-breaking it is possible to find clues of foreign bribery only in two points of the structure:

- the corporate records;
- the path of the money.

### **3. Practical sources of investigative leads**

#### **Corporate accounts**

From the corruptor's side, an investigation into international corruption is basically an investigation into corporate wrongdoings and international financial transactions.

A central role in tracing illegal flows of money is played by the investigation into corporate accounts.

In fact, while bank information is generally kept in jurisdictions which offer very limited co-operation, corporate information is generally accessible to the Prosecutors and through corporate information it is possible to detect corrupt payments.

The offence of false accounting is the main tool in the hands of investigators and prosecutors when they try to detect misconduct within companies. It is fundamental for 2 reasons:

- because it is in essence a sign of illness in the body of the corporations: if the books seems fake there is undoubtedly some wrongdoings in the company: misappropriation, tax fraud, market abuse, corruption;
- because it allows extensive investigations into the company's accounts and makes it possible to identify the chain of command.

It must be remembered that article 8 of OECD Anti-Bribery Convention reads: *“In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary... regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents... for the purpose of bribing foreign public officials or of hiding such bribery...Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications”*

This is not the case in many countries including Italy.

### **Financial intelligence**

I refer to the information exchanged among the financial intelligence units. A Financial Intelligence Unit is a central, national agency responsible for receiving, analyzing and disseminating to the competent authorities disclosures of financial information.

FIU could have a paramount importance in tracing illegal funds linked to foreign bribery.

Unfortunately many national agencies do nothing or, at the most, just disclose information concerning people whose involvement in criminal activities is already in the public domain. Moreover their mandate doesn't include foreign bribery.

Another problem is that the information exchanged among FIUs can't generally be used as evidence. Therefore what is learnt through financial intelligence channels must be in any case officially obtained through mutual legal assistance.

So the the financial intelligence channel is very often a waste of time.

### **Mutual legal assistance**

Grand corruption/Foreign corruption cases regard transnational crimes. Domestic investigations alone cannot enter into the very core of corrupt transactions because these are carried out in various jurisdictions with different legal systems.

MLA is a very fashionable topic within the legal circles. In theory the regulations now are numerous, detailed and all highly inspired. The mla practice shows that very often the good principles are ignored or duped.

In practice, there are at least two approaches to international assistance.

A proactive approach implies that the authorities in the requested state and the requesting authorities act together in the evidence-gathering process.

This means in practice:

- an agreed investigation strategy;
- informal contacts and discussions on a regular basis;
- joint questioning of witnesses;
- joint execution of searches.

When this happens mla is exciting work, where you meet wonderful people, who have experience of the domestic legal technicalities and know the local environment. People who enable the foreign requesting authority to move between bank secrets and corporate archives with the same authoritativeness as the domestic enforcement agencies

The passive approach is definitely more common worldwide. It does not necessarily lead to a refusal of assistance. No state can afford to deny assistance. What happens in practice is that:

- the assistance is very slow;
- communications between the requesting and requested authority are scarce and only formal;
- the requested authorities do not engage in agreeing on an investigation strategy,
- only facade support is given during the evidence-gathering operations.

Let me say it openly. Very often the requested authorities see foreign MLA requests as an annoyance.

It must be remembered that article 9 of OECD Anti-Bribery Convention reads: *“Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance...”*

#### **4. Prosecution**

##### **Statute of Limitation**

Prosecution of foreign bribery is very similar to prosecution of grand corruption.

A problem that many prosecutors face in this kind of case is Statute of Limitation. This was highlighted during a meeting among prosecutors in 2007, for the ten years of OECD Convention.

It can be sufficient to quote an extract of the final recommendation.



*The search for, collection and analysis of information was considered too time consuming, and a core preoccupation of prosecutors was that information collection and exchange be accelerated. Their concern was motivated by the fact that in many countries the prevailing statute of limitations provisions are rather short when taking into account the difficulty to detect, investigate and bring a case to court. Indeed, once the statute of limitations has expired, the offence cannot be proceeded against, regardless of the weight of the evidence or the seriousness of the offence.*

It must be remembered that article 6 of OECD Anti-Bribery Convention reads: “Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence”

This is not the case in many countries including Italy.

### **Practical advice**

I am sometimes asked what it is like to conduct an investigation and try to prosecute high profile people for crimes like corruption, tax fraud, etc. What obstacles did you meet? How did you cope with this obstacles?

I honestly don't think prosecutors need to be Machiavellian or to elaborate sophisticated strategies.

Just look for good evidence and follow the rules.

So my advice is as follows:

- During the investigation use such force as is reasonably necessary (warrants, arrests, phone listening). The evidence obtained in extreme situations can easily vanish during the trial.
- Use experts, especially forensic accountants. Never force their work. If they reach some results independently of your suggestions, at the trial their evidence will be stronger and they will be less likely to be discredited during cross examination.
- Never put pressure on witnesses during the investigation. At the trial any slight pressure that was put on them during the investigation is recalled by the witnesses as if their evidence had been taken under duress.

In conclusion: when crooks are powerful prosecutors must be clever. Forget the force, use the brain but never give up.

## INVESTIGATION AND PROSECUTION OF CORRUPTION IN HEALTH SECTOR

**Mr. Marcello Paranhos de Oliveira Miller,**  
Public Prosecutor,  
Public Prosecutors Office  
in Rio de Janeiro  
Brazil

I would firstly like to thank the OECD and the Romanian Anti-Corruption Directorate for kindly inviting me to take part in this seminar. It is a rare opportunity for us, prosecutors, to exchange views and experiences and to get to know each other.

I am a Brazilian federal prosecutor, currently stationed in Rio de Janeiro. In Brazil, as in many European countries, prosecutorial positions are organized as a career service, entrance to which is attained through competitive examination. I've been in the federal prosecution service for over seven years, and although the unit I am currently assigned to is specialized in financial crimes and money laundering, we do try also cases that do not fall under those subjects. The institution to which I belong is named Ministério Público Federal; it is not affiliated with any of the branches of government.

In the second half of 2007 I was assigned a case that is worth discussing. The case involved corruption of an unusual kind. They were all physicians doctors. And the case involved tampering with the national liver transplant waiting list.

In Brazil, transplants are regulated by federal law. The Omnibus Transplantation Act mandates that recipients be scheduled for transplant according to a national waiting list, which is binding on all transplant centers in the country, public or private. As of 2005, the ranking of patients in that list is not chronological; the fundamental ranking factor has become the gravity of each patient's condition, which, in the case of livers, is measured by internationally established medical criteria. Moreover, a number of liver diseases, due to the narrow prospect of survival they entail, disqualify the patient to apply (that is not, however, tantamount to a death sentence, as the patient can still benefit from a living-donor liver transplant). One last relevant detail: the Brazilian law and its regulation provide for a *sole* waiting list, the word 'sole' being expressly laid out in text, which obviously preempts the possibility of a separate waiting list of 'marginal liver' recipients, for example.

This latter concept of 'marginal liver' requires some explanation. Doctors are supposed to evaluate the suitability of any donated liver for transplant in light of certain medical criteria. In Brazil's federal system, the authority to lay down and regulate those criteria lies with the states, which often delegate them to the state transplant administration. This latter body is responsible for collecting donated livers, classifying them as suitable or unsuitable for transplant and assigning the suitable ones for transplant according to the national waiting list. That involves a lot of decision-making and it's not as automatic as it may seem: transport contingencies, recipient unavailability and other factors, if duly certified, may allow the administration to bypass a higher-ranking patient.

In any case, though, an intermediate classification of organs is ruled out. If the doctor finds that the liver is barely suitable or borderline, he must inform the entitled patient, and it must be left for him/her to

decide. Transplantation centers may pose that question in advance, when the patient's name is entered onto the list, as long as application proceedings are uniform.

That is, in a snapshot, the legal and regulatory backdrop against which the case unfolds.

Back in 2006, a federal audit by the Federal Health Ministry found that strange things were happening within the Rio de Janeiro State Transplant Administration. According to the auditors' findings, at least 12 liver recipients had been largely bypassed for no apparent reason, and in at least one case a patient – brother to a renowned movie director – who was not and could not be on the list due to a barring condition received a liver in very suspicious circumstances, which included transportation of the organ from a state to another by private jet funded by the recipient and an injunction to include the recipient into the national waiting list issued by a single judge sitting in the court of appeals of a third state, which was more than 800 miles away from either city and in which no one involved lived, not to mention that the jurisdiction over the list has to be federal.

Those findings were relayed to the Rio de Janeiro Office of the Federal Prosecution Service. They were firstly reviewed by the division of civil prosecutions, health services section (In the Brazilian justice system, certain non-criminal breaches of the law are subject to civil prosecution, which may be aimed at compelling the offender to restore the status quo or having him undergo civil sanctions, which consist of one or all of the following: a fine, recall from public office and suspension of political rights; this is not the same and suit for compensation or performance; it is, really, a civil prosecution, and it can take place simultaneously with its criminal counterpart). A civil inquiry was started by my colleagues in the civil division, and soon a name came to surface; I'll refer to him as Doctor X, as the case is still pending sentence. Doctor X was one of the top liver transplant surgeons in Brazil, pursued part of his medical studies in Paris, where he obtained a PhD in Hepatology and is a tenured professor of the subject in the Medical School of the Federal University at Rio de Janeiro, one of the best in the country. Plus, he ran the liver transplantation service at the University's hospital.

All transplants reported by the Health Ministry audit as having skipped the national waiting list were performed by Doctor X. In addition to that, he was the head of the state transplant administration in the years 2003-2004, right when the first suspicious transplant took place. Information on Doctor X soon began to mount, and it included the fact that a part of the doctors who worked with him had suddenly 'rebelled' and started a separate transplant service in another federal hospital. It also included the fact that most of the suspicious transplants had occurred at one of the most expensive and exclusive private clinics in Rio de Janeiro.

In light of such evidence, which indicated that the national waiting list had not been skipped merely because of procedural errors or administrative negligence, the prosecutors in charge of the civil inquiry directed the federal police to start a criminal investigation. That's where I step in.

The commissioner in charge of the investigation and I had our first meeting some five months before the indictment. In that meeting, we planned the investigation along the following lines:

- (1) the three schemes for which we had the clearest evidentiary picture were to be focused on;
- (2) liver transplant surgeons were to be interviewed for legally relevant aspects of their practice, with as little debate as possible on Medicine;
- (3) employees of the state transplant administration were to be interviewed for their action on the three episodes;

(4); the members of Doctor X's team were to be interviewed for the string of decision-making in the three episodes;

(5) Doctor X and his whole team were to be wiretapped, for they would obviously talk the news of the investigation over as it unfolded;

(6) Doctor X was not to be interviewed until we were ready to indict.

The investigation showed that the three schemes were not very similar to each other, but for the fact that Doctor X and his team performed the surgeries in all three of them.

The first event consisted of a transplant benefitting a man with obvious political connections – he was the State Transport Secretary's brother – who ranked 32<sup>th</sup> among the patients in the national waiting list medically and geographically qualified to receive the organ. According to the liver transplant surgeon who was scheduled to perform the transplant, when he entered the OR he was surprised to see Doctor X there in full surgical swing. That surgeon asked what was going on, since the patient receiving the transplant was not the one for which he'd ordered preparation; Doctor X replied that the liver had been found to be marginal and gave no further explanation.

As it turned out, the placement of that liver had been Doctor X's own decision as the head of the state transplant administration. The extraction papers as well as testimony by the surgeon that performed showed that, although the liver was not in prime condition, it was still suitable. The bypassed patients were never consulted.

The second event consisted of a wild bypass. The actual recipient suffered from advanced liver cancer, which barred him from the national waiting list. A liver was about to be made available for Rio de Janeiro, Doctor X confirmed acceptance and availability by the highest-ranking patient, who was under his care - this was stated by the employee on duty at the administration, who talked over the phone to Doctor X himself. The entitled patient, however, was never notified. Doctor X informed the administration that the recipient was able to cover the cost of interstate transportation of the organ, which was relayed to the center where the donor was being kept alive, along with all the information concerning the transplant. The administration thought its job was done. The liver was thus flown in a private jet to Rio de Janeiro, hauled to the private clinic I mentioned before; in the meantime, the most unusual – and I'd say legally useless – judicial injunction had been granted almost 1000 km away; and then the liver was implanted into the brother of one of the most famous movie directors in the country.

The third event was not to be – it was an attempt. The administration was already very suspicious of Doctor X. So when a liver was made available for Rio de Janeiro and the highest-ranking patient happened to be under his care, the administration decided to keep a close watch on proceedings. And the pattern resurfaced: during the extraction of the organ Doctor X contacted the administration to inform that the liver had been found to be marginal and requested clearance to skip the national waiting list. Clearance was denied, and surrender of the liver for forensic analysis was demanded. The liver was found to be normal. The entitled patient was in hospital, but awake and conscious; he was never asked if he would have accepted a 'marginal' liver.

Recorded conversations of wiretapped members of Doctor X's team revealed that at least in the third episode a false statement on the donor's condition had been relayed to the administration. They also revealed a clinical hepatologist who worked with Doctor X telling a friend that "my friend X is a real troublemaker, does whatever he wants with the livers, won't give a damn."

The investigation presented unusual difficulties. The first obvious difficulty pertained to the subject-matter. The Brazilian transplant system is under-regulated; it basically trusts the Doctors, who aren't so many after all. Figuring out a country's transplant system, with its rules and institutions, can be really tough. Medicine must, in addition, come into play: a prosecutor should not discuss medicine with a doctor, but it must learn at least the underpinning basics, and that can be hard enough.

The second difficulty stems from patient loyalty. Even bypassed patients refused to testify; Doctor X had performed on some of them, and those who were still waiting were not willing to fall out with their doctor and resume treatment with a different team.

The third difficulty was about Doctor X's team members attitude. For the most part they had been his pupils. As they were interviewed by the Police, they knew the stakes were very high: if they testified against Doctor X, and he managed to walk free, he would have years to undermine their careers. His influence over them was enormous: we listened in on phone conversations between Doctor X and these other doctors: more than once, upon obtaining the information that they had been called to the Federal Police to be interviewed, Doctor X would get in touch with them and ask them to call on his attorney's office before the interview, in an obvious attempt to influence their statements.

The fourth difficulty had to do with connections. Two of Doctor X's siblings are judges sitting in Rio de Janeiro, one of them in federal court; so Doctor X is friends with a number of judges sitting in the very court before which he was to appear as defendant. Another one of his siblings – there were seven of them – is a high-profile criminal defense attorney. And the movie director whose brother benefited from one of the transplants was on friendly terms with the biggest media organization in the country.

The fifth difficulty concerned legal captioning. The bribery statute was a close call: the first event did not involve medical fees; plus, it could be argued that the defendant had not been paid in excess of his regular fees for the surgery in the second event and had not been paid at all in the third event, for the illegal transplant never occurred. The Omnibus Transplantation Act does carry criminal sanctions for illegal transplants, but the definition of that offense as well as the light sentencing range it carries suggest that the legislative intent for that statute was to establish criminal responsibility for procedural breaches of the law on transplantation, such as notification failures.

In light of this, we decided to caption Doctor X's conduct under a statutory provision that makes it a crime to deviate goods under state administration. In all three events, he demanded availability of the organ in his official capacity as chief surgeon at a federal hospital for patients under the care of the same hospital. There were also a false statement that he signed which entailed criminal responsibility in the context of the second event: he declared his private patient to be eligible for liver transplant, so as to help him obtain an urgent judicial injunction with which a private clinic accredited as a transplant center would be prepared to take him in.

Four members of his team were also indicted as accomplices.

The sixth difficulty was the ensuing media war. Doctor X's relations ensured him a not-so-neutral coverage by the country's second largest newspaper. Moreover, the idea that a doctor had been arrested for what could be defined as stealing livers had a lot of media appeal. Judges are not supposed to be influenced by the media, but to some extent they all are. It was a very unusual case in that the defendant took the lead in playing the media, but then we had to tag along, to respond, so that our case would not appear to be weak.

The Rio de Janeiro federal trial court returned the indictment as requested and, also at our request, issued a warrant for his provisional arrest. The grounds for arrest were clear: not only was Doctor X in full swing at the federal hospital, but also – and more importantly – once indicted he was sure to exercise even more influence over the other doctors and even patients so that their testimony in open court would be favorable to him.

Doctor X remained under arrest for 8 days. The Federal Court of Appeals for the 2<sup>nd</sup> Circuit granted him habeas relief by replacing the arrest with a temporary restraining order by which he was to be discharged of his duties at the federal hospital, suspended of transplantation activities and forbidden to maintain contact with the other defendants.

All the other defendants entered into agreements with office of the prosecutor by which they paid fines and testified to the best of their knowledge in exchange for a conditional waiver of prosecution. One of these testimonies, given in open court, was quite relevant to shed light on the third event.

Proceedings continue. Both parties have presented their final statements in written form, and the case is still pending sentence. I am no longer lead prosecutor, for I have chosen to move to work with another court, which is specialized in financial crimes and money laundering. There has also been a change of judges: the one who presided over the first stage proceedings is an ageing man and has been on medical leave for some time.

Strict anti-corruption law enforcement, as we all know, is one of the best ways for prosecutors to aid in good governance and government modernization efforts. High and middle-level officials are almost always among the most finely educated and privileged individuals in their society. Their motive to take graft is basically greed or bitterness of an existential nature, and that is one of the reasons why their conduct is so abhorrent: because it is so avoidable. So it is the certainty of prompt, tough response that will do the bulk of the job of keeping them honest.

Thank you very much.

## EXPERIENCE IN INVESTIGATING HIGH LEVEL CORRUPTION IN LATVIA

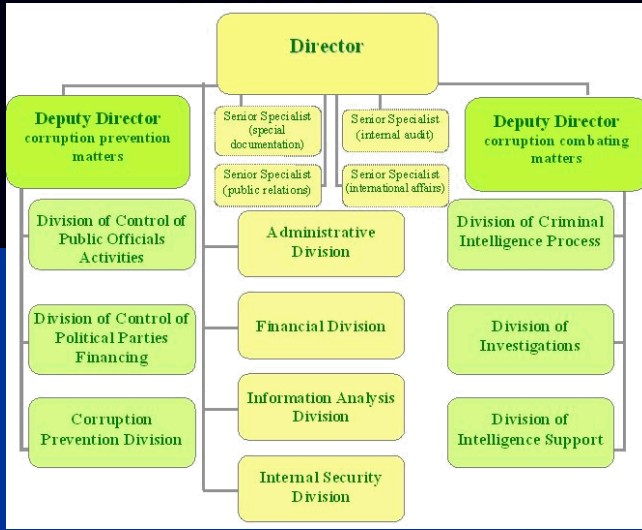
**Mr. Rimants Kuzma,**  
Investigator,  
Corruption Prevention and Combating Bureau,  
Latvia

### **Corruption Prevention and Combating Bureau (KNAB)**

#### **Main areas of activities:**

- Detect and prevent corruption-related crimes foreseen in the Criminal Code;
- Conduct pre-trial investigations of criminal cases related to corruption and support their criminal prosecution;
- Enforce restrictions and incompatibilities related to activities of public officials;
- Call public officials to administrative liability for violations of the law on Prevention of Conflict of Interest in Activities of Public Officials;
- Control respect of rules on financing of political parties;
- Develop anti-corruption strategy and state programme on prevention and fight against corruption and control its implementation.

## Structure of KNAB



## KNAB in action

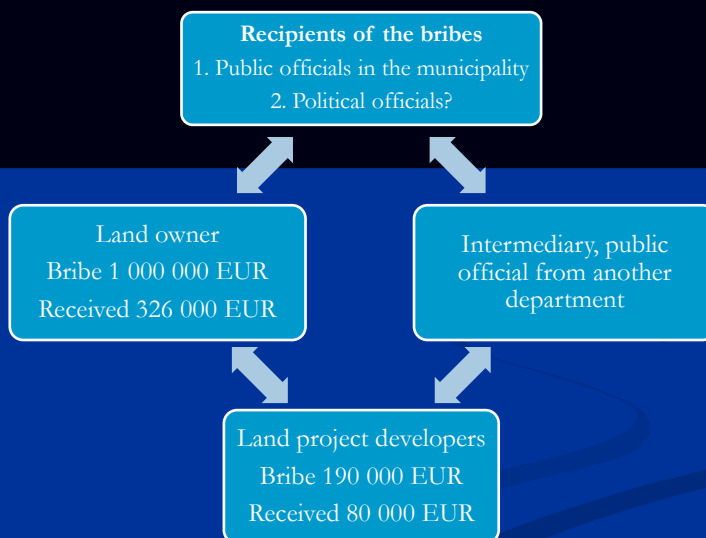




## Criminal case involving extortion and receipt of a significant bribe

- Size of the bribe requested is 1 190 000 Euros (in four episodes)
- Charges laid against 5 persons
- Property frozen, including motor boat and money in cash amounting to more than 345 000 Euros

### Scheme of the crime



## Challenges faced in investigation

- Pressure on the investigator using mass media
- Tensions with other law enforcement bodies

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## Topic 4. Independence and Specialisation of Police and Prosecutors

### EFFECTIVE DETECTION AND INVESTIGATION OF CORRUPTION BY A SPECIALISED AND INDEPENDENT ANTI-CORRUPTION BODY

**Mr. Daumantas Počius,**  
Chief Investigator,  
Pre – trial Investigation Division,  
Vilnius Department,  
Special Investigation Service,  
Lithuania

#### **The first aspect is *independence and specialization* of the institution:**

Should anticorruption institution be independent and how does it influence its effectiveness?  
Where is the border line between independence of the institution and uncontrolled operations?  
What benefits does specialization of the institution give?

#### **The second is *effective detection and investigation* of corruption**

There is a Lithuanian proverb:  
*“One man in the field is not a warrior”.*

The question would be: how does the independence of the institution affect its abilities to fight corruption effectively?

My presentation is based on experience gained by Special Investigation Service (SIS).

#### **Preconditions of independence of our anticorruption body (SIS)**

- **Laws and regulations related to direct activities and overall operation of the institution**
  - According to the law SIS is an independent anticorruption body accountable to the President of the Republic of Lithuania and Seimas (Parliament) of the Republic of Lithuania;
  - **The law on the special investigation service** prescribes that performing the tasks assigned to it, the Special Investigations Service shall maintain professional links with other institutions of the Republic of Lithuania, also with various agencies, organizations and enterprises.
  - **Also the law on the special investigation service** obliges central and local government institutions and agencies to allow for the Special Investigations Service to have free and unrestricted access to the data of state registers, cadastres and classifiers, data banks of state institutions, agencies and enterprises. Data banks of other enterprises, agencies, organizations and natural persons SIS can access on a contractual basis.

- **National anticorruption program** of the Republic of Lithuania is implemented by Government and SIS;
  - **The law on operational (intelligence) activities** describes SIS as one of the 8 main independent institutions, which can perform operational (intelligence) activities;
  - **In the code criminal procedure of the Republic of Lithuania** SIS is described as an independent institution of pre-trial investigation.
- **Organizational structure of the law enforcement institutions**
    - In 1997 SIS was established as an anticorruption body under ministry of internal affairs;
    - Since 2000 the SIS is not under the ministry of internal affairs or the ministry of justice. It functions independently on cooperation basis with other law enforcement and governmental institutions;
- **Actions by the supervising authorities and institutions**
    - Intelligence operations carried by SIS are controlled by the Prosecutors' offices;
    - Pre-trial investigations carried by SIS are controlled / led by the Prosecutors' offices;
    - Some intrusive intelligence and investigative means, for example wiretapping and imitation of criminal behavior, are sanctioned by courts;
    - Parliamentary control of the activities of SIS is implemented by the work of Anticorruption commission and the Commission on control of operational (intelligence) activities of the Seimas of the Republic of Lithuania;
    - The director of SIS also makes annual accounts to Seimas (Parliament) of the Republic of Lithuania about SIS work and results;
- **Funding of the particular anticorruption institution**
    - Funding of the SIS is listed on the separate line of the state budget;
    - The budget of the SIS is planned and negotiated separately from other state institutions and could not be modified by lower level legislative acts;
    - This funding model protects the budget of institution from excessive reduction in case of other government institution make claims to these funds, it also allows to easier plan institution activities and expenses.
- **Public opinion on the anticorruption institution**
    - The public opinion formed by mass media could influence the independence of the institution in indirect and direct ways. Deliberately and gratuitously raising the questions and doubts about activities of the institution by the mass media could provoke political decisions, which, regarding the political situation could not be adequate to the situation. For example, pressure made to the head of the institution to resign, presenting amendments of some legal acts, the restriction or refuse to use particular data bases.

**Does the independence of the institution affect its capabilities to effectively fight corruption?**

**The answer is yes, of course it does.**

**To put it more specific -**

**In the fight of high level corruption every higher ranking institution above the anticorruption body creates risks for possible influence in intelligence operations and pre-trial investigations of the anticorruption body.**

#### **How does it work?**

- It is very complicated to target officials of the higher ranking institution, which implements control of the anticorruption body's operations;
- If the anticorruption body is present in the structure of bigger law enforcement organization the risk rises of confidential information leaks, because of larger numbers of working / administrative contacts with officers of the higher ranking organization;
- The higher ranking officials of the law enforcement body could demand the anticorruption body to present excessive information on intelligence operations conducted and pre-trial investigations;
- The officials of the higher ranking law enforcement body could influence the anticorruption body by administrative means. For example, cutting down the salary of the staff, changing operation rules and conditions, reducing the funds for certain anticorruption body activities and so on;
- The head of the law enforcement institution which incorporates the anticorruption body has no motives to push the fight against corruption to the maximum, because he is accountable for many other activities / duties performed by the law enforcement institution and he is interested in keeping balance of overall results. The head of the independent anticorruption body is directly responsible for operations in the particular sphere that is fight against corruption.
- The presence of the anticorruption body in the structure of a bigger law enforcement institution determines situation in which it is very complicated or next to impossible for anticorruption body to build its own good relations and trust with society, which is crucial for its operations. The society will have the same opinion on the anticorruption body as on the whole law enforcement body whose part it is. For example in case the anticorruption body was a part of the Police force or Prosecutors office it would have to share the public opinion about these institutions.
- The independent institution is more flexible to make organizational changes regarding to operational demands;

**There are slight differences in two possible independent anticorruption institution models:**

- 1. Relatively small independent anticorruption body, which uses resources of other law enforcement and governmental bodies on co operational basis.**

**In this case the advantages are:**

- a. The cost of operation of the anticorruption body would be lower;
- b. Flexibility of the institution regarding the operational demands.

**The disadvantages are:**

- c. The institution results would partially depend on the competence of the specialists of other institutions;
- d. The flow of intelligence information from other institutions would depend solely on these institutions which provide information.
- e. The management of classified information is more complicated because of the need to share the sensible information on ongoing investigations with other institutions;

**2. Autonomous self-supporting independent anticorruption body with very little need of cooperation and relations with other institutions. The example of such institution would be state security services in many countries.**

**In this case advantages are:**

- a. The institution could recruit the best specialists of relevant specialties;
- b. The management of classified information is not complicated because of the staff of the institution is selected and screened by the institution, there is very limited need to share the sensible information on ongoing investigations with other institutions;
- c. If the anticorruption institution has all human resources and technical means needed for the intelligence operations and support of the pre-trial investigations, it can operate more flexible without any adjustments of the plans regarding to the other law enforcement institution possibilities to provide assistance;

**The disadvantages are:**

- d. Operational costs of the institution would be high;
- e. Some of the functions, operational activities, performed by the anticorruption body and other institutions functions (for example, technical support of the intelligence operations) would overlap.

The SIS its activities started as a small anticorruption body with very limited technical facilities and human resources to conduct intelligence operations solely on its own resources. There was a great need for external support. Today SIS is a self-supporting independent anticorruption body which cooperates with other law enforcement institutions on a mutual basis. There is very limited need to share the sensible information on ongoing investigations with other law enforcement institutions.

Ironically, but we get the indications about classified information leaks not from the law enforcement institutions we ask to assist with technical means, but from supervising authorities such as prosecutors' offices and courts.

**Finally, what has proved to work for SIS?**

- Effective fight against corruption could be achieved using many horizontal relations with other governmental institutions and specialized law enforcement bodies as possible. These relations should be on a mutual basis;
- The information on ongoing surveillance and pre-trial investigations of anticorruption body should be passed to other institutions with great precaution. The anticorruption institution should trust other law enforcement institutions and supervising authorities but, at the same it time should take in to account the reliability of the individual members of their staff;
- Proper presentation of information on the activities of anticorruption body to mass media (for example certain information on progress of pre-trial investigations, information on detentions of high ranking officials and so on.) helps prevent misunderstanding and misjudgment of the actions taken by the anticorruption body. By offering limited information to the mass media the anticorruption body builds links with it which limits the negative attacks of the media against the actions undertaken by the anticorruption body.

## Topic 5. Effective Asset Forfeiture – from Tracing to Effective Confiscation

### EFFECTIVE INVESTIGATION OF ASSETS, PRACTICAL APPLICATION OF MUTUAL LEGAL ASSISTANCE AND ASSET RECOVERY

**Ms. Phyllis Atkinson,**  
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International Centre for Asset Recovery-  
Basel Institute on Governance,  
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#### Introduction

Asset Recovery work can play a major role in reducing the harm that crime causes to the community. It can ratchet up or increase the pressure on criminals, at the criminals' own expense given that they are deprived of the proceeds of their crime. It can begin to damage the incentives to crime, and undermine negative role models.

No country can afford to sit on its laurels whilst criminals enjoy the proceeds of their criminal activities. Legislation which permits the confiscation of the proceeds of crime is a valuable tool in the hands of any investigator, law enforcement officer or prosecutor, and also assists in ensuring the criminal is hit where it hurts most – his pocket. One needs to embed the use of asset recovery tools across the Justice system. The case for recovering the proceeds of crime is easy to make. There are two primary reasons why confiscation has gained support from lawmakers over the years: firstly, the profit incentive is taken away from crime, and secondly, criminal activity is disrupted when money is taken away from criminals. Asset recovery prevents criminal proceeds being reinvested in other forms of crime. By reducing the rewards of crime, it begins to affect the balance of risk and reward, and the prospects of losing profits may deter some from crime. Fundamentally it serves justice, in that no-one should be allowed to continue to profit from crime.

Gaspare Mutolo, a mafia don who was collaborating with an Italian anti-mafia commission back in 1992, said:

*“The worst feeling is when our money is taken away from us. People prefer to be put behind bars and keep their money than to stay free without the money! Money is the main thing.”*

Traditionally efforts have been focused on the prevention of corruption – stop it from happening but part of the equation has been neglected by States, namely, asset recovery. What about the tail end of corruption? Corruption usually involves some sort of benefit to the offending party. Why not place increased emphasis on depriving the culprit of the proceeds of such corruption?

In addition, in many countries, criminal investigations are primarily directed towards the investigation of the underlying criminality. It is still comparatively rare for investigators, as a routine part of the

investigation of major proceeds-generating offences, to 'follow the money' and establish what happened to the proceeds.

### **International Standard Setters**

Before considering the asset recovery process, its place within the overall justice system and various asset recovery mechanisms available to the investigator and prosecutor, let us reflect briefly on international standard setters in this regard. What do the United Nations Convention Against Corruption (UNCAC) and the Council of Europe Criminal Law Convention on Corruption require of member States in relation to asset recovery?

#### **The United Nations Convention Against Corruption (UNCAC)**

The United Nations Convention Against Corruption (UNCAC) came into force on 14 December 2005, and has been ratified by approximately 140 countries so far. It is the most comprehensive international anti-corruption convention to date as it covers the broadest range of corruption offences, and is innovative in many respects. Two of these include:

- It is the first international instrument that aims to function as a multilateral mutual legal assistance treaty in respect of corruption offences.
- It is the first Convention to ever refer to the recovery of assets as a priority in the fight against corruption.

#### **Article 31 of UNCAC**

Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

- Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

#### **The Council of Europe Criminal Law Convention on Corruption (CoE Convention)**

The Council of Europe Criminal Law Convention on Corruption (CoE Convention) came into force on 1 July 2002, and has been ratified by approximately 41 countries to date. The Convention is wide-ranging in scope, and complements existing legal instruments. It is an ambitious instrument aimed at the co-ordinated criminalisation of a large number of corrupt practices and the development of common standards concerning certain corruption offences. It also incorporates provisions concerning the gathering of evidence and confiscation of the proceeds of crime.

During the course of a financial investigation, preventive measures leading to the preservation of the assets in question are not uncommon. Article 19 of the CoE Convention deals with measures needed to enable a country to confiscate the instrumentalities and proceeds of criminal offences established in accordance with the Convention, or property the value of which corresponds to such proceeds.



In Article 23, the Convention deals with the tools needed to enable a country to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds. It requires, for the implementation of Article 19 dealing with confiscation, the adoption of legal instruments allowing Parties to take the necessary provisional steps, before measures leading to confiscation can be imposed. In addition to the relevant investigation which must be conducted as to the quantity of the proceeds gained or the expenses saved and the way in which profits (openly or not) are deposited, it is necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent it disappearing before a decision on confiscation has been taken or executed.

### **Selection of Suitable Procedure**

Depending on the legal provisions of your country's domestic regime and its ratification of international conventions, various legal resources/procedures are available to recover a victim's assets and funds from perpetrators, both through criminal and civil procedures.

However, the biggest challenge involves making an informed and correct decision in selecting the procedure most suitable to the needs and circumstances of the matter under investigation. It is important to strategise each particular case with the relevant investigation agency to ensure that there is no conflict of interest between the objectives of prosecution and asset recovery.

### **Forfeiture Success in South Africa**

In my home country, South Africa, the Asset Forfeiture Unit (AFU) experienced one of the best years in 2008/2009 since the unit was launched 10 years ago – the value of the frozen assets was R320 million (USD 42.5 million) and the value of the forfeited assets R272 million (USD 36 million). In the past 10 years, the unit has frozen assets to the value of R3, 35 billion (USD 00.5 billion) in more than 1 700 cases. It has deposited more than R230 million (USD 30 million) into a special fund to fight crime known as the Criminal Assets Recovery Account (CARA) and repaid more than R400 million (USD 53 million) to victims of crime.

### **Asset Recovery Process**

Proceeds of crime represent criminal income. They manifest themselves as assets, some of which are the object of the crime itself, such as stolen funds. However, in more complex financial crimes, the asset to be linked to the offence is more likely to be the product of an intervening transaction such as the transfer of funds through offshore companies using nominee shareholders.

To benefit from profit-generating crime, criminals are usually forced to launder the proceeds to hide the origins thereof. If the investigator knows how and where to look, there is always a connection between criminals' assets and their crimes. In addition to often providing evidence of criminal intent and identifying otherwise unknown accomplices, tracking the ownership trail may also lead to the seizure of property constituting illegal proceeds. To trace money and property successfully, the investigator must be equipped to uncover and identify ownership interests often camouflaged by changes in the form and nature of the ownership. He must also know how to unravel accurately cleverly disguised control over, and interest in, property. He or she must also know who to approach for information, where such information can be found, what can be used to create a financial profile and how to manage the collated information in the most efficient and effective manner. In many instances, criminal proceeds are stashed

abroad, hence the need for international co-operation between countries to ensure such assets can be located, frozen or seized and confiscated.

Asset recovery is a long process, and it is therefore important that prosecutors and investigators understand the investigative process involved. It is equally important that they understand the manner in which an investigation aimed at the ultimate recovery of assets fits into the criminal investigation.

The investigative process is the core activity that must precede any asset recovery effort. A jurisdiction where funds have been secreted will not confiscate or repatriate the assets to the country of origin unless evidence is presented, linking them to an illegal activity. This evidence must be admissible in court proceedings. There are basically two ways in which the evidence can be collected. Law enforcement officials in the country where the illegal activity occurred, can conduct an investigation using all available legal authorities. Alternatively, a private law firm can be retained to file suit in the jurisdiction where the assets are located. The fastest route to uncovering hidden assets is often to pursue civil remedies while the criminal investigation is already under way. This is especially true in cases involving cross-border transactions.

### **Asset Recovery Investigation**

The recovery of assets must be preceded by an investigation aimed at:

- Identification;
- Tracing;
- Freezing;
- Seizing.

### **What is the goal of an asset investigation?**

An integrated financial investigation is an essential element of any strategy for targeting proceeds from crime. The investigator does not have separate and distinct investigations but rather a singular financial investigation with following multiple goals:

- Firstly, it will connect the asset to the corrupt or illegal activity. This will form the basis for confiscation, and can be accomplished through the collation and presentation of either direct or circumstantial evidence.
- Secondly, the investigation should establish sufficient evidence to prosecute the corrupt official on criminal charges of both corruption and money laundering, *i.e.* it should link the criminal to the underlying criminality.
- Thirdly, the evidence gathered will also enable to trace and identify assets that have been stolen or misappropriated. Therefore, the asset tracing, the money laundering investigation, the establishment of the corruption charges and the seizure of assets are all, in essence, the same investigation. This will form the cornerstone for the eventual repatriation of the stolen funds.

The **process** of tracing and recovering assets is usually preceded by an investigation into allegations and/or suspicions of unlawful activities.

**The process comprises the following basic steps:**

- Investigation into allegations or suspicions;
- Gathering evidence to prove or disprove the above;
- Tracing the proceeds of unlawful activities;
- Recovery and forfeiture of such proceeds or assets.

As we all know, the primary goal of the criminal prosecution process is not to recover assets or move with enormous speed but rather to prove a crime for prosecution. The criminal process may, however, serve two other equally important purposes:

- Punishing the subject;
- Gathering evidence that can lead to the missing assets.

Figure 1 below shows the stages in the asset recovery process. A lead or pre-lead triggers the investigative procedure of tracing the assets and building evidence to support the case. The freeze and seize stages fall largely under the auspices of the judicial system. Finally, the seized assets are returned to the requesting country.

**Figure 1: Stages of the Asset Recovery Process**



It is important at this juncture to note the differences between freezing, seizing, confiscation and return:

**Freezing**

Freezing is a preventive measure applicable to bank accounts and other financial products that prevents the nominative owner of such products from moving, transferring or converting these assets. Accounts should be frozen through a judicial order limiting the ownership rights ideally until the end of the criminal process.

Freezing is a measure that must be approached carefully to ensure that it is taken at the appropriate moment during the process. Once assets are frozen, the investigator or prosecutor runs the risk of alerting the target of the investigation, which could hinder the tracing of other assets. Also, following the movement of assets could lead the investigator to other accounts where further funds may be stashed, even proceeds from different offences. If assets are frozen prematurely the investigator may lose the opportunity to find other accounts. On the other hand, the transfer of money has become extremely easy. It can be done online, over the telephone, etc. This means, that while criminals can move their monies around very quickly and conceal them very effectively, law enforcement takes much longer to trace them, as investigators are bound by the law. This also means that if assets are frozen too late, we may lose our trail. Therefore, careful consideration as to when to freeze assets is required.

## Seizing

Seizing is a preventive measure applicable to movable or immovable property that prevents the nominative owner of such property from selling or transferring it, ideally for the duration of the criminal process;

Certain issues must be taken into account when dealing with the seizure of assets. The nature of the assets to be seized is of special consideration. Assets that depreciate easily, assets that require high maintenance costs, high-risk assets, perishable assets, living stock and precious woods must be carefully assessed before seizure. Alternatives to seizing might be necessary.

## Confiscation

Confiscation is a definite measure, ordered at the very end of the criminal process. Confiscation is the actual change of ownership from the current owner to the government. It is applicable to movable or immovable property, bank accounts and other financial products alike.

In very simple terms, we can consider freezing and seizing to be like spouses separating. It is a temporary measure and by no means definite. Confiscation, on the other hand, can be compared to divorce proceedings. It is permanent and definite: ownership rights are lost to the State.

## Return

Return is the process by which assets are returned to the country of origin. Sometimes sharing of assets will be required, depending on the concrete case.

In practice, asset recovery actions can commence either at the onset of a criminal investigation or at some point during that investigation when information is received that an asset recovery action is warranted. Alternatively, the knowledge of a suspect transaction or property can lead to the action. These actions may commence without a criminal action but there is normally a reasonable suspicion that there may be corruption.

Although a singular financial investigation is advocated above, it is particularly important to note that, in reality, one often has two or more separate investigations. In some criminal forfeiture cases the asset recovery work does not start until after final judgment in the criminal corruption case. Other countries allow investigations to happen in parallel but the rules differ significantly on the extent to which these different actions can be linked. However, the bottom line is that it is not possible to divorce the asset recovery process from the underlying criminal investigation. In the case of criminal forfeiture the success of the case is dependent on the success of the criminal investigation.

At the initial stage, the decision whether or not to initiate an asset recovery action will depend on two things- the quality of the specific information received and the quality of the source of information. The decision to initiate an asset recovery case can be taken at any point between the decision to investigate and where a conviction occurs. It is very important that as soon as the decision to commence an investigation is made, that the asset recovery element is considered in the case plan. For instance, if possible, sufficient evidence should be obtained to freeze known assets before the suspect is alerted.

## Asset Recovery Approaches

Deciding upon the exact manner and which legal processes to utilise in seeking to freeze, seize and repatriate assets is of critical importance.

There are a number of different approaches to asset recovery depending on the jurisdiction and the specifics of the case. It is important to differentiate between and understand these approaches. Generally there are several approaches through which prosecutors can recover stolen assets:

- Asset recovery through criminal proceedings or so-called conviction based forfeiture (*Action in personam*)
- Asset recovery through civil proceedings against property or so-called non-conviction based confiscation/civil asset forfeiture/civil forfeiture (*Action in rem*)
- Asset recovery through civil procedure/civil lawsuit against the person
- Civil action available in civil law countries.

### Conviction Based (Criminal) Asset Forfeiture

Conviction Based or Criminal Forfeiture is the most common type of forfeiture and is often part of the sentencing process, and is possible when a legal basis exists between states such as a bilateral or multi-lateral agreement. Mutual Legal Assistance (MLA) is usually necessary within the context of asset recovery (to be dealt with in more detail later). This type of forfeiture and non-conviction based asset forfeiture, although utilising different procedures, share the same objective, namely the forfeiture by the State of the proceeds and instrumentalities of crime.

Generally there are two stages to Criminal Confiscation:

- Criminal restraint orders support the criminal investigations or prosecutions. These orders will generally stop the use of assets until the criminal case is concluded.
- Confiscation orders can be granted once there is a criminal conviction.

It is important to remember that criminal mechanisms to recover the corruptly acquired assets depend on the criminal conviction of the wrongdoer, either in his or her domestic courts or in the courts of the jurisdiction where his or her illicit assets are located, and an enforceable and final confiscation order against his assets. However, it is sometimes difficult to satisfy these conditions as criminal proceedings will usually require that the accused is present before the court to stand trial. A wrongdoer may be dead or have fled the country to avoid prosecution. A criminal conviction may be impossible to obtain because of the ability of influential and powerful defendants corruptly to suppress investigations or manipulate witnesses or judges, or where his or her defence team is able to engineer endless adjournments and appeals.

The standard of proof required to secure a conviction will generally be high in common law jurisdictions, "beyond reasonable doubt".

### Non-conviction based (NCB) Asset Forfeiture (civil forfeiture, civil asset forfeiture)

This type of asset forfeiture proceedings are fundamentally different from criminal proceedings as they target the actual property derived from unlawful conduct rather than attempting to establish to a criminal standard of proof that a particular criminal offence had been committed. An NCB asset

forfeiture regime can be established in both civil and common law jurisdictions. The starting point is article 54(1)(c) of the UNCAC which requires all member States to consider forfeiting the proceeds of crime without a conviction. It proposes NCB asset forfeiture as a tool for all jurisdictions to consider in the fight against corruption, a tool that transcends the differences between systems.

The traditional approach to serious criminality has been arrest, followed by the institution of criminal proceedings with a view to conviction and imprisonment. In recent years, such has been the wealth generated from economic crime that a confiscation or forfeiture element has been added to the criminal process in many jurisdictions. There now also appears to be a global trend to use stand-alone civil proceedings as a means of recovering the proceeds of crime in the hope that they will be more effective than proceedings that are ancillary to and dependent on a criminal prosecution. Recent examples of jurisdictions that have introduced civil forfeiture legislation include Albania, Columbia, Italy, South Africa, Ireland, Australia, Slovenia and the United Kingdom.

This trend towards civil forfeiture has been prompted by the nature of organised crime. Organised crime heads use their resources to keep themselves distant from the crime that they are controlling and to mask the criminal origin of their assets. For this reason, it has become extremely difficult to carry out successful criminal investigations leading to the prosecution and conviction of such individuals, with the result that finances derived from crime are often effectively out of the reach of the law and are available to be used to finance more crime.

It is not always possible to prosecute offenders. Sometimes it might even be for unforeseeable reasons, such as when the culprit is deceased or has absconded. Yet, in some cases it is possible to identify assets that are the [proceeds of crime](#). Consequently a response strategy that relies upon alternative measures has been developed. This procedure is by way of civil recovery and is aimed at tainted property – actual proceeds and not other property to the value of the benefit gained or instrumentality.

Separate powers exist allowing for States to confiscate assets as the proceeds of crime but in the absence of a criminal conviction – such powers are exercised only by law enforcement or anti-corruption agencies, and often there has to be a good reason for proceeding without first securing a criminal conviction, e.g. death or flight. It is a form of action directed at the assets themselves, sometimes called an action in rem. Typically there is a lower burden of proof, i.e. the State will have to prove on a balance of probabilities (in common law countries) that the offender's assets are either the proceeds of crime or represent property used to commit a crime (instrumentalities). Confusingly called civil forfeiture or civil recovery proceedings but they are distinct from the private civil proceedings dealt with later.

Much of the effort is focused on establishing the absence of any legitimate source of capital or income on the part of the respondent which could account for the acquisition or accumulation of the property and monies that are being sought for recovery.

[Civil asset forfeiture](#) is convenient in a number of cases such as:

The defendant is deceased. Since traditional criminal law focuses on a person's responsibility the usual way to retrieve [proceeds of crime](#) has been the action in personam. When a person has died and therefore the possibility to prosecute has been extinguished, traditionally this has meant that the illegally obtained assets may not be recovered. Since in rem action goes directly against the assets themselves, this is the perfect remedy in such cases.

The defendant has been acquitted in criminal proceeding and [confiscation](#) was not possible. A non-conviction based [forfeiture](#) proceeding would allow the recovery of the [proceeds of crime](#). This should be not an attempt to "re-litigate" a proceeding, as this proceeding is not meant to establish a person's culpability or responsibility, but the origin of the assets themselves.

There are also cases in which the defendant cannot be found within the jurisdiction because he has fled, because he is already imprisoned abroad or for any other reasons.

The owner of the assets is uncertain. [Money laundering](#) usually follows the commission of an economic crime in order to conceal the origin of the assets. If the [money laundering](#) process was effective even the ownership can be difficult to prove. In these cases non-conviction based [forfeiture](#) becomes of special importance.

The statute of limitations prevents the offence from being investigated. In countries stricken by [corruption](#) this is of special importance, as corrupt public officials tend to stay in office for several years. Some countries enjoy provisions which relate to illicit enrichment – this can be a helpful tool in recovering assets but should not necessarily serve as substitute for conducting a corruption or money laundering investigation aimed at prosecuting and convicting the offender. This is a non-mandatory offence in terms of the UNCAC but does not always involve a shift in burden to the perpetrator as is often argued although the provisions remain controversial for this reason.

The State still has to prove the existence of assets, the ownership of such assets and then an increase in such assets before the accused is expected to prove that the assets derived from a legitimate source. It involves a relaxation of the burden of proof more than anything and should not be rejected on the basis that it incurs a shift in the burden of proof which in some countries may be deemed unconstitutional as it violates an accused person's right not to incriminate himself. However, no constitutional right is absolute and this is not really a shift in the burden of proof.

### [Civil action available in civil law countries](#)

Civil proceedings are a further method of recovering corruptly-acquired assets. They run parallel with the criminal proceedings. The mechanism is not dependent on government to government co-operation through criminal mutual legal assistance mechanisms. In relation to foreign assets, a State will bring a private action in the civil courts of the foreign jurisdiction where corruptly acquired assets are located. It is the same process that would be used by private citizens or corporate entities with a claim against another.

Civil action can be brought by a bona fide third party, either a private individual or the State. There must have been preceding criminal proceedings whether this led to a conviction or acquittal. The matter goes to the civil judge who determines the damages aspect thereof. There would have been prior criminal proceedings where the person incurred damages.

Victims of an offence can participate in the criminal process to seek redress through a civil action. The civil suit is then embedded in the criminal process and the civil actor becomes an active part of the criminal process, with the possibility to gather and offer evidence for trial, cross examine witnesses, make appeals and participate in trial, just as the prosecutor and the defense would. The civil action is, however, dependent on the prosecution and if the latter does not proceed to trial, the civil action is dismissed and victims will have to seek redress in the civil jurisdiction. However, if the prosecution proceeds to trial and

for any reason the accused is acquitted, the court can rule on the civil action and issue a [confiscation](#) order.

Some countries, such as [Switzerland](#), have allowed foreign states seeking the return of corruptly acquired assets to become a civil party to the Swiss criminal investigations or proceedings concerning those assets. The foreign state will have the ability to access documents on the court file, to participate in the examination of witnesses, to make submissions to the investigating magistrate, and to seek the repatriation of assets. This effective combination of civil and criminal proceedings is not always available in all jurisdictions.

#### *Advantages of civil proceedings:*

It is the only realistic method of recovering illicit assets in circumstances where a criminal conviction or enforceable confiscation order cannot be obtained in a sensible time frame.

The burden of proof is, in most jurisdictions, lower than the criminal burden – common law countries express it as “balance of probabilities” with such a burden giving the civil court greater scope to make inferences of corruption from the evidence before it. The wrongdoer is extremely unlikely to be able to give to the court any legitimate explanation as to how he or she came by the allegedly illegally acquired assets.

The absence of the defendant is not usually a bar to the bringing of civil proceedings, unlike the criminal position, provided that the court is satisfied that a defendant has been properly notified of the claim by service of the proceedings on him.

Sometimes it is simply more straightforward for the authorities in the State seeking to recover assets to simply pursue those assets in civil proceedings rather than to pursue domestic criminal proceedings against high profile targets whose prosecution may arouse strong feelings among their supporters.

#### *Disadvantages of civil proceedings:*

The cost can be problematic as funding lawyers to bring civil claims is expensive – costs are difficult to predict as much depends on the manner in which claims are defended.

In the civil law system, the trial is more of an evolving process with few civil corruption cases proceeding to a final judicial conclusion: settlement will tend to have been reached or a defence collapsed well before a case falls to be decided. In those cases reaching trial with an international dimension, the court may have to make significant efforts to enable the trial to proceed. One advantage of the civil process is that, in general, courts have the power to conduct a trial without the defendant being present in the court where the trial is taking place – indeed trials can proceed in the absence of the defendant that chooses not to participate at the last minute.

If the State succeeds through the civil proceedings, there should be no question but that the assets will be returned unconditionally to the Applicant State. That is the right of any successful civil litigant.



## Civil lawsuits

Where a [criminal prosecution](#) is not possible or practicable and civil asset recovery unavailable, then the victim or a State may have to resort to civil litigation. This aims to provide a remedy either by requiring the respondent to pay compensation or for the return of the assets to the plaintiff.

Advantages to the taking of civil proceedings are the following:

- The claimant retains greater control over the case;
- The burden of proof is lower than in criminal cases;
- Usually more inferences can be drawn;
- The absence of the respondent is not usually a bar to the action; and
- There are far ranging powers to seize and freeze documents and assets.
- Disadvantages admittedly include the cost of bringing a civil action, the fact that often undertakings have to be given regarding costs and possible compensation to a respondent in the event of a case being unsuccessful and that sometimes evidence obtained through [mutual legal assistance](#) cannot be used in civil litigation.

## Structure of Investigative Process

How should the investigative process be structured when seeking to recover the proceeds of crime? Large-scale monetary corruption cases should always have a focus on how the money was paid and who received the benefit. The use of both direct and indirect evidence such as illicit enrichment provisions to show that the perpetrator is living beyond his means, require careful consideration. This is with a view to linking the perpetrator to the underlying criminality and, ultimately, the asset in question to both the perpetrator and the criminal conduct. No purpose is served if the perpetrator can be linked to the asset but the prosecution fails to prove that the asset emanates from the underlying criminality.

The financial investigative portion of the case can be conducted in a variety of ways, depending on the circumstances of the case. The major strategies that can be employed are summarised as follows:

- Specific item case, using direct evidence;
- Direct proof of bribe, through audio and video recorded evidence;
- An indirect method of proving income, using circumstantial evidence;
- Proving the true purpose of a series of concealed or fraudulent transactions, using circumstantial evidence.

What sort of cases or investigations would require the use of one of the above methods? Let's explore some examples which illustrate when each of these financial investigative techniques could be used to assist in proving the criminal violations and tracing assets.

### Specific item

This method would be used when specific payments of bribery or misappropriated government funds can be traced to the official's direct benefit. The evidence would directly prove the link between the corrupt activity and the value received by the public official.

## **Direct proof of bribe**

An undercover or covert operation may be able to develop direct evidence of a bribe. On rare occasions, an informant or a representative of a private company may provide information to law enforcement that a bribe has been solicited from him by a public official. In this instance, it may be possible to set up surveillance video and audio equipment that will document the bribe transaction.

## **Indirect methods of proving illegal income**

If illegal income cannot be traced directly to the corrupt official, then an indirect method of proof may be required to corroborate evidence of corrupt payments. For example, if it can be proven that the official spent money during a set period of time that was substantially in excess of his legal income, this could be used as circumstantial evidence to prove the amount of illegal income that the person received. In a corruption or money laundering case, this type of proof would be used in conjunction with other evidence that established the corrupt activity such as bid rigging or other misappropriation of funds. If the intended criminal charge was unjustified or unexplained wealth, then the indirect method of proving income may be the main evidence in the case.

There are two main methods for proving illegal income through an indirect method:

- *the Net Worth method*;
- *the Source and Application of Funds method* (also referred to as the *Expenditures method*).

There is also:

- *the Cash Flow Analysis method*.

The Cash Flow Analysis method has been used less frequently.

The Net Worth method is considered to be somewhat confusing and difficult to explain at trial. The concept of the Source and Application method is relatively simple, and is the preferential indirect method of proving income in most cases. The basic theory for this method is that the person under investigation spent far more money during a set period of time than he had legally available to him.

For example, a Deputy Minister under investigation maintains a bank account at a domestic financial institution. The records of this account should be requested very early in the investigation because it may require a significant amount of time for the bank to research the records. If the government salary of the Deputy Minister has been deposited into this domestic account, it will be important to perform a complete analysis to establish how his legitimate salary has been spent. A cash flow analysis relating to any cash withdrawals or deposits should also be prepared. Once these financial flows have been analysed, it will create a complete picture of the distribution of his legal funds and show how much cash was available for purchases. This may be very significant if expenditures are later identified from unknown or illegal funds. Large cash payments or purchases from unknown sources may be an important piece of evidence at trial.

Corruption cases are often difficult to prove through direct evidence because the perpetrators are skilled and devious schemers who may utilise the services of lawyers and accountants to disguise the trail of the funds. Painting the complete financial picture of the corrupt official and isolating his legal income to more clearly identify expenditures from unknown sources can be important facts when presented at trial.

This type of circumstantial evidence will, of course, have to be combined with other evidence - pieces of the puzzle - to demonstrate that the money flows from unknown sources came from illegal or corrupt activities. The Organisation for Economic Co-operation and Development (OECD) has stated "Proving the requisite intention is not always an easy task since direct evidence (e.g. a confession) is often unavailable. Indeed, bribery and trading in influence offences can be difficult to detect and prove due to their covert nature, and because both parties to the transaction do not want the offence exposed. Therefore, the offender's mental state may have to be inferred from objective factual circumstances."

### **Proving concealed or fraudulent transactions using circumstantial evidence**

There are some cases in which neither the specific item method nor an indirect method, such as the Source and Application of Funds, would be appropriate. The case may have no direct linkage between the corrupt activity and the acquired wealth of the public official. Additionally, the increase in wealth attributed to the official may appear to have been legitimate. In cases such as this, the investigation may have to analyse the specific transactions that resulted in the official's increase in wealth. It may be necessary to trace the transactions through a series of prior property owners to arrive at the true nature of the operations.

### **Mutual Legal Assistance**

Investigations which focus on "following the money" undoubtedly need resources, expertise and, almost inevitably, effective international co-operation. However, securing evidence abroad often provides the key to success in a complex, commercial investigation or those involving other forms of serious crime, and results in the successful recovery of assets.

Thousands of companies worldwide are involved in transactions transcending international borders on a daily basis. One transaction can, and often does, consist of a variety of activities to be concluded in a number of different countries, in order to complete the transaction. If it were to be established that such a transaction or a specific leg thereof was criminal, the law enforcement agency of the country where the complaint is lodged, will have to conduct a multi-jurisdictional investigation in order to collate the necessary evidence to prove the crime concerned.

It must be accepted that crime often has an international dimension of considerable proportions which requires the assistance and co-operation of a number of foreign authorities to solve. National criminal justice processes cannot remain frustrated within borders while crime ignores and crosses international borders.

Effective co-operation between states by way of Mutual Legal Assistance (MLA) is an essential component of transnational criminal investigations, particularly ones aimed at tracing and confiscating assets.

### **What exactly is meant by Mutual Legal Assistance and how is it obtained?**

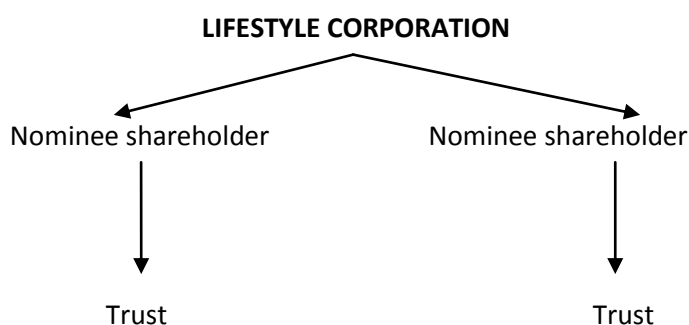
In order to make this presentation as practical and meaningful as possible, imagine the following scenario which requires an understanding of the elements of embezzlement and money laundering, following the money trail and, importantly, investigations abroad and cross-border co-operation.

You are assigned a complex investigation which involves Mr Maistrenko, Director General of local buyer, Department of Health and Welfare, Bargain Electrical Limited, the offshore seller, and Lifestyle Corporation, which was initiated on the following basis:

Mr Maistrenko, the Director General of the Department of Health and Welfare, a local Ukrainian government department, has embezzled the department's money and transferred the proceeds of such embezzlement abroad. The Department of Health and Welfare was induced to enter into a transaction in term of which it was required to pay an amount of USD 10 million to Bargain Electrical Limited, a London-based company, for electronic equipment which was only worth USD 8 million.

However, Mr Maistrenko did not disclose to the management of the Department of Health and Welfare that he had a direct and/or indirect interest in Bargain Electrical Limited and stood to benefit in the amount of USD2 million ( as a result of the transaction).

In the belief that he could safely conceal the proceeds of his unlawful activities (which amounts to money laundering) in a so-called tax haven (i.e. Guernsey, Jersey, Isle of Man, Cayman islands etc), Mr Maistrenko incorporated a company, *Lifestyle Corporation* , in the British Virgin Islands which is domiciled in Guernsey. The company is managed by one of the numerous trust companies on the island. Mr Maistrenko ensured that the trust company provided nominee shareholders for Lifestyle Corporation, which hold shares on behalf of trusts of which Mr Maistrenko is a discretionary beneficiary.



(Maistrenko is a discretionary beneficiary of both trusts.)

The sum of USD10 million was paid to Bargain Electrical Limited which, in turn, ensured that USD2 million was transferred to Lifestyle Corporation. Mr Maistrenko thereafter utilises the money to fund a lavish lifestyle and purchase offshore assets which are registered in the name of further companies connected to Mr Maistrenko in the same way.

A yacht is purchased in the UK and other luxury items.

#### **What are the challenges facing you in terms of the overseas leg of such an investigation?**

- Identify and trace the assets;
- Follow the flow of the funds;
- Pierce the beneficial ownership of the trusts;
- Uncover Mr Maistrenko's links with the various offshore companies and trusts;
- Link the Director General with criminal conduct;
- Link the assets to the underlying criminal conduct.

**Questions to be answered:**

- What information do I have?
- What information do I need?
- Who do I approach for such information?
- How do I compile the request for information?
- How do I satisfy both the domestic and foreign legislative requirements?
- How do I ensure that the evidence obtained meets admissibility requirements?
- Do I need to inform the suspect that I intend securing the assistance of foreign authorities in obtaining evidence abroad?

MLA in respect of criminal matters is to be understood in the narrow sense as the rendering by one country, the Requested State, to another, the Requesting State, assistance in securing information or evidentiary material for the purpose of investigation and/or prosecution. Mutual legal assistance (MLA) allows for a country to approach another for assistance in a criminal investigation of the nature described above. Such a request may entail asking for assistance in the examination of witnesses who cannot or will not return to give evidence at a criminal trial. An MLA regime is clearly invaluable and essential in investigating cases of transnational crime and emphasises the need for an international response to an international problem.

In a broad sense, it includes assistance in enforcing foreign restraint and/or confiscation orders, in recovering fines and/or compensation, transfer of the proceeds of crime and even co-operation in operational actions.

As a State has no right to pursue its own investigations or to engage in unorthodox enforcement practices in the territory of a foreign country, it must request and obtain authorisation and assistance.

In terms of the above-mentioned example, one cannot simply demand information relating to the company, Lifestyle Corporation, managed in Guernsey, or the utilisation of its funds to purchase various assets. In order to obtain such information, one would have to make a formal request for MLA to Guernsey, trusting that it has MLA legislation and is able to obtain and pass on the relevant information (depending on the nature of bank secrecy laws etc.)

**Types of Assistance**

The importance of informal co-operation cannot be over-emphasised which in addition to formal assistance can be of great help to the investigator of complex corruption and other financial crime investigations. But let us have a look at both formal and informal types of assistance.

Let's look at some practical examples. Some good questions to ask are as follows:

**Banking information**

*Question:* During your investigation, you found that one of the cheques used to pay for the house in the United Kingdom by our Director-General of the Department of Health and Welfare was drawn from a bank account in Switzerland. How would you obtain this information?

*Answer:* There are two avenues -

### FIU contact

If it is merely for information purposes and to determine whether to follow leads, a Financial Intelligence Unit (FIU) contact could be useful but keep in mind that this information can never be considered to be evidence.

### Mutual legal assistance

If the information is required as evidence, to be introduced in court, then a formal MLA request is unavoidable. Formal letters of request are the only way in which evidence can be obtained overseas and introduced in court.

**Formal assistance** includes a number of instruments which note the terms upon which one state will give legal assistance to another. The terms may include the procedure for making requests, grounds for refusing assistance and restrictions on the use to which the assistance may be put:

- A Letter Rogatory - it is a formal request from a [court](#) to a foreign court for some type of judicial assistance.
- Bilateral treaties - A treaty is an agreement under [international law](#) entered into by actors in international law, namely [sovereign states](#) and [international organisations](#).
- Multilateral treaties - they have several differences, and establish rights and obligations between each party and every other party. Multilateral treaties are often, but not always, open to any state; others are regional. E.g. UNCAC, European Convention on MLA in Criminal Matters.
- Letters of request – Investigators/Prosecutors can seek assistance from states with which their country does not have formal MLA arrangements. Such requests are simply a request for assistance without there being any obligation on the part of the recipient.

### **Kinds of assistance**

MLA is generally any assistance rendered by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in a criminal matter irrespective of whether the assistance sought is to be provided by a court or some other authority.

Assistance can include:

- locating or identifying persons;
- locating or providing documents, records and articles, including lending of exhibits;
- taking the statements or testimony of persons;
- search and seizure;
- serving documents including documents seeking the attendance of persons;
- facilitating the appearance of witnesses or the assistance of persons in investigations;
- assisting in proceedings related to restraint and forfeiture of the proceeds of crime, to compensation or restitution or to the recovery or collection of fines;
- any other form of assistance not prohibited by the laws of the Requested State.
- It is incumbent on a person dealing with a request to ensure that domestic law provides a basis for rendering a given kind of assistance.

### **Basis for Co-operation**

A basis for co-operation is also required. Ideally there should be a bilateral treaty or multilateral convention to which the States concerned are parties. However, in the absence of treaties or conventions, the basis is found in international comity (or goodwill).

### **Informal or formal co-operation**

Prosecutors and investigators sometimes have recourse to MLA without exploring whether informal mutual assistance would, in fact, meet their needs. It is sometimes forgotten that the country receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously. Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

The extent to which countries are willing to assist with a formal request does, of course, vary greatly. In many cases, it will depend on a particular country's own domestic laws, on the state of the relationship between that country and the requesting state and, it has to be said, the attitude and helpfulness of those on the ground to whom the request is made. The importance of excellent working relationships being built up and maintained transnationally cannot be too greatly stressed.

Although no definitive list can be made of the type of enquiries that may be dealt with informally, some general observations might be useful. Variations from state to state, must, however, always be borne in mind.

- If the enquiry is a routine one and does not require the country of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
- The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained informally.
- Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
- A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness's evidence is likely to be non-contentious.
- The obtaining of lists of previous convictions and of basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal way.

Taking matters one stage further, many states have no objection to an investigator of the requesting state telephoning the witness, obtaining relevant information and sending an appropriately drafted statement by post thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to assist the requesting authority and in circumstances where no objections arise from the authorities in the foreign state concerned (from whom prior permission must be sought). *The golden rule must be: Ensure that any informal request is made and executed lawfully.*

It is also very important to note the conditions in terms of which the information is provided – in many instances when information is provided informally, the giver will impose the condition that the information may only be used for intelligence purposes and not as evidence in court.

Very often the formal method is the most suitable, acceptable and safest method.

It is possible to draw up a guidance list of the sorts of request where a formal letter will be required:

- Obtaining testimony from a non-voluntary witness.
- Seeking to interview a suspect under caution.
- Obtaining account information and documentary evidence from banks and financial institutions.
- Requests for search and seizure.
- Internet records and the contents of emails.
- The transfer of consenting persons into custody in order for testimony to be given.

Prosecutors and judges making a formal request should always assert the international obligation of a requested state to assist where such an obligation exists by way of international instrument. Equally, the authority upon which the letter of request is written should also be spelt out.

Prosecutors and prosecuting authorities are recommended to make early contact with a counterpart in the country to which the request is to be made. The key principle must be this: regard should always be given to the fact that a requested state will have to comply with its own domestic law, both as regards whether assistance can be given at all and, if so, how that assistance is, in fact, given.

### **Use of “Gatekeepers”**

One of the greatest challenges when seeking to trace and recover assets lies in the lengths to which criminals are prepared to go in order to conceal the source of their wealth or their link with ill-gotten gains. To quote Stephen Baker, an English barrister and Jersey advocate, a partner of BakerPlatt, a law firm based in Jersey:

*“The financial world does not operate in one dimension. The traditional view that individuals hold direct, simple relationships with financial service providers is increasingly less relevant. This is especially so in a world of ever increasing complexity, driven by technological change and shifting political and social sands.”*

Criminals have developed ever-increasingly sophisticated means of concealing their illicit gains but have not done so without assistance. So they invest time, money and effort into the manner in which their property is laundered and then used – they seek to achieve a ‘disconnect’ between (a) the criminal and the proceeds of his crime, (b) the proceeds of his crime and the form in which he ultimately derives his benefit and finally (c) the criminal and his access to the benefit. These disconnects facilitate the safe enjoyment by the criminal of the fruits of his crime.

It is imperative that investigators and prosecutors of corruption and money laundering cases as well as those who focus their efforts on the recovery of assets should develop an understanding of the way in which so-called gatekeepers are used. Gatekeepers, as the name would imply, are the people who facilitate “access” to the world of financial services, enabling criminals to disguise their profits. These individuals and institutions are frequently bankers, corporate service providers, trust companies, lawyers, accountants or other organizations which have access to the financial system. Depending on the precise nature of their role, gatekeepers commonly utilise the following:

- Commission of a predicate offence – for example, the provision of a company owned by an overlying trust as a party to a fictitious contract or a contract that exists for an illegal purpose;
- Disguising of a person’s involvement in a commercial transaction – for example, disguising a principal’s interest in a target company about which he has privileged information;



- Layering of a criminal property – for example, passing property through the ownership of a company in an effort to place as much distance between property and the original criminal source, or
- Disguising of the ownership of property by the ultimate beneficial owners of that property.

Trusts and other offshore financial services are attractive to criminals because they make it more difficult to determine the true identity of the person who owns and effectively controls assets. A chief executive or chief financial officer may be diverting company profits to himself; an insider dealer may be tired of watching clients make money and may look to make a 'killing' of his own; a corrupt politician may loot his treasury for millions of dollars and seek to invest the proceeds through a trust. Even drug traffickers and ordinary fraudsters may seek financial services 'offshore'.

### **Abuse of trusts**

There are various ways in which a person will seek to disguise his involvement in illicit activities. The use of overseas limited companies and bank accounts in those company names are very simple examples. Other methods are foundations, Anstalts and similar means. However, trusts, and the various services offered by the trust industry, are a particularly good tool for criminal investments if those involved in such entities are not alert to the risks. In jurisdictions where trustees are not "regulated", their vulnerability to criminal abuse is very high. The trust, and the ability to manipulate it, are indeed integral to the 'smoke and mirrors' a criminal uses to disguise ownership of property while retaining control over it. They can enable a criminal to achieve an effective disconnect (in terms of ownership) of property whilst enabling them to continue to exercise control and gain benefit.

### **Conclusion**

In many countries, criminal investigations are primarily directed towards the investigation of the underlying criminality. However, tracing money and property with a view to confiscation and targeting the criminal where it hurts most is an invaluable tool in the hands of any investigator and prosecutor in the fight against crime such as corruption.

As technological developments facilitate the ease with which one is able to transact and move across borders, and Internet and Electronic Funds Transfers are accepted features of modern business, the assistance of foreign states is vital if the proceeds of crime held by an offender elsewhere in the world are to be traced, seized and confiscated. Securing evidence abroad often provides the key to success in a complex commercial investigation and bringing those involved in organised crime to book.

## TRACING OF ASSETS, FREEZING AND CONFISCATING OF ASSETS IN CRIMINAL PROCEEDINGS IN CORRUPTION CASES INVESTIGATED IN SWITZERLAND

**Mr. Jean-Bernard Schmid,**  
Investigating Magistrate,  
Financial Section,  
Palais de Justice,  
Switzerland

### **Anti-Corruption Legal framework**

The legal framework against corruption includes the transposition into the Swiss penal code of the 1998 OECD Convention's requirements to criminalize active and passive corruption of foreign officials, by legal persons included (*for the OECD review of Switzerland, see the "Information by Country" under "Bribery and corruption" at [www.oecd.org](http://www.oecd.org)*).

Switzerland has also ratified the Council of Europe's Criminal Law Convention on Corruption (*ETS no. 173 - 1999 / proscribing so called "private" corruption*), the UNTOC (2003) and the UNCAC (2005).

### **Judicial organization in Switzerland**

The various cantonal procedural codes and juridical organisation laws will be unified in Switzerland as to January 2011.

The function of Investigating magistrate will disappear as such. The criminal investigations will be conducted by the Public Ministry's Prosecutors. To compensate for the coercive powers given to the Prosecutors - while these powers were, before, in the sole capacity of the more "neutral" Investigating magistrates - the rights of the accused will be theoretically strengthened, notably the right to be assisted by a lawyer at the police custody stage.

The new Public Ministry will not be subordinated to the Government, contrarily to France where, because of such a hierarchical link, the suppression of the Investigating magistrate is raising a lot of opposition.

This new legal structure will have little effect on the way important corruption cases are being investigated, including in the difficult area of asset tracing, freezing and confiscating.

In financial centers like Geneva, a special section of Prosecutors / Investigating magistrates is responsible for complex financial cases and international investigations. Analysts and specially trained police officers are linked to that special section, that will retain, in 2011, the same tasks and resources as today.

### **Identifying and tracing assets**

Only assets suspected to be proceeds or instrumentalities of an illicit activity are liable to be seized and, if proven so, confiscated.

Which implies that the first condition to effectively identify and trace such assets is to know one's

criminal scene and environment.

In terms of corruption, it means intelligence about activities known to be prone to graft, including human trafficking and prostitution, the narcotics market, the extortion business, real estate, public markets, etc.

It also means effective monitoring, as defined by law, of governmental, parliamentary, judicial and police activities, particularly when important financial interests are at stake.

Also worth analysing and monitoring are the many classical money laundering schemes, in cash or by compensation, by wire transfers through the regular bank system, via parabanking structures or using the more modern e-banking network.

That includes focusing not only on traditional banks but on the many parallel financial intermediaries, often operating crossborder like, among other examples, money changers, business lawyers, notaries, fiduciaries, travel agencies, etc.

Under Swiss law, the link between assets and a criminal activity can be direct or indirect ; identifying a perpetrator is not necessary ; any kind of asset, liquid or not, is potentially relevant ; replacement value is to consider if the original assets are lost or not tracable anymore (see below).

Open questions that have not been settled in court include how to define the proceeds of corruption : graft money alone or the profit derived from corrupt practices ? to what extent should it include the profit made on a contract or a concession won by bribing State officials ?

### **Source of information**

Various sources of information will help initiate an investigation, among which :

- regular police data collection ;
- regular administrative data, notably from fiscal authorities, real estate transactions, etc. ;
- suspicious transaction reports (STR's) from financial intermediaries, notably banks, fiduciaries and business lawyers, who are required by law to run due diligence screenings about their clients's personal and economical background, the plausibility of the commercial operations they conduct and the origin of the assets they manage for them (see the Swiss Anti Money Laundering Act and its various ordinances) ; compliance people are de facto required to act as internal police ; this autoregulation system is based on the assumption that a professional will have better and easier access to his client's data, but results in the State delegating police work to private structures with various levels of efficiency ;
- auditors if required to report suspicious operations ;
- Egmont's financial investigating units (FIU's) in as much as they can share the information that they often collect for "intelligence purposes only", which implies a degree of confidentiality that may prevent such information to be used in regular court proceedings ;
- whistleblowers and similar informants ;
- mutual legal assistance requests (MLA) from foreign States, that may refer to illicit operations possibly under the jurisdiction of the requested State, notably money laundering offences, forgery of documents, assist in diverting of funds, breach of trust, fraud, etc. ;
- for elected officials, an obligation to disclose the assets they own can be a source of valuable information ;

- the press, the internet and private data banks collecting public information (Worldcheck, Factiva and similar, regularly used by compliance services of banks and corporations active on the international markets).

Coordinating these various sources of information is key to efficiency, such coordination being meant nationally as well as internationally, which is still a quite distant target.

Few countries, if any, run active operations to, for instance, target companies operating in countries and / or on markets known to be prone to corruption (natural resources, oil and gas, arms, real estate, etc.), nor do they run regular enquiries about their politically exposed person's wealth.

The actual political will to take judicial action against corruption can be valued with reference to, among other elements, the allocation of resources or the use of prosecutorial discretion to take action, or not, in such proceedings.

To note that under the OECD Convention (art. 5), the investigation and the prosecution of offences of bribery of foreign public officials cannot be “influenced by considerations of national economic interest” nor by “the identity of the natural or legal persons involved”.

### **Technicalities**

At the start of an investigation, it often proves very important to have the legal ability to :

- take provisional measures, like asset freezing orders ;
- impose confidentiality to the people or entities subject to the first measures like search and seizure orders ; under Swiss law, this is often imposed on banks and other financial intermediaries ;
- avoid leaks to the press (unless you fear that the case could be ruined by undue interference ...).

Practically, such confidentiality is never guaranteed for very long. If a savings account can be frozen or monitored over a relatively long period of time without its holder being aware, it has proven particularly difficult to impose confidentiality on commercial accounts with daily movements. It is thus advisable to value the situation on a case by case basis, allowing ordinary operations whenever possible rather than uncovering an ongoing investigation. It might also appear opportune to allow certain payments like alimony, lawyer's fees, etc., always remembering that frozen assets should as a rule be kept for restitution to the victims of the supposedly illegal deeds.

### **Possible complications can appear with :**

- diplomatic immunities ;
- professional secret of lawyers, notaries and auditors, as long as they act in their specific professional capacity and not as company managers, board members, financial intermediaries for a client, etc.
- the managing of frozen assets ; on that issue, an agreement has been signed between the Swiss banker's association and the criminal authorities stating that, as long as the circumstances permit it, frozen assets are managed in a conservative way, aiming to secure the capital rather than taking risky positions.

To note that the so-called "bank secrecy" is no more than a commercial secret that can under no circumstances be opposed to a criminal investigation.

**Also :**

- having a clear idea of what one is looking for and take time, on the premises, to sort documents or secure them under judicial seal rather than take them along, certainly helps limit the amount of data being collected, hence make it possible to analyse it within a reasonable frame of time ;
- electronic data should be seized according to strict technical protocols, to ensure their integrity, which in practice rapidly becomes extremely complicated and time consuming considering that such data can only be analysed when the IT police brigades have had the opportunity to transfer it under a usable format ; also to note is that without specific software, specialized knowledge and experience, analyzing electronic mass data is practically impossible ; private data protection issues can also limit e-data collection, respectively their transfer to foreign authorities in MLA procedures.

### **Seizing bank documents**

Banks and financial intermediaries operating in Switzerland are required, by law, to carry out due diligence about their clients, their commercial activities and the origin of the assets under their custody.

Typically, a bank file should include for each client, whether a physical person or a company, an offshore or a trust, the following documents that should be considered worth of seizing :

- the documents used to open the account (id's, statutes, bylaws, signature cards, powers of attorney, etc.) ;
- the necessary data to identify the "beneficial owner" of the assets lodged under the account (the so called Swiss "Form A") ; lacking diligence to identify the real client behind possible proxies is an offence as such under Swiss criminal law ;
- a KYC (Know your customer) client file, more or less detailed, about the personal data, the financial situation, the economic background and the origin of the assets of the client ; special diligence is required for "politically exposed persons" (PEP's) ;
- the compliance records and notes, including the documents that the client might have produced to justify an operation (agreements, contracts, exchange of notes and similar) ;
- the account records (note that such commercial records are, by law, to be saved during a ten year maximum period ; they may, but do not have to be destroyed after that) ;
- the Swifts forms, to trace the origin and the destination of a transfer by identifying the ordering banks and clients, respectively the beneficiaries of the operations of a transfer ;
- the clients orders to the bank, the correspondance, the telephone notes, the manager notes, the logs of the visits to the safe.

It can also prove useful to take a witness statement from the account manager to gather more precise information about a client, his economical background and ties, specific operations on the account, etc.

### **Confiscation**

According to the rules of criminal law, it has to be proven beyond a reasonable doubt that the assets to be confiscated are the proceeds or the instrumentalities of an offence.

Under Swiss law, if such a proof has been supplied, the confiscation of assets, or their replacement value, can be ordered *in rem*, without conviction of the perpetrator, without even having to identify him.

If it can be proven that the assets are controlled by a criminal organization, the burden of proving the licit origin on the assets is on the defendant.

Once confiscated, the assets are prioritarily returned to the victims of the offence, in compensation of their damages claims.

On the specific issue of large scale kleptocracy by heads of States, it is not always seen as opportune to return confiscated assets directly to the countries' treasury they have been diverted from, especially if corrupt State personnel is still in power ; monitored restitution has been used, with various degrees of success (see UNCAC, art. 57/5).

### **MLA and important elements of assistance requests to Switzerland**

Mutual legal assistance is key in most corruption cases that practically always involve illegal operations perpetrated under more than one jurisdiction, if only the laundering of their proceeds carried out, as a rule, abroad to avoid their tracing and confiscation.

#### **Legal framework**

Switzerland has signed all the relevant international treaties and the multilateral conventions ruling legal assistance (notably the 1959 CoE's ETS 30 Convention on mutual assistance in criminal matters). It is also signatory to numerous bilateral conventions with a large number of countries. In the absence of a convention or a treaty, the domestic Swiss MLA law is applied, on the reciprocity condition.

#### **Grounds for refusal**

The usual grounds for refusing legal assistance apply, notably for political offences, offences implying racial, religious or sexual, discrimination, or if the requests endanger national sovereignty, security, public order or other essential interests of the country.

Cooperation is also denied if the requesting State's proceedings do not respect the basic rules of due process (see the UNDHR and its Pact II on Civil and Political rights, along with the European Convention on Human Rights).

Both set of conditions have at times raised tricky issues, notably with potentially tainted elements of proof obtained in breach of due process rules.

#### **Basic requirements**

A MLA request to Switzerland must contain a short description of the facts on which the foreign investigation is based (time, place, persons involved, operating mode).

No proof as such is required.

The condition of - fact based - dual criminality is given for bribery ; the issue is open for offences like,

among others, trading in influence, illicit enrichment, illegal financing of political parties or simple fiscal evasion.

Provisional measures, like the temporary freezing of a bank account, can be requested and obtained quickly and relatively easily ; they are carried out under Swiss law ; the requesting authority can ask to participate in the proceedings.

The speciality reservation applies as a rule.

### **Practical tips**

If unfamiliar with such proceedings, do not hesitate to contact the Federal Office of Justice (*Bundesrain 20, CH-3003 Berne Swirzerland – Tel.: +41 31 322 11 20, F +41 31 322 53 80*), acting as the Swiss central authority for any matter related to legal assistance, or any magistrate of the judiciary who will steer you onto the right track.

Their website dedicated to legal assistance is (in German, French and Italian) at :

[http://www.bj.admin.ch/bj/fr/home/themen/sicherheit/internationale\\_rechthilfe.html](http://www.bj.admin.ch/bj/fr/home/themen/sicherheit/internationale_rechthilfe.html)

For a detailed handbook on how to request MLA from Switzerland, see <http://www.rhf.admin.ch/rhf/fr/home/rhf.html> on the same website.

## TRACING AND CONFISCATING ASSETS GAINED THROUGH CORRUPTION IN UKRAINE

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От лица Генеральной прокуратуры Украины искренне благодарю организаторов мероприятия, принимающую сторону за приглашение принять участие в нем и возможность выступить.

Всем известно, что ни одна из стран мира не имела и не имеет полного иммунитета от коррупции - изменяются лишь ее объемы и проявления, а также возможностями противодействия, которые определяются уровнем экономического развития государства и отношением общества к этому злу. Коррупция - явление транснациональное. Ее деструктивное влияние отрицательно сказывается на социальной, экономической, политической сферах во всем мире. Эти проблемы актуальные и для нашего молодого государства.

Поэтому Украина активно поддержала План действий по борьбе с коррупцией для государств с переходной экономикой, который был рассмотрен и принят еще в 2003 году в Стамбуле.

Итогом такой деятельности стало подписание нашим государством Конвенций ООН против коррупции и о коррупции в контексте уголовного и гражданского прав.

Конвенция СЕ об отмывании, поиске, аресте и конфискации доходов, полученных преступным путем, от 8 ноября 1990г., ратифицирована нашим государством 17 декабря 1997г.

Украина является участницей свыше 150 межгосударственных соглашений и договоров, которые касаются борьбы с организованной преступностью и коррупцией.

В этом направлении Генеральная прокуратура Украины активно сотрудничает со многими государствами и международными организациями. Непосредственно подписано ряд соглашений, в том числе о сотрудничестве генеральных прокуратур государств-участниц Содружества независимых государств по борьбе с коррупцией.

Предотвращение коррупционных деяний - важное направление деятельности государственных и правоохранительных органов Украины.

Действующим законодательством на прокуроров в Украине возложены особые задачи.

Во-первых, это надзор за исполнением антикоррупционных законов правоохранительными и другими органами власти.

Согласно уголовно-процессуальному законодательству, следователи прокуратуры наделены полномочиями по расследованию уголовных дел о взяточничестве и других коррупционных преступлениях.



Общеизвестно, что одним из способов получения «грязных» денег коррумпированными чиновниками - это взятки, злоупотребление властью с целью получение разного рода преимуществ и льгот, средств из государственных социальных фондов, а также присвоенных займов международных финансовых учреждений, полученных в рамках финансовой помощи.

За совершение таких действий в Украине установлена уголовная ответственность. В частности, статья 368 Уголовного кодекса предусматривает ответственность за взяточничество, статья 364 - за злоупотребление служебным положением и так далее. Как правило, эти преступления признаются коррупционными и за их совершение предусмотрена дополнительная мера наказания - конфискация имущества осужденного лица.

Согласно ч. 6 ст. 41 Конституции Украины конфискация имущества может быть применена исключительно по решению суда в случаях, объеме и порядке, установленных законом.

Это конституционное предписание реализовано в ст. 59 УК, согласно которой конфискация имущества заключается в принудительном безвозмездном изъятии по приговору суда в собственность государства всего или части имущества, которое является собственностью осужденного.

Конфискация имущества устанавливается за тяжкие и особенно тяжкие корыстные преступления и может быть применена лишь в случаях, специально предусмотренных в Особой части этого Кодекса, например, в санкции части 2 и 3 ст. 368 УК).

С целью обеспечения возможной конфискации имущества органы досудебного следствия, в том числе следователи прокуратуры, обязаны принимать меры к отысканию имущества обвиняемых и наложения на него ареста.

Прокуроры также обеспечивают поддержание государственного обвинения в этой и других категориях уголовных дел при их рассмотрении в судах.

Законом Украины «О борьбе с коррупцией» оперативные работники прокуратуры наделены правом выявления административных коррупционных правонарушений, составления соответствующих протоколов и направления таких материалов в суд.

Кроме того, органы прокуратуры активно используют возможности, представленные ст.10 Закона Украины «О прокуратуре», обеспечивая координацию согласованных действий в этом направлении всех правоохранительных органов.

А поэтому правоохранительным и другим органам исполнительной власти поставлены конкретные задачи относительно повышения эффективности борьбы с коррупцией.

Во исполнение поручений Главы государства Генеральной прокуратурой Украины совместно с СБУ разработаны планы системного противодействия коррупции и взяточничеству среди работников правоохранительных органов.

В результате проведенных мероприятий наметились положительные тенденции усиления противодействия коррупции, в первую очередь уголовно-правовыми средствами.

В августе прокуратурой г. Севастополя возбуждено уголовное дело относительно преступной организации в составе должностных лиц ряда коммерческих структур, которые мошенническим путем завладели государственными землями площадью 39 га стоимостью около 12 млн. долларов США.

Органам прокуратуры удалось закрепить прошлогодние успехи к активизации противодействия коррупции.

Следователями прокуратуры в текущем году окончено расследование и направлено в суд с обвинительным заключением более полторы тысячи (+12,6%) уголовных дел о коррупционных преступлениях. К уголовной ответственности за совершение таких преступлений привлечено 1,7 тыс. лиц (в прошлом году 1,5 тыс.).

Например. Прокуратурой Донецкой области в августе с.г. завершено следствие и направлено в суд уголовное дело относительно организованной группы с коррумпированными связями в составе 5 служебных лиц органов пограничной и таможенной служб на посту «Успенка» Амвросеевской таможни, которые за взятки оказывали содействие контрабанде товаров стоимостью почти 100 тыс. долларов США.

Стала более эффективной работа органов прокуратуры относительно поиска имущества обвиненных и возмещению причиненного преступлением ущерба.

Сумма установленного ущерба по уголовным делам о коррупционных преступлениях, расследованных следователями прокуратуры, превышает 12 млн. долларов США. Из них в ходе досудебного следствия возмещено почти половину (6 млн. долларов США, или почти в два раза больше чем в прошлом году).

С целью конфискации имущества обвиненных судом следователями прокуратуры чаще используется право наложения ареста на имущество обвиненных.

В целом наложит арест на имущество обвиненных (подозреваемых) стоимостью 12,5 млн. долларов США, что в случае принятия судом решения о его конфискации обеспечит возмещение 96,7% причиненного преступлением ущерба.

При этом улучшилось взаимодействие следственных органов прокуратуры с оперативными подразделениями правоохранительных органов, которые осуществляют оперативно-розыскную деятельность относительно поиска имущества обвиненных.

В текущем году активизировано изобличение коррумпированных чиновников в бюджетной системе и сфере земельных отношений. Расследовано и направлено к суду соответственно 188 и 177 уголовных дел этой категории.

В отдельных регионах разоблачены широкомасштабные злоупотребления с землей.

В стадии завершения уголовное дело о преступной группировке в составе бывших работников СБУ, МВД, адвокатуры и даже судьи, которые незаконно завладели земельными участками вблизи столицы площадью 381га, рыночная стоимость свыше 25 млн. долларов США. Потерпевших от этой земельной аферы почти полторы тысячи лиц.

Необходимо отметить, что правоохранительные органы уделяют особое внимание раскрытию и расследованию коррупционных преступлений, совершенных организованными группами и преступными организациями.

Скоординированными действиями правоохранительных ведомств ликвидировано 33 преступных объединения, которые совершали коррупционные преступления.

Так, в Запорожской области в суд направлено уголовное дело относительно преступной организации, члены которой путем злоупотребления служебным положением завладели бюджетными средствами, выделенными Фондом социального страхования на сумму свыше 1,2 млн. долларов США.

Органами прокуратуры усиленно противодействуют взяточничеству, как одному из опаснейших коррупционных проявлений. На рассмотрение судов направлено более 1 тыс. уголовных дел о получении и дачи взятки.

Преимущественно такие преступления совершают должностные лица органов исполнительной власти и органов местного самоуправления, которым действующим законодательством предоставлено довольно широкие властные полномочия, особенно в сфере земельного правоотношения.

Для примера. В сентябре прокуратурой г. Киева привлечено к уголовной ответственности руководителей Фонда госимущества за требование и получение 40 тыс. долларов США взятки за решение вопроса о приватизации и имущества комплекса.

Повышенное внимание уделяется противодействию коррупции в системе судебной ветви власти. Вследствие скоординированных действий органами прокуратуры по материалам оперативных разработок спецподразделений МВД и СБУ возбуждено 41 уголовное дело о преступлениях с признаками коррупции в отношении судей.

В частности, в июне текущего года прокуратурой Житомирской области возбуждено уголовное дело за фактом требования и получение взятки в размере 2,5 тыс. долларов США судьей одного из районных судов г. Житомира за принятие незаконного решения о реализации арестованного имущества.

Учитывая общественный резонанс указанной категории дел, большинство из них находится в производстве следователей Генеральной прокуратуры Украины.

В мае текущего года возбуждено уголовное дело и предъявлено обвинение за ч. 2 ст. 368 УК Украины председателю одного из судов Винницкой области в связи требованием и получением 2 тыс. долларов США взятки за вынесение мягкого приговора.

В текущем году органами прокуратуры завершено расследование и направлено суд с обвинительным заключением 27 уголовных дел относительно судей, совершивших преступления с признаками коррупции.

Генеральной прокуратурой направлено в суд уголовное дело в отношении так называемого «колядника» - бывшего председателя Апелляционного административного суда и 8 судей других судов Львовской области за получение взяток на общую сумму более 100 тыс. долларов США. Слушание дела в суде продолжается.

Хочу обратить внимание на проблемы, которые возникают при привлечении судей к уголовной ответственности.

Вследствие корпоративности судейского корпуса имеет место отрицательная практика затягивания рассмотрения таких дел, а также отмены постановлений о возбуждении уголовных дел относительно судей другими судами.

Например, дело в отношении заместителя председателя одного из районных судов г. Одессы слушается более 4 лет.

Разными судами отменены постановления следственных органов прокуратуры о возбуждении 8 уголовных дел относительно судей.

На незаконные судебные решения в делах этой категории прокурорами внесены апелляционные и кассационные представления.

В последние годы правоохранные органы направили свои усилия на выявление коррупционных действий, содеянных госслужащими высших рангов (их привлечено к админответственности свыше 1 тыс.).

Например, за совершение коррупционных действий в июле судом привлечено к ответственности директора департамента Министерства образования и науки Украины.

Не оказывает содействия борьбе с коррупцией ее распространение в правоохранных органах. Так, в текущем году к административной ответственности за совершение коррупционных действий судами привлечено свыше 200 служебных лиц органов внутренних дел и налоговой администрации.

В то же время значительное количество привлеченных к ответственности работников правоохранных ведомств также свидетельствует о стремлении самых органов искоренить, минимизировать коррупцию в своих рядах.

Хочу отметить, как только возникает вопрос о коррупции все смотрят в сторону правоохранных органов, будто бы это проблема исключительно их. Однако борьба с коррупцией это задача не только силовых структур, а всех без исключения государственных учреждений.

Эффективность нормативно определенных механизмов противодействия коррупции повышается при условии наличия политически осведомленного общества с высоким уровнем правосознания, которое может контролировать действия госслужащих.

В завершение хочу подчеркнуть, что Генеральная прокуратура Украины и в дальнейшем готова сотрудничать в процессах усовершенствования наработок направленных на решение основных организационных и практических вопросов противодействия коррупции.

Убежден, что обсуждение существующих проблем поможет глубже понять задачи, которые необходимо решать совместно.

## Working Group 1. Effective means to gather evidence in corruption cases

### **Hypothetical case**

*(Based on a case study developed for the [ADB OECD Asia-Pacific Anti-Corruption Initiative](#) by Ms. Arvinder Sambej, Amicus Legal Consultants Ltd.)*

Mr Kurkov is a senior specialist in the Ministry of Transport. He works in the administrative support unit. Part of his duties is to arrange the procurement of goods and services for the Ministry.

Mr Kurkov's position is a middle-ranking one, which he has worked in the Ministry for 10 years.

In conjunction with two other civil servants, Mr Kurkov is responsible for overseeing preparation of tender technical proposals, putting together the tender information and gathering bids from potential bidders. He does not, however, carry out a decision-making role as to the actual awarding of contracts.

There have been allegations circulating for some time of widespread corruption within this Ministry, particularly in relation to certain significant roads and bridges construction projects, for which it is responsible. There were many allegations in the media. However, there have been no criminal investigations.

The new government came to power a few months ago. It announced that there would be a mayor anti-corruption drive in the public sector. As part of this initiative, it has chosen the Ministry of Transport as the first public institution to be subject to an independent audit, particularly in the area of public procurement. A confidential telephone "hotline" and an Ethics Office were created within the Ministry to report corruption.

The hotline has been operational for the last three days. Yesterday, Mr Kurkov rang it and requested a meeting with the Ethics office. Although the hotline accepts anonymous calls, Mr Kurkov voluntarily identified himself. Late yesterday, Mr Kurkov met with two representatives of the Ethics office. The contents of the conversation were recorded in form of written notes, signed by Mr Kurkov.

Mr Kurkov stated that he wished to report a history of corrupt dealings in the Ministry of Transport, some of which he had been involved in. He explained that he has been a middleman in corrupt dealings and is willing to co-operate with an investigation in exchange for immunity from prosecution.

His gain for what he describes as a minor part in the process is a degree of career advancement when, after four years in the post, his salary and responsibilities were increased. He explained that he has come forward now as he was worried about exposure as a result of the new anti-corruption policy.

Mr Kurkov alleges that construction projects managed by the Ministry of Transport have been routinely awarded subject to the condition that bidders make advance "commission payments". These payments needed to be made to an account in Switzerland, belonging to a company called – Mysterious Consultancies Ltd.

Mysterious Consultancies Ltd is a company registered in the British Virgin Islands (BVI). It has an office in our country. As far as Mr Kurkov knows, Mysterious Consultancies Ltd does not do any useful work in exchange for the payments it receives. Mr Kurkov said that he tried to inquire what sort of business this company is engaged in, but he was told not to ask such questions. He understands, however, that those he describes as “the owners” of the company are careful to distance themselves from its day to day running.

Mr Kurkov believes that the Mr Jankauskas, longstanding office manager of Mysterious Consultancies Ltd. makes most of the daily decisions for the company.

Mr Kurkov has no evidence to support this, but he believes that the actual beneficiary of these advance “commission payments” is Mr Vujovic, the Minister of Transport, through the intermediary of his wife and ultimately also his political party.

Mr Kurkov alleges that the latest example is a contract for building a bridge, which is about to be awarded to Fast Road Ltd, a company registered in Lihtenstein, known to be a subsidiary of Trikkea, an enterprise registered in Germany.

Four companies have submitted tenders two weeks ago. Mr Kurkov is expecting to speak by phone to a Fast Road Ltd manager within the next days about the procedure for making the “facilitation payment” to Mysterious Consultancies Ltd.

The Financial Intelligence Unit of our country has just provided information to the National Anti-Corruption Commission that came from their counterparts in the United Kingdom. The information shows that the Sometimes Honest Bank (SHB) has reported two suspicious transfers made a month ago. The transfers were made from Mysterious Consultancies Ltd account in ABC Bank in Switzerland to Grand Designs Ltd, a company based in London, the United Kingdom.

Each of the two transfers was in the sum of 400 000 US dollars. An enquiry of the companies register in the UK has revealed that Grand Designs has two directors, Mrs Aleksandra Vujovic and Mr Alisher Sultanov (both nationals of our country).

SHB Bank made the report to the FIU in United Kingdom, because its risk management system identified Mrs Vujovic and Mr Jankauskas (her brother) as “Politically Exposed Persons” at the time that the account was opened. “Customer due diligence” was carried out by this bank. It led to suspicions that the two transfers were proceeds of criminal activity.

An investigatory journalist in a TV programme showed that Mr Vujovic and Mrs Vujovic live in a villa in front of the sea and it was bought a year ago. According to this programme, the villa is registered on the name of Mrs Vujovic. The TV programme also filmed Mr Vujovic driving a Mercedes-Benz S 600 of 2007 (market price 48 thousand EUROS) and interviewed neighbours saying he has been driving this car regularly. As a candidate to election Mr Vujovic had to submit an asset declaration. He declared an apartment in the capital city, a Wolkswagen Golf of 2003 (market value about 5 000 EUROS), savings in cash in the amount of 500 000 EUROS and a loan of 50 000 EUROS.

In recent elections the Reforms party won a considerable part of the votes following an impressive pre-election campaign. Mr Vujovic was one of the leading candidates. He was elected and shortly after became Minister of Transport in the new coalition government (he was also Minister of Transport for

previous government 3 previous years). Several media reports talked about possible illegal donations received by the Reforms party.

### **Tasks and questions**

**You work at the National Anti-Corruption Commission (NACC). NACC has both investigative and prosecutorial powers in relation to corruption crimes. Given the sensitivity of the matter, the Director and responsible prosecutors and investigators and have gathered together for a meeting.**

**You need to make the following decisions without delay:**

- Can Mr Kurkov be offered immunity? If so, should he be offered it? If not, is there any alternative protection that can be made in exchange for his co-operation?
- Should a criminal investigation be initiated? What offences should be investigated? Who should be targeted? Suggest pieces of evidence to prove each element of these offences.
- In the event a covert investigation is started, should Mr Kurkov be deployed in a covert role or should another method be used?
- What other special investigative means can be used? What could be the main challenges?
- There seem to be allegation of illicit wealth of the Minister. How can this be proven?
- Is there a need to freeze the assets in this case? How to identify these assets and how to freeze them?
- What investigatory means can be used in relation to Minister? Main challenges?
- Can intelligence or evidence be sought from foreign countries in respect of the offences to be investigated? If so, how should NACC go about making such requests?
- Can NACC in its investigation also cover the legal persons and how?
- In case a team for investigation of this case is put together, apart from NACC which other institutions and eventually hired specialists should be involved?

## Working Group 2. Laying charges and defending a corruption case in the court

### Case study

#### Facts. The bidding for medical equipment

The Ministry of Health from State X has launched a **tender for buying 16 million Euro medical equipment, in the benefit of Hospital St. Mary**. The purchase would be financed from a loan guaranteed by the state. The Bidding Evaluation Committee was composed of doctors and officials from the ministry. **Dr. Andrei - famous physician, member of an important political party and Senator in the Parliament of the state X was appointed as the President of the Evaluation Committee**. 8 companies have submitted bids. The tender was won by the Swiss company MEDICA.

The contract was signed and forwarded, as required by law, to the Ministry of Finance for analysis in order to issue letters of guarantee that would allow payments to the winning company. Responsible for compiling the dossier that would allow the signing of the letter of guarantee was Mrs Wali. Mrs. Wali has prepared and signed all necessary documentation, based on which the letter of guarantee was signed by the Minister of Finances and the contract has begun to be executed.

After three years, the Health Minister has ordered **an internal audit on the conduct of public procurement procedures** within the ministry, including the one resulted in the contract with the Swiss company MEDICA. The audit report concluded that:

- the medical equipment included in the tender specifications had nothing to do with those mentioned in the list of necessary equipment required by the hospital.
- the winning company was the one that offered the highest price
- the high-performance equipment purchased is stored at the Hospital, unused.

In its turn, the Ministry of Finance also ordered **an external audit**, made by a British consulting firm. This audit report reached similar conclusions as the first report.

Since there were doubts about the legality of a public procurement procedure in that case, a **criminal investigation** has been opened.

The investigation directed by the prosecutor concluded that the tender procedure has been rigged by the president of the Bidding Evaluation Committee, Dr. Andrei, who has favored the Swiss firm MEDICA. Thus, **the finding financial and accounting report prepared by a specialist of the prosecution office**, at the request of the prosecutor, highlighted a series of breaches of the public procurement procedure and the fact that a proper evaluation should have indicated another bidder as winner.

While investigating the possible link between the winning company and members of the evaluation committee, the prosecutor collected evidence showing that **between Dr. Andrei and the company MEDICA owned by Dr. Martin and operating in the state X through his representative, Ms. Cora, there were close relations** even before the opening of the tender; that these relations have continued by



revealing confidential information during the tendering procedure and, furthermore, that during and after the auction, Dr. Andrei received substantial financial benefits from that company.

**The evidence on which the prosecutor based his charges against Dr. Andrei:**

- **Exchange of mail** between Mrs. Cora and Dr. Martin and other staff of the company MEDICA, through which **confidential information during the auction was communicated**, as well as information regarding Dr. Andrei's whereabouts.
- **Statements of 3 employees of the company MEDICA** who confirmed the existence of close and lasting relations between Dr. Andrei and Dr. Martin, **Dr. Andrei being considered as a very influential person in the political and healthcare field in his country, with opportunities to become health minister in the near future.** The expression used by one of the witnesses was "*Dr. Andrei was considered a man of the future, a super-guru to be kept hot*". The witnesses said that the company has paid a series of fees to Dr. Andrei, while **the payments were recorded in the accounting books of the company as "assistance for the development of a project in the State X"**. Dr. Andrei was recognized from the **photo album** presented by the prosecutor.
- **Accounting documents of the company MEDICA and bank statements** showing the **payment of travel expenses for 7 trips of Dr. Andrei and his concubine in different countries** (Monaco, Switzerland, Spain, USA), justified as **meetings with company representatives** in order to discuss about "*a tender in the State X*" or as sponsorships for Dr. Andrei's participation in some medical congresses.
- Documents **proving the setting up by Dr. Andrei of the offshore company "SMART Ltd" based in British Virgin Islands** and the opening of the offshore company's bank accounts, as well as the doctor's personal bank accounts in the same Swiss banks, in the same day. According to the bank statements, within 1 year after the above mentioned public contract was signed, several payments were made by MEDICA in the accounts of the off shore company, totaling about **3 million Euro**. During the next 3 years, this amount was withdrawn by Dr. Andrei in different installments, or transferred to his personal accounts. The investigation identified payments made from the offshore company's accounts as well as from the personal bank accounts of Dr. Andrei to **finance trips for himself and his concubine in the Caribbean - the island of Bora Bora, in Singapore, U.S., as well as for shopping in luxury stores for jewelry, luxury watches, haute couture clothing, fireworks, etc.**

**The evidence on which the prosecutor based his charges against Mrs. Wali:**

These demonstrate the close links between her and the representatives of the company MEDICA – the owner Dr. Martin and Mrs. Cora, his representative in the state X, as well as the receipt by her of undue benefits from the company during the procedure prior to the letter of guarantee to be signed by the Minister of Finance:

- **The exchange of mail** between Mrs. Cora and Dr. Martin in which they discuss the **organization of meetings at the headquarters of MEDICA**, in Switzerland and the payment of travel expenses for Ms. Wali to be present at these meetings, as well as talking about various **gifts** that were to be given to the defendant.
- **Accounting documents of the company MEDICA** in which there were mentioned payments of 100,000 Euro to Mrs. Wali, with the justification "**payments for speeding up the execution of the contract with the Ministry of Finance.**"

- **Bank statements** proving the transfer of sums totaling about 100,000 euros from the account of MEDICA to the account of Mrs. Wali's husband, account for which Mrs. Wali had the power of attorney.
- A copy of the **tender specifications**, found during a search conducted at the office of Dr. Andrei, wore **Mrs. Wali's handwritten annotations**, demonstrating her involvement in this business long before she has been vested with formal attributions of verification of the contract.
- Ms. Wali has been **recognized in the photo album** showed by the prosecutor to of the employees of MEDICA as a "friend" of Mrs. Cora, supposed to help the company in running smoothly the contract with the Ministry of Health.

During the criminal investigation **none of the two defendants admitted that they received any material benefit** from the company who won the bid, nor that they have directed in any way the outcome of the bidding. The defendant Dr. Andrei, in his first statement, denied any connection with the off shore company SMART Ltd. and its bank accounts. Subsequently, the defendant refused to give statements, relying on the **right to silence**.

**The prosecutor has indicted the two defendants in two separate cases.** Defendant Dr. Andrei was indicted for bribery, abuse of office and money laundering, and defendant Mrs. Wali for bribery. The two trials were held in different courts.

In court, **both defendants defended themselves by presenting a different explanation of the receipt and spending of the money** transferred by the company MEDICA to the bank accounts controlled by them.

#### **Defense and the ruling of the court:**

**1. Mrs. Wali defended herself by claiming that the money transferred to her husband's bank account represents a payment made by a business partner of her husband to settle a debt to him** and that the business partner has made the payment through the company MEDICA, who owed him money. The court did not accept this defense because **the business relations between the defendant's husband and his alleged partner were not proven by any document**, the only evidence given in relation to this allegation being **the witness statement of the defendant's husband**. Instead, **the explanation of the payment as it was presented in the indictment**, that it represented the benefit received for the defendant's help in connection with carrying out the contract with the Ministry of Health was accepted by the court because **it resulted from the corroborated evidence presented by prosecutors**, evidence which demonstrates the close relations existing between the defendant and the Swiss company representatives. The court also held that the fact that payment was made in the bank account of the defendant's husband does not constitute an impediment to Mrs. Wali's criminal responsibility because the benefit can be received by intermediary and, even if the evidence indicated that the money was meant to the defendant's husband, the situation would not be changed because an undue benefit given to the family of a public official should be considered as a bribe as well.

**Mrs. Wali's trial at first instance lasted 6 months** and the **defendant was sentenced to two years imprisonment with suspension of execution** (the court held personal circumstances favorable to the defendant). The ruling remained unchanged during the legal remedies and the decision was **final**.

**2. Dr. Andrei** has defended himself in the trial in two respects. First, he **argued that the public tender was conducted fairly**, and the company MEDICA was entitled to win. In this respect, he requested the court to order **an expert report by an independent expert** and the court granted the request. The expert

report concluded that, despite some violations of procurement law, the score given by the evaluation committee was right in favor of the winning firm. Note that, given the lack of budgetary resources of the court, it has **accepted that the payment of the independent expert to be made by the defendant**. A second line of defense was the defendant's claim that **the payments made by the company MEDICA to the bank accounts of the offshore company SMART Ltd., set up by him, represents in reality money owed by MEDICA to Mrs. Cora**, for the services rendered to the company and that **the defendant agreed to act as an intermediary between the Swiss company and its representative in the State X, on humanitarian grounds**, Mrs. Cora being his patient. Moreover, the defendant argued that he also agreed and he did that for humanitarian reasons as well, to help Mrs. Cora **spend** that money, accompanying her in her many travels abroad where she had to undergo medical treatment and buying her what she asked for. Unfortunately, Mrs. Cora died before she could be heard during the proceedings. In support of its allegations, the defendant indicated **the letter sent by Dr. Martin – the owner of MEDICA – to the court**, letter in which he mentioned about a "*soul relationship*" existed between Dr. Andrei and Mrs. Cora and about the informal ways in which Mrs. Cora was paid by the company. Note that during the investigation, Dr. Martin did not respond to summons and could not be heard through the mutual legal assistance procedure. The **defendant also argued that the accounting documents and notes found during the searches conducted at the headquarters of MEDICA company, in Switzerland, are false**, being made by the company's representatives with the purpose of tax deduction of some fictitious expenses. The court accepted all these defenses and concluded that, **in the absence of direct evidence**, it was not proven beyond reasonable doubt that the official received undue benefits in relation to the role performed by him in the public tender.

**Dr. Andrei's trial at first instance lasted four years** and the defendant was **acquitted**. The prosecutor lodged appeal.

#### Questions and issues to discuss:

1. **Direct and indirect evidence**. What is the **value of financial evidence** in a corruption trial? What precautions should be taken during the criminal investigation for a corruption case based on financial evidence to succeed in court?
2. What evidential value may have the **audit reports and the findings of the specialists** employed by the prosecution? What can be considered as an **independent expert report**?
3. How should the prosecutor build his case when the defendant invokes his **right to silence** during a criminal investigation?
4. **The trial length**. In this case the defense strategy aimed at extending the duration of the trial (by invoking numerous procedural exceptions with dilatory effect), so that, with time, the social importance and resonance of the act committed to fade and, possibly the statute of limitation period to elapse. In your legislations are there sufficient means to prevent undue delays in a criminal trial?
5. During the trial, the defendant and his lawyer have repeatedly appeared in **TV shows**, presenting either the defendant's innocence in this case, or emphasizing his professional accomplishments and the special value of the defendant as a physician. How relevant (if) must be for the judge the public opinion formed in relation to a concrete case?
6. **Specialization of judges** in corruption cases and, in general, in cases of economic crime ("white collar crime"). Do we need specialized judges?

## Annex 1. Seminar Agenda

### DAY I : 20 October 2010

#### 9:30 Welcoming remarks

*Ms. Laura Codruta Kovesi*, the Prosecutor General of Romania  
*Mr. Daniel Morar*, Chief Prosecutor, National Anticorruption Directorate, Romania  
*Ms. Inese Gaika*, Anti-Corruption Division, OECD

Facilitators: *Mrs. Cynthia L. Eldridge*, U.S. Department of Justice, Resident Legal Advisor in Albania  
*Mr. Martin Kreutner*, President of the European Partners against Corruption, Chairman of the Steering Committee of IACA, the International Anti-Corruption Academy, Austria

#### 10:00 – 13:00 TOPIC 1: EFFECTIVE MEANS TO DETECT AND INVESTIGATE CORRUPTION CRIMES

##### ***Means of detecting and investigating corruption offences and joint investigation teams***

*Mr. Juuso Oilinki*, Detective Chief Inspector, Finnish Police, National Bureau of Investigation, Finland

##### ***Effective detection and investigation of corruption***

*Mr. Jure Rus*, Head of the investigation, NPU UKP GPU, National Bureau of Investigation, Slovenia

##### ***European Convention on Human Rights: standards in investigating corruption***

*Mr. Dmytro Kotliar*, Resident advisor, ACN, OECD

##### ***Joint Investigative teams: a successful tool to investigate corruption in Albania***

*Mr. Dritan Rreshka*, Head of the Joint Investigative Unit in Tirana, Prosecutor General's Office, Albania

##### ***Discussion***

#### 14:00 – 16:00 TOPIC 2: PROSECUTION OF CORRUPTION

##### ***Coordinating and prosecuting corruption cases, elements of corruption crimes and qualification of crimes***

*Dr. Rainer Hornung*, public prosecutor, Freiburg, Baden-Wuerttemberg, Germany

##### ***Role of USKOK in coordinating and prosecuting corruption in Croatia***

*Ms. Diana Pervan*, County State Attorney Office, Zagreb, Croatia

**16:00 – 17:30 Parallel Working Groups**

<p>WORKING GROUP 1: <b><i>Effective means to gather evidence in corruption cases</i></b></p> <p>Moderators: <i>Ms. Phyllis Atkinson, Ms. Inese Gaika</i></p>	<p>WORKING GROUP 2: <b><i>Laying charges and defending a corruption case in the court</i></b></p> <p>Moderators: <i>Mrs. Anca Jurma, Mr. Dmytro Kotliar</i></p>
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**DAY II : 21 October 2010**

**10:00 – 13:00 TOPIC 3: SELECTED KEY CORRUPTION OFFENCES**

Facilitators: *Ms. Anca Jurma*, chief prosecutor, Service for International Cooperation, Public Information and Relations, DNA, Romania  
*Mr. Dmytro Kotliar*, OECD

***Investigation and prosecution of high level corruption in Romania***  
*Mr. Cristian Anghel*, prosecutor, DNA, Romania

***Investigation and prosecution of foreign bribery***  
*Mr. Fabio de Pasquale*, prosecutor, Court of Justice of Milano, Italy

***Investigation and prosecution of corruption in health sector***  
*Mr. Marcello Paranhos de Oliveira Miller*, public prosecutor, Public Prosecutors Office in Rio de Janeiro

***Experience in investigating high level corruption in Latvia***  
*Mr. Rimants Kuzma*, investigator, Corruption Prevention and Combating Bureau, Latvia

***Discussion***

**14:00 – 15:30 TOPIC 4: INDEPENDENCE AND SPECIALISATION OF POLICE AND PROSECUTORS**

Chairs: *Mr. Martin Kreutner*, President of the European Partners against Corruption, Chairman of the Steering Committee of IACA, the International Anti-Corruption Academy, Austria  
*Ms. Laura Stefan*, Romanian Academic Society, Anti-Corruption Coordinator, Romania

***Independence and specialisation – presentation of the issues by chairs***

***Brainstorming***

***Effective detection and investigation of corruption by a specialised and independent anti-corruption body in Lithuania***  
*Mr. Daumantas Počius*, investigator, Special Investigation Service, Lithuania

### **DAY III : 22 October 2010**

#### **10:00 – 12:00 TOPIC 5: EFFECTIVE ASSET FORFEITURE – FROM TRACING TO EFFECTIVE CONFISCATION**

Facilitator: *Ms. Cynthia L. Eldridge*, U.S. Department of Justice, Resident Legal Advisor, Albania

***Effective investigation of assets, practical application of MLA and asset recovery***

*Ms. Phyllis Atkinson*, Head of Training, Basel Institute on Governance/ International Centre for Asset Recovery, Switzerland

***Effectively tracing and freezing assets and ensuring confiscation – experience of Switzerland***

*Mr. Jean-Bernard Schmid*, Investigating Magistrate, Financial Section, Palais de Justice, Switzerland

***Tracing and confiscating assets gained through corruption in Ukraine***

*Mr. Stanislav Turovskyi*, prosecutor, Prosecutor General's Office of Ukraine

***Discussion***

#### **12:10 – 13:00 Conclusions**

## Annex 2. List of Participants

Countries	
Albania	<p><b>Mr. Dritan Rreshka</b> Tirana Prosecution Office Specialized Unit for Fight against Economic Crime and Corruption Head</p> <p><b>Mr. Madrid Kullolli</b> Durrës Prosecution Office Task Force Antifraud and Corruption Head</p> <p><b>Mr. Maksim Sota</b> Vlora Prosecution Office Task Force Antifraud and Corruption Head Prosecutor</p>
Armenia	<p><b>Mr. Arshak Gasparyan</b> State Revenue Committee Department of Investigations Head of Investigative Department # 1</p> <p><b>Mr. Eduard Sarikyan</b> State Revenue Committee General Department of Investigations Head</p>
Azerbaijan	<p><b>Mr. Rashid Mahmudov</b> General Prosecutor's Office Anticorruption Department with the Prosecutor General Prosecutor of Analytical-information Division</p>
Belarus	<p><b>Ms. Aksana Sheliamet</b> Prosecutor General's Office of the Republic of Belarus Division for Supervision over the Observance of the Legislation for Combating Corruption and Organized Crime Senior Prosecutor</p>
Bulgaria	<p><b>Ms. Pavlina Nikolova</b> Supreme cassation Prosecutor's Office Prosecutor</p>
Croatia	<p><b>Ms. Diana Pervan</b> County State Attorney's Office Economic Crime Department</p>

	Deputy County Attorney
Estonia	<p><b>Ms. Triin Bergmann</b> State Prosecutor Office of the Prosecutor General Prosecution Department</p> <p><b>Mr. Villu Örd</b> Security Police Leading Specialist</p>
FYR Macedonia	<p><b>Mrs. Gordana Smakoska</b> Basic Public Prosecution Office for Organized Crime and Corruption Public Prosecutor in Basic Public Prosecution Office for Organized Crime and Corruption</p>
Georgia	<p><b>Mr. Vaja Panozishvili</b> Tbilisi Prosecutor's Office Investigative Unit Deputy Head</p> <p><b>Mr. Kakhaber Machavariani</b> Tbilisi Prosecutor's Office Chief Prosecutor of Georgia Investigative Unit Deputy Head</p>
Kyrgyzstan	<p><b>Mr. Anvar Gafurov</b> National University Prosecutor General Office Senior Prosecutor Anticorruption Directorate</p> <p><b>Mr. Mirbek Rasulov</b> National University Prosecutor General Office Deputy Head of Directorate for investigation of particularly important criminal cases</p>
Latvia	<p><b>Mr. Rimants Kuzma</b> Corruption Prevention and Combating Bureau Investigator</p> <p><b>Ms. Viorika Jirgena</b> Prosecutor's General Office Criminal Law Department Prosecutor</p>



Lithuania	<p><b>Mr. Daumantas Pocius</b> Special Investigation Service Pre-trial Investigation Division Chief Investigator</p> <p><b>Mr. Edvardas Rutkauskas</b> Special Investigation Service Intelligence branch of Operational Activities Division Head of intelligence branch</p>
Moldova	<p><b>Mr. Gheorghe Russu</b> Center for Combating Economic Crimes and Corruption Deputy Director</p>
Montenegro	<p><b>Mr. Nikola Samardzic</b> Basic State Prosecutor Herceg Novi Deputy Basic State Prosecutor Herceg Novi</p> <p><b>Mr. Zarco Pajkovic</b> Basic Prosecutor office in Kotor Deputy Prosecutor</p>
Romania	<p><b>Ms. Laura Codruta Kovesi</b> Prosecutor's Office attached to the High Court of Cassation and Justice General Prosecutor</p>
<b>DNA - National Anticorruption Directorate</b>	<p><b>Mr. Daniel Marius Morar</b> Chief prosecutor</p> <p><b>Mrs. Carmen Galca</b> Deputy chief prosecutor</p> <p><b>Ms. Laura Oprean</b> Deputy chief prosecutor</p> <p><b>Ms. Anca Jurma (main contact)</b> Chief prosecutor Service for International Cooperation, Public Information and Relations</p> <p><b>Mr. Costin Vârlan (main contact)</b> Prosecutor Service for International Cooperation, Public Information and Relations</p> <p><b>Mr. Viorel Cerbu</b> Deputy chief prosecutor of the Section for Combating Corruption Offences</p> <p><b>Mr. Cristian Anghel</b> Prosecutor, Penal Judicial Section</p>

	<p><b>Mrs. Monica Danciu</b> Prosecutor, Penal Judicial Section</p> <p><b>Mr. Horatiu Baias</b> Section for Combating Offences Assimilated to Corruption Prosecutor</p> <p><b>Mrs Livia Saplacan</b> Spokesperson of the DNA</p>
	<p><b>Mr. Andrei Nistor</b> Ministry of Administration and Interior General Anticorruption Directorate Police officer, Chief of the Investigation Department</p> <p><b>Mrs. Daniela Anton</b> Prosecutor's Office attached to the High Court of Cassation and Justice Section for Criminal Investigation and Forensics, Prosecutor</p> <p><b>Ms. Camelia Bogdan</b> Judge Second Penal Section Bucharest Tribunal</p>
Tajikistan	<p><b>Mr. Eradj Mahmadaliev</b> Agency of State Financial Control and Struggle against Corruption Investigation Department Senior Investigator of the highly important cases</p>
Ukraine	<p><b>Mr. Stanislav Turovskyi</b> Prosecutor General's Office of Ukraine Main Department of Supervision over Law Observance in Operative and Search Activity, Inquiry and Pre-Trial Investigation Deputy Head of Department</p>
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