

Protecting the Independence of Judges

Kiev, 15 June 2019

International standards and best practices

HARD LAW

- Council of Europe civil and criminal anti-corruption Conventions: GRECO
- UN Anti-Corruption Convention
- Inter-american Convention against corruption
- African union Anti-Corruption Convention

SOFT LAW

- CE Rec on anti-corruption measures: GRECO
- Financial Action Task Force 40 Recommendations
- Basel Institute of Governance

Criminal law measures

- 1. Criminalization of erroneous or insufficient declaration of assets
- 2. Illicit enrichment:
 - South America (Argentina, Belize, Bolivia, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico)
 - Asia (Bangladesh, Butan, Brunei, China, Cambodia, India, Malaysia, Nepal, Pakistan, Yemen, Jordan, Philippines)
 - Africa (Algeria, Benin, Botswana, Burundi, Ethiopia, Egypt, Lesotho, Madagascar, Malawi, Nigeria, Uganda, Senegal, Sierra Leone, Gabon, Zambia)
 - Europe (Albania, Cyprus and Macedonia)

2. Illicit enrichment

- Not for every citizen, but for special categories of public employees: PEPs
- Crime of abstract danger (*abstrakte Gefährdungsdelikte*):
 - Incongruence between (directly and indirectly owned) property and earnings
 - Incongruence between lifestyle and earnings
 - Risk of breach of presumption of innocence (It CC, Portuguese CC, Ukrainian CC)?

2. Illicit enrichment

- PP proves what are actual earnings and assets and the gross disproportion between them;
- Defendant may rebut all elements of the crime:
 - That he has more earnings
 - That he has less assets
 - That there is not disproportion between them because the assets derive from sources other than earnings, such as an inheritance

3. Confiscation

- Enlarged confiscation: based on a previous conviction for corruption or other crimes related to the performance of professional duties; goes beyond the direct proceeds of the crime, includes all assets (without any causal link with the offence) earned after the commission of the offence during a certain period of time
- NCB confiscation: non conviction based confiscation: civil forfeiture of property not based on a previous conviction

II. Criminal procedure measures

- Special investigative techniques: undercover operations, anonymous witnesses, plea bargaining
- Special evidence rules: more exceptions to the fruit of the poisonous tree doctrine:
 - Inevitable discovery exception (in spite of breach of important defence rights direct and indirect evidence is taken into account if it would be otherwise –inevitably- gathered)
 - Good faith exception (in spite of breach of defence rights evidence is taken into account if the police officer was in good faith)
- Special courts, like High Anti-corruption court
 - GRECO: only for « transitional period » (4th round report)
 - Consultative Council of European judges opinion 15: reluctant

4. Judicial self-governance

- High Council of Justice, 21 members, with a majority of judges elected by their peers, no Minister of justice, no Prosecutor General: Venice Commission and GRECO ok after 2016 Const. Reform
- Extended competence after 2016, including lifting of judicial immunity (not Parliament) and consent to detention
- But **complicated qualification procedure**: unclear division of powers, overlaps between HCJ and the High Qualifications Commission of judges: the latter should be part of the HCJ
- But **role of the Public Council of Integrity is problematic** (no rules on conflicts of interest imposed on civil society members)
- High Administrative Court is competent to decide appeals against acts of the HCJ and HQC (article 19 , § 18 of the Code of Administrative Procedure)

4. Judicial self-governance

- **Evaluation of judges by National School of Judges is criticised;** should be replaced by periodic performance evaluation carried out by judges on basis of pre-established, uniform and objective criteria
- Automated case management of cases; assignment of cases by computer without any possibility of manipulation

5. Disciplinary proceedings

- HCJ competent for all disciplinary offences
- But unclear scope of some disciplinary offences ; unclear criminal offences such as delivery of unfair judgment
- But non appealable dismissal of complaints by the JR
- But limited right of complainant to appeal HCJ disciplinary chambers
- Disciplinary and disqualification proceedings should involve the complainant (the alleged victim of judicial abuse) and the challenged judge, but the latter should not intervene in the decision making procedure (challenged judge cannot be judge of his own case)

5. Disciplinary proceedings

- Disciplinary and dismissal proceedings against judges with all defences similar to criminal procedure, including:
 - The right to be heard in public before the HCJ sitting in plenary
 - The right to make oral representations on both factual and legal issues and the penalties before the HCJ
 - The right to have witnesses heard before the HCJ
 - The right to appeal the HCJ decision to a court with full jurisdiction (on facts and law, including credibility of witnesses and proportionality of penalty) (*Ramos Nunes v. Portugal*)
 - The right to an adversarial and public hearing before the body performing judicial review of the HCJ decision
 - The right to be heard orally before the court
 - Members of the appellate court not subject to disciplinary power of HCJ
 - President of appellate court should not intervene in the composition of the disciplinary chambers of the HCJ
 - The presumption of innocence