DISTINGUISHING CRITERIA BETWEEN PETTY AND HIGH-RANKING CORRUPTION

COUNTRIES' CASE STUDIES

Editor: Tünde A. Barabás

Distinguishing criteria between petty and high-ranking corruption

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CONTENT

The risk of corruption and the distinction between 'petty' and 'high-ranking' corruption in European countries

INTRODUCTION

Corruption causes damages to all EU Member States and to the EU as a whole, too. The CRITCOR-project (Corruption risk, risk of corruption? Distinguishing criteria between petty and high-ranking corruption, supported by the Hercule III 2020 Training, Conferences and Staff Exchange HERCULE-2020-TC-AG Program of the EU) aims to explore factors that allow the formulation, the measurement, the analysis and the differentiation of levels of corruption. The demarcation of the different levels of corruption focuses on the distinction between low-level and high-level corruption, as the fight against the latter is gaining importance at EU level. With this approach, the project targets to further develop the potential ways of curbing corruption in the Member States of the European Union adopting a deliberative method which is new for researching corruption.

As we can see in all EU countries, the prosecution/criminal justice system makes action mostly in high profile corruption cases. The main question – apart from how the high-level corruption/corporate crime can be defined – is what the appropriate criminological or criminal justice responses should be in order to combat corruption.

One of the most famous theories applicable in this field could be 'responsive regulation' (AYRES – BRAITHWAITE, 1992: 87.), which stands for 'tripartism' in legal regularisation. It highlights the limits of regulation as a transaction between the state and business. It argues that unless there is some third party (or a number of them) in the regulatory game, regulation will be captured and corrupted by money power. According to Braithwaite's theory *"responsive regulation involves listening to multiple stakeholders and making a deliberative and flexible (responsive) choice from regulatory strategies that can be conceptually arranged in a pyramid. At the bottom of the pyramid are more frequently used strategies of first choice that are less coercive, less interventionist, and cheaper."*[1] If the damage caused by a crime can be remedied, it can be allocated in the society or a corporation can donate money for a certain NGO and "buy" the "absolution". In the project we examine how the indicators of corruption in society and of corruption crimes that can be assessed in terms of criminal law relate to each other.

There is a clear difference between petty and high corruption activities in the sense of causality, in the social, political and economy inputs, or in the language used in connection with it. It can be presumed that petty corruption has much more to do with individual decision-making and a human behavior, whilst in the case of high-ranking corruption, there are more different social, political and economic factors at play. The current research intends to clarify the border between the legally defined/ pursued corruption activities and the socially accepted ones. We examine how indicators of corruption in society and corruption crimes that can be assessed in terms of criminal law, relate to each other.

The CRITCOR-project relies on four pillars: 1) The international participants of the kick-off meeting in March 2021analyzed the definition, the forms, the measuring, as well as the actors and the

[1] http://johnbraithwaite.com/responsive-regulation/

language of corruption, in order to develop a common language and a common ground. 2) At the second workshop, participants were invited to discuss the above-mentioned topics, and by an intensive and common analysis, the topic of corruption was interpreted in a more profound way, giving a deeper insight into the phenomenon. 3) As the third pillar of the project (in November 2021), a training session will be held using the so-called world cafe method, for Hungarian judges, prosecutors and police officers. They will discuss four case studies on corruption in order to find out the important aspects of it for professionals in the criminal justice. 4) At the final conference, we are planning to summarize results based upon the four pillars of the project. By the time of the final conference, two volumes and a toolkit will be published.

As the leader of the project, the National Institute of Criminology (OKRI) has been conducting research on the phenomenon of corruption – both on its criminal law, criminological side and its sociological aspects – in line with its tasks and objectives for more than a decade now. In addition to theoretical research, documents were analyzed, in-depth interviews were made, questionnaires were completed in order to examine the features and problematical issues of domestic practices. On several occasions, international comparative methods were used for such purposes: recommendations for legislation and also the application of law were developed, and some research even concerned the issue of measuring corruption, the forensic, public order and security segments of the phenomenon.

The CRITCOR-project also provides an opportunity to facilitate the protection of the financial interests of the European Union by further developing the results of the institutional research: including international, comparative, awareness-raising workshops and conferences organized for representatives of legal professions. As well as strengthening the international co-operation, the evaluation of the results and sharing international experiences and good practices and their use in domestic legislation and in the application of law. In the past 10 years, OKRI has made plenty of research and has implemented projects which dealt with phenomena, issues and tools appearing and emerging at EU level, partly relating to the protection of the financial interests of the EU.

We expect that the results of the project will contribute to the prevention and the repression of corruption in the EU Member States in the long term.

In this book, which contains the first results of the project, you can learn about the different ways of combating corruption in European countries with the help of the most prominent foreign and Hungarian authors on the subject, and can also get a more detailed picture on the situation in Hungary in terms of corruption and fraud against the EU's financial interests.

Budapest, October 2021

Tünde A. Barabás

References

AYRES, Ian – BRAITHWAITE, John (1992): *Responsive Regulation. Transcending the Deregulation Debate.* New York: Oxford University Press.

I. INTERNATIONAL CASE STUDIES

NARRATIVES OF TRANSITIONAL JUSTICE, ECONOMIC VIOLENCE AND ORGANISED CORRUPTION DURING TRANSITION – WHERE IS THE WESTERN BALKANS?[1]

SUNČANA ROKSANDIĆ[*]

Introduction

Without addressing economic violence, there can be no long term stability and prosperity. It took a while for the international community to recognise this interconnection. Transitional justice policies and mechanisms often disregarded this phenomenon, which led to sometimes serious consequences including the existence of organised corruption. This term is not introduced in order to add more confusion to white-collar crime research but, on the contrary, to underline the importance of addressing corruption and violations of economic, social and cultural rights in transitional justice polices.

This Chapter therefore starts with a description of traditional approach towards transitional justice that has been shown to be flowed (Section 2), then continues with addressing violations of economic, social and cultural rights and economic crimes in the application of transitional justice mechanisms (Section 3) and then continues with the Section (4) situation in the Western Balkans[2], described as *"an unusual and extraordinary threat for the national security and foreign policy of the US"* and with the notion of organized crime in the Western Balkans. The main points of this Chapter are underlined in the Conclusion.

[1] Part of this article (Chapter 2 and 3) are based on on the research conducted for the book Sunčana Roksandić Vidlička (2017) and for the article by Sunčana Roksandić (2019), but with added points concering organised corruption and new developments. The main findings on the concept of organized corruption as it exists in the Western Balkans is available online in ZVEKIĆ – ROKSANDIĆ, 2021a and ZVEKIĆ – ROKSANDIĆ, 2021b.

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[2] It should be noted that the Western Balkans has become a common name used by e.g. the EU for Albania, Bosnia and Herzegovina, Montenegro, Northern Macedonia, Serbia and Kosovo (Kosovo in accordance with UN Security Council Resolution No. 1244/1999).

The traditional approach towards transitional justice that was shown to be flawed

Transitional justice refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions, reparation programmes, and various kinds of institutional reforms. (ICTJ, 2009)

One of the most-cited definitions of transitional justice comes from *Ruti Teitel*. *Teitel* defines transitional justice as *"the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes"* (TEITEL, 2003: 69.). Teitel also defines three phases of modern transitional justice. Phase I can be traced back to World War II (also see CASSIN, 2013) (as well as the post-World War I period) and was "extraordinary in its internationalism" (TEITEL, 2005: 839.) Phase II, the post-Cold War phase, is associated with the post-1989 *"wave of democratization, modernization and nation-building"* (TEITEL, 2005: 839.), mainly in response to political changes in Latin America and Eastern Europe and the demands for justice in these regions. Towards the end of the 20th century, *"global politics was characterized by conflict resolution and a recourse of justice"* (TEITEL, 2003: 71.). Phase III is associated with contemporary conditions of persistent conflict, which lay the foundation for the generalisation and normalisation of a law of violence. (TEITEL, 2003: 71.) Furthermore, global transitional justice *"implies an expanded legalism while at the same time reflecting its trends of juridicization and decentralization in terms of jurisdictional sites – local and transnational – as well as new legitimacies based on a paradigm shift from a state- to a human-centred discourse in foreign affairs"* (TEITEL, 2005: 839.). Moreover, broadly speaking, transitional justice relates to a set of legal, political, and moral dilemmas on how to deal with past violence in societies undergoing some form of political transition. (SHARP, 2014: 6.; citing NAGY, 2008) As *Dustin Sharp* describes it: *"[S]ome influential articles […] view the parameters of justice in times of transition to democracy as a function of a series of bargains between elite groups, with more or less justice available depending on the extent to which elite perpetrator groups were able to dictate the terms of transition"* (SHARP, 2004: 7.). According to Sharp, Phase IV of transitional justice should deal with *"questions of justice in transition that are more holistic, potentially yielding a more just distribution of political and economic power in post-conflict societies and reflecting fundamental commitments to local deliberation and political autonomy"* (SHARP, 2003: 178.). I agree very strongly with this statement, based on the so far experience with transitional processes (or lack of them) in Croatia and the Western Balkans.

It is today quite clear that crimes committed by some elite groups – especially political-white-collar crimes, regardless of how devastating the consequences are for the country in question, will not be on the elites' top list for prosecution, especially in weak societies (ROKSANDIĆ, 2017: 382–419.) and especially if these elites successfully in maintain their status after conflict or transition.

In addition, transitional justice can also be described as a legal policy debate, arising at moments of national crisis, that seeks to resolve certain dilemmas over how to deal with serious crime (e.g. KEMP, 2021: 254.; see also ESER – ARNOLD, 1999), raising issues of how to approach to the rule of law – giving prevalence to, for example, substantive or to procedural justice.

In the UN Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies of 2004, the notion of transitional justice *"comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"*[3]. According to this Report, *"justice is viewed as an ideal of accountability and fairness in the protection and vindication of rights as well as the prevention and punishment of wrongs. Justice implies a regard for the rights of the accused, for the interest of victims, and for the well-being of society at large"*[4].

The goals of transitional justice are sometimes described as "the ultimate aims of any redress mechanism": peace, security, reconciliation, democracy, and the rule of law (more KEMP, 2021: 254 et seq.). With regard to peace, it is important that its narrative reflects positive peace and not a negative one. As Sharp states, the notion of negative peace that has often been employed in transitional justice discourse and debates is a much narrower concept of peace than the notion of positive peace […], which involves not just the silence of AK-47s and the absence of the direct violence of hot conflict, but also the absence of more indirect forms of violence, including forms of structural violence such as poverty, corruption, radical economic, social, civil, and political inequalities, and other forms of social injustice. (SHARP, 2014: 6.; also citing GALTUNG 1968: 167.)

According to the International Centre for Transitional Justice, one part of the legal basis for transitional justice is clearly stated in the decision of the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v. Honduras* in 1988[5] where the court found that all states have four fundamental obligations in the area of human rights. These are: to take reasonable steps to prevent human rights violations; to conduct a serious investigation of violations when they occur; to impose suitable sanctions on those responsible for violations; and to ensure reparations for victims of the violation. It is however important to address all human rights abuses, not only civil and political ones.

Therefore, transitional justice is not a 'special' kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression, which is not easy to achieve without sometimes creating new injustices. One can state that the ambition of "transitional justice" is to assist

[3] The UN Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc S/2004/616 (August 23rd, 2004), par. 9.
[4] UN Report on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies 2004, par. 7.
[5] *Velasquez Rodriguez case*, Judgment of July 29th, 1988, Inter-Am. Ct.H.R. (Ser. C) No. 4 (1988) (28 I.L.M. 291).

"the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future" (ARBOUR, 2007: 2.) and therefore demands, as *Alexander Boraine* points out, a "holistic interpretation." While not detracting from criminal justice, this approach *"offers a deeper, richer and broader vision of justice, which seeks to confront perpetrators, address the needs of victims and assist in the start of a process of reconciliation and transformation"* (BORAINE, 2006). It must reach for and go beyond the crimes and abuses committed during the conflict that led to transition, and it must address the human rights violations that pre-dated the conflict and thus caused and/or contributed to it. (ARBOUR, 2007: 3.) In any case, criminal justice for human rights abuses committed during periods of political repression or dictatorship is one of the greatest challenges to post-conflict societies. (SCHABAS, 2004: 1–2.)

On the international scene, today it is clear that the "holistic approach" to transitional justice should include the protection and strengthening of all rights, not only civil and political ones; it should also refer to procedural and substantive justice. Moreover, it is clear today that solutions and approaches must be localised and adapted to individual country contexts. In any case, bargains with "elites" could in the long run bring more damage than one may expect when bargains were made to achieve short term goals with, for example, warlords engaged in organised crime.

In any case, the four tenets of international human rights law have framed transitional justice and the fight against impunity; namely (a) the state's obligation to investigate and prosecute alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law, including sexual violence, and to punish those found guilty; (b) the right to know the truth about past abuses and the fate of disappeared persons; (c) the right to reparations for victims of gross violations of human rights and serious violations of international humanitarian law; and (d) the state's obligation to prevent, through different measures, the recurrence of such atrocities in the future. Developing the protection of economic, social, and cultural rights within international human rights law should therefore also have an important say in the development of transitional justice measures. (see UN, 2014: 5.)

Neil Kritz explored and identified four components of transitional justice: truth-seeking (informational disclosure), reparations, prosecutions, and non-recurrence measures such as institutional reforms (see more KRITZ, 1995) that are also able to address violations of economic, social and cultural violence such as serious economic crimes, including the corruption that is endemic in transitional societies.

In Sharp's opinion, *"for the most part, ignorance of economic violence continues to be one of the principle blind spots of the field of transitional justice"* (SHARP, 2014: 2.). I fully agree with this statement, although it seems that this blind spot is no longer blind; it has at least been recognised as one. Economic violence includes violations of economic and social rights, corruption, and plundering natural resources. (SHARP, 2014: 2.) Sharp also underlines that the language of "never

again" *has little meaning if the self-imposed blind spots of the field distort our understanding of conflict and limit our range of possibilities"* (SHARP, 2014: 3.). Today, it is no longer the case, at least in theory and in the policies of international institutions when dealing with transitional justice mechanisms. It is quite clear that lands rich with natural resources could be a catalyst for conflicts or the quest for domination or land-grabbing.

Addressing violations of economic, social and cultural rights and economic crimes in the application of transitional justice mechanisms

Changing paradigms, such as opening the doors for economic and social rights in transitional justice discourse, as well as addressing corruption, can be seen particularly clearly when comparing the two UN Reports on The Rule of Law and Transitional Justice of 2004 and 2011. In the 2004 report, the UN's Secretary-General indicates that helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses *"requires attention to a myriad of deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security"* [6]. In its paragraph 4, the 2004 Report states that concepts such as justice, the rule of law and transitional justice are essential to understanding the international community's efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable governance, and peacefully resolve conflict.

The 2011 Report[7] tackles the progress with respect to the implementation of the recommendations found in the 2004 Report. It highlights the UN's approach to strengthening the rule of law, which in the meantime has become more clearly articulated and more effectively implemented and has started more frequently to address emerging threats, such as organised crime and illicit trafficking, and the root causes of conflict, including economic and social justice issues.

> *"Deep capacity deficits in State justice and security institutions, exacerbated by widespread corruption and political interference, lead to diminishing levels of citizen security and economic opportunity. [...] Transnationally organized crime emerges in parallel with increasing instability, stoking new forms of violence while further undermining the legitimacy and competence of State institutions."* [8]

[6] United Nations S/2004/616, UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report 2004, II, 3.
[7] United Nations S/2011/634, October 12th, 2011, UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.
[8] Page 3 of the Report. UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report 2011, 3.

This report additionally highlighted that, for societies emerging from conflict, weak justice and security institutions struggle to manage the wider socio-economic and political challenges that are inherent in recovery processes:

> *"Institutional actors may prove to be incapable or unwilling to pursue accountability for serious crimes of the past. […] A deepening appreciation of the challenges and risks that rule of law deficits pose to international peace and security informs a growing discussion among Member States on the impact that insecurity has on sustainable development and the achievement of the Millennium Development Goals. […] As highlighted in the […] World Bank World Development Report in 2011, these efforts are key to facilitating complex processes of social, political and institutional transformation that break cycles of violence and activate economic recovery."*[9]

Through the UN Sustainable Development Goals (SDG), the international community has recognised that corruption poses serious threats to the stability and security of societies, undermining the institutions and values of democracy and jeopardising sustainable development and the rule of law. This is particularly the focus of SDG 16 on Peace, Justice and Strong Institutions.[10]

Therefore, as emphasised in the 2014 UNHROHR publication on Transitional justice and ESC Rights, awareness should be raised among stakeholders regarding *the importance of including relevant violations of economic, social, and cultural rights in transitional justice as well as the latter's potential to deal with such violations.*

However, it must be warned that the potential for transitional justice to effect lasting changes in society should not be overestimated. Even if its mechanisms deal with root causes and violations of ESC rights, their contribution to social change will continue to be modest, though important, (UN 2014: 57.) if institutional reform does not follow and the culture of integrity does not take precedence over corruption. In 2021, it is time to address how neglecting economic violence during the transitions in Eastern Europe and the Western Balkans contributed to state-building and the current existence of organised corruption. Especially in the Western Balkans, it seems that organised corruption is blocking both economic development and respect for the rule of law and human dignity of citizens.

To mention briefly, as with existing judicial mechanisms, the adjudication of ESC rights in a transitional context is occurring more frequently than is generally recognised (ARBOUR, 2007: 13.), at least regarding some violations.

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[9] The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the UN Secretary-General 2011, 4, paragraphs 7 & 8.

[10] UN Sustainable Developmet Goals, Goal 16: Promote just, peaceful and inclusive society. https://www.un.org/sustainabledevelopment/peace-justice/

Notwithstanding the Nuremberg trials (see more SCHMID, 2011), the ICTY Trial Chamber in the *Kupreškić case*[11] (see also more ARBOUR, 2007: 34.) recognised that the comprehensive destruction of homes and property may constitute a crime against humanity, if committed with the requisite intent. The intentional starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival – including wilfully impeding relief supplies – is also recognized as an international crime.[12] The Truth and Reconciliation Commission of Liberia concluded that, under international criminal law, individuals who have committed economic crimes during a period of armed conflict should be prosecuted for pillage – a war crime – according to article 8 of the ICCSt.[13] Pillage refers to the unlawful appropriation of public or private property during an armed conflict.[14] Furthermore, it should be emphasised that, after several decades had passed, some German companies hired professional historians to investigate their cooperation with the Nazis. In the late 1990s, Deutsche Bank, a major German bank, accepted "moral responsibility" for purchasing gold taken from concentration camp victims[15]. In the years since Deutsche Bank's admission, other German companies, including carmakers Volkswagen, Audi and Daimler, have commissioned investigations into their past ties with the Nazis and admitted to their use of slave labour.

The Truth and Reconciliation Commission in Liberia was mandated (in 2005) to investigate economic crimes, such as the exploitation of natural or public resources, that perpetuated armed conflicts during the period of January 1979 to October 2003 and determine whether these had been isolated incidents or part of a systematic pattern. It was also mandated to establish the antecedents, circumstances, factor, and contexts of such violations and abuses and to determine those responsible for the commission of these violations. It is worth mentioning that Liberia, like Croatia for the economic crimes during privatisation and ownership transformation occurring during the Homeland War and peaceful reintegration, faced statute of limitations problems for the prosecution of those economic crimes (see more NOVOSELEC et al., 2015). The recommendation of the Liberian report (2009) was to extend the limitation period for economic crimes perpetrated during the conflict because economic criminal actors controlled Liberia's state

[11] *Prosecutor v. Kupreskić*, case No. IT-95-16-T, Trial Judgment, para 628-631, January 14th, 2000.

[12] Additional Protocols to the Protocols to the Geneva Conventions of August 12th, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol i), art. 54, par. 1, June 8th, 1977, 1125 U.N.T.S. 3; Rome Statute of the International Criminal Court, art. 8, par. 2 (b) (xxv); U.N. Doc. A/CONF. 183/9 (July 17th, 1998). See also arts. 6 (c), 8(2) (b) (ix), 8(29) (b) (xvi); ARBOUR, 2007: 15, footnote 42. Also see O'MALLEY, 2010: 30–33. (discussing the use of international standards and mechanisms, including the Rome Statute, to prevent and adjudicate crimes against education); ARBOUR, 2007: 16, footnote 43.

[13] TRC, Truth and Reconciliation Commission of Liberia 2009, 42–43, par. 155.

[14] Also see Charter of the Nuremberg International Military Tribunal, art. 6; Statute of the International Criminal Tribunal for Rwanda, art. 4; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 3; Statute of the Special Court of Sierra Leone, art. 3.

[15] See more John Schmid: "Deutsche Bank Says It 'Regrets' Nazi Deals". *New York Times,* August 1, 1998, accessed June 8, 2016, as cited in the Business of Slave Labour: https://www.facinghistory.org/holocaust-and-human-behavior/chapter-10/business-slave-labor

apparatus during much, if not all, of the time period provided for commencing prosecution under Liberia's statute of limitations, the Government of Liberia should adopt legislation that provides a general extension of statute of limitations that apply to economic crimes uncovered by the TRC and in subsequent, related investigations where the alleged perpetrator has evaded justice. The Government of Liberia should also adopt legislation that lengthens the statute of limitations for future criminal prosecutions related to economic crime.[16]

The Report justified the aforementioned recommendation with article 29 of the United Nations Convention against Corruption[17] which calls on states to alternatively provide the suspension of the statute of limitations if the alleged offender has evaded the administration of justice, establishing longer statutes of limitations for offences under the Convention.

The example of addressing this question (existence of economic crimes that fuel conflicts/violations) could also be seen in the Sierra Leone Truth Commission,[18] South Africa's, Kenya and Tunisia's. (MANI, 2008: 255.) For example, Sierra Leone's Commission looked at the role of mineral resources, in particular diamonds, in fuelling the conflict[19] and at the responsibility of external actors such as the National Patriotic Front of Liberia, *Charles Taylor*, and Libya. It found that the conflict was possible because of the *"endemic greed, corruption and nepotism that deprived the nation of its dignity and reduced most people to a state of poverty"* [20]. Also, rather recently (in 2019), the UN Independent International Fact-Finding Mission on Myanmar urged the international community to sever ties with Myanmar's military and the vast web of companies it controls and relies on. The Mission said the revenues the military earns from domestic and foreign business deals substantially enhances its ability to carry out gross violations of human rights with impunity.[21]

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[16] Truth and Reconciliation Commission of Liberia 2009, 43, par. 156. As pointed out, however, Liberian judges have the discretion to extend the statute of limitations for cause, such as when the failure to commence prosecution is the result of excusable neglect (Criminal Procedure Law, par. 2:1.6).

[17] UN General Assembly, Resolution 58/4, United Nations Convention Against Corruption, 31st October 2003.

[18] The Sierra Leone Truth and Reconciliation Commission also constituted an important attempt to deal with violations of economic, social and cultural rights as well as the root causes of conflict or repression. (see more UN, 2014: 20–22.) In accordance with the Truth and Reconciliation Commission Act 2000, it was mandated *"to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict"*. The Commission looked into the root causes of the conflict, identifying trends that divided the country and political decisions that benefited the elite, as well as considering particular events. It looked at the role of mineral resources, in particular diamonds, in fuelling the conflict. (see in particular Witness to Truth and Reconciliation Commission, Vol. 2. www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents)

[19] Witness to Truth and Reconciliation Commission, Vol. 3B, ch. 1. www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents

[20] Witness to Truth and Reconciliation Commission, Vol. 2, ch. 2, par. 13. www.sierraleonetrc.org/index.php/view-the-final-report/download-table-of-contents

[21] UN Human Rights Office of the High Commissiner, UN Fact-Finding Mission on Myanmar exposexs military business ties, calls for target et sanctions and arms embargos, August 5, 2019. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24868&LangID=E

The right to truth is very important, especially since unresolved questions can haunt societies for many decades. For instance, in Switzerland, *"in the immediate post-war period, the first reaction concerned the looted assets that had been brought into Switzerland"* [22] (ICE, 2002: 484.) prior to and during the Second World War, but it was only in the 1990s that a truth commission was formed to undertake detailed research and to try to establish some "historic truth" surrounding these events: the Independent Commission of Experts Switzerland, the Second World War on Switzerland, National Socialism and the Second World War also called the *Bergier* Commission. (ICE, 2002) As stated in the Final Report (ICE, 2002: 2.), in the months prior to the Commission's appointment in late 1996,

> *"[t]he debate on the gold transactions between the Swiss National Bank and National Socialist Germany and the dormant assets in Swiss banks had unexpectedly come to a head. In light of the growing criticism from the outside at that time, the Swiss Parliament and the Federal Council decided to investigate these accusations, which had never ceased during the post-war period. […] Investigations shall be conducted into the scope and fate of all types of assets which were either acquired by banks, insurance companies, solicitors, notaries, fiduciaries, asset managers or other natural or legal persons or associations of persons resident or with headquarters in Switzerland, or which were transferred to the aforementioned for safekeeping, investment or to be forwarded to third parties, or which were accepted by the Swiss National Bank."* [23]

Therefore, both trials and truth commissions are said to have delivered a range of (sometimes overlapping and complementary) benefits to transitional societies (BISSET, 2012: 33., see also OLSEN et al., 2010) and led to context-specific legal solutions and reparation programmes, depending on the situation within the country. Germany, not only after WWII, but also after reunification, brought in a series of special laws and measures aiming to ease the transitional process – for example, the Act Regulating Open Property Issues (1990)[24]. One of the most important issues facing transitional states is what they should do about past property violations. (ATUAHENE, 2010)

The importance of addressing economic crimes, naimely corruption, in order to prevent conflict and/or maintain peace was the topic of the already historic meeting of the United Nations Security Council in September 2018, which focused on the link between corruption and conflict and emphasised the important of anti-corruption policies in maintaining international peace and security.[25] This was in line with the Guidance Note of the Secretary General on the United Nations

[22] As often emphasised (see 2002 Report, 6–7), the Commission was given unprecedented powers and resources by the Swiss Parliament; it had unimpeded access to the archives held by Swiss private companies, including banks, insurance companies, and enterprises; the companies were prohibited from destroying any files relating to the period being examined by the commission; the initial budget of 5 million Swiss Francs was increased to a total of 22 million Francs.

[23] The ICE was mandated to conduct an historical investigation into the contentious events and incriminating evidence. See art. 1 ("Subject") of the Federal Decree of December 13th, 1996, which was adopted unanimously by both houses of Parliament – the National Council and the Council of States.

[24] http://www.proyectos.cchs.csic.es/transitionaljustice/content/germany. See more in SANYA, 2016.

[25] Security Council Meeting, September 10, 2018: Maintenance of Peace and Security, S/PV.8346: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.8346

Approach to Transitional Justice,[26] that *the UN should strive to ensure that transitional justice processes and mechanisms take into account the root causes of conflict and repressive rule and address violations of all rights, including economic, social and cultural rights… Peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and social services, and endemic corruption can be addressed in a legitimate and fair manner by trusted public institutions.*

The interconnectivity of neglecting violations of ESC rights and corruption during transition has a lasting and important impact on international and local communities and individuals, and inevitably transitional justice processes need a holistic approach as an effective response to human rights abuses. The next chapter provides an example of this statement and its following linkage between corruption and conflict, where corruption and serious, systematic and widespread economic crimes either contributes to instability or prolongs it.

The situation in the Western Balkans is an unusual and extraordinary threat for the national security and foreign policy of the US

A memorandum establishing anti-corruption as a core national security interest of United States was enacted on June 3 2021.[27] It states that corruption erodes public trust; hobbles effective governance; distorts markets and equitable access to services; undercuts development efforts; contributes to national fragility, extremism and migration; and provides authoritarian leaders with a means of undermining democracies worldwide. It is also stated that when leaders steal from the citizens of their nations or oligarchs flout the rule of law, economic growth slows down, inequality widens and trust in government plummets.

Further on in the Memorandum, it is estimated that acts of corruption sap between 2 and 5 percent from global gross domestic product: Although such costs are not shared evenly around the world, abuse of power for private gain, embezzlement of public property, bribery, and other forms of corruption affect every country and community. Proceeds from these acts cross state borders and can affect economies and political systems far from their origins. Anonymous shell companies, opaque financial systems, and professional service providers enable the movement and laundering of illicit wealth in the United States and other democracies based on the rule of law.

Thus, it is additionally explicitly stated in the Memorandum that corruption threatens the national security of the United States, economic equity, global anti-poverty and development

[26] See Guidance Note of the UN Secretary-General on the United Nations Approach to Transitional Justice, Principle 9.

[27] United States of America, The White House, Presidential Action, Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest, June 03, 2021: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/

efforts and democracy itself. However, by effectively preventing and countering corruption and demonstrating the benefits of transparent and accountable governance, a critical advantage can be provided for the United States and other democracies.

By issuing this Memorandum, President Biden has established the fight against corruption as a core United States national security interest. At the same time, key elements of an anti-corruption strategy have been established that include modernisation, coordination and additional resources to improve the ability of key executive departments and agencies to promote good governance and prevent and combat corruption, including proposing relevant laws to Congress. Furthermore, it has been declared as crucial in the Memorandum to combat all forms of illicit financing in the United States and international financial systems, including the strong application of federal law requiring U.S. companies to report their beneficial owner or owners to the Treasury; reduce foreign financial secrecy; improve the exchange of information; and, where appropriate, identify the need for new reforms.

It is also considered necessary to hold corrupt individuals, transnational criminal organizations and their facilitators accountable, including, as appropriate, by identifying, freezing and recovering stolen assets through increased information sharing and intelligence collection and analysis, criminal or civil enforcement action, sanctions and, where possible and appropriate, returning confiscated property to the benefit of citizens harmed by corruption.

The need to strengthen the capacity of US and international institutions and multilateral bodies is also stressed, which should be focused on establishing global anti-corruption norms, asset recovery, promoting financial transparency, encouraging open government, strengthening the framework of financial institutions to prevent corruption in development finance, combating anti-money laundering, illicit finace and bribery, including, where possible, addressing the demand side of bribery. Therefore, bribery is also listed as part of an anti-corruption strategy.

Also mentioned in the Memorandum was the need to support and strengthen the capacity of civil society, the media and other oversight and accountability actors to conduct research into and analysis of corruption trends, advocate for preventive measures, investigate and detect corruption, hold leaders accountable and inform and support government accountability and reform efforts, and work to ensure that these actors have a secure and open operational environment at the domestic and international levels.

Working with international partners to counteract strategic corruption by foreign leaders, foreign state-owned or affiliated legal entities, transnational criminal organisations and other foreign actors and their domestic collaborators, including by closing loopholes used by these actors to interfere with democratic processes in the United States and abroad is also underlined in the Memorandum.

In addition, there is a need to strengthen efforts to rapidly and flexibly increase the resources of the United States and partner countries in investigations, financial, technical, political, and other assistance to foreign countries that show a desire to reduce corruption; assist and strengthen the capacity of US (including state and local) governments and institutions, as well as partner and other foreign governments at all levels, to implement transparency, oversight, and accountability measures that will fight corruption and provide its citizens with accessible and useful information on government programmes, policies and spending; promote partnerships with the private sector and civil society in advocating for anti-corruption measures and taking measures to prevent corruption; and establish best practices and enforcement mechanisms so that foreign assisance and security cooperation have built-in anti-corruption measures.

The interagency review in the United States will be completed within 200 days of the date of the Memorandum, and the Assistant to the President and the National Security Adviser will submit a report and recommendations to the President for further guidance and action.

A few days later, on June 8, 2021, President Biden also issued an Executive Order[28] on Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans, determining that the situation in the territory of the former Socialist Federal Republic of Yugoslavia and the Republic of Albania (Western Balkans), in the past two decades, including undermining postwar agreements and institutions following the collapse of the former Socialist Federal Republic of Yugoslavia, as well as widespread and corruption within various governments and institutions in the Western Balkan, hampers progress toward effective and democratic governance and full integration into transatlantic institutions, and thereby constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States.

It is stated in this Executive Order of President Biden that all property and interests in property that are in the United States, that hereafter come within the United States, or that are, or hereafter come, within the possession or control of any United States person from the fa-list of specific persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State concerning, among others, those to be responsible for or complicit in, or to have directly or indirectly engaged in, actions or policies that threaten the peace, security, stability, or territorial integrity of any area or state in the Western Balkans; to be responsible for

[28] United States of America, President's Executive Order 14033, Blocking Property and Suspending Entry into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans. A Presidential Document by the Executive Office of the President on June 8, 2021. https://www.federalregister.gov/documents/2021/06/10/2021-12382/blocking-property-and-suspending-entry-into-the-united-states-of-certain-persons-contributing-to-the

or complicit in, or to have directly or indirectly engaged in, serious human rights abuse in the Western Balkans; to be responsible for or complicit in, or to have directly or indirectly engaged in, corruption related to the Western Balkans, including corruption by, on behalf of, or otherwise related to a government in the Western Balkans, or a current or former government official at any level of government in the Western Balkans, such as the misappropriation of public assets, expropriation of private assets for personal gain or political purposes, or bribery.

On the same day President Biden issued a Notice on the Continuation of the National Emergency with Respect to the Western Balkans[29] declaring that the actions of individuals threatening peace and international stabilisation efforts in the Western Balkans, including acts of extremist violence and obstructive activities, continued to pose an unusual and extraordinary threat to US national security and foreign policy. For this reason, the national state of emergency declared on 26 June 2001 must remain in force after 26 June 2021, thus continuing the national state of emergency declared in relation to the Western Balkans by Executive Order 13219 for one year.

This further confirms that organised corruption is a serious security problem for the Western Balkans, and it is necessary to do in countries of that region exactly what is planned to be done in the United States, which is to analyze weaknesses and identify where the occurrence of corruption is most likely to occur in order to establish the most effective anti-corruption mechanisms at all levels. It is certainly crucial to increase the capacity (financial investigators!) to effectively combat corrutption. As criminal law comes last, the combat against corruption includes not only the activities of investigative and judicial bodies but also strengthening the independence of all actors in both the public and private sector.

Organized Corruption – a phenomenon of the Western Balkans?

Corruption is thus one of the main challenges to the rule of law, life chances and the well-being of people in the Western Balkans (WB6). It is both the cause and consequence of the many crimes and behaviours that permeate the region, and the way in which corruption is linked to politics suggests the degree of organized corruption and even elements of state capture in the region.

According to the definition by *Zvekić and Roksandić* (ZVEKIĆ – ROKSANDIĆ, 2021a; 2021b) organised corruption respresents a symbiosis of organised crime, criminal methods and high-level corruption, which creates a crooked ecosystem that enriches and protects those with access to power.

[29] United States of America, The White House, Presidential Action. Notice on the Continuation of the National Emergency with Respect to the Western Balkan, June 08, 2021. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/08/notice-on-the-continuation-of-the-national-emergency-with-respect-to-the-western-balkans/

Given the prevalence of the phenomenon, there is always a lack of comprehensive research on the nexus of corruption and organised crime in the Western Balkans. Many civil society initiatives rely solely on external support in the implementation of projects, which necessarily leads to the impossibility of conducting all the necessary research. On May 4 2021, the Infrastructure of Integrity reports from the Global Initiative Against Transnational Organized Crime were published, based on an analysis of legislative changes and the implementation of pledges by experts who researched the phenomenology of corruption and its impact on governance in the Western Balkans and the capacity of these countries in the fight against cit.

Western Balkan countries, like Croatia in the past, want to meet the requirements of Chapter 23 in the EU membership accession negotiations, but there is no doubt that implementation of such reforms will not be achieved without creating a culture of integrity. The anti-corruption legislation in WB6 is largely in line with UN and EU regulations. However, necessary legal reforms are sometimes not followed by the implementation of these same reforms. All WB countries have an anti-corruption institutional structure that works on both repression and prevention of corruption. However, there is a disconnect between good legislation on paper and a full implementation in practice. There is also a need for open and reliable cooperation between government, parliament and civil society in order to promote an anti-corruption culture and effective prevention of corruption.

In 2018 and 2019, the governments of the Western Balkan countries made promises and pledges in order to combat corruption in their own countries, with a concrete pledge for targeted specific areas, such as public-private partnership, public procurement, taxes, data on beneficial owners,extractive industry; whistleblower protection, opportunities to implement anti-corruption measures, including the role of the repressive apparatus and the judiciary, the role of the media, the development of institutional integrity, anti-corruption education and transparency initiatives; regulation and implementation of international cooperation of relevant bodies and issues related to confiscation of the proceeds of crime.

Unfortuately, as underlined in the aforementioned Report, the pledges are not widely known. Thus, there is limited knowledge of anti-corruption pledges, both among the general public and within government agencies responsible for their implementation. Nevertheless, their implementation is crucial for the process of accession to the European Union.

The Western Balkans also need to improve their analytical and preventive capacities and mutual cooperation, as well as prosecutorial/judicial approaches and resources against any form of corruption, but especially against organised corruption. This includes transparent and timely reporting to oversight mechanisms, parliament and the general public.

Conclusion

It seems that fighting corruption became among the top if not "the top" security intesests both for the EU, when external security is in question (especially in the enlargement process for Western Balkan countries), and certainly, as explicitly stated, for the US. However, what exactly will be the result of President Biden's Memorandum, Order and Notice or of insisting on combating corruption in the enlargement process of the EU for the citizens of Western Balkan countires need to be monitord. In addition, UN Security Coucil recognised the important of anti-corruption policies in maintaining international peace and security. What futher steps will be taken by the international community is expected to be seen, especially concering either bringing additional protocol to the UN Convention against Coruption to make it more operational and effective when organised corruption is at stake, or introducing a new mechanism that will effectively tackle organised corruption.

I would emphasise that implementing anti-corruption policies is of crucial importance for long term prosperity and well-being. Transitional justice policies should always include addressing ESC rights violations and serious and widespread corruption and economic crimes that affect human security, while not doing so only perpetuates instability and disrespect for the rule of law.

References

ARBOUR, Louise (2007): *Economic and Social Justice for Societies in Transition.* New York University Journal of International Law and Politics, 40(1), 1–26. https://nyujilp.org/wp-content/uploads/2013/02/40.1-Arbour.pdf

ATUAHENE, Bernadette (2010): Property and Transitional Justice. *58 Ucla Law Review Discourse,* 65. 65–93.

BISSET, Alison (2012): *Truth Commissions and Criminal Court.* New York: Cambridge University Press.

BORAINE, Alexander L. (2006): Transitional Justice: A Holistic Interpretation. *Journal of International Affairs,* 60(1), 17–27.

CASSIN, René (2013): State Sovereignty and Transitional Justice in the Period of the Second World War. In: LANGERAAR, Chrisje B. – HOL, Antoine – ROZENBLIT, Dina S. (eds): *Transitional Justice. Images and Memories.* Farnham. 51–70.

ESER, Albin – ARNOLD, Jörg (eds.) (1999): *Strafrecht in Reaktion auf Systemunrecht [Criminal Law in Reaction to State Crime]. Vergleichende Einblicke in Transitionsprozesse [Comparative Insights into Transitional Processes]*. Internationales Kolloquium [International Colloquium Freiburg]. Freiburg i. Br.: Max-Planck-Institut für ausländisches und internationales Strafrecht.

(ICE) INDEPENDENT COMMISSION OF EXPERTS (2002): *Switzerland: National Socialism and the Second World War. Final Report of the Independent Commission of Experts.* The Independent Commission of Experts.

(ICTJ) INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (2009): *What is Transitional Justice?* Factsheet. International Center for Transitional Justice. http://ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf

KEMP, Susan (2021): Alternative Justice Mechanisms, Compliance and Fragmentation of International Law. In: van den HERIK, Larissa J. – STAHN, Carsten (eds.): *The Diversification and Fragmentation of International Criminal Law.* Leiden: Leiden Studies on the Frontiers of International Law, Vol. I. 247–285.

KRITZ, Neil J. (ed.) (1995): *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations.* United States Institute for Peace Press.

MANI, Rama (2008): Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development. *The International Justice Journal of Transitional Justice,* 2. 253–265. https://academic.oup.com/ijtj/article/2/3/253/2356985

NAGY, Rosemary (2008): Transitional Justice as Global Project: Critical Reflections. *Third World Quarterly,* 29(2), 275–289.

NOVOSELEC, Petar – ROKSANDIĆ, V. Sunčana – MARŠAVELSKI, Aleksandar (2015): Retroactive prosecution of transitional economic crimes in Croatia – testing the legal principles and human rights. In: HUISMAN, Wim – van de WALLE, Gudrun – van ERP, Judith (eds.): *The Routledge Handbook of White-Collar and Corporate Crime in Europe*. Abingdon: Routledge.

O'MALLEY, Brendan (2010): *Education under Attack: A Global Study on Targeted Political and Military Violence Against Education Staff, Students, Teachers, Union and Government Officials, Aid Workers and Institutions.* France: United Nations Educational, Scientific and Cultural Organization.

OLSEN, Tricia D. – PAYNE, Leigh A. – REITER, Andrew G. (2010): *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy.* Washington D.C.: United States Institute of Peace.

ROKSANDIĆ, V. Sunčana (2017): *Prosecuting Serious Economic Crimes as International Crimes. A New Mandate for the ICC?* Berlin: Duncker & Humblot.

ROKSANDIĆ, V. Sunčana (2019): Tranzicijska pravda kao metoda ostvarenja ustavnih vrednota uz analizu prakse Europskog suda za ljudska prava i odluke Ustavnog suda u predmetu Hypo. In: TURKOVIĆ, Ksenija – VAJDA, M. Maja – PRTENJAČA, D. Marta (eds.): *Kazneno pravo: sinergija teorije i prakse, Liber amicorum Petar Novoselec*. Zagreb: Pravni fakultet Sveučilište u Zagrebu. 435–481.

SANYA, Romeike (2016): *Occasional Paper No. 1. Transitional Justice in Germany after 1945 and after 1990*. Nürnberg: International Nuremberg Principles Academy. https://www.nurembergacademy.org/fileadmin/media/pdf/news/Transitional_Justice_in_Germany.pdf

SCHABAS, William A. (2004): Introduction. In: SCHABAS, William A. – DARCY, Shane (eds): *Truth Commissions and Courts. The Tension between Criminal Justice and the Search for Truth.* Springer.

SCHMID, Evelyn (2011): War Crimes Related to Violations of Economic, Social and Cultural Rights. *Heidelberg Journal of International Law,* 71(3). 523–541.

SHARP, Dustin N. (2003): Interrogating the peripheries: The preoccupations of fourth-generation transitional justice. *Harvard Human Rights Journal,* 26, 149–178. https://harvardhrj.com/wp-content/uploads/sites/14/2013/05/V26-Sharp.pdf

SHARP, Dustin N. (2014): Introduction: Addressing Economic Violence in Times of Transition. In: SHARP, Dustin N. (ed.): *Justice and Economic Violence in Transition.* New York: Springer. 1–26.

TEITEL, Ruti (2003): Transitional Justice Genealogy. *Harvard Human Rights Journal,* 16, 69–94. https://www.qub.ac.uk/Research/GRI/mitchell-institute/FileStore/Filetoupload,757186,en.pdf

TEITEL, Ruti (2005): The Law and Politics of Contemporary Transitional Justice. *Cornell International Law Journal,* 38(3), 837–862. https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1658&context=cilj

UN (2014): Transitional justice and economic, social and cultural rights. UN Human Rights Office of the High Commissioner. https://doi.org/10.18356/2eabb087-en

ZVEKIĆ, U. Uglješa – ROKSANDIĆ, Sunčana (2021a): *Infrastructure of Integrity, Political Economy of Organized Corruption and Anti-Corruption in the Western Balkan Research Report Part 2 of 4.* Global Initiative against Organized Crime, March. https://globalinitiative.net/wp-content/uploads/2020/10/Infrastructure-of-integrity-24-GITOC.pdf

ZVEKIĆ, U. Uglješa – ROKSANDIĆ, Sunčana (2021b): *Infrastructure of Integrity, Western Balkans anti corruption pledges monitor, Research Report Part 3 of 4.* Global Initiative against Organized Crime, March. https://globalinitiative.net/wp-content/uploads/2020/10/Infrastructure-of-integrity-34-GITOC.pdf

CORRUPTION IN THE CZECH REPUBLIC: AN OVERVIEW

VLADIMÍR NAXERA*

Introduction

Over the course of more than thirty years of development after the fall of the communist regime, corruption has become a significant phenomenon in Czech politics. Corruption brings about a number of negative consequences, being a negative phenomenon (not only) in the Czech environment – whether these are impacts on public finances, on the equality of citizens in the approach to the state and its institutions, the quality of the entire democratic process, or the security situation. (NAXERA, 2017)

Due to these negative impacts, corruption has also become a significant political topic. This process has been gradual, but it was during the first post-communist decade that corruption started to be framed as a fundamental problem in political and public debates. It has retained this position, growing even stronger. Currently, the discursive power of corruption (also amplified by the media [LEDENEVA et al., 2017]) is such that it can displace a whole number of other significant topics from the political sphere. In many respects, the political debate was reduced to mutual accusations of corruption between the government and the opposition. Corruption has thus become "public enemy number one" in the Czech Republic, just as in other places in the world. (BRATU et al., 2017)

Corruption became an important topic due to a number of corruption scandals that affected political parties throughout the political spectre, as well as due to the instrumental grasp of this topic on the side of the newly found anti-establishment parties and movements. For example, these personalities noted for marked anti-corruption rhetoric gained over 50% of votes in the parliamentary elections in 2017. (NAXERA, 2021a)

However, corruption is not only a topic grasped from "above", but also from "below", especially on the side of civic society organizations with an anti-corruption focus. We should mention the very active Czech branch of Transparency International, conducting a significant number of disputes with Andrej Babiš, the current prime minister (see below for his activities), *Nadační fond proti korupci* (Anticorruption Endowment Fund), or *Rekonstrukce státu*

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(Reconstruction of the State). The last organisation named is a loose association of anti-corruption organisations and individuals with a wide sphere of action, which tries to lobby for anti-corruption legislation, engaging closely with political actors. (PEROTTINO et al., 2020)

Being a fundamental political topic, corruption has become the object of interest for Czech researchers. Some time ago, *Milan Školník* provided a comprehensive summary of the transformation of *corruption studies* in the Czech Republic. (ŠKOLNÍK, 2021a) At the same time, it is necessary to say that there are currently only a few Czech authors dealing with corruption systematically. To name a few, *Vladimíra Dvořáková* (especially research into the impact of the post-communist transformation on corruption [DVOŘÁKOVÁ, 2014; 2019], as well as the so-called *corruption opportunity space* [DVOŘÁKOVÁ, 2020]), Milan Školník (especially research on the impact of corruption on trust and participation [ŠKOLNÍK, 2019; 2020a; 2020b; 2020c; 2021a; 2021b]), and *Vladimír Naxera* (especially research on the impact of the communist regime and transformation on post-communist corruption [NAXERA, 2012; 2013; 2014; 2015a], the relationship between corruption and state power [KRČÁL – NAXERA, 2015]), the perception of corruption (NAXERA, 2015b), and also the transformation of the anti-corruption rhetoric of Czech politicians (NAXERA, 2018; 2021a; 2021b; NAXERA – KRČÁL, 2014).

The aim of this chapter is to provide a basic summary of different aspects of political practice associated with corruption in the Czech Republic. After introducing the country's profile, the paper will focus on several topics: the position of corruption in the Czech legal system; data on the amount of corruption and its perception by the public; selected corruption cases and their impact; and anti-corruption strategies. The focus and content of the chapter correspond to the field competence of the author – this means the text is written from the point of view of political science (with only minor overlaps with the field of criminology and law), which marks the selection of sources, as well as partial topics and the overall tone of the text.

Country profile

The Czech Republic is a parliamentary democracy. According to the annually published assessment of Freedom House, the Czech Republic scores 91 out of 100 points, and it is thus the freest regime throughout the V4. (FREEDOM HOUSE, 2021) The fact that the quality of democracy in the country is (together with Slovakia) among the best within the region is confirmed by numerous research studies. (BUSTIKOVA – GUASTI, 2017) Despite this fact, we should point out certain tendencies associated with a so-called *illiberal turn* or *democratic backsliding*, which the Czech environment could not avoid. (HANLEY – VACHUDOVA, 2018)

Numerous analyses specifically point out the strengthening positions of populist protagonists (BUSTIKOVA – GUASTI, 2018; NAXERA – KRČÁL, 2018) (including the current President, *Miloš*

Zeman, and prime minister *Andrej Babiš*), who recently did not hesitate (like in other countries) to take advantage of the situation within the COVID-19 pandemic. (NAXERA – STULÍK, 2021a) Czech populists succeed significantly, also thanks to their appropriate grasp of the corruption theme. (NAXERA, 2021a; NAXERA – KRČÁL, 2019)

In 2021, the Czech population numbered 10.7 million citizens. The population is markedly ethnically homogeneous, and it has one of the lowest levels of religiousness in the world (although there are significant differences between the Czech regions in this respect). The Czech Republic is a markedly urbanized environment – the urban population amounts to nearly 75% of the total. The current age median is 43.3 years. (CIA, 2021)

The Czech Republic operates with a market economy, the current form and structure of which was significantly influenced by reforms following the fall of the communist regime (MYANT, 2014), especially through the privatisation processes. These processes alone are interesting with respect to the form of corrupt transactions. Post-communist privatisation is often viewed as the moment that gave rise (in an unjust way) to the new ownership class, often based on former communist elites. (NAXERA, 2015b) A number of political actors are still able to use the legacy of privatisation accompanied by corruption from nearly thirty years ago within the framework of their political struggle.

In 2019, GDP per capita amounted to nearly 41,000 USD. The structure of employee share in the individual sectors in 2015 was as follows: agriculture 2.8%, industry 38% and services 59.2%. (CIA, 2021) The level of unemployment is approximately 3% on a long-term basis. The current economic situation (especially the budget deficit and inflation) were significantly impacted by the consequences of the COVID-19 pandemic.

More information regarding the socio-economic profile of the country is summarized by OECD data in Table 1 below.

Table 1: Country profile

	Country Average	OECD median region	Czech regions	
			Top 20%	Bottom 20%
Community				
Perceived social network support (%), 2013	88.1	91.4	92.4	80.7
Health				
Life Expectancy at birth (years), 2016	79.1	80.4	80.3	77.6
Age adjusted mortality rate (per 1 000 people), 2016	9.2	8.1	8.5	10.3
Jobs				
Employment rate 15 to 64 years old (%), 2017	73.7	67.7	76.8	71.4
Unemployment rate 15 to 64 years old (%), 2017	3.0	5.5	1.9	4.2
Access to services				
Households with broadband access (%), 2017	83.0	78.0	88.2	78.9
Income				
Disposable income per capita (in USD PPP), 2016	13 997	17 695	16 759	12 554
Education				
Labour force with at least upper secondary education (%), 2017	95.3	81.7	97.0	92.4
Safety				
Homicide Rate (per 100 000 people), 2016	1.3	1.3	0.9	1.7
Civic engagement				
Voters in last national election (%), 2017 or lastest year	60.8	70.9	65.6	54.0
Environment				
Level of air pollution in PM2.5 (µg/m³), 2015	19.8	12.4	16.1	23.1
Life Satisfaction				
Life satisfaction (scale from 0 to 10), 2013	6.5	6.8	6.7	6.2
Housing				
Rooms per person, 2016	1.5	1.8	1.5	1.3

Source: OECD Regional Database. Visualisation: https://www.oecdregionalwellbeing.org.

Notes: (1) OECD regions refer to the first administrative tier of subnational government (large regions, Territorial Level 2); Czech Republic is composed of 8 large regions. (2) Household income per capita data are based on USD constant PPP, constant prices (year 2010).

Source: OECD, 2018

Corruption profile in law

The way corruption figures in the Czech law is a result of a long process of constructing a discourse on the meaning of the term of corruption. This process was originally parallel to a similar process of construing "organised crime" (KUPKA et al., 2021), but both processes nevertheless intersected eventually. As a result, a joint unit for investigating corruption and organised crime was established (see below).

The rather unclear meaning of the actual term corruption represents a kind of a problem in this respect – this word may naturally mark a constellation of different acts, from bribing a traffic police officer to a situation we might define as *state capture* (HEYWOOD, 2017). Therefore, this unclear meaning of the word corruption allows extensive debates regarding what is and what is not corruption. For example, a number of (not only Czech) politicians reduce corruption to "bribery" in discourse, stating things like *"I'm not corrupt, I've never accepted a bribe in over twenty years in politics*". (DVOŘÁKOVÁ, 2020)

The Czech Criminal Code does not mention the term corruption explicitly. It does state a number of offences, which do contain the term corruption explicitly, but the corrupt essence of the offences is at least implicitly included in the way they are written. It is apparent in the following Sections: Section 331 Accepting bribes, Section 332 Bribery, Section 333 Indirect bribery, Section 334 Common provisions, Section 256 Arranging for advantage in the commissioning of a public tender, public competition and public auction, Section 258 Scheming in public auctions. Further sections sanction acts possibly caused by corruption or clientelism in some cases: Section 329 Abuse of competence of public officials, Section 330 Negligent obstruction of duty of a public official, Section 220 Breach of duty in the administration of the property of another, Section 221 Negligent breach of duty in the administration of the property of another.[1] The mere fact that the Code does not denote corruption explicitly (it "only" determines the boundaries of illegal activities) allows for a political discussion regarding what is corruption and what is not – for one person, a grant fraud is "simply" a fraud, but another person may indicate such fraud as corruption (if the definition introduced above is fulfilled).

This can be demonstrated through an interesting example of the discourse formation of the content for the term of corruption with regard to discussions on the *"Čapí hnízdo case"*.

> *Čapí hnízdo* (the Storks' nest in English) is a farm with a hotel and restaurant that operates as a firm within the Agrofert concern, owned by prime minister Andrej Babiš. His current criminal prosecution is associated with this firm – according to the criminal prosecution authorities, Čapí hnízdo was purposefully separated from the Agrofert concern in 2007 in

[1] Policie České Republiky: *Co je korupce.* https://www.policie.cz/clanek/stop-korupci.aspx

> order to qualify for an EU grant assigned for small and medium-sized businesses (which it would not be entitled to receive as part of a large concern) amounting to 50 million CZK. At the time, the company was registered with anonymous owners (it later turned out they were members of Babiš's family) but according to the criminal proceedings, Babiš never stopped controlling the company. Shortly before the elections in 2017, the police asked the Chamber of Deputies of the Czech Parliament to release Andrej Babiš for criminal prosecution.
> Is the grant for Čapí hnízdo corruption, as a part of Czech political representation claims? Or is it "merely" fraud? Is the entire case just a "dispute regarding a grant" as the Czech president Miloš Zeman, Babiš's political ally, claims? Or is it simply an investment and, moreover, a generally beneficial investment, as Andrej Babiš argues (adding that "everybody else is corrupt")? The way several stakeholders in Czech politics became involved in the discussion of the (non-) corruption essence of the "Čapí hnízdo case" shows how important the topic of corruption is within the strategies of political struggle. (NAXERA, 2021b)

Who are the stakeholders participating in the prosecution and investigation of corruption in the Czech Republic? They are the criminal prosecution bodies, including the Public Prosecutor's Offices (parts of the executive power), courts (parts of judicial power), and the Czech Police. The police is the only body among the above to have specialised anti-corruption divisions. The system of public prosecution has four levels in the Czech Republic – there are 86 District Public Prosecutor's Offices, eight Regional Public Prosecutor's Offices, and two High Public Prosecutor's Offices; the Prosecutor General's Office is at the top of the system. The system of courts also has four levels, and it also exists on the same levels (district, regional, high, supreme).

Within the context of investigating political corruption and abuse of power by politicians, the position of the Prosecutor General mentioned above is crucial. Although he is independent in his position, he is appointed (and can be removed) by the government, which creates a risk of political pressure. The resignation of *Pavel Zeman*, who was in this position from 2010 to 2021, could serve as an example. His resignation was a reaction to pressure from the government, namely the Minister of Justice *Marie Benešová*. There were a number of conflicts between the government and Pavel Zeman – one of them was associated with the criminal prosecution of Andrej Babiš described above. In 2019, public prosecutor *Jaroslav Šaroch* suspended the criminal prosecution, but Pavel Zeman renewed it, claiming the suspension was premature and illegal. Zeman resigned in the first half of 2021 after an escalated conflict with the government, and his successor was appointed less than two months before the expected final decision of Šaroch, regarding whether the prosecution would be stopped or handed over to a court.

Within the Czech Police, there used to be a special anti-corruption unit for a long time – the Unit for Combating Corruption and Financial Crimes. Its predecessor, the Unit to Protect Economic Interests, was established shortly after the fall of communism in 1991. The unit was

renamed several times, merging with other units, and then from 2003 it operated as an autarchic unit investigating corruption and serious economic crimes. In 2016, the anti-corruption police merged with another division – the Special Unit for Combating Organised Crime, sometimes nicknamed the "anti-mob squad". It existed from 2005, and in 2008 *Robert Šlachta* became its head; we will discuss him further on in this paper.

Within the police reorganisation plan, both the so-far independent units (anti-corruption and anti-mob) ceased to exist, merging into a single unit with over 900 employees – the National Headquarters against Organised Crime. The unit, with nation-wide competence, specialises in detecting organized crime, serious economic crimes and corruption, cybercrimes, terrorism and extremism.[2] The leader of the anti-mob unit, Robert Šlachta, resigned to express his protest against the reorganisation, and then he left the Police to work for the Board of Customs, until finally leaving the service for good.

There is another security organisation participating in corruption investigations – the General Inspection of Security Units (for cases of corrupt acts by police officers). Apart from criminal prosecution bodies, the activities of numerous other independent organizations and public administration institutions are associated with detecting corruption – whether it is the Supreme Audit Office, the Office for the Protection of Competition, the Office for Supervision of the Economies of Political Parties and Movements, the National Security Authority or others. (DVOŘÁKOVÁ, 2020)

Corruption perceptions and measuring them

The essential issue in *corruption studies* is the perception of corruption by the public. The perception of corruption went through a number of transformations in the Czech Republic. (NAXERA, 2015a) After the fall of the communist regime, the Czech situation fitted together well within the context of the entire region. Some research focusing on the entire region within the first two post-socialist decades shows a number of parallel key characteristics for the individual countries: (1) there are differences between how petty and high-ranking corruption is perceived; (2) there are differences between how the level of corruption is perceived by citizens and members of the elite. In other words, the citizens in individual countries believed corruption existed on a larger scale, while the political elites of the given countries did not. At this time, citizens were more convinced about the spread of high-ranking corruption than the political elites (as a result, there is a general belief that politicians are corrupt). On the other hand, both groups of respondents manifested their belief of the spread of petty corruption in the same way. (USLANER, 2008: 160.) These conclusions apply to the Czech case in general.

[2] Policie České Republiky: *Národní centrála proti organizovanému zločinu SKPV.* https://www.policie.cz/clanek/narodni-centrala-proti-organizovanemu-zlocinu-skpv.aspx

The belief that the elites are corrupt was often used as a justification for citizens themselves to be involved in petty corruption transactions. (KARKLINS, 2005: 59.) This is also shown in more recent research – just like in other countries (PAVLOVA, 2020), it is true for the Czech Republic as well that while a large number of people support the anti-corruption agenda, many of them are involved in everyday corrupt activities. There is a discursive classification of corruption as petty or high-ranking; whereas a corrupt politician or high-positioned officer is perceived as a criminal, a regular citizen offering or accepting bribes is perceived as a victim of an unjust regime, and his participation in the corruption system does not become a part of the anti-corruption debate.

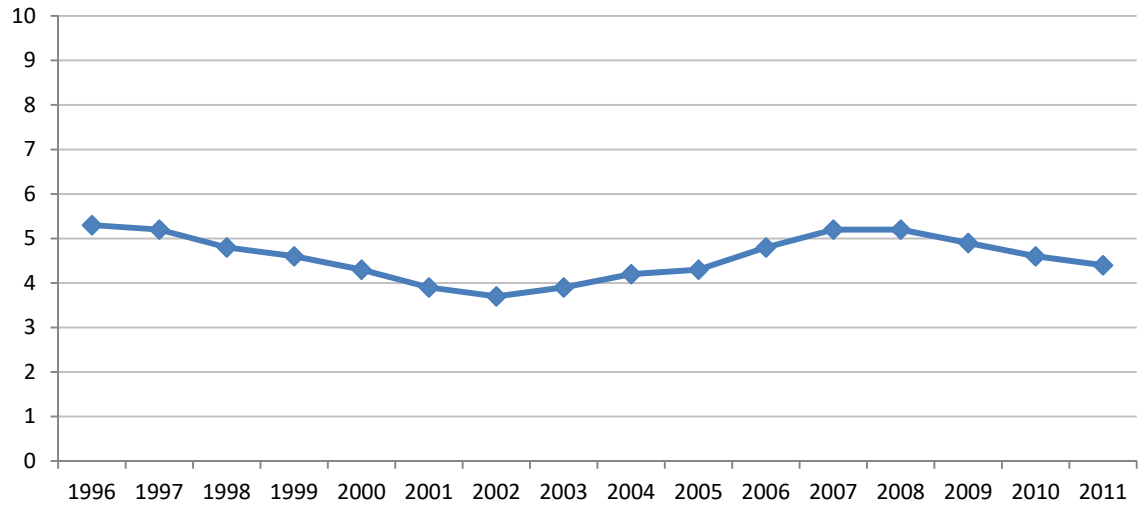
The problem of the unclear meaning of the actual term of corruption, as suggested above, is naturally reflected in the perception of corruption. This is also influenced by the long-term establishment of certain practices (originating during the communist era) within the framework of the public space. These practices became a customarily excusable activity (moreover, they were often been a necessary form of action within the communist regime), but they are still corruption. For example, there is *gift-giving*, which should be reserved for the private sphere in a liberal-democratic regime, not for the public sphere. (MÜLLER, 2012) It has to be perceived as a form of corruption, specifically bribery, in the public sphere. (BRATU – KAŽOKA, 2018) Nevertheless, it is so deeply rooted that it is very often perceived as a manifestation of good manners, not as an effort to gain an unjustified advantage (such as a priority solution of a problem, or above-standard treatment), despite the fact that most public institutions in the Czech Republic have ethical codes[3] that deal with these situations rather strictly and show that "official discourse" is significantly different from "public discourse", and "public expectations" in this respect. Offering reciprocal services has been established with even deeper roots. According to research carried out in 2013, only 19% of polled Czech citizens were willing to offer a financial bribe in contact with an official, but 49% of the polled people were willing to offer a gift, and 53% were willing to provide a service or a favour. (NAXERA, 2015b) The problematic notion of a gift in the public space was well demonstrated in the *"Nagygate" case*, which we will discuss later.

Contemporary public opinion polls show that, in the Czech Republic, corruption was not perceived as one of the most pressing problems of the country's post-Velvet Revolution development during the early 1990s. Nor was it, despite a large number of high-profile corruption cases associated with privatisation, for example. This perception was supported by the fact that the political elite did not present corruption as a key factor. On the contrary, it was often minimised. However, the perception of corruption transformed over the decade, and individual studies started to show corruption as the essential factor influencing the country's political and economic life. With some variations, this situation still exists today.

[3] E.g. Úřad vlády ČR: *Etický kodex zaměstnanců úřadu vlády ČR.* https://www.vlada.cz/cz/urad-vlady/eticky-kodex/eticky-kodex-zamestnancu-uradu-vlady-cr-100436/

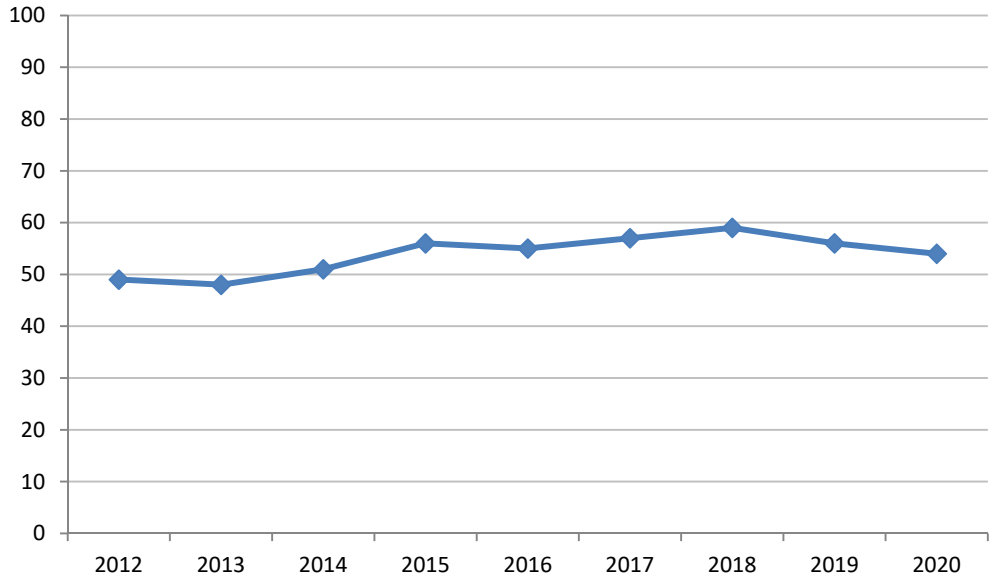
To refer to the level of corruption in the Czech Republic (or the level of corruption perception), research workers most often use the *Corruption Perception Index* published annually since 1995 by Transparency International. Figures 1 and 2 below show the development of CPI in the Czech Republic (from 1996, when it was included in the monitoring). The development of the index is divided into two parts, due to the change of methodology and the resulting change in determining the index size.

Figure 1: CPI in the Czech Republic (1996–2011)



Source: based on the CPI data

Figure 2: CPI in the Czech Republic (since 2012)



Source: based on the CPI data

According to the CPI indicator, the perception of corruption in the Czech Republic lacks any significant sways. However, there are two trends worth mentioning. The first one regards the drop of the index during the period of the so-called "opposition contract"[4], which is regularly associated with the growth of corruption in the highest political spheres. (KLÍMA, 2015) The second rather interesting trend is the constant growth of the index from 2013 on, when the government of *Bohuslav Sobotka* [5] was appointed, which continued until 2018 (with a minor drop in 2019 and 2020). Despite the fact that Sobotka's government was already associated with the operation of Andrej Babiš and several problems[6] this operation brought about (see the next sections below), Vladimíra Dvořáková believes that the movement of the index during this period can be assigned to three main factors: (1) Better evaluation of Sobotka's government after the previous experience with the government of *Petr Nečas* (with respect to its end; see below in the text); (2) The strong anti-corruption pre-election rhetoric of the coalition partners (ANO especially); and (3) The adoption of several laws with anti-corruption content (in accordance with the requirements of the European Union, for example). (DVOŘÁKOVÁ, 2020: 65.)

This trend is confirmed to a great extent by research by the Public Opinion Research Centre, which is summarised in Figure 3. The results of enquiries asking *"How widespread do you think bribery and corruption is in this country?"* show that the belief of high corruption levels was strongest in the years 2012–2014, with a subsequent trend of mitigation of these beliefs. However, the last enquiry dated 2018 still shows that the sum of respondents who consider nearly all or more than a half of the constitutional officials to be corrupt is significantly higher than the number of respondents who believe only a minimum or less than a half of politicians are corrupt.[7]

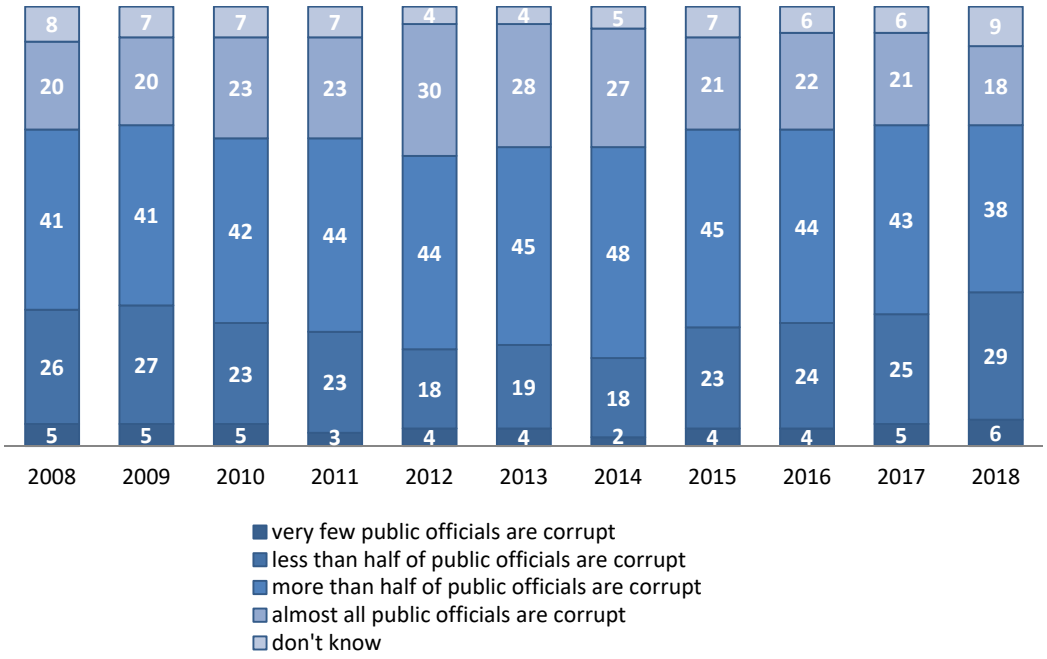
[4] An opposition contract indicates a situation in the years 1998–2002. Due to the stalemate election result in 1998 and the impossibility of forming a clearly centre-right wing or centre-left wing majority, the two largest parties came to an agreement. The winning Social Democracy formed a minority government tolerated by the main right-wing party in the country – the Civic Democratic Party. In exchange for allowing the formation of the government and the pledge not to initiate any attempts to overthrow it, this party gained a number of profitable positions. This era is often perceived as the time when political influence over state institutions was strengthened. A number of these institutions were influenced by the political parties for a long time afterwards. Moreover, both these parties were connected with non-transparent business.

[5] Bohuslav Sobotka was a prime minister for the Social-Democratic party in the years 2013–2017.

[6] Andrej Babiš, who founded the ANO movement shortly before the 2013 elections, having profiled this movement as anti-corruption and anti-establishment, started to work as the minister of finance in Bohuslav Sobotka's government. Despite the anti-corruption rhetoric, he has faced and still faces a whole number of problems (see above and below in this text).

[7] Postoje obyvatel České republiky k politickým stranám – listopad 2018. *Tisková zpráva CVVM*, 12 December 2018. https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4765/f9/pv181212.pdf

Figure 3: Perception of corruption and bribes in the public sphere (responses in %)



Source[8]

Research carried out within the framework of Eurobarometer yielded similar results. In many respects, the belief of Czech people regarding the expansion of corruption within the country is higher than average throughout the European Union. Among other things, it is the agreement with the following statements regarding the relationship of business and politics: 1) Too close links between business and politics in our country lead to corruption; 2) In our country, favouritism and corruption hamper business competition; 3) Corruption is part of the business culture in our country; 4) In our country the only way to succeed in business is to have political connections. In the same way, the Czech people, much more than the EU average, believe that political parties, politicians, and officials are corrupt. Among the reasons why citizens fail to report cases of corruption to state authorities, apart from the answer (also common in the entire EU) "it's impossible to prove", there is the belief that the given individuals will not be punished anyway.[9] And among other things, this goes on to document, rather suitably, the frequent perception of elites as corrupt and unpunishable.

Enquiries carried out on a national level also suggest that even today (the last research taken into account was undertaken at the beginning of 2020, just before the pandemic situation occurred, which may change the subsequent evaluation significantly), corruption is considered to be the most pressing problem public institutions should deal with. For 62% of respondents, it is

[8] Názor na rozšířenost a míru korupce u veřejných činitelů. *Tisková zpráva CVVM*, 18 May 2018. https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a4623/f9/po180518a.pdf

[9] European Union: *Special Eurobarometer 502* (2020). https://europa.eu/eurobarometer/surveys/detail/2247

very urgent to deal with corruption, which makes corruption "outrun" themes like economic criminality, health, or immigration.[10] In the long term, moreover, corruption is perceived as the factor that contributes most to the way politicians make decisions.[11]

Corruption and a local context: The *"Nagygate" affair* as a typical example of (not-)dealing with (non-)corruption

Over more than thirty years of development after the fall of the communist regime, there are a number of interesting corruption cases in the Czech Republic, affecting different spheres – professional football (NUMERATO, 2016) and local and regional politics, as well as the highest levels of politics. At the level of top politics, we can find a number of government representatives struggling with corruption issues.

To present the following description, a case commonly identified as "Nagygate" was selected, which was well discussed in expert literature by *Petr Kupka and Michal Mochťak* (both Czech [KUPKA – MOCHŤAK, 2014] and English [KUPKA – MOCHŤAK, 2015]). The following description of the case will mostly be based on their papers. [12]

The Nagygate case, which happened in 2013, was the greatest political scandal up until then in the country, and it was also the greatest police intervention against top politicians. Although the courts have gradually exonerated a vast majority of the accused, the certainly meets the criteria of corruption (in terms of the abuse of a public position for one's own enrichment) as well as organised crime. (KUPKA – MOCHŤAK, 2015) Despite the fact that, at the criminal-legal level, the case has gradually "faded away", it still has substantial political consequences, which I will discuss at the end of this section.

The term Nagygate is used to mark an entire complex of cases interconnected by *Jana Nagyová* (today *Nečasová*). Jana Nagyová was the head of office (and at the time also the secret mistress and now wife) of prime minister *Petr Nečas* (Civic Democratic Party), who was the leader of the centre-right wing government from 2010 on. Although the government coalition put "struggle

[10] Míra naléhavosti různých oblastí veřejného života – březen 2020. *Tisková zpráva CVVM*, 14 April 2020. https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a5191/f9/po200414.pdf

[11] Vliv na politické rozhodování – březen 2020. *Tisková zpráva CVVM*, 11 May 2020. https://cvvm.soc.cas.cz/media/com_form2content/documents/c2/a5205/f9/pd200511.pdf

[12] The Nagygate case was also selected in consideration of the fact that it has been concluded to a large extent, which allows for the evaluation of the results of the entire case. However, other cases are worth mentioning, especially the activities of the current prime minister Andrej Babiš, who is currently subject to criminal prosecution on account of a possible grant fraud (see above). However, this criminal prosecution is only the tip of the iceberg – Andrej Babiš (who, besides being the prime minister, is also one of the richest Czech entrepreneurs) combines political and economic activities in a way that may be described as *state capture*. Among other things, it is about public grants being assigned to Babiš's firms, using state institutions to support and protect his own entrepreneurial activities, etc. For more details see NAXERA – STULÍK, 2021b.

against corruption" in its name, it had to deal with a number of scandals over time. Nagygate was eventually the immediate cause of this government's fall.

It was a combination of several different cases – each of these three branches could be analysed separately, but they are interconnected by the already mentioned Jana Nagyová, and they are interesting for their complexity. Petr Nečas himself called attention to the fact that there were individual problems combined instrumentally into a single complex. (NAXERA, 2021b) And this instrumental combination, together with the question of justification of the police intervention, stirred up the biggest controversy from the beginning.

On 13 June 2013, the Special Unit for Combating Organised Crime carried out an intervention in several places at once at the bidding of the Olomouc High Public Prosecutor's Office. The spectacular intervention at the government office (conducted personally by *Robert Šlachta*), during which *Jana Nagyová* was arrested, attracted the most attention. Further on, three former parliamentary representatives of the Civic Democratic Party were arrested, namely *Ivan Fuksa, Petr Tluchoř* and *Marek Šnajdr*. And later on, the head of military intelligence services, *Milan Kovanda*, was arrested together with his predecessor, *Ondrej Páleník*, and several other persons. The case also included influential Prague entrepreneurs *Ivo Rittig* and *Roman Janoušek*, associated with the Civic Democratic Party on a long-term basis. They were abroad at the time of the intervention (the media speculated that they had been informed about the intervention in advance), but the police nevertheless searched their homes and offices.

What was the point of the individual branches of the entire case?

The first branch consisted of the abuse of military intelligence for personal interests of Jana Nagyová. According to the indictment, employees of the intelligence services monitored the wife of prime minister Nečas, as Nagyová was his secret mistress at the time. Nagyová arranged for the monitoring with the heads of the intelligence services, despite the fact that only the government was entitled to do so. According to the charges, the entire act was motivated by Nagyová's personal reasons, although later on she herself claimed the motivation was to protect national security.

The second branch was associated with three former parliamentary representatives of the Civic Democratic Party, Tluchoř, Fuksa and Šnajdr. At the time, the government connected the vote on one of the government's draft laws with giving the vote of confidence to the government, in an attempt to secure the votes of government parliamentary representatives who had protested against the draft law. However, Tluchoř, Fuksa and Šnajdr opposed the law. Prime minister Nečas allegedly played the key role, offering the three "rebels" lucrative posts in state-owned companies for waiving their seats, allowing substitutes to take their places and to help pass the law. Moreover, the remuneration in the given positions was much higher than parliamentary remuneration.

The third branch was associated with the alleged bribes accepted by Nagyová from powerful entrepreneurs to whom she gave secret information (to be further used by them in their entrepreneurial activities). Through Nagyová, these entrepreneurs also manipulated particular persons installed in key positions in the public sector or public procurement.

A whole number of charges were raised in this case, the most significant of which were the following: Jana Nagyová was charged with bribery and the organised crime of abuse of the competence of public officials; former parliamentary representatives Tluchoř, Šnajdr and Fuksa were charged with bribery in association with waiving their mandates; former heads of Military Intelligence Services Kovanda and Páleník were charged with abuse of the competence of public officials. Other people were charged as well, including the ex-prime minister Nečas (with bribery and false testimony).

The whole complex of court proceedings, which were held at courts of different levels until 2020, ended with a vast majority of persons being acquitted. Three former parliamentary representatives were acquitted based on the claim that legislative immunity applied to their acts. Other persons were acquitted later on due to a lack of evidence or the failure to fulfil the merits of the individual crimes. The only tangible result was in a court ruling that Jana Nagyová failed to pay tax on luxurious gifts she received from the entrepreneurs involved in exchange for information and access to the prime minister[13]. However, this prosecution was eventually suspended too, as Nagyová had already been penalised in administrative proceedings in this matter and no person may be punished several times for a single deed.

The entire case (regardless of the result) is important because it showed a whole number of problematic aspects of the functioning of the Czech state, which naturally has far-reaching consequences on the quality of the democratic process. (KUPKA – MOCHŤAK, 2015) Although the case fizzled out, it impacted further political development. Immediately after the fall of the government, the issue was in the way the new government was formed – despite the fact that there was a sufficient majority in the Chamber of Deputies to allow for the formation of a new government based on the existing coalition, just with a different prime minister, President *Miloš Zeman* appointed a caretaker government lead by *Jiří Rusnok*, in which there were numerous political allies and personal friends of Miloš Zeman. Although this government failed to acquire the vote of confidence in August 2013 in the Chamber of Deputies, Zeman kept the government in power – not respecting constitutional customs – to the beginning of 2014. And even though Rusnok's government did not have the vote of confidence of the Chamber of Deputies, it still made a many significant decisions, including personal ones. (BRUNCLÍK, 2016) Rhetorically, Zeman situated himself in the role of a politician who put an "anti-corruption government in power with the consent of all the people". The support of the people, within the framework of this argument, thus seems to be more important than the support of the Chamber of Deputies,

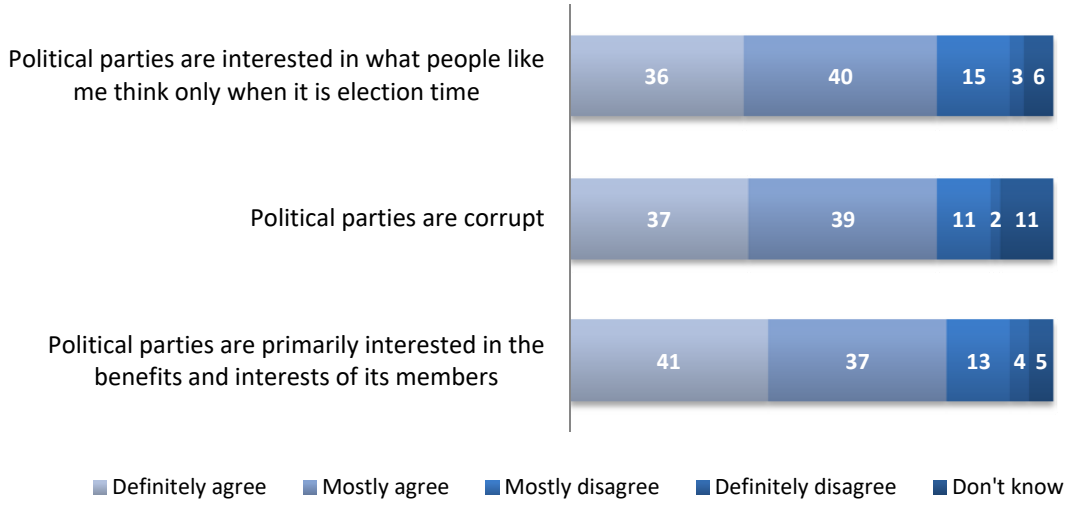
[13] This, among other things, illustrates the problematic nature of the institute of offering gifts in the public sphere, which was discussed above.

required by the Constitution. The will of the people therefore seems to be the decisive factor for political decisions, which fully corresponds with the principles of populism. (e.g. MUDDE – KALTWASSER, 2018)

This case and the fall of the government also influenced the result of the 2013 election. Populist movement ANO, formed shortly before the elections by the current Prime Minister Andrej Babiš, ended in second place. Corruption became one of the key election topics for him. The police intervention and the fall of the government helped to strengthen the public discourse on "corrupt elites" who "must be replaced". (NAXERA, 2021a) Therefore, the 2013 elections not only opened the path to power for Babiš, but the distribution of power within the Czech party system was also significantly transformed.

Political parties in particular are often marked as corrupt stakeholders in this context. Figure 4 shows the results of a public opinion poll regarding political parties in 2014, i.e. not long after the fall of the government and the elections mentioned above. The poll suggests a situation that is very suitable for the new stakeholder standing as a candidate with the help of rhetoric, fighting against "corrupt parties".

Figure 4: Attitudes toward political parties in the Czech Republic (September 2014; responses in %)



Source[14]

The result of the individual charges against the stakeholders in the case also had a significant political and social aftermath. The fact that a number of stakeholders were not accused and the rest of them were mostly acquitted by the courts may make some of society believe that "corrupt politicians are unpunishable".

[14] Postoje k politickým stranám – září 2014. *Tisková zpráva CVVM*, 29 October 2014. http://cvvm.soc.cas.cz/media/com_form2content/documents/c1/a7280/f3/pv141029.pdf

However, for a different part of society, the same results of court proceedings may be used as an argument supporting the growing controversy of the case, as well as the actual police intervention, which is often understood as being instrumental to the replacement of political elites. After all, some investigative journalists (KMENTA, 2017) suggested that Andrej Babiš and his backstage negotiations influenced the intervention that caused the fall of Petr Nečas' government.

National anti-corruption strategies

The way the official government documents started to reflect on the topic of corruption copied the process of the topic of corruption penetrating into substantial social and political topics during the 1990s. The first complex anti-corruption strategy of the Czech government was adopted in 1999, yet regular strategies valid for several years have only been adopted from 2006 on, specified every year with an annual action plan.

The currently valid government concept for fighting against corruption for the years 2018 to 2022[15] largely corresponds to the trends of fighting against corruption in an international environment. On the other hand, we should add that formally well-implemented mechanisms may not be sufficient to provide for an efficient anti-corruption struggle. (BRATU et al., 2017; BAEZ-CAMARGO – LEDENEVA, 2017) The concept determines four priority areas of fighting against corruption: 1) executive and independent power and state administration; 2) transparency and open access to information; 3) economic handling of state property; 4) development of civic society.

Although a large number of laws with an anti-corruption content were passed over the past years corresponding to international standards (DVOŘÁKOVÁ, 2020), the effectiveness of the real setup and implementation of anti-corruption measures is rather low. This goes to show that anti-corruption standards that look good on the paper may not necessarily mean successful anti-corruption practice.

One example of a discrepancy between anti-corruption law that looks good on paper and real practice is the current situation of Prime Minister Andrej Babiš and the European grants assigned to his firms. In 2017, the Act on Conflict of Interest was amended, with one of its sections stating that companies at least 25 percent owned by a member of the government may not apply for public subsidies, incentives, etc. For this reason, Andrej Babiš transferred Agrofert in a trust fund, and de iure, ceased to be its owner. However, according to the findings of the European Commission from 2019, Andrej Babiš did not cease to be the recipient of the final benefits resulting from the fund being active, thus remaining the de facto owner. The European

[15] Úřad vlády České Republiky: Vládní koncepce boje s korupcí na léta 2018 až 2022. *Justice.cz*, 2018. https://korupce.cz/protikorupcni-dokumenty-vlady/na-leta-2018-az-2022/

Commission therefore decided to suspend the provision of EU subsidies to all companies associated in this corporate group until the matter was investigated (with retroactive effect). (NAXERA – STULÍK, 2021b)

The real state of the measures is proving to be insufficient, especially in the following areas: 1) control over politicians, and 2) transparent and efficient investments of public funds. On the other hand, other categories are a little better, such as 1) transparent financing of political parties (for example, the Office to Supervise the Economies of Political Parties and Movements has been operating since 2017), or 2) the functioning of public administration.[16]

The ineffectiveness of some measures and institutions is not only given by unsuitable practice, despite a formally good setup, but also by the actual unsuitable setup. One of the key institutions watching over the handling of public funds, i.e. the Czech Republic Supreme Audit Office, is not competent to inspect the economies of municipalities, regions, or companies with capital participation of the state or self-governments. This obviously creates a significant gap in the anti-corruption efforts, creating opportunity for corruption. (DVOŘÁKOVÁ, 2020)

The Act on Civil Service (passed in 2014 and taking effect from 2015) is another example of standards that are not set up very well. It was meant to depoliticise the public administration and to prevent transfers and promotions of public officials on the basis of clientelism, nepotism and party patronage. It is a law that was very difficult to put through, and the passing of this Act was associated with major political conflicts and intra-party disputes, as well as political pressure, as many political parties could not really hide their view that the Act was unwanted.[17] However, the wording of the Act also projects external factors (such as the requirements of EU or the effort to comply with international standards of the anti-corruption struggle). The resulting law has the potential to improve state service qualitatively within Central Europe, but it is far from complying with international standards – it actually goes straight against these standards at least within the framework of several evaluation criteria. These failures are as follows: the law only partially disallows non-systemic remunerations for officials, and it also fails to limit the numbers and budgets of advisors of politicians. Nevertheless, its greatest failure is in the effort to separate political and clerical positions in state administration. (KUČERA, 2018)

Conclusion

As this paper demonstrated, corruption is in many aspects a key factor in Czech politics and an important political topic. Especially over the past years, new parties presenting themselves as

[16] Celková účinnost protikorupčních opatření. *Protikorupční barometr*, http://www.protikorupcnibarometr.cz/

[17] It is worth mentioning that shortly before the Act took legal force, significant personnel changes took place in a number of state institutions, being in line of party affiliation. These changes would not be so easily made after the new Act took force. This shows the real absence of political will to have a functional act on civil service.

being anti-corruption have been emerging. For example, there is the new movement named Přísaha (Oath) founded by former detective Robert Šlachta, mentioned above in the text, in early 2021. While this paper was being finalised, this movement attacked the 5% limit of votes necessary for entering the parliament. Šlachta describes his motive to enter politics (referring to the Nagygate case described above, during which the police interventions were conducted by detectives from Šlachta's division): "And then the year 2013 came, and our intervention at the government office. The prime minister's mistress was managing this country being bribed by mobsters, and everybody else was just watching. I couldn't do that. The law must apply to all persons equally. I remember the night before the intervention at the government office. I couldn't sleep; I was so nervous. I knew they wouldn't like this. I knew they would feel that we've gone too far. But I couldn't do anything else. I had to do the only thing that was right in my opinion, even if it meant the end of my career."

So, corruption is used as a topic within the framework of political struggle by a large number of politicians across the political spectre. At the same time, however, it remains the key factor impacting the country's political, social, and economic development. As is documented by data from CPI, society perceives it as a fundamental problem.

Despite the fact that the Czech Republic made progress in adopting and implementing anti-corruption legislation, there are still many limits. Apart from the ones mentioned above in the paper, it is necessary to point out the absence of real political will to assert and enforce anti-corruption standards systematically and in an equal way. Another limit that needs to be mentioned rests in the position and functioning of the media. Leaving aside the political pressure exerted on the media of public service, which has been escalating over the past years, there are also private media that play a key role – they are mostly owned by Czech billionaires, often linked with political spheres. After all, Prime Minister Babiš himself purchased a publishing house producing two of the most-widely read Czech journals before entering politics. The everyday operation of these journals goes to show what convenient tools they can be in labelling political opponents as corrupt, or in diverting attention away from one's own problems.

References

BAEZ-CAMARGO, Claudia – LEDENEVA, Alena (2017): Where Does Informality Stop and Corruption Begin? Informal Governance and the Public/Private Crossover in Mexico, Russia and Tanzania. *Slavonic and East European Review*, 95(1), 49–75. https://discovery.ucl.ac.uk/id/eprint/1551566/1/slaveasteurorev2.95.1.0049_Baez_Ledeneva.pdf

BRATU, Roxana – SOTIROPOULOS, Dimitri A. – STAYONOVA, Maya (2017): Through the Lens of Social Constructionism: The Development of Innovative Anti-Corruption Policies and Practices in Bulgaria, Greece and Romania, 2000–2015. *Slavonic and East European Review*, 95(1), 117–150.

BRATU, Roxana – KAŽOKA, Iveta (2018): Metaphors of corruption in the news media coverage of seven European countries. *European Journal of Communication*, 33(7), 57–72. http://sro.sussex.ac.uk/id/eprint/81773/1/Metaphors%20_article_JournalismFocus_IK_RB_v2_1.pdf

BRUNCLÍK, Miloš (2016): Three Technocratic Cabinets in the Czech Republic: A Symptom of Party Failure? *Politics in Central Europe*, 12(2), 7–28.

BUSTIKOVA, Lenka – GUASTI, Petra (2017): The Illiberal Turn or Swerve in Central Europe? *Politics and Governance*, 5(4), 166–176. https://www.cogitatiopress.com/politicsandgovernance/article/view/1156/1156

BUSTIKOVA, Lenka – GUASTI, Petra (2018): The State as a Firm: Understanding the Autocratic Roots of Technocratic Populism. *East European Politics and Societies and Cultures*, 33(2), 302–330; https://www.fb03.uni-frankfurt.de/84859411/The_State_as_a_Firm_Understanding_the_Autocratic_Roots_of_Technocratic_Populism.pdf

CIA (2021): *The World Factbook, Czechia*. *CIA.gov*. https://www.cia.gov/the-world-factbook/countries/czechia/

DVOŘÁKOVÁ, Vladimíra (2014): (Ne)budování státu: proč se po roce 1989 stát nebudoval a proč jej nebudujeme ani nyní? *Politologická revue / Czech Political Science Review*, 20(2), 19–30.

DVOŘÁKOVÁ, Vladimíra (2019): Regime Change as a Trigger of Corruption: Experience from Post-Communist Countries. *Politologická revue / Czech Political Science Review*, 25(2), 101–126. http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-3419bbb9-7b0f-4ed8-9ff7-371f2c687b0d

DVOŘÁKOVÁ, Vladimíra (2020): *O prostoru korupčních příležitostí. Kdy, kde a jak se vytvářejí v České republice.* Praha: SLON.

FREEDOM HOUSE (2021): *Countries and Territories.* https://freedomhouse.org/countries/freedom-world/scores

HANLEY, Seán – VACHUDOVA, Milada A. (2018): Understanding the illiberal turn: democratic backsliding in the Czech Republic. *East European Politics*, 34(3), 276–296.

HEYWOOD, Paul M. (2017): Rethinking Corruption: Hocus-Pocus, Locus and Focus. *Slavonic and East European Review*, 95(1), 21–48. https://doi.org/10.5699/slaveasteurorev2.95.1.0021

KARKLINS, Rasma (2005): *The System Made Me Do It. Corruption in Post-communist Societies.* Armok–London, M. E. Sharp.

KLÍMA, Michal (2015): *Od totality k defektní demokracii. Privatizace a kolonizace politických stran netransparentním byznysem.* Praha: SLON. https://sreview.soc.cas.cz/pdfs/csr/2016/01/06.pdf

KMENTA, Jaroslav (2017): *Boss Babiš.* JKM.

KRČÁL, Petr – NAXERA, Vladimír (2015): Vztah korupčního jednání a státního aparátu. *Politologická revue / Czech Political Science Review*, 21(2),73–93.

KUČERA, František (2018): Český zákon o státní službě: odpovídá mezinárodním protikorupčním standardům? *Politologická revue / Czech Political Science Review*, 24(1), 5–28.

KUPKA, Petr – MOCHŤAK, Michal (2014): Aféra Nagygate mezi korupcí a organizovaným zločinem: korupční sítě a jejich možný vliv na kvalitu demokracie v České republice. *Central European Political Studies Review*, 16(4), 237–263.

KUPKA, Petr – MOCHŤAK, Michal (2015): The Nagygate Affair, Corruption and Organized Crime: Corruption Networks and their Potential Impact on the Quality of Democracy in the Czech Republic. *World Political Science*, 11(1), 157–185.

KUPKA, Petr – WALACH, Václav – TVRDÁ, Kateřina (2021): Profit, or power? Towards a construction of organized crime in Czech policy. *International Journal of Law, Crime and Justice*, 66, 1–10.

LEDENEVA, Alena – BRATU, Roxana – KÖKER, Phillip (2017): Corruption Studies for the Twenty-First Century: Paradigm Shifts and Innovative Approaches. *Slavonic and East European Review*, 95(1), 1–20. http://dx.doi.org/10.5699/slaveasteurorev2.95.1.0001

MUDDE, Cas – KALTWASSER, R. Cristóbal (2018): Studying Populism in Comparative Perspective: Reflections on the Contemporary and Future Research Agenda. *Comparative Political Studies*, 51(13), 1667–1693. https://wrdtp.ac.uk/wp-content/uploads/2018/09/Mudde-and-Kaltwasser-Populism-in-Comparative-Perspective.pdf

MÜLLER, Karel B. (2012): Kmotři, dárky a moderní byrokracie: dílčí shrnutí a dvě kritické poznámky k sociálním studiím lobbingu. *Acta Fakulty filozofické Západočeské univerzity v Plzni*, 4(3), 81–101. https://adoc.pub/karel-b-mller-kmoti-darky-a-moderni-demokracie-dili-shrnuti-.html

MYANT, Martin (2014): *Vzestup a pád českého kapitalismu. Ekonomický vývoj České republiky od roku 1989*. Praha: Academia.

NAXERA, Vladimír (2012): Korupce a postkomunismus. *Central European Political Studies Review*, 14(2–3), 248–271. https://journals.muni.cz/cepsr/article/view/4583/3666

NAXERA, Vladimír (2013): Patterns of Corruption, Clientelism, and Party Patronage in Central European Communist and Post-Communist Societies. *Politics in Central Europe*, 9(1), 47–68. https://www.politicsincentraleurope.eu/documents/file/Volume1_2013_FINAL_13_10_10.pdf

NAXERA, Vladimír (2014): Stranická patronáž a její vztah ke korupci a klientelismu: teoretický koncept a nástin uplatnění v postkomunistickém prostředí. *Central European Political Studies Review*, 16(4), 264–287. https://journals.muni.cz/cepsr/article/view/4487/3554

NAXERA, Vladimír (2015a): *Korupce v komunistickém režimu a v průběhu postkomunistické transformace. Studie korupčních, klientelistických a patronážních jevů z prostředí Československa/České republiky*. Brno, Dokořán.

NAXERA, Vladimír (2015b): Corruption Perception in the Czech Republic. *Politics in Central Europe*, 11(1), 51–73. https://sciendo.com/pdf/10.1515/pce-2015-0001

NAXERA, Vladimír (2017): Democracy, Corruption and (In)Security: a Theoretical Interpretation and Several Observations from the Czech Environment. In: UŠIAK, Jaroslav – KOLLÁR, Dávid – MELKOVÁ, Michaela (eds.): *Security Forum 2017. Conference Proceedings from the 10th Annual International Scientific Conference, February 8th–9th, 2017*. Banská Bystrica: Interpolis, 78–88. https://www.fpvmv.umb.sk/drive/2020-06-07/security-forum-2017-conference-proceedings.pdf

NAXERA, Vladimír (2018): The Never-ending Story: Czech Governments, Corruption and Populist Anti-Corruption Rhetoric (2010–2018). *Politics in Central Europe*, 14(3), 31–54.

NAXERA, Vladimír (2021a): 'Let us blow them down!': Corruption as the subject of (non-)populist communication of the Czech Pirate Party. *Politics*. https://doi.org/10.1177%2F02633957211010984

NAXERA, Vladimír (2021b): *Od kritiky postsocialistické privatizace po nástup protikorupčních hnutí. Téma korupce v komunikaci aktérů polistopadové české politiky*. Plzeň: University of West Bohemia Press.

NAXERA, Vladimír – KRČÁL, Petr (2018): "This is a Controlled Invasion": The Czech President Miloš Zeman's Populist Perception of Islam and Immigration as Security Threats. *Journal of Nationalism, Memory & Language Politics*, 12(2), 192–215. https://www.sciendo.com/article/10.2478/jnmlp-2018-0008

NAXERA, Vladimír – KRČÁL, Petr (2019): "You can't corrupt eight million voters": corruption as a topic in Miloš Zeman's populist Strategy. *Studies of Transition States and Societies*, 11(1), 3–18. https://www.ssoar.info/ssoar/bitstream/handle/document/63977/ssoar-stss-2019-1-naxera_et_al-You_cant_corrupt_eight_million.pdf?sequence=1&isAllowed=y

NAXERA, Vladimír – STULÍK, Ondřej (2021a): 'I will handle it personally': The neo-patrimonial rhetoric of the Czech Prime Minister in the times of COVID-19. *Journal of Contemporary European Studies*, 1, 1–13.

NAXERA, Vladimír – STULÍK, Ondřej (2021b): I am the State. On Czech Prime Minister Andrej Babiš' reaction to the decision of the European Commission. *Verfassungsblog on Matters Constitutional*, 3 May. https://verfassungsblog.de/i-am-the-state/?fbclid=IwAR11RfMyemHcz-CrCRQvPqZ5pEj82xNoxFW3r1pONKQnXykh8L_gH0-ucwg

NUMERATO, Dino (2016): Corruption and public secrecy: An ethnography of football match-fixing. *Current Sociology*, 64(5), 699–717.

OECD (2018): *Regions and Cities at a Glance 2018 – Czech Republic.* https://www.oecd.org/regional/CZECH-REPUBLIC-Regions-and-Cities-2018.pdf

ŠKOLNÍK, Milan (2019): Není korupce jako korupce: vnímání a zkušenost ve vztahu k politické participaci. *Acta Fakulty filozofické Západočeské univerzity v Plzni / West Bohemian Review of Social Sciences & Humanities*, 11(2), 22–39. https://dspace5.zcu.cz/bitstream/11025/36376/1/2_Acta-2019-11-2-Skolnik.pdf

ŠKOLNÍK, Milan (2020a): Corruption and political participation: A review. *Sociální Studia / Social Studies*, 17(1), 89–105. https://journals.muni.cz/socialni_studia/article/view/13564/11483

ŠKOLNÍK, Milan (2020b): Korupce a důvěra ve veřejnou správu v postkomunistické Evropě. *Acta Politologica*, 12(1), 20–39.

ŠKOLNÍK, Milan (2020c): Where have all the non-corrupt civil servants gone? Corruption and trust in public administration in European countries. *Polish Sociological Review*, 211(3), 345–360.

ŠKOLNÍK, Milan (2021a): Korupce v České republice – dosavadní stav bádání. *Acta Politologica*, 13(2), 22–38.

ŠKOLNÍK, Milan (2021b): Corruption and its Impact on Protest Activities in Post-communist Europe. *European Review*, 29(5), 1–15. https://www.cambridge.org/core/journals/european-review/article/abs/corruption-and-its-impact-on-protest-activities-in-postcommunist-europe/C5CA70DD9E243806C50AE8A2B3B37725

PAVLOVA, Elena (2020): Corrupt governance: Self-defeating anti-corruption rhetoric and initiatives in Russia. *New Perspectives*, 28(2), 205–222.

PEROTTINO, Michel – STAUBER, Jakub – ŠÁROVEC, Daniel (2020): Reconstruction of the state: Lobbying against political corruption in the Czech Republic. *Journal of Public Affairs*, 20(1), 1–10.

USLANER, Eric M. (2008): *Corruption, Inequality, and the Rule of Law.* Cambridge: Cambridge University Press.

CORRUPTION AND CORRUPTION CONTROL IN GERMANY

MICHAEL KILCHLING*

Country Profile

Germany is a federal parliamentary republic, located right in the centre of the European Union. Government, legislation, judiciary and executive are divided into two levels: the federation and the 16 federal states (*Länder*), which all have their own constitutions and parliaments. The Federal Constitution (*Grundgesetz* – Basic Law) was adopted on 8 May 1949 and revised in 1990 with the Unification Treaty. Germany has approximately 82.9 million inhabitants (2019). The educational status of 13.3% of the population is below secondary, 56.8% have secondary and 29.9% tertiary attainment (2019). According to the most recent statistics, the country's GDP was USD 4,474.8 billion, i.e. USD 53,812 per capita (2020). The employment rate is 75.4% while 3.9 percent are registered as unemployed (2021/1); the latest rate of youth not in employment, education or training (NEET) was 3.1%.[1]

There is a clear assignment of responsibilities between the federal and *Länder* levels. The legislative power for criminal and criminal procedure laws is exclusively at the federal level: in addition to the Federal Parliament (*Bundestag*), federal laws and their amendments also have to pass the Federal Council (*Bundesrat*) in which the state governments are represented.[2] Other legal matters, such as police law[3] which regulates preventive measures of intervention, are in the competence of the states. The same goes for the organisation of prosecution and the judiciary (local, regional and higher state courts[4]); this explains why case law can significantly vary between the states, at least as long as there is no clear and binding precedent for a specific legal issue by

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[1] All data taken from https://data.oecd.org/germany.htm.

[2] From a functional perspective, the Federal Council with its 69 representatives (including the 16 states' prime ministers) can be seen as a kind of second chamber.

[3] In addition to the Federal Police Act, there are 16 state police acts, all independent and considerably disparate in form and substance.

[4] Solely the Federal Court of Appeals (*Bundesgerichtshof* – *BGH*), the specialised federal appeals courts (administrative, finance, labour, social, etc.), and the Federal Constitutional Court (*Bundesverfassungsgericht* – *BVerfG*) are federal courts. Following the same principle, the Federal Attorney General is responsible for the prosecution of terrorism and crimes against the state exclusively; all other crimes are dealt with by the local prosecutor offices, which are supervised and instructed by the states' Attorney Generals.

interpretation by the Federal Court of Appeals. In sentencing, however, the competent local and regional courts have great autonomy, guided by the higher state courts, which quite often have established their particular sentencing traditions ("tariffs"[5]). The same is true for the prosecutorial decision-making, including diversion practices,[6] which can vary to an even greater extent among the states than judicial case disposition. All these circumstances have to be considered when it comes to the statutory regulation and prosecution of corruption.

Corruption is an ambivalent issue of general interest in Germany. On the one hand, it appears to be an ever-present topic in political discussions – in the media as well as at the *Stammtisch* in the taverns. The elites, above all "the politicians", are rumoured to be all corrupt. The recent affair around allegedly corrupt COVID mask deals, in which a handful of conservative politicians have been involved,[7] fuels such preconceptions. Official data from the judiciary, on the other hand, provide a more distinct picture. These contradictory observations imply that what is casually assumed to be a corrupt practice by public opinion, it is rather a political and social phenomena than a criminally relevant behaviour. Some social scientists have argued that Germany is on its way towards becoming an envious society. (*"Neidgesellschaft"*; see ENZENSBERGER et al. 2001) A good example for the discrepancies of suspicion, media discourse, prejudice, and the veritable criminal substance of corruption allegations were the developments in the so-called Christian Wulff affair that happened several years ago. Mr. Wulff was forced by public pressure to resign from his position of Federal President *(Bundespräsident)* based on allegations of accepting undue benefits during his earlier career as state prime minister of Lower Saxony. Official allegations were *inter alia* focused on a private invitation to the Munich *Oktoberfest* in 2008.[8] Public outrage, however, reached its peak on the discovery made by journalists that, on the occasion of his purchase of a new private luxury car, Wulff's little son received a plastic bobby-car as a present from their *Autohaus*. Lengthy investigations led to a charge and opening of a trial before a grand chamber of the Hannover district court. In the course of the proceedings, however, the presiding judge offered a diversionary case dismissal due to insignificance.[9] Before filing the charge, the prosecutor had already made a first offer to close the files on the condition

[5] Roughly speaking, sentences are on average slightly more lenient in the North than in the South; for more details, see GRUNDIES, 2018.

[6] Prosecutorial diversion rates vary between some 23% (Bavaria) and 40% of all cases investigated that would be due to a formal charge (Hamburg), i.e., a relative variance of nearly 75%; Federal Statistical Office, Prosecutorial statistics of 2019, table 2.2.1.2.

[7] Several members of the federal and the Bavarian parliaments have been accused of having received enormous payments for the commission of COVID masks deals. Amounts reported vary between EUR 250,000, 660,000, and some 1.2 million in bribes for the main suspects. For more details, see PINEDA, 2021. They (Pineda & OCCRP) publicly defended themselves by referring to usual commercial and legal commission fees in a situation of extreme scarcity at the beginning of the pandemic. Prosecutorial investigations have not been initiated yet.

[8] A befriended businessperson had borne the hospitality costs of EUR 720 for hotel, food and beverages. See *Der Spiegel* of 27.02.2014: www.spiegel.de/politik/deutschland/christian-wulff-freispruch-im-prozess-um-korruption-a-955932.html

[9] Unconditional "petty case" dismissal without further punitive consequences, according to sec. 153 of the Code of Criminal Procedure.

of accepting a transaction fine of EUR 20,000.[10] In most cases, prominent defendants would make use of such an opportunity and pay any monetary "price" to escape the risk of conviction, as Bernie Ecclestone, the former owner of Formula One did. When he was tried at the Munich district court for corruption around the sale of shares some years ago, he paid USD 100 million on such an occasion, which is the highest transaction fine ever realised in Germany.[11] Not so Mr. Wulff. He rejected both offers to terminate the case in an informal way, and took full risk. And in fact, the case ended in a formal acquittal.[12] Today he is fully rehabilitated and entitled to undertake representative duties as a former president.[13] The lesson that could be learned from these and other cases is that journalistic fact-gathering and judicial evaluation of evidence is not the same, in particular when corruption is concerned. The bobby-car has not even become a subject of the criminal charge.

Profile of Provisions on Corruption in Law

Like in many jurisdictions, corruption is not an official legal term in Germany. In the public discourse, the word has a clear "politico-moral character" (ROTHSTEIN – VARRAICH, 2017: 32.) As a technical term, it represents an umbrella concept that links with various scientific disciplines. (For more details, see ROTHSTEIN – VARRAICH, 2017: 1–2; 17.) One side-effect of this multi-disciplinary interest in corruption is what Jacobs once called *"the always expanding definition[s] of corruption"* (JACOBS, 2002: 81.). Meanwhile, the repertory is so multi-faceted that it might be easier to find consensus about defining the opposite of corruption, which is, good governance – as *Rothstein and Varreich* have argued (ROTHSTEIN – VARRAICH, 2017: 125.). That statement can be valid both in public administration and in the business world. The key features of the desired non-corrupt governance are fair, impartial and consistent administration. (ROTHSTEIN, 2021: 6.) From a political and sociological perspective, there seems to be a lot of truth in this idea indeed., However, this reverse interpretation unfortunately does not help us in the area of criminal law, as law has to define – the wrong as exactly as possible, and would not prescribe and describe what is right'; because the mere absence of the right does not necessarily imply criminal liability. A further problem arises with regard to Rothstein's radical re-definition: based on such an approach, the main subject-matter of interest is the abuse of power or its non-compliance with the administrative acquis, and not the illicit benefit. The latter, however, is a constituent component of corruption from a penal point of view.

[10] Case dismissal with conditions such as a transaction fine, victim-offender mediation, community service, etc., according to sec. 153a of the Code of Criminal Procedure.

[11] In the case of a court conviction, the highest theoretically possible criminal fine would be EUR 10.8 million, i.e., 360 daily units of EUR 30,000 each (i.e., the maximum statutory amount according to sec. 38 of the Penal Code). Any of such diversionary case dismissals require, active consensus between prosecution, court, and defence. For more details of the Ecclestone case, see e.g. https://www.nytimes.com/2014/08/06/world/europe/formula-one-chief-settles-bribery-case-for-100-million.html

[12] Hannover District Court, verdict of 27.02.2014, 40 KLs 6/13.

[13] In Germany, federal presidents keep their official rank after their term has ended.

In the legal context, key actors in legislation and judicature regularly stick to the traditional definition of bribery, namely *"the misuse of public or administrative power for private gain"* (WOLF, 2021: 22.). Transparency International has a slightly broader definition in use, thereby replacing profit or gain by *"benefit or advantage"*[14]. In the legal literature, a kind of mixed definition is most common, with a more detailed notion of private benefit which includes any material or immaterial advantage. (For more details, see BANNENBERG, 2002: 11–12.)

In the further course of this chapter, the term corruption is used as a non-technical synonym.

General Framework for Penal Corruption Control

Since the reform initiated through the 1997 Act to Combat Corruption,[15] all major provisions can be found in the Penal Code. They are spread in three different chapters; bribery in the public sector is regulated among crimes committed in public office, bribery in the private business sector can be found as part of the chapter of crimes against fair competition, and bribery of elected representatives is in the chapter of crimes against constitutional organs and elections. In total, more than a dozen different statutory variants can be differentiated. (For more details see LORD, 2016: 74–75.) Almost all of these are classified as misdemeanours, which can be punished by fixed-term (and impermanent) prison sentences and/or fines (the latter option with few exceptions). Only one statutory offence constitutes a felony for which the minimum penalty of one year of imprisonment is mandatory, namely taking bribes as a judge. It should be added that in especially serious cases the minimum is two years.[16] The statutory maximum varies; for the most serious cases 10 years are provided by the Penal Code. The provision on especially serious cases was introduced only in 1997 through the Act to Combat Corruption, thus exceeding the scope of the 10 years maximum. Within the regular catalogue of penalties, this is the harshest statutory maximum provided in the German penal code for a non-lethal crime.[17] In addition, there are quite a number of accompanying offences, such as collusive tendering, tax evasion, and money laundering, as well as a couple of fallback provisions that can eventually be applied as functional equivalents in cases in which sufficient evidence for one of the explicit bribery crimes cannot be established. They cannot be covered here in more detail, with the exception of embezzlement, which plays an important role in German practice in the prosecution of corrupt or quasi-corrupt case scenarios in the business sector.[18]

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[14] www.transparency.de/ueber-uns/was-ist-korruption/

[15] Act to Combat Corruption [*Korruptionsbekämpfungsgesetz – KorrBekG*] of 13.08.1997, BGBl. I [Official Gazette, part I], 2083.

[16] Sec. 332 para. 2 and sec. 335 para. 1 no. 2 of the Penal Code (see below).

[17] The situation is similar in regard to the statutory minimum penalties available; only a handful of the most serious capital crimes, such as homicide, or robbery or hostage-taking resulting in death provide for a minimum penalty of 10 years or life imprisonment. The absolute maximum fixed-term sentence that can be imposed is 15 years, even in cases of multiple crimes (sec. 38 of the Penal Code). This comparison indicates the high rank of bribery on a conceptual general unlawfulness and seriousness scale.

[18] See below, 2.2.2.

In addition to the main penalties, further consequences may apply in case of a conviction. Penal confiscation can be applied in order to confiscate the illicit benefits or their monetary value.[19] Liability for confiscation targets the actual perpetrators and under certain conditions others who have profited from the crime.[20] As an exception to the penal *in personam* principle, this option is not limited to natural persons; it includes legal entities and can be of relevance in cases of corruption in the business sector, too. However, in such cases, it is, rather complicated to quantify the monetary value of such profit, as will be shown later.[21] This liability for penal confiscation is accessory and depends on the conviction of a main perpetrator. A further collateral penal consequence that may apply to convicts of corruption in the public sector is the loss of the ability to hold a public position or to be elected for a period of five years. This additional penalty comes into effect automatically in case of conviction for a felony subject to at least one year of imprisonment.[22]

To date, Germany has not introduced criminal liability for legal entities. After long hesitance, a draft bill (for an overview, see MORRISON & FOERSTER LLP, 2020) had been launched which aimed at introducing more rigorous sanctions against businesses. The bill was critically evaluated in the scholarly discussion. (See e.g., ROSTALSKI, 2020) In the lack of political consensus between the governing parties, this initiative was ruled out with the termination of the current legislative period (according to the discontinuity principle). A new initiative can only be started in the next period, presumably not before 2022. As of now, legal persons can exclusively be fined with an administrative fine under the Regulatory Offences Act. (For more details, see BÖSE, 2011) Such a sanction can be imposed against a company (or an otherwise organised business) in case of a crime committed by an employee in breach or negligence of compliance rules or other obligations for which the company is liable. The maximum amount that can be imposed is capped at 10 million Euros.[23] Alternatively, confiscation of the company's profit can be ordered.[24]

Besides penal responsibility, civil servants are also the subject of a second control system based on the public service law, which provides an additional disciplinary regime.[25] In 2019, the public sector in Germany included a total number of ca. 1.8 million civil servants.[26] All of them, not only active ones but also those who are already retired, can be held accountable for their official and private behaviour. In compliance with the detailed anti-corruption regulations as part of their

[19] Sec. 73, 73c of the Penal Code.
[20] Sec. 73b of the Penal Code.
[21] See below, 4.2.
[22] Sec. 45 of the Penal Code.
[23] Sec. 30 of the Regulatory Offences Act (ROA) [*Ordnungswidrigkeitengesetz*].
[24] Sec. 29a of the ROA: value confiscation; the net principle applies (sec. 29a para. 3 ROA).
[25] The Federal Act on the Disciplinary Proceedings regulates the proceedings against federal civil servants; all states have similar laws addressing their civil servants.
[26] *Statistisches Bundesamt* [Federal Statistical Office]
www.destatis.de/DE/Themen/Staat/Oeffentlicher-Dienst/Tabellen/beschaeftigungsbereiche.html

core duties; acceptance of any present, reward or other advantage is explicitly prohibited.[27] Disciplinary proceedings can be initiated independent of/ or in addition to, the criminal prosecution. In the latter case, the process follows the court trial. The catalogue of disciplinary sanctions is comprehensive; it includes reprimand, administrative fine, cut of wages or cut or loss of pension, demotion or removal from the civil service. The latter consequence applies to any explicitly serious breach of duty. It is mandatory upon conviction to a prison sentence of at least one year; in the case of taking bribes, of at least six months. Removal means the loss of their status and all related rights, including, *inter alia*, their pension and the privileged medical care. On top of all this, an extra disciplinary forfeiture provision applies to civil servants: any present, reward, or other advantage unduly received has to be surrendered to the state if penal confiscation has not been ordered.[28] These rigorous sanctions, with their potentially lifelong impact, can be considered as a greater deterrent than the "ordinary" penal corrections.

Finally, some procedural remarks. Corruption cases in the public sector are investigated and tried by the local prosecution offices. For corruption in the business sector, the situation is different. Most states have established specialised prosecutorial divisions and court chambers for economic crimes, which are often centralised at one district court within their jurisdiction; their competency includes corruption in the business sector.[29] Unlike some other countries there is no separate, autonomous agency, such as the Austrian *Wirtschafts- und Korruptionsstaatsanwaltschaft* in Vienna. In principle, police and prosecution have standard investigative powers. In cases of suspicion of bribery in the public sector and in especially serious cases of corruption in the business sector, additional covert measures, such as telephone tapping and the requisition of telecommunication metadata can be deployed.[30] In especially serious cases of bribery in the public sector, secret online computer search[31] is allowed, too. For proportionality reasons, these special measures of investigation are reserved for specified serious crimes exclusively; their applicability is a further indicator of the abstract seriousness rank of the related crimes.[32]

If necessary, the police can rely on their specialised financial investigation units, which were established in the course of the 1990s in all federal and state police agencies. There were pioneer efforts of using complicated inquiries into the money flows in some grand corruption cases in their consolidation years. An investigation that has developed to become a model case for this type of investigation was the so-called LEUNA affair. (For more details, see KILCHLING, 2001) In the course of the privatisation of the state-owned LEUNA, a refinery and gas station company (which had a monopoly in the former East Germany), enormous bribes were paid allegedly that could be at

[27] Sec. 42 and 47 of the Act on the Status of Civil Servants [*Beamtenstatusgesetz – BeamtStG*]. For exceptions, see below, 2.2.1.
[28] Sec. 42 para. 2 BeamtStG.
[29] Sec. 74c of the Judicature Act [*Gerichtsverfassungsgesetz – GVG*].
[30] Sec. 100a, 100g of the Code of Criminal Procedure.
[31] Sec. 100b of the Code of Criminal Procedure; critics sometimes call it online hacking by the state.
[32] See above.

least partly traced back to the sphere of the French Elf Aquitaine company. That company which received the bid.[33] This case represented some close similarities to the concurrent Croatian-Hungarian INA/MOL case. (See ROKSANDIĆ VIDLIČKA, 2017: 117–118.) The illustration of the suspicious financial transactions in the LEUNA-case became rather famous those times; and with regard to its mere size the police named it "the tapestry" (wallpaper).[34]

Penal Provisions in Detail

As mentioned earlier, corruption is not in use as a generic term in criminal law in Germany. Instead, several specific terms are provided for the various statutory alternatives. Terminology further varies between the different sectors, public, business, and politics.

Corruption in the Public Sector

With regard to the public sector, two basic types of corrupt scenarios can be distinguished: 1. benefit-driven actions by civil servants that are carried out within the legal and administrative rules and the regular scope of expedience, and 2. actions that are carried out in breach of the legal or administrative rules, or exceeding the individual scope of expediency.

The equivalent terms for bribery[35] are only used in law for the latter type. For both scenarios, the Penal Code further provides separate sections for active and passive corruption. Further attention should be paid to the rank order of the provisions. For both scenarios of corruption in the public sector the passive variants – "accepting benefits" and "taking bribes" – come first, thus implying that corrupt civil servants are seen as the prime target of the law; whilst active corruption – "granting benefits" and "giving bribes" – are the second in line. From a mere phenomenological perspective, the opposite order might appear more logical: giving would precede taking. However, the given structure also reflects the legally protected value[36] of the provisions, which is the integrity of the civil service and the trust of citizens in its integrity. Any semblance of eventual venality or bias in decision-making shall be prevented. This is why actions that may be entirely legal from an abstract perspective, both formally and substantively, can be punishable, as soon as money or other benefits join in. Technically speaking, all these provisions are classified as "offences of abstract endangerment"[37].

[33] Three managers got convicted in France, not anyone in Germany. See also: www.zeit.de/2001/28/Aus_Mangel_an_Courage/
[34] The diagram, published first by the weekly newspaper DIE ZEIT, is available online under http://investigativ.org/kapitel-3/3-5-1-2-2/
[35] *Bestechung* (active corruption) and *Bestechlichkeit* (passive corruption, literally: "being corrupt").
[36] *Rechtsgut*.
[37] *Abstraktes Gefährdungsdelikt*.

The statutory provisions on corruption in the public sector (sections 331 to 334 of the Penal Code) represent the traditional understanding of corruption in Germany. They remained more or less stable since coming into force with the German Penal Code in 1871.[38] Not only the basic structure of the four main provisions but also their numbering remained the same over time. Even the regular statutory penalty for bribery – 5 years maximum – has also been provided identically from the beginning.[39] Moreover, the original code already included an extra provision on confiscation.[40] The basic structure has been the following: sections 331 (passive) and 333 (active) go together, targeting the exchange of benefit, and sections 332 (passive) and 334 (active), targeting genuine bribery.

Relevant provisions at a glance:[41]

Section 331: Accepting benefits

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the discharge of a duty incur a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or a third party in return for the fact that they performed or will in the future perform a judicial act incur a penalty of imprisonment for a term not exceeding five years or a fine.

(3) The offence does not entail criminal liability pursuant to subsection (1) if offenders allow themselves to be promised or accept a benefit which they did not demand and the competent authority, within the scope of its powers, either previously authorised the acceptance or offenders promptly make a report to the competent authority and it authorises the acceptance.

Section 332: Taking bribes

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform an official act, and thereby breached or would breach their official duties, incur a penalty of imprisonment for a term of between six months and five years. In less serious cases, the penalty is imprisonment for a term not exceeding three years or a fine.

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[38] The Penal Code of the German Reich (*Reichsstrafgesetzbuch*) was formally re-enacted in West Germany as the Penal Code (*Strafgesetzbuch*) in 1953; between 1957 and 1990, the former East Germany had its own (socialist) codification (Penal Code of the German Democratic Republic).

[39] When looking on the general developments in sentencing policies and practices in Germany since the late 19th century, which became constantly more lenient over time, this statutory maximum of five years appears harsher today than it was in the early years; in addition, the trend towards stricter punishments provided for bribery was further amplified with the introduction of the provision on especially serious cases with its 10 year-limit in 1997.

[40] See the former sec. 335 of the 1871 Penal Code; see OPPENHOFF, 1873.

[41] Excerpts of the relevant provisions. Unofficial English versions based on translations by BOHLANDER, 2008 (regularly amended by Ute Reusch), as provided by the Federal Ministry of Justice at www.gesetze-im-internet.de/englisch_stgb/index.html. Wording and spelling slightly adjusted by Author.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform a judicial act, and thereby breached or would breach their judicial duties, incur a penalty of imprisonment for a term of between one year and 10 years. In less serious cases, the penalty is imprisonment for a term of between six months and five years.
(3) If offenders demand, allow themselves to be promised or accept a benefit in return for a future act, then subsections (1) and (2) already apply if they have indicated to the other person that they are willing

1. to breach their duties by performing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

Section 333: Granting benefits
(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the discharge of a duty incurs a penalty of imprisonment for a term not exceeding three years or a fine.
(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they performed or will in the future perform a judicial act incurs a penalty of imprisonment for a term not exceeding five years or a fine.
(3) The offence does not entail criminal liability pursuant to subsection (1) if the competent authority, within the scope of its powers, either previously authorised the recipient's acceptance of the benefit or authorises it upon prompt reporting by the recipient.
Section 334: Giving bribes
(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the fact that they have performed or would in future perform an official act, and thereby breached or would breach their official duties, incurs a penalty of imprisonment for a term of between three months and five years. In less serious cases, the penalty is imprisonment for a term not exceeding two years or a fine.
(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they

1. performed a judicial act and thereby breached their judicial duties or
2. would perform a judicial act and would thereby breach their judicial duties

incurs a penalty of imprisonment for a term of between three months and five years in the cases under no. 1, imprisonment for a term of between six months and five years in the cases under no. 2.
(3) If offenders offer, promise or grant the benefit in return for a future act, then subsections (1) and (2) already apply if they attempt to induce others

1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

Section 335: Especially serious cases of taking and giving bribes
(1) In especially serious cases

1. of an offence under

a) section 332 (1) sentence 1, also in conjunction with (3), and

b) section 334 (1) sentence 1 and (2), in each case also in conjunction with (3),
the penalty is imprisonment for a term of between one year and 10 years and
2. of an offence under section 332 (2), also in conjunction with (3), the penalty is imprisonment for a term of at least two years.
(2) An especially serious case within the meaning of subsection (1) typically occurs where
1. the act relates to a major benefit,
2. the offender accepts continued benefits which are demanded in return for the fact that the offender would perform an official act in the future or
3. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

For the application of the above cited provisions, three key issues are the focus of attention. The first one relates to the personal scope of application: Who are public officials, European officials or persons entrusted with special public service functions? Originally, the formal status of civil servants was a pivotal point of orientation. Meanwhile, however, the boundaries became increasingly blurred. In principle, the terms are explicitly defined in the law,[42] and thus the followings are concerned: civil servants including judges, other persons who are entrusted with special public service functions, persons who carry out public official functions, and persons appointed or commissioned to perform public administrative services, regardless of the organizational form. These latter variants have gained increasing relevance due to privatisation policies of the 1990s and 2000s. In the course of this development, some hybrid forms of organisational bodies were created: partially privatised sectors, public-private partnerships, etc., which produced enormous demarcation problems. (WOLF, 2021: 25.) Case law on these issues is also voluminous. (For details, see HECKER, 2019; HEINE – EISELE, 2019)

Even the meaning of the common term 'civil servant' is not always clear. In a case involving a high ranking official of the Protestant Church administration, the courts had to decide on his/her status, too. The issue caused dilemmas stemming from the double-faced constitutional position of the Catholic and the Protestant Churches, as they traditionally[43] have a quasi-official status as public-law institutions, whilst providing with their own autonomous public service law, too.[44] In 2000 it was definitely ruled at last that,(notwithstanding the formal status of the Churches) their administrative staff do not carry out public administrative services,[45] which has resulted that the entire set of provisions on crimes committed in public office does not apply to them.

The second issue of interest is the definition and interpretation of the "undue benefit". In principle, it includes any material or immaterial advantage, through which the economic, legal or personal situation of the beneficiary is objectively bettered without being entitled to it. (For more

[42] Sec. 11 of the Penal Code.
[43] Regulated by the *Staatskirchenrecht* [State-Church Law].
[44] Accordingly, their official title is *"Kirchenbeamte"* [civil servants of the Church].
[45] Higher State Court (OLG) of Düsseldorf, verdict of 16.10.2000 – 1 Ws 534/00, NJW 2001, 85.

details and examples, see HEINE – EISELE, 2019, § 331 annot. 13 et seq.) The benefit can be direct or indirect, personal or for someone else. The list of potentially relevant benefits is long. Besides any direct forms of financial payments, presents and cost-free benefits, indirect variants such as under-priced deals or discounted services can be punishable, too. Examples from case law include reduced mortgage loan or advantageous interest rate, free lending of vehicles or equipment for private use, use of customer loyalty programmes (frequent flyer or traveller credits) for private use, private extension or taking a guest on business trips, etc. Only socially adequate benefits, e.g., a cup of coffee or tea, a pencil or similar professional marketing materials, or traditional end-of-the year donations for dustmen, postmen, newspaper delivery, etc. are acceptable. In addition, presents that cannot be refused without violating rules of courtesy, e.g., handed over by a foreign delegation, are exceptions as well. (For these and more examples, HEINE – EISELE, 2019, § 331 annot. 40.) In general, practices are rigid. A constant source for concern are any forms of hospitality costs (meals, restaurant bills, hotel nights, holiday deals) but all administrative bodies have explicit regulations in place which provide detailed rules, that include strict maximum amounts, which can vary between EUR 5 and 25, depending on, for example, administrative or government sectors, or positions.[46] Anything that exceeds these bagatelle limits has to be reported to and approved by the employer.

The third and final question relates to the particular legal requirement of a wrongful agreement. This *quid pro quo* element reflects the essence of the corrupt deal. While the wrongful agreement must be objectively and subjectively explicit in cases of bribery, an implicit, "loosened" consent is sufficient for the basic variants of granting or taking benefits. Benefit and action must correspond in any form. . In the case of the former Federal President Wulff, the court rejected that such a *quid pro quo* took place. The possibility that the invitation might have been a private favour in return for another – past or future – private invitation could not be refuted by the prosecutor. (For more details, see KUBICIEL, 2014)

Corruption in the Business and Healthcare Sectors

The regulation of corruption follows rather different rules in the business sector. Through the Act to Combat Corruption[47] which amended the Penal Code in 1997, the new 26th chapter on "crimes against fair competition", was introduced. These statutory offences were not totally new. They were partially regulated before outside the Penal Code, in the context of the Act Against Unfair Competition (AUC). On the one hand, its transfer into the Penal Code was a symbolic act through which general prevention in the sector should be strengthened. On the other hand, this formal upgrade transformed business corruption from an administrative offence into a criminal one, so that these offences now can be prosecuted ex officio, without a criminal

[46] For example, the ordinance of the state ministry of finance of Rhineland-Palatinate: www.verwaltung.personal.uni-mainz.de/files/2020/02/Rundschreiben-Merkblatt-Bek%C3%A4mpfung-der-Korruption_DE_05-2019.pdf

[47] See above.

complaint if the prosecutor determines a public interest.[48] In addition, victims can formally request the prosecution of the alleged crimes under the Code of Criminal Procedure, which is an option that does not apply in AUC proceedings.[49] In this particular context, the definition of victims is broader than in other cases. It includes any potential competitors as well as the employer, if the corruption was initiated or carried out by an employee in breach of internal duties. A further peculiarity of the statutory definition of bribery in private businesses is the explicit focus on employees and agents. The principal's penal liability is precluded. Neither business owners, CEOs, managing directors, etc., nor self-employed individuals running a one-man company can be held liable under section 299 of the Penal Code. With regard to these persons, the legislator gave priority to their economic freedom, which includes the autonomy to take their business decisions independently. (For more details, see HEINE – EISELE, 2019, § 299 annot. 11.) In return for the lack of criminal liability, enhanced civil liability risks apply when compliance rules and other control measures have not been sufficiently implemented. In addition, the extended confiscation rules referred to above[50] apply.

At the same time, this exemption is, one of the reasons why it has always been extremely difficult to investigate and prosecute corrupt activities in the healthcare sector. There was dissatisfaction about the fact that the following widespread practices could hardly ever be prosecuted: such as invited free attendance at medical congresses in luxury resorts, deals for referring patients to designated laboratories, or monetary gratifications for the selective prescription of specific pharmaceuticals, On the one hand, many sectors of the health system, in particular hospitals, have been privatised in the recent decades, with the result that clinic staff has no longer belonged to the group of public officials. On the other hand, self-employed (free)medical doctors and staff are bound by a multitude of administrative regulations, including the medical 'authorizing' law ("Approbation Gesetz") with its disciplinary regimes, and the public health insurance law, which presents them more as members of a regulated profession rather than real private and business-oriented actors. (For critical remarks, see VON MAYDELL, 1996) Under such circumstances, it couldn't be a real surprise that, in the course of the so-called cardiac valves-scandal of the 1990s [which was presumed to have caused a loss of ca. EUR 1.5 billion for over-priced cardiac valves and other medical technical devices (for more details, see CLADE, 2000)] only about 32 out of the initial number of more than 1,500 investigations resulted in a conviction (mainly for fraud or other substitute offences). (GASSNER – KLARS, 2002: 313.) Eventually, there was a considerable consensus that such practices should be penalised in the future. This is why the legislator decided to introduce extra provisions on taking and giving bribes

[48] Sec. 301 para. 1 of the Penal Code.

[49] So-called prosecution enforcement procedure [*Klageerzwingungsverfahren*] according to sec. 172 of the Code of Criminal Procedure; upon an individual complaint, the Higher State Court can overrule a prosecutorial case dismissal and order the prosecutor to re-open the case and file a charge.

[50] See above 2.1.

in the healthcare sector.[51] The provision now targets all persons in a (formal[52]) medical profession, independent of their occupational status.

Besides the conceptual differences mentioned, the legal terms and the technicalities of the provisions on business and healthcare corruption are, in principle, the same as for corruption in the public sector. However, the standards of social adequacy are different. Usual practices of business life, such as, quantity discounts, presents, lunch or dinner invitations (including get-togethers without a concrete ground for the purpose of so-called general "climate care", which is prohibited in the public sector), are accepted. For the latter, additional criteria, such as their position in the company (management level versus lower departmental staff) or the appropriate lifestyle has to be considered, too, when it comes to the question of whether a pizzeria or golf club might be appropriate for a dinner invitation. (For more details, see HEINE – EISELE, 2019, § 299 annot. 35.)

Relevant provisions at a glance:[53]

Section 299: Taking and giving bribes in commercial practice

(1) Whoever, in commercial practice in the capacity as an employee or agent of a business,

1. demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for giving an unfair preference to another in the competitive purchase of goods or services in Germany or abroad or

2. without the permission of the business demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for performing or refraining from performing an act in the competitive purchase of goods or services, thereby breaching the duty incumbent on them towards the business,

incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Whoever, in commercial practice,

1. offers, promises or grants a benefit to an employee or agent of a business or a third party in return for giving that person or another an unfair preference in the competitive purchase of goods or services in Germany or abroad or

2. without the permission of the business offers, promises or grants an employee or agent of a business or a third party a benefit in return for performing or refraining from performing an act in the competitive purchase of goods or services, and thereby breaches the duty incumbent on them in relation to the business,

incurs the same penalty.

[51] Sec. 299a and 299b of the Penal Code, introduced by the Act to Combat Corruption in the Health Sector of 30.05.2016, BGBl. I, 1254.

[52] All professions that need a state-regulated education; these include not only medical doctors, dentists, veterinarians, etc., but also paramedics, midwives, psychotherapists, medical-laboratory assistants, masseurs, nurses, and many more.

[53] See above.

Section 299a: Taking bribes in the healthcare sector

Whoever, as a member of a healing profession which requires state-regulated training to exercise the profession or to use the professional title demands, allows themselves to be promised or accepts a benefit for themselves or another in connection with the exercise of their profession in return for

1. prescribing medication, remedies or health aids or medical devices,
2. procuring medication or health aids or medical devices which are designed for direct use by the member of the profession or one of their professional assistants or
3. supplying patients or samples and diagnostic data,

and thereby provides an unfair competitive advantage to another in Germany or abroad, incurs a penalty of imprisonment for a term not exceeding three years or a fine.

Section 299b: Giving bribes in the healthcare sector

Whoever offers, promises or grants a benefit to a member of a healing profession within the meaning of section 299a or to a third party in connection with their professional activities in return for

1. prescribing medication, remedies or health aids or medical devices,
2. procuring medication or health aids or medical devices which are designed for direct application by the member of the healing profession or one of their professional assistants or
3. supplying patients or samples and diagnostic data,

and thereby provides an unfair competitive advantage to that person or another in Germany or abroad, incurs a penalty of imprisonment for a term not exceeding three years or a fine.

Section 300: Especially serious cases of taking and giving bribes in commercial practice and the healthcare sector

In especially serious cases, an offence under sections 299, 299a and 299b incurs a penalty of imprisonment for a term of between three months and five years. An especially serious case typically occurs where

1. the offence relates to a major benefit or
2. the offender acts on a commercial basis or as a member of a gang whose purpose is the continued commission of such offences.

As mentioned earlier, the business crime sections in prosecution and the judiciary have developed an additional sharp weapon that is applied in a variety of cases of irregular or improper business activities. The instrument used for this purpose is the statutory provision on embezzlement (breach of trust[54]). Besides its originally narrow scope of application, i.e., the breach of fiduciary duties of a bookkeeper, it is meanwhile used as a kind of "all-purpose weapon" (SEIER, 2004) that may also be of help for prosecuting corrupt or seemingly corrupt activities in business life that cannot be subsumed under the relevant provisions on business corruption. Technically speaking, it is not a real functional equivalent, but a fallback provision of high practical relevance, applied to target any kind of impure business action which cannot be subsumed under one of the explicit economic crime statutes. From a prosecutorial point of view, this path even has an additional punitive advantage: the possible penalty that can be requested is higher than the one for bribery in the business sector.[55]

[54] *Untreue*, sec. 266 of the Penal Code.

[55] The statutory maximum in sec. 266 is five years, as compared to the three years maximum provided in sec. 299.

Legally, any deviation from internal compliance rules may cause financial risks for a company. Following this logic, not only obvious bribery and related preparatory "steps", such as the administration of black money accounts, have led to embezzlement charges and convictions, but also manifold scenarios of presumably irregular or immoral business activities such as excessive manager income (premiums, gratifications, gratuities, so-called signing or joining bonuses), overpaying[56] or extra-tariff remuneration of staff, voluntary allowances for staff, undercharged billing, payment of overcharged prices, irregular expenditure of research funds, covert donations to political parties, sponsoring, pharma marketing, so-called pleasure trips, reimbursement of occupation-related monetary sanctions or legal charges, purchase of expensive works of art for decorating the executive floor of company headquarters, and even economically risky deals, too. (For a collection of these and many more examples, see PERRON, 2019, § 266 annot. 19a/b.) From a criminological point of view, this prosecution practice has the statistical side-effect that such variants of corrupt or quasi-corrupt business activities, when tried as embezzlement, are not registered as business corruption.[57] A while ago, the Federal Constitutional Court intervened in order to at least carefully cushion this excessive application practice (for a critical review, see SEIER, 2004) by ruling that punishability for embezzlement requires incontrovertible evidence of concrete material damage or at least a real risk of such damage. The court further felt a need to remind the criminal courts of the *in dubio pro reo* principle by explicitly emphasising that, in the absence of such evidence, a defendant has to be acquitted.[58]

Notwithstanding this alert by the highest judicial instance, this omnibus provision is still considered to be a quite effective weapon in prosecution practice against irregularities or allegedly improper – rather than truly criminal – wrongdoings in the business sector, thereby also targeting individuals (sometimes) in an undeserved manner. Under the current strict commercial anti-corruption regimes, any employee who becomes involved in corrupt activities for the advantage of his or her company risks being prosecuted for embezzlement as it is more than unlikely that the management, supported by their powerful legal department, would concede responsibility for any profit unduly taken out of it. They can enjoy the commercial fruits while at the same time their employee, as the weakest link in the chain, risks going into prison.

Such a case will be presented later.

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[56] In a recent criminal case, four Volkswagen managers were tried for having overpaid the head of the workers council (*Betriebsrat*) and some of his colleagues, who, according to an explicit legal regulation of the so-called VW Act are strongly represented on Volkswagen's supervisory board. With reference to the parity status of workers at the company, their representatives were paid similar allowancies to those of management representatives. In the end, the court explicitly rejected the punishability of this practice; all defendants were acquitted. Braunschweig District Court, verdict of 28.09.2021 – 16 KLs 85/19. For more details on this case, see: www.handelsblatt.com/english/companies/bernd-osterloh-how-much-is-too-much/23569666.html?ticket=ST-570686-aKXATtgpGNRTj7iWK0rM-ap3; www.nytimes.com/2017/05/12/business/vw-expenses-fraud.html

[57] See also below, 4.1.

[58] BVerfG, ruling of 23.06.2010 – 2 BvR 491/09, 2 BvR 105/09, 2 BvR 2559/08, BVerfGE 126, 170.

Section 266: Embezzlement

(1) Whoever abuses the power conferred on them by law, by commission of an authority or legal transaction to dispose of the assets of another or to make binding agreements for another, or whoever breaches their duty to safeguard the pecuniary interests of another which are incumbent upon them by reason of law, by commission of an authority, legal transaction or fiduciary relationship, and thereby adversely affects the person for whose pecuniary interests they were responsible, incurs a penalty of imprisonment for a term not exceeding five years or a fine.

Political Corruption

Political corruption is an area which is treated with particular carefulness by the German legislator. The reasons are manifold; one of the main reasons for the hesitance towards introducing strict(er) penal control in the political arena is a traditional attitude, according to which lobbying is, at least in principle, considered to be a legitimate and welcome form of participation in the pluralistic democratic process. (WOLF, 2021: 22.) Recently, the so-called Azerbaijan connection was widely discussed; several parliamentarians are suspected of having received financial benefits by President Aliyev and his family in return for friendly lobbying within the Council of Europe's organs.[59] Legally speaking, neither consensus nor a realistic concept for defining the dividing line between legitimate lobbying on the one hand, and criminally relevant influencing of the political decision-making process on the other hand, has been attained. While Germany is party to the relevant UN and OECD Conventions, the country has not (yet) ratified the Council of Europe Convention because it has a wide approach to the corruption of parliamentarians. Besides the traditional provision on buying or selling votes (section 108b), which addresses citizens as voters in general elections and has never played a significant role in Germany, a new provision on elected officials taking and giving bribes (section 108e), was introduced in 1994. Three years later, it was revised by the 1997 Act to Combat Corruption[60] in order to bring it into accordance with international standards (as far as they are binding for Germany). On account of the clear critical positions in expert reports, namely by GRECO and the European Commission (for more details, see HOVEN – KUBICIEL, 2014), the provision was further amended in 2014.[61]

Relevant provisions at a glance:

Section 108b: Bribing voters

(1) Whoever offers, promises or grants another gifts or other benefits in exchange for not voting or for voting in a particular manner incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(2) Whoever demands, allows themselves to be promised or accepts gifts or other benefits in exchange for not voting or voting in a particular manner incurs the same penalty.

[59] See www.esiweb.org/proposals/caviar-diplomacy

[60] See above.

[61] 48th Penal Code Amendment Act of 23.04.2014, BGBl. I, 410.

Section 108e: Taking of bribes by or giving of bribes to elected officials

(1) Whoever, in the capacity as a Member of the *Bundestag* or as a member of one of the *Länder* parliaments, demands, allows themselves to be promised or accepts an undue advantage for themselves or a third party in return for performing or refraining from performing an act, upon request or instruction, in the exercise of their mandate incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(2) Whoever offers, promises or grants to a Member of the *Bundestag* or a member of one of the *Länder* parliaments an undue advantage for the member themselves or a third party in return for that member performing or refraining from performing an act, upon request or instruction in the exercise of their mandate, incurs the same penalty.

(3) Members of

1. a local administrative body,
2. a body of an administrative unit established for a subarea of a Land or a local authority and elected in direct and general elections,
3. the Federal Convention,
4. the European Parliament,
5. a parliamentary assembly of an international organisation and
6. a legislative body of a foreign state

are considered equal to the members referred to in subsections (1) and (2).

(4) An undue advantage is in particular not deemed to exist if the acceptance of the advantage is in accordance with the relevant provisions relating to the member's legal status. The following are not considered as undue advantage:

1. a political mandate or a political function or
2. a donation which is permissible under the Political Parties Act or other relevant legislation.

(5) In addition to a sentence of imprisonment of at least six months, the court may order the loss of the ability to be elected in public elections and to vote on public matters.

A specificity of section 108e is the requirement of a "twofold qualified" wrongful agreement. First, the general *quid pro quo* requirement of corruption, i.e., the complementariness between the benefit and the action, has to be met. In addition, a particular, second condition applies: the parliamentarian has to act upon a request or instruction. This element reflects the legally protected value of the provision, i.e., the free parliamentary mandate which enjoys strong constitutional protection. (ESER, 2019, § 108e annot. 2.) This high legal weight of the individual autonomy of elected officials makes prosecution difficult. In particular, the double wrongfulness standard implies that *ex post* gratifications are not punishable. Nor are donations to political parties, as long as they are in accordance with the administrative transparency rules set forth in the Political Parties Act (see above section 108e para 4 of the Penal Code, which defines due advantages). In light of these specific exemptions with regard to these two of the most common variants of political corruption, critical scholars as well as NGOs argue that the current version of section 108e of the Penal Code is still not sufficient to comply with the relevant international standards. (HOVEN – KUBICIEL, 2014)

Measuring corruption

Corruption is a clandestine crime so the measurement of its prevalence is challenging. In addition to the official numbers shown in the regular crime statistics, empirical research methods such as, enquiries with experts and population surveys are helpful tools for assessing the spread of the phenomenon in a country. International comparisons can provide further insight. However, any of the available instruments can only provide an approximation of the real extent. (For more details, see SAMPFORD, 2007)

International surveys

There are a variety of international surveys, conducted by non-governmental organisations as well as official agencies, which provide empirical and comparative data with a specific focus on corruption. Germany is one of the countries covered by these instruments.

The most well-known barometer, which is also most often quoted in the political arena and in the media, is Transparency International's Global Corruption Perception Index. In recent years, Germany ranks among the top ten low-corruption countries. According to the revised scoring system introduced in 2012, the scores received in previous years were 81 and 80, respectively. For more details, see *Table 1*. The rate of the two top-ranked countries – New Zealand and Denmark – is 88. The overall rank amongst the 180 countries surveyed for the 9-year period since the redesign of the scoring system is 9th, with a slow upward trend. According to the previous ranking system Germany's scores ranged around 8 (2009, 2011), sometimes moderately lower (7.9 in 2008 and 2010, 7.6 in 2000), sometimes a little above (8.14 in 1995, 8.2 in 2005).

Table 1: Germany in the Global Corruption Perception Index

	2020	2019	2018	2017	2016	2015	2014	2013	2012
Score	80	80	80	81	81	81	79	78	79
Rank	9	9	11	12	10	11	12	12	13

Source: www.transparency.org/en/cpi/2020/table/nzl

The results of the surveys conducted for the EU's Eurobarometer[62] provide a rather diverse picture. When asked for their general opinion on the level of corruption in the country, 53% of German respondents considered it to be widespread; which is less than the EU-28 average of 71%. Whilst, 35 percent even said it has increased (EU-28: 43%). However, when asked whether they are personally affected by corruption in their daily life, only 9% agreed, as compared to 26% for the EU-28. Amongst the various administrative sectors, police and the justice authorities

[62] Unless otherwise indicated, all numbers are taken from the most recent Special Eurobarometer 502, based on interviews conducted in December 2019: https://europa.eu/eurobarometer/surveys/detail/2247

receive the highest levels of trust, at 69% and 32%, respectively. Both figures are significantly above the EU average. The lowest trust scores are assigned to EU institutions and politicians, at 2% and 5%, respectively. In Transparency International's Global Corruption Barometer, the domestic police and judges receive an even better rating: only three percent consider them to be corrupt.[63]

Even more nuanced are the answers to whether the respondents have personally experienced or witnessed any case of corruption: only two percent said yes, 97% gave a negative reply. The picture is quite similar with special regard to business-related corruption: the question whether someone has asked or expected the respondent (or colleagues at work) to provide a gift, favour, or extra money in return for a service or a permit was affirmed by only one percent of all.[64] In Transparency International's Global Corruption Barometer, the findings are quite similar: three percent of public service users in Germany reported that they had paid a bribe to get a service performed in the previous 12 months.

Besides the principal shortcomings of opinion polls on complex crime phenomena such as, in particular corruption or fraud, in relation to which popular and legal definitions are often not congruent , [65] these findings reflect a particular methodological problem that is well-known in survey-based research. In the area of victimological research, it is widely discussed as the crime-perception paradox: quite often the perceived extent of crime has no correlation with its real extent; moreover, the lower the crime rate in a given country, the higher is the perceived – imaginary – extent. (For more details, see HUMMELSHEIM et al. 2011; VISSER et al. 2013) The most plausible explanation for these phenomena is that the perceptions asked about are fuelled by the media reception, in which all sorts of allegedly corrupt behaviour in business and politics are amongst the favourite topics. Against this background, the methodology employed by Transparency International's corruption perception index, which is based on interviews with informed country experts and business people[66] may appear more reliable than population polls.

Corruption in police statistics

A more fact-related impression can be drawn from official statistics recorded by domestic public agencies. The first instance which comes to generate a more precise picture of the real spread of crime in a country is police. Their statistics disclose all cases that came to the attention of police, either as a result of their own control activities, or through the input of citizens' reports. What

[63] Transparency International, Global Corruption Barometer European Union 2021: https://images.transparencycdn.org/images/TI_GCB_EU_2021_web_2021-06-14-151758.pdf
[64] Flash Eurobarometer 482: Business and corruption, interviews conducted September-October 2019: https://europa.eu/eurobarometer/surveys/detail/2248
[65] This might be one of the reasons that corruption is not covered by the European Victimization Survey. See European Union Agency for Fundamental Rights, Crime, Safety, and Victims' Rights (Fundamental Rights Survey 2021): https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-crime-safety-victims-rights_en.pdf.
[66] More info on methodology at www.transparency.org/en/cpi/2020/index/nzl.

cannot be recorded under such circumstances is the dark field, which significantly varies in extent depending of the type of crime in estion. The fact that corruption belongs to the category of transaction crime that is regularly carried out in hiding, by actors who all risk prosecution as potential co-perpetrators, and in the absence of (direct) victims, leads, on the one hand, to the assumption that the records are too low. On the other hand, one has to take into consideration that the number of cases shown in the police statistics – at least in Germany – are unfiltered, as they also count cases of mere suspicion which will never be prosecuted. Therefore, the annual situation report on corruption[67] cannot provide an accurate account of the situation. Irrespective of these shortcomings, the police statistics are informative, as they provide more descriptive details of the corruption environment than court statistics, with their particular focus on procedural and outcome-related facts.

The total number of cases investigated by police in Germany in 2019 was 5,428. In relation to the total number of 5,436,401 concluded cases[68] this is a share of 0.1%. This latest number was moderately lower than the 5-year average of 5,854 annual corruption-related investigations. These cases involved a total number of 2,539 suspects, 1,423 of them for active corruption (56%, so-called "givers") and 1,126 for passive corruption (44%). There were 729 cases related to corruption in the commercial sector (5-year average: 1,305) and 281 to the healthcare sector (first introduced in May 2016: 14 cases, 126 in 2017 and 69 in 2018).

Half of those suspected of passive corruption (49.9%) were public administration staff, 39.3% related to the commercial sector, 9% to prosecution offices and 1.5% to politics. The total share of public officials amongst the suspects of passive corruption was 67%, which is lower than the 5-year average of 71%.

Particularly interesting is also the list of alleged benefits which reflect rather well the most common type of corruption scandals that regularly pop up in the media: in 75% of all cases, free admission granted to events was the cause of a police investigation. This has also been one of the most intensively discussed scenarios in the scholarly debates around corruption. One particularly prominent case will be presented later on.[69] All other types of benefits play only a minor role: cash or monetary payments – commonly seen as one of the major triggers and motivators of corrupt conduct – was involved in no more than 11.6% of the cases,[70] followed by other financial benefits (5.6%), material awards (5.5%), free food/drink (0.5%), free work services (0.4%), and free travel (0.3%). The total value of all benefits was EUR 52 million, which also remained below the 5-year average of EUR 63 million.

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[67] Unless indicated differently, all police figures taken from *Bundeskriminalamt* [Federal Police Office], *Bundeslagebild Korruption* [situation report corruption] 2019.

[68] *Bundeskriminalamt* [Federal Police Office], *Polizeiliche Kriminalstatistik* [crime statistics] 2019, Vol. 1, table 2.2.1.

[69] See below, 4.3.

[70] In previous years the share of monetary payments was higher, ranging between some 33–36% (2013, 2015, 2016), 62% (2018), and 77% (2017), respectively. *Bundeskriminalamt* [Federal Police Office], *Bundeslagebild Korruption* [situation reports corruption] of the related years.

As regards active corruption, in 69.8% of all cases the alleged requests were business-related; only 23.5% involved private interests and 6.7% could not be identified clearly. Business sectors involved include, in first rank, the service industry (33.1%), followed by the automobile sector (14.7%), construction (12.6%), sales of military goods (5.6%), pharmaceuticals (4.6%), real estate (1.4%), insurance & finance (1.0%), logistics (0.8%), chemicals (0.5%), and nursing (0.4%).

The expected or requested advantages (services) in exchange for the promised or rendered benefits were manifold. Most often, the givers wanted to receive administrative permission (42.1%), followed by those who intended to get a work/project contract (25.5%). The next categories included those, who tried to get advantage in criminal (8.6%) or administrative offence procedures (1.4%), advantage in procurement or competition procedures (6.0%), disclosure of internal information (3.8%), issuing residence permits (2.9%), reduction of public fees (0.8%), and fake invoices (0.6%); whilst in 8.2% of the cases a specific demand could not be the identified. Corrupt interference in criminal procedures can be further specified. They include attempts to avoid penal consequences, in particular the withdrawal of the driver's license and influencing witnesses, as well as activities targeting prison staff in order to 'convince' them to smuggle in drugs or mobile telephones. The value of these advantages cannot be quantified in financial terms.

Overall, finally, investigations in corruption cases have a high clearance rate of about 80 percent, which is significantly above the average.[71]

Corruption in court statistics

A rather distinct picture comes to the fore in the judicial case statistics. These represent the number of cases which were finally found punishable by final and binding judicial verdict. From 2015 to 2019, the annual number of convictions varied slightly, with a minimum of 187 in 2018 and a maximum of 249 in 2019 (see *Table 2*). There is no constant upward or downward trend; lows and highs fluctuate unsteadily. In relation to the total number of convictions, however, which is also unstable, the proportion has been constant over the years, at 0.03 percent. Within the different categories of corruption, some particular patterns can be identified. First of all, the vast majority of cases related to corruption can be found in the public sector while business corruption is not only lower but is also in decline: in 2015, the latter amounted to 27.5% of all corruption cases, in 2019 only 15%. In addition, one single case of political corruption was registered in 2016. Public sector corruption varies slightly in case numbers, with a maximum of

[71] Aggregate value for crimes against fair competition, corruption and malpractice; the overall clearance rate for all crimes is 57.5%; see *Bundeskriminalamt* [Federal Police Office], *Polizeiliche Kriminalstatistik* [crime statistics] 2019, Vol. 1, tab. 2.2.1.

210 in 2019. Within the different variants of corruption in the public sector, there is an obvious preponderance of active bribery; at160 out of the 210 entries for 2019.

Table 2: Convictions in cases of corruption in the public and the private sectors, in relation to the total number of convictions (2015–2019)[*]

		2015	2016	2017	2018	2019
Total convictions		739,487	737,873	716,044	712,338	728,868
PUBLIC SECTOR						
Accepting benefits		10	5	6	4	7
Granting benefits		15	19	28	19	10
Taking bribes		11	13	18	15	19
Giving bribes		119	86	126	116	160
Especially serious cases of bribery		16	18	22	12	14
Sub-total corruption public sector		171	141	200	166	210
PRIVATE SECTOR						
Taking or giving bribes in commercial practice		39	17	13	14	20
Especially serious cases of commercial bribery		26	35	18	7	19
Taking or giving bribes in the healthcare sector**		–	0	0	0	0
Especially serious cases of bribery in the healthcare sector**		–	0	0	0	0
Sub-total corruption private sector		65	52	31	21	39
POLITICAL SECTOR						
Taking of bribes by or giving of bribes to elected officials		0	1	0	0	0
Total corruption	**N**	**236**	**194**	**231**	**187**	**249**
	%	**0.03**	**0.03**	**0.03**	**0.03**	**0.03**

[*] All numbers are person-related. Source: *Statistisches Bundesamt* [Federal Statistical Office], *Strafverfolgung* [penal convictions] 2015–2019, table 2.1; [**] Statutory offences introduced in May 2016.

A further pattern is striking: active corruption cases ("giving bribes": 160) are much more frequent than passive corruption ("taking bribes": 19) in the public sector. This ratio between the two – phenomenologically intertwined – categories is more or less stable, except for 2016, when a significantly lower number of active bribers were convicted. This is interesting because active and passive should, at least in theory, go hand in hand. There is only one plausible explanation for this obvious imbalance: it represents unsuccessful efforts. Under the statutory circumstances of this particular type of crime, which is characterised by its early ("forefield") punishability, a mere offer once articulated[72] – which, according to the general fact-assessment (subsumption) rules, would typically constitute only the attempt of a crime – is sufficient for determining full completion of the offence. (Subsequent reaction by the recipient of such offer is irrelevant; see HEINE – EISELE, 2019, § 333 annot. 13.) The uneven distribution of convictions clearly indicates

[72] The official rubric of the offence ("giving bribes") is misleading because "offering" is a sufficient statutory element; look at the text of sec. 334 of the Penal Code.

that, in most situations, such offers are rejected by the officials approached, and are reported, otherwise they wouldn't have come to the attention of the police. Considering the total number of ca. 1.8 million civil servants employed in the same year,[73] this indicates that resistance in the public sector seems to be extremely strong. When looking again at the 2019 cases, it can be assumed that only 0.001 percent became in fact involved in a criminally relevant corrupt arrangement. The numbers further imply that it is quite risky in Germany even to articulate an approach of this sort.

The picture is more balanced between active and passive cases when looking at the basic alternative of granting and accepting benefits. The gap between active and passive cases is much smaller, while the overall prevalence of this offence type is extremely low (8.1 percent of all those convicted of public corruption in 2019).

Private sector corruption is even less prevalent in Germany than corruption in the public sector. This is particularly true for the healthcare sector: in clear contrast to the fuss about that issue in the media and the great attention in the academic discussion which preceded its explicit criminalisation, so far no such case brought a conviction since this offence was introduced in 2016; and only one defendant was tried but acquitted.[74] In direct comparison to classic corruption in the public sector, the relation of private business corruption even decreased from ca. 1:4 in 2015 to ca. 1:6 in 2019. Within the latter sector there is, however, another interesting finding. The relative importance of especially serious cases recorded is higher in private than in public corruption cases:, about 50 percent (as compared to 6.7% percent). This indicates that the "price", i.e., the value of the benefits exchanged between private business partners,[75] is higher than in the public sector. As the police reports summarised above have shown, concert and soccer match tickets or restaurant invitation affairs seem to be typical scenarios in which civil servants are involved while big money cases are primarily to be found among business-related cases.

How can this obvious discrepancy between the initial case load at police stage (n = 5,428 in 2019) and the judicial cases (n = 340 tried, n = 249 convicted; see *Table 3*) be explained? According to the general case adjudication practice at the prosecutorial level, about 8.5 percent of the cases are charged and 11.1 % are terminated by penal order (without a formal trial[76]); together these two alternatives sum to 19.6%. Based on this overall prosecution practice, one might expect a quantity of some 1,060 corruption trials, i.e., three times as many as in reality. This obvious gap indicates that more cases than in other areas of crime are already filtered out at the investigation level, either because of their criminal irrelevance (they were legal activities), or in

[73] See above.

[74] *Statistisches Bundesamt* [Federal Statistical Office], *Strafverfolgung* [penal convictions] 2017, table 2.1.

[75] See above, sec. 300 no. 1 of the Penal Code.

[76] A prosecutorial penal order can replace drawing up an elaborate bill of indictment; the court can issue the penalty immediately, without a hearing. If the perpetrator abstains from lodging an appeal, this form of punishment is a full equivalent to an orally pronounced conviction with all its regular consequences.

the absence of sufficient evidence or due to their petty nature.[77] This does, however, not mean that the criteria applied for the decision for or against indictment would be explicitly strict or even stricter than in other areas of crime. On the contrary, the statistics on the case disposition by the courts indicate a consistent prosecution practice in cases in which the probability of a later conviction is not guaranteed as well. This conclusion can be drawn from the fact that the judicial diversion rate as well as the acquittal rate is higher here than on average.

Table 3: Case disposition by the courts (2019)[*]

	Tried	Convicted		Dismissed		Acquitted	
	N	N	%	N	%	N	%
PUBLIC SECTOR							
Accepting benefits	26	7	26.9	16	**61.5**	3	**11.5**
Granting benefits	13	10	76.9	3	**23.1**	0	0.0
Taking bribes	39	19	48.7	19	**48.7**	1	2.6
Giving bribes	184	160	**87.0**	20	10.8	4	2.2
Especially serious cases of bribery	18	14	77.8	4	**22.2**	0	0.0
Sub-total corruption public sector	280	210	75.0	62	**22.1**	8	2.9
PRIVATE SECTOR							
Taking or giving bribes in commercial practice	37	20	51.4	13	**35.1**	4	**10.8**
Especially serious cases of commercial bribery	23	19	82.6	4	17.4	0	0.0
Taking or giving bribes in the healthcare sector	–	–	–	–	–	–	–
Especially serious cases of bribery in the healthcare sector	–	–	–	–	–	–	–
Sub-total corruption private sector	60	39	65.0	17	**28.3**	4	**6.7**
Total corruption	340	249	73.2	79	**23.2**	12	**3.5**
All trials			*81.7*		*12.8*		*2.9*

[*] All numbers are person-related. Source: *Statistisches Bundesamt* [Federal Statistical Office], *Strafverfolgung* [penal convictions] 2019, tables 2.1 and 2.2.

The figures presented in *Table 3* show further noteworthy details. In almost all variants of corruption, the conviction rate is significantly lower than the average of 81.7% for all court cases – with one exception, i.e. giving bribes in the public sector. In this sub-category (which includes, as explained earlier, many uncompleted cases) the conviction rate is significantly higher, i.e., 87%, while it is approximately half as large for the passive variant (taking bribes: 48.7%) and even lower for accepting benefits (26.9%). Inverse findings can be seen when looking at the acquittal rate which is traditionally very low in Germany: on average only 2.9% of all defendants are acquitted by the courts, but 3.5% of those accused for corruption in total, and 6.7% charged for corruption in the private sector. The highest rates can be found in regard to accepting benefits

[77] Petty crimes are often dismissed. The general prosecutorial diversion rate is 28%; see above, footnote 6. More detailed, offence-related statistics are not available. It can be assumed that the number is higher in corruption cases.

(11.5%) and bribery in the commercial sector (10.8%), i.e., three up to four times more often than on average. And finally, no less interesting, the look on the judicial dismissal rates. While 12.8% of all court trials come to such a diversionary end, nearly twice as many corruption trials are dismissed (22.1% and 23.2%, respectively). For almost all of the sub-categories, significantly higher diversion rates can be identified, with only 2 exceptions: especially serious cases of commercial bribery, and – once again – giving bribes in the public sector. Such dismissed cases are typically not completely unsubstantiated, but in the eyes of the judges minor either in terms of substance or in terms of guilt. The case of the former Federal President Wulff introduced earlier[78] can stand for the type of cases disposed of in such a way. It can be assumed that a considerable number of the dismissed cases would have ended in an acquittal had the defendants refused approval on the diversionary ending of their trial, as Mr. Wulff has done.

Table 4: Main Penalties imposed on convicted offenders (2019)[*]

	Fine		**Imprisonment total…**		***…of these: with probation***	
	N	%	N	%	N	%
PUBLIC SECTOR						
Accepting benefits	5	71.4	2	28.6	2	**100.0**
Granting benefits	9	90.0	1	10.0	1	**100.0**
Taking bribes	4	21.1	15	**78.9**	11	**73.3**
Giving bribes	121	77.1	36	22.9	30	**83.3**
Especially serious cases of bribery	0	0.0	14	**100.0**	11	**78.6**
Sub-total corruption public sector	139	67.1	68	**32.9**	55	**80.9**
PRIVATE SECTOR						
Taking or giving bribes in commercial practice	13	65.0	7	**35.0**	6	**85.7**
Especially serious cases of commercial bribery	9	47.4	10	**52.6**	9	**90.0**
Taking or giving bribes in the healthcare sector	–	–	–	–	–	–
Especially serious cases of bribery in the healthcare sector	–	–	–	–	–	–
Sub-total corruption private sector	22	56.4	17	**43.6**	15	**88.2**
Total corruption	161	64.6	85	**34.1**	70	**82.4**
All convictions		*84.7*		*15.3*		*68.8*

[*] All numbers are person-related. Imprisonment and fines can be combined. N = 246. The difference to the total number of convicts shown in *Table 3* (N = 249) can be explained by other (extraordinary) sanctions. Source: *Statistisches Bundesamt* [Federal Statistical Office], *Strafverfolgung* [penal convictions] 2019, table 2.3.

The full and final picture can be gained when looking at the specific penalties imposed by the courts in those cases that came to conviction (see *Table 4*). The sentencing outcome deviates from the average pattern again. Whereas in general 84.7% of all of those convicted in Germany receive

[78] See above, 1.

a monetary fine, and 15.3% a prison sentence, twice as many of those found guilty for corruption are sentenced to imprisonment, 32.9% in the public sector and even 43.6% of those guilty of private sector corruption, or 34.1% on average. Accordingly, the incidence of fines is significantly lower – however, with one exception, those found guilty of giving bribes. The fact that three quarters of them get off lightly is a final indicator for the earlier presumption that most of these cases are uncompleted attempts (unsuccessful offers), for which the penalties are regularly reduced. Opposite sentencing practices apply to civil servants who have in fact taken a bribe: 78.9% of them receive a prison sentence, i.e., five times as many than on average. And this happened in 100% of especially serious cases of bribery in the public sector.

The findings are even more interesting when looking exclusively at immediate prison sentences[79]. In all sub-categories, the probation rate is higher than on average. Whereas on average ca. 5 percent of all those found guilty and convicted receive an unconditional prison sentence and immediately go to prison, the related percentage is more or less the same in cases of private corruption (5.2%[80]) – but significantly higher when it comes to convictions for public sector corruption. The variation is moderate from the average perspective (6.3% of unconditional prison sentences for all convicts of public sector corruption), but 21.2% of those guilty of taking bribes, or 21.4% in especially serious cases, receive such a sentence – these are slightly more than four times as great a proportion as the average rate for all criminals in Germany. No immediate prison sentence was imposed in cases of the basic crime (accepting/granting benefits), but a considerable proportion of those in qualified cases (taking/giving bribes and especially serious cases of bribery) were jailed, with a clear distinction between active and passive cases.

At the very end of the proceedings, 15 out of the total number of 340 defendants tried for one of the sub-categories of corruption in 2019 were actually sent to prison, four of them for private sector corruption, while 161 were punished with a fine. This is, in dry numbers, the core of criminally relevant corruption in a calendar year. Overall, corruption cases comprise no more than 0.03 percent of all convictions.[81] All the figures presented in this chapter are indicators of the low prevalence and the relatively minor character of (registered) corruption, in particular in the public sector. The low conviction rate as well as the high diversion and probation rates that we can find in the conviction statistics for this sector altogether underline this assumption.

[79] Only a minority of probationers will be sent to prison later, either because of the commission of a new crime or because of non-compliance with conditions or probation orders. They cannot be traced back in the statistics.
[80] Calculated as the percentage of those without probation versus the number of those convicted in each sub-category as shown in *Table 3*.
[81] N = 728,868, see *Table 2*.

Corruption and the local context – Corruption profile in practice

The Siemens/ENEL case

In contrast to the overall character of corruption in Germany, grand corruption cases are unveiled from time to time, but they are quite rare, at least in absolute numbers. Some high-profile cases were investigated in the early 2000s in the context of the Siemens corruption affairs, which also raised international interest, in Europe as well as in the USA. One of these cases is particularly interesting because it demonstrates the problems of consistent prosecution of corruption in Germany.

> The main facts of the case were as follows: two managers of the Siemens power plant division[82] were accused of bribing managers of the ENEL energy company in Italy. In exchange for a pay-off of ca. EUR 5 million, Siemens earned the contract on refurbishing a hydro-electric plant in Italy, i.e., equipping the powerhouse with new turbines, plus future maintenance services; the value of the contract was EUR 338.1 million, the net profit before tax was some EUR 103.8 million. At first instance, at the Darmstadt regional court, the defendants were convicted of giving bribes in commercial practice. One of them as the main actor was sentenced to two years of imprisonment, whilst his colleague got a prison sentence of 9 months for aiding and abetting. In addition, the court ordered value confiscation of EUR 38 million from Siemens as the direct profiteer of the offence. All parties, including Siemens, appealed, and the final outcome delivered by the Federal Court of Appeals[83] was remarkable; it quashed the prior verdict, thus accepting Siemens' main arguments.

Two aspects are of particular interest in our context. First, the senate denied the classification of the subject-matter as corruption. This divergent interpretation was justified by the fact that, according to the internal compliance rules of Siemens, such pay-offs were not allowed. Instead, the senate applied the above-mentioned catch-all offence for impure business action, embezzlement. By authorising the payment of the bribe money[84] the managers had violated their fiduciary duties towards Siemens. This modification of the legal interpretation of the operation had a significant second consequence: Siemens was no longer liable to confiscation. All in all,

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[82] Siemens Power Generation.

[83] *BGH*, ruling of 29.08. 2008 – 2 StR 587/07, NJW 2009, p. 89.

[84] The court further held that criminal responsibility does not necessarily require effective payment of the bribe; preparatory steps such as, in particular, the transfer of money to a black funds account out of which bribes are often paid is sufficient to determine a criminally relevant violation of the financial interests of the employer. According to that logic, business corruption often appears in the disguise of embezzlement. For more details, see above, 2.2.2. It is likely that several of the cases counted in the annual conviction statistics as embezzlement (n = 803 in 2019; *Statistisches Bundesamt* [Federal Statistical Office], *Strafverfolgung* [penal convictions] 2019, table 2.1.) would, from a criminological point of view, represent such kinds of corrupt case scenarios. It can therefore be presumed that corruption in the private business sector is underrepresented to some extent in the official conviction statistics.

Siemens, represented by one of the most prominent German defence counsel specialised in economic crimes, successfully managed to receive their full exculpation by re-defining their own role, which was completely reversed – from a delinquent party, involved in or at least financially profiteering from criminal conduct, into a victim.

Definition of illicit profit

Let's take a closer look at the confiscation-related aspects of this case. Lack of consensus about the correct interpretation and application of the penal confiscation provisions in cases of corruption led to a revision of the principle governing the confiscation concept. This concept was originally governed by the so-called gross principle, as introduced by the [First] Act to Combat Organised Crime of 1992[85], according to which "everything obtained" – through or for the commission of a crime – should from then on be the object of (mandatory) confiscation. Accordingly, in cases of corruption, both sides, the bribing and the receiving party,[86] would be liable for confiscation. This extensive definition of proceeds was meant to replace the prior net principle, by which only positive gain was targeted. However, what is the profit of the bribing party? According to the prior concept, offenders had the chance to have all costs and expenses subtracted before confiscation. (For more details on the German confiscation system in general, see KILCHLING, 2014; with particular reference to confiscation in cases of corruption, see KILCHLING, 2001.) Despite some scholarly controversy, the new approach was welcomed by prosecution practitioners and, at least in principle, also by the judiciary. Above all, the Constitutional Court held that the extended definition of proceeds did not violate the constitutionally protected property rights.[87] However, there was one pocket of resistance toward extensive[88] confiscation: the two senates at the Federal Court of Appeals, which are responsible for cases of economic crime and corruption. They repeatedly argued that the concept of the "gross" principle, when applied in cases of corruption, cannot mean that the entire income earned on the basis of a corrupt contract should be liable for confiscation. Instead, they established a new "abstract" method of determining he immediate advantage obtained by the crime, which in the case of a corrupt contract would solely be *the contract as such, not the value of that contract.*[89] Accordingly, the completion of the contracted services and the realisation of the revenue taken out of it was classified as *legal*. Not even the profit before tax should be the determinant basis of calculation: all the taxes[90] and other expenditures further reduce the amount that is finally liable for confiscation.

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[85] *Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität – OrgKG* of 15.07.1992, BGBl. I, 1302.

[86] For the receiving party, the case is rather simple. If the ENEL managers were German nationals, their personal profit (EUR 5 million kickback received) would indeed be liable for confiscation under sec. 73 of the Penal Code.

[87] Federal Constitutional Court, ruling of 14.01.2004 – 2 BvR 564/95105, BVerfGE 110, 1.

[88] The term "extensive confiscation" is used here in specification of the gross principle; it should not be mixed up with extended confiscation as defined in article 5 of EU Directive 2014/42/EU, O.J. L 127/39.

[89] *BGH*, BGHSt 50, 299, *BGH*, NJW 2010, p. 882 (5th senate), *BGH*, NJW 2012, 1159 (3rd senate).

[90] *BGH*, BGHSt 47, 260 (5th senate).

This ad hoc interpretation is in obvious contrast to what the legislator originally had in mind: offenders should bear the risk of arithmetical (factual) over-confiscation caused by the irrelevance of costs incurred through the preparation and commission of a crime, damage, devaluation or even loss of the gain. In addition, it neglects the fact that the law does not at all limit confiscation to immediate proceeds; on the contrary, the law explicitly includes follow-up advantages taken out of the immediate profit later and also any surrogate assets into the catalogue of liable enrichments.[91]

As mentioned, this narrow interpretation was developed exclusively for cases of business corruption. Quite obviously, legal enterprises – even if involved in corrupt activities – should not be treated in the same way as criminal organisations, against which the concept was developed. The other divisions at the appeals court were much less reluctant and followed the original purpose of the law by applying the original gross principle more strictly.[92] Nevertheless the legislator finally retreated and changed the law in the direction claimed by the *BGH*'s influential business crime division. Accordingly in 2017, the gross principle was replaced by a new additional section, which explicitly provides that *"when calculating the value of [illicit proceeds], any expenditure on the part of the offender, participant or [other person liable to confiscation] is to be deducted"*[93].

The *de facto* retreat of the gross principle in confiscation could clearly be observed during the investigation and trial phases of the Siemens/ENEL case. Originally, the prosecution intended to follow the gross principle strictly. In that sense, they announced in their bill of indictment that they would seek confiscation of the full value of the contract, i.e. EUR 338.1 million, from Siemens. As it became apparent during the trial hearings that the Darmstadt court would follow the Federal Court's narrow interpretation, they finally plead for confiscation of the net profit before tax, i.e., EUR 103.8 million. The court, however, followed the arguments of the defence, who further argued that all taxes and other expenses should additionally be deducted, and ordered confiscation to the lowest possible extent, i.e., the EUR 38 million mentioned above. In the final verdict by the Federal Court of Appeals, the liability of Siemens further faded away and resulted in zero confiscation.

Several lessons about the specificities of penal control of business corruption can be learned from the case discussed above:

1) Upon active intervention by the judiciary, confiscation has lost its effectiveness and impact in cases of corruption when legal businesses are involved;
2) embezzlement has taken the function of a catch-all offence for impure business action, including particular variants of corrupt or quasi-corrupt behaviour;

[91] Sec. 73 para 2 of the Penal Code.
[92] *BGH*, NStZ 2009, p. 275 (1st senate), *BGH*, NStZ 1994, 123 (2nd senate).
[93] Sec. 73d para 1 of the Penal Code, as introduced through the Act to Reform the Penal Confiscation Provisions of 13.04.2017, BGBl. I, 872.

3) conviction of individual employees who have paid out bribe money as embezzlers blocks confiscation of the financial gain of their employers, who quite often are the real beneficiaries of business corruption; and
4) such cases are not visible in the court statistics on business corruption.

Sponsoring: The EnBW case

A category of case scenarios that has been widely discussed in media as well as in the legal literature is sponsorship in particular sponsoring sports or cultural events involving public officials. One particular case which kept the courts up to the Federal Court of Appeals busy relates to the 2006 FIFA world championship in Germany. The energy supplier of the state of Baden-Württemberg – EnBW – was one of the premium sponsors of the event. In this capacity, the company received 14,000 premium tickets for their free disposal. *Inter alia*, one package of tickets, which included VIP lounge access, was donated, together with the annual Christmas greeting cards, to Baden-Württemberg's prime minister and selected cabinet members of the state and the federal governments, who were all involved with sports matters. Most of the addressees refused the tickets, some of them accepted, including the prime minister. Some of them were charged, but almost all cases were dismissed upon payment of a transaction fine.

One case, however, was tried through all instances. The former CEO of EnBW, was accused of granting benefits. Some commentators considered his prosecution as a "bizarre" symbol of an excessive interpretation of corruption control. The idea that officials could not be invited as representatives of the host country at a world sports event would be a symbol of "unworldly purism". Such a trial "wouldn't be imaginable in any country, except Germany".[94] Contrary to the arguments of the prosecutors, who pushed the case through all instances (for more details, see TRÜG, 2009),[95] the courts came to similar conclusions, albeit based on different – legal – arguments. The courts held that such tickets can be a benefit as required by the corruption statutes. However, the crucial statutory element in this case was the existence of the required wrongful agreement (*quid pro quo*). For a long time, it was unclear how this is to be understood in the context of sports sponsorship. Taken literally, the statute requires the benefit be granted in return for the fact that the receiver has "performed or would in future perform an official act". Can the mere presence of a public official at a sports event be accordingly subsumed? To make complicated legal considerations brief, the question was clearly denied by the Federal Court of Appeals.[96] Public officials are invited on account of their status. Representation is all that is

[94] All quotes taken from www.faz.net/aktuell/sport/fussball/wm-ticket-affaere-der-skurrile-claassen-prozess-1485429.html; translated by author.
[95] The prosecutors pleaded for conviction and a monetary fine of EUR 450,000. Mr. Claasen was acquitted at all instances.
[96] BGH, ruling of 14.10.2008 – 1 StR 260/08, NJW 2008, 3580.

expected. The mere presence of a renowned person – president, chancellor, minister, state secretary, etc. – does not have any direct or indirect connection with a concrete duty. In addition, the Court couldn't see a further typical characteristic of corrupt arrangements, i.e., its clandestine *modus operandi*. Sponsoring, on the contrary, is carried out in public. It even needs publicity, which is the purpose and core essence of such marketing activities, otherwise the desired image transfer wouldn't work. (TRÜG, 2009: 197.)

This case brought at least some clarity into a complex area of public life. Nevertheless, sponsorship is still perceived as an area characterised by uncertainty over potential corruption allegations. In many cases, small details can make a difference, and actors involved still bear a risk of prosecution.

Prevention

Prevention is an important element of anti-corruption policies in Germany. Prevention concepts have to take into account that the majority of individuals involved in corruption have significantly different personality characteristics to those of the typical criminal. In some respects these are quite similar to perpetrators of economic crime, i.e., they are living in wealth, are well integrated in social life and not uncommonly even members of the business elite. (For more details, see BANNENBERG, 2002: 340–341.) This is why the cultural environment and structural circumstances rather than individual characteristics of the actors involved in corrupt activities are considered to be the main causal factors. (For more details, see GOLINSKI, 2016) Accordingly, successful concepts have to take into consideration the very distinct cultures in public administration and in the private economy.

Several instruments have been introduced to stimulate the prevention of corruption. In the public sector, the formal instructions providing detailed rules of conduct for civil servants addressed above play a major role. Strategies also include precautionary organisational measures such as the four-eyes principle in decision-making, or the constant rotation of responsibilities, both aiming at preventing the nascency of inter-personal relations between public officials and applicants. The most important instrument of prevention within the public sector, however, is the particular disciplinary regime, which, as explained before, is considered to have even a greater deterrent effect than criminal law.

A further important instrument at the intersection of public and private interests is procurement law.[97] (For more details, see BRAKALOVA – KARENFORT, 2014) It provides detailed

[97] Most relevant provisions are laid down in Part IV of the Act against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen – GWB*] and in the Regulation on the Award of Public Contracts [*Vergabeverordnung – VgV*]. A considerable list of additional sector-related regulations apply.

procedures that have to be applied to all public contracts, including single purchase orders above a particular threshold. Thresholds differ from sector to sector and between administrative areas. A local or regional school office needs different rules to a procurement agency for military equipment. Even if a formal procurement procedure is not required, three offers always have to be gathered in advance of a purchase. Over the years, procurement law has developed to become a legal sphere of its own, characterised by strict procedural rules shaped by growing volumes of accompanying administrative regulations. From a functional perspective, the latter instruments aim at reaching corruption prevention through bureaucracy. The counter-effects – or "price" – of this approach, however, are lengthy procurement procedures which require expert knowledge of the rules and regulations, which have become increasingly elaborate. Under such circumstances small enterprises, for example in the construction business, or self-employed craftsmen or traders have hardly a chance to compete with bigger firms that have the staff and resources to participate in public calls for bids compliantly and successfully. Moreover, from time to time even bigger construction companies have gone bankrupt or close to bankruptcy in the course of delayed procurement procedures.

In the private business sector, competition law has a similar function to public procurement law. In addition, compliance has gained increasing importance and impact. Besides their direct steering effects, the concept has further indirect functions: the question as to whether or not compliance rules have been implemented by the employer and respected by the staff is a decisive criterion in the context of labour law sanctions (addressing employees), tort law suits (addressing employers), and criminal law sanctions (addressing either of them). (For more detals, see GOLINSKY, 2016)

In addition to these well-established prevention strategies, new instruments have been developed in selected areas; here and there they are (still) in test mode, applied mainly at the local, regional or state level. Such instruments include blacklisting in so-called corruption registers, lobby registers, or anonymous online reporting platforms. (For more details, see WOLF, 2021)

6. Conclusions

This analysis has shown that, besides a limited number of single grand corruption cases such as, Leuna, Siemens, the cardiac valves scandal, and several cases in the construction industry that could not be addressed here in more detail, petty corruption appears to be the dominant type in Germany. There is an obvious gap between the popular discussion of corruption as a social and political phenomenon on the one hand, and the judicially evidenced and statistically documented spectrum of cases on the other hand. While police and prosecution authorities carry out consistent, sometimes even rigorous, investigation and prosecution practices, the final case outcome at the judicial level is significantly more moderate. The statistics and case examples presented may even imply that the judiciary sometimes gained the role of a corrective, intermediary agency, thus counter-balancing over-eager indictments. Sometimes, however,

judicial intervention can also have adverse systemic effects. The problematic role of the Federal Court of Appeals in ruling out confiscation in cases of business corruption was explicitly emphasised, too.

In light of the obviously low prevalence of corruption in Germany, the impact of prevention policies has to be considered and evaluated carefully. Besides the fact that international research indicates that the results of many anti-corruption programs are "meagre" (ROTHSTEIN, 2021: 1.) in general, the potential counter-productive effects of preventive measures of corruption control should have greater weight in low prevalence countries. Such cost-benefit analyses are difficult, since both the costs of corruption as well as the costs of corruption control are complicated to measure – which in retrospect makes the assessment of potential benefits accordingly difficult. (For further details, see JACOBS, 2002) In the German discussion, the following problematic counter-effects of the various anti-corruption strategies are under discussion: dysfunctional governance, increasing lack of trust, bureaucracy, constriction of administrative discretion and flexibility, risk of wrongful defamation and suspicion, potential conflicts with data reduction and data protection, criminalisation and penalisation of socially accepted activities, constraint of general and entrepreneurial freedom of action, loss of political and democratic leeway, retardation of procedures, and, last but not least, overestimation of the problem in the public perception. (For more details, see WOLF, 2021) As Rothstein pointed out: *"Corruption is not a problem caused by a lack of, or dysfunctional formal or legal rules. Highly corrupt countries often have very stringent laws and regulations against corruption."* (ROTHSTEIN, 2021: 5.)

At the end of the day, corruption control is a complex endeavour. The determination of the dividing line between overestimation and trivialisation of the phenomenon remains difficult. (WOLF, 2021: 27.)

REFERENCES

BANNENBERG, Britta (2002): *Korruption in Deutschland und ihre soziale Kontrolle. Eine kriminologisch-strafrechtliche Analyse*. Neuwied–Kriftel: Luchterhand.

BÖSE, Martin (2011): Corporate Criminal Liability in Germany. In: PIETH, M. – IVORY, R. (eds.): *Corporate Criminal Liability – Emergence, Convergence, and Risk.* Dordrecht–Heidelberg: Springer. 227–254.

BOHLANDER, Michael (2008): *The German Criminal Code: A Modern English Translation*. Oxford: Bloomsbury Publishing.

BRAKALOVA, Maria – KARENFORT, Jörg (2014): Public procurement in Germany: overview. www.global.practicallaw.com/8-521-5162

CLADE, Harald (2000): Herzklappen-Komplex: In 32 Fällen Anklage. *Deutsches Ärzteblatt*, 97(44), A-2897; B-2461; C-2189. www.aerzteblatt.de/archiv/24852/Herzklappen-Komplex-In-32-Faellen-Anklage

ENZENSBERGER, Hans M. et al. (eds.) (2001): *Die Neidgesellschaft. Kursbuch Vol. 143.* Hamburg: Rowohlt.

ESER, Albin (2019): § 108e. In: SCHÖNKE, A. – SCHRÖDER, H. (eds.): *Strafgesetzbuch. Kommentar*. 30th edition. München: C. H. Beck. 1439–1446.

GASSNER, Maximilian – KLARS, Andreas (2002): "Korruptionsfalle Gesundheitswesen". Darstellung, Strukturen und Lösungsansätze (Teil 1). *Pharma Recht (PharmR),* 309–325.

GOLINSKI, Kirsten (2016): *Antikorruptionsprogramme auf dem Prüfstand. Möglichkeiten und Grenzen einer effektiven Korruptionsbekämpfung durch Compliance-Programme in Unternehmen*. Berlin: Berliner Wissenschafts-Verlag.

GRUNDIES, Volker (2018): Regionale Unterschiede in der gerichtlichen Sanktionspraxis in der Bundesrepublik Deutschland. Eine empirische Analyse. In: HERMANN, D. – PÖGE, A. (eds.), *Kriminalsoziologie. Handbuch für Wissenschaft und Praxis*. Baden-Baden: Nomos. 295–316. DOI: 10.5771/9783845271842-458.

HECKER, Bernd (2019): § 11. In: SCHÖNKE, A. – SCHRÖDER, H. (eds.): *Strafgesetzbuch. Kommentar*. 30th edition. München: C. H. Beck. 117–135.

HEINE, Günter – EISELE, Jörg (2019): §§ 331-335a. In: SCHÖNKE, A. – SCHRÖDER, H. (eds.): *Strafgesetzbuch. Kommentar*. 30th edition. München: C. H. Beck. 3213–3250.

HOVEN, Elisa – KUBICIEL, Michael (2014): Das Verbot der Mandatsträgerbestechung – Strafgrund und Umfang des neuen § 108e StGB. *Neue Kriminalpolitik*, 26(4), 339–358. https://www.nomos-elibrary.de/10.5771/0934-9200-2014-4-339.pdf?download_full_pdf=1

HUMMELSHEIM, Dina – HIRTENLEHNER, Helmut – JACKSON, Jonathan – OBERWITTLER, Dietrich (2011): Social insecurities and fear of crime: A cross-national study on the impact of welfare state policies on crime-related anxieties. *European Sociological Review*, 27(3), 327–345. DOI: 10.1093/esr/jcq010

JACOBS, James J. (2002): Dilemmas of Corruption Control. In: KOTKIN, S. – SAJÓ, A. (eds.): *Political Corruption in Transition. A Sceptic's Handbook*. Budapest–New York: CEU Press. 81–90.

KILCHLING, Michael (2001): Tracing, Seizing and Confiscating Proceeds from Corruption (and Other Illegal Conduct) Within or Outside the Criminal Justice System. *European Journal of Crime, Criminal Law and Criminal Justice*, 9(4), 264-280.

KILCHLING, Michael (2014): Finance-Oriented Strategies of Organized Crime Control. In: PAOLI, L. (ed.): *The Oxford Handbook of Organized Crime*. New York: Oxford University Press. 655–673 DOI: 10.1093/oxfordhb/9780199730445.013.006.

KUBICIEL, Michael (2014): Ein politischer Skandal, kein Justizskandal. *Legal Tribune Online (LTO)* of 28 February 2014 www.lto.de/recht/hintergruende/h/lg-hannover-urteil-40kls612-wulff-korruption-freispruch/

LORD, Nicholas (2016): *Regulating Corporate Bribery in International Business. Anti-corruption in the UK and Germany*. London: Routledge.

MAYDELL VON, Bernd (1996): Der Statuswandel der freien Heilberufe in der GKV – rechtliche Rahmenbedingungen und Reformoptionen. *Neue Zeitschrift für Sozialrecht (NZS)*, 243–247.

MORRISON & FOERSTER LLP (2020): *Proposed German Act on Corporate Criminal Liability Is Forging Ahead* www.lexology.com/library/detail.aspx?g=5136d6cb-9493-4041-b182-21a29aba2885

OPPENHOFF, Friedrich Ch. (1873): *Strafgesetzbuch für das Deutsche Reich*. 3rd edition. Berlin.

PERRON, Walter (2019): § 266. In: SCHÖNKE, A. – SCHRÖDER, H. (eds.): *Strafgesetzbuch. Kommentar*. 30th edition. München: C. H. Beck. 2727–2767.

PINEDA, Juliett (2021): *More German Politicians Resign over Face Masks Bribery Scandal. OCCRP DAILY*, 31 March 2021 www.occrp.org/en/daily/14134-more-german-politicians-resign-over-face-masks-bribery-scandal

ROKSANDIĆ VIDLIČKA, Sunčana (2017): *Prosecuting Serious Economic Crimes as International Crimes. A New Mandate for the ICC?* Publications of the Max Planck Partner Group for Balkan Criminology, Vol. 2. Berlin: Duncker & Humblot.

ROSTALSKI, Frauke (2020): Neben der Spur: Verbandssanktionengesetzgebung auf Abwegen. *Neue Juristische Wochenschrift (NJW)*, 2087–2091.

ROTHSTEIN, Bo (2021): *Controlling Corruption. A Social Contract Approach.* Oxford: Oxford University Press.

ROTHSTEIN, Bo – VARRAICH, Aiysha (2017): *Making Sense of Corruption.* Cambridge: Cambridge University Press.

SAMPFORD, Charles J. G. (ed.) (2007): *Measuring Corruption*. Aldershot: Ashgate.

SEIER, Jürgen (2004): Die Untreue (§ 266 StGB) als "Allzweckwaffe". In: KOHLMANN, G. – NESTLER, C. – SEIER, J. (eds.): *Entwicklungen und Probleme des Strafrechts an der Schwelle zum 21. Jahrhundert*. Berlin: Duncker & Humblot. 106–117.

TRÜG, Gerson (2009): Vorteilsgewährung durch Übersendung von WM-Gutscheinen – Schützt Sponsoring vor Strafe? *Neue Juristische Wochenschrift (NJW)*, 196–198.

VISSER, Mark – SCHOLTE, Marijn – SCHEEPERS, Peer (2013): Fear of crime and feelings of unsafety in European countries: Macro and micro explanations in cross-national perspective. *Sociological Quarterly*, 54(2), 278–301. https://www.researchgate.net/publication/259574079_Fear_of_Crime_and_Feelings_of_Unsafety_in_European_Countries_Macro_and_Micro_Explanations_in_Cross-National_Perspective

WOLF, Sebastian (2021): Korruption und Antikorruption in Politik und Verwaltung. *Aus Politik und Zeitgeschichte (APUZ)*, 71(19–)20, 21–27. www.bpb.de/apuz/332693/korruption-und-antikorruption-in-politik-und-verwaltung

COUNTRY CASE STUDY – HUNGARY

ÉVA INZELT – REGINA SZEPCSIK*

Country Profile – Hungary[1]

Population

Hungary's population was 9.8 million in 2020, and has been decreasing steadily for years. It is divided into 19 counties, which are very heterogeneous in terms of population. While the average is around 490 000 inhabitants per county, the least populated county had around 193 000 inhabitants in 2017 (Nógrád) and the two most populated were Budapest (1.75 million inhabitants) and Pest (1.25 million inhabitants).

In Hungary, 63% of the population lives in cities of more than 50 000 inhabitants. The share of population in cities with more than 500 000 people is 30% compared to 55% in the OECD area.

The Hungarian population is concentrated in cities, just like the OECD population, but the urban population in Hungary is 71.1% of the national population.

GDP – Gross Domestic Product

Hungary's GDP was USD 33,619 per capita, while the OECD's average was USD 44,517 per capita.

The gap in GDP per capita between Hungarian regions increased significantly between 2000 and 2007, subsequently remained stable until 2013, and then started to decrease. The GDP per capita in the Northern Great Plain – the Hungarian region with the lowest GDP per capita – has grown by 5% per year since 2013, twice the growth rate of the country over the same period. Regional economic disparities have nonetheless increased moderately since 2000.

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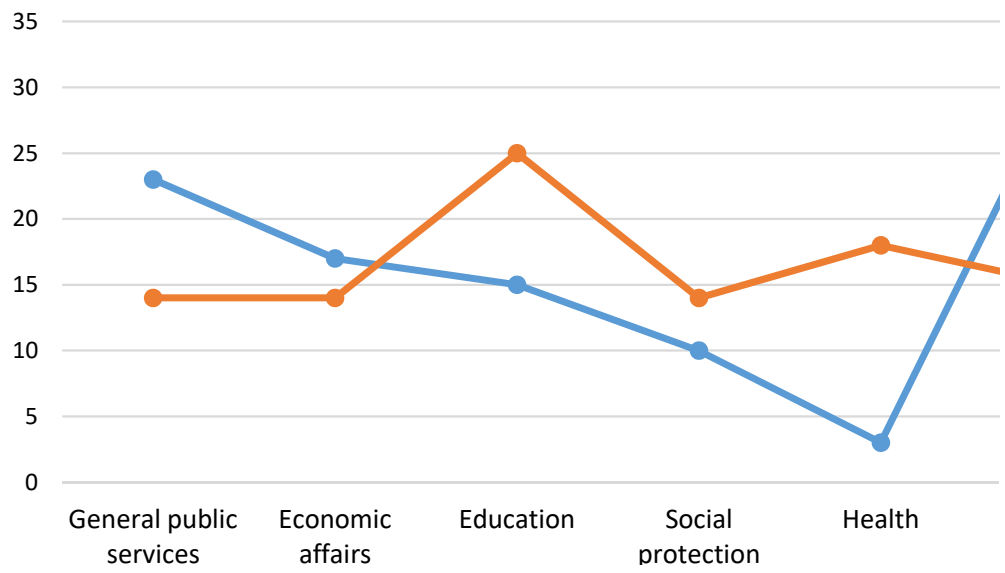
[1] OECD – Country profiles: regional facts and figures: Hungary.
See https://www.oecd.org/regional/regional-policy/country-profiles.htm

Subnational government expenditure amounts to USD 1 609 per capita in Hungary compared to an OECD average of USD 6 817. In Hungary, this is equivalent to 12.9% of total public expenditure and to 6% of GDP.

The 'Other' function (which includes housing and community amenities, recreation, culture and religion; environment; public order and safety) and general public services are the two largest spending items for subnational governments in Hungary: together they represent 54% of subnational expenditure compared to 29% in the OECD area. In Hungary, 27.3% of total public investment was carried out by subnational governments compared to an OECD average of 56.9%.

Figure 1: Subnational government expenditure in percentage by function



Social and Economy Structure

Hungary is a parliamentary representative democratic republic. The country has a unicameral parliament composed of the National Assembly, the members of which are elected every four years by direct universal suffrage. The Head of State, the President of the Republic, is elected indirectly by the Parliament for a five-year term, and the Head of Government, the Prime Minister, is appointed by the President for a four-year term.

Life satisfaction can be an important indicator. According OECD data, the Hungarian people's life satisfaction is much lower (5.0) than the OECD average, which is 6.8 out of 10.

Also, the average income per capita is USD 11 000 in Hungary, much below than the OECD average, which is USD 17 695 per capita. Inequality is also high in Hungary. The poorest 20% of households earn 6.7% of total income.

Nevertheless, civic engagement is very low in Hungary. This is shown by the percentage of voters in the last national election, which was 62.6%, much below the OECD average of 70.9%.

Unemployment rate

The unemployment rate was 4.2% for people aged 15-64 in 2017, while the OECD average was 5.5% The youth unemployment rate in Northern Great Plain reached 17% in 2017, more than twice the level of Central Hungary, and slightly above the 15% OECD average.

Education

There were several changes in the Hungarian education system in the last ten years. The 2012 Constitutional reform centralised several functions in education (primary and secondary education) which means their scope and financing sources have been reduced.

At the same time, according to government expenditure, the Hungarian government spend 15% of its outgoings on education, far less than the 25% OECD average.

Although those with at least upper secondary education are 87.2% of the labour force (country average), slightly above the 81.7% OECD average, spending on education has sharply decreased since 2011.

Corruption profile in law Criminal law legislation on corruption

In Hungary, corruption offences are regulated by the new Criminal Code of 2012 in Chapter XXVII of the Special Part under the chapter "Corruption offences", except *Abuse of public office*, which can be found in Chapter XXVIII of the Special Part under the chapter "Public Office Offences".

First, bribery always aims to shape a life situation, to influence a decision. Two behaviours are in opposition, which means there are at least two actors in bribery, the active and the passive briber. The active briber gives or promises some kind of advantage (money, gift or other service) to the passive briber in order to make the other party decide in his/her favour. The passive briber is the person who has the power to make a decision. Both parties shall be guilty. (GYŐRY – INZELT, 2016: 476.)

Art. 290 – Giving a bribe

In this case, the legal object of the offence is the purity of economic activity. The object of the offence is undue advantage (mainly money, but it can also be of a personal or moral nature). A typical example of a financial advantage is granting a loan or credit, while a personal advantage

can be the provision of a job. The undue advantage is given or promised to a person acting on behalf of the entity. The crime is completed with the promise of the benefit and can be committed by anyone.

There are qualified cases, for example when someone committed the crime in a criminal association or on a commercial basis. At same time, the penalty may be reduced without limit if the offence is reported to the authorities before it comes to the attention of the authorities and the circumstances of the offence are disclosed.

Art. 291 – Receiving a bribe

The legal object of this offence is the purity of economic activity, as in the previous case. The passive briber initiates the corrupt relationship when the benefit is requested by him/her. Insinuations and drawing attention to habits also constitute a request. An excellent example of this was the doctor who, without question, reminded the relatives that it was appropriate to thank the members of the "team" for their work. The offence is committed by a person carrying out activities for or on behalf of an economic entity. This offence can only be committed intentionally. There are, of course, also qualified cases of this offence; for example when committed in criminal association or on a commercial basis. Furthermore, if the offender cooperates with the authorities, the punishment shall be decreased.

Art. 293 – Public bribery

The legal object of the offence is the purity of public life and the influence-free activities of public officials. This offence can be committed by anyone.

The object of the offence is an undue advantage. Anything that directly or even indirectly puts the official in a more favourable position is an advantage. It is important that the advantage must be unlawful. The active briber seeks to influence the official in relation to his or her activities. The offence is committed by the person who seeks to influence; hence the advantage must be capable of being influenced.

The offence is completed when the promise of the undue advantage is made, so it is not necessary that the undue advantage is transferred; the offence is completed without it. If the public official refuses the undue advantage, the act is still complete.

The offence shall be regarded as more serious if the briber gives or promises the undue benefit in order to induce the official to breach his or her official duty, exceed his or her powers or abuse his or her official position. The penalty may be reduced without limit, or even waived in cases of particular merit, if the offence is reported to the authority before it comes to the knowledge of the

authority and the circumstances of its commission are disclosed. Mitigation of the sentence is at the discretion of the court.

Art. 294 – Passive Public Bribery

The Hungarian Criminal Code protects the purity of official life by punishing passive public bribery. This includes when an official requests an undue advantage, accepts an undue advantage or agrees with the requestor or acceptor of an unfair advantage given or promised to a third party. For instance, *"A police officer is liable for accepting bribery if he receives an undue advantage, such as regular free meal in a restaurant, not for himself, but for his wife and daughter. He knows that the restaurant's owner is giving it to him because he wants to influence his police duties."* (FILÓ – NEMES, 2019: 160.)

This offence may be committed intentionally by an official or a foreign official. It is also important to note that where the offence is committed by a senior official, the offence considered more serious. A senior official is defined as a person who is in charge of a department in an office or public authority. The law is even more severe if the offence is committed in a criminal association or on a commercial basis and it is committed in breach of official duty or in misuse of power.

As in the case of active public bribery, the penalty can be reduced or dismissed without limit, but there are three conjunctive conditions: the act is reported before the authority becomes aware of it, the circumstances of the offence are disclosed and the undue financial advantage or its equivalent is handed over to the authority.

Art. 299 – Influence peddling

In this case, the object of the offence is an undue advantage of any kind. The conduct consists of requesting an undue advantage, accepting an undue advantage or a promise of such an advantage, or agreeing with the person requesting or accepting an undue advantage given or promised to a third party. The offence is committed even if the perpetrator pretends to influence an official but the person giving the benefit believes that the influence is real.

The offence will be completed when the undue advantage is requested: neither the transfer of the advantage nor the assertion of influence is necessary. The offence can be committed by anyone except an official, because then it would be receiving a bribe. There are qualified cases, for example if he or she alleges or gives the impression that he or she is bribing an official or impersonates an official or commits the offence in a commercial case. There are also mitigating circumstances or non-application of penalties.

Art. 305 – Abuse of public office

The Hungarian Penal Code regulates the *Abuse of public office* in Chapter XXVIII of the Special Part, under the chapter *The Public Office Offences*, and not under the *Corruption offences.* In this case, the law seeks to protect confidence and trust in the lawful functioning of public officials and the official apparatus. Since officials are responsible for upholding and enforcing the law, it is prejudicial if they abuse their official status.

The Hungarian legislation mentions three types of misconduct: breach of official duty (including dereliction), exceeding their sphere of office action and other abuse of official position. The offence can only be committed by a public official. The offender's aim is to cause unlawful harm to others or to gain an undue advantage for himself. The undue advantage can be personal, moral or material. It should be noted that abuse of public office is the most common of the public office offences.

The Structure of the Hungarian Criminal Justice System

The Hungarian criminal justice system is composed of several elements, including the police, the prosecution office, the court and judges, plus the correctional service. These institutions are organisationally and functionally independent, but they are interdependent at the same time, because criminal proceedings link them together. The criminal police is part of the police organisation, the prosecutor is part of the prosecution office and the criminal court belongs to the judicial system, but *in order to combat crime and establish criminal responsibility, they can only work together, cooperating with each other and linking their activities into a unified whole process*. (FARKAS, 2016: 988–989.)

It is important to note that these units also have separate objectives, as their efficiency and effectiveness indicators have different factors. In particular, the investigating authority will be evaluated by the number of offences detected, the prosecution by the number of effective prosecutions, while the court will be judged on the number of appeals and the number of final and binding judgments without appeal.

Moreover, it is not an issue that these individual objectives are mutually exclusive, it is simply important to note that, in addition to their common objective, they also have individual objectives. (FARKAS, 2016: 992.) After all, if these individual goals are all achieved, it will also increase the efficiency of the judiciary.

Different levels of authority and jurisdiction

Each case is divided according to the level of the criminal procedure authority, which means that there is general, special and exceptional first instance jurisdiction. General jurisdiction is reserved to the local authorities, and the district level in the capital. Special jurisdiction is reserved to the authorities at county level and at capital level. Exceptional first instance means that, with regard to more complex cases of particular importance, the head of the organisation can refer the case to another national institution, e.g. if the general rule is district level police office, in such case the investigation is carrying out by the county level of the prosecution office.

Jurisdiction is defined by the rules which, according to the territorial division of Hungary, designate the authority competent to deal with a specific case from among the authorities operating at the same level. There are two types of that: the general (authority in whose territory the offence was committed) and the specific (used when, for whatever reason, there is no authority with jurisdiction to act in the case).

Investigating authorities

The tasks of the investigating authorities include the prompt and thorough investigation of criminal offences, and the performance of the procedural steps necessary to bring the perpetrators of criminal offences to justice. The investigating authority carries out investigations on the basis of an order from the prosecutor or independently (in cases where it has detected the offence or has been reported by a third party). It is significant that, in the case of offences reported or discovered on the basis of its own detection, any investigating authority is obliged to carry out the urgent investigative acts, regardless of its competence and jurisdiction.

In Hungary, the general investigating authority is the police. The Hungarian police are responsible for preventing and detecting crime, protecting public safety, public order and the state border. Its activities are regulated by Act XXXIV of 1994. Furthermore, the Prosecutor's Investigation Office also has investigative powers in relation to the offences under its jurisdiction.

Otherwise, the investigating authorities can participate – with the permission of the Attorney General – in an investigation team with the investigating authorities of European Union members and EUROPOL, under the general conditions established in the law.

The role of the court in criminal proceedings

The final decision in criminal cases is taken by the courts, and the court also decides on coercive measures involving deprivation or restriction of liberty in criminal proceedings.

Judges are independent and subject only to the law. They may not be instructed in the exercise of their judicial functions. Also, they cannot participate in any political activity. Official judges are always commissioned by the President of the Republic.

In Hungary, the courts are organised at four levels: the Curia – the Supreme Court of Justice –, Court of Appeal, Regional courts and District courts. In addition, each case can be tried at up to three levels: first, second and third instance.

District courts act in the first instance, and only certain serious crimes (e.g. homicide, kidnapping) are tried at first instance by Regional courts They can try cases at the second instance, while the court of third instance is the Court of Appeal for cases where the court of second instance has acted. The Supreme Court of Justice will hear cases in which the Court of Appeal has given judgment at second instance.

The District court has a single judge, but there also can be a full-bench hearing for more serious criminal offences. For major offences relating to economic crimes, when the case is complex with many parties involved, five professional judges will act.

In the Hungarian justice system, there is an investigating judge who – before an indictment is filed – is appointed by the president of the county court to perform the duties of a judge at first instance. The investigating judge is the person who decides whether to use secret data, including the permit to collect secret data and whether the evidence is obtained in this way can be used. (TÖRÖK, 2010) As well as the investigating judge makes decision on witness protection.

The role of the prosecution in criminal proceedings

The Prosecution Office has an important role in the justice system. It is an independent establishment, and subject only to the law and it is directed by the Attorney General. Hungary follows the *Independent Prosecution Model,* which means that the prosecution is absolutely independent from the executive authorities and accountable and responsible only to the National Assembly, which has no voice in professional matters.

The classic role of the prosecutor in criminal cases is to decide on indictment and pursue the prosecution in court. During criminal proceedings, prosecutors also perform other tasks: they monitor and supervise the police investigation and the execution of sentences, especially custodial sentences. It is also essential that the prosecutor in its supervisory activities can check and monitor the penitentiaries and the prisons in the country.

It is important that the prosecutor does not take the decision himself when breach of the law is detected, however he/she can first take an initiative to do what with the body concerned or, if this

is unsuccessful, he can appeal to the courts. He or She represents the public prosecution in court proceedings, but his role in criminal proceedings is also crucial. The prosecutor directs and supervises the police pre-charge investigation and can even take the investigation into his or her own hands. In some cases, only the prosecution can investigate, for example, if a judge, a prosecutor or a professional police officer has committed a crime. Nevertheless, the Prosecution Office, unlike the courts, operates on the basis of a strict hierarchy. As mentioned above, the Prosecution Office is directed by the Attorney General, who has a widespread entitlement, including the power to appoint and dismiss prosecutors and the prosecution's chiefs.

It is also closely linked to the judicial system in other respects: the highest judicial forum, the Curia, is represented by the prosecutors of the Office of the Prosecutor General. The Apellate Chief Prosecution Offices operate at the seats of the Courts of Appeal. They can be found in the capital and also in the counties. Finally, the District-level Prosecution Offices carry out their tasks at the district courts.

Investigation into Corruption Cases

Detecting and proving corruption cases are difficult. Proving Corruption offences is challenging because there is no private individual victim and both parties benefit from the crime. The offence is characterised by close cooperation, secrecy and conspiracy. The possibilities of physical evidence are limited. It does not leave an external trace in the environment, and, in general third parties, have no knowledge of the act. Also, the moral judgment by the society e.g. in case of gratitude payment in the health care system is not obvious. (KEREZSI et al., 2014: 82.)

There are several ways that a crime may come to the attention of the authorities. One is when a citizen reports to the police. Another way is on the basis of legally obtaining information from the authorities or a report from a police officer, border guard or any other official when he or she has been offered an undue advantage. It is important to note that many anonymous reports are made but do not lead to any investigation because they are inappropriate, incorrect or baseless and are therefore rejected. If the suspicions are confirmed on the basis of the allegations made in the report, a secret information gathering operation will usually be ordered.

The most common detection technique is secret information gathering or catching in the act. The secret information gathering operation is carried out by the spotting unit. This is mainly telephone interception, less frequently room interception, which is led by National Protective Service. This is essential, because the resulting data are the main conclusive evidence. After the investigation has been opened, secret data collection may also be obtained by order of the investigating authority, generally by the police or the prosecutor's investigation office. It generally used when evidence cannot be obtained by other means or when obstacles are encountered in the case. (KEREZSI et al., 2014: 93.)

Typical evidence is collected by questioning, interrogation and confrontation of participants (witness with another witness, suspect with another suspect), but confrontations of suspects and witnesses is rare in the investigation stage. If available, documentary evidence, information from mobile phone logs, bank account activity, emails, text messages and social networking sites are also common means of proof. (KEREZSI et al., 2014: 92.) All in all, if there is no evidence from operational activities or catching the perpetrator in the act, corruption is very difficult to prove because there are few witnesses and little documentary evidence.

In Hungary, the criminal proceedings take five to ten years from the commission of the crime until a criminal conviction has been determined. Basically, the investigation stage takes a long time. Moreover, the length of the trial phase depends on the nature of the crime, the number of defendants and how the offence was committed. At Regional courts, in the first instance, cases are closed in one hearing in one week for minor cases e.g. theft, vandalism, asssault. In multi-accused cases – over forty accused – can take five or six years, and this is only the first instance conviction. (KEREZSI et al., 2014: 90.)

In addition, the role of the *whistleblower* is important too because such persons can also bring cases to the attention of the authorities. However, there is no tradition of this legal institution in Hungary. The regulation of *whistleblowers* could provide a significant solution to the difficulty of detecting economic crimes, because corruption and economic crimes are typically those kinds where none of the participants has any interest in disclosing the activity.

The Hungarian legislation on *whistleblowers* – Act CLXV of 2013 on Complaints and Public Interest Disclosures[2] – does not provide strong protection, by international comparison. There is also a lack of concrete financial incentives. The Act state that *"[a] whistleblower who is a natural person shall be entitled to aid provided to ensure his or her protection, as defined in the relevant law, if he or she is likely to be at risk"*. Although it mentions aid, it does not specify the exact amount. Furthermore, it is important that the regulation of whistleblowers includes legislation that *"provides for employment and other protections for those who report economic or typically corrupt offences to the authorities and requires for the authorities to establish separate departments to investigate whistleblowing"*. (GYŐRY – INZELT, 2016: 471.)

Transparency International Hungary also provides legal assistance to help whistleblowers. They can also be contacted if a citizen wants to report corruption. As Transparency International Hungary is a non-governmental organisation in the form of a foundation, it has no authority or power to initiate instructions, but it can provide legal advice in cases of irregularities in public

[2] http://www.ajbh.hu/documents/14315/130159/Act_CLXV_of_2013_.pdf/faa3e557-8e16-473f-1fa9-539e7cdb0f22

procurement. It can also help to connect the whistleblower with an investigative journalist, so that the case can be given more publicity. In exceptional and special cases, it can also represent the whistleblower in court because they are entitled to representation.

Furthermore, it is important to ask who is responsible for this type of crime. When the offences are committed within an organisational framework, individual criminal liability is immensely difficult to prove. The *Criminal Responsibility of Legal Persons* is widespread, not only in the common-law countries, but also in continental countries, including Hungary. On this basis, criminal proceedings are bought against the legal entity, but it is so rarely used that it is considered a "dead legal institution" in Hungary. (GYŐRY – INZELT, 2016: 470.)

Measuring Corruption

"The measurement of corruption is necessary to achieve progress towards greater integrity, transparency and accountability in governance". (SAMPFORD et al., 2006) Perception indicators, for example, are excellent for measuring global and comparative corruption, but are not sufficient for diagnostics.

It is important to understand the opportunities and the limitations of all corruption measurement tools and to apply them properly. There are several reasons for the difficulties in measuring corruption and the low number of cases. These also include the relationship of trust and confidence between the parties, or the absence of direct victim.

The *"EU Anti-Corruption Report, Hungary"* was published by the Council of the European Union in 2014. The report focused on areas identified as problematic for corruption risks. These included the lack of transparency in public procurement procedures, financing of political parties, transparency and access to information or informal payments which completely infiltrate healthcare. Even though "gratitude" payments are an accepted practice in Hungary, these informal payments in the healthcare system also involve a risk of corruption. Last but not least, clientelism and nepotism are also a cause of concern.

In the next few pages I will briefly describe the corruption situation in Hungary based on the national official crime statistics and some internationally accepted indicators.

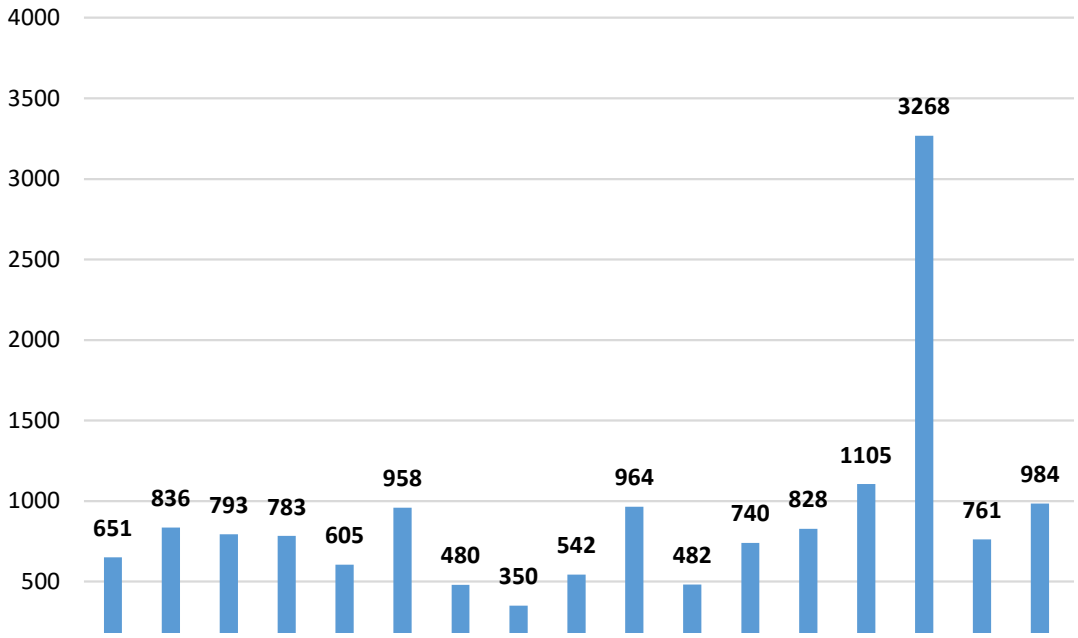
National Official Crime Statistics

In Hungary, corruption offences are about 1.0% of all registered crimes. The latency is high, therefore *"criminal corruption is characterised by such low crime statistical occurrences that the data for registered corruption cases can only be used for concluding the minimum level of these offences".*

(GYŐRY – INZELT, 2016: 478.) It is important to emphasise that crime statics alone cannot give a realistic picture of the true extent of corruption.

As shown in the graph below, the number of registered corruption offences ranged from 350 to 3268 over the past decades. The high number of cases in 2014 was caused by a single activity, the falsification of foreign language examination results. In this case, an intermediate language exam cost approximately 850 euros, but an advanced one could be purchased for 1400 euros. Although the fraud had been going on for years, it was only registered in 2014.

Figure 2: Number of corruption cases in Hungary over the past twenty years (2000–2020)



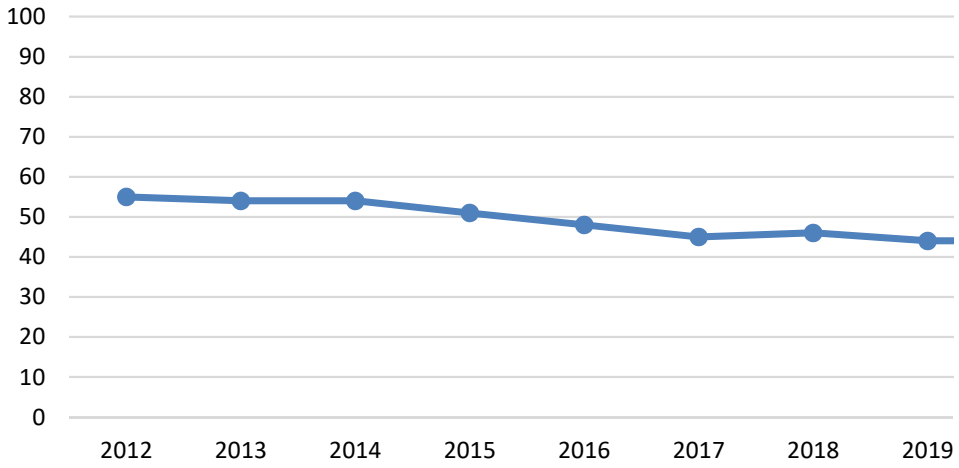
Source: Office of the Prosecutor General – Statistics: Number of corruption cases

Transparency International (TI) – Corruption Perception Index (CPI)[3]

Transparency International is a global civil society organisation committed to cooperating with the widest range of governmental, for-profit and non-profit corporations and organisations. TI has prepared the CPI every year since 1995. This is a complex and the most commonly used indicator that gives us a summary of the corruption situation in many countries. The complex index uses a scale from 0 (highly corrupt) to 100 (low levels of corruption / very clean), using many different sources of data from expert and business surveys carried out by various independent and well-known institutions.

[3] https://transparency.hu/en/adatok-a-korrupciorol/korrupcio-erzekelesi-index/

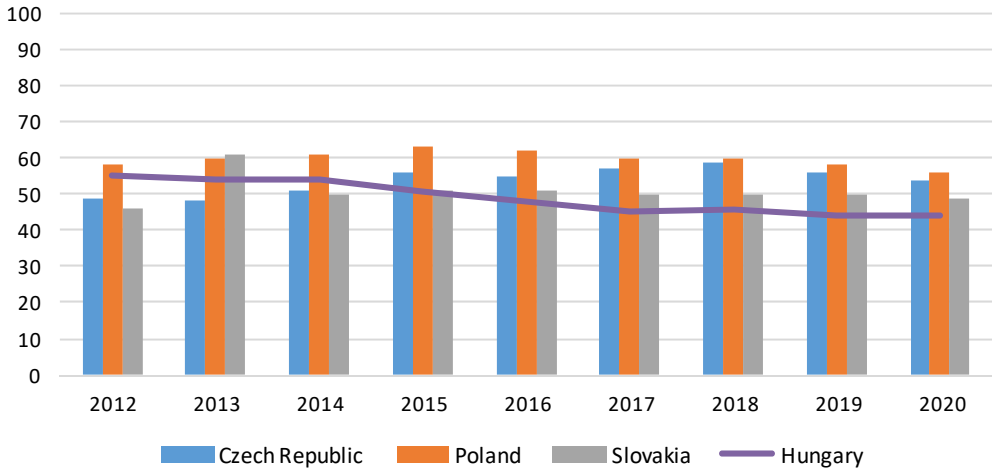
Figure 3: Hungary's score on the TI – Corruption Perception Index



Source: Corruption Perception Index –Hungary, Transparency International Hungary

Hungary has been consistently ranked in the bottom third of the European Union for years. While Hungary is considered to be moderately corrupt globally, it is one of the most corrupt member state in the European Union. With a score of 44 in 2019, Hungary ranked last among both the V4 countries and the member states that joined the European Union in 2004.

Figure 4: Corruption Perception Index in relation on Visegrad Group (2012–2020)



Source: Corruption Perception Index, Transparency International Hungary

In 2020 – among the 180 countries examined – Hungary received 44 points, placing it int 69th position, tied with Romania and Bulgaria. This result hardly exceeds the ranking's global average, which was 43 points. While considered moderately corrupt globally, Hungary lags significantly behind its regional peers. The three other members of the Visegrad 4 group scored much better than Hungary, *„with Slovakia receiving 5 points more, Czechia 10 points more and*

Poland 12 points more than Hungary".[4] Hungary is still seriously affected by corruption and still compares very poorly with other European countries. Despite all efforts, creating proper accountability and fighting corruption remains a major challenge.

Corruption and local context – Corruption profile in practice

Corruption in health care system, Lambsdorff principal-agent-client model in practice

In order to analyse our Hungarian case study we use Lambsdorff's principal-agent-client model. (LAMBSDORFF, 2007: 62–65.) According to *Zoltán Szántó*, it is a modern political economy and economic sociology model that offers a fruitful framework for theoretical and empirical analysis of corruption. This model is based on rational choice theory: its actors consider the expected costs and benefits of their options, and choose the option which yields the highest net benefit for them. The agent (e.g., a tax collector) employed by the principal (e.g., a chief officer of a tax office) comes in contact with the client (for example a taxpayer). The model says that the agent will become corrupt if his or her net benefit from corruption exceeds the net benefit from being honest. Furthermore, the model says that the client will attempt bribery if his or her net benefit from bribing exceeds the net benefit from refraining from bribery. (SZÁNTÓ 1997; see also SZÁNTÓ, 1998)

In this case, the defendants I–XI (agents) issued expert opinions with untrue content for money. The accused XII and XIII (principals) mediated the agents to "patients" (clients). *(See Table 1)*

Table 1: Roles of the 70 defendants in the case

Principals		Agents	Clients
Internal intermediaries	External intermediaries	bribed persons	bribers
XIV., XV., XVI. accused	XII., XIII., XVII. accused	I–XI. accused	39 accused persons
medical experts' assistants	intermediaries, the engines of the acts of corruption	physicians, experts	patients

The physicians wrote in the expert's report that they found a greater reduction in the patients' condition for being able to work than the actual situation was. With this expert report, the clients received (a higher amount of) regular social benefits (disability pensions).

The patients gave the money to the principals. Some of the money was passed on to the doctors (agents).

[4] https://transparency.hu/en/adatok-a-korrupciorol/korrupcio-erzekelesi-index/cpi-2020/

This mechanism was well-known in the city where it occurred. The recruitment of patients worked through word of mouth. The principals ran this system for more than one and a half years. Finally, the prosecution services started to investigate. During the case they used secret data acquisition.

In the end they accused 70 persons of being involved in the incidents.

In the judgment, the intermediaries were sentenced to one year's imprisonment, suspended for three years; the patients were fined and ordered to pay back the illicit pensions and the doctors were sentenced to one year imprisonment, suspended for one year, or one year's probation.

Corruption prevention – National anti-corruption strategies in Hungary

In this chapter we will briefly review the main stages of the Hungarian anti-corruption legislation in the past twenty years.

The different government-initiated anti-corruption programmes in Hungary are partly the consequences of international pressure. The most influential source of pressure is the European Union (EU). While seeking EU membership, Hungarian governments participated in several anti-corruption actions initiated by the EU.

Resolution 1023/2001 introduced the Governmental Strategy Against Corruption. It contained a wide range of proposals concerned with conflicts of interest, property declarations, prepared more effective control over the sources of political parties' assets and donations and regulated lobbying. In connection with the publicity of public data, it reduced the definition of business, bank or securities secrets, the length of immunity, restraint of profession in the case of committing bribery or trafficking in influence and introduced criminal sanctions applicable against legal persons for money-laundering, terrorism, and public procurement offences.

The strategy, however, took the 'traditional approach' to fighting administrative corruption by focusing primarily on punitive measures instead of prevention.

According to the strategy accepted in 2004 (Government decision no. 1011/2004), the Advisory Board for Corruption-free Public Life (hereinafter the Board) was established. The Board consisted of representatives from the Ministry of Justice, the Ministry of Interior, the Ministry of Defence, the Ministry of Finance, the Prime Minister's Office, the Governmental Supervisory Office, the National Security Office, the National Headquarters of the Police, the General Directorate of the Customs and Finance Guard, the Chief of the Coordination Office of OLAF, the State Audit Office and the Prosecutor General's Office. Additionally, representatives

from civil society (e.g.. university researchers and members of the Academy of Sciences) were invited to participate in the Board meetings. The main tasks of the Board were to carry out research relating to corruption, continuous evaluation of the results of anti-corruption activities, providing advice on anti-corruption measures and liaising with the United Nations Office on Drugs and Crime (UNODC), the Organisation for Economic Co-operation and Development (OECD), and the Council of Europe Group of States against corruption (GRECO).

Anti-corruption activities continued in 2007 with government decision 1037, *"The tasks related to the fight against corruption"*. As stated in the government decision, the government requested the Minister of Justice to draw up a long-term 'strategic document' and a short-term 'programme of action' to fight against corruption. These documents were to be formulated in detail by the Anti-corruption Co-ordination Body (hereinafter ACB) established in August 2007. Its members were the representatives of the Ministry of Justice, the Ministry of Health, the Ministry of Economy and Transport, the Ministry of Local Government and Regional Development, Ministry of Finance, the Ministry of the Prime Minister's Office. Permanent guests were the representatives of the State Audit Office, the Hungarian Competition Authority, the Council of Public Procurement, the National Council of Justice, Parliamentary Commissioner for Data Protection and Freedom of Information and the Prosecutor General's Office. The Ministry of Justice designated, on a temporary or permanent basis, non-governmental public organisations and representatives of civil society, in the proportion of government bodies (six persons). In January 2008 the ACB prepared the anti-corruption strategy and action plan. In view of the involvement of non-governmental public organisations and representatives of civil society in the work of the body (including Transparency International Hungary), the new anti-corruption programme was expected to be an important step towards a widely accepted national strategy against corruption. The ACB was scheduled to produce an Anti-corruption Strategy by the end of 2007, and the government planned to make a decision based on its strategy by February 2008.

In February 2009, the Ministry of Justice and Law Enforcement made an Anti-corruption action Plan which contained five main areas: a) Whistle-blowing protection (Draft Act); b) Establishment of the so-called "Authority for Protection of Public Interest" (Draft Act); c) Ethical guidelines for civil servants (Draft Parliament Decision); d) Stricter regulations in the field of lobbying (Draft amendment of the Lobby Act); e) Transparency in party financing (Draft amendment of the Operation and Financial Management of Political Parties Act).

In September 2010 Hungary, joined the International Anti-Corruption Academy (IACA). Its aim is to overcome current shortcomings in knowledge and practice in the field of anti-corruption.

From 2011 the government increased financial support for the Office of the Central Prosecution Service in order to establish the Public Prosecutor's Department of Anti-corruption.

The Department deals with corruption cases where the value of the crime and/or the public outrage is high. The Department has been working from the beginning of April 2011.

An integrity testing system was introduced in 2010 in order to reduce police corruption.[5] The aim was to control the activities of persons belong to the staff of the police and other organisations of the ministry of internal affairs. Integrity tests are carried out by the National Protective Service (hereinafter NPS). The duration of integrity test is 15 days, which can be extended by another 15 days once by the director general of the NPS. The integrity test has to be approved by the public prosecutor. This supervision can be ordered for a member of protected staff a maximum of three times in a calendar year. The examined person has to be informed of the results within 15 working days of completion.[6]

'The Corruption Prevention Programme for Public Administration 2012–2014' was adopted in March 2012. The principal aims of his anti-corruption programme were to build credibility and increasing public trust in state organisation and to introduce changes the gradually. It was intended to overview acts (e.g., Public Procurement Act) in order to decrease corruption risks. Whistle-blowing protection was also again on the agenda. The programme primarily focused on government institutions, and less attention was paid to the business sector.

Finally, in 2013, the regulation on whistle-blowing was enacted. Act CLXV of 2013 on Complaints and Public Interest Disclosures contains the procedure for disclosing confidential data. According to the preamble of the Act: *"The National Assembly, committed to increasing public confidence in the functioning of public bodies, recognising the importance of complaints and public interest disclosures in improving the functioning of the state, having regard to the international obligations of Hungary undertaken in connection with action against corruption, as well as the recommendations of international organisations, recognising the efforts made by whistleblowers in order to promote public interests, and ensuring the measures needed for the fullest protection of whistleblowers [...]."*.[7]

In 2013, the government enacted Government Decree 50/2013. (II. 25.) on the system of integrity management at public administration bodies and the procedural rules of receiving lobbyists. It was a great step ahead on fighting corruption in the public sector; however, it mostly affects the work of low-level public officials.[8]

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[5] See in detail Government decree 293/2010. (XII. 22.) on designation of the police's organ for internal crime prevention and crime detection, on discharge of its duties, and on detailed regulation for life style monitoring and integrity testing.

[6] https://nvsz.hu/en/integrity-testing

[7] Act CLXV of 2013 on Complaints and Public Interest Disclosures. http://corruptionprevention.gov.hu/download/4/ce/02000/Act%20CLXV%20of%202013%20Act%20on%20Complaints%20and%20Public%20Interest%20Disclosures.pdf

[8] Government Decree 50/2013 (II. 25.) on the system of integrity management at public administration bodies and the procedural rules of receiving lobbyists. http://corruptionprevention.gov.hu/download/7/ce/02000/Governmental%20Decree%2050_2013.pdf

The concept of the Public Administration Programme was continued in the National Anti-Corruption Program (2015–2018) (hereinafter: the Program) in such a way that, this time, it aimed to orient non-governmental actors in line with the general objectives, as well as changing corruption and emerging corruption risk factors. The Program laid down the main principles of government action against corruption and the theoretical and methodological foundations needed to determine the directions of action. Within the framework of the situation assessment, it summarised the development of the fight against corruption in Hungary, presented the government measures taken to prevent corruption, analysed corruption and related indices, dealt with the findings of international organisations, and reviewed the main international anti-corruption and integrity trends.

Its general objectives were to make the management of public funds more transparent, to improve official procedures, to develop regulations that promote business integrity, to expand anti-corruption education and training, to develop attitudes and to create the personal and material conditions for an effective fight against corruption; it expected measures in these areas to strengthen organisational and individual resilience to corruption in the medium term.

In order to achieve these aims, the government accepted the Government Decision no. 1336/2015 (V.27.) on the adoption of the National Anti-Corruption Programme and the Action Plan on related measures for 2015–2016[9], as well as Government Decision No.1239/2017 (IV.28.) on the adoption of the plan on measures related to the National Anti-Corruption Programme for 2017 and 2018[10].

The Program identified the following areas of intervention: increasing organisational resilience; no influence on public procurement; increasing transparency; declarations of assets of civil servants; development of official procedures; promoting clean business; education, training, attitude formation; and strengthening the personal and material conditions of the fight against corruption.

The newest developments are the 1328/2020. (VI. 19.) Government Resolution on the adoption of the Medium-Term National Anti-Corruption Strategy for the period 2020–2022 and the related action plan, as well as the Medium-Term National Anti-Corruption Strategy for the period 2020–2022.[11]

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[9] No. 1336/2015. (V. 27.) Government Decision On the adoption of the National Anti-Corruption Programme and the Action Plan on related measures for 2015–2016.
http://corruptionprevention.gov.hu/download/5/ce/02000/Action%20Plan%202015-2016%20on%20therelated%20measures%20-%20National%20Anti-Corruption%20Program.pdf

[10] Government Decision No. 1239/2017 (IV. 28.) on the adoption of the plan on the measures related to the National Anti-Corruption Programme for 2017 and 2018.
http://corruptionprevention.gov.hu/download/6/ce/02000/Government%20Decision%201239%20of%202017.pdf

[11] https://korrupciomegelozes.kormany.hu/download/f/ff/92000/STRAT%C3%89GIA%20k%C3%B6zz%C3%A9tett.pdf; https://korrupciomegelozes.kormany.hu/download/a/21/a2000/1328_2020_(VI_19_)%20Korm_hat%C3%A1rozat.pdfhttps://korrupciomegelozes.kormany.hu/download/a/21/a2000/1328_2020_(VI_19_)%20Korm_hat%C3%A1rozat.pdf

The Strategy achieves its goals in three areas of intervention, being technology-based, rule-based and value-based. An innovation of the Strategy is making technology-based intervention areas as much of a priority as rule and value-based areas of intervention. This is an important part of the strategy because of the dynamically evolving e-government.

Despite the important attempts to curb petty corruption, these strategies and the focus of the Criminal Justice System still fails to address the lack of high-profile corruption investigations.

References

FARKAS Ákos (2016): *A büntetői gazságszolgáltatási rendszer hatékonyságának korlátai*. In: BORBÍRÓ Andrea – GÖNCZÖL Katalin – KEREZSI Klára – LÉVAY Miklós (szerk.): *Kriminológia.* Budapest: Wolters Kluwer.

FILÓ Mihály – NEMES András (2019): *Büntetőjog. Különös rész: A korrupciós bűncselekmények.* Budapest: ELTE Eötvös Kiadó.

GYŐRY Csaba – INZELT Éva (2016): Fehérgalléros, gazdasági és korrupciós bűnözés. In: BORBÍRÓ Andrea – GÖNCZÖL Katalin – KEREZSI Klára – LÉVAY Miklós (szerk.): *Kriminológia.* Budapest: Wolters Kluwer.

KEREZSI Klára – INZELT Éva – LÉVAY Miklós (2014): *Korrupciós bűncselekmények a büntető igazságszolgáltatás tükrében.* https://www.ajk.elte.hu/media/39/1e/d6420ce846d0a6b5a8541f7a319c16208f834ee00073679fe8f2a0433ed7/Inzelt-%C3%89va-Kerezsi-Kl%C3%A1ra-L%C3%A9vay-Mikl%C3%B3s-Korrupci%C3%B3s-b%C5%B1ncselekm%C3%A9nyek-a-b%C3%BCntet%C5%91-igazs%C3%A1gszolg%C3%A1ltat%C3%A1s-t%C3%BCkr%C3%A9ben.pdf

LAMBSDORFF, Johann G. (2007): *The Institutional Economics of Corruption and Reform. Theory, Evidence and Policy.* Cambridge: Cambridge University Press.

SAMPFORD, Charles – SHACKLOCK, Arthur – CONNORS, Carmel – GALTUNG, Frederick (2006): *Measuring Corruption.* Routledge.

SZÁNTÓ Zoltán (1997): Megbízók, megbízottak és kliensek: vázlat a korrupció fogalmáról, *Szociológiai Szemle,* 4. 109–114.

SZÁNTÓ, Zoltán (1998): Principals, agents, and clients. https://szociologia.hu/dynamic/RevSoc_1998_SzantoZ_Principals_agents_clients.pdf

TÖRÖK Zsolt (2010): Hivatali és korrupciós bűncselekmények bírói gyakorlatának aktuális kérdései. 2. rész. *Ügyészek Lapja,* 3. 5–16.

ITALIAN CASE STUDIES

COSTANZA DE CARO – ANNALISA MANGIARACINA – LUCIA PARLATO*

Country profile

Population in 2020

•59 449 527 inhabitants

Growth rate

• -0.5%

GDP in 2020

•USD 41 492 per capita

Projected growth rate in 2021

•4.4%

Jobs					
Employment rate 15 to 64 years old (%), 2019	59.0	76.0	69.4	41.4
Unemployment rate 15 to 64 years old (%), 2019	10.2	3.3	5.6	20.7
Community				
Perceived social network support (%), 2014-18	91.0	94.1	94.3	88.9
Environment				
Level of air pollution in PM 2.5 (µg/m³), 2019	19.2	7.0	11.2	21.8
Safety				
Homicide Rate (per 100 000 people), 2016-18	0.7	0.7	0.3	1.0
Income				
Disposable income per capita (in USD PPP), 2018	0	26 617	25 567	14 837
Access to services				
Households with broadband access (%), 2019	82.0	91.3	85.8	75.0
Life Satisfaction				
Life satisfaction (scale from 0 to 10), 2014-18	6.1	7.3	6.3	5.8
Civic engagement				
Voters in last national election (%), 2019 or latest year	72.9	84.2	78.4	64.8
Housing				
Rooms per person, 2018	0.0	2.3	1.9	1.5
Health				
Life Expectancy at birth (years), 2018	82.7	82.6	84.1	82.2
Age adjusted mortality rate (per 1 000 people), 2018	6.7	6.6	6.3	7.4
Education				
Population with at least upper secondary education, 25-64 year-olds (%), 2019	62.2	90.3	69.9	51.9

* *Costanza De Caro, Law Student,* University of Palermo, Italy; *Prof. Annalisa Mangiaracina,* University of Palermo, Department of Law, Italy; *Prof. Lucia Parlato,* University of Palermo, Department of Law, Italy. The present paper is the result of a common research. However, Costanza De Caro drafted *Country profile, Ban on granting penitentiary benefits; The anti-corruption Authority* (ANAC), *Corruption and the local context, Measuring corruption, Prevention/ National Corruption Strategies,* Annalisa Mangiaracina drafted *Confiscation; confiscation by equivalent; non-conviction based confiscation; criminal responsibility of legal persons; the stage of investigation; the prosecution* ex officio; *the whistleblowers; the length of preliminary investigations; transparency for political organisations,* Lucia Parlato drafted *Criminal law legislation on corruption; criminal offences: passive bribery; active bribery; foreign bribery; private bribery; abuse of public office; additional sanctions; mitigating circumstances; the special non-punishment clause; pecuniary reparation; specific investigative measures; interception of communications; undercover operations; special proceedings: summary trial and plea bargaining; other relevant information and trends in corruption.*

Criminal law legislation on corruption

Introduction

Offences against corruption, together with embezzlement, extortion and abuse of office, are mainly regulated in the second title of the second book of the Italian Criminal Code (hereinafter: CC). Such regulation is composed of two parts: the category of offences of public officials against public administration (arts. 314-335 *bis*), and the category of offences of private citizens against the public administration (arts. 336-356). The purpose of the legislator is to protect the impartiality and good performance of public administration, by contrasting the conduct that damages their functioning and reputation. In addition, some criminal offences are provided for by the Italian Civil Code (ICC) as well as by the Legislative Decree no. 231 of 8 June 2001, on criminal liability against legal entities in the event that any of the crimes listed in the text of the above-mentioned Legislative Decree (including crimes against public administration) is perpetrated by directors, managers or employees for the benefit, or in the interest, of the company.

The normative framework on corruption went through several changes over the years[1]. The first relevant amendment came into force with Law no. 86 of 26 of April 1990. This law introduced new provisions into the CC, such as art. 316-*bis* related to the crime of "embezzlement to the detriment of the state" and art. 319-*ter* concerning the crime of "bribery in judicial actions". Amendments to several articles, already in force in the ambit of crimes against the public administration, were also introduced. After the 1995 PFI Convention (on the protection of European communities' financial interests), in 2000, by Law no. 300 of 22 September, the Italian legislator introduced art. 316-*ter* into the Italian Criminal Code concerning the crime of "misappropriation of funds to the detriment of the state" (or other public entities or the EU), as well as the crime of "international corruption" in art. 322-*bis* and a specific rule on confiscation for equivalent for main offences against public administration (art. 322-*ter*).

On November 28, 2012, by Law no. 190 (known as "Severino's reform"), the Italian legislator passed a significant reform, introducing, *inter alia*, new bribery offences – "undue inducement to give or promise a benefit" *ex* Article 319 *quater* and "illicit trafficking of influence" *ex* art. 346 *bis* – increasing the punishments for existing offences and generally enlarging the sphere of criminal responsibility for private parties involved in bribery. Moreover, it introduced an independent and administrative authority – the National Anti-corruption Authority (ANAC) – responsible for coordinating policies, defining guidelines and supervising and controlling corruption. (CARLONI – PAOLETTI, 2019: 32 ff.) Severino's reform has an historic relevance because, since that moment, administrative prevention alongside criminal punishment has become a fundamental instrument in the area of corruption.

[1] In the Italian literature see, among others, BASSI et al., 2020; ROMANO, 2019; VIGANÒ, 2014.

After the 2012 reform, another important change occurred in 2015, with Law no. 69 of 27 May, which greatly increased the length of custodial sentences in the criminal provisions for bribery and corruption set out in the CC. Then, Legislative Decree no. 38 of 15 March 2017 extended the reach of private commercial bribery by implementing the EU Framework Decision 2003/568/JHA on combating corruption in the private sector. On January 31 2019, Law no. 3, on "Measures to fight crimes against the public administration as well as on the matter of the statute of limitations and transparency of political parties and movements" entered into force. This law (called the Bribe Destroyer Act) – well-known as "spazzacorrotti" – as affirmed in the explanatory report, was passed with the purpose of "strengthening the activity of prevention, detection and repression of crimes against the public administration" [2]. It also was aimed at adapting national law to the instruments for the fight against corruption adopted by the European Council. Indeed, the Compliance Report adopted by GRECO (*Groupe d'Etats contre la Corruption*)[3], concerning measures taken by the Italian legislator to conform national legislation to the European Convention on corruption of 1999, ratified by Italy with Law no. 110 of 28 June 2012 revealed the partial implementation – and in one case the lack of implementation – of some recommendations.

Most recently, further innovations were introduced in 2020, by Legislative Decree no. 75 of 4 July (in force since 30 July 2020) entitled "Implementation of the EU Directive no. 2017/1371 (so-called PIF Directive) concerning the contrast, by means of criminal law, of frauds affecting Union's financial interests" (See CORSARO – ZAMBRINI, 2020).

Criminal offences: passive bribery

Bribery offences related to public officials are addressed in arts. 318-322 *bis* of CC. In particular, they distinguish several types of offences, depending on the conduct of the perpetrator.

Art. 318 punishes "improper bribery" or "bribery for the performance of the function", which occurs when the public official, in connection with the performance of his or her functions or powers, unduly receives personally or collects for a third party money or other benefits, or accepts the promise of them. The notion of "other benefits" is wide, including not only economic benefits, but rather any kind of economic and moral advantage[4]. The author of the crime is a

[2] For a critical approach on the reform, see, among others: GAMBARDELLA, 2019; MONGILLO, 2019a; PADOVANI, 2018; PISANI, 2019: 25. For an overview of the reform, see FLORA – MARANDOLA, 2019; ORLANDI – SEMINARA, 2019.

[3] Council of Europe, GRECO, *Fourth evaluation round. Corruption prevention in respect of members of parliament, judges and prosecutors. Compliance report Italy*, 7 December 2018. https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809022a7

[4] Court of Cassation, Section VI, 8 January 2021, no. 10084. www.dejure.it.

public official or, pursuant to art. 320 CC, a person performing a public service[5]. According to the case law[6], the immunity provided for by art. 68 § 1 of Italian Constitution is not an obstacle to the prosecution of the offence in relation to the activities performed by a member of the Parliament. Punishment has been increased by Law no. 3/2019: it is imprisonment ranging from a minimum of three years to a maximum of eight years[7]. As a common rule, principles applicable to the assessment of the penalties are provided by the "general part" of the Criminal Code in arts. 132 and 133. The first one states that the application of penalties shall be at the judge's discretion, within the limits (minimum and maximum) established by the law for each crime; the second specifies the principles to be applied by the judge in the exercise of his or her discretionary power (e.g. the judge has to take into account the seriousness of the offence and the individual's attitude to the crime). Sanctions are increased in the event of a repeat of the crime, in accordance with art. 99 CC, or where there are aggravating circumstances.

Art. 319 punishes "proper bribery" or "bribery for the performance of an act contrary to the duties" which occurs where the public official, in exchange for performing (or having performed) an act conflicting with the duties of his or her office, or in exchange for omitting or delaying (or having omitted or delayed) an act of his/her office, receives money or other benefits, or accepts a promise of such things. In order to ascertain the offence, under art. 319 CC, it is necessary that the illicit agreement between the public official and the private provides the realisation of an act specifically identified as contrary to the duty of the office[8]. Punishment is imprisonment from six to ten years. Following art. 319 *bis*, headed as "aggravating circumstances", the penalty is increased where the facts referred to in art. 319 of the CC are based on the assignment of public offices or salaries or pensions or signing contracts involving the public authority to which the public official belongs, or the payment or refund of taxes. The perpetrator of the crime is a public official or, pursuant to art. 320, a person performing a public service. As provided by the law, the offence is considered committed both when an illegal exchange of money takes place and in the

[5] Art. 357 of the CC provides the definition of public officials: *"As provided for under the criminal law, those who perform a legislative, judicial or administrative public function are public officials. As provided for under the same law, the administrative function is public when it is regulated by public law provisions and authority's acts; when it is featured by the formation and statement of the public administration's will or by its implementation by means of authority and certifying powers. defined as those who perform legislative, judicial or administrative public functions".* Italian jurisprudence interprets "public function" to the widest possible extent and may also include employees of public enterprises and companies which have been officially granted licenses to perform public services. Art. 358 of the CC defines the person in charge of a public service: *"For the purposes of criminal law, whoever performs a public service for whatever purpose shall be considered to be in charge of a public service. Public service shall mean an activity that is governed in accordance with the same modalities as a public function, although in the absence of the power vested in the latter, and excluding the performance of simply ordinary tasks and exclusively manual work".*

[6] Tribunal of Milan, Section X, 9 February 2021, no. 97. www.dejure.it. In the same judgment the Tribunal has excluded the application to the member of the Parliament of the offence of "proper bribery" *ex* Article 319 CC.

[7] The minimum and maximum of penalty were originally fixed, respectively, at one year and six years' imprisonment.

[8] For the differences with art. 318 CC see Court of Cassation, Section VI, 22 October 2019, no. 18125. www.dejure.it.

event of a "promise": it means that an agreement between a public official and a third party is sufficient to constitute the offence.

Art. 319 *ter* concerns "Bribery in judicial acts" which occurs where the conduct as provided for by the above-mentioned Articles 318 and 319 – so including "improper" and "proper" bribery – is undertaken for favouring or damaging a party in civil, criminal or administrative proceedings (tax proceedings are also included). In the notion of judicial act can be mentioned, for instance, being heard as a witness in criminal proceedings or the act performed by the clerk's office. The specific intent (*dolo specifico*) to favour or damage a party is required. The crime is also committed when money or other benefits are received or have been accepted the promise, for an act previously done: so called "subsequent bribery" (*corruzione susseguente*)[9]. Punishment is imprisonment from six to twelve years.

As mentioned before, by Law no. 190/2012, new offences were introduced in the CC. The first concerns the "undue inducement to give or promise a benefit", which punishes the public official or the person in charge of a public service, where, by abusing his or her position or powers, he or she induces someone to give or promise to him or her or to a third party, money or anything of value unlawfully (art. 319-*quater*). Punishment is imprisonment from six to ten years and six months.

The second concerns the conduct of active and passive influence peddling in art. 346-*bis*, changed by Law no. 3/2019 with the aim of punishing prodromal conduct with regard to corruptive arrangements that may involve a public official, whose decisions one would want to influence illicitly [10]. It punishes anyone who, while not committing the offences of proper bribery and bribery in judicial acts[11], by exploiting existing or alleged relations with a public official, unduly makes someone give or promise to him/her or others, money or another advantage, as the price for his/her unlawful intermediations towards the public official, or as consideration for the public official for carrying out an act conflicting with the office's duties, or for the omission or delay of an office's act. Criminal responsibility also applies to the private party who unduly gives or promises money or other advantages (art. 346-*bis*). By the new Law, the scope of the provision has been extended to include when a potential mediator only claims to be able to exercise undue influence on a public official, a person in charge of a public service or one of the persons referred to in art. 322-*bis* CC (foreign public official) in relation to the exercise of his/her functions or powers. Moreover, the benefit given or promised is no longer of an economic nature. Punishment is imprisonment from one year to four years and six months. The penalty is increased if the author of the crime is a public official or the person in charge of a public service (§ 3); or if the

[9] Court of Cassation, Joint Section, 25 February 2010, no. 15208; Court of Cassation, Section VI, 9 October 2019, no. 48100. www.dejure.it.

[10] For an analysis of issues posed by the new structure of the offence, see MONGILLO, 2019b: 42.

[11] See Court of Cassation, Section VI, 19 February 2020, no. 12095, on the subsidiarity clause. www.dejure.it.

act is committed in connection with the exercise of a judicial activity or to remunerate the public official or the person in charge of a public service or another of the persons referred to in art. 322 *bis* in connection with performing an act contrary to the duties of the office or to the omission or delay of such an act (§ 4). The penalty is reduced if the act is of particular tenuousness (§ 5).

Active bribery

The conduct of active bribery is provided for by arts. 321 and 322 of the CC. According to the first rule, headed "punishment against the briber", "The penalties provided for under the first subsection of the section 318, 319, 319-*bis*, 319-*ter*, and 320 in relation with the above-mentioned hypotheses specified in the section 318 and 319 shall also apply to whoever gives or promises money or other benefits to the public official or person in charge of a public service".

Art. 322 of the CC, headed "Aiding and abetting bribery", provides that a person who offers or promises undue money or other advantage to a public official or person in charge of a public service for the performance of his functions or powers, if the offer or promise is not accepted, shall be subject to the penalty specified in paragraph one of art. 318, reduced by one third. If the offer or promise is made to induce a public official or a person in charge of a public service to omit or delay a duty of his/her office, or rather to perform an act contrary to his/her office, if the offer or promise has not been accepted, the offender is bound by section 319 to the punishment provided for therein, reduced by one third. The penalty referred to in paragraph one shall apply to a public official or person in charge of a public service who solicits the promise or giving of money or other advantage for the performance of his functions or powers. The punishment provided for under the second subsection shall apply to the public official or person in charge of a public service who solicits a promise, or being given money or other benefits by a private individual, for the purposes specified under art. 319.

Foreign bribery

Pursuant to art. 322 *bis* CC (§§ 1 and 2), bribery offences originally applicable for domestic public officials have been extended to public officials of EU institutions and EU Member States, and to the private briber. Following several reforms, most recently by Law no. 3/2019 (CAPUTO, 2019: 73.), its application has been extended to bribery offences committed by public officials of foreign states and international organisations (such as the UN, the OECD and the European Council)[12], with the limitations that only active corruption is punished (i.e., only the private

[12] 1. Members of the European Commission, of the European Parliament, of the Court of Justice, of the European Court of Auditors; 2. Officers and agents contracted in compliance with the Staff Regulations of the European Community or with the rules applicable to agents of the European Community; 3. persons entrusted by member countries or by any public or private body in the European Community who exercise functions corresponding to those of officers or agents of the European Community; 4. members and personnel of corporations founded on the

briber, on the understanding that foreign public officials will be punished according to the laws of the relevant jurisdiction). Under art. 322 *bis* CC, the reach of bribery offences has been significantly broadened, in that it is now immaterial whether the functions of the official who receives or is offered a consideration has any connection to Italy.

According to art. 322-*ter*. 1., introduced by Law no. 3/2019, assets seized within proceedings related to the offence punished by art. 322 *bis*, other than money and financial assets, under the authorisation of the judicial authority, can be placed in the custody of the judiciary police, who make a request in order to satisfy organizational needs.

Private bribery

In 2002 an offence prohibiting private bribery was introduced, provided for by art. 2635 of the Italian Civil Code. The reach of the offence was first extended by Law no. 190/2012, and then by Legislative Decree no. 38/2017, which has implemented the EU Framework Decision 2003/568/JHA on combating corruption in the private sector. According to art. 2635, unless the act constitutes a more serious offence, managers, general directors and executive officers responsible for drafting the accounting documents of a company, auditors and official receivers who, upon receiving or accepting the promise for themselves or others of money or other advantage, perform or omit to perform acts, in breach of the obligations inherent to their office and duties of loyalty, thereby causing harm to the company, shall be sentenced to imprisonment from one to three years. A sentence to imprisonment for up to one year and six months shall be imposed if the act is committed by a person subject to the direction or supervision of any of the subjects indicated in paragraph one. Whoever gives or promises money or other advantage to the persons indicated in paragraphs one and two shall be sentenced to the penalties specified therein. The penalties specified in the above-mentioned paragraphs shall be doubled in the case of a company with shares traded on regulated markets in Italy or other States of the European Union, or which are largely widespread within the meaning of Article 116 of the consolidated legislation on financial intermediation (*Testo unico delle disposizioni in materia di intermediazione finanziaria*) in Legislative Decree no. 58 of 24 February 1998 as amended.

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basis of Treaties which established the European Community; 5. those who, in other member states of the European Union, perform functions and carry out activities corresponding to those of public officials and those in charge of a public service; 5 *bis*. judges, prosecutors, deputy prosecutors, officers and agents of the International Criminal Court, to persons entrusted by countries belonging to the Treaty which established the International Criminal Court that exercise functions corresponding to those of officers or agents of said Court, to members and personnel of bodies founded on the basis of the Treaty which established the International Criminal Court; 5 *ter*. persons who perform function or activities corresponding to those of public officials and those in charge of a public service in international public organizations; 5 *quater*. members of international parliamentary assemblies or those organized at an international or supranational level and judges and agents of the international courts; 5 *quinquies*. Persons who perform function or activities corresponding to those of public officials and those in charge of a public service in States outside the EU, when the conduct prejudices economic interests of the EU.

It is important to note that Law no. 3/2019 has introduced the opportunity to punish *ex officio* bribery in the private sector by eliminating the procedural requirement of a complaint by the victim. It must be recalled that, by virtue of the reserve clause at the beginning of paragraph 1, art. 2635 Civil Code, does not apply if the conduct constitutes a more serious criminal offence.

The above mentioned Legislative Decree no. 38/2017 introduced art. 2635-*bis* of the Italian Civil Code ("incitement of private-to-private corruption") which punishes executives, general managers, directors, auditors and liquidators of a company (or any employee of a company acting under the direction or supervision of any of these persons) who demand, for themselves or others, the payment or promise of money or other kinds of advantage, in order to act – or omit to act – in breach of the duties relating to their office or in breach of the duty of loyalty incumbent upon them, even when that demand is not accepted (§ 2). Moreover, that provision sanctions any person, outside the company, who offers or promises the payment of money or other kinds of undue advantage to someone holding representative, administrative, or executive positions within the company in order to persuade them to act – or omit to act – in breach of the duties relating to their office or in breach of the duty of loyalty incumbent upon them (§ 1). It follows that, as a result of the amendments introduced by Legislative Decree no. 38/2017, both active and passive corruptive behaviours are punished, irrespective of whether the subject accepts or declines the offer of undue advantage or not. Moreover, Legislative Decree no. 38/2017 also included the offence of instigation to private corruption among those that can lead to the criminal liability of corporations under Legislative Decree no. 231/2000.

Law no. 3/2019 has eliminated, also for this offence, the procedural requirement of a complaint by the victim.

Abuse of public office

The crime of abuse of public office has gone through several changes, most recently by Law no. 120 of 11 September 2020, aimed at restricting the application of the provision[13]. According to art. 323 CC, "Unless the conduct constitutes a more serious crime, a public official or a person in charge of a public service who, in the exercise of his functions or service, in breach of specific rules of conduct expressly set forth by the law or either by acts having the force of law which are not discretionary, or omitting to abstain in the presence of a proper interest or the interest of a relative or in other cases prescribed, intentionally procures for himself or others an unfair pecuniary benefit or causes an unfair disadvantage to others is subject to a prison sentence from one year up to four years. The penalty is increased where the advantage or the damage are of relevant gravity". The legislator replaced the words "violations of either rules of Law or secondary regulations" with "violation of specific rules of conduct expressly set forth by rules of either Law or equivalent legislation which are not discretionary". As a consequence of the modification, only

[13] For a critical approach on the reform see, *inter alia*, PARODI GIUSINO, 2021.

violations of rules of conduct which are both specific and expressly provided by the Law are able to trigger the crime at issue. This means that the offence pursuant to art. 323 CC cannot be perpetrated merely by violating general principles of the legal system (e.g., art. 97 of the Italian Constitution, which states the duties of impartiality and efficiency of the public administration); and only violations of non-discretionary rules of conduct can be considered for abuse of office[14]. This implies that the abuse of power (which may occur when, in discretionary acts, power is used for a purpose which is different from that for which it was granted) can no longer be regarded as criminal: a sort of *abolitio criminis*.

Additional sanctions

Relevant instruments in the fight against corruption are the additional sanctions (*pene accessorie*), to apply as a consequence of the conviction for certain types of offences.

Specifically, art. 317 *bis*, originally introduced by Law no. 86/1990, provided a perpetual interdiction from public office following a conviction for crimes provided for by arts. 314, 317, 319 and 319-*ter* of Criminal Code, reduced to a temporary sanction for the hypothesis of a sentence of imprisonment for less than three years. The provision has been significantly changed in 2019, by Law no. 3. First of all, the legislator has enlarged the list of offences to which the accessory sanction of a ban from public office is applied (now including crimes set forth in the following articles: 318, 319-*bis*, 319-*quater*, § 1, 320, 321, 322, 322-*bis* and 346-*bis* of the Criminal Code). Moreover, the law has added, as a further sanction, the prohibition of convicted public officers from contracting with the public administration, except for access to public services[15]: indeed, this sanction was not provided for by art. 32 *ter* CC and could only be applied *pro tempore*. However, it should be stated that this sanction cannot be applied in case of a conviction for conducts committed before the entry into force of Law no. 3/2019.

Furthermore, it is of note that, where the penalty for one of the above-mentioned offences is imprisonment not exceeding two years or where the judge has recognised the circumstance referred to in art. 323-*bis* § 1 of Criminal Code, the accessory sanction is predetermined for a time ranging from a minimum of five years to a maximum of seven years, while, for the recognition of the sanction referred to in § 2 of the art. 323-*bis* of the Criminal Code (industrious reparation) the range is from one year to five years. As noted by scholars (MAGGIO, 2021: 521.), it is necessary to take into consideration the regulation of the suspension of the sentence as well, pursuant to art. 166 § 1 of the Criminal Code, which encompasses both the

[14] Court of Cassation, Section VI, 1st February 2021, no. 14214; Court of Cassation, Section VI, 28 January 2021, no. 8057. www.dejure.it.

[15] It is to be noted that in art. 32-*quater* of the Criminal Code concerning hypothesis where the conviction is followed by the inability to negotiate with the public administration, the reference to arts. 319-*ter*, 346-*bis* and 452-*quaterdecies* of the CC was introduced.

main and accessory punishment. This rule – as changed by Law no. 3/2019 – provides that, in the case of conviction for the aforementioned crimes, the judge has the option to order that the suspension does not extend its effects to the accessory penalties of the interdiction from public offices and of the inability to contract with the public administration. As a sort of "return to the past" (LONGOBARDO, 2019: 155–156.), the application of the accessory penalty is also confirmed in front of the conditional suspension of the sentence, with the only difference that this applicability is subject to the discretion of the judge. What is not clear concerns the criteria to be used by the judge in exercising the discretionary power recognised by art. 166 § 1 CC.

Moreover, according to the last paragraph added in art. 179 CC, the rehabilitation granted in conformity to the rules provided for by this article does not produce effects on perpetual ancillary penalties and is extinguished after a period of not less than seven years from rehabilitation, but only if the person convicted has given actual and constant proof of good conduct. The rule is clearly aimed at reducing the risk of recidivism.

It is also worth noting that the debarment from contracting with the public administration can be applied, as a precautionary measure, before sentencing as well: for instance, at the stage of preliminary investigation, at the request of the Public Prosecutor. Indeed, Article 289 *bis*, added by Law no. 3/2019 in the Italian criminal procedure code, among disqualifying measures[16], has introduced a new precautionary measure that, in case of crimes against public administration, can be applied outside the limits of the penalty provided for by art. 287 § 1 CPC[17]. This measure comes alongside the suspension from public duty or service, regulated by art. 289 CPC, also applicable, according to § 2, in the event of prosecution of a crime against the public administration, independently of the penalty limits. According to § 2 of Article 288, during preliminary investigations, before deciding upon the application of the measure requested, the judge for preliminary investigations shall question the suspected persons. In the context of the rules concerning the application of coercive measures, this represents a special condition because, as a general principle, these measures are applied by the judge *inaudita altera parte* (art. 292), being the questioning postponed until the application of the measure itself, in the ten days (five days for the precautionary detention in prison) following enforcement. The anticipation of questioning is aimed, on one side, at permitting the exercise of the right of defence, recognised by art. 24 of Italian Constitution; on the other, at putting the judge in a better position to assess the existence of the general conditions for the application of the measure: i.e. the existence of "serious indication of guilt" and at least one of the three specific grounds provided for by art. 274 CPC (risk of acquisition or of the genuineness of the evidence, risk of flight; and risk of the offence being repeated). This being the premise, it should be noted that the new measure of debarment from

[16] Other disqualifying measures are suspension of parental liability (art. 288); suspension from public duty or service (art. 289); temporary prohibition to exercise specific professional or entrepreneurial activities (art. 290).

[17] Art. 287 is so structured: *"Without prejudice to special provisions, the measures provided for in this Chapter shall only be applied if the prosecution involves crimes for which the law imposes a life sentence or the penalty of imprisonment for a maximum term exceeding three years."*

contracting with the public administration does not permit the questioning of the suspect before its application: it is clearly a missed opportunity for all the parties in the proceedings.

Mitigating circumstances

Under art. 323 *bis* § 1, when the offences under arts. 314, 316, 316-*bis*, 316-*ter*, 317, 318, 319, 319-*quater*, 320, 322, 322-*bis* and 323 of the CC are particularly slight, the sanction is reduced by up to one third. Such a mitigating circumstance occurs when the whole offence is barely offensive and, therefore, not very serious, with reference to the conduct carried out, the amount of economic damage or profit attained, the subjective attitude of the perpetrator and the event[18]. Therefore, its cannot only be determined by the mere slightness of the advantage gained by the perpetrator.

The second mitigating circumstance (art. 323 *bis* § 2) has been introduced by Law no. 69/2015 and occurs if the perpetrator made effective efforts to prevent any further consequences of the criminal activity, provide evidence of criminal offences and identify other perpetrators or allow the seizure of the profits. It is to be noted that, with regard to the conduct aimed at providing evidence of crimes, it is necessary that the conduct itself is relevant for the collection of evidence and not only to reinforce the evidence already collected[19]. Such a circumstance (which is applicable only with reference to the offences under arts. 318, 319, 319-*ter*, 319-*quater*, 320, 321, 322 and 322 *bis* of the CC) is a kind of active repentance *post delictum* and results in a reduction of the penalties from one to two thirds.

In accordance with art. 25, § 5-*bis* Legislative Decree no. 231/2001, the same mitigating measure is applicable to the benefit of the legal entity which meets all the above-mentioned conditions and adopts an organisational model suitable for preventing crimes of the same type.

The special non-punishment clause

By Law no. 3/2019 (BELLAGAMBA, 2021), a special non-punishment clause (*causa di non punibilità*) has been introduced by a new art. 323 *ter* CC: a rewarding mechanism, inspired by the legislation on "collaborators of justice" adopted in the field of mafia-type organisations. It will be applied to individuals who commit bribery offences (such as those provided for in arts. 318, 319, 319-*ter*, 319-*quater*, 320, 321 and 322-*bis*, concerning corruption and undue inducement and 353, 353-*bis* and 354 CC) in the event that they voluntarily disclose and provide useful and concrete information to secure evidence of the crime and to identify other offenders involved. To

[18] Court of Cassation, Section VI, 15 April 2021, no. 25915. www.dejure.it.
[19] See Court of Cassation, Section VI, 5 November 2020, no. 9512, where is specified that the conducts of cooperation are alternatives. www.dejure.it.

qualify for non-punishment, the disclosure has to be made before the offender becomes aware of the investigation being carried out with regard to the committed offence and not later than four months from the date of the offence. Self-reporting must be satisfactory in terms of evidence, in the sense that the reporting person shall not merely confess their own crime but also concretely provide useful information within four months, even if not necessarily "decisive" to ensure evidence of the crime and to identify the other offenders. (See MONGILLO, 2019b: 265.) Therefore, the exonerating self-reporting act is not only composed of an admission of guilt but also of a collaborative "tip off" momentum. The accusations disclosed by the collaborator concerning the criminal responsibility of the other offenders require further scrutiny in contradictory between the parties and a specific validation in light of the criteria developed in the case law. Theoretically, the non-punishment clause is of a subjective nature; therefore, in light of the principle of personality, it can only deploy its effects in respect of the natural person to which it is referred and not towards possible participants as well. It is worth noting that the clause in question does not exclude culpability for the illegal act committed, rather the punishability of the offender because of the utilitarian reason according to which contrasting corruption by making it emerge is more profitable.

The clause waiving punishability is not applicable if the self-incrimination is aimed at perpetrating the crime reported in favour of an undercover agent who has acted in breach of the law (§ 3).

Pecuniary reparation

According to art. 322 *quater* CC, introduced by Law no. 69/2015, and amended by Law no. 3/2019, in the case of a conviction for crimes such as those provided for by arts. 314, 317, 318, 319-*ter*, 319-*quater*, 320, 321 and 322-*bis*, the payment of a sum equal to the price or the profit of the crime is ordered as a pecuniary repair in favour of the administration prejudiced by the conduct of the public official or the public service, without prejudice to its right to compensation for damage. The reparation has to be applied to the public official as well as to any private-sector worker convicted for one of the crimes enumerated by the provision, this being an ancillary civil sanction[20].

Ban on granting penitentiary benefits

By Law no. 3/2019, modifications on penitentiary conditions – in particular on art. 4-*bis* § 1 of Law no. 354 of 24 July 1975 – have been implemented in order to strengthen the values of neutralisation and punishment of the offender ("negative prevention") over his or her rehabilitation. Against this backdrop, the main criminal acts against the public administration (arts. 314, § 1, 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater*, § 1, 320, 321, 322, 322-*bis* CC) have

[20] Court of Cassation, Section VI, 5 February 2020, no. 16098. www.dejure.it.

been included in the list of obstructing crimes (*reati ostativi*), meaning those particularly serious and offensive conducts which prevent the offender from accessing penitentiary benefits, such as alternatives to imprisonment, gaining permissions as a reward and working on the outside. (See BACCARI, 2019: 281.)

By doing that, the legislator extended a peculiar regime originally intended to be reserved to those convicted for mafia-type association crimes to the conducts against the public administration. Hence, art. 4-*bis* of Law no. 354/1975 on the penitentiary system (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty) envisages a more disadvantageous regime to obtain the above-mentioned benefits, as its applicability is conditional on collaboration with the justice system *ex* art. 58-*ter* or – according to the new provision inserted by Law no. 3/2019 – *ex* art. 323-*bis* § 2 CC. Thus, cooperation with justice remains the key for access to penitentiary benefits. Nonetheless, Law no. 3/2019 has undergone a declaration of unconstitutionality with the decision no. 32/2020[21], namely concerning the part in which the amendments introduced also apply to persons convicted for crimes committed before the law entered into force. With this relevant decision, the Constitutional Court reversed the consolidated interpretation in case law, according to which the provisions concerning the enforcement of the sentence are not of a substantive nature and therefore are not subject to the prohibition of retroactivity of criminal law under art. 25 of the Constitution. Instead, the Court affirms that sentences shall be implemented according to the law in force at the time of their enforcement, unless it causes a substantial transformation of the nature of the penalty. In light of the harsh regime provided for under art. 4-*bis*, the latter must not be applied retroactively when alternative measures to imprisonment, parole and the prohibition of suspension of the enforcement of the sentence are concerned.

As far as the condition of procedural collaboration, the Italian Constitutional Court intervened in 2019 with the decision no. 253[22] to point out that the presumption of the persisting social danger of the offender with regard to bonus periods of short release (*permessi premio*) shall not work in absolute terms, as it cannot be inferred from a refusal to collaborate with the magistrates whether there are sufficient elements to exclude any further relations with organised crime or the resumption of such relations. The declaration of unconstitutionality concerns the absoluteness of the presumption; therefore, it should be deemed to be relative, laying the burden of proof on their non-involvement with any criminal pact on the offender.

[21] Constitutional Court, 26 February 2020, no. 32.
[22] Constitutional Court, 4 December 2019, no. 253.

Confiscation

The Italian legal system provides different types of confiscation. (See DIAMANTI et al., 2019) They can be summarised as follows:

a) ordinary confiscation, aimed at confiscating assets linked to a specific crime, following a criminal conviction for that crime;
b) value confiscation, so that assets of equivalent value can be confiscated as well, where specific criminal assets are outside the reach of investigators;
c) the so-called "extended" confiscation, which can be ordered within a criminal procedure, or as a consequence of a conviction for serious economic crimes, especially when organised crime is involved; that is the case where a criminal conviction is followed by the confiscation of not only the assets associated with the specific crime, but also of additional assets which the court determines are the proceeds of another, unspecified crime. Confiscation may be based on circumstantial evidence, for example the balance between a persons' assets and their lawful source of income;
d) third party confiscation, so that assets can be confiscated from third parties to whom they have been transferred;
e) Non-conviction-based confiscation (*Misure di prevenzione*: art. 24 of Legislative Decree no. 159 of 6 September 2011, as amended by Law 1st December 2018, no. 32), ordered through a separate procedure managed by the criminal court (*Tribunale di prevenzione*).

Art. 240 of the Criminal Code is the general provision on confiscation[23]. It is mandatory when the assets are the "price" of the offence (meaning the price paid by a third party to commit the offence), or the production, use, transport, possession or transfer of which constitutes an offence. In the latter case, confiscation of assets is possible even in the absence of a conviction. As noted, confiscation is also applicable to proceeds and instrumentalities of a criminal offence. There is no definition of the term "proceeds" but, in practice, it is generally understood in a broad sense in order to cover both direct and indirect proceeds.

Extended confiscation (*confisca allargata*), originally provided for by art. 12 *sexies* of Legislative Decree no. 306 of 8 June 1992 and amendments, is currently regulated in art. 240 *bis* of the CC, introduced by Legislative Decree no. 21 of 1 March 2018. This article establishes that, for several

[23] In the event of conviction, the judge can order the confiscation of the items that served or were used to commit the crime, and the items that constituted the product or the profit thereof. Confiscation is always ordered: 1) for the items that constitute the price of the crime; 1-*bis*) for the assets that constitute the profit or product of computer crimes, or confiscation of an equivalent amount if the former is not possible; 2) for items: the manufacture, use, carrying, possession or disposal of which constitutes a crime, even if no conviction has been issued. The provisions of the first part and of point no. 1 and no. 1 *bis* of the preceding paragraph do not apply if the item belongs to a person unrelated to the crime. The provision of point no. 2 does not apply if the item belongs to a person unrelated to the crime, and if the manufacture, use, carrying, possession, or disposal of it can be permitted by administrative authorisation.

specific offences indicated within the text of the provision, in cases of conviction (or application of a penalty at the request of the parties[24]) it is always ordered that the money, assets or other utilities, the origins of which cannot be justified by the convicted person, and of which, even through a natural or legal person, he/she appears to be the owner or have the availability thereof in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her occupation shall be confiscated. Whatever the case, the convicted person cannot justify the legitimate origins of the assets on the assumption that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion, unless the tax obligation was extinguished through compliance with the law. In the cases described in the first paragraph, in the event that the money, assets, and other utilities referred to in the same paragraph cannot be confiscated, the judge orders the confiscation of other sums of legitimate money, assets, and other utilities available to the offender, for an equivalent value, even through a third party.

The person concerned has to be convicted of serious offences, such as belonging to a mafia-type association or criminal association for the purposes of human trafficking, extortion, kidnapping for extortion, usury, money-laundering, terrorist offences and nearly all of the offences against the public administration, including corruption offences. In particular, arts. 314 (embezzlement), 316 (embezzlement taking advantage of another's error), 316-*bis* (embezzlement against the State), 316-*ter* (misappropriation of funds against the State), 317 (extortion), 318 (bribery for the performance of an official function), 319 (bribery for actions contrary to official duties), 319-*ter* (bribery in judicial proceedings), 319-*quater* (undue inducement to give or promise benefits), 320 (bribery of a public service employee), 322 (incitement to bribery), 322-*bis* (embezzlement, extortion, undue inducement to give or promise benefits, bribery, and incitement to bribery of members of the International Criminal Court, European Community bodies, and officials of the European Community and of foreign countries).

With regard to extended confiscation, art. 578-*bis* of the CPC, introduced by Italian Legislative Decree no. 21 of 2018 and amended by Italian Law no. 3/2019, states that when confiscation has been ordered in special cases pursuant to art. 240-*bis* of the Italian Penal Code and other legal provisions or pursuant to art. 322-*ter* of the Italian Penal Code, the appeal judge or the Court of Cassation, in declaring the offence expired due to extinguishment of the offence or by amnesty, shall deliberate on the appeal only with regard to the effects of the confiscation, after determining the liability of the accused. It follows that, in order to apply the provision in question, the judge must have already ordered the confiscation before the offence is extinguished; in the end, if the confiscation has not already been ordered, it will still be possible to initiate a preventive procedure in order to apply confiscation as a patrimonial prevention measure. (See DIAMANTI et al., 2019: 327.; MAUGERI, 2018)

[24] "Application of the penalty at the request of the parties" is a special procedure regulated in art. 444 et ff. of the Italian Criminal procedural code. For more details see *infra*.

Confiscation by equivalent

Confiscation by equivalent assets, aimed at depriving the offender of the advantages derived from his/her criminal activity, operates when the direct confiscation of the assets is no longer possible because the assets have been hidden or consumed or are no longer identifiable. Value confiscation of corruption proceeds is possible pursuant to and to the extent provided by art. 322-*ter* of the CC. It statues that: *"In the case of conviction, or the application of punishment at the request of the parties pursuant to art. 444 of the Code of Criminal Procedure (CPC), for any of the offences as per Articles 314 to 320, even though they were committed by the persons referred to in Article 322-bis, first paragraph, confiscation of the goods representing the price or proceeds thereof shall always be ordered, unless the goods mentioned belong to a person who has not committed the offence; if that confiscation is not possible, the confiscation of the goods which the offender has at his disposal shall be ordered for a value corresponding to such a price. In the event of conviction or the application of punishment pursuant to Article 444 of the Code of Criminal Procedure, as regards the offence provided for in Article 321, even though it was committed in relation to Article 322-bis, second paragraph, confiscation of the goods representing the proceeds of it shall always be ordered, unless those goods belong to a person who has not committed the offence; if such a confiscation is not possible, the confiscation of the goods which the offender has at his disposal shall be ordered for a value corresponding to that of the proceeds calculated and, at all events, for a value which is not lower than the money or other assets given or promised to the public official or to the person in charge of a public service or to other persons referred to in Articles 322-bis, second paragraph. In the cases provided for in paragraphs 1 and 2 the judge shall also determine, upon conviction, the sums of money or shall indicate the goods to be confiscated since they represent the price or proceeds of the offence or since they have a value corresponding to that of such proceeds or price".*

According to case law[25], the confiscation of an equivalent, *ex* art. 322-*ter* § 2, having a sanctionatory nature, cannot involve each of the accomplices in the offence to pay the full amount of estimated profit, but has to be allocated to the level of every accomplice's participation in the profit.

Non-conviction-based confiscation

Preventive measures (or *ante-delictum*) – personal and financial – were originally introduced by the Italian legislator as anti-mafia legal instruments[26]. In particular, patrimonial prevention measures, such as seizure and confiscation of assets, were firstly provided by Law 13 of September 1982, no. 646, the so-called Rognoni-La Torre Law. Then, by Legislative Decree no. 92 of 23

[25] Court of Cassation, Section VI, 20 January 2021, no. 4727. www.dejure.it.
[26] For an overview see CARDAMONE, 2016.

May 2008 (containing "urgent measures concerning public security" converted by the Law of 24 July 2008 no. 125) the principle of disjoint application of prevention measures related to property (or financial) and prevention measures against persons was introduced. The law provides that: personal and financial preventive measures can be applied separately; financial preventive measures can be applied even in the event of the death of the person concerned; if the death of the person occurs during the proceedings, it continues against the heirs or successors. Later, in 2010, by Law of 13 August, no. 136 ("Special plan against the mafia and delegation to the Government on anti-mafia legislation") the Government was delegated to adopt a code of anti-mafia laws and preventive measures. With the Legislative Decree 159 of 6 September 2011 "Anti-mafia laws Code and preventive measures, as well as new arrangements for anti-mafia documentation"), the so-called Anti-Mafia Code entered into force. It maintains the existing division of preventive measures into the two above-mentioned categories, personal and financial.

The seizure and confiscation of assets can be ordered when there are "sufficient clues" that such assets are the proceeds of a crime. Seizure for prevention is ordered by the court (*Tribunale di prevenzione*), even *ex officio*, with a reasoned decree, in relation to the assets that could be directly or indirectly available to a person against whom a proposal for preventive measures has been submitted, when their value is disproportionate to the subject's declared income or occupation, or when, based on "sufficient evidence", there is reason to believe that they are or constitute the re-use of the fruits of illegal activities (art. 20 of Italian Legislative Decree no. 159/2011). In such a case, it is up to the defendant to demonstrate the legitimate provenance of the assets. This is an obvious case of reversal of the burden of proof. Moreover, seizure and confiscation can also be applied to assets owned by third parties, where these can reasonably be attributed to the defendant (e.g., assets owned by relatives). The illicit purchase of assets also justifies the seizure and confiscation of those goods which are passed to the heirs when the suspect dies either during the confiscation proceedings or if such a procedure has been initiated within five years from his or her death (art. 18 of Italian Legislative Decree no. 159/2011). Under the procedural profile, preventive measures are not applied in the ambit of ordinary criminal proceedings, but within a parallel procedure, with extremely limited defensive guarantees.

It is to be highlighted that Italy's preventive measures have been amended in 2017, by Law no. 161 of 17 October, that carried out a deep legislative reform of the so-called "anti-mafia code". The reform extended the possibility to apply personal and patrimonial prevention measures against people suspected of crimes against the public administration (such as proper and improper bribery, corruption in judicial proceedings, undue inducement to give or promise anything of value, active and foreign bribery). The Italian scholars (MAIELLO, 2018: 5.) have strongly criticised this reform: with the extension of preventive measures to crimes against the public administration, the Italian legislator expresses the concept that the mafia and corruption are the same thing and, consequently, they should legally be treated in the same way.

Criminal responsibility of legal persons

As already stated in the introduction, in Italy, the criminal responsibility of legal persons is regulated by Legislative Decree no. 231/2001. Entities, companies and associations may be held directly liable for crimes of subjective intent committed either in Italy or abroad on behalf or for the benefit of a company by a class of persons who have operational authority and are therefore liable on behalf of the company. This includes (i) directors and managers who represent a company or any relevant autonomous business unit, or *de facto* manage and control a company; or (ii) individuals who are subject to the direction and supervision of the above-mentioned managers and directors. According to art. 5, a company may only be held liable under Legislative Decree no.231/2001 if the crimes have been committed in the company's interest or for the company's benefit. Conversely, no company liability arises if the top management or the individuals under the top management's control acted exclusively in their own or third parties' interests.

Among the offences listed, art. 25 mentions also corruption crimes. It has been affected by Legislative Decree No. 190/2012, which modified the crime of corruption (providing a distinction between so-called corruption by coercion and undue incitement to give or promise benefits). Furthermore, by Law no. 3/2019, that introduced the offence of "influence peddling" (pursuant to art. 346-*bis*) and, lastly by Legislative Decree no.75/2020, that inserted some crimes against public administration (arts. 314, 316 and 323) where they result in damage to the financial interest of the EU. Currently, art. 25 provides: corruption and bribery (arts. 317, 318, 319, 319-*bis*, 319-*ter*, 320, 321 and 322-*bis*); instigation of corruption (art. 322); embezzlement (art. 316-*bis*); wrongful obtainment of contributions to the detriment of the state (art. 316-*ter*); undue inducement to give or promise a benefit (art. 319-*quater*); influence peddling (art. 346-*bis*); and abuse of office (art. 323).

In the event that a company is convicted of bribery offences, it may face pecuniary penalties up to a maximum of more than EUR 1 million for bribery crimes (depending on the criminal offence concerned); disqualifying sanctions, ranging from four to seven years in the case of crimes committed by top managers and from two to four years in cases of crimes committed by employees – applicable also before the start of the trial – as follows: a) a ban on carrying out the company's business activity; b) suspension or withdrawal of authorisations, licences or concessions instrumental in the commission of the crime; c) a ban on concluding contracts with the public administration; d) exclusion from (or withdrawal of) contributions, assistance and financing; and e) a ban on advertising goods or services; and confiscation of the price or proceeds of the crime, as well as of corporate assets; and the publication of the conviction (art. 9).

The above-mentioned disqualifying sanctions can be reduced up to a maximum of two years if the company, before the first-instance decision, acted in order to prevent further consequences of

the crime, or actively cooperates with the Authorities in order to secure evidence and ensure the identification of liable individuals or the seizure/confiscation of the money or advantage(s) transferred, and eliminated the organisational deficiencies that led to the crime through the adoption and implementation of a compliance and ethics programme (so-called *"Modello 231"*) to prevent further crimes of the same kind (art. 25 § 5 *bis*).

In addition to the conviction, the confiscation of the price or the profit of the crime is always ordered, except for the part that can be returned to the damaged party and without prejudice to the rights acquired by third parties in good faith (art. 19). It may even be ordered by an equivalent. In addition to this main scenario covering sanctions, the Legislative Decree also includes criminal provisions with confiscation scenarios for various purposes, in particular: a) in the case of the entity's acquittal for having effectively adopted an organisational model, it is permitted to confiscate the profit that the entity gained from the crime (even by equivalent) [art. 6 (5) of Italian Legislative Decree no. 231 of 2001]; b) it is also permitted to confiscate the profit generated during the continuation of the activity through a judicial commissioner [art. 15 (4) of Italian Legislative Decree no. 231 of 2001]; c) it is permitted to confiscate the profit in the event of the failure to respect the prohibitive penalties [art. 23 (2) of Italian Legislative Decree no. 231 of 2001]. Preventive confiscation is ordered by the Court for seized property, the origins of which cannot be justified by the defendant, and of which, even through a natural or legal person, he/she appears to be the owner or can avail of it in any capacity, for a value that is disproportionate to his/her income declared for tax purposes or his/her occupation, as well as any assets that are or constitute the re-use of the fruits of illegal activities. Whatever the case, the defendant cannot justify the legitimate origins of the assets if it is found that the money used to purchase them constitutes the proceeds or the reinvestment of funds derived from tax evasion (art. 24 of Italian Legislative Decree no. 159 of 2011).

The stage of investigation

The first instance of the Italian criminal process is divided into three phases: preliminary investigations; preliminary hearing and the trial. Investigations into allegations of bribery and corruption are carried out by the Public Prosecutor's Office (hereinafter: PPO), which leads investigations and directs the criminal police (art. 327 CPC). A criminal police department made up of personnel coming from the various law enforcement corps (*Polizia di Stato*, *Carabinieri*, *Guardia di Finanza*, *Polizia penitenziaria*, *Corpo forestale dello Stato*)[27] is established within each Office of the public prosecutor.

Among the law enforcement corps who play a significant role in the investigation against corruption, the Guardia di Finanza (GdF) must be mentioned, a specialised military police body

[27] On the structure see GIALUZ ET AL., 2017: 25.

which provides support to the competent prosecutor's office and cooperates with the National Anti-Corruption Authority and strictly linked to the Ministry of Economics and Finance. The GdF is the competent authority for receiving reports of suspicious transactions and, together with the anti-mafia Directorate, conducts the ensuing investigations, and can access banking information. The GdF can support the ANAC in the exercise of its competences, both in the area of public contracts and in the broad sector of corruption prevention measures. The GdF also cooperates with the European Anti-Fraud Office (OLAF). According to the GdF, between August 2016 and August 2019, 339 legal actions concerning corruption were launched with 117 pre-trial detention orders for corruption issued by the judicial authorities and related only to the procurement sector. 74% of the events (113 cases) concerned the awarding of public contracts.

The criminal police carry out any investigation and activity ordered or delegated by the judicial authority (art. 55 § 2). In particular, they must transmit to the Public prosecutor any *notitiae criminis* without delay (art. 347), but when the police perform acts requiring the participation of a lawyer, the time-limit for the communication is 48 hours (§ 2 *bis*); in case of serious offences and, in any case, where there are reasons of urgency, the *notitia criminis* shall be issued immediately (§ 3). The police may arrest (discretionary arrest *in flagrante delicto*) without a warrant a person who has committed a crime of embezzlement by taking advantage of somebody else's error as provided for in art. 316 CC; or in cases of corruption for an activity contrary to official duties provided for in arts. 319 § 4 and 321 CC (art. 381 CPC). In these cases, arrest shall only be enforced if it is justified by the seriousness of the criminal act or by the person's dangerousness, inferred from his personality or the circumstances of the act. In that case, the measure has to be ordered by the judge for preliminary investigations.

Specific powers are attributed to the Italian anti-corruption Authority (ANAC) (MARRA, 2019: 441.), established by the Italian Anti-Corruption Law no. 190/2012 (Severino Law), which substitutes the Independent Commission for the Evaluation, Transparency and Integrity of Government (*Commissione indipendente per la valutazione, la trasparenza e l'integrità delle amministrazioni pubbliche*, CIVIT), with the aim of controlling, preventing and fighting corruption and illegality in the public administration. Its rules are aimed at ensuring effective coordination and exchange of information with the Italian Prosecutor's Offices when investigating cases of bribery and corruption.

The prosecution ex officio

The crime of corruption can be prosecuted *ex officio*, which means that it is prosecuted regardless of the injury to third parties and therefore regardless of the report of the injured party.

Public officials and persons in charge of a public service are required to report, without delay and in writing, to the public prosecutor or to the criminal police official, offences of which they become aware while carrying out or because of their functions or their service, in accordance with art. 331 of the CPC. If, during civil or administrative proceedings, an act emerges which may constitute an offence subject to prosecution on the Public Prosecutor's motion, the proceeding authority shall draft and forward the report to the Public Prosecutor without delay. The failure to report such offences constitutes a crime, following arts. 361[28] and 362 of the CC.

It should be noted that Law no. 3/2019 has modified the discipline for crimes against the public administration committed abroad, by Italian citizens (art. 9 CC) or by foreign citizens (art. 10 CC). In these situations, the Law provides a group of offences against the public administration – such as, *inter alia*, bribery of a person in charge of a public service, undue trading in influence, extortion by a public official, bribery for the exercise of a public function – or for the prosecution of which the request by the offended party or by the Minister of Justice is no longer required.

The whistleblowers

In Italy, provisions concerning the protection of whistleblowers (DELLA BELLA – ZORZETTO, 2020; EVARISTI, 2021: 971.) in the public sector are set out in art. 54-*bis* of Legislative Decree no. 165 of 30 March 2001, which regulates the general employment rules and procedures for public service employees, whilst provisions regarding the private sector are set out in art. 6 of Legislative Decree no. 231/2001[29]. Both decrees have been amended by Law no. 179/2017 entitled "Provisions for the protection of whistleblowers who report offences or irregularities

[28] Art. 361, headed "failure to report a crime by a public official" stipulates the following: *"The public official who fails to report or delays reporting to the court, or to another authority which has the obligation to report to the court, an offence that he or she has become apprised of in the performance of his duties or because of his or her functions, shall be punished with a fine ranging from EUR 30 to EUR 516. The sanction is imprisonment of up to one year, if the offender is a judicial police official or agent, who learned of the offence but did not report it. The provisions above shall not apply when the offence is punishable solely on the allegation of the offended party."*

[29] These rules are not mandatory for all entities but apply only to those that have adopted systems and controls to prevent criminal offences ("Manual 231"). Manual 231 must provide for: one or more channels that enable directors and employees, ensuring that their identity remains confidential, to present particularised reports of unlawful conduct relevant to the Italian Legislative Decree, based upon precise and consistent factual evidence, or of breaches of Manual 231 itself, where they have become so aware by reason of the duties they have performed; and at least one other reporting channel, with information technology equally capable of ensuring the confidentiality of the whistleblower's identity. Manual 231 must provide for whistleblower protection against acts of retaliation or discrimination for reasons directly or indirectly linked to the reporting. In a reversal of the usual burden of proof, in the event of any dispute relating to disciplinary measures, demotion or reductions in employment duties, dismissals, transfers, or other organisational measures that directly or indirectly adversely affect the whistleblower's employment conditions, it is for the employer to show that those measures were based on grounds that had nothing to do with the whistleblowing. Moreover, the disciplinary system set forth in Manual 231 must provide for sanctions against: (i) any person who breaches the measures protecting the whistleblower; and (ii) any whistleblower who acts wilfully, or with gross negligence, in making a report that turns out to be unfounded.

which have come to their attention in the context of a public or private employment relationship". According to art. 54 *bis*, § 1[30], persons liable for slander (untruthfully reporting to the relevant authority a person for committing an offence or simulating the proof of a crime), for defamation (any communication that harms the reputation of another person or persons), or liable for an unjust action (due to pay compensation for damages) will not be afforded the foreseen protection. With these three exceptions, public employees should receive protection when reporting unlawful conduct[31]. However, in order to obtain protection, the public employee first needs to report the wrongdoing to the ANAC or to a judicial authority. As far as the wrongdoing reported or disclosed is concerned, the Law describes it as any illicit behaviour of which a public employee becomes apprised through his/her employment. Whistleblowers are protected against three types of workplace reprisal they may undergo as a result of reporting wrongdoing: i) dismissal, ii) disciplinary sanctions; iii) direct or indirect discriminatory measures. The list of possible retaliatory actions, particularly discriminatory measures, could be interpreted to include a wide variety of reprisals, such as demotion, harassment, forced transfer, bullying, etc. The Law also provides that discriminatory measures must be referred to the Department of Public Administration. § 3 also provides that a whistleblower's identity shall be kept confidential. It may, however, be revealed in cases where disciplinary charges against the alleged wrongdoer are based exclusively on the whistleblower's report, or where the knowledge of the whistleblower's identity is absolutely necessary for the alleged wrongdoer's defence.

No incentive is offered to whistleblowers as a consequence of reporting bribery or corruption. The only "incentive" – actually, a sort of "protection" for the whistleblower – is that provided by art. 3 of Law no. 179/2017, which qualifies the complaint of the whistleblower, if the "interest of the integrity of the public administration" is pursued by him or her, as a "justified cause" of

[30] 1. A public employee who reports (…)unlawful conduct which has come to his attention in the performance of his duties may not be punished, dismissed or subjected to direct or indirect discriminatory measure, having an effect on his working conditions for reasons directly or indirectly related to the report. 2. The identity of the individual making the report may not be disclosed without his consent during disciplinary proceedings, provided that the disciplinary action was initiated on the basis of different evidence in addition to the report. If the disciplinary action was initiated entirely or partly on the basis of the report, the individual's identity may only be disclosed if this information is absolutely indispensable for the defence of the individual accused of misconduct. 3. The adoption of discriminatory measures shall be reported to the Department for Public Administration by the interested party or by the trade union organisations with greatest representation within the administration in which they were implemented in order to enable the appropriate action to be taken. 4. The statement shall not be available for access in accordance with Art. 22 et seq. of Law no. 241 of 7 August 1990.

[31] The ANAC imposed a penalty for retaliatory measures against a whistleblower for the first time since the adoption of the whistleblower protection legislation. The whistleblower, a manager and a member of the Disciplinary Committee in a municipality based in the region of Campania, reported the members of the committee for negligence by a public official (art. 328 CC) and abuse of public office (art. 323 CC). Following the filing of the report with the judicial authority, the manager was suspended from work without pay for ten days and then for another twelve days. After a careful examination of the matter and a hearing of two members of the disciplinary committee, the ANAC considered the underlying reasons for the measures against the whistleblower as retaliatory, inflicting a penalty of €5,000 ($6,200) on the person responsible for the suspension.
See https://fcpablog.com/2019/10/17/italy-finally-protects-a-whistleblower-issues-first-penalty-for-retaliation/

disclosure of professional secrets. Therefore, art. 3 provides for an exonerating circumstance for the crimes of "disclosure and use of official secrets" (art. 326 CC), "disclosure of professional secrets" (art. 622 CC), "disclosure of scientific and industrial secrets" (art. 623 CC) and "breach of the duty of loyalty" (art. 2105 of the Civil Code).

The length of preliminary investigations

When a crime is reported, the Public Prosecutor – who can also actively search information relating to the offence – has the duty to insert the notice into the register of *notitiae criminis* (art. 335 CPC) immediately: starting from that moment, preliminary investigations officially take place. The Code of Criminal Procedure limits the length of an investigation in order to protect the interests of persons under investigation (art. 405 CPC). After undertaking an investigation by filing a *notitiae criminis* in the register, a Public Prosecutor has six months or twelve months (for more serious offences) to complete an investigation. In complex cases, the judge for preliminary investigations may extend the limitation period to 18 months on request of the prosecutor (art. 407 § 1 CPC), or to 24 months (for more serious offences). Corruption cases are not in the list of crimes deemed as serious offences; therefore, the time limit to conclude investigations is fixed at 18 months. Preliminary investigations finish with the request for committal to trial (art. 416), filed by the Public Prosecutor unless a request to discontinue the case is submitted, according to arts. 408 and 411. In the first case, the Public Prosecutor forwards the request to the judge to set up a preliminary hearing. At the end of the hearing a judgment of no ground to proceed (art. 425) or, as an alternative, the decree for committal to trial (art. 429) can be pronounced. Trials for corruption cases will be heard in front of the Tribunal in a collegial setting. Art. 132 *bis* of the implementing provisions of the Code of Criminal Procedure code, to expedite the initiation of criminal proceedings, requires prioritising hearings for the offences related to corruption cases (such as arts. 317, 319, 319 *ter*, 319 *quater*, 320, 321 and 322 *bis* CC)[32].

Specific investigative measures

As with other serious crimes, a range of investigative techniques is available for investigating corruption cases, including interception of communications and video surveillance. Undercover operations may be used since the reform introduced by Law no. 3/2019.

Interception of communications

A relevant means of obtaining evidence is the interception of conversations or communications, admitted only for offences listed in art. 266. The interception of communications in ordinary cases is regulated by art. 266 and followings of the CPP. They are called 'interception *post-*

[32] See lett. f-*bis*, introduced by Law 23 June 2017, no. 103.

delictum' as, in principle, they can only be used after an offence has been committed and the preliminary investigations have started. Art. 267 § 1 reads as follows: the interception is authorised by a reasoned decision where there are serious grounds (*gravi indizi*) for believing that a crime has been committed and it is absolutely indispensable for the purposes of the investigation. The interception warrant is issued by the judge for preliminary investigations upon the application of the Public Prosecutor. Art. 266 § 2 prohibits any interception carried out in a home or dwelling, or in another building or structure of private ownership, unless there is reason to believe that criminal activity has taken or is taking place within that building.

Exceptional provisions for the interception of communication under less stringent requirements were first enacted by art. 13 of Law no. 203 of 12 July 1991, for the investigation of organised crime offences, later extended to terrorism cases. According to the provision, an interception can be authorised where there are sufficient (instead of *serious*) grounds (*sufficienti indizi*) for believing that a crime has been committed. Second, interceptions need only to be necessary (rather than indispensable) for investigative purposes. Moreover, it permits – notwithstanding what is provided by art. 266 CPC – interception in the house, or in any other private places, in proceedings relating to organised crime offences, even if there is no reasonable ground to believe that any criminal activity is actually taking place there.

The United Criminal Chambers of the Supreme Court[33] adopted a relevant decision regarding this issue. The question posed to the Joint Sessions was the following: *"[Is] it possible to carry out electronic surveillance among people present through the installation of a trojan on portable electronic devices (smartphones, tablets or laptops) even in private dwellings, although not identified separately and even if no criminal activity is undertaken inside them?"*

In its judgment, the Court distinguished between two categories of activities: "online searches" and "online surveillance". Whereas the former involve copying existing data, the latter involves all other forms of hacking-based surveillance. In light of the qualifier in Article 266 § 2, the Court ruled that, for "online surveillance" (i.e. "real time interception" using malware) such activities could be lawful under art. 266 § 2 but must be "limited exclusively to proceedings relating to offences of organised crime" (namely mafia and terrorism-related crimes) under art. 51, § 3-*bis* and 3-*quater*, CPC. The reason behind this decision concerns the fact that, according to the interpretation of the court, such surveillance does not constitute an infallible condition for the legitimacy and usability of interceptions of conversations and communications between those present, recorded with the use of trojan technologies. (VACIAGO – SILVA RAMALHO, 2016: 92.)

In this regard, several legislative reforms have been put forward in recent years. First, by Law no. 103 of 23 June 2017, the scope of application of such technological instrument has been

[33] Court of Cassation, Joint Section, 1 July 2016, no. 26889, Scurato. See GIORDANO, 2020.

codified, providing for its admissibility for the interceptions of conversations in matters concerning organised crimes. Then, by Law no. 3/2019 the possibility of using trojan horses has been extended to corruption cases. (SIGNORATO, 2019: 245.; ZICCARDI, 2020) Further amendments have been introduced by Law 28 February 2020, no. 7 and lastly by Law 25 June 2020, no. 70.

Trying to sum up the current legislative framework, in ordinary cases (as provided by art. 266 § 1), the interception of communications between individuals present is allowed, which can also be performed through the insertion of a computer sensor on a portable electronic device. If sensors are to be installed in private residences, they can be authorised by the judge only if justified reasons to believe that criminal activity is taking place there exist (art. 266 § 2). However, such interception is always allowed for organised crime offences, and therefore even if it takes place in private homes regardless of whether criminal activity is taking place there, and also for the crime of public officials against the public administration punished by imprisonment of no less than a maximum of five years: in the latter case it is necessary to specify reasons that justify the recourse to this measure in private places (art. 266 § 2 *bis*).

Concerning the conditions for the authorisation of interception by the judge for preliminary investigations, art. 267 requires that, in the case of use of an IT trojan for interception on portable devices, the authorisation decree must indicate the reason that makes this method necessary for the purpose of the investigation and, if there are crimes other than those referred to in art. 51 § 3 *bis* and 3 *quater* and for crimes of public officials against the public administration punished with imprisonment of no less than a maximum of five years, also the place and time, even indirectly determined, in relation to which the activation of microphone is allowed.

Undercover operations

By Law no. 3/2019, the legislator amended art. 9 of Legislative Decree no. 146 of March 16, 2006 – aimed at implementing the United National Convention against Transnational Organised Crime (UNTOC) – extending the use of undercover agents to investigate corruption offences as well. First of all, it has expanded the list of offences for which the recourse to the special technique is admitted, including bribery (art. 317), different types of corruption (arts. 318, 319, 319-*bis*, 319-*ter*, 320, 321, 322-*bis* of the Criminal Code), undue inducement to give or promise benefits (art. 319-*quarter* § 1), incitement to corruption (art. 322), foreign bribery (art. 322 *bis*), trafficking in illegal influence (art. 346 *bis*), and violations of freedom in public trade (arts. 353 and 353 *bis*).

Moreover, it has widened the activities that the agent can perform as a simulated corrupt public official: " [The] the payment of money or other utilities in the fulfilment of an illicit

agreement already concluded by others, the promise or offer of money or other utilities requested or solicited by the public official or the person in charge of a public service as a price for committing the crime", still mentioning in the last sentence "prodromal and instrumental" conduct among those whose punishment is excluded. Alongside the risk highlighted by scholars (MAGGIO, 2021: 519.) according to which this exonerating conduct may become a cause of indiscriminate impunity for all the activities performed by the undercover agents, the new provision has triggered several criticisms. Keeping in mind the distinction between the undercover agent and the agent provocateur, drawn by the European Court of Human Rights in several judgments[34], it should be avoided that the conduct of the agent who "promises or offers money" is an initiative by the agent, so as to induce the commission of a crime against the public administration." (CAMON, 2018: 3.) In order to avoid doubts on the nature of the behaviour, the Explanatory Report stated that *"non-punishable conduct remains confined to that necessary for the acquisition of evidence relating to illegal activities already in progress and that does not instigate or provoke criminal conduct, but is indirectly or purely instrumental in the fulfilment of others' illegal activity"*. (CASSIBBA, 2019: 207.)

An essential requirement is that undercover operations shall be arranged for the sole "purpose of acquiring evidence" in relation to the crimes listed in the above-mentioned Article 9, so undercover operations cannot, therefore, be used for purely preventive purposes and shall only take place after the acquisition of a *notitia criminis*, in the framework of an already established criminal procedure. (MAGGIO, 2021: 520.)

According to the general provision, the undercover agent has to be a police officer belonging to specialised structures – with the possibility to rely on agents, auxiliaries and intermediaries, to whom the exemption clause is extended – who has to perform his/her activities within an official operation arranged by top law enforcement agencies after the authorisation by the public prosecutor. As highlighted by scholars (MONGILLO, 2019a: 254.), the new rule does not mention specialised structures in the field of corruption. As such, every time a crime of corruption is relevant within an investigation where a specialised structure (as in drug crimes) exists, an official belonging to these structures can perform the undercover operation.

Special proceedings: summary trial and plea bargaining

In the Italian criminal procedural code there are some special proceedings, aimed at reducing the length of criminal proceedings, all regulated in Book VI of the CPC. The most significant are summary trial (*giudizio abbreviato*) and the application of a penalty at the request of the

[34] The leading case is ECtHR, 9 June 1998, *Teixeira de Castro v. Portugal*, § 31; see also ECtHR, 5 February 2008, *Ramanauskas v. Lithuania*; ECtHR, 21 February 2008, *Pyrgiotakis v. Greece*; ECtHR, 4 November 2010, *Bannikova v. Russia*, §§ 33; ECtHR, 20 February 2018, *Ramanauskas v. Lithuania* (No. 2), §§ 52–61.

parties/plea bargaining (*applicazione della pena su richiesta delle parti*): they both do not envisage the trial, as they are celebratedduring the preliminary hearing (*udienza preliminare*).

In the summary trial (art. 438 and ff) the defendant requests to be judged on the evidence gathered during the preliminary investigations and defence investigations. Since a reform adopted in 2019, it cannot be requested for crimes punishable by long or life imprisonment. In the case of conviction, the sentence is reduced by one third and by half for misdemeanours.

With regard to the plea bargaining (art. 444 and ff), the prosecution and the defence can jointly ask the judge for preliminary investigation or the judge for preliminary hearing to impose a specific penalty on which they both agree, as long as the proposed sentence for the offence on trial does not exceed two years of imprisonment, reduced by up to one-third compared with the one provided by the law for the criminal offence concerned. With Law no. 134 of 12 June 2003, the legislator introduced a new kind of plea bargain (called a "broadened plea bargain", *patteggiamento allargato*): the threshold for its application has been increased to an envisaged sentence that does not exceed 5 years of imprisonment, reduced by up to one-third.

The judge retains his or her discretionary powers to accept or reject this kind of procedure. The benefits of the procedure for the defendant may be summarised as follows: the sanctions agreed on with the prosecutor are reduced by a maximum of one third; if the judgment does not exceed two years of imprisonment (or two years of imprisonment combined with a financial penalty), the judgment itself does not entail paying the cost of the proceedings or the application of ancillary penalties and security measures, except for confiscation in the cases set forth by art. 240 of the CC; if the judgment does not exceed two years of imprisonment (or two years of imprisonment combined with a financial penalty), the offence shall be extinguished if the accused does not commit a crime or misdemeanour of the same kind within five years (if the judgment concerns a crime) or two years (if the judgment concerns a misdemeanour).

Some special rules are provided for in the matter of corruption. Indeed, as set forth by art. 444 § 1-*ter* of the CPC, in the event of prosecution of any of the crimes set forth in arts. 314, 317, 318, 319, 319-*ter*, 319-*quarter* and 322-*bis* of the ICC, the request for plea bargain proceedings is subject to the full restitution of the price or the profit arising from the offence. The court shall assess whether the latter condition is met and, in general terms, whether the plea bargain agreement complies with the law. If the evaluation is positive, the court delivers the plea bargain sentence, otherwise it is rejected. At this regard it is to report a judgment[35] that has admitted the special proceedings requested by a private defendant with regard to the undue induction, even without the full restitution. An interpretation aimed at mitigating the rigid rules introduced by

[35] Judge for the preliminary investigation of Bologna, 13 November 2020, no. 1023. with a comment by PINCELLI, 2020.

Law no. 69/2015, that as a consequence have reduced the margin of application of these special proceedings.

Furthermore, Law no. 3/2019 (MENNA – PAGLIANO, 2019: 233.), aimed at reinforcing the fight against corruption, added paragraph no. 3-*bis* to art. 444 of the CPC, which states that, in the event of prosecution for any of the crimes provided for by arts. 314 paragraphs 1, 317, 318, 319, 319-ter, 319-*quarter*, paragraphs 1, 320, 321, 322, 322-*bis* and 346-bis of the ICC, the plea bargain request may be subject to the exclusion or suspension of the accessory penalties provided for by art. 317-*bis* of the ICC. Should the judge deem it mandatory to apply these accessory penalties – a ban from public office or the prohibition of public officers from contracting with the public administration – they shall reject the plea bargain request.

As far as criminal liability of legal persons is concerned, pursuant to art. 63 of Legislative Decree no. 231/2001, administrative liability may also be settled through a plea bargain agreement. Indeed, the company is entitled to settle its potential administrative liability with an agreement on pecuniary sanctions and on the duration of disqualifying measures (if applicable).

The anti-corruption Authority (ANAC)

The Italian Anti-corruption Authority (ANAC), established by Law no. 190/2012, implementing art. 6 of the UN Convention against corruption, is an independent and administrative authority aimed at preventing corruption in public administrations. (PARISI, 2020) The board is composed of five members appointed for a non-renewable mandate of six years. The nominations, proposed by the Minister for Public Administration and Simplification, in agreement with the Minister for Justice and the Minister for the Interior, are approved by the Council of Ministers and the candidates are appointed by the President of the Republic. It has also been identified as the responsible entity for the supervision and regulation of public contracts. This competence is complemented by the collection of data on tenders and on companies operating in the public sector. For this purpose, ANAC manages the Observatory for public contracts.

The ANAC is also a recipient of whistleblowing reports from public administrations pursuant to Legislative Decree no. 90 of 24 June 2014. A power attributed by the same Legislative Decree was that of putting a contract under external control (*commissariamento*) if the firm obtained it through corruption or was influenced by some mafia-type organisation. Furthermore, the ANAC is tasked with defining the Anti-corruption strategy and supervising the adoption of the three-year plans. The Anti-corruption strategy is based on a national anti-corruption plan (P.N.A.) and three-year anti-corruption plans and codes of conduct to be adopted by the public administration and state-controlled enterprises. Whilst it can impose sanctions in the event of failure to adopt the three-year plans and/or codes of conduct, the authority has largely invested in fostering a

preventive culture by providing advice and guidance to the public administration, as well as establishing guidelines and standards for codes of conduct in specific administrative areas.

The ANAC has a broad range of powers (listed in several sources such as Legislative Decrees no. 90/2014 and no. 50/2016), which may be summarised as follows: analysis of the causes which facilitate corruption, identifying preventive initiatives (for this purpose the authority issues the annual National Anti-Corruption Plan); inspections by requesting information, acts and documents, and the implementation of the initiatives required by the National Anti-Corruption Plan; supervision of public contracts and public tenders; reporting to the Public Prosecutor's Office in the event of crimes or to the Court of Auditors in the event of detriment to the Treasury; regulation by issuing guidelines (also having a binding value); management of the national database of public contracts, digital record of public contracts and national register of evaluation commission members; imposition of disqualifying and pecuniary sanctions in the event of failure, without justified reason, to provide the information requested by it or the contracting authorities or, in the event of providing false information or documents; incentive reporting through a whistle-blowing channel and imposition of pecuniary sanctions against those who take revengeful initiatives against the reporters; and Corruption Prevention and Transparency Officials who fail to assess the reports received; in the event of prosecution of any of the crimes under arts. 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater*, 320, 322, 322-*bis*, 346-*bis*, 353 and 353-*bis* of the ICC or in the event of potential unlawful conduct referable to a successful tenderer, the ANAC will inform the Prosecutor's Office and propose that the Prefect:

a) orders the replacement of the persons involved in the investigation in corporate bodies and, if the company fails to comply, imposes extraordinary and temporary management of the company with specific reference to the fulfilment of the public contract related to the potential unlawful conduct; or
b) imposes extraordinary and temporary management of the company with specific reference to the fulfilment of the public contract related to the potential unlawful conduct.

Transparency for political organisations

By Law no. 3/2019, several changes have been introduced aimed at ensuring the transparency of political parties, movements, and foundations[36]. In particular, art. 1 § 10 provides for the increased transparency requirements with regard to political party funding – now donations with an annual value equivalent to 500 euros or more will have to be fully disclosed. Moreover, it is forbidden for political parties and movements to receive contributions in the form of money, other benefits, services and/or other forms of support from governments or public bodies of foreign states, or from legal entities established in a foreign country that are not obliged to respect the fiscal rules in Italy (§ 12).

[36] For more details see RONGA, 2019: 307.; GIUPPONI, 2019: 359.

According to art. 1 § 14 of this Law, within two weeks prior to electoral contests of any type in all municipalities with at least 15,000 inhabitants, political parties and movements must publish on their own internet sites the *curricula vitae* of their candidates and the certificates issued by the respective judicial registers providing their absence of criminal background. The *curriculum vitae* and criminal certificates (which must be issued no later than 90 days prior to the date of the electoral event) must also be published in an appropriate section called "Transparent Elections" on the internet site of the institution directly connected with the election, or on the site of the Ministry of the Interior concerning the elections of members of the National Parliament or the European Parliament coming from Italy (§ 15).

The concept of political parties and movements encompasses foundations, associations and committees, the executive organs of which are appointed wholly or in part by political parties and movements or by persons who are or have been, within the previous ten years, members of the National Parliament, the European Parliament, or regional or local electoral assemblies, or those who hold or have held, in the previous ten years, government appointments at the national, regional or local levels, or institutional appointments based on their membership of political parties or movements, among other grounds (§ 20). Political parties or movements that violate the new restrictions related to transparency and the fight against corruption are subject to administrative fines between three and four times the amount of the contribution, benefits or other forms of financial support involved. [*Id.* art. 1(21)]. Law no. 3/2019 charges the Commission for Transparency and Control of Statements of Political Parties and Movements with verifying the compliance of these new provisions related to transparency and corruption (§ 26).

Measuring corruption

Italy, as well as other countries, lacks scientific data on the corruptive phenomenon or constant territorial collections of data which may provide for a unique and accessible measurement system. (GNALDI – PONTI, 2018) "Real" corruption is hard to quantify; nevertheless, several attempts to develop precise indicators to measure the impact and the extent of the phenomenon have been put forward even though some statistical research has shown how the perception of corruption by citizens is influenced by their specific characteristics and countries of origin. Attempts based on the direct experiences of the victims or on significant data, such as the divergence existing between market prices and selling prices of public services failed in terms of exactitude. Moreover, judiciary statistics do not indicate the number of corrupt criminal acts perpetrated in light of the illicit pacts difficult to detect and rarely reported. (MONGILLO, 2019a: 239.)

A reliable indicator concerns the perception existing among stakeholders of the pervasiveness of corruption. According to the 2020 Corruption Perception Index Report issued by

Transparency International, Italy scores 53/100, ranking 20th within the European Union and 52nd globally. Since 2012, it has gained 11 points, showing an improved opinion among experts and businesspeople of the levels of public sector corruption. Nonetheless, it shall be noted how these data are influenced by "common sensations" felt by civil society which holds the lowest ever levels of confidence in public institutions, making this parameter not completely reliable. Indeed, according to the 2020 Special Eurobarometer survey, submitted to members of civil society, 88% of respondents in Italy deem corruption to be a widespread phenomenon, especially at the political level (political parties and politicians at national, regional and local level).

Corruption and the local context – Corruption profile in practice

Francesco Cascio, a Sicilian politician, according to the public prosecutor of Palermo, during the period spent as an assessor at the Department of Tourism, between 2001-2004, under the Government headed by Salvatore Cuffaro, concluded an illicit agreement with the entrepreneur Giuseppe Lapis aiming to perform acts (specifically three cases of corruption) contrary to his duties aimed at guaranteeing that the enterprise "Ecotecna s.r.l." received European financing of more than six million euro for building a resort, as well as of a sport centre for golf activities. As a remuneration he would have obtained from entrepreneurs Giuseppe and Gianluigi Lapis, owner of Ecotecna s.r.l., "works" and "services" for the construction of his country-house, located not far from the resort itself. Cascio, according to the charge, would have acted in cooperation with two other public officers who opted for the ordinary trial. The proceedings against the latter defendants were closed in 2019 by the Tribunal of Palermo with a declaration of extinguishment of the offence *ex* Article 531 CPC.

The proceedings against Cascio were more complex. After the conclusion of preliminary investigations, the defendant requested a summary trial (art. 438 CPC), to be initiated before the judge of preliminary hearing in Palermo. He was convicted and sentenced to two years and eight months imprisonment and, as a consequence of the "Severino law", was suspended from political office. Indeed, art. 8 of Legislative Decree, no. 235 of 31 December 2012 (codifying the provisions governing disqualification from standing for election (*incandidabilità*) and disqualification from holding elected and government office (*divieto di ricoprire cariche elettive e di Governo*) following final convictions for certain offences) provides the automatic suspension of those persons convicted of particularly serious offences or offences against the public administration whose criminal conviction has not yet become final[37]. On 29th November 2017, the Court of Appeal of Palermo, upon appeal by the defendant, reversed the judgment. In particular, it declared annulment due to the expiration of time with regard to the corrupt acts having occurred in 2001, and acquittal for the last part of the indicted conduct. As of the day of the appeal decision, the suspension by the political function expired and he returned to his political role. The general Prosecutor submitted an objection to the judgment of the Appeal Court, but in 2018 the Supreme Court rejected it.

[37] See Constitutional Court, 11 March 2021, no. 35, on the conformity of automatic suspension with ECHR.

Prevention/National Corruption Strategies

The prevention and fight against corruption is shared between several authorities. The National Anti-Corruption Authority (ANAC), as said before, was introduced by Law no. 190/2012, acquiring its current denomination in 2014. It is an independent administrative body tasked with the prevention of corruption within the public sector and in state-controlled or participated entities, through the implementation of duties of transparency and fairness in all managerial aspects and in the commitment and execution of public contracts. ANAC also plays a consultive role, providing advice and guidance to the public administration, as well as establishing guidelines and standards for codes of conduct in specific administrative areas. Furthermore, the 2012 law entrusts the authority with the building of the national anti-corruption strategy, requiring the delineation of a National Anti-Corruption Plan (P.N.A.) which defines the general preventive measures that public administrations must implement in order to comply with the legislative framework. ANAC is also tasked to supervise the adoption of a three-year Corruption Prevention Plan (P.T.P.C.) by public administrations. At this regard, the authority may impose administrative pecuniary sanctions on those required subjects who fail to adopt the three-year anti-corruption plan or a code of conduct. Furthermore, its sanctioning power concerns negligent or fraudulent actions or omission by bidders participating in the public procurement process.

2020 was significantly marked by the pandemic crisis. The emergency brought about an unprecedented increase in the national public expenditure for the purchase of healthcare materials, its catastrophic consequences at every aspect of society creating profitable opportunities for corruption to prosper and grow, since the necessity to act rapidly has led to a sacrifice in terms of transparency. Against this backdrop, the role played by national anti-corruption authorities is essential to monitor the correct implementation of public procurement procedures and guarantee transparency in the decision-making process as well as the quality in the public spending, also preventing criminal organizations to infiltrate in legal economies. The ANAC has increasingly strengthened its supervisory activity in order to offer proper support to public administrations adopting and implementing concrete corruption preventive measures; to this end, it has employed recommendations to foster *moral persuasion* and compliance with the anti-corruption strategies, which will be further investigated in 2021. The ANAC also intends to foster new trends in the implementation of appropriate techniques to prevent the e phenomenon of corruption. Indeed, in its 2020 Report to the Italian Parliament, the ANAC promoted several proposals concerning the Resilience and Recovery National Plan in order to simplify the procedures for the commission and performance of public contracts by means of a digitalization process. According to the Authority, the creation of a centralised digital platform would guarantee equal treatment for all participants, fair competition, the secrecy of every bid, transparency and traceability, all leading to a consistent reduction of litigation.

Other relevant information and trends in corruption

Corruption is a widespread phenomenon, the pervasiveness of which systematically reaches different profiles of the public administration. Indeed, corrupt conduct may occur in respect of public officials or persons in charge of a public service but, more specifically, also in respect of members of parliaments, judges and prosecutors. National governments shall put forward sufficient legal provisions and dissuasive measures in order to prevent these subjects to engage in incorrect and ambiguous behaviours. The Group of States against Corruption (GRECO), in its second compliance report published on March 29th 2021 assessing the measures taken by the authorities of Italy to implement the recommendations issued in the Fourth Round Evaluation Report on Italy, acknowledges that steps forward have been made in the fight against corruption and positively welcomes the measures adopted; nonetheless, it also notices that Italy had failed to satisfactorily implement important recommendations to reduce the risk of corruption.

As far as the regulation on members of parliament is concerned, several reforms are currently undergoing discussion in the competent seats in order to strengthen the integrity and transparency of MPs. Specifically, a proposal for an amendment to the Rules of Procedure of the Chamber of Deputies in order to implement the Code of Conducts with which MPs are required to comply, with the aim of encouraging financial disclosure on their part. Still, GRECO notes that the range of non-criminal sanctions for unethical behaviour is to be further developed. A proposal on amending the Code of Conduct also concerns a robust regime for donations, gifts, hospitality, favours and other benefits for deputies, including in connection with their obligation to declare travel, accommodation and expenses covered by sponsors. Moreover, a draft Law amending the regime on Conflicts of Interest, tightening it and enhancing its enforceability is under discussion; GRECO invites the Italian authorities to rationalise such a regime. GRECO positively assesses the imposition of a one-year ban on MPs (*cooling-off* period) following the end of their office in order to prevent instances where the parliamentary mandate could potentially be misused by an individual member for personal interest purposes.

The Italian framework on corruption prevention in respect of judges and prosecutors shows that tangible risks exist for these figures to undergo external pressures in the exercise of their public functions. Judges and prosecutors are obliged to maintain the qualities of impartiality and independence through all their mandate. Against this backdrop, targeted measures have been taken to strengthen the financial disclosure regime of magistrates. Likewise, multifaceted measures have been taken to prevent and detect corruption risks and conflicts of interests within the fiscal jurisdiction and to enhance training on integrity-related matters. Draft legislation has been prepared to provide stricter regulation to limit the participation of magistrates in political life – this is a long-awaited reform, which concerns a particularly sensitive issue in Italy, and thus requires more resolute action.

Since seven out of twelve recommendations are yet to be implemented on the part of Italian authorities, Italy will be required to submit a follow-up report on the progress made by 31 March 2022.

References

BACCARI, Marco (2019): Le modifiche della legge "anticorruzione" in materia di ordinamento penitenziario. In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

BASSI, Alessandra – CARCANO, Domenico – MARI, Attilio (2020): *I reati contro la P.A.: questioni sostanziali e processuali*. Milano: Giuffré Francis Lefevre.

BELLAGAMBA, Filippo (2021): La non punibilità del delatore nei reati contro la pubblica amministrazione: "praticabile" compromesso o vera e propria chimera? *Sistema penale*, 9.

CAMON, Alberto (2018): Disegno di legge spazzacorrotti e processo penale. Osservazioni a prima lettura. *Archivio penale*, 3.

CAPUTO, Matteo (2019): Contro la corruzione internazionale una tutela penale senza più…"riserve"? In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

CARDAMONE, Daniela (2016): *Criminal prevention in Italy. From the "Pica Act" to the "Anti-mafia Code".* http://www.europeanrights.eu/public/commenti/bronzini1-Cardamone_Criminal_prevention_in_Italy_2.0.pdf

CARLONI, Enrico – PAOLETTI, Diletta (2019): The administrative prevention of corruption: the Italian model and its pillars. In: CARLONI, Enrico – PAOLETTI, Diletta (eds): *Preventing corruption through administrative measures*. Perugia: Morlacchi.

CASSIBBA, Fabio (2019): L'espansione delle operazioni sottocopertura. In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

CORSARO, Claudia – ZAMBRINI, Marco (2020): Il recepimento della direttiva PIF e le novità in materia di reati contro la pubblica amministrazione e di reati tributari. L'ulteriore ampliamento dei reati presupposto per la responsabilità degli enti. *Giurisprudenza penale,* 7–8. https://www.giurisprudenzapenale.com/2020/07/21/il-recepimento-della-direttiva-pif-e-le-novita-in-materia-di-reati-contro-la-pubblica-amministrazione-e-reati-tributari-lulteriore-ampliamento-dei-reati-presupposto-per-la-responsabilita-deg/

DELLA BELLA, Angela – ZORZETTO, Silvia (eds.) (2020): *Whistleblowing e prevenzione dell'illegalità*. Milano: Giuffré Francis Lefebre.

DIAMANTI, Francesco – DEI CAS, Eleonora A. A. – BOLIS, Samuel (2019): Italy. In: BERNARDI, Alessandro (ed.): *Improving confiscation procedures in the European Union*. Napoli: Jovene.

EVARISTI, Giacomo M. (2021): Whistleblowing, tutela dell'anonimato e processo penale: tra limiti costituzionali e orizzonti convenzionali. *Diritto penale e processo*, 7.

FLORA, Giovanni – MARANDOLA, Antonella (eds.) (2019): *La disciplina dei delitti di corruzione. Profili penali e processuali (L. 9 gennaio 2019, n.3 c.d. «spazzacorrotti»)*. Pisa: Pacini.

GAMBARDELLA, Marco (2019): Il grande assente nella nuova "legge spazzacorrotti": il microsistema delle fattispecie di corruzione. *Cassazione penale*, 44–73.

GIALUZ, Mitja (2017): The Italian code of criminal procedure: a reading guide. In: GIALUZ, Mitja – LUPÀRIA, Luca – SCARPA, Federica (eds.): *The Italian code of criminal procedure*. Milano: Wolter Kluwers.

GIORDANO, Luigi (2020): Presupposti e limiti all'utilizzo del captatore informatico: le indicazioni della Suprema corte. *Sistema penale*, 4, 109-143.

GIUPPONI, Tommaso F. (2019): Gli obblighi di trasparenza per partiti e movimenti politici. ORLANDI, Renzo – SEMINARA, Sergio (eds.) (2019): *Una nuova legge contro la corruzione. Commento alla legge 9 gennaio 2019, n. 3*. Torino: Giappichelli.

GNALDI, Michela – PONTI, Benedetto (eds.) (2018): *Misurare la corruzione oggi. Obiettivi, metodi, esperienze.* Milano: Franco Angeli.

LONGOBARDO, Carlo (2019): Le pene accessorie spazzeranno via i corrotti? In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

MAGGIO, Paola (2021): A critical analysis of corruption and anti-corruption policies in Italy. *Journal of Financial Crime*, 28(2), 513–530.

MAIELLO, Vincenzo (2018): La corruzione nel prisma della prevenzione ante delictum. *Discrimen*, 4. 2–7.

MARRA, Marialuisa (2019): The Italian National Anti-Corruption Authority. In: CARLONI, Enrico – PAOLETTI, Diletta (eds): *Preventing corruption through administrative measures*. Perugia: Morlacchi.

MAUGERI, Anna M. (2018): La riforma della confisca (d.lgs. 202/2016). Lo statuto della confisca allargata ex art. 240-bis c.p.: spada di Damocle sine die sottratta alla prescrizione (dalla l. 161/2017 al d.lgs. n. 21/2018)". *Archivio penale*, 3, 235–294.

MENNA, Mariano – PAGLIANO, Antonio (2019): Le modifiche in tema di patteggiamento. In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

MONGILLO, Vincenzo (2019a): La legge "spazzacorrotti": ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione. *Diritto penale contemporaneo*, 5, 231–311.
https://archiviodpc.dirittopenaleuomo.org/upload/9617-mongillo2019a.pdf

MONGILLO, Vincenzo (2019b): Il delitto di traffico di influenze illecite nell'ordinamento italiano dalla legge "Severino" alla "spazzacorrotti": nodi irrisolti, problemi nuovi. In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

ORLANDI, Renzo – SEMINARA, Sergio (eds.) (2019): *Una nuova legge contro la corruzione. Commento alla legge 9 gennaio 2019, n. 3*. Torino: Giappichelli.

PADOVANI, Tullio (2018): La spazzacorrotti. Riforma delle illusioni e illusioni della riforma. *Archivio penale*, 3.

PARISI, Nicoletta (2020): Il ruolo dell'autorità nazionale anticorruzione. Una prospettiva sistematica in disaccordo con la vulgata opinio. *DPCE online*, 45(4).

PARODI GIUSINO, Manfredi (2021): Osservazioni critiche sulla riforma dell'art. 323 c.p. *Sistema penale*, 7–8, 71–104.

PINCELLI, Linda (2020): Il privato indotto può accedere al patteggiamento senza ottemperare agli obblighi restitutori sanciti dall'art. 444 co. 1-*ter* c.p.p.: un rito alternativo nuovamente appetibile? Nota a Trib. Bologna, sent. 13 novembre 2020, n. 1023. *Sistema penale.* https://www.sistemapenale.it/it/scheda/gip-bologna-induzione-indebita-obblighi-restitutori-patteggiamento

PISANI, Nicola (2019): La recente politica di inasprimento sanzionatorio tra irragionevolezza e irrazionalità. In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

ROMANO, Mario (2019): *I delitti contro la pubblica amministrazione*. Milano: Giuffré.

RONGA, Umberto (2019): Tentativi di prevenzione della corruzione politica. Utilità e profili critici della legge 9 gennaio 2019, n. 3. In: IASEVOLI, Clelia (ed.): *La cd. Legge 'Spazzacorrotti'. Croniche innovazioni tra diritto e procedura penale*. Bari: Cacucci.

SIGNORATO, Silvia (2019): Intercettazioni di comunicazioni. In: ORLANDI, Renzo – SEMINARA, Sergio (eds.): *Una nuova legge contro la corruzione. Commento alla legge 9 gennaio 2019, n. 3*. Torino: Giappichelli.

VACIAGO, Giuseppe – SILVA RAMALHO, David (2016): Online searches and online surveillance: the use of trojans and other types of malware as means of obtaining evidence in criminal proceedings. *Digital Evidence and Signature Law Review,* 13.

VIGANÒ, Francesco (2014): I delitti di corruzione nell'ordinamento italiano: qualche considerazione sulle riforme già fatte e su quel che resta da fare. *Diritto penale contemporaneo*, 3–4, 4–24.

ZICCARDI, Giovanni (2020): *Cyber law in Italy.* 3rd ed. Milano: Wolters Kluwer.

CORRUPTION AND CORRUPTION CONTROL IN THE NETHERLANDS

WIM HUISMAN*

Country profile

In August 2020, the total population of the Netherlands was 17,140,098.[1] The Netherlands is a relatively small country with a total land area of 33,720 square kilometres. With a population density of 508 people per square kilometre, the Netherlands is the most densely populated country in the EU and one of the most densely populated countries in the world. Around 92.5% of the population lives in is urban areas.

The Dutch economy centres heavily around foreign trade, ranking second on the World Economic Forum's Enabling Trade Index.[2] In 2020, the Gross Domestic Product was 914 105 million USD. Depending on measurement, the Dutch economy is between the 15th and 20th largest in the world, and at 53.538 USD the country ranks between 10th and 15th in terms of GDP per capita. Before the corona crisis, the Netherlands' economy was enjoying a period of stability, as shown by relatively low inflation (2.7% in December 2019) and low unemployment (3.5% in October 2019). Compared to other EU-countries, the Dutch economy is making a speedy recovery from the corona crisis.[3]

The Netherlands has a high level of economic freedom, ranking 24th at the Economic Freedom of the World Index.[4] The country was ranked the fourth most competitive economy in the world in 2020.[5] In addition, the country was ranked the fifth most innovative nation in the world in the 2020 Global Innovation Index.[6]

The Kingdom of the Netherlands consists of four constituent countries, located on two continents: The Netherlands in Europe and Aruba, Curaçao and Sint Maarten in the Caribbean. The Netherlands has a well-functioning democracy. In 2020, the country ranked 7th on the

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[1] https://data.un.org/en/iso/nl.html

[2] http://reports.weforum.org/global-enabling-trade-report-2016/enabling-trade-rankings/

[3] https://www.dnb.nl/en/actueel/dnb/press-releases-2021/dutch-economy-expected-to-bounce-back-swiftly-after-covid-19-crisis/

[4] https://www.fraserinstitute.org/studies/economic-freedom-of-the-world-2020-annual-report

[5] https://www.imd.org/news/updates/IMD-2020-World-Competitiveness-Ranking-revealed/

[6] https://www.globalinnovationindex.org/Home

Quality of Democracy index.[7] The Netherlands is a constitutional monarchy. The Constitution charges the Government – the Monarch and His ministers – with the responsibility for governing the country. The Monarch, although part of the Government, cannot be held accountable for political decisions, and has mainly a cultural function. The Netherlands is a parliamentary democracy. The Dutch Parliament (*Staten-Generaal*) consists of two houses: the Lower House (*Tweede Kamer der Staten-Generaal*) and the Upper House or Senate (*Eerste Kamer der Staten-Generaal*). Dutch governments as a rule are formed by coalitions of a number of political parties owing to the electoral system of proportional representation. Ministers or deputy ministers are not themselves members of Parliament. (TAK, 2008)

In the Dutch constitution there is a separation of powers between the legislature, the administration and the judiciary. The judiciary comprises both judges and public prosecutors. The Minister of Safety & Justice is responsible for the judiciary as far as it concerns the prosecution service (public prosecutor). Judges are independent and no Minister has authority over them. (TAK, 2008: 4.) The Netherlands ranks 5th on the WJP Rule of Law index.[8]

The OECD provides further comparative country characteristics:

	Country Average	OECD median region	Dutch regions	
			Top 20%	Bottom 20%
Community				
Perceived social network support (%), 2013	93.9	91.4	96.3	92.0
Jobs				
Employment rate 15 to 64 years old (%), 2017	75.1	67.7	77.2	72.3
Unemployment rate 15 to 64 years old (%), 2017	5.0	5.5	4.2	5.8
Safety				
Homicide Rate (per 100 000 people), 2016	0.9	1.3	0.5	1.3
Life Satisfaction				
Life satisfaction (scale from 0 to 10), 2013	7.5	6.8	7.6	7.4
Health				
Life Expectancy at birth (years), 2016	81.7	80.4	82.0	81.4
Age adjusted mortality rate (per 1 000 people), 2016	7.6	8.1	7.5	7.8
Civic engagement				
Voters in last national election (%), 2017 or lastest year	81.6	70.9	83.9	79.5
Education				
Labour force with at least upper secondary education (%), 2017	78.4	81.7	82.0	75.6
Income				
Disposable income per capita (in USD PPP), 2016	18 631	17 695	19 981	17 629
Environment				
Level of air pollution in PM 2.5 (µg/m³), 2015	13.8	12.4	13.6	15.3
Housing				
Rooms per person, 2016	2.0	1.8	2.1	2.0
Access to services				
Households with broadband access (%), 2017	98.0	78.0	98.8	96.0

Source: OECD Regional Database. Visualisation: https://www.oecdregionalwellbeing.org.

Notes: (1) OECD regions refer to the first administrative tier of subnational government (large regions, Territorial Level 2); the Netherlands is composed of 12 large regions. (2) Household income per capita data are based on USD constant PPP, constant prices (year 2010).

[7] https://www.democracymatrix.com/ranking

[8] https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020

Quality of live is relatively high in the Netherlands. The Netherlands rank 8th on the UN Human Development index 2020.[9] On the Human Freedom index 2020 (human freedom is understood as the absence of coercive constraint), the country ranks 14th.[10] The Netherlands ranks as the world's fifth happiest country, according to the 2020 World Happiness Report, taking into account factors such as healthy life expectancy, freedom, trust, corruption, and social support.[11]

Corruption profile in law

The criminalization of corruption

In the Netherlands, corruption is criminalised in the Criminal Code as bribery, distinguishing active and passive as well as bribery in the public sphere (public administration) and the private sphere (business). The different types of corruption have been penalised in various articles within the Dutch criminal code (art. 177; 178; 178a; 363; 364; 238ter). Active public bribery is described as the act of offering a gift or promise or providing a service with the objective of persuading the official to do or fail to do something to the advantage of the person performing the bribery (art. 177 Sr). The official can be a current civil servant, a former civil servant, a foreign official or a judge making a decision in a court case the offender has an interest in.

Passive bribery in the public sphere is described as public officials accepting a promise or service, knowing or reasonably suspecting that this was offered in order to make them do or fail to do something or following something they have done or failed to do in the past (art 363, 364 Sr). Additionally, it includes officials asking for a gift, promise or service in order to make them do or fail to do something or following something they have done or failed to do in the past. Again, this can also concern a judge ruling a court case.

Bribery in the private sphere, outside public administration, is covered in a separate article, containing both active and passive bribery (art 238ter Sr). This article states that a person who is employed in a private position and who, contrary to their professional obligations, does or fails to do something, accepting or requesting a gift, promise or service, engages in private bribery. This is also the case when this person can reasonably be expected to be aware of the fact that the act performed is not in line with their professional position (art 238ter Sr).

The legal definition of corruption as bribery is rather narrow compared to how corruption is viewed in Dutch society. Dutch corruption expert Slingerland observes a shift in the definition of corruption in the Netherlands, moving towards the broader definition as described by

[9] http://hdr.undp.org/en/composite/HDI
[10] https://www.fraserinstitute.org/sites/default/files/human-freedom-index-2020.pdf
[11] https://worldhappiness.report/

Transparency International: 'all forms of abuse of power by anyone who has been entrusted with this power' (interviewed by GROEN, 2020). She takes note of a growing awareness in society that corruption is not limited to the mere exchange of goods in order to obtain a certain goal, but there is a wide array of behaviours balancing on the border of what is morally acceptable when it comes to integrity issues. She notices this shift taking place in the courtroom as well, mentioning the much debated case of a mayoral candidate on a phone call with an alderman in this municipality, in which case the alderman was convicted for passive corruption, merely by producing an affirmative noise on the phone when asked for certain information. This shows that the exchange of favours can be a very abstract one in order to meet the definition of bribery.

Criminal justice and combating corruption

The Dutch judiciary is organised at three levels. There are 11 district courts of first instance for dealing with criminal cases. There are five Courts of Appeal. The Supreme Court (*Hoge Raad*) is the highest court in the fields of civil, criminal and tax law in the Netherlands. It is responsible for hearing appeals in cassation and for a number of specific tasks with which it is charged by law. The Dutch judiciary is independent and governed by its own Council of the Judiciary (*Raad voor de Rechtspraak*).

The organization of the Public Prosecutor's Office mirrors that of the judges with offices at district court level and at the level of the Court of Appeal. At the top sits the Board of Procurators General. At the level of the Supreme Court, the Procurator General of the Supreme Court has a special status. The main task of the Procurator General of the Supreme Court is to provide the members of the Supreme Court with independent advice – known as an 'advisory opinion' - on how to rule in the cassation proceedings before them. The Supreme Court and the Procurator General and his office form a single organisation.

The Netherlands has a centralized, national police force with 10 regional districts. The police is charged with the traditional tasks of maintaining public order and law enforcement, including criminal investigation, but does not play a role in combating corruption, with the exception of preventing corruption within its own police force.

The general perception of the Netherlands as a relatively corruption-free country (see section 3) may explain why its anti-corruption policy is relatively underdeveloped. (HOPPE et al., 2015: 31.) The Dutch anti-corruption policy focuses mainly, albeit not exclusively, on raising awareness and prevention. The number of acts of corruption discovered, or at least criminally investigated, appears fairly low. Each year, approximately fifty criminal investigations into corruption in the Dutch public sector are conducted, mostly relating to bribery. A substantial proportion of these

investigations is conducted by the National Police Internal Investigations Department, a highly specialized investigation service for combating corruption.[12]

The National Police Internal Investigations Department is a Special Investigation Service of the Dutch police (*Rijksrecherche*) that plays a leading role in investigating corruption in the Netherlands. It investigates allegations about conduct of government officials and public servants that severely affects the integrity of or the way in which government operates. It is also called on for impartial investigations of officials' behaviour and if any risk of partiality needs to be avoided. (GORSIRA et al., 2021: 50.)

Further, corruption investigations are conducted by special investigation services, particularly by the Tax and Customs Administration's Fiscal Information and Investigation Service. The Fiscal Information and Investigation Service is the criminal investigation service of the Tax and Customs Administration and responsible for investigations in tax fraud and other financial and economic crimes, including corruption. For the latter, the Fiscal Information and Investigation Service has set up a specialized department that closely cooperates with the *Rijksrecherche* and the specialized public prosecutors, the Anti-Corruption Centre.

Roughly one third of the criminal investigations into corruption results in prosecution, with an average of five public officials and three businessmen being sentenced to imprisonment each year. (DE GRAAF et al., 2008) The number of convictions has remained stable in recent decades. Specialized prosecutors have been appointed by the Public Prosecutor's Office to coordinate criminal investigations and prosecution of corruption cases. Bribery of public officials is usually dealt with by a specialized unit of the Public Prosecutor's Office, the *Landelijk Parket*. This unit is responsible for fighting high-level, international organised crime and serious subversive crime, to which public bribery is seen as a manifestation. In recent cases, a number of high-level public officials were prosecuted and convicted for taking bribes (section 4).

Commercial bribery is usually dealt with by another specialized unit of the Public Prosecutor's Office, the National Public Prosecutor's Office for Serious Fraud, Environmental Crime and Asset Confiscation (*Functioneel Parket*).[13] This unit is responsible for fighting serious white-collar crimes, including fraud and environmental crimes. Recent cases mostly include multi-national corporations registered in the Netherlands suspected of paying bribes to foreign public officials. These cases have ended in deferred prosecution agreements (section 4).

In the Netherlands, the Public Prosecutor's Office has the discretion to select cases for investigation and prosecution. On the basis of published guidelines, criminal investigation

[12] European Commission, Annex Netherlands to the EU Anti-Corruption Report, Brussels, 3.2.2014, COM(2014) 38 final, ANNEX 19.
[13] https://www.om.nl/onderwerpen/corruptie/aanpak-corruptie

agencies and the specialized public prosecutors have frequent meetings to select cases for criminal investigation and prosecution. Dutch criminal justice policy does not make a formal distinction between petty and high-level corruption. Nevertheless, as a result of the selection criteria as well as the assignment of the specialized units of the Public Prosecutor's Office, mostly high-level cases of corruption will be selected. Recent cases against public officials include a former member of Parliament, deputy-ministers at provincial level, aldermen at municipality level and managers of governmental organisation. So officials in public office with political responsibility and in leadership positions. Recent cases against companies include leading multi-national companies and some of their executives (section 4).

In the Dutch judiciary, there is not a separate department assigned to deal with corruption cases. In practice however, Dutch courts have often organised specialized 'chambers' that deal with fraud and corruption cases.

Measuring corruption

Because corruption is a crime with a high dark figure, official crime statistics do not provide a good measurement of the actual prevalence of corruption. This is especially true for the Netherlands, as the country is criticized for its limited law enforcement and the low number of criminal prosecution cases. In the period 2016-2019, the Netherlands opened 16 investigations of foreign, commercial bribery, commenced two cases and concluded three cases with sanctions. (DELL, 2020) In 2020, the *Rijksrecherche* investigated 36 cases of alleged bribery of public officials. (OECD, 2021) These fairly low numbers of reported cases will not say much about the actual scale of corruption in the Netherlands. For instance, a recent self-report study painted another picture. In a sample of 200 civil servants and 200 business people working in public procurement, 22 percent of the officials and 20 percent of the business employees admitted having accepted respectively offered bribes in the past. (GORSIRA et al., 2016: 1–16.)

While perception indexes also have flaws in measuring the prevalence of corruption, to do offer international comparison. According to the TI Corruption Perceptions Index (TI CPI), The Netherlands is among the ten least corrupt countries worldwide. In the last measurement, in 2020, The Netherlands were ranked as the eighth least corrupt country out of the 180 countries the index includes, with a score of 82 out of 100.[14] Although this is the same score and position the country achieved in 2019 and 2017, its score has slightly declined compared to the years 2016 (83) and 2015 (84). According to the Dutch chapter of Transparency International, this is related to the quality of democracy in the Netherlands, where not enough attention is paid to prevention of abuse of power amongst politicians and officials. Additionally, the quality of the

[14] https://www.transparency.org/en/cpi/2020/index/nld

constitutional state is an issue, referring to problems with the financing process of the Dutch justice system and integrity issues within the police and public prosecution service.

Alongside the Corruption Perception Index, which is based on expert opinions, Transparency International publishes the Global Corruption Barometer, based on citizen's opinions.[15] Again, the Netherlands appears to be one of the countries in the report with the lowest levels of perceived public corruption. The surveys show that 17% of Dutch citizens report that corruption is one of the three biggest problems the country is facing, listing it in the 34th position out of 42 countries included in this list. The survey on perceptions of corruption levels for members of parliament includes 32 countries and ranks the countries on people reporting most or all members of parliament are corrupt. In The Netherlands, 12% of the citizens report that this is the case, ranking it in the 29th position.

The report also covers the levels of corruption citizens have experienced during the past 12 months, asking people if they or anyone in their household have experienced bribery with one or multiple of the following public institutions: the road police, public agencies issuing official documents, the civil courts, public education, public medical care, public agencies in charge of unemployment benefits and public agencies in charge of other social security benefits. In the Netherlands, 2% of the respondents report experience with bribery with one of these institutions, placing it at the bottom of the scale, alongside several other EU-countries, only the UK (0) and Sweden (1) having lower scores.

Another source of information on corruption levels is the Eurobarometer, published by the European Union. The Eurobarometer covers citizens' and businesses' attitudes on and experiences with corruption.

Regarding citizens' perceptions and experiences, most recent survey results have been reported in the Eurobarometer in 2020.[16] This report displays several dimensions of experience with and attitudes towards corruption. To the question whether people think corruption is widespread in their country, 47% of the respondents in the Netherlands replied that this is the case, compared to a 71% average in the European Union and with 4 countries reporting lower scores. When asked whether they are personally affected by corruption in their country, 4% of people in the Netherlands agreed with this, ranking it in the lowest position along with Denmark and considerably lower than the EU average at 26%.

On the topic of public corruption, 41% of respondents in the Netherlands indicated that there is corruption in local and/or regional public institutions in their country, placing it in the third

[15] https://images.transparencycdn.org/images/GCB_Citizens_voices_FINAL.pdf
[16] https://europa.eu/eurobarometer/surveys/detail/2247

lowest position of EU countries, above Denmark and Finland. On a national level, 45% of people in the Netherlands report that they think corruption is an issue within public institutions, again placing the country above Denmark and Finland.

Personal experience with corruption was measured by asking respondents whether they had experienced or witnessed any case of corruption in the last 12 months, to which 5% of respondents in the Netherlands replied confirmatively and which was exactly the same as the EU average.

Most recent survey results of businesses' attitudes towards corruption in the EU were published December 2019.[17] When asked the question 'Do you consider corruption to be a problem or not for your company when doing business in your country?', 12% of companies in the Netherlands indicated that corruption is a total problem in the country, compared to a EU-average of 37. This ranks the Netherlands in the 26st position out of 28 countries, with only Estonia and Denmark scoring lower. When considering the development over the previous years, the survey shows a decline in reported corruption problems, from 24% in 2013, 19% in 2015, 13% in 2017 to 12% in 2019. When presented with the question, *'How widespread do you think the problem of corruption is in your country?'*, 57% of companies in the Netherlands replied 'total widespread', compared to an 67% average in the EU.

Company experiences with corruption was measured by asking whether anyone in the country itself asked or expected someone from the company to give a gift, favour or extra money for any of the following permits or services. In the Netherlands, 17% of the companies replied 'at least one', indicating experience with corruption. This score is higher as the 10% EU average.

An additional source for the Netherlands on corruption levels is the survey on the prevalence and prevention of financial crime amongst companies and other organisations in the Netherlands. (PwC, 2021) Of the respondents, 21% reported that their organisation has been confronted with incidences of corruption in the previous year, 13% saying that this happened at least once, 5% reporting between 5 and 10 times and 3% saying corruption took place more than 10 times. Levels of active and passive bribery were almost equal, with 60% out of respondents reporting encountering corruption saying passive bribery was involved and 61% reporting active bribery. This is a slight change from the year 2017, when levels of active and passive bribery were equal, both amounting to 60%. (PwC, 2021: 12.)

Additionally, the companies included in the survey were split out into different categories, distinguishing 16 sectors the companies operate within. This shows that the sectors where corruption was reported the most (over 30%) are energy and water (46%), construction (43%),

[17] https://europa.eu/eurobarometer/surveys/detail/2248

public administration (32%) and manufacturing (31%) (PWC, 2021). When considering the size of the companies included in the survey, corruption is most reported amongst medium size companies in the Netherlands, employing 100-999 people. 30% of these companies reported corruption, compared to 16% of companies employing up to 100 people and 18% of companies employing more than 1000 people. (PwC, 2021: 8.)

Notwithstanding the difficulties of measuring corruption and the flaws of doing so with perception studies, the measures and indexes presented above create the general impression that compared to other countries, in- and outside the EU, the prevalence of corruption in the Netherlands is relatively low.

Corruption and local context – Corruption profile in practice

As already mentioned in section 2 on the prevalence of corruption, two types of corruption cases stand out in the Netherlands. These types follow the division of the organisation of criminal investigation in the Netherlands as the *Rijksrecherche* investigates bribery in the public sphere and the Fiscal Information and Investigation Service investigates corruption in the private sphere; mostly foreign bribery in business. Of both types, a number of cases concerning high profile suspects have been dealt with by the Public Prosecutor's Office.

> The first type of cases are cases of passive bribery in which politicians or high level managers in public administration where prosecuted for accepting bribes by companies or befriended company managers. Surprisingly, in some of these cases, the bribing companies were not prosecuted. These bribery cases mostly occurred on the local level of municipalities and provinces in the Netherlands. A good example of a recent case, is the conviction of *Jos van Rey* to community service and a conditional prison sentence of one year. After appeal, the verdict was approved but the Supreme Court and Van Rey announced to take the case the European Court of Justice.[18] Van Rey had a lengthy career in public office, serving many years as alderman of the city of Roermond in the South of the Netherlands while also being a member of the Dutch parliament, serving terms both in the Lower House and in the Upper House on behalf of the liberal party VVD. During the corruption trial he was delisted as a member of the liberal party and subsequently Van Rey started his own local political party, after which this party won the municipal elections in Roermond. According to the judge, Van Rey was bribed by accepting numerous dinners, leisure trips and tickets to soccer matches by a local entrepreneur active in construction. Allegedly, in return the company of this entrepreneur was granted lucrative contracts for construction projects by the city administration. Van Rey claimed that the was the first official in the Netherlands to be convicted for 'friendship'.

[18] https://www.nrc.nl/nieuws/2019/07/09/hoge-raad-van-rey-terecht-veroordeeld-voor-corruptie-a3966545

The second type of cases are cases of active bribery in which major Dutch companies or their agents were suspected of offering bribes to public officials and politicians mostly in other countries in order to acquire contracts. A landmark case was against SBM Offshore, a leading supplier of floating production and mooring systems for the off shore oil industry, which is headquartered in the Netherlands and is registered at the AEX stock exchange in Amsterdam. A whistle-blower revealed that the company was systematically paying bribes via agents to public officials in African and South-American countries to ensure contracts with state-owned oil companies. In an out-of-court settlement with the Public Prosecutor's Service, the company agreed to pay 240 million euros to prevent further prosecution, under the condition that the company would significantly improve its anti-corruption procedures and compliance management.[19] Related to the same facts, a former CEO of the company has now been convicted to a prison sentence in the United States of America. The fine of 240 million euro was a record at the time, but that was shortly after overturned by a similar settlement with telecommunications company Vimpelcom.[20] In a joint investigation with the US department of Justice, the company agreed to pay 740 million euros for of bribing the daughter of the former president of Uzbekistan to obtain licences for the local telecom market. Vimpelcom, the world's sixth largest telecom operator, was a Russian company that was registered in the Netherlands or fiscal reasons.

Prevention/ National anti-corruption strategies

Anti-corruption policy in the Netherlands is strongly related to integrity policy, which is a compulsory part of any public body's set of guidelines and regulations. (NELEN – KOLTHOFF, 2018) Accordingly, anti-corruption policy in the Netherlands needs to be viewed taking integrity policy equally into account. Because of the country's emphasis on integrity, the 'positive' flipside to corruption, it is a debated matter whether corruption is emphasised enough in policy measures and in society in general in the Netherlands. Perhaps also because of the comforting outcomes of the international perceptions studies as a self-fulfilling prophecy, corruption as a problem in society has been ignored for a long time. However, following a number of high-level corruption scandals in local politics, public administration and in the construction industry, attitude have hardened in the new Millennium. A turning point was the white paper on anti-corruption published by the House of Representatives in 2005, this being the first time anti-corruption policy was explicitly formulated out by the government. The notice was specifically aimed at addressing corruption amongst public officials.[21] This high level policy document raised awareness of the fact that corruption is certainly an issue in Dutch society which needs addressing. Nevertheless, the preventing corruption through

[19] https://www.vn.nl/the-cover-up-at-dutch-multinational-sbm/
[20] https://www.ft.com/content/e5f63772-d693-11e5-8887-98e7feb46f27
[21] Ministerie van Justitie & Ministerie van Binnenlandse Zaken en Koninkrijksrelaties. 2005, November 11. Corruptiepreventie; nota [Letter of government]. https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vi3aogkagdzs

promoting integrity among Dutch public administration and Dutch business, remains the backbone of anti-corruption strategy in the Netherlands.

The Netherlands have joined various conventions against corruption, which monitor policies and development of anti-corruption efforts in the country. Implications are made with each evaluation round and progress is monitored in reports. These give an overview of the state of anti-corruption policies in the Netherlands.

The Group of States against Corruption (GRECO), part of the Council of Europe, analyses countries' anti-corruption efforts and the state of implementing different recommendations. In the fifth round in 2018 GRECO described anti-corruption policies in the Netherlands and draws a number of conclusions and makes recommendations. On the level of central government, although the report states that there is no concrete framework provided by laws or a code of conduct, a few important tools are mentioned. The 'blue book', a handbook providing guidelines for ministers and state secretaries, puts a set of guidelines on integrity in place. This book, complemented with directions from ministers and the Prime Minister, sets the basic guidelines in general as well as when integrity issues are concerned. Legally, there are several laws that lay down integrity regulations, which ministers and state secretaries commit to through the oath they take when starting their position. There is, however, no consistent enforcement mechanism in place, as this is organised on individual ministry level.

Before they are officially welcomed into office, background checks are performed on prospective state secretaries and ministers by the General Intelligence and Security Service to clear up any issues that might affect the reliability or integrity of these people. Then, when it comes to complaints from the general public, the National Ombudsman is assigned with the task to judge government officials on misconduct towards the population, which includes integrity issues. Additionally, cases started through the Whistleblowers authority can have an impact on ministers and state secretaries, although they cannot be directly controlled by this body.

The National Police force as well as the Military police (Royal Marechaussee) have a code of conduct in place. For the National Police, this consists of the Professional code of the Police, drawn up in 2014. The police have gone through different stages of integrity policy, considering integrity as an 'integral part of craftsmanship and professional responsibility'. Additionally, not accepting any bribes is part of the police officer's oath each police officer takes when starting the job. Integrity in police work is monitored by individual police departments, supervised by the police Security, Integrity and Complaints Department.

The Marechaussee's integrity policy falls within the Defence Code of Conduct, which covers different aspects of behaviour, including integrity matters. The basic values are professionalism,

cooperation, awareness of responsibility, acting ethically with respect and security. Compliance with the code is supervised by Marechaussee's integrity cluster.

Based on the findings in the Netherlands, the GRECO evaluation team has listed a number of recommendations on improvements they see necessary in order to achieve an adequate anti-corruption policy. Regarding the central government, the main issue with the current policy according to the recommendations is the lack of a general code of conduct, including supervision and sanctions, and a clear integrity strategy. Also, the GRECO believes there is too much risk on conflicts of interest and related to this, a lack of rules and guidance as well as transparency. Related to this, the GRECO advises ad hoc disclosure requirements when conflicts of interest might be involved, as well as post-employment job restrictions.

The recommendations towards the law enforcement agencies follow the same train of thought, suggesting better guidance for the police code of conduct and a similar code for the Marechaussee, improving the supervision and enforcement. Besides this, regular integrity training and screening are recommended, as well as a standard procedure and registration of gifts that are offered and received. Additionally, better control mechanisms are advised regarding confidential information and risks on conflicts of interest need to be minimised, studying this issue as well as setting up post-employment restrictions and improving supervision on this matter. Finally, whistleblowing is advised to be accommodated, requiring employees to report incidents and improving protection of whistle-blowers.

In July 2020, GRECO published its Fifth Round Compliance Report on the Netherlands.[22] GRECO was sorry to conclude that that the Netherlands have satisfactorily implemented none of the sixteen recommendations contained in the Fifth Round Evaluation Report. Eight recommendations have been partly implemented and eight have not been implemented. With respect to top executive functions, GRECO regrets the lack of progress on the implementation of any of its recommendations and calls on the authorities to take decisive steps to implement recommendations on persons with top executives functions. Regarding law enforcement agencies, GRECO notes that some progress can be witnessed. For instance, the Theme pages of the Professional Code of the National Police have been updated to cover better integrity matters, and the Marechaussee adopted practical Rules of conduct that provide practical examples of integrity dilemmas. Efforts are also ongoing with a view to fully incorporating integrity matters into training.

Another anti-corruption convention the Netherlands are part of is the OECD Working Group on Bribery, which evaluates countries' efforts to fight foreign bribery. The most recent evaluation report for the Netherlands dates from November 2020 and this concerns the fourth phase of

[22] https://rm.coe.int/fifth-evaluation-round-preventing-corruption-and-promoting-integrity-i/1680a2fcb0

evaluation. (OECD, 2021) This is a follow-up report for recommendations made in the Phase 3evaluation in 2015, which means that the Netherlands' efforts to implement these are evaluated.

The points for improvement raised in previous evaluations by the OECD have instigated a number of policy adjustments in the Netherlands on foreign bribery. The law on foreign bribery has been simplified, no longer discriminating between cases involving a 'breach of duty' and not involving this. Also, sanctions have been increased. Making small facilitation payments to foreign countries is actively discouraged, although this could be done even more thoroughly in order to raise awareness amongst companies. When it comes to the prosecution of legal persons, mailbox companies receive special attention, emphasising their status as legal persons under the Dutch law. Besides these, other companies are prosecuted as legal persons when suspected of foreign bribery.

In order to improve the information gathering progress and simplify the prosecution process, government bodies have started an information sharing platform, cooperating between different government bodies. Within the Dutch government, combined investigation teams have been formed, involving the Police Internal Investigation Department, as well as the Fiscal Intelligence and Investigation Service, improving on efficiency when prosecuting cases. Improved cooperation between these government bodies has equally been implemented when it comes to tax-related issues. Also, cooperation with foreign governments has been improved, by for example creating Joint Investigation Teams. Besides these efficiency measures, exclusion from public tenders is implemented for companies within four years of a conviction of foreign bribery.

On the topic of awareness raising, projects have been set up in the public as well as the private sector. Within the public sector, the focus has been on an integrated approach: working together exchanging information and informing different government bodies. In the private sector, companies' 'International Corporate Responsibility' was emphasised, improving communication between the government and private companies.

In the 4th evaluation, OECD notices that foreign bribery enforcement has ramped up in the Netherlands, following the establishment of specialised investigative and prosecutorial teams described in section 2. The OECD also highlights other positive developments, such as innovative sanctions imposed on company auditors in foreign bribery cases pursuant to an enforcement policy targeting gatekeepers and recent case law that confirms a broader approach to exercising jurisdiction over mailbox companies. It also notes the Netherlands' strong framework for international co-operation and success in confiscating the proceeds of bribery in concluded cases against companies. The report praises the Netherlands' increased efforts to detect possible foreign bribery, including through innovative approaches by the Financial Intelligence Unit of the police, the Fiscal Intelligence and Information Service, the National Public Prosecutor's Office for Serious Fraud, Environmental Crime and Asset Confiscation and the financial sector, as well as the Netherlands' efforts in raising awareness. Finally, and following up on earlier

recommendations by OECD and GRECO, a new Whistleblower Authority Act will come into force December 2021, offering better protection to whistle-blowers.

Corruption and anti-corruption in the Netherlands: a tale of the Merchant and the Minister?

This country report on corruption and anti-corruption policies report seemingly contradicting findings. On the one hand, the prevalence of corruption appears to be low. According to international corruption perception indexes, the Netherlands is among the least corrupt countries in the world. Dutch public administration and local business appears to maintain a high level of integrity and to be less prone to corruption. Perhaps as a result, policies are not so much aimed at fighting corruption, but at promoting integrity in public administration and in business.

On the other hand, the heavy reliance on foreign trade creates a risk profile for corruption. Recent cases have shown that paying bribes to foreign officials to get contracts was a standard business practice for some reputed Dutch companies. Also, Dutch lax fiscal legislation makes the country attractive as a country of tax residence for – in fact – foreign companies. Fiscal immigration of such companies makes the Netherlands vulnerable for importing corruption as well, as the Vimpelcom case has shown. In relation to the size and risk profile of the Dutch economy, only a small number of cases of foreign bribery have been concluded as was observed by OECD and Transparency International. In the period 2016-2019, the Netherlands only opened 16 investigations, commenced two cases and concluded three cases with sanctions. (DELL, 2020: 88) Just seven companies and two individuals have been sanctioned in five foreign bribery cases as per November 2020, all through non-trial resolutions. (OECD, 2021: 11.) Notwithstanding recent efforts to step up investigation and sanctioning, current law enforcement does not seem in par with corrupt practices in the Netherlands. With a lack of domestic petty corruption, foreign corruption cases are inherently high-level corruption cases, as they involve major, multi-national companies. Overall, the Netherlands appear to succeed in keeping the indoors clean while bringing corruption outdoors.

References

DELL, Gillian et al. (2020): *Exporting Corruption. Progress report 2020: Assessing enforcement of the OECD Anti-Bribery Convention.* Berlin: Transparency International. https://images.transparencycdn.org/images/2020_ReportFull_ExportingCorruption_English.pdf

DE GRAAF, Gjalt – HUBERTS, Leo W. J. C. – NELEN, Hans (2008): Is the glass half full or half empty? Perceptions of the scale and nature of corruption in the Netherlands. *Perspectives on European Politics and Society,* 9(1), 84–94.

GORSIRA, Madelijne – HUISMAN, Wim – DENKERS, Adriaan – STEG, Linda (2021): Why Dutch officials take bribes: a toxic mix of factors. *Crime, Law and Social Change,* 75(1). 45–72. https://doi.org/10.1007/s10611-020-09919-w

GROEN, Smadar (2020): Gender and Corruption. A comparative case study on the Netherlands and Romania. MSc thesis. Amsterdam: Vrije Universiteit.

HOPPE, Robertus – WOLDENDORP, Jaap – BANDELOW, Nils C. (2015): *SGI, Sustainable Governance Indicators. 2015 Netherlands report.* Gütersloh: Bertelsmann Stiftung. http://www.sgi-network.org/2016/The_Netherlands

NELEN, Hans – KOLTHOFF, Emile (2018): Ambtelijke en bestuurlijke corruptie in Nederland; waar staan we anno 2018? *Tijdschrift voor Criminologie,* 60(4), 507–523.

OECD (2021): *Implementing the OECD Anti-Bribery Convention. Phase 4 Report: Netherlands.* https://www.oecd.org/corruption/netherlands-phase-4-report-en.pdf

PWC (2021): *Economic Crime Survey Nederland 2021.* Amsterdam: Projectteam PwC. https://www.pwc.nl/nl/actueel-publicaties/assets/pdfs/pwc-economic-crime-survey-2021.pdf

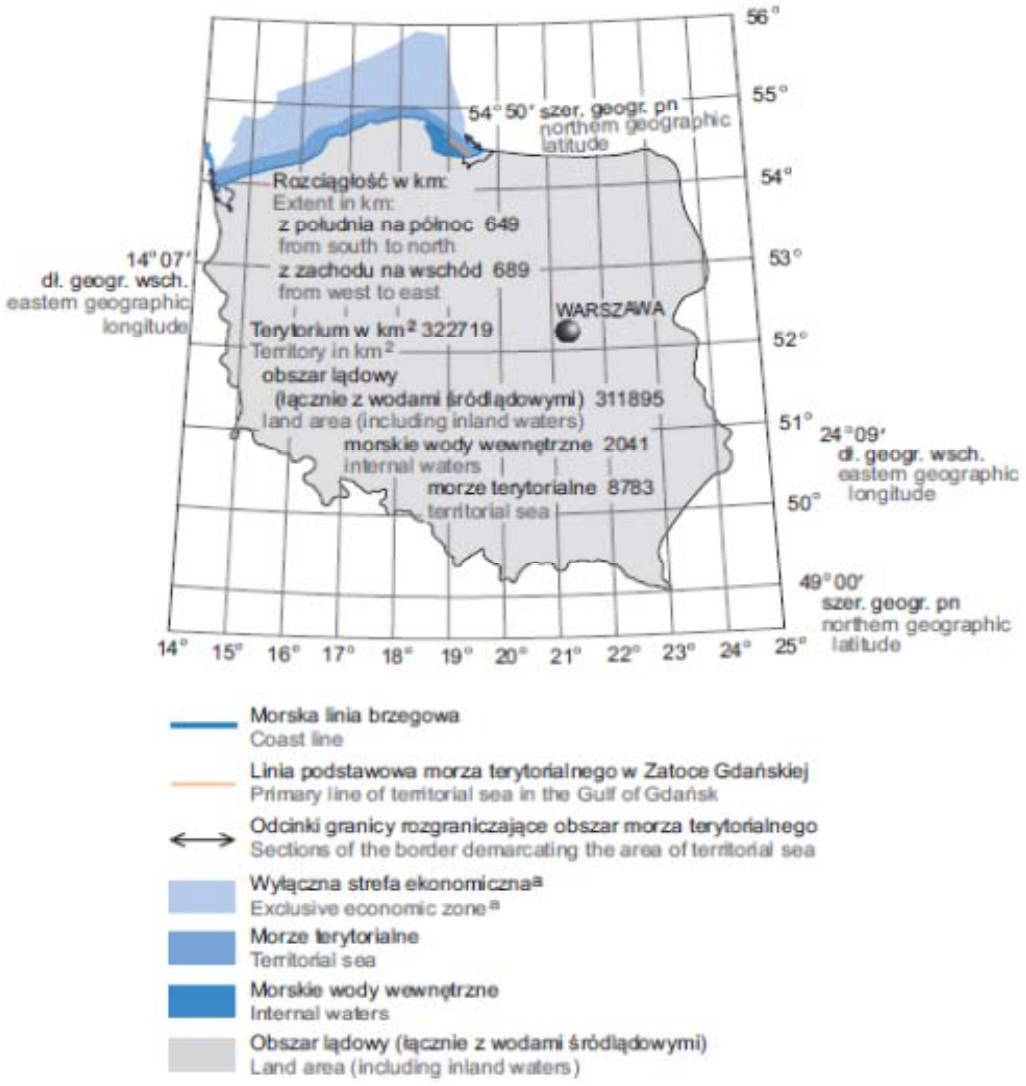
TAK, Peter J. P. (2008): *The Dutch criminal justice system.* Nijmegen: Wolff Legal Publishers.

POLISH CASE STUDY

CENTRAL ANTI-CORRUPTION BUREAU OF THE REPUBLIC OF POLAND

Country profile

Territorial division



a Granica wyłącznych stref ekonomicznych Rzeczypospolitej Polskiej oraz Królestwa Danii została uregulowana dwustronną umową, podpisaną 19 listopada 2018 r. w Brukseli.

a Border of exclusive economic zones of the Republic of Poland and the Kingdom of Denmark has been regulated by a bilateral agreement, signed on 19 November 2018 in Brussel.

Source: GUS, 2021: 17.

On 1st January 2021,[1] the total area of the country adopted according to the administrative division is 312,722 km² and covers 311,895 km² of land (including inland waters) and part of internal sea waters – 827 km², i.e. part of the Vistula Lagoon together with harbour waters, part of Neuwarper See and part of the Szczecin Lagoon together with the Świna River and the Dziwna River and the Kamieński Lagoon together with harbour waters, the Oder River between the Szczecin Lagoon and harbour waters, harbour waters of the Gulf of Gdańsk and harbours bordering territorial sea waters.

Political, administrative and legal system

Poland is a republic and a parliamentary democracy. The rules of the functioning of the state are determined by the Constitution of the Republic of Poland,[2] which is the highest legal act.

The political system in Poland is based on the tripartite division of power between the legislative, executive and judiciary powers.[3] Legislative power is exercised by a bicameral parliament (Sejm, lower house, with 460 members, and Senate, upper house, with 100 senators) elected by universal suffrage for a 4-year term. The Sejm passes laws and exercises control over state organs, including the Council of Ministers. The Supreme Chamber of Control is subordinated to the Sejm as the highest control body in the state. The main task of the Senate is to co-create Polish law with the Sejm.

The current composition of the Sejm and the Senate, elected for 2019–2023, is as follows: Law and Justice Parliamentary Club, Civic Coalition Parliamentary Club (Civic Platform, Modern, Polish Initiative, the Greens), Left-Wing Coalition Parliamentary Club (Together, Democratic Left Alliance, Robert Biedroń's Spring), Polish Coalition Parliamentary Club – Polish People's Party – Kukiz'15, Confederation Deputies' Group.

Executive power rests with the Council of Ministers and the President.[4] The country's domestic and foreign policy is conducted by the Council of Ministers, whose work is directed by the Prime Minister. The Council of Ministers coordinates and controls the work of the government administration. The Prime Minister supervises local governments and is the official head of government administration employees. The Prime Minister and, upon his motion, the ministers are appointed by the President of the Republic of Poland.

[1] https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5501/14/14/1/polska_w_liczbach_2021.pdf
[2] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No 78, item 483)
[3] Arts. 10(1) and (2) and art. 95(1) of the Polish Constitution
[4] Art. 10(2) of the Polish Constitution

The President of the Republic of Poland is elected for a 5-year term by universal suffrage and ensures the observance of the Constitution and is the supreme head of the Polish Armed Forces.

Judicial power is exercised by independent courts and tribunals, headed by the Supreme Court, the State Tribunal and the Constitutional Court. The Supreme Court supervises the activities of common and military courts and is the highest instance for appeals against the decisions of lower courts. The activities of public administration are controlled by the Supreme Administrative Court and other administrative courts. The Constitutional Tribunal adjudicates on the compliance of laws and international agreements with the Constitution, the aims and activities of political parties, and resolves disputes over competences between the central constitutional organs of the state. The State Tribunal decides on the constitutional liability of the highest state officials, such as the President of the Republic of Poland, the Prime Minister and the members of the Council of Ministers.

A three-tier territorial division of the state, consisting of communes, districts and provinces was introduced as of 1 January 1999.[5] A total of 308 districts, 65 cities with district rights, and 16 provinces were created. The division into 2,489 communes remained unchanged. On 31 December 2020, there were 16 provinces, 314 districts, 66 cities with district rights and 2,477 communes, including 302 municipalities (66 municipalities also have the status of a city with district rights), 1,533 rural communes and 642 urban-rural communes. The communes are further subdivided, into "sołectwos", for example. As of 31 December 2020, there were 40,821 sołectwos.

Poland in figures

Population (as at 31 December of each year mentioned)

Poland's population at the end of 2020 was 38,265,000, down nearly 118,000 from 2019. Changes in the population in recent years have been mainly affected by the birth rate, which has remained negative since 2013. A low level of births, a high number of deaths, a significantly lower number of marriages than in previous years and reduced immigration to Poland have deepened the unfavourable population situation in Poland that has been observed for several years. No significant changes ensuring a stable demographic development should be expected in the near future.

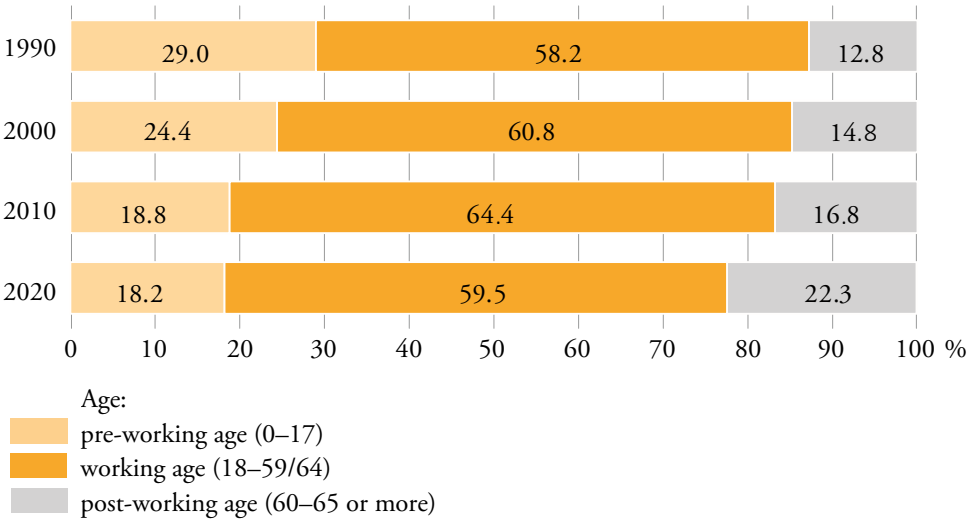
[5] Act of 24 July 1998 on the Introduction of the basic three-tier territorial division of the state Journal of Laws (No 96, item 603).

	1990	2000	2010	2020
Total in 1000s	38,073	38,254	38,530	38,265
of which women	19,521	19,717	19,877	19,763
Urban population in %	62	62	61	60
Women per 100 men	105	106	107	107
urban	108	110	111	111
rural	100	101	101	101
Median age	32.30	35.40	38.00	41.70
men	30.900	33.40	36.30	40.10
women	33.7	37.40	39.90	43.30

Source: POLAND STATISTICS, 2021: 2.

Population by economic age groups

The demographic ageing of society, expressed by a larger share of elderly people in the population structure, constitutes a significant challenge for the development of Poland. In future, it may result, among other things, in an increasing demand for health services for this group of residents. In addition, the decreasing size of the pre-working age (0–17), as well as the working age population (18–59/64) leads to turbulence in the labour market.



Source: POLAND STATISTICS, 2021: 2.

Economic activity of the population aged 15 and more (annual average)

The economically active segment of the population is understood as performing or being ready to perform work in return for gain. The concept of labour force participation was defined for the purpose of a representative Labour Force Survey (LFS) conducted quarterly by the Central Statistical Office in Poland according to the methodology of the International Labour Organization and Eurostat recommendations. It enables the analysis of changes in the level of economic activity of the Polish population divided into three discrete groups: the employed, the unemployed and the economically inactive.

	2010	2019	2020
	in 1000s		
Actively working	17,123	17,019	16,979
of which women	7,677	7,620	7,579
of which at working age[a)]	16,691	16,354	16,266
working	15,473	16,461	16,442
of which women	6,908	7,346	7,329
Unemployed [b)]	1,650	558	537
of which women	769	274	249
Professionally inactive	13,832	13,264	13,292
of which women	8,456	8,204	8,244

a) aged: men 18–64; women 18–59;

b) aged: 15–74.

Source: POLAND STATISTICS, 2021: 6.

Employment structure by education level and age in Q4 2020

The highest value within the economically active group in Q4 2020 was found among 35–44-year-olds, at 47.70%. This was followed by those aged 25–34, with a work rate of 46.10%. As for people with post-secondary and secondary education, the highest rate was achieved among 15–24-year-olds at 40.50%.

Table 4: Employment structure by education level and age in Q4 2020

age	total	Education				
		higher	post-secondary and secondary vocational	general secondary	vocational [a)]	lower secondary and primary [b)]
Total	**100.00**	**37.20**	**26.60**	**8.90**	**22.60**	**4.70**
aged 15–24	5.50	11.40	40.50	21.40	17.40	9.30
25–34	23.50	46.10	24.20	13.50	12.40	3.80
35–44	29.50	47.70	24.30	6.80	18.10	3.10
45–54	23.50	30.30	25.30	7.00	32.40	5.00
55–64	15.50	23.60	30.90	5.20	34.10	6.20
aged 65 or more	2.50	33.70	30.30	5.20	22.90	7.90

a–b) including: a) – industrial education; b) – incomplete primary education.

Source: GUS, 2021: 129.

Unemployed aged 15–74 (on average in each of the above years)

In Poland, in the legal sense, an unemployed person is a person who is not employed and does not perform other gainful work, who is able and ready to take up employment on a full-time basis, who does not attend school on a daily basis, and who is registered in the relevant District Employment Office, provided that the person:

- is over 18 years of age, with the exception of young graduates,
- is under 60 (women) or under 65 (men),
- has not acquired the right to an old-age or invalidity pension,
- does not own or possess an agricultural property with an area of more than 2 converted hectares,
- is not a person with a disability whose medical condition prevents him or her from engaging in even half-time employment,
- is not a person in pre-trial detention and is not serving a prison sentence,
- does not receive monthly income in an amount exceeding half of the minimum wage,
- does not receive a permanent allowance or social pension.

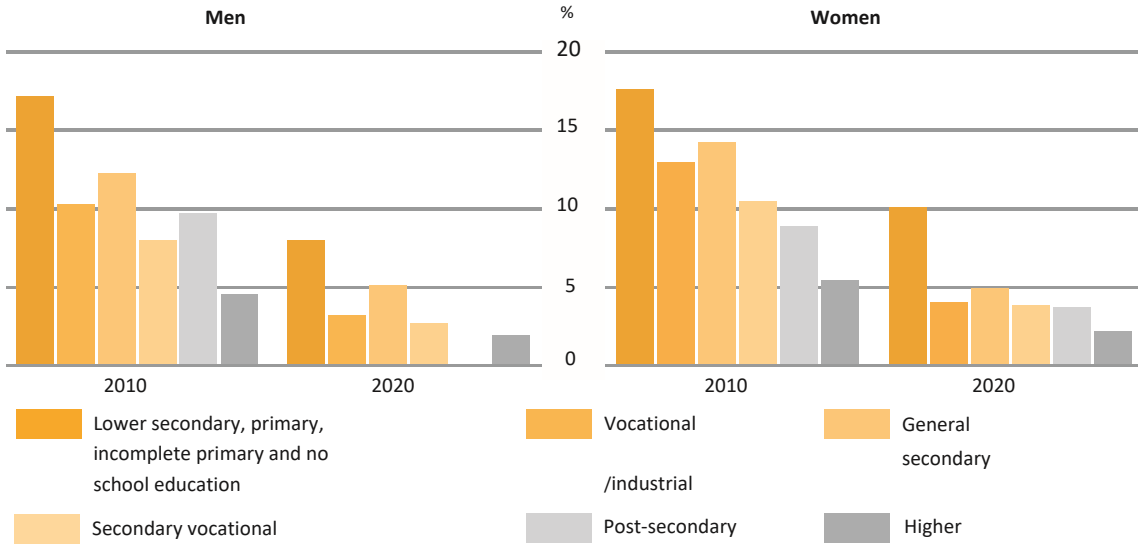
The following tables show the scale of unemployment by age, gender and education level.

Level of unemployment in Poland

	2010	2019	2020
Total in 1000s	1,650	558	537
total in % – unemployed:			
women	46.60	49.10	46.40
working age	99.30	98.90	98.70
not previously employed	17.60	18.10	16.40
have completed a fixed-term, casual job	25.30	27.80	26.40
long-term (13 months or more)	25.50	14.90	14.20
Unemployment rate in %	9.60	3.30	3.20
Average time of looking for a job in months	9.40	7.70	7.10

Source: POLAND STATISTICS, 2021: 7.

Unemployment rate by gender and education level (annual average)



Source: POLAND STATISTICS, 2021: 7.

Over the last 10 years, Poland's unemployment rate has fallen significantly, with a rate of 3.30% in 2019, lower than the European (EU28) average of 6.30%.

Remuneration

The above data shows that the average monthly gross salary in the national economy in Poland in 2020 was PLN 5,167.47. It grew by 5.00% compared to 2019.

	2010	2019	2020
Average total gross monthly remuneration in PLN	3,224.13	4,920.09	5,167.47
public sector	3,757.86	5,511.11	5,900.60
private sector	2,952.38	4,695.06	5,013.54
Average total gross monthly remuneration in PLN – previous year=100:			
nominal	103.90	107.20	105.00
real	101.40	104.80	101.70

Source: POLAND STATISTICS, 2021: 8.

Households with Internet access

The development of international statistics on the information society was initiated in 1997 by the OECD and involved the development of consistent definitions and methodologies that would ensure comparability of data across countries. Community surveys on ICT usage have been conducted in the EU according to a harmonised methodology since 2003, and in Poland since accession. The survey enables analysis of the uptake of broadband Internet access, which allows people to use advanced Internet services thanks to high data transfer speeds. The table below illustrates the growth in broadband access in households.

	2010	2019	2020
	as % of total households of the group		
Total	63.40	86.70	90.40
including broadband access	56.80	83.30	89.60
Including households:			
with children	82.90	99.30	99.50
without children	53.70	80.40	85.90

[a] The data refer to households with at least one person aged 16–74.

Source: POLAND STATISTICS, 2021: 17.

In 2020, 90.40% of households had Internet access at home. This percentage was 3.70% higher than the previous year. The level of this indicator varied by household type, degree of urbanisation, place of residence and region. Households with children were much more likely to have Internet access at home than those without.

Family benefits

As of 1 April 2016, the child benefit from the Family 500+ programme has been available to eligible persons under the Act of 11 February 2016 on state aid in raising children (Journal of Laws of 2019, item 2407, as amended); as of 1 July 2019, child benefit is due for each child until the age of 18, regardless of the income earned by the family; also as of this date, information on the number of families collecting it is not recorded. The child benefit is financed from the state budget and is not subject to personal income tax.

Details	2010	2015	2019	2020
Average monthly benefit in PLN				
family allowance	86.00	101.00	113.00	114.00
Family allowance supplement due to:				
childbirth	1,000.00	1,000.00	785.00	786.00
childcare during parental leave	385.00	388.00	375.00	377.00
single parenthood	175.00	178.00	189.00	189.00
education and rehabilitation of a child with disabilities	77.00	80.00	104.00	104.00
the beginning of the school year	100.00	100.00	57.00	60.00
a child taking up education in a school outside the place of residence	53.00	56.00	69.00	69.00
raising a child in a large family	80.00	82.00	92.00	92.00
one-off childbirth grant	1,000.00	1,000.00	1,000.00	998.00
parental benefit	–	–	909.00	909.00
Care benefits:	153.00	153.00	189.00	216.00
attendance allowance				
special care allowance	–	508.00	612.00	615.00
carer's allowance	513.00	1,190.00	1,571.00	1,807.00

Source: GUS, 2021: 159.

Birth rate

	1990	2000	2010	2020
Per 1,000 population				
live births	14.30	9.90	10.70	9.30
deaths	10.20	9.60	9.80	12.40
birth rate	4.10	0.30	0.90	-3.20
marriages contracted	6.70	5.05	5.90	3.80
divorces	1.10	1.10	1.60	1.30
Separations in 1000s	–	1.30	2.80	0.70
Infant deaths per 1,000 live births	19.30	8.10	5.00	3.60

Source: POLAND STATISTICS, 2021: 3.

Average life expectancy in Poland between 2010 and 2020

Between 2009 and 2012, there was a real increase in population due to a positive birth rate and a decrease in the negative balance of migration. The year 2013 was the first year with no population growth. The observed demographic changes may indicate that a way out of the deep demographic depression that Poland has been in for a long time is unlikely to happen. The deep demographic decline of the 1990s and the persistent emigration (especially of young people) since 2004 will cause increasing difficulties in demographic development, the labour market and the social security system.

Year	Men						Women					
	By age											
	0	15	30	45	60	75	0	15	30	45	60	75
2010	72.1	57.6	43.3	29.7	18.3	9.5	80.6	66.1	51.3	36.8	23.5	11.9
2011	72.4	58.0	43.7	30.0	18.5	9.7	80.9	66.4	51.6	37.1	23.8	12.1
2012	72.7	58.2	43.9	30.2	18.6	9.7	81.0	66.5	51.7	37.1	23.8	12.2
2013	73.1	58.6	44.3	30.5	18.7	8.8	81.1	66.6	51.8	37.3	23.9	12.3
2014	73.8	59.2	44.9	31.0	19.2	10.1	81.6	67.1	52.3	37.7	24.3	12.6
2015	73.6	59.0	44.7	30.8	19.0	10.0	81.6	67.0	52.2	37.6	24.1	12.5
2016	73.9	59.4	45.0	31.2	19.3	10.3	81.9	67.3	52.5	38.0	24.5	12.8
2017	74.0	59.4	45.0	31.2	19.2	10.2	81.8	67.2	52.4	37.9	24.3	12.8
2018	73.8	59.3	44.9	31.1	19.1	10.2	81.7	67.1	52.3	37.7	24.2	12.7
2019	74.1	59.5	45.1	31.3	19.3	10.2	81.8	67.2	52.4	37.8	24.2	12.6
2020	72.6	58.0	43.6	29.9	17.9	9.2	80.7	66.1	51.3	36.8	23.2	11.9

Source: POLAND STATISTICS, 2020: 10.

Election of the President of the Republic of Poland in 2020

The turnout in the last presidential election in Poland was 68.18% and was the highest in the 21st century. The highest ever turnout in independent Poland was recorded in the second round of the presidential election in 1995 – 68.23%.

Details	First round – 28 June 2020		Second round – 12 July 2020	
	in 1000s	% of those entitled	in 1000s	% of those entitled
Entitlement to vote	30,204.70	100.00	30,268.50	100.00
Votes cast: in 1000s	19,483.30	64.51	20,636.60	68.18
including valid votes:	19,425.50	64.31	20,458.90	67.59

Source: GUS, 2021: 53.

Elections to the Sejm and Senate of the Republic of Poland

The last parliamentary elections in Poland were held in 2019. The turnout was 61.74% and it was the best parliamentary election result since the memorable elections in Poland in June 1989. In terms of the number of votes, the 2019 election set a record at 18,678,457, which was one and a half million more than in the first round of the 1989 election. As many as 207,747 voters cast erroneous ballots, representing 1.11% of all votes cast, which is the lowest result ever.

Details	Sejm	Senate	Sejm	Senate
	25.10.2015		13.10.2019	
Entitlement to vote in 1000s	30,629.20		30,253.60	
Votes cast: in 1000s	15,595.30	15,593.00	18,678.50	18,677.90
% of those entitled	50.92	50.91	61.74	61.74
Including valid votes: in 1000s	15,200.70	14,988.10	18,470.70	18,201.30
% of those entitled	49.63	48.93	61.05	60.16

Source: GUS, 2021: 53.

Environmental pollution

In 2019 (as of 31 December), wastewater treatment plants served 74.50% of the country's population. The amount of waste generated in 2019, compared to 2018, decreased by 1,205,000 tonnes. Nevertheless, the amount of municipal waste per 1 inhabitant is cyclically increasing.

	2010	2018	2019
Waste generated during the year (excluding municipal waste) in 1000 tonnes	113,479	115,339	114,134
Total municipal waste generated during the year in 1000 tonnes	12,038	12,485	12,753
per capita in kg	315	325	332
Industrial and municipal wastewater requiring treatment in hm3	2,309	2,192	2,176
of which treated	2,134	2,085	2,071
Population using sewage treatment plants as % of total population	64.70	74.00	74.50

Source: POLAND STATISTICS, 2021: 19.

Total emissions of main air pollutants

The level (in absolute terms) of total greenhouse gas emissions in Poland, including carbon dioxide, is one of the highest among the European Union countries. Annual per capita greenhouse gas emissions (expressed as carbon dioxide equivalent) in 2019 were 10.2 tonnes for Poland and 7.9 tonnes for the European Union.

	2010	2018	2019
	in 1000 tonnes		
Greenhouse gases [a)]	413,502	411,852	390,745
Sulphur dioxide	817	495	427
Nitrogen oxides [b)]	877	725	682
Carbon monoxide	2,980	2,318	2,112

[a, b] Expressed as: [a)] carbon dioxide equivalent; [b)] nitrogen dioxide.

Source: POLAND STATISTICS, 2021: 20.

Gross domestic product

Gross domestic product is the main category in the national account system and illustrates the final result of the activities of all entities within the national economy. The essential component of gross domestic product is the sum of gross value added of all domestic institutional sectors or all sections of the national economy. Gross value added is the difference between output and intermediate consumption and is calculated at basic prices. According to the estimate, the gross domestic product was 2.80% lower compared to 2019.

	2010	2019	2020
Gross domestic product dynamics (constant prices): previous year=100	103.70	104.70	97.30
2010=100	100.0	138.10	134.40
Gross value-added dynamics (constant prices): previous year=100	103.80	104.60	97.20
2010=100	100.0	137.7	133.8

Source: POLAND STATISTICS, 2021: 31.

Housing stock [a] as at 31 December of a given year

The information on housing stock is prepared by the Central Statistical Office using the balance method, based on the results of the 2011 National Population and Housing Census. The data presented concerns both inhabited and uninhabited housing stock.

Details	2010	2015	2019	2020		
	total				urban	rural
Housing units in 1000s	13,470	14,119	14,813	15,015	10,154	4,862
Rooms in housing units in 1000s	51,279	53,961	56,612	57,358	26,053	21,305
Usable floor area of housing units in 1000 m²	973,942	1,039,071	1,101,398	1,118,813	658,039	460,774
Average number of rooms in housing units	3.81	3.82	3.82	3.82	3.55	4.38
Usable floor area in m² per housing unit	72.30	73.60	74.40	74.50	64.80	94.80
per person [b]	25.30	27.00	28.70	29.20	28.70	30.00
Number of persons [b]:						
per 1 housing unit	2.86	2.72	2.59	2.55	2.26	3.16
per 1 room	0.75	0.71	0.68	0.67	0.64	0.72

[a] Based on balances. [b] The total population as of December 31 was used for the calculations.

Source: GUS, 2021: 181.

Life satisfaction in 2020

It is believed that Poles are a nation of ever complaining pessimists. However, the results of surveys conducted show that Poles are increasingly satisfied with their quality of life. The main sources of life satisfaction are family, social relationships, good health and a, career and place of residence. Poles are least satisfied with their financial situation and income level.

Are you generally satisfied:	*Very satisfied*	*Rather satisfied*	*Moderately satisfied*	*Rather dissatisfied*	*Very dissatis-fied*	*Difficult to say / Don't want to answer*	*Not app-licable*
as a percentage:							
with your children	60	14	2	1	0	3	20
with your marriage/partner-ship	42	24	5	1	2	3	23
with your closest friends	39	46	12	1	0	1	1
with your place of residence	42	43	11	4	0	0	0
with your health	22	39	22	12	5	0	0
with your education and qualifications	25	39	23	9	2	2	0
with your career	18	38	15	5	1	5	18
with your material conditions of existence – housing, equipment, etc.	16	49	28	4	2	1	0
with your future prospects	10	38	28	10	2	12	0
with your income and financial situation	5	31	41	13	8	2	0

Source: CBOS: 2021: 4.

Homicides identified by the Police and public prosecutor's offices [a)] in closed pre-trial proceedings)

The number of homicides in 2020 increased in comparison to previous years. However, the number of crimes recorded by the Police and public prosecutor's offices decreased.

Types of offences	2010	2015	2019	2020	
				total	of which Police
Homicide – Art. 148 Penal Code	680	528	557	666	641

[a] Data on crimes found by a public prosecutor's office refer to prosecutors' own investigations and those entrusted by a prosecutor to authorised bodies other than the Police.

Source: GUS, 2021: 81.

Offences identified by the Police and public prosecutor's offices [a)] in closed pre-trial proceedings)

Types of offences	2010	2015	2019	2020	
				total	of which Police
Total, of which:	1,138,523	809,929	806,258	774,974	765,409
Homicide – Art. 148 Penal Code	680	528	557	666	641
Bodily injury – Art. 156 and 157 Penal Code	15,695	10,430	10,346	8,818	8,694
Participation in a fight or battery – Art. 158 and 159 Penal Code	11,883	4,766	3,566	2,826	2,801
Offences under the Act on Counteracting Drug Addiction [b)]	72,375	46,819	59,5659	59,771	59,442
Operating a motor vehicle while under the influence of alcohol or an intoxicant – Art. 178a Penal Code	142,144	64,487	56,336	53,047	52,907
Rape – Art. 197 Penal Code	1,567	1,226	1,406	1,100	1,034
Sexual intercourse with a minor below 15 years of age – Art. 200(1) Penal Code	1,532	1,067	1,191	1,034	972
Corruption offences – Art.s 228–231, 250a, 296a and 296b Penal Code	12,487	10,847	9,367	10,438	8,038
Property theft – Art. 275(1), 278 and 279 Penal Code [c)]	220,455	145,666	103,975	98,960	98,886
including car theft	16,539	12,040	8,672	8,788	8,784
Burglary – Art. 279 Penal Code [d)]	140,085	91,418	69,272	72,524	72,502
Robbery – Art. 280 Penal Code	18,145	6,082	3,453	3,091	3,051
Theft with assault – Art. 281 Penal Code	1,214	1,146	1,080	1,057	1,044
Criminal coercion – Art. 282 Penal Code	7,859	670	432	376	370
Fraud – Art. 286 and 287 Penal Code	86,608	117,763	133,621	133,302	132,712

[a] Data on crimes found by a public prosecutor's office refer to prosecutors' own investigations and those entrusted by a prosecutor to authorised bodies other than the Police.
[b] Refers to the Act of 29 July 2005 on Counteracting Drug Addiction (i.e. Journal of Laws of 2020, item 2050).
[c] Car theft by burglary only
[d] Excluding car theft by burglary

Source: GUS, 2021: 81–82.

Corruption profile in law

In Poland, the main legal act that defines corruption offences is the Act of 6 June 1997 – the Penal Code.[6] Chapter XIX of the Act distinguishes five basic forms of corruption, i.e. bribery by public officials, active bribery, paid protection, influence peddling and misuse of powers, and failing to perform duties in order to gain a financial or personal benefit [arts. 228–230a and 231(2) of the Penal Code]. Corruption offences also include electoral bribery under art. 250a of the Penal Code and making false statements to gain a material or personal advantage as defined in art. 271(3) of the Penal Code. Chapter XXXVI of the Penal Code defines corruption offences against business transactions [arts. 296(2); 296a, 302(2) and (3), and 305(1) of the Penal Code].

Bribery by public officials (passive bribery, aArt. 228 of the Penal Code) consists of accepting a financial or personal benefit or a promise thereof in connection with the performance of a public function. This provision protects the proper functioning of public institutions and the disinterestedness of persons performing public functions, as well as the public's trust in the reliability of the institutions' activities. (Wróbel – Zoll, 2017; art. 228.) Persons performing public functions include public officials, members of local government bodies, persons employed in an organisational unit that controls public funds (with the exception of persons performing service activities, i.e., activities that do not constitute substantive performance of the powers of a given body, but only assist in its work) and other persons whose powers or duties with respect to public activities are defined or recognised by statute or by an international agreement binding on the Republic of Poland ('foreign public officials'). This provision also covers persons performing a public function in a foreign state or an international organisation. The term 'financial benefit' is understood as any financial gain consisting of the increase of assets or decrease of liabilities or avoidance of imminent financial loss. (Wróbel – Zoll, 2017; art. 228.) A personal benefit, on the other hand, is any good of a non-pecuniary nature, not convertible into money, but convenient to the recipient or satisfying some need that he or she may have. (Góral, 2000: 306.) A benefit may be taken for oneself or for another person, either before or after the official act. The offence in question, like other corruption offences, can only be committed with intentional fault. The definition of the basic type of passive bribery adopted by the Polish legislator, according to the broad model of responsibility for corruption offences, is much broader than the scope of responsibility in international standards and the penal codes of many European states, where, in order to satisfy the elements the offence, a connection with a specific official act is required. (Wróbel – Zoll, 2017; art. 228.) Conduct satisfying the elements of the basic passive bribery offence is punishable by imprisonment for 6 months to 8 years. If the perpetrator's conduct for which he or she accepted a financial or personal benefit or a promise thereof in connection with the performance of a public function constitutes a breach of law, he or she is punishable by imprisonment for a term of 1 to 10 years. The same penalty shall be imposed on a person who, in

[6] Journal of Laws of 2020, items 1444 and 1517; and of 2021, item 1023.

connection with the performance of a public function, makes the performance of the official act conditional upon receiving a financial or personal benefit or a promise thereof, or demands such a benefit. The harshest punishment is envisaged for accepting a financial benefit of significant value (exceeding PLN 200,000 at the time of committing a prohibited act).

The offender may be sentenced to 2 to 12 years of imprisonment. The above cases constitute the basic passive bribery offence.

In addition to passive bribery, the Penal Code also criminalises active bribery (Art. 229 of the Penal Code), which consists of giving or promising to give a financial or personal benefit to a person performing a public function in connection with the performance of that function.

In this case, however, anyone may become the offender (a general offence) by exerting influence on a person performing a public function. The benefit may be given in any form.[7] The promise to give a benefit can be expressed in any way, on condition that it is express. It can be any conduct whereby a person in public office can expect a benefit to be provided in the future.[8] The granting of a benefit or a promise thereof need not be connected with a specific act by a person performing a public function, but must be connected with the performed function. If the benefit granted is not accepted, the perpetrator is liable for attempt. The legislator has provided for the same sanction for active bribery as for passive bribery.

The Penal Code also criminalises passive and active paid protection (Arts. 230 and 230a of the Penal Code). The object of regulatory protection is the authority of state institutions, local governments, international organisations or any foreign organisational unit that controls public funds. Passive paid protection is understood as engaging in intermediation in settling a matter in exchange for a financial or personal benefit or a promise thereof by invoking influence in a state or local government institution, international or domestic organisation or in a foreign organisational unit that controls public funds, or by inducing another person to believe in or reassuring them of the existence of such influence. However, it is not necessary to actually have influence in the institutions listed in the provision in order to fulfil the elements of this offence. (Wróbel – Zoll, 2017; art. 230.) Active paid protection is granting or promising to grant benefits in exchange for intermediation in settling a matter with the above entities. This offence therefore consists of unlawfully influencing a decision, action or omission of a person holding a public function. The offences in question are punishable in the same way as basic passive and active bribery offences.

[7] Judgement of the District Court for Warsaw-Mokotów in Warsaw of 18/07/2014, Ref. VIII K 1108/12.
[8] Judgement of the Supreme Court of 05/11/1997, Ref. V KKN 105/97.

The last of the corruption offences against the activities of state and local government institutions is misuse of powers or failing to perform duties in order to obtain a financial or personal benefit [art. 231(2) of the Penal Code]. The offence in question can only be committed by a public official, which includes, but is not limited to, the President of the Republic of Poland, MPs, senators, councillors, members of the European Parliament, judges, prosecutors, notaries, and trustees. In a particular case, the circle of entities who may commit this offence will be determined by the personal scope specified in a standard ordering certain behaviour or prohibiting certain actions. The obligation may originate from provisions that apply to all officials or to a specific category of officials. The obligation may also be of an individual nature and will then originate from the provisions of regulations, instructions or an order to perform specific activities issued by an authorised person. Failure to perform a duty includes both failure to undertake a duty incumbent on a public official and improper performance of that duty. In the case of misuse of powers, it must be demonstrated that the conduct undertaken by the offender was not within the scope of his or her authority and an indication of a substantive or formal connection to that authority. (WRÓBEL – ZOLL, 2017; art. 231.) The offence may also consist of acting within the scope of competence but not in accordance with the legal conditions of the action taken by a public official.[9] By misusing his or her powers or failing to fulfil his or her duties, the perpetrator acts to the detriment of the public or private interest. Detriment within the meaning of the discussed provision includes not only material damage, but also non-material damage, e.g. moral damage.[10] This offence is punishable by imprisonment for one to 10 years.

If the elements of the act in question and the offence of passive bribery are met at the same time, the perpetrator will only be liable for the latter.

The purpose of art. 250a of the Penal Code is to ensure the proper exercise of electoral rights. A person who accepts or demands a personal or financial benefit in exchange for voting in a specific manner, as well as a person who gives such a benefit to a person entitled to vote in order to induce them to vote in a specific manner or for voting in a specific manner shall be subject to imprisonment for 3 months to 5 years. The specified conduct includes not only voting for a specific person (in an election) or for a specific answer (in a referendum), but also casting an invalid vote. (STEFAŃSKI, 2004: 71.) However, a person who accepts or demands benefits for refraining from voting is not liable for the offence of electoral corruption. It is irrelevant whether the bribed person fulfilled his or her obligation, i.e. how he or she actually voted. (WRÓBEL – ZOLL, 2017; art. 250a) If the perpetrator notifies the prosecuting authority of the offence and the circumstances in which it was committed before the authority becomes aware of it *('active repentance')*, this results in a mandatory mitigation of punishment and maybe even a waiver of the punishment by the court. The above applies only to the basic offence or an offence of lesser significance.

[9] Judgement of the Supreme Court of 28/11/2006, Ref. III KK 152/06.
[10] Resolution of the Supreme Court of 23/06/1992, Ref. I KZP 21/92.

As defined in art. 271(3) of the Penal Code, corruption offences also include making false statements about a legally relevant circumstance in a document by a public official or another person authorised to issue the document in order to gain a financial or personal benefit. By making false statements, the perpetrator creates an authentic document with untrue content in the scope of a legally relevant circumstance. This may consist of confirming a circumstance which did not take place or a distortion or concealment of a circumstance.[11] Another person authorised to issue a document should be understood as a natural person who, on the basis of a strictly defined, specific delegation of a legal nature existing at the moment of committing the offence, is authorised to issue specific documents in the name and on behalf of the principal.[12] This offence is punishable by imprisonment for 6 months to 8 years.

The offence of corruption defined in art. 296(2) of the Penal Code *(abuse of trust in business dealings for financial gain)* may be committed by a person who is obliged to deal with the property affairs or business activities of a natural or legal person or an organisational unit without legal personality under a provision of the law, a decision of a competent authority or a contract. It consists of an abuse of power or a breach of duty by such a person in order to achieve a financial benefit, resulting in causing considerable financial damage to the entity whose property affairs or business operations the in which the person is involved, or in causing a direct threat of such damage. It may also be committed by a public official who, by virtue of a statute or a decision of a relevant authority, deals with the property or business affairs of state or local government institutions within their economic activity. This offence is punishable by imprisonment for 6 months to 8 years. An offender who has voluntarily repaired the damage in full prior to the initiation of criminal proceedings is not liable to punishment. Repairing the damage in full after the initiation of the proceedings allows for extraordinary mitigation or even a waiver of punishment. When the damage is substantially repaired by the offender, the court may apply extraordinary mitigation of punishment.

Art. 296a of the Penal Code *(economic bribery)* provides protection for the proper functioning of entities conducting business. Criminal activity consists of demanding or accepting a financial or personal benefit or a promise thereof. In this case, the benefit is related to engaging in conduct likely to cause damage to a business entity by an act of unfair competition or an impermissible preferential action in favour of the purchaser or recipient of goods, services or benefits. The conduct must be the result of the offender's misuse of power or failure to perform a duty. The offence may be committed only by a person holding a managerial position in that entity or being in a relationship of employment, contract of mandate or specific task contract. This offence is punishable by imprisonment for 3 months to 5 years. A person who gives or promises to give a

[11] Decision of the Supreme Court of 08/11/2002, II KKN 139/01.
[12] Judgement of the Supreme Court of 23/02/2021, Ref. IV KK 497/20.

benefit shall be liable to the same penalty. In the case of inflicting significant property damage, the perpetrator is liable to imprisonment for 6 months to 8 years.

The offence of bribery in enforcement proceedings [art. 302 (2)–(3) of the Penal Code] consists of giving or promising to give a financial benefit to a creditor for acting to the detriment of other creditors in connection with bankruptcy proceedings or proceedings aimed at preventing bankruptcy. The above act is punishable by imprisonment for up to 3 years. The same penalty is imposed on a creditor who, in connection with the conduct described above, accepts or demands a benefit to the detriment of other creditors. The penalty range enables the court to waive the penalty if a penal measure, forfeiture or a compensation measure is ordered at the same time and the social harm of the act is not significant, and the purpose of punishment is thus fulfilled (art. 59 of the Penal Code).

The last of the corruption offences specified in the Penal Code is interference in a public tender to gain a financial benefit [art. 305(1) of the Penal Code]. In the case of this offence, the perpetrator prevents or obstructs a public tender or enters into an agreement with another person to the detriment of the owner of property or a person or institution for whose benefit the tender is held to gain a financial benefit. This offence is of a general nature and is punishable by imprisonment for up to 3 years. The penalty range enables the court to waive the penalty if the social harm of the act is not significant and a penal measure, forfeiture or a compensation measure is ordered at the same time, and the purpose of punishment is thus fulfilled (art. 59 of the Penal Code). If the perpetrator voluntarily repaired the damage in full, the court may apply extraordinary mitigation of punishment or even waive it. If the damage is substantially repaired by the offender, the court may apply extraordinary mitigation of punishment.

Corruption offences are also defined in the Act of 25 June 2010 on sport.[13] The art. of 46 of the above-mentioned Act penalises the acceptance of a financial or personal benefit or a promise thereof in connection with sports competitions organised by the Polish Sports Association or other authorised entities in exchange for unfair behaviour that may affect the outcome or course of a competition. The same punishment, i.e. imprisonment for 6 months to 8 years, is imposed on a person who, in the above-mentioned cases, gives or promises to give a financial or personal benefit. On the other hand, higher sanctions are envisaged if the benefit is of considerable value; in such a case, the perpetrator faces imprisonment for 1 to 10 years. Art. 47 of the Act, by contrast, refers to a situation in which a person, having knowledge of the commission of a prohibited act under art. 46, takes part in parimutuel betting *(betting for winnings in cash or in kind)* on the sports competition to which the knowledge relates, or discloses that knowledge in order for another person to take part in such betting. This offence is punishable by imprisonment for 3 months to 5 years. In the event of a conviction for the above offence, it may be justified to

[13] Journal of Laws of 2020, item 1133,

impose a punitive measure in the form of a ban on entering gambling establishments and participating in gambling in addition to the punishment. Moreover, art. 48 of the Act criminalises the offence of (passive and active) paid patronage in sports. It is punishable to act as an intermediary in determining a specific result or the course of a sports competition in exchange for a financial or personal benefit or a promise thereof by invoking influence in the Polish Sports Association or in an entity acting on the basis of a contract concluded with that Association or in an entity acting under its authority, or by inducing or supporting the belief of another person in such influence. It is also prohibited under penalty of law to give or promise to give a financial or personal benefit in exchange for intermediation in determining a particular result or the course of a sports competition, which consists of unlawfully influencing the conduct of a person holding a function in the Polish Sports Association or an entity associated with it in connection with the performance of such function. The penalties for the above crimes are the same as the penalties for passive and active paid patronage specified in the Penal Code. These provisions constitute *lex specialis* in relation to arts. 230(1) and 230a(1) of the Penal Code. There is no aggravated form, neither in the case of paid patronage as defined in the Penal Code nor in the Sports Act.

Art. 54 of the Act of 12 May 2011 on the reimbursement of medicines, foodstuffs for special nutritional uses and medical devices[14] *(Reimbursement Act)* defines the offence of corruption relating to the pharmaceutical sector. This provision protects the correct marketing of reimbursed products, which is essential for the pharmaceutical market as a whole, the stability of the reimbursement system and the real availability of reimbursed benefits. (ADAMSKI et al. 2014: art. 54.) This offence may be committed by a person dealing with manufacturing or trading in reimbursed products, a person authorised to issue prescriptions or orders for performance of guaranteed benefits in the scope of provision of medical devices, a person supplying such products to a provider and a provider or a person representing a provider. The former is subject to criminal liability for accepting or requesting a financial or personal benefit or a promise thereof in exchange for conduct affecting the marketing of publicly reimbursed drugs, foodstuffs for special nutritional uses or medical devices, or marketing or refraining from marketing a specific drug, foodstuff for special nutritional uses or medical devices subject to such reimbursement. Demanding or accepting a financial or personal benefit or a promise thereof by an authorised entity in exchange for issuing a prescription or order or refraining from issuing it is also criminalised. A supplier to a provider, a provider, and a person representing a provider, on the other hand, may be criminally liable for requesting or accepting a financial or personal benefit or a promise thereof in exchange for the purchase of the products in question. The perpetrator may also be a recipient who gives or promises to give a benefit in the cases defined above. This offence is punishable by imprisonment for 6 months to 8 years.

[14] Journal of Laws of 2021, items 523, 1292 and 1559.

The offence of corruption is also defined in art. 497(3) of the Act of 5 January 2011 – Election Code.[15] This provision criminalises electoral bribery in the course of collecting signatures of support and providing such support. A person who gives or accepts a financial or personal benefit in exchange for collecting or providing a signature for the submission of a list of candidates or a candidate is subject to punishment. However, making a promise to give such a benefit is not punishable. The offence is punishable by a fine from PLN 10,000 to PLN 50,000. The penalty range enables a waiver of the penalty and ordering a penal measure, forfeiture or a compensation measure if the social harm of the act is not significant and the purpose of punishment is thus fulfilled.

The legislator has provided for lower penalties for offences of lesser significance with regard to *passive and active bribery* (arts. 228 and 229 of the Penal Code), *passive and active paid protection* (arts. 230 and 230a of the Penal Code), *electoral bribery* (art. 250a of the Penal Code), *abuse of trust* (art. 296a of the Penal Code), *corruption in sports* (art. 46 of the Sports Act) *and paid patronage in sports* (art. 48 of the Sports Act), as well as the offence of corruption under the Reimbursement Act. The perpetrator is punishable by a fine, restriction of liberty or imprisonment for up to 2 years (except for the latter offence, where the penalty of imprisonment may not exceed 3 years). Circumstances affecting the assessment of whether an offence is of lesser significance include: the social impact of the corrupt act, the value of the financial benefit, the nature of the personal benefit, and the circumstances of accepting the benefit. (WRÓBEL – ZOLL, 2017; art. 228.) In the case of all of the above-mentioned offences, with the exception of the offence under art. 54 of the Reimbursement Act, a sentence of imprisonment is pronounced only when another penalty or penal measure cannot fulfil the purposes of punishment (art. 58 of the Penal Code). The penalty range provided for in all of the above-mentioned provisions enables the court to waive the penalty if the social harm of the act is not significant and a penal measure, forfeiture or a compensation measure is ordered at the same time and the purpose of punishment is thus fulfilled (art. 59 of the Penal Code).

In relation to persons granting or promising to grant a financial or personal benefit in the case of the offences specified in arts. 229(1)–(5) of the Penal Code, arts. 230a(1) and (2) of the Penal Code, arts. 296a(2) or (3) in conjunction with (2) and art. 46(2), arts. 46(3) or (4) in conjunction with (2), as well as in arts. 48(2) or (3) in conjunction with (2), the legislator has also provided a non-criminality clause, which is aimed at breaking up criminal solidarity between the person who gave the benefit or made a promise thereof and the person who accepted it. The following are prerequisites for the perpetrator to be eligible for the privilege of non-punishment: acceptance of a benefit or a promise thereof by a person performing a public function, notification by the perpetrator to a law enforcement agency before that agency learned of the fact of the crime from another source, and disclosure of all relevant circumstances of the case.

[15] Journal of Laws of 2020, item 1319,

Pursuant to art. 60(3) of the Penal Code, it is possible to apply an extraordinary mitigation of punishment or even a conditional suspension of its execution to a perpetrator who cooperates with other persons in committing a crime if he or she discloses information on those participating in the commission of a crime and provides important details of its commission to a law enforcement agency. In the above-mentioned case, the court may, pursuant to Art. 61 of the Penal Code, waive the penalty, particularly if the role of the perpetrator in the commission of the offence was subordinate, and the information provided contributed to preventing the commission of another offence. When waiving the penalty, the court may also waive any penal measures or forfeitures, even if their imposition was mandatory. Art. 60(4) of the Penal Code enables the court, upon a request from the prosecutor, to apply extraordinary mitigation of punishment or even conditional suspension of its execution in relation to a perpetrator of a crime who, irrespective of the explanations given in his or her case, disclosed and presented relevant circumstances which were previously unknown to the prosecuting authority. The above refers to offences punishable by more than 5 years of imprisonment.

Pursuant to art. 37b of the Penal Code, in the case of all corruption offences punishable by imprisonment, regardless of the lower limit of the statutory penalty range for a given offence, the court may apply the institution of penalty sequence, i.e. it may impose a penalty of restriction of liberty (from 1 month to 2 years) and imprisonment for up to 6 months at the same time if the upper limit of the statutory penalty range is at least 10 years, or for up to 3 months for the remaining offences punishable by imprisonment. If the offence is only punishable by imprisonment for up to 8 years and the imprisonment imposed would not be more severe than one year, the court may instead impose the penalty of restriction of liberty for a term not less than 3 months or a fine not less than 100 daily rates, if it also imposes a penalty measure, a compensation measure or forfeiture (art. 37a of the Penal Code).

If a financial or personal benefit constituting an object is accepted, the court is obliged to rule on its forfeiture pursuant to art. 44(1) of the Penal Code. If the financial benefit received does not have the characteristic of an object (e.g. it is the difference between the list price of a car and the price for which it was sold to a bribed person, which constitutes a concealed bribe), the court shall rule on the forfeiture of this benefit or its equivalent. With respect to perpetrators of corruption offences, it is sometimes justified: to impose a punitive measure in the form of a prohibition to hold a certain position, to practice a certain profession or to conduct business; to make the judgement public; or to order a pecuniary payment. In the case of a perpetrator who committed the offence in order to achieve a financial benefit or if he or she achieved such a benefit, the court may impose a fine in addition to imprisonment [art. 33(2) of the Penal Code].

For all of the discussed corruption offences, with the exception of those specified in arts. 231(2), 296(2) and 305(1) of the Penal Code, as well as art. 497(3) of the Elections Code and art. 54 of the Reimbursement Act, according to the provisions of the Act on liability of collective

entities for acts prohibited under penalty of 28 October 2002,[16] a collective entity is also liable for an act that constitutes the conduct of an individual acting in its interest if it benefited or could have benefited that entity. Pursuant to art. 8 of the aforementioned act, the court orders a fine against a collective entity and forfeiture of objects originating, even indirectly, from a prohibited act or which were used or intended to be used to commit such an act, a financial benefit originating, even indirectly, from a prohibited act, or the equivalent of objects or financial benefits originating, even indirectly, from a prohibited act. The court may also impose, inter alia: a ban on promoting or advertising the business conducted, products manufactured or sold, services rendered or benefits provided; a ban on receiving grants, subsidies or other forms of financial support from public funds; a ban on receiving assistance from international organisations of which the Republic of Poland is a member; or a ban on competing for public contracts, and make the judgment public.

Anti-corruption provisions are found not only in the aforementioned Acts, but also in many other legal acts, including the Act of 21 August 1997 on the restriction of economic activity by persons holding public office[17] (the Anti-Corruption Act), which introduced restrictions related to professional activity during and after holding public functions in order to avoid conflicts of interest that could arise in relation to simultaneous performance of public functions and employment in the private sector, the obligation to submit asset declarations by the entities listed in the act, as well as a system of sanctions for violation of these restrictions.

The Central Anti-Corruption Bureau (CBA) is a special service established to fight corruption in public and economic life, especially in state and local government institutions, as well as to combat activities detrimental to the economic interests of the Republic of Poland.

There are also other services and institutions involved in countering corruption offences. The Internal Security Agency (ABW) is tasked, among other activities, with the identification, prevention and detection of corruption offences against persons performing public functions, referred to in arts. 1 and 2 of the Anti-Corruption Act, if they may undermine state security. Combatting corruption is also among the tasks of the Police. The Police Headquarters structure includes the Anti-Corruption Department, which operates under the Criminal Bureau. Its tasks include inspiring, coordinating and supervising operational, reconnaissance and procedural activities in the field of recognition and disclosure of the most serious corruption offences and prosecution of the perpetrators. It also provides direct assistance to units competent for combatting corruption in the police organisational units in carrying out specific anti-corruption undertakings. Additionally, the Border Guard (SG) may conduct proceedings in cases concerning the identification, prevention and detection of offences set forth in arts. 228, 229 and 231 of the

[16] Journal of Laws of 2020, item 358; and of 2021, item 1177.
[17] Journal of Laws of 2019, item 2399,

Penal Code, committed by Border Guard officers in connection with the performance of their official duties. Its tasks also include identification, prevention and detection of crimes under art. 229 of the Penal Code, committed by persons who are not officers or employees of the Border Guard in connection with the performance of their official duties by officers or employees of the Border Guard. The Military Counterintelligence Service (SKW) recognises, prevents and detects offences specified in arts. 228–230 of the Penal Code committed by soldiers on active military duty, officers of the SKW and the Military Intelligence Service, as well as employees of the Foreign Service of the Republic of Poland (SZ RP) and other organisational units of the Ministry of National Defence (MON) if they may endanger the security or combat capability of the SZ RP or other organisational units of the MON. The Military Police (ŻW) is competent to fight corruption in the Polish Armed Forces. The tasks of the National Fiscal Administration (KAS) include the identification, detection and combatting of offences defined in arts. 228–231 of the Penal Code, committed by persons employed in organisational units of the KAS or by KAS officers.

The competent authorities cooperate with each other in the fight against corruption. The Head of the CBA, the Head of the ABW, the Head of the SKW, the Chief Commandant of the Police, the Chief Commandant of the SW, the Chief Commandant of the ŻW and the Head of the KAS are obliged to cooperate, within the scope of their respective competence, in fighting corruption in state institutions and local government as well as in public and economic life, and in combatting activities detrimental to the State's economic interests. The Head of the CBA co-ordinates the operational, reconnaissance, informative and analytical activities undertaken by the bodies referred to above, if they may have an impact on the performance of the tasks of the CBA. Furthermore, government administration bodies, local government bodies and state institutions are obliged, within the scope of their activity, to cooperate with the CBA, in particular to provide assistance in the performance of its tasks.

All corruption offences are prosecuted ex officio, except for the offence under art. 305(1) of the Penal Code, when the victim is not the State Treasury (otherwise on request). Law enforcement agencies are often alerted to an offence from anonymous reporters, as well as from individuals who have provided a financial benefit. Moreover, state and local government institutions which have discovered, in connection with their activities, that an offence prosecuted ex officio has been committed, are obliged to notify the public prosecutor or the Police immediately and to present the necessary actions until the body appointed to prosecute the offence arrive or until the body issues an appropriate order, in order to prevent the destruction of traces and evidence of the offence. Additionally, the services are equipped with legal instruments for effective detection. Within the framework of operational and reconnaissance activities, they may use operational control, which enables correspondence to be obtained and recorded (including via electronic means of communication) along with, conversations (carried out with the use of technical means) and data contained in storage media, telecommunication terminal equipment and IT and ICT systems. In the course of operational activities, officers are also

authorised to carry out controlled purchases and use controlled delivery. Law enforcement authorities are also able to access bank, insurance or treasury secrets. Certain activities undertaken in the course of operational and reconnaissance activities require the consent of a competent court or prosecutor; for example, the above-mentioned operational control shall be ordered by a competent court, upon the request of a body entitled to conduct such control, submitted after obtaining the consent of the competent prosecutor. Material collected as a result of operational and reconnaissance activities may later be used as evidence in criminal proceedings.

If there is a justified suspicion that an offence has been committed, a decision is issued to initiate an investigation. Forms of pre-trial investigation differ in the types of cases they handle, the length of time they take and the authorities who conduct them. Pre-trial proceedings are conducted or supervised by a public prosecutor and, to the extent provided by law, carried out by the Police. In cases provided for in the Act, the powers of the Police are vested in other authorities (e.g. the CBA, the ABW, the Border Guard and the Military Police). Moreover, some pre-trial activities specified in the Act are carried out by the court. The provisions of the Act of 6 June 1997 – Code of Criminal Procedure,[18] which provide law enforcement agencies with legal instruments to fight corruption crimes, include the institution of an incognito witness (art. 184 of the Code of Criminal Procedure). Another law enforcement tool for fighting corruption is the institution of a crown witness, which can be used in the case of a crime committed in an organised group (Act of 25 June 1997 on crown witness[19]). Pre-trial proceedings may end with an indictment, a motion for conviction and the imposition of a penalty or penalty measures agreed on with the accused, a motion for conditional discontinuation of proceedings or a motion for discontinuation of proceedings and the application of precautionary measures, or discontinuation of the investigation.

Pursuant to art. 15 of the Code of Criminal Procedure, the police and other authorities in the field of criminal proceedings carry out the orders of the court, the court referendary and the public prosecutor. On the other hand, all state and local government institutions are obliged, within the scope of their activities, to provide assistance to the authorities conducting criminal proceedings within the time limit set by these authorities. Legal persons or organisational units without legal personality other than those specified above, as well as natural persons, are obliged to provide assistance upon request by the bodies conducting criminal proceedings, within the scope and on the date indicated by the bodies, if it is impossible or considerably difficult to carry out a procedural act without such assistance.

As a rule, corruption offences are decided by the district court in the first instance. One exception is the offence under art. 296(3) of the Penal Code, which is decided by the district court in the first instance. The appellate court may, at the request of the district court, remand a

[18] Journal of Laws of 2021, items 534 and 1023.
[19] Journal of Laws of 2016, item 1197,

case involving any offence to the district court for first-instance trial because of the particular gravity or complexity of the case. The district court also hears appeals from judgments and orders made in the first instance in the district court and other matters delegated to it by law, whereas the appellate court hears appeals from first-instance judgements and orders of the district court, and other matters delegated to it by law. The prosecutor leads the prosecution before all courts. However, not every public official can be held criminally liable in a court of law. The President of the Republic of Poland and members of the Council of Ministers who have committed a crime in connection with their functions can only be answerable to the State Tribunal.

Finally, it should be pointed out that the activities of law enforcement agencies consist not only of identifying and detecting corruption offences. They also assess draft legislation in the government legislative process for corruption risks and prepare draft legislation containing anti-corruption solutions. Representatives of the bodies also take part in the legislative work of the committees of the Sejm and the Senate.

Measuring corruption

Corruption is a serious problem that affects various spheres of civic life. It impacts the whole of society from all directions, crippling and hampering the economy that provides the basis for the economic development of countries, preventing the exercise of rights belonging to each individual, destroying trust in state institutions, and worst of all, striking hardest at the often poor and innocent people. (LEWICKA-STRZAŁECKA, 2011: 17) It is not only national, but also cross-border in scope, which is why more and more international anti-corruption programmes and institutions are being created. Many apparatuses are being established to counteract this pathological behaviour at the international level through such organisations as: the United Nations, the Council of Europe, the International Monetary Fund and the World Bank. (IYER – SAMOCIUK, 2007: 27.)

Poland took real action against corruption in 1998–2005, adapting Polish law to international and European conventions. During this period, the penal policy against corruption offences was also tightened, and in 2006 the Central Anti-Corruption Bureau, a special service with broad powers, was established to fight corruption.

Corruption indices for Poland

When developing a strategy to fight corruption, it is essential to know the level and forms of corruption in a given country and to identify high-risk sectors and drivers.

Collecting reliable data on corruption levels is particularly challenging, given that corruption thrives when it remains hidden.

Corruption Perceptions Index in Poland 2012–2020

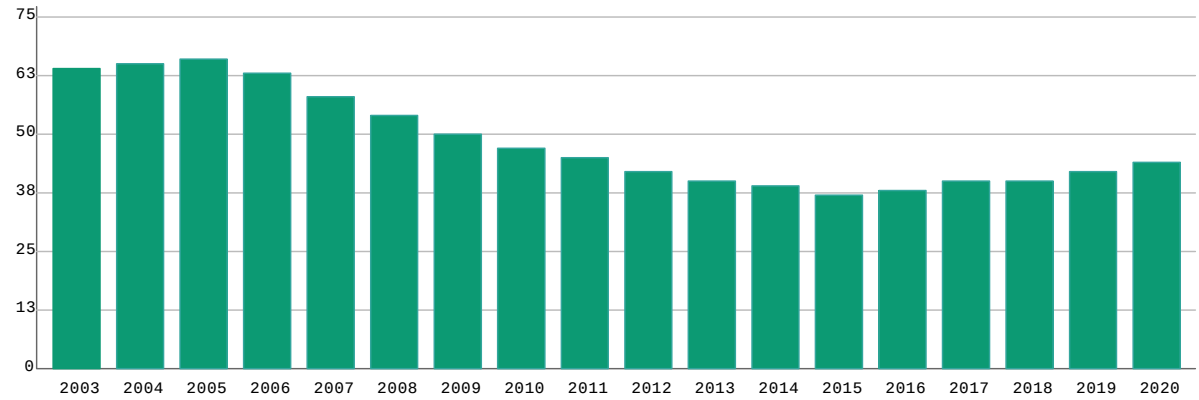
One frequently cited global indicator is *Transparency International's Corruption Perceptions Index (CPI)*, calculated using 12 data sources from 11 institutions recording perceptions of corruption over the previous 2 years.

Developed by *Johann Graf Lambsdorff*, a German economist at the University of Göttingen, the CPI was first published in 1995. The index ranks individual countries according to the extent to which they observe corruption among public officials and politicians. It uses a scale from 0 (highly corrupt) to 100 (very clean).

Year	CPI	Poland's rank	Decrease/increase
2012	58	41	-
2013	60	38	▲ 2
2014	61	36	▲ 1
2015	63	29.0	▲ 2
2016	62	29.0	▼ 1
2017	60	36	▼ 2
2018	60	36	–
2019	58	41	▼ 2
2020	56	45	▼ 2

Legend:
▲ increase
▼ decrease

Source: www.transparency.org; www.theglobaleconomy.com/Poland/transparency_corruption/



Source: www.worlddata.info/europe/poland/corruption.php

Year	Rank	Ø in Europe	Ø worldwide
2020	44	41.20	67.70
2019	42	40.60	56.80
2018	40	40.30	56.90
2017	40	40.20	56.90
2016	38	40.80	57.10
2015	37	40.50	57.50
2014	39	41.60	56.80
2013	40	42.20	57.40
2012	42	42.40	56.80
2011	45	44.10	59.70
2010	47	44.00	59.90
2009	50	42.80	59.70
2008	54	42.30	59.80
2007	58	41.60	60.10
2006	63	41.40	59.10
2005	66	41.20	59.10
2004	65	41.60	58.30
2003	64	42.00	57.60

Source: www.worlddata.info/europe/poland/corruption.php

Control of Corruption

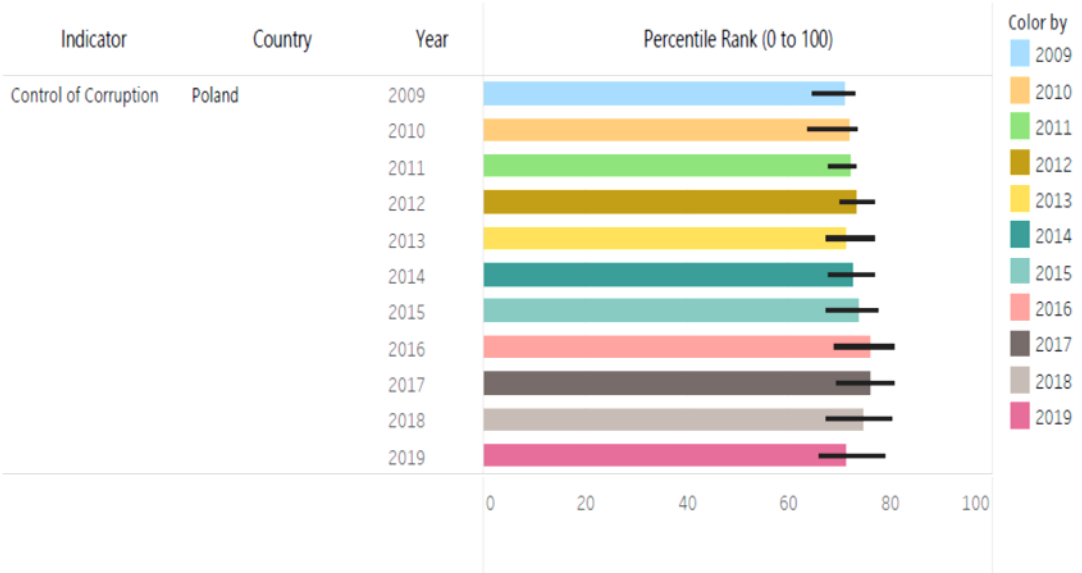
The Control of Corruption index developed by the *World Bank* is used to assess global governance. The World Bank conducts a research project titled WGI – Worldwide Governance Indicators. It covers 212 countries and territories and measures six dimensions:

1. *Voice and Accountability* – the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association and free media
2. *Political Stability and Absence of Violence/Terrorism* – the likelihood that the government will be destabilised or overthrown by unconstitutional or violent means, including politically-motivated violence and terrorism
3. *Government Effectiveness* – the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.

4. *Regulatory Quality* – the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development.
5. *Rule of Law* – the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.
6. *Control of Corruption* – the extent to which public power is exercised for private gain, including both petty and grand forms of corruption.

Data are collected from 35 sources provided by 32 different organisations. They reflect the viewpoints of representatives of the public, private and non-governmental sectors, as well as ordinary citizens. The 0–100 scale used indicates the country's position in the ranking among all countries in the world – level 0 corresponds to the lowest rank, and 100 to the highest rank. Poland scored 71.15 points in 2019.[20]

Indicator	Country	Year	Number of Sources	Governance (-2.5 to +2.5)	Percentile Rank	Standard Error
Control of Corruption	Poland	2009	14	0,45	70,81	0,13
		2014	13	0,64	72,60	0,12
		2019	12	0,60	71,15	0,14



[20] Source: http://info.worldbank.org/governance/wgi/pdf/WGi.pdf

Index of Public Integrity

The Index of Public Integrity (abbreviated iPi) is another interesting measure, consisting of six components: Judicial Independence, Administrative Burden, Trade Openness, Budget Transparency, E-Citizenship, and Freedom of the Press. The purpose of this index, published by the European Anti-Corruption and State Building Research Centre, was to provide an objective and comprehensive picture of the state of corruption control in 109 or 117 countries (depending on the year). Poland was ranked in 29th position in 2015, 32nd position in 2017 and 42nd position in 2019.

Trace Bribery Risk Matrix

The Trace Bribery Risk Matrix is an index measuring the risk of corruption in 194 countries, autonomous territories and semi-autonomous territories. The country's overall risk score is the result of assessing four areas of government performance: Business Interactions with Government, Anti-Bribery Deterrence and Enforcement, Government and Civil Service Transparency, and Capacity for Civil Society Oversight. The table below shows how this index fluctuated for Poland between 2014 and 2017–2020.

Year	Rank	Risk assessment	Business Interactions with Government	Anti-Bribery Deterrence and Enforcement	Government and Civil Service Transparency	Capacity for Civil Society Oversight
2014	31	39	41	30	43	16
2017	39	32	38	22	35	21
2018	36	35	41	34	35	25
2019	40	37	48	35	32	26
2020	41	34	35	38	34	27

Source: https://www.traceinternational.org/trace-matrix?year

The overall risk score for Poland in 2020 decreased compared to 2019 with an increase in risk in the anti-corruption domain. (Denmark was the highest ranked country in 2020.)

Global Competitiveness Report

Another frequently cited study is the Global Competitiveness Report. It is compiled annually by the World Economic Forum to determine the level of performance of economies around the world and includes a number of indicators focussing on institutions relevant to corruption risk. The results are based on business representatives' responses to the Executive Opinion Survey, weighted to account for sample size, and include responses from the past two years. As in 2018, the 2019 survey ranked Poland 37th globally (out of 141 countries).

Additionally, Poland ranked 1st in macroeconomic stability. On the other hand, Poland's position in the Transparency category remained unchanged, with the 'incidence of corruption' indicator putting it in 34th place.

Economy Profiles

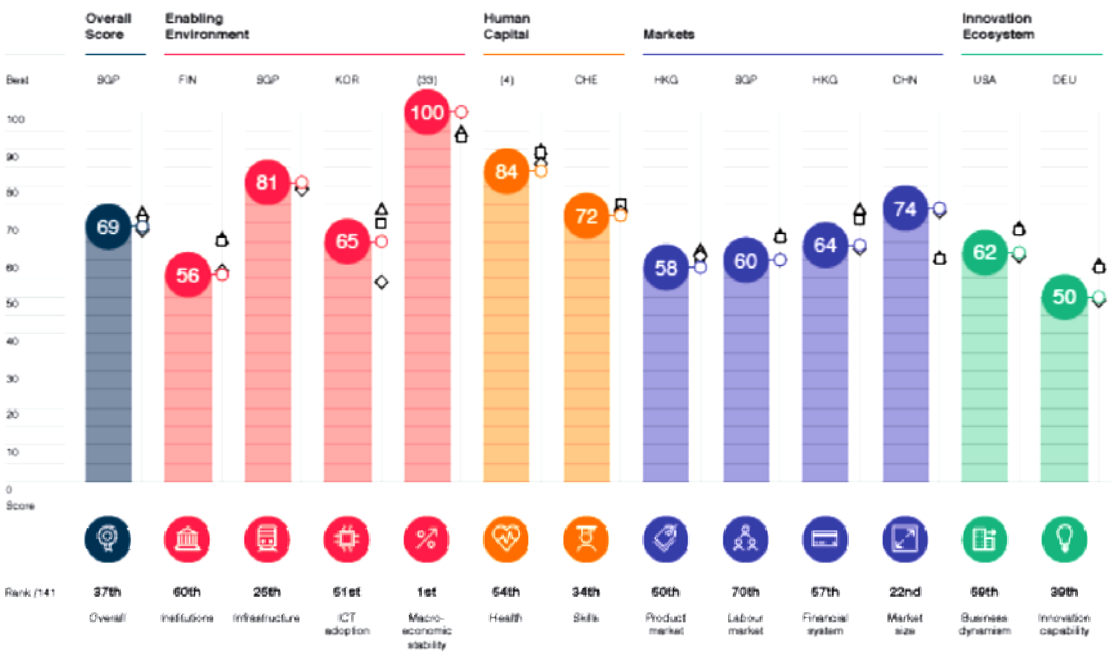
Poland

37th/141

Global Competitiveness Index 4.0 2019 edition

Rank in 2018 edition: 37th/140

Performance Overview 2019 Key ◇ Previous edition △ High-income group average ☐ Europe and North America average



Selected contextual indicators

Population millions	38.0	GDP (PPP) % world GDP	0.90
GDP per capita US$	15,430.9	5-year average FDI inward flow % GDP	2.6
10-year average annual GDP growth %	3.1		

Social and environmental performance

Environmental footprint gha/capita	5.4	Global Gender Gap Index 0-1 (gender parity)	0.7
Renewable energy consumption share %	11.9	Income Gini 0 (perfect equality) -100 (perfect inequality)	31.8
Unemployment rate %	3.7		

Source: SCHWAB, 2019: 482.

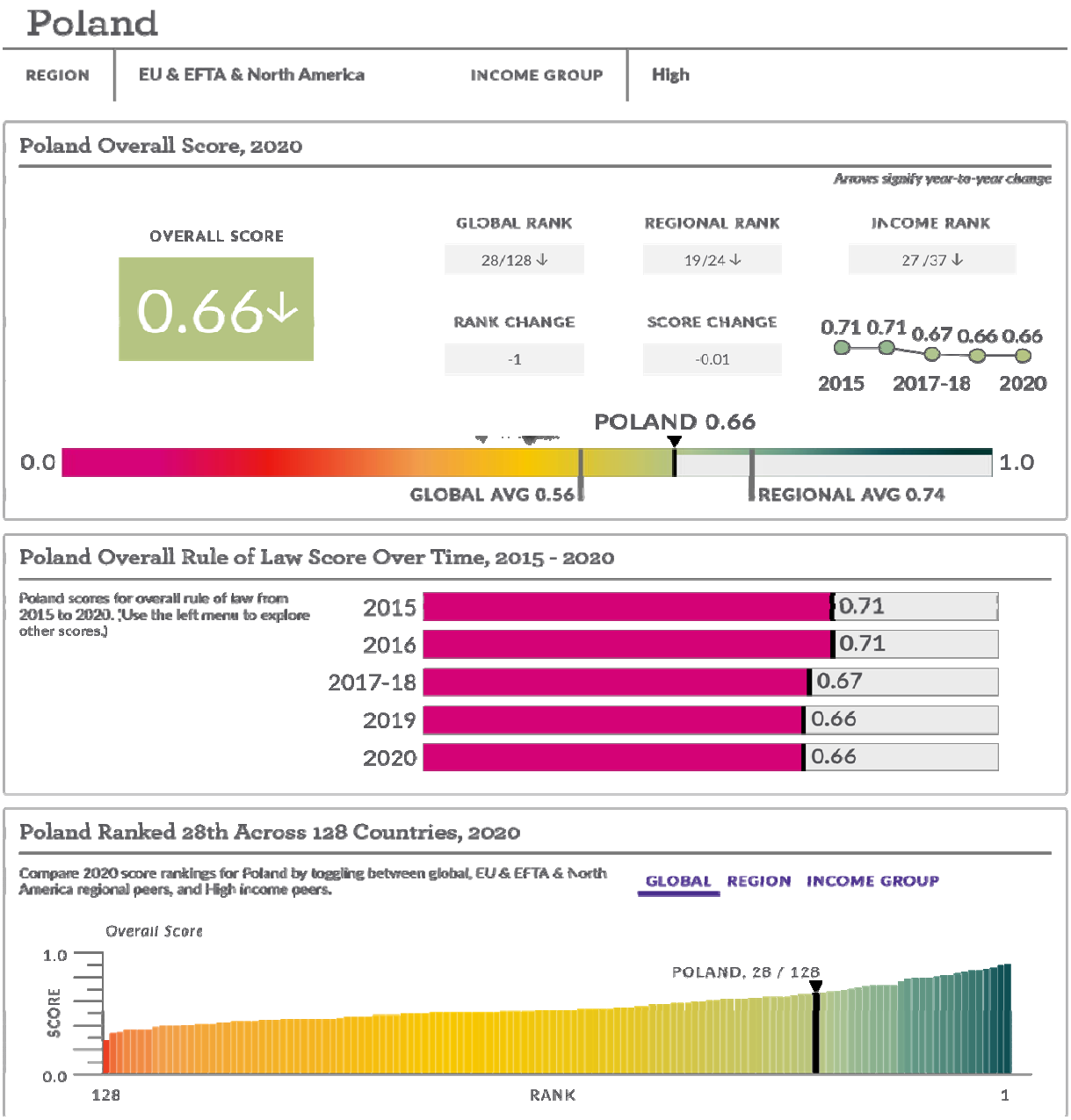
Poland				37th/141
Index Component	Value	Score	Rank/141	Best Performer
1st pillar: Institutions 0–100	-	56.4 ↓	60	Finland
Security 0–100	-	79.7 ↑	52	Finland
1.01 Organized crime 1–7 (best)	5.1	68.6 ↑	46	Finland
1.02 Homicide rate per 100,000 pop.	0.8	99.0 ↓	26	Multiple (14)
1.03 Terrorism incidence 0 (very high) -100 (no incidence)	99.9	99.9 =	57	Multiple (25)
1.04 Reliability of police services 1–7 (best)	4.1	51.5 ↑	83	Finland
Social capital 0–100	-	49.4 ↓	76	New Zealand
1.05 Social capital 0–100 (best)	49.4	49.4 ↓	70	New Zealand
Checks and balances 0–100	-	45.8 ↓	89	Finland
1.06 Budget transparency 0–100 (best)	59	59.0	30	Multiple (2)
1.07 Judicial independence 1–7 (best)	2.7	27.7 ↓	118	Finland
1.08 Efficiency of legal framework in challenging regulations 1–7 (best)	2.5	25.3 ↑	121	Finland
1.09 Freedom of the press 0–100 (worst)	28.9	71.1 ↓	48	Norway
Public-sector performance 0–100	-	51.5 ↑	66	Singapore
1.10 Burden of government regulation 1–7 (best)	2.9	31.4 ↑	113	Singapore
1.11 Efficiency of legal framework in settling disputes 1–7 (best)	3.0	33.8 ↑	107	Singapore
1.12 E-Participation 0–1 (best)	0.89	89.3 =	31	Multiple (3)
Transparency 0–100	-	60.0 =	34	Denmark
1.13 Incidence of corruption 0–100 (best)	60.0	60.0 =	34	Denmark
Property rights 0–100	-	55.6 ↑	62	Finland
1.14 Property rights 1–7 (best)	4.1	51.4 ↑	90	Finland
1.15 Intellectual property protection 1–7 (best)	4.1	52.0 ↑	70	Finland
1.16 Quality of land administration 0–30 (best)	19.0	63.3 ↓	51	Multiple (5)
Corporate governance 0–100	-	61.4 ↑	65	New Zealand
1.17 Strength of auditing and accounting standards 1–7 (best)	4.7	61.1 ↑	70	Finland
1.18 Conflict of interest regulation 0–10 (best)	6.0	60.0 =	53	Kenya
1.19 Shareholder governance 0–10 (best)	6.3	63.0 =	55	Kazakhstan
Future orientation of government 0–100	-	48.0	99	Luxembourg
1.20 Government ensuring policy stability 1–7 (best)	2.9	31.6	123	Switzerland
1.21 Government's responsiveness to change 1–7 (best)	3.3	38.6	93	Singapore
1.22 Legal framework's adaptability to digital business models 1–7 (best)	3.5	41.5	82	United States
1.23 Government long-term vision 1–7 (best)	3.2	36.0	102	Singapore
1.24 Energy efficiency regulation 0–100 (best)	49.7	49.7	56	Italy
1.25 Renewable energy regulation 0–100 (best)	44.9	44.9	78	Germany
1.26 Environment-related treaties in force count (out of 29)	24	82.8	36	Multiple (6)

Source: SCHWAB, 2019: 483–485.

Rule of Law Index

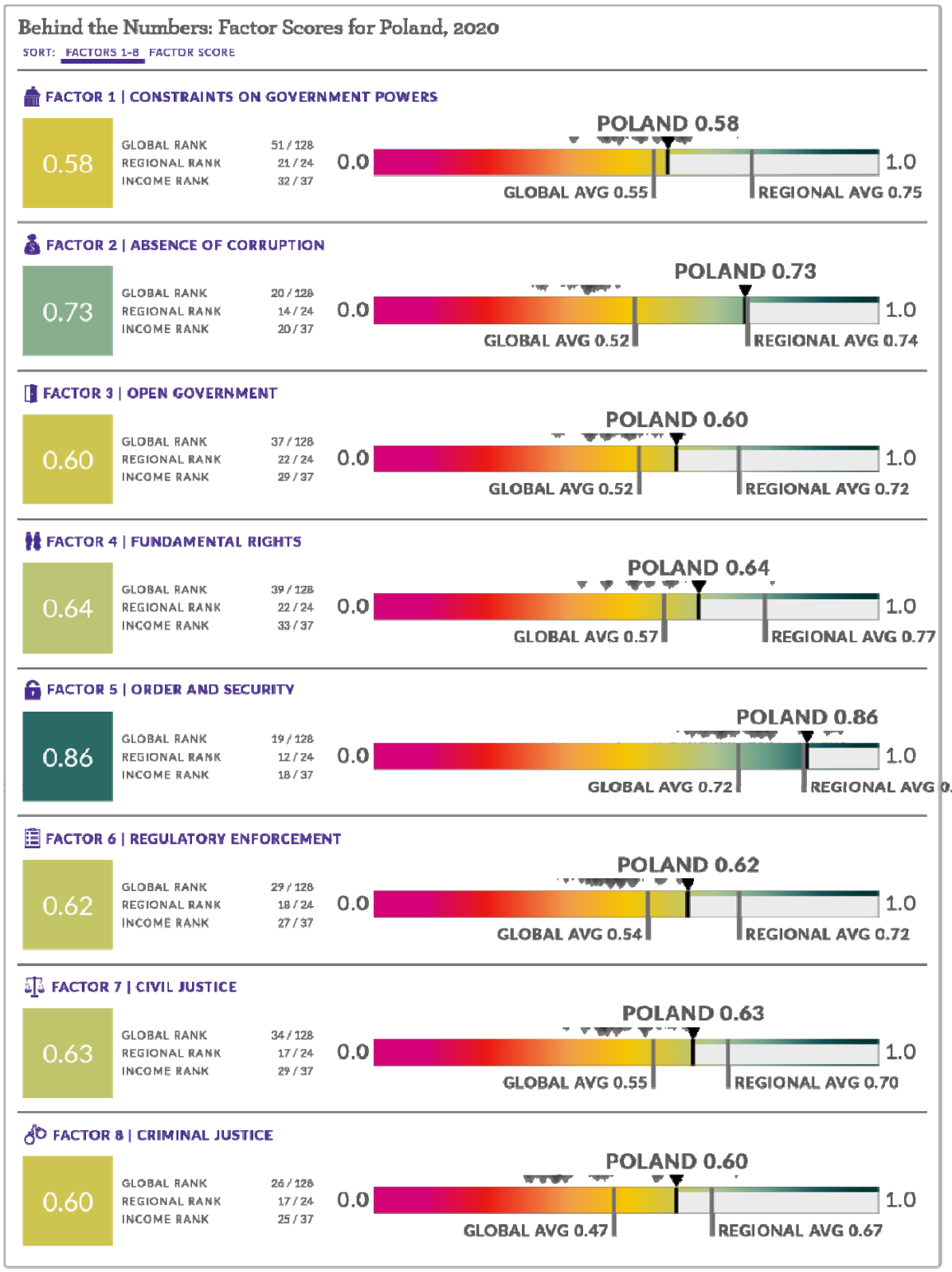
In 2020, Poland ranked 28th in the Rule of Law Index with a score of 0.66, while in 2019 the same number of points placed Poland 27th. In this index, eight different areas of state life are evaluated. Domain number 2 concerns the issue of corruption. In 2020, Poland achieved the same result in this domain as in 2019, i.e. 0.73 points, ranking 20th in the world. The domain captures three forms of corruption: bribery, abuse of office, and misappropriation of public funds or other resources. These are examined in relation to officials in the executive, judiciary, military, police and legislature.

Overall scores for Poland for 2020 in the Rule of Law Index



Source: https://worldjusticeproject.org/rule-of-law-index/country/2020/Poland/Absence%20of%20Corruption/

Detailed results for Poland in 2020 in the Rule of Law Index



Source: https://worldjusticeproject.org/rule-of-law-index/country/2020/Poland/Absence%20of%20Corruption/

EU International Crime Survey (EU ICS)

The EU ICS continues the tradition of the International Crime Victim Survey (ICVS), which was initiated in 1987 by a group of European criminologists with expertise in national crime surveys.[21] The last published EU study dates from 2005.

In 1996, the ICVS introduced a question on corruption that was asked of respondents in a street poll. The purpose of the survey was to compare the experiences of residents of industrialised countries with other countries around the world. In the 2005 EU ICS survey, the question was as follows:

> '*In some countries, there is a problem of corruption among government or public officials. During 2004, did any government official, for instance a customs officer, a police officer, a judge or inspector in your country ask you, or expected you to pay a bribe for his or her services?*

Whereas on average nearly one in five people in the developing world reported incidents involving corruption, and about one in eight in Eastern European countries, corruption was very uncommon in industrialised countries.

Within the EU, only 1.40% reported any incident, with most countries showing rates below 0.50%. Greece stood out with a percentage of 13.50%. As had been the case in the previous iterations, corruption was also high in Poland, Hungary and Estonia. Government officials and police officers have been cited as bribe-takers most often. Rates in Denmark, France and Portugal are relatively low but yet significantly higher than many other European countries. Results of previous iterations also showed relatively high rates in France and Portugal.[22]

Fighting corruption crimes in Poland – cyclical report

The Central Anticorruption Bureau prepares periodic reports on the level of corruption in Poland. This is the only publication in Poland that brings together the results of the investigative activities of all state services and bodies involved in the prosecution of corruption.

The report contains data from the databases of the National Centre for Criminal Information (KCIK), operating within the structures of the National Police Headquarters, which collects information on cases subject to operational and reconnaissance activities and on instituted or completed pre-trail proceedings. This includes data on crimes committed, information on persons prosecuted, as well as on objects used to commit crimes or lost in connection with crimes. The presented data concern corruption offences registered in KCIK by the Internal Security Agency, Central Anti-Corruption Bureau (CAB), Police, Prosecutor's Office, Border Guard and Military Police.

[21] https://wp.unil.ch/icvs/files/2012/11/EUICS-The-Burden-of-Crime-in-the-EU.pdf
[22] *Ibid.*

Number of corruption offences registered in 2015–2020 by the Police, ABW, CBA, Prosecutor's Office, Border Guard and Military Police

Legal classification	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Penal Code										
Art. 228	3,676	4,128	6,124	2,216	2,398	4,496	5,468	5,560	2,164	4,158
Art. 229	3,605	3,235	2,881	2,304	2,167	1,951	2,204	1991	2,761	2,081
Art. 230	1,012	975	773	547	662	467	779	354	541	1,287
Art. 230a	159	251	333	336	118	194	144	152	179	153
Art. 231(2)	387	2,083	4,423	3,303	2,894	912	2,245	1,352	1,947	1,196
Art. 250a	122	40	18	103	115	28	11	38	57	20
Art. 271(3)	N/A	N/A	N/A	N/A	8,797	17,531	24,829	22,431	19,427	18,538
Art. 296a	153	158	447	160	290	141	317	149	268	135
Art. 296b (repealed)	178	99	148	92	0	0	0	0	0	0
Art. 302	N/A	N/A	N/A	N/A	96	0	0	0	0	88
Art. 305(1)	N/A	N/A	252	286	243	246	246	276	233	300
Sports Act										
Art. 46	4	3	4	4	7	0	3	3	10	1
Art. 47	0	0	0	2	0	0	1	0	1	0
Art. 48	0	0	2	0	2	1	0	0	3	0
Reimbursement Act										
Art. 54	-	-	0	1	1	1	0	3	6	1
TOTAL	*9,703*	*10,972*	*15,405*	*9,354*	*17,790*	*25,968*	*36,247*	*32,309*	*27,597*	*27,958*

Source: KCIK

The most frequently registered crime in the KCIK databases year by year is making false statements in a document in order to achieve financial or personal gain [art. 271(3) of the Penal Code]. It should be mentioned that this crime has been included in the compilation since 2015, hence there is no data for earlier years. The second most common registered is passive bribery of public officials (art. 228 of the Penal Code).

Pre-trial proceedings, by service, instituted in the period 2011–2020 in cases related to corruption offences

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Police	2,048	1,887	1,747	1,774	1,742	1,697	1,681	1,537	1,403	1,272
CAB	102	113	116	123	123	65	92	74	95	103
Border Guard	74	68	51	39	58	32	70	68	65	19
Military Police	50	44	32	28	27	32	49	68	58	43
ABW	42	19	9	14	5	11	10	7	11	7
KAS	0	0	0	0	0	0	2	28	37	53

Source: Corruption Maps for 2013–2018, data provided by the agencies

Opinion polls

Finally, reference should be made to research conducted by the Centre for Public Opinion Research. Communication No 63/2017 of the Centre for Public Opinion Research titled '*Opinie na temat korupcji w Polsce*' (Opinions on Corruption in Poland) stated that the vast majority of respondents[23] (76%) believe that corruption in Poland is a big problem, while almost one third (31%) stated that it is a very big problem. Every seventh respondent (15%) felt that the extent of corruption in Poland is small, and only a few respondents (1%) that it is very small.

According to the above survey, since June 2013, the perception of corruption has significantly decreased in the areas most often associated with it, i.e. health care (a decrease of 15 percentage points) and among politicians: party activists, councillors, MPs and senators (a decrease of 14 points). This issue is presented in the table below.

Every now and then, corruption is discussed in various areas of our social life. In which of the listed fields, in your opinion, does corruption occur most frequently?	Respondents' answers by poll date										
	Oct. 2001	June 2002	June 2003	June 2004	May 2005	July 2006	Dec. 2007	April 2009	April 2010	July 2013	May 2017
	in %										
Among politicians – party activists, councillors, MPs, senators	54	52	60	64	61	35	44	55	60	62	48
In health care	47	42	43	37	50	53	58	54	58	53	38
In courts and prosecutor's offices	37	33	33	42	37	32	30	29.0	29.0	31	32
In commune, district and provincial offices	29.0	25	29.0	30	21	28	25	28	31	27	30
In central offices and ministries	38	29.0	37	39	34	22	32	27	26	18	21
In state-owned companies	13	12	11	11	11	9	15	14	13	13	17
In the police	31	23	25	21	34	31	28	16	15	21	16
In private companies	13	9	11	9	12	8	9	10	8	9	12
In banks	6	3	5	4	4	3	2	4	3	2	5
In education and science	7	8	4	5	4	8	3	3	3	3	2
Elsewhere	1	0	1	1	1	2	0	4	1	2	1
Difficult to say	1	12	8	7	6	15	10	8	7	8	13

Source: CBOS, 2017: 5.

[23] Survey titled '*Aktualne problemy i wydarzenia*' (Current Issues and Events) (324) conducted using computer-assisted face-to-face interviews (CAPI) from 5 to 14 May 2017 on a representative random sample of 1,034 adults in Poland.

Examples of corruption cases

Corruption and directing an organised criminal group by a former transport minister

The investigation was conducted on the suspicion of corrupt activities and participation in an organised criminal group of a former Minister of Transport who held a public office as the Head of the Ukrainian Agency for Roads and Bridges, Ukravtodor.
The demands for financial benefits were directed to the representatives of business entities from Poland and Ukraine, who planned or participated in the projects commissioned by Ukravtodor. In order to thwart the establishment of the criminal origin of the funds, the suspect set up business entities with the aim of receiving funds through payments for fictitious invoices, or by taking up shares in the established companies. He also accepted benefits in the form of cash or valuable assets. Chains of economic entities based in various countries in Europe and Asia (Czech Republic, Latvia, United Kingdom, Ireland, Cyprus, Georgia and Turkmenistan) were used to transfer the money, which made it difficult to identify the source of the funds.
In the course of the investigation, the services secured funds from the committed corruption offences in various currencies, i.e. EUR 536,500, USD 470,000 and PLN 30,000, and real estate with a total estimated value of over PLN 2 million, as well as movable property in the form of a car worth PLN 400,000 and paintings worth approximately PLN 50,000. Moreover, the amount of security against property from the remaining suspects amounted to PLN 375,000 in total.

Corruption in the organisation of financial support for innovation

CBA officers were conducting an investigation concerning a corrupt practice carried out by the president of the management board and a partner of an entity responsible for managing the Bridge Alfa fund. The entity is the beneficiary of a public grant concluded with the National Centre for Research and Development (NCBiR) worth PLN 28.8 million, of which over PLN 23 million constitutes the amount transferred by NCBiR, while the remaining resources were the fund's own contribution. The role of the Bridge Alfa fund was to organise financial support for entities from the innovative sector operating on the basis of R&D (research and development). The evidence collected during the investigation indicated that the president of the company managing the fund made the transfer of the subsidy, as well as the number of shares acquired in the subsidised company, conditional on granting a material benefit of PLN 200,000 transferred in the form of a private investment in the controlled entities. Another thread of the investigation concerned leading to a disadvantageous disposal of property of the Polish Development Fund in the amount of PLN 180,000 through misrepresentation of the number of people actually employed in

order to gain financial benefit. The financial subsidy for entrepreneurs depends on the number of people employed.

Bribe for legalising the stay of foreigners

The investigation concerned the out-of-order acceptance and approval of foreigners' applications for temporary residence and work permits in exchange for financial and personal benefits for inspectors employed in the Lower Silesian Provincial Office and in the Łódź Provincial Office, Sieradz Branch. The criminal proceedings involved a person who was initially employed as a manager in the Lower Silesian Provincial Office in Wrocław and then started a business consisting of acting as an intermediary in handling cases related to foreigners and, using her social contacts, persuaded officials to approve applications. In return for their favour, the officials received material benefits in the form of money and items of value. A joint investigation carried out by the CBA and the Border Guard as well as the Regional Prosecutor's Office in Wrocław led to the detention of 5 persons, who were charged with 12 corruption offences and participation in an organised criminal group. Three persons were placed under pre-trial detention for a period of 1 and 3 months, and the remaining two were subjected to preventive non-detention measures.

Abuse of influence by a former Governor of the Lesser Poland Province

In the course of the investigation, it was established that the former Governor of the Lesser Poland Province, using his influence in the Kraków City Council, undertook to act as an intermediary in arranging amendments to the local spatial development plan. The changes mainly concerned a reduction in the ratio of the biologically active area on a given site and parking parameters. Two companies, which owned a number of investments and properties in Kraków, i.e. a water park, a cinema, a hotel and two shopping centres, were interested in the new provision. Moreover, some of these investments were made on land leased or previously purchased from the Dominican Monastery in Kraków. The companies were linked by joint business projects, including plans to merge the two shopping centres and sell the properties in 2018 to a potential investor. The aim of the presidents of the companies was to bring about the quickest possible adoption of the development plan, as the potential sale of the shopping centres depended on the plan coming into effect.

In return, the businessmen made a payment of PLN 184,500 under a sponsorship agreement to the account of one of Kraków's sports clubs, the president of which acted in agreement with the former Governor.

The investigation is currently underway against four suspects who were arrested in June 2021 and charged with offences under arts. 230(1) and 230a(1) of the Penal Code.

Abuse of influence in state institutions

The proceedings were initiated on the basis of findings made in the course of activities carried out under Art. 17 of the Act on the CBA, i.e. as a result of the application of operational control. According to the evidence gathered, the suspects, acting within an organised criminal group, used their influence in various public institutions, including law enforcement agencies, the Ministry of Justice, the Ministry of Finance and State Treasury-controlled companies and, in return for financial benefits or promises thereof, acted as intermediaries in addressing certain issues. They accepted financial benefits from other persons, who were also charged, in exchange for handling their matters.

The mechanism of operation was that one of the suspects sought out and 'drummed up' persons subject to criminal proceedings or those who wanted to obtain positive decisions from public authorities or establish cooperation with State Treasury-owned companies. Then, the offender introduced another person as a secret service officer who promised to deal with the issue in exchange for financial benefits.

Over PLN 2.9 million worth of cash was secured during the investigation. The Silesian Subdivision of the Department for Organised Crime and Corruption of the National Prosecutor's Office, which supervises the investigation, issued decisions on securing property for the total amount of over PLN 806,900.

The remaining amount of approximately PLN 2 million (in various currencies) was transferred to the Lubuski Customs and Fiscal Office in Gorzów Wielkopolski to establish security on property against one of the persons who has the status of a suspect in cases conducted by both the CBA and by the Lubuski Customs and Fiscal Office in Gorzów Wielkopolski.

The investigation resulted in 13 suspects being charged with a total of 36 counts. In total, 20 preventive measures were applied against suspects, including: pre-trial detention, security on property, police supervision, a ban on leaving the country and a ban on contacting specific persons.

Bribe for the head of a hospital ward

The analysis of the documentation gathered in the course of the investigation made it possible to file a request for consent to prosecute the Speaker of the Senate, which was forwarded to the Senate of the Republic of Poland. The forwarded request concerns the suspicion of accepting financial benefits from patients or their relatives during the time when the Speaker was the director of a specialist hospital and the head of one of the departments. Under current law, the waiver of immunity of MPs and senators is necessary to declare criminal charges.

The prosecution intends to present the senator with four charges of accepting financial benefits in 2006, 2009 and 2012. According to the findings, the doctor accepted financial

benefits in the form of cash in PLN and USD in the amount of PLN 1,500 to 7,000 put in envelopes. In return, he pledged to personally perform the surgeries or perform them quickly, and to provide good medical care.
The witnesses' statements show that the fact that the head of the department was accepting bribes was common knowledge in the hospital ward. There was also a belief that the payment of a bribe was necessary for the patient to be treated well. In the course of the proceedings, the prosecution questioned 15 witnesses from among the patients of the hospital and their family members, who confirmed that the doctor had also accepted financial benefits from them before 2006.

Giving a bribe to a deputy mayor

In the course of activities carried out under Art. 19 of the Act on the CBA, CBA officers arrested a businesswoman in connection with giving a financial benefit of PLN 30,000 to a deputy mayor.
The corrupt procedure consisted of granting a financial benefit to the deputy mayor by a person holding the position of partner and president of the company's management board in connection with the performance of his duties in order to obtain a favourable administrative decision for the company, allowing it to conduct a business activity consisting of recycling plastics and rubber. Upon the motion of the prosecutor's office, the District Court in Siedlce applied a preventive measure in the form of pre-trial detention against the suspect, which was later repealed and replaced with bail in the amount of PLN 40,000. Currently, the proceedings are at the final stage, the drafting of an indictment.

Prevention/ National anti-corruption strategies

Combating corruption and economic crime is a basic activity and a reason for the Central Anti-Corruption Bureau's existence. However, the importance of corruption prevention is constantly growing. Raising awareness of corruption-related offences and strengthening integrity among both citizens and public officials became one of fields of the CBA's interest from the very beginning of the Bureau and, in recent years it has moved up to the top priority list. Currently, the CBA applies a number of solutions, including those mentioned below.

Anti-corruption training

Since 2010 CBA officers, on the grounds of their experience in the field of combating and preventing corruption, have conducted training courses for employees of government, public administration institutions, and companies with State Treasury shareholding. By the end of 2018, more than 1,100 training courses were conducted in about 700 institutions. More than 53,000

people were trained, and by mid-October 2021 slightly more than 1,300 training courses had been conducted (more than 62,000 persons trained). The courses are complemented with handbooks issued by the CBA and addressed to officials, entrepreneurs and politicians.

E-learning

The anti-corruption e-learning platform of the Central Anti-Corruption Bureau[24] () is a publicly available, free e-learning platform with anti-corruption training courses for all people interested in anti-corruption issues, especially officials, entrepreneurs and students. Its primary goal is to spread knowledge about corruption and to promote good practices in preventing and combating this phenomenon. It is also one of the key tools of the Bureau's education. The platform, in both a Polish and English language version, comprises the latest solutions, including legislative and organisational ones, in the field of counteracting corruption. It contains three training modules: 1) Corruption in public administration, 2) Corruption in business, and 3) Counteracting corruption.

By the end of May 2019, nearly 150,000 people from Poland and abroad had completed the training. These numbers increased significantly during the COVID-19 pandemic, and by the end of 2020 the number who had completed the courses has risen to nearly 300,000.

Based on experience of the Bureau, similar on-line anticorruption training courses were implemented in September 2021 by the Special Investigation Service of the Republic of Lithuania (STT).

The platform was created as part of the project co-financed in 2013-2015 from the funds of the European Commission entitled *Rising of Anticorruption Training System* and is the Bureau's own project.

Publications

In 2010-2020, the CBA issued 66 publications, 45 of which were in Polish, 12 in English, and 9 bilingual – Polish-English.[25]

Anti-corruption handbooks:

- *The anti-corruption handbook for officials*
- *The anti-corruption handbook for entrepreneurs*
- *Anti-corruption recommendations on public procurement procedures*

[24] https://szkolenia-antykorupcyjne.edu.pl

[25] The publications are available in the form of e-books and audiobooks on the websites: www.cba.gov.pl and www.antykorupcja.gov.pl

- *Political corruption. Guidance for representatives of authorities elected in the general election*
- *The guidelines establishing and implementing effective compliance programs in public sector entities*
- *The anti-corruption guidelines for public administration. Unified institutional solutions and rules of conduct for public official and persons entrusted with top executive functions (PTEF)*

The websites

- www.cba.gov.pl – the official site of the CBA is also available in English. The website in both language versions include basic information related to the activities of the Bureau and is adapted to the needs of people with disabilities.
- www.antykorupcja.gov.pl – informative and educational website.

Educational content can also be found on websites run by the CBA on Facebook, Twitter, and YouTube. The website contains information of an educational nature covering, among others, current media reports on corruption and its countermeasures, analyses, and reports, as well as the results of social research.

The Government Programme for Counteracting Corruption for the years 2018–2020 (RPPK)

The adopted Programme was the outcome of work of the Central Anti-Corruption Bureau, undertaken as a result of arrangements between the Minister of Interior and Administration, who was responsible for the implementation of the Programme for 2014–2019, and the Minister – Special Services Coordinator.

The Government Programme for Counteracting Corruption for 2018-2020 introduced an obligation to conduct systemic actions in the field of counteracting corruption resulting from the recommendation of the Group of States Against Corruption (GRECO) and recommendations of the European Union and the Council of Europe, as well as the United Nations Convention against Corruption. While creating it, the Bureau was also guided by the necessity to be coherent with the *Strategy for Responsible Development for the period up to 2020 (including the perspective up to 2030)*, adopted in 2017.

When formulating new objectives, it was assumed the RPPK for 2018-2020 would act as a tool ensuring flexible planning and management of legislative, operational, preventive and educational activities undertaken by state services and authorities in the area of counteracting corruption crime. As the main objective, the Central Anti-Corruption Bureau indicated a real limitation of corruption crime in the country and raising public awareness of counteracting corrupt behaviour.

References

ADAMSKI, Jakub – URBAN, Krysztof – WARMIŃSKA-FRIBERG, Ewa (2014): *Refundacja leków, środków spożywczych specjalnego przeznaczenia żywieniowego oraz wyrobów medycznych. Komentarz.* Warsaw: Wolters Kluwer. https://sip.lex.pl/komentarze-i-publikacje/komentarze/refundacja-lekow-srodkow-spozywczych-specjalnego-przeznaczenia-587366035

(CBOS) CENTRUM BADANIA OPINII SPOŁECZNEJ / CENTRE FOR PUBLIC OPINION RESEARCH (2017): *Research Communication No 63/2017 titled 'Opinie na temat korupcji w Polsce'.* Warsaw: Centre for Public Opinion Research. https://www.cbos.pl/SPISKOM.POL/2017/K_063_17.PDF

(CBOS) CENTRUM BADANIA OPINII SPOŁECZNEJ / CENTRE FOR PUBLIC OPINION RESEARCH (2021): *Research Communication No 5/2021 titled 'Zadowolenie z życia'.* Warsaw: Centre for Public Opinion Research. https://www.cbos.pl/SPISKOM.POL/2021/K_005_21.PDF

(GUS) GŁÓWNEGO URZĘDU STATYSTYCZNEGO / STATISTICS POLAND (2021): *Mały Rocznik Statystyczny Polski / Concise Statistical Yearbook of Poland.* Warsaw: Statistics Poland. https://stat.gov.pl/download/gfx/portalinformacyjny/en/defaultaktualnosci/3328/1/22/1/concise_statistical_yearbook_of_poland_2021_31.08.2021.pdf

GÓRAL, Roman (2000): *Kodeks karny. Praktyczny komentarz.* Warsaw: Wydaw.

IYER, Nigel – SAMOCIUK, Martin (2007): *Defraudacja i korupcja. Zapobieganie i wykrywanie.* Warsaw: PWN

LEWICKA-STRZAŁECKA, Anna (2011): *Nędza korupcji.* Kraków: Salvator.

POLAND STATISTICS (2020): *Life expectancy tables of Poland 2020.* Warsaw: Poland Statistics.

POLAND STATISTICS (2021): *Poland in numbers 2021.* Warsaw: Poland Statistics. https://stat.gov.pl/en/

SCHWAB, Klaus (ed.) (2019): *The Global Competitiveness Report 2019*. Cologny–Geneva: Word Economic Forum. https://www3.weforum.org/docs/WEF_TheGlobalCompetitivenessReport2019.pdf

STEFAŃSKI, Ryszard A. (2004): Przestępstwo korupcji wyborczej (art. 250a k.k.). *Prokuratura i Prawo 1233–2577,* 4, 68–79.

WRÓBEL, Włodzimierz – ZOLL, Andrzej (eds.) (2017): *Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212-277d.* Warsaw: Wolters Kluver.

PETTY AND HIGH-RANKING CORRUPTION IN ROMANIA

ANDRA-ROXANA TRANDAFIR – ANCA JURMA*

Country profile

Romania is situated in Central and South-Eastern Europe, on the lower course of the Danube River, north of the Balkan Peninsula an on the North-West shore of the Black Sea. It is the 12th largest country in the continent, comprising an area of 238,391 km2. It borders Bulgaria in the South, Serbia in the South-West, Hungary in the North-West, Ukraine in both North and East, and the Republic of Moldova in the East. The shore of the Black Sea lies in the South-East. Romania joined the European Union in 2007 and represents its external border in several areas.

The last demographic census was carried out in Romania in 2011[1]. It shows, comparing with the results of the 2002 census that the population is gradually declining, from 21,698,181 inhabitants in 2002 to 20,121,641 in 2011. The decline is also seen in the official statistics, which show that, at the end of 2020, the population was 19,186,201[2]. An important part of the population lives abroad[3], mainly in Italy, Spain, Germany, the United Kingdom, France etc.

More than half of the population (53.8% as per the last records[4]) lives in urban areas. Bucharest is the capital of the country and the biggest city; other important urban areas are Cluj-Napoca in Western Romania, Timişoara in the South-West, Iaşi in the East and Constanţa in the South-East.

Approximatively 51.2% percent of the population is made of women[5]; the percentage has remained almost unchanged in the past 20 years. The age structure shows that the largest part of the population (60.2%) is comprised of adults (people between 20 – 64 years of age). Children (0 – 14 years of age) represent only 21%, and the elderly population (over 65 years of age) – 18.7%. (EUROPEAN COMMISSION, 2021a)

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[1] A new census is ongoing in 2021–2022.

[2] Source: Eurostat.

[3] Estimates range from 3–5 million in 2017. (THE WORLD BANK, 2018)

[4] See the Romanian National Institute for Statistics, data available from 1 January 2018. www.insse.ro

[5] *Ibid.*

Romanians make up about 89.9% of the population, the rest mainly comprising of Hungarians (6.5% of the population) and gypsies (3.3% of the population). Other minorities include Ukrainians, Germans, Turks, Lipovans and Tatars.

The official language is Romanian, although in some counties (Covasna and Harghita) the majority of the population is of Hungarian origin and Hungarian is widely spoken.

The education system includes the early education system (0-6 years), primary education (ICSED 1), secondary lower education (ICSED 2), secondary superior education (ICSED 3), non-university tertiary education (ICSED 4) and higher education (ICSED 5-8). The literacy rate was 98.604 % in 2020[6].

The dominant religion is Orthodox (86.5% of the population), followed by Roman Catholics (4.6%), Protestants (3.2%), and Pentecostals (1.9%)[7].

From the economic point of view, it has to be noted that, after the fall of the Communist regime in 1989, the country experienced a decade of economic instability and decline. It was not until 2000 that the Romanian economy started to develop, with relative stability: unemployment was low, inflation declining. The Romanian GDP is however low comparing to other European countries, ranging 65 per capita in purchasing power standard (PPS) at the end of 2020[8]. There is still an important gap between different regions, which make GDP vary widely across the country. The unemployment rate has been slowly but constantly decreasing, reaching 5.5% during the Covid pandemic in 2021. (EUROPEAN COMMISSION, 2021b)

According to the official data available at the level of the European Union, the most important sectors of Romania's economy in 2018 were industry (26.1%), wholesale and retail trade, transport, accommodation and food services (20.2%) and public administration, defence, education, human health and social work activities (14.5%). Intra-EU trade accounts for 77% of Romania's exports (Germany 23%, Italy 11% and France 7%), while outside the EU 3% go to Turkey and 2% to the United States. It is important to note that 75% of Romanian imports come from EU Member States (Germany 20%, Italy 9% and Hungary 7%), while outside the EU 5% come from China and 4% from Turkey[9].

[6] Source: https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?locations=RO
[7] For more detailed information see INSTITUTUL NAȚIONAL DE STATISTICĂ ROMÂNĂ:2013: 4.
[8] See: https://europa.eu/european-union/about-eu/figures/living_ro#population
[9] See for all these data: https://europa.eu/european-union/about-eu/countries/member-countries/romania_en

In Romania, the official currency is *Leu* (lion), which – since the revaluation of 2005 –has been worth about € 0.2–0.3. Romania joined the European Union in 2007 and is expected to adopt the Euro in the future.

Regarding politics, the country, which functions as a republic[10], is governed on the basis of a multi-party democratic system and the separation of the legislative, executive and judicial powers, all provided by the Constitution adopted after the 1989 Revolution[11].

Romania is divided into 41 counties and the municipality of Bucharest, the capital of the country. Each county is administered by a county council and is subdivided into cities and communes, which have their own mayor and local council. A commune is also comprised of one or more villages that do not have any legal status.

Corruption profile in law

Romanian legislation on corruption

The Romanian Criminal Code entered into force on February 1st 2014, replacing the previous Code dating from 1969. At that moment, there were more than 200 special laws containing criminal offences. Some of these offences were integrated into the Criminal Code.

The Code is divided into a general and a special part. The special part contains the description of each criminal offence. The Title V is dedicated to corruption and offences in public positions; its first chapter refers to corruption offences while the second deals with offences in public positions. In terms of corruption, there are four offences which can be read together: receiving a bribe (art. 289), giving a bribe (art. 290), influence peddling (art. 291) and buying influence (art. 292).

Receiving a bribe is defined as "*the action of the public servant who, directly or indirectly, for themselves or on behalf of others, solicits or receives money or other undue benefits or accepts a promise of money or benefits, in exchange for performing, not performing, speeding up or delaying the performance of an action which falls under purview of their professional duties or with respect to the performance of an action contrary to their professional duties, constitutes a violation of the law and shall be punishable by no less that 3 and no more than 10 years of imprisonment and the ban from exercising the right to hold a public office or to exercise the profession or the activity in relation to which they committed the violation.*"

[10] It is unclear whether the country is a semi-presidential republic or parliamentary one.
[11] The Constitution was adopted in 1991 and revised in 2003.

A *public servant* is defined by the Criminal Code[12]; a lot of debate has been made about this notion, leading to many mandatory decisions of the High Court of Cassation and Justice. It has been decided, for example, that the professors within public schools, the expert appointed by the prosecutor or judge, the doctors within public hospitals, the employees of private banks are some of these public servants. It has also been decided that if a doctor receives supplementary payments or donations from patients, such action does not represent the exercise of a right and thus does not justify receiving bribes. Art. 289 further states that *"the action provided under par. (1), committed by one of the persons provided under Article 175 par. (2), shall constitute a criminal offense only when committed in relation with the performance or delaying the performance of an action related to their legal duties or related to the performance of an action contrary to such duties."* Art. 175 par. (2) refers to so-called assimilated public servants[13] such as public notaries, judicial enforcers etc.

Also according to art. 289, *"the money, valuables or any other benefits received shall be subject to forfeiture, and when such can no longer be located, the forfeiture of the equivalent shall be ordered."*

Giving a bribe, as defined in art. 290 of the Criminal Code, refers to the promise, giving or the offering of money or other benefits under the conditions provided under article 289 and shall be punishable by no less than 2 and no more than 7 years of imprisonment. Such action shall not constitute an offence when the bribe giver was constrained by any means by the bribe taker. Moreover, the bribe giver shall not be punishable if they report the action prior to the criminal investigation bodies be notified thereupon. The money, valuables or any other assets given shall be given back to the person who gave them under constraint or given following the denunciation provided above. As in the case of receiving a bribe, the money, valuables or any other benefits offered or given shall be subject to forfeiture, and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered.

According to art. 291, influence peddling refers to the soliciting, receiving or accepting the promise of money or other benefits, directly or indirectly, for oneself or for another, committed by a person who has influence or who alleges that they have influence over a public servant and who promises they will persuade the latter perform, fail to perform, speed up or delay the

[12] Art. 175 par. (1): *"For the purposes of criminal law, public servant is the person who, on a permanent or temporary basis, with or without remuneration:*
a) shall exercise the duties and responsibilities, set under the law, to implement the prerogatives of the legislative, executive or judiciary branches;
b) shall exercise a function of public dignity or a public office irrespective of its nature;
c) shall exercise, alone or jointly with other persons, within a public utility company, or another economic operator or a legal entity owned by the state alone or whose majority shareholder the state is, responsibilities needed to carry out the activity of the entity."

[13] Art. 175 par. (2): *"At the same time, for the purposes of criminal law, the following shall be deemed a public servant: the person who supplies a public-interest service, which they have been vested with by the public authorities or who shall be subject to the latter's control or supervision with respect to carrying out such public service."*

performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties and shall be punishable by no less than 2 and no more than 7 years of imprisonment. As in the previous cases, the money, valuables or any other assets received shall be subject to forfeiture and when they cannot be located anymore, the forfeiture of the equivalent shall be ordered.

Buying influence, as provided by art. 292, refers to the promise, the supply of or giving money or other benefits, for oneself or for another, directly or indirectly, to a person who has influence or who alleges they have influence over a public servant to persuade the latter to perform, fail to perform, speed up or delay the performance of an act that falls under the latter's professional duties or to perform an act contrary to such duties. The criminal offence is punishable by no less than 2 and no more than 7 years of imprisonment and the prohibition to exercise certain rights. As in the case of giving bribery, the perpetrator shall not be punishable if they report the action prior to the criminal investigation bodies being notified thereof and the money, valuables or any other assets shall be given back to the person who gave them if they were given following that denunciation. As in the previous situations, the money, valuables or any other benefits given or supplied shall be subject to forfeiture, and when they cannot be located anymore, the forfeiture of the equivalent shall be ordered.

It has to be stated that Chapter I of Title V contains two more articles, which refer to acts committed by members of the courts of arbiters or in connection thereto and acts committed by foreign officials or related to them.

Another article of the Criminal Code provides for a mitigating circumstance applicable as well in case of corruption offences. Thus, art. 308 (*Corruption offenses and service offenses committed by other persons*) mentions that the stipulations under arts. 289–292 (all the criminal offences mentioned above) shall apply accordingly to acts committed by or in connection with the persons who carry out, on a permanent or on a temporary basis, with or without a remuneration, a duty irrespective of its nature in the service of a natural person of those provided under art. 175 par. (2) or within any legal entity. In this case, the special limits of the punishment shall be decreased by one third.

Other than the criminal offences provided in the Criminal Code, there is another important law connected to corruption: Law no. 78/2000 on preventing, discovering and sanctioning corruption offences[14]. The law applies to persons who exercise a public position, regardless of the manner applied to invest them within public authorities or public institutions; persons who fill,

[14] The Law 78/2000 represents the basis of DNA competence, within the limits established by the Government Emergency Ordinance no. 43/2002. The GEO 43/2002 establishes a set of criteria (financial thresholds and categories of high and medium level public officials) that should be met for a case to fall under the competence of DNA, as shown below in Section 2.2.

permanently or temporarily, according to the law, a position or a task, to the extent to which they participate in decisions-making process, or they can influence the decisions, within public services, autonomous administrations, trading companies, national companies, national societies, cooperative units or other economic agents; persons who carry out control tasks according to the law; persons who grant specialized assistance to the units stipulated above, to the extent to which they participate in the decisions-making process or can influence the decisions; persons who, regardless of their position, carry out, control or grant specialized assistance, to the extent to which they participate in the decision-making process or can influence the decisions, with regard to operations that involve capital circulation, banking operations, hard currency exchange or credit operations, investment operations in stock exchanges, in insurance, in mutual investment or regarding the bank accounts or those assimilated to them, internal and international transactions; persons who have a management position in a political party or formation, in a trade union, in an employer's organization or in a non-profit society or foundation; other natural persons than those stipulated in above under the terms stipulated by law. Art. 7 of this law provides for an aggravated circumstance, when the offence of taking bribe or influence peddling committed by a person who exercises a position of public dignity; is a judge or a prosecutor; is a criminal investigation body or is in charge with ascertaining or sanctioning contraventions; is one of the persons provided by article 293 of the Criminal Code. In this case, the criminal offence is punished according to art. 289 or 291 of the Criminal Code, whose limits are increased by a third.

Based on these regulations, it can be stated that the difference between large scale and petty corruption derives from the criminal Code itself (depending on the person receiving bribe) and from Law no. 78/2000. The difference can also be seen in the case law, as we will prove below.

Romanian legal system

The Romanian legal system is based on Roman-Germanic (continental) law. Consequently, even before the accession to the European Union, Romanian legislation was very much inspired by that of the Western European countries. Nonetheless, the communist era brought its own approach and some of the provisions dating from that time still exist.

The Criminal Procedure Code which dated from 1969 was also replaced by the new Criminal Procedure Code, which was adopted in 2009 and entered into force on February 1st, 2014, the same date as the Criminal Code. This Code keeps a great part of the provisions of the previous one, so we could say that the pillars of the criminal justice system haven't changed, but was also meant to (re)instate some concepts, such as the preliminary chamber procedure (which existed under a similar form in the Criminal Procedure Code dating from 1939, but not in the one from 1968) or the plea agreement (non-existent before).

However, this new approach of the legislator seems to be constantly sanctioned by the Romanian Constitutional Court, as, since 2014, more than 40 decisions on the unconstitutionality of the provisions of the Code have been given[15].

The Romanian Criminal Procedure Code is traditionally divided into two main parts: a general part and a special part. According to this Code, the Romanian criminal trial consists of four phases: the criminal investigation, the preliminary chamber, the trial and the enforcement of sentences[16].

The *criminal investigation* is the first stage of the criminal process. It starts whenever the criminal investigation bodies decide that a referral (complaint, report, preliminary complaint and including when they take action *ex officio*) meets the conditions required by law and it is found that none of the cases preventing criminal action as under art. 16 par. (1) of the Criminal Procedure Code applies. The criminal investigation shall start even if the offender is not known (i.e. there are signs that a person was killed, but the criminal investigation body does not have any information about who could have killed her). If the offender becomes known and there is proof showing reasonable suspicion that the given person committed the offence, the criminal investigation body can decide to continue the criminal investigation towards him, thus becoming a suspect. If the criminal procedure is set in motion (meaning that the prosecutor has proof – namely sufficient proof – that a specific person has perpetrated the offence and there is no circumstance preventing the criminal action, as provided in art. 16 of the Criminal Procedure Code), the suspect becomes a defendant, having more rights and obligations than a suspect (i.e. pretrial detention is longer). The purpose of the criminal investigation is to gather conclusive evidence and it is carried out by the prosecutor (who is obliged to perform the criminal investigation himself for a series of offences provided by the law – usually those that are more severe, i.e. homicides, some offences against justice, all offences where only the National Anticorruption Directorate (DNA) is competent) and by the criminal investigation bodies, judicial police or special investigation bodies under the prosecutor's supervision. During the investigation, the prosecutor can perform any act in any situation. Whenever the law does not require that the prosecutor himself performs the investigation, or if for activities which can be delegated (i.e. enforcement of seizures), the prosecutor can delegate them to the judicial police. The procedure during the criminal investigation is not public. Following criminal investigation and depending on its findings, a decision is taken not to proceed with prosecution or to prosecute by indictment issued by the prosecutor.

[15] For example: lack of maximum duration of house arrest, impossibility to challenge seizures decided by courts, lack of provisions related to absolute nullities for material and personal competence in case of investigation bodies.

[16] The translation of the legal terms is the one used by the Romanian Ministry of Justice in its translation of the Criminal Procedure Code, available at the date when it was published in the Official Journal. www.just.ro/wp-content/uploads/2016/01/Noul-cod-procedura-penala-EN.doc

Both types of decisions can be challenged in front of the *preliminary chamber* judge. If the preliminary chamber judge decides that the indictment act observes the legal provisions in force and that the criminal investigation was conducted properly, he can decide to start the trial. The preliminary chamber judge does not have powers other than to check his competence, the legality of the bill of indictment act, the legality in the administration of evidence and that of the performance of the investigation; he cannot decide, for instance, on the merits of the case and rule that the trial cannot start (except in the event that all evidence has been excluded or the prosecutor does not remedy the deficiencies in the indictment or the latter demands the case back). The legal provisions in this field are much more complicated and it is the area where the Constitutional Court has intervened the most.

The *trial* is thus the third stage of the criminal process. According to the Criminal Procedure Code, the trial is public. The court (the judge) directly conducts all actions necessary for this stage of the trial and is in direct contact with the evidence. All the evidence can be discussed by the parties, prosecutor, court and lawyer; the court can decide that all of some of the witnesses from the investigation phase should be reheard, depending on the necessity of such proof. At the end of the trial, the judge pronounces the sentence. The sentence can be appealed by all interested persons (not just the parties). The appeal judges (normally two) will analyse all the aspects of the trial again. The decision of these judges is final. The Code also provides the possibility for appeal for review (which verifies only the compliance of the challenged ruling with the applicable law), and a challenge for annulment and revision of the decision, which are all extraordinary appeals.

The *enforcement* of the sentence (actually, just the initiation of the enforcement procedure) is the fourth and last stage of the criminal trial. This phase is reached after trial, when the court issued a final judgment of conviction. It includes the entire procedure of implementing of the final judgment (issuing the arrest and detention warrant with a view to enforcing the punishment of imprisonment, issuing the order to enforce the punishment of imprisonment, issuing the order prohibiting the defendant from leaving the country etc.).

From the above details, it can be seen that the Romanian criminal justice system is a mixed system, which gathers principles of the inquisitorial and adversarial systems (sometimes lacking harmonisation between them). We can also notice a great part of the main actors in the criminal justice system. Thus, the participants in the criminal trial, according to art. 29 of the Criminal Procedure Code, are the judicial bodies (criminal investigation bodies – including the police and special bodies[17], prosecutor, judge for rights and liberties, preliminary chamber judge, courts); the

[17] Special public official who received approval in this respect from the General Prosecutor: in case of crimes perpetrated by military personnel and for corruption offences and work-related offences perpetrated by personnel of the civil navy, if the navigation was endangered (art. 57 par. 2 of the Romanian Criminal Procedure Code).

lawyer; the parties (defendant, civil party, party with civil liability); the main subjects (suspect, victim); and other litigants (witnesses, experts, interpreters, procedural agents, specialised fact-finding bodies, as well as any other persons or bodies set by the law as having specific rights, obligations and prerogatives in criminal judicial proceedings).

Corruption cases are investigated by the prosecutor; depending on the specific criminal offence, they may be investigated by the National Anticorruption Directorate (DNA) only. The DNA was established in 2002 as a specialised structure of the Public Ministry, thus subordinated to the General Prosecutor's Office. They are established for fighting "large scale and medium corruption"[18] and they contain a central division and territorial structures. The competence of the DNA includes the criminal offences provided by Law no. 78/2000 if they caused damage higher than 200.000 euros or if the asset which represents the object of the corruption offence is higher than 100.000 euros and also if they were perpetrated by certain persons, such as members of the Parliament or of the Government, police officers, mayors, judges and prosecutors, etc. It has also to be noted that, in 2018, a separate division for investigating criminal offences in the field of justice was established[19]. This division is competent for any criminal offence perpetrated by judges and prosecutors, including corruption.

The competent court for corruption offences is generally the Tribunal; if the offender has a special quality (i.e. judge, prosecutor, member of the Parliament), the competence belongs to the court of appeal or to the High Court of Cassation and Justice.

Measuring corruption

In the TI Corruption Perception Index 2020, Romania scores 44 and ranks 69th globally, along with two other EU Member States, Bulgaria and Hungary, and 19th in the European Union.

According to the Special Eurobarometer 502 (2020), 83% of the Romanian respondents consider corruption widespread in their country (EU average is 71%) and 64% of people feel personally affected by corruption in their daily lives (EU average is 26%).

The Flash Eurobarometer 482(2019) measuring businesses' attitude towards corruption in the EU offers the following data about Romania: 97% of companies consider corruption to be widespread (EU average is 63%) and 88% of companies consider that corruption is a problem when doing business (EU average is 37%). On the other hand, 58% of respondents believe that there are enough successful prosecutions to deter people from corrupt practices (EU average is

[18] See www.pna.ro.

[19] It has to be noted that there is a lot of controversies around this special division and discussions are being made regarding dismantling it.

36%) while 37% of companies find that people and businesses convicted of bribing a high-level official are appropriately punished (EU average is 31%).

Since its accession to the EU, Romania reinforced its legal and institutional framework in the fight against corruption and put an emphasis on promoting a multi-sectoral public policy on preventing and combating corruption. The successive anti-corruption strategic documents adopted by the Romanian governments in this period[20] identified the most important areas in which anti-corruption measures should be taken with priority. Among those areas, we can mention the following: the public administration, at both the central and local level, the business environment, with a special highlight on public procurement procedures, the judicial system, financing political parties and political campaigns and the healthcare and education systems.

The activity carried out by the prosecutors in corruption cases during the last 5 years (2016-2020) is reflected in the statistical data published by the Prosecution Office attached to the High Court of Cassation and Justice (general data concerning the activity of all the prosecution offices of Romania in corruption cases, petty, medium or high-level, including the DNA).

Thus, the data regarding the offences of corruption and assimilated into corruption that have been sent to trial by the prosecutors in 2016–2020 are as follows[21]. *(See Table)*

With regard to high-level corruption, during the last 5 years, the DNA sent to trial, among others, the following categories of high-level officials:

- 10 ministers, including 1 former Prime Minister
- 31 Members of Parliament, out of which 22 Deputies and 9 Senators, including a former President of the Chamber of Deputies and president of the ruling party
- 2 Members of the European Parliament
- 13 State Secretaries
- 134 Mayors
- 11 Presidents of County Councils
- 25 judges and prosecutors
- 59 directors and presidents of public institutions

[20] http://www.just.ro/strategii-si-politici/strategii-nationale/

[21] Most of the information provided may be found on the website of the Public Ministry: https://www.mpublic.ro/ro/content/raport-de-activitate

Table 1

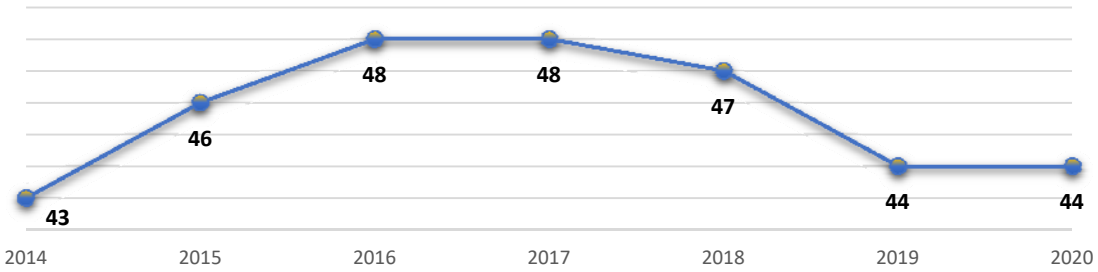
Year	TOTAL PERSONS SENT TO TRIAL , out of which	PERCENTAGE OF THE PERSONS SENT TO TRIAL (%)	CORRUPTION OFFENCES PROVIDED BY THE CRIMINAL CODE					Law on combating corruption no. 78/2000 – corruption offences, offenses assimilated in corruption and EU fraud offences, of which the activity of DNA
			Taking a bribe (art. 289 CC)	Giving a bribe (art. 290 CC)	Influence peddling (art. 291 CC)	Buying influence (art. 292 CC)	Abuse of office (art. 297 CC)	
2016	1795	2.8	183	212	84	64	295	1109 / 925
2017	1366	23	127	158	80	96	145	820 / 724
2018	1243	2.1	125	212	87	121	130	397 / 326
2019	1128	1.8	94	144	64	54	75	457 / 382
2020	1281	2.1	109	304	64	31	91	421 / 380

As the European Commission highlighted several times in its reports in the Cooperation and Verification Mechanism[22], the track record of the institutions with a role in investigating, prosecuting and adjudicating high-level corruption has been stronger every year since 2013. The press constantly featured regular indictments issued by the DNA and court decisions regarding corruption offences committed by politicians from all the main political parties, and also high-level public officials, magistrates and businessmen. However, the political environment established during 2017–2019 was strongly adverse to anticorruption measures and justice reform, and the legislation adopted or amended in that period created significant challenges to the key anticorruption institutions and important setbacks to the progress achieved. Some legislative amendments, such as the creation of a special section for investigating all types of criminal offences committed by judges and prosecutors, which took over the competence of the DNA on judicial corruption and put pressure on the prosecutors, were severely criticised by the international community (GRECO, CVM and Rule of law reports of the European Commission, Venice Commission, and more recently the Court of Justice of the EU), and are currently very difficult to reverse.

Under this climate, the perception of citizens regarding corruption has slightly fallen in 2019 and 2020 as compared to 2016 and 2017. Nevertheless, the perception over the past 5 years is considered relatively stable, as the graphic below regarding the Transparency International Corruption Perception Index shows. *(See Figure 1)*

[22] See EUROPEAN COMMISSION, 2021c

Figure 1: CPI Romania 2014–2020



Currently, according to TI Romania, the lack of transparency in public procurement, the underfinancing of the healthcare system and the lack of consistent measures in the digitalization of administrative procedures are constant problems at national level, aggravated in the context of the Covid-19 pandemic. Corrupt practices in companies, which at the declarative level adopt integrity policies, have been likely to have affected the credibility of the business environment. (TRANSPARENCY INTERNATIONAL ROMANIA, 2021)

Corruption and the local context – Corruption profile in practice

Regarding the typology of cases, DNA investigations have covered corruption offences in connection with concluding and performing public procurement contracts, influencing administrative decisions, privatisation and underestimation of property values belonging to state owned companies, restitution of private property confiscated by the communist regime, illegal financing of electoral campaigns, influencing judicial decisions, phenomena of organized, systemic corruption at the level of some police structures, customs, border police and educational institutes.

The following cases could be considered as examples of the most well-known high-level corruption cases that have reached final court decisions.

I. *The case of the former Prime-Minister of Romania (so called "Zambaccian case")*[23]

The case started from a press investigation published in 2004 followed by a complaint filed by a politician from the opposition regarding suspicions that the Prime Minister, Mr. A. N., bought land in Bucharest at an undervalued price. Later on, in January 2006, a company reported to the DNA that it was used by the family of the prime-minister to import, while infringing customs regulations, valuable goods for refurbishing one of their houses. One of the houses was located on *Zambaccian Street*, hence the name of the case. The investigation was carried out by the DNA.

[23] http://www.pna.ro/comunicat.xhtml?id=1610

Briefly, the facts were the following. Mr. A. N. and his wife, D. N. bought, in the period 2002–2004, during their official and private visits, valuable goods from China: construction materials, sanitary items, furniture, electrical and household items, and decorative items that were used to equip two buildings owned by N. These goods, with a value of approximately 600,000 USD, were paid for by the N. couple. Under the management of I. J., a close collaborator of the Prime Minister who controlled several construction companies to Romania, these goods were introduced to Romania as a fictitious import performed by one of the companies controlled by her, company V. It paid the expenses related to the customs taxes, excises, and transport from the ship to the buildings of the couple N. The money spent by company V. for this purpose was approximately 300,000 USD.

In the same period, construction, renovation and refurbishing works were performed at two of Mr. A. N.'s houses. The works were carried out by three companies, all of them controlled by I. J. The majority of the works were either not invoiced or the invoices remained unpaid and the link with the N. family was thoroughly hidden. Thus, approx. 400,000 USD was added to the undue benefit obtained by Mr. A. N.

In return for all the benefits that I. J. brought to Mr. A. N. and his family, he took care of her career. Thus, during this period, she was appointed the General Inspector of the State Inspectorate in Constructions, subordinated to the National Control Authority. When the relations between I. J. and the head of the NCA became tense, the Prime Minister engineered a Government Decision in which the SIC was brought under his direct subordination, as Prime Minister, increased her authority and competences and maintained her under his protection.

When the investigation started, Mr. A. N. was no longer Prime Minister; his mandate ended in 2004. He was a Member of Parliament and, during 2004–2006, President of the Chamber of Deputies. As a member of Parliament with no ministerial functions, according to the law applicable in 2006, he did not enjoy any immunity from investigation or prosecution. The only immunity a Member of the Parliament enjoys is related to pretrial arrest or detention and to the search measures. During the investigation, the prosecutors requested the Chamber of Deputies to waive the immunity of Mr. A. N. in order to enforce a search order in his apartment in the house on Zambaccian Street. The Chamber of Deputies, whose president was Mr. A. N., refused to comply. The prosecutors therefore searched the apartment of his son, situated in the same house.

In 2006, the case was sent to trial. The charges against Mr. A. N. were bribe taking and blackmail (because, during the investigation, he threatened a witness, a public official who helped him to conceal the link between his name and the goods and services received from China, to force him not to speak with the prosecutors). His wife was accused of participation in bribe taking; participation in the use of false documents in the customs procedure and money laundering. I. J. was accused of bribe giving, participation in forgery

in accounting books; participation in misuse of the company's assets; participation in the use of false documents in customs procedure; and money laundering.

The High Court of Cassation and Justice, competent due to the position of the defendant, started the trial, but after one year a decision by the Constitutional Court was made, stating that former ministers enjoy the same level of immunity as acting ministers, which, according to the law, meant that they enjoyed full immunity from investigation. They could not be investigated unless the Parliament (in the case of ministers and former ministers who were at the same time Members of Parliament) or the President of Romania (in the case of ministers or former ministers who were not at the same time Members of the Parliament) lifted their immunity. Therefore, the High Court of Cassation and Justice sent the case back to the prosecutors to repeat the criminal investigation while complying with the new rules on immunity.

In March 2009, the Chamber of Deputies lifted the immunity of Mr. A. N., the investigation was repeated and a new indictment was submitted to the court in 2010. At first instance, the defendants were acquitted of bribery and money laundering, but convicted of blackmail (Mr. A. N.), use of false documents in customs procedures (D. N. and I. J.) and misuse of company assets (I. J.). In January 2014, the appeal panel of the High Court of Cassation and Justice convicted all the defendants of all the offences with which they were charged and sentenced them as follows: Mr. A. N. – 4 years immediate imprisonment; D. N. – 3 years suspended imprisonment sentence; I. J. – 4 years immediate imprisonment. Prohibition of some civil rights and confiscation of the equivalent value of approx. 600,000 USD was also ordered by the court.

Both Mr. A. N. and I. J. spent time in detention. When police came to arrest Mr. A. N., he tried to commit suicide, shooting himself, but the police reacted promptly and he was out of danger.

II. *The case of the trafficking of influence for the appointment of the Governor of the Administration of the Danube Delta*[24]

In Romania, the name of S. O. V. – a businessman, owner of an important media trust, a so-called "media mogul", influential in the political environment in the early 2000s, who was investigated, prosecuted and convicted in several cases of economic fraud, money laundering, and corruption – is very well-known. Information from one of these cases was the starting point for the DNA to open the case in which the former President of the Chamber of Deputies, Mr. B. O., was investigated for trafficking of influence.

Briefly, S. O. V., who had some businesses in the Danube Delta, was interested in gaining leeway to develop these businesses and therefore he arranged that one of the persons employed in his media trust, a journalist, known also for his activism in the field of

[24] http://www.pna.ro/comunicat.xhtml?id=7770

environment protection, be appointed as the Governor of the Administration of the Danube Delta. For that purpose, in the summer of 2008, he approached Mr. B. O., the President of the Chamber of Deputies at that time.

Mr. B. O. was very preoccupied at that time with the preparations for the coming parliamentary elections that took place in November 2008. According to the rules of the party he belonged to, all the expenses for the electoral campaigns of the candidates to the positions of MPs had to be borne by the candidates. Therefore, Mr. B. O. was interested in obtaining the necessary funds for his electoral campaign and more. With the help of an intermediary, Mr. B. O. was brought by helicopter to S. O. V.'s holiday house, in the Danube Delta, and there the corrupt deal occurred. Mr. B. O. requested a million euro and electoral support, meaning the provision, free of charge, by the companies controlled by S. O. V. of marketing and consultancy services in the electoral campaign.

The position of Governor of the Administration Danube Delta is a political position; the appointment is made by Government Decision. Mr. B. O. used his position as President of the Chamber of Deputies and member of the same political party as the Prime Minister, and also his personal family ties with the Prime Minister (he was the witness at the Prime Minister's wedding – which, in the Romanian culture, is an important bond) and he persuaded the Prime Minister to promote this Government decision and appoint S. O. V.'s protégée of as Governor of the Administration of the Danube Delta. Moreover, even if he did not have any official role in the appointment to this position, he called in the current Governor and asked him to resign, which the Governor refused, and informed him that the new Governor would be the journalist.

The appointment took place as promised. In October 2008, S. O. V. honoured his promises and instructed a collaborator to transfer the sum of 1,000,000 euro from one of his offshore companies to a company controlled by the intermediary and to pay the President of the Chamber of Deputies the promised money. The money had been transferred from a bank account opened in Cyprus to a bank account opened in Bulgaria. After a few days, the intermediary went with the cash to the office of the President of the Chamber of Deputies at the premises of the political party and paid the money.

Later on, the investigation showed that the marketing and consultancy services for Mr. B. O.'s electoral campaign had been delivered by a public opinion polling company controlled by S. O. V. (at least 3 opinion polls, analyses and monitoring of the media, political analysis reports, statistical data regarding the profile of the electors, simulations of the vote, etc.) free of charge. Mr. B. O. won his seat in the Parliament at the elections in November 2008.

The financial investigation caried out in the case with regard to the revenues and expenses of the defendant Mr. B. O. and his family showed very clearly that his expenses in the following period had been excessive, including electoral expenses as well as family and personal expenses that could not have been justified by him or his family's legal revenues.

The prosecutors took interim seizure measures against his assets in order to secure the future confiscation of the undue benefits received.
Mr. B. O. was indicted in 2016, being accused of trafficking influence. As a member of Parliament, he did not enjoy immunity from the investigation or prosecution.
The first instance court, the Bucharest Tribunal, convicted him in 2019 to 7 years immediate imprisonment. The Court of Appeal reduced his sentence and ruled in 2020 a final conviction decision of 5 years immediate imprisonment, as well as the confiscation of the 1,000,000 euro received for his trafficking of influence. He is currently serving his sentence.

Prevention – National anti-corruption strategies

In the field of the fight against corruption, Romania shows a complex and comprehensive institutional framework represented by several specialised agencies:

- The DNA (National Anticorruption Directorate) – a prosecution office specialising in the investigation and prosecution of high and medium level corruption and EU frauds, according to the definitions provided by the special law. The DNA has nationwide jurisdiction and employs prosecutors, officers of the judicial police and experts in various economic fields to assist in the investigations.
- ANI (National Integrity Agency) – an administrative agency responsible for the' verification of assets, conflicts of interests and incompatibilities among public officials and elected officials.
- A specialised directorate within the Ministry of Internal Affairs (DGA – General Anticorruption Directorate) competent in matters regarding the integrity of and corruption concerning the personnel of the Ministry of Internal Affairs, including the police. The DGA has not only an investigative component, but a strong preventive component as well. Thus, it carries out anticorruption training activities for the personnel of the Ministry of Internal Affairs, organises awareness campaigns addressed to the personnel of the ministry and to the general public, develops methodologies for the management of corruption risks, evaluates the institutional reaction to corruption and carries out integrity tests for the personnel of the ministry.

The investigation and prosecution of the corruption offences that do not fall under the competence of the DNA, the so-called petty corruption cases, are dealt with by the prosecutors from the regular prosecution offices, mostly by the prosecution offices attached to the 41 counties of Romania.

At the policy level, the Ministry of Justice has specific competences to develop the public policies, strategies and action plans in the field of justice reform, preventing and combating corruption and other serious forms of criminality. Moreover, the Ministry of Justice is

responsible for the drafting and implementation of the National Anticorruption Strategy. For this purpose, a Technical Secretariat of the National Anticorruption Strategy has been set up. All the relevant stakeholders are involved in it to support the implementation of the strategy. In this way, several platforms of cooperation have been established: the Platform of the independent agencies and anticorruption institutions; the platform of the central public administration, the platform of the local public administration; the platform of the business environment; and the platform of civil society. The policy documents are discussed and the decisions are taken after consultation with the platforms.

Under this framework, several national anti-corruption strategies have been adopted and followed one another since 2005. The current strategy, the National Anticorruption Strategy 2016–2020, has the following general objectives:

- Developing a culture of transparency for open governance at central and local level
- Increasing institutional integrity by including corruption prevention measures as mandatory elements of management plans and their regular evaluation as an integral part of administrative performance
- Strengthening integrity, reducing vulnerabilities and corruption risks in priority sectors of activity (namely healthcare, education, Parliament activity, judicial system, financing of political parties and electoral campaigns, public procurement, business environment and local public administration)
- Increasing the awareness and understanding of integrity standards by employees and beneficiaries of public services at central and local level
- Strengthening the performance of the fight against corruption through criminal processes and administrative means
- Increasing the implementation of anti-corruption measures by approving integrity plans and regular self-assessment at the level of all central and local public institutions, as well as public enterprises

After the period covered by the NAS 2016–2020 elapsed, the work in view of adopting a new strategy started. Currently, the Ministry of Justice presented a new draft strategy aimed to cover the period 2021–2025, and has discussed it in the above-mentioned platforms of cooperation. The new draft strategy, not yet adopted by the Government, maintains the same categories of sectors vulnerable to corruption, in which priority measures are needed, as the previous strategy and includes two new ones: environment protection and protection of cultural heritage. The general objectives proposed by the draft strategy are broadly similar to those adopted in the previous strategy, but adapted to the current situation:

- Reducing the impact of corruption on citizens
- Strengthening institutional management and administrative capacity to prevent and combat corruption

- Strengthening integrity in the priority sectors of activity
- Strengthening performance in combating corruption through penal and administrative means
- Increasing the degree of implementation of anti-corruption measures through the approval of the integrity plans and periodic self-assessment at the level of all central and local public institutions and public enterprises.

References

European Commission (2021a): *The 2021 Ageing Report.* https://ec.europa.eu/info/publications/2021-ageing-report-economic-and-budgetary-projections-eu-member-states-2019-2070_en

European Commission (2021b): *Labour market information – Romania.* July https://ec.europa.eu/eures/main.jsp?catId=9545&countryId=RO&acro=lmi&lang=en&regionId=RO0&nuts2Code=%20&nuts3Code=&regionName=National%20Level

European Commission (2021c): *The report on progress in Bulgaria and Romania.* https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en; https://ec.europa.eu/info/files/progress-report-romania-com-2021-370-final_en

Institutul Național de Statistică Română [National Institute of Statistics] (2013): *Ce ne spune recensământul din 2011 despre religie? [What does the 2011 census reveal about religion?]* www.insse.ro/cms/files/publicatii/pliante%20statistice/08-Recensamintele%20despre%20religie_n.pdf

The World Bank (2018): *Romania Systematic Country Diagnostic. Background Note. Migration.* https://documents1.worldbank.org/curated/en/210481530907970911/pdf/128064-SCD-PUBLIC-P160439-RomaniaSCDBackgroundNoteMigration.pdf

Transparency International Romania (2021): *România nu reuşeşte să părăsească ultimele locuri în UE, alături de Bulgaria și Ungaria. Comunicat de presă Indicele de Percepție a Corupției 2020 în contextul COVID-19.* https://www.transparency.org.ro/sites/default/files/comunicat_de_presa_ti-romania_cpi_2020.pdf

COUNTRY CASE STUDIES – SERBIA

ALEKSANDAR STEVANOVIĆ – NIKOLA VUJIČIĆ*

Country profile[1]

A census[2] was last conducted in the Republic of Serbia in 2011. According to that census, the total number of inhabitants was 7,186,862. As the principal two characteristics, in comparison to previous censuses, the negative birth rate was emphasised (in comparison to the census from 2002, the birth rate was -4.3%), as well as that Serbia was among the demographically oldest countries of the world (the average inhabitant was 42.2 years old). (RZS, 2015: 47.; MARINKOVIĆ, 2013: 2.) According to the estimate of the Statistical Office of the Republic of Serbia (hereinafter: the Office), the total number of inhabitants in 2020 was 6,899,126 (in comparison to 2011 there was a notable decrease in the number of inhabitants -4%). In 2020 there were circa 47% more deaths than births. This further contributes to the statement that the trend of negative birth rate is continuing. The average age was 43.4 (women were on average older than men by 2.8 years). If we look at the structure of the population in relation to their age, most inhabitants (64.6%) were 15-64 years old, then +65 (21.1%), while the group of those up to 14 years (14.3%) was the smallest. If we look at the internal migration of inhabitants, it is noticeable that most inhabitants lived in the Belgrade region (the city of Belgrade and the surrounding places), which also had the only positive migration rate, while emigration of people was biggest in the regions of Sumadija and western Serbia, as well as southern and eastern Serbia. As for international migrations, which issue is especially topical in recent years in the whole of Europe, data are not available, since the Office does not record data on this. (RZS, 2021a)

GDP in 2020 amounted to USD 52.96 billion (0.05% of the world economy) which is the highest in the 1995–2020 period.[3] GDP Annual Growth rate was -1% in comparison to 2019, where we should state that all countries recorded a fall (the world average was -3.6; Europe -6.7;

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[1] Presented data relate to the year 2020. In situations where there were no data for the said year, last published data were used.

[2] The census did not include people who lived in the territory of the Autonomous Province of Kosovo.

[3] Serbia's economy depends on manufacturing and exports, driven by foreign direct investments. The FDI are concentrated in a variety of industries, including metal processing, building, textile, beverage, electronics and financial. On the expenditure side, household consumption is the main component of GDP and accounts for 76 percent of its total use, followed by gross fixed capital formation (17 percent) and government expenditure (18 percent). Exports of goods and services account for 44 percent of GDP while imports account for 54 percent, subtracting 10 percent of total GDP. Source: https://tradingeconomics.com/serbia/gdp-growth

and the EU -6.2). In this sense, we can state that the drop in GDP was smaller in comparison to the European average. The total world GDP decline could be explained by problems connected with the consequences of the COVID-19 virus on the world economy. GDP per capita growth (annual %) in Serbia was -0.4 (the world: -4.6; EURO: -6.8 and the EU: -6.9). Inflation rate (annual %) in Serbia was circa 1.8, which is somewhat higher in comparison to the average inflation rate in all countries (1.7), the EU (1.4) and the EUR region (1.2).[4]

Employment: The number of employed people in 2020 was 2,894,800. The unemployment rate was 9%, which is a fall of 1.4% in comparison to 2019, while employment rate was 49.1%, which is an increase of 0.1%. The multi-year trend of increasing formal and decreasing informal employment continued in 2020. The most informally employed people were recorded in the 25-54 age, group and among those self-employed with no employees. Looking at activities, the biggest fall in total employment was recorded in agriculture, forestry and fishing industry, while the biggest increase in employment was recorded in construction, media and communications. The trend of permanent employment growth, which began in 2015, continued in 2020. The number of permanently employed people in 2020 was greater by 59,600 in comparison to 2019, while the number of people working on contracts, temporary or seasonal jobs, in the same period was smaller by 43,600. In 2020, the smallest unemployment rate was recorded in the Belgrade region, as well as the biggest employment rate (employment rate growth of 0.9%). The average net income in December 2020 was RSD 66,092.00 (USD 660), where the net nominal value of income in comparison to January 2020 increased by 10.6%. It is important to state that median at the end of 2020 was RSD 48,676.00 (USD 486), which means that around 50% of employed people had a net income up to that amount. (RZS, 2021b)

Safety / Homicide rate: According to the available data published by EUROSTAT for the year 2018, the murder rate in Serbia was 1.42 (EURO average: 0.96)[5], which puts it in seventh place (it is behind Latvia, Lithuania, Estonia, Malta, Cyprus and Romania)[6]. According to the World Bank data, this rate is somewhat lower, and is 1.23.

Democracy / Elections: The last parliamentary elections were held on June 21 and July 1, 2020, when 48.9% of citizens on the list of voters made use of their voting right. The Serbian Progressive Party won 75.2% of mandates (somewhat less than 61% of all voters voted for this list from the 22 offered lists). (RZS, 2020: 8–9.) The last presidential elections were held on April 2 2017, when 54.34% of citizens on the list of voters made use of their voting right. Citizens could choose between 11 candidates, and *Aleksandar Vučić* was elected President with 55.08%

[4] Source: https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=RS

[5] According to the World Bank data for 2018, intentional homicides rate in Serbia was 1. Source: https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=RS

[6] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Crime_statistics#intentional_homicides_in_the_EU-27_in_2018

votes won. (RZS, 2017: 8–9.) The issue of democracy and respect for human, i.e. citizens' rights has often been raised in recent years, with a special accent put on the freedom of the media, i.e., its unequal treatment of the governing and opposition parties. Corruption and the judiciary are highlighted as special problems with regard to the rule of law, especially concerning the *"Savamala"*, *"Krušik"*, *"Jovanjica"*, *"Telekom"* and other affairs. As for the European integration of Serbia, this issue has been made topical through negotiations regarding Chapter 23 (Judiciary and Fundamental Rights) and Chapter 10 (Information Society and Media), where EU reports point to the above problems and the need to solve them.[7]

Corruption profile in law

Innumerable definitions of corruption are available and each of them focuses on corruption in different ways, highlighting different elements as its main characteristics. There are several international legal acts that seek to unify anti-corruption mechanisms at the universal level. The United Nations Convention against Corruption (UNCAC, Merida 2003) is a fundamental legal instrument for the fight against corruption worldwide and its implementation is one of the priority development goals of the UN.

The Republic of Serbia has ratified UNCAC since 2005. Considering the nature of legal obligation, UNCAC contains different types of clauses: binding; clauses to be considered by the State party; optional; and limiting. Binding provisions for signatory states establish obligations that must be implemented what was in principle done when it comes to the Republic of Serbia.

Having in mind that the Republic of Serbia became a member of the Council of Europe in 2003, the normative acts of the Council of Europe related to the fight against corruption are also in force. Serbia has thus ratified the anti-corruption regulations of the Council of Europe. The Convention on Criminal Corruption (Strasbourg, 1999) was ratified by the Law on Ratification of the Criminal Law Convention on Corruption[8] as well as the Law on Ratification. (Additional Protocol to the Criminal Law Convention on Corruption[9]) The Convention on Civil Law Corruption (Strasbourg, 1999) was ratified by the Law on Ratification of the Civil Law Convention on Corruption.[10]

The prevailing view in the domestic literature is that the term corruption should include only those forms of behaviour that are incriminated in criminal law. (IGNJATOVIĆ, 2016: 121.) If we look at corruption through the prism of criminal law, it should be noted that criminal legislation

[7] https://ec.europa.eu/neighbourhood-enlargement/sites/default/files/serbia_report_2020.pdf
[8] Official Gazette of the FRY, International Treaties, No. 2/2002 and Official Gazette of Serbia and Montenegro-International Treaties, No. 18/2005.
[9] The Official Gazette of the Republic of Serbia, International Agreements, No. 102/2007.
[10] *ibid.*

in the Republic of Serbia did not know the concept of corruption as a legal term until the amendments to the Criminal Code from 2002, when a separate chapter provided for corruption. With the adoption of the Criminal Code in force today, this special chapter has been deleted, and criminal acts that fall into the area of corruption are clearly defined.

The concept of corruption is legally defined in the Law on Prevention of Corruption[11], so that corruption is a relationship that arises from the use of one's official or social position or influence in order to gain benefits for oneself or others. It seems that, based on the legal definition of corruption, it can be concluded that the legislator in the Republic of Serbia has joined the global tendency to prevent corruption in the private sector, since corruption is defined not only as an abuse of official, but also as a social position.[12]

Corrupt criminal offenses in the narrower sense (active / passive bribery, private / public bribery, trading in influence and abuse of public office) are provided for in the Criminal Code, while certain corrupt criminal offences in the broader sense are also provided for in other laws.

In the following, we will analyse the criminal offenses prescribed by art. 367 of the Criminal Code – *taking bribes*; art. 368 of the Criminal Code – *offering bribes*; art. 366 of the Criminal Code – *trading in influence*; and art. 359 of the Criminal Code – *abuse of office*.

Taking bribes (passive bribery)

The criminal offence of *taking bribes* is contained in the chapter on criminal offences against official duty and is prescribed by art. 367 of the Criminal Code as follows: *"An official who directly or indirectly solicits or accepts a gift or other benefit, or the promise of a gift or other benefit for himself or another to perform an official act within his competence that should not be performed, or not to perform an official act that should be performed, shall be punished by imprisonment of from two to twelve years."*

In addition to the basic form of crime cited above, the legislation proposes another form that differs from the basic in that a corrupt action refers to what an official person would have to do or not do what he should not do. The crime is punishable by one to two year in prison. The legislator also prescribed a more serious form of this criminal act by underlining certain activities that should be especially protected from corrupt influence. Hence, the more severe form of bribery is prescribed as follows: *"An official, who commits the offence in connection with the*

[11] The Official Gazette of the Republic of Serbia, Nos. 35/2019; 88/2019; 11/2021.

[12] However, in that sense, the legal definition of corruption from the previous Law on the Anti-Corruption Agency was much better and more precise, since corruption was defined as a relationship based on abuse of official or social position or influence, *in the public or private sector*, in for the purpose of gaining personal benefit or benefit for another.

detection of a criminal offence, instigation or conduct of criminal proceedings, or pronouncement or enforcement of criminal sanctions, shall be punished by imprisonment from three to fifteen years."

The law also stipulates that an official who, after performing or failing to perform an official act accepts a gift or other benefit will be punished for the crime of taking bribes. Finally, a foreign official and responsible officer in an enterprise, institution or other entity who commits the offence will be punished with the penalty prescribed for that offence.

In order to achieve the complete goal of criminalising the crime of taking bribes, the received gift or material gain shall be seized: When it comes to the capacity of the perpetrator, for the existence of the criminal offence of taking bribes, it is necessary to determine whether the one who receives the bribe or requests it, is acting as an official person. In order for the perpetrator's actions to acquire the legal characteristics of the criminal offence of taking bribes, he must have the status of an official person.

Art. 112 of the Criminal Code, defines the term official as follows: An official is a person discharging official duties in government authority; an elected, appointed or assigned person in a government authority, local self-government body or a person permanently or periodically discharging an official duty or office in such bodies; a person in an institution, enterprise or other entity who is assigned periodic discharge of public authority, who rules on the rights, obligations or interests of natural or legal persons or on public interest.

Of particular importance is the provision according to which a person who is de facto assigned to discharge official duties or tasks is going to be considered as an official person. A criminal offence is committed by requesting a bribe, so an attempted criminal offence is not possible. For the existence of this criminal offence, it is irrelevant whether the official has subsequently performed an official act or not, or whether he has done or failed to do something in accordance with or contrary to the law.

Intent is the only form of guilt in committing all forms of the crime of taking bribes. The relation of this criminal offence to the criminal offense of abuse of office is completely determined in the decision of the Supreme Court, which states that there is a principle of inclusion, i.e., that when in the same actions of the perpetrator there are elements of abuse and bribery, there will only be the crime of bribery. Taking bribes and illegal performance of official duties are functionally related to the required bribe, since it is only a further phase in the illegal conduct of the official duty. (JOCIĆ, 2018: 61)

Offering bribes (active bribery)

The legislator prescribed the basic form of this criminal offence as follows: Whoever makes or offers a gift or other benefit to an official to, within his official competence, perform an official act that should not be performed or not to perform an official act that should be performed, or who acts as intermediary in such bribery of an official, shall be punished by imprisonment of from six months to five years.

It is obvious that the legislator is stricter towards persons who commit passive bribery, i.e. take bribes.

The legislator prescribes another form of this criminal offence as follows: Whoever makes or offers a gift or other benefit to an official to, within his official competence, perform an official act that he is obliged to perform or not to perform an official act that he may not perform or who acts as intermediary in such bribery of an official, shall be punished by imprisonment of up to three years.

The legislator prescribed that the criminal offence of offering bribes will be committed when the bribe is given or promised to a responsible officer in an enterprise, institution or other entity. Within this incrimination, the legislator also encourages anti-corruption awareness by prescribing that an offender who reports the offence before becoming aware that it has been detected may avoid punishment. Additionally, the gift or other benefit seized from the person accepting the bribe may be returned to the persons giving the bribe.

Trading in influence

The Criminal Code provides as follows: Whoever solicits or accepts, directly or through a third party, reward or other advantage for himself or another to use his official or social position or his real or assumed influence to intercede for performance or failure to perform an official act, shall be punished by imprisonment of from six months to five years.

The following paragraph prescribes the active form of this criminal offence: Whoever promises, offers or gives, directly or through a third party, a reward or other benefit to another to intercede through using his official or social position or his real or assumed influence for performance of or failure to perform an official act, shall be punished by imprisonment of up to three years.

The next paragraph incriminates mediation to perform an official action that should not be performed or not to perform an official action that should be performed. This form is a more severe form and is punishable by imprisonment from one to eight years.

If any reward or advantage has been received for trading in influence, the offender shall be punished by imprisonment of from two to ten years.

An active form of mediation to perform an official action that should not be performed or not to perform an official action that should be performed is also prescribed. The offender shall be punished by imprisonment from six months to five years.

Abuse of office

Art. 359 of the Criminal Code provides for a criminal offence as follows: An official who, by abuse of office or authority, by exceeding the limits of his official authority or by dereliction of duty acquires any benefit for himself or another or a physical or legal person, or causes damage to a third party or seriously violates the rights of another, shall be punished by imprisonment of from six months to five years.

This is a basic criminal offence against official duty. The object of protection is an official duty and its correct, purposeful and lawful performance in order to preserve the trust in the authorities and in the entire legal order. The offence has three basic forms of manifestation. These are: a) exploitation of official positions, b) exceeding official authority and c) non-performance of an official duty.

The legislator also prescribed two more serious forms according to the degree of the consequence, measured in money. Thus, it was stated that if the commission of the offence results in acquiring material gain exceeding four hundred and fifty thousand dinars in value, the offender shall be punished by imprisonment of from one to eight years and if the value of acquired material gain exceeds one million five hundred thousand dinars, the offender shall be punished by imprisonment of from two to twelve years.

In the theory of criminal law, the notion of abuse of official duty is divided into its objective and subjective meaning. Official duty is abused in the objective sense when the official acts against the interests of the service by exceeding his own official authority or does not perform his official duties. Official duty is abused in the subjective sense when an official undertakes official actions within his official authority, but he does not do so in the interest of the service but to achieve some material goal. (SRZENTIĆ et al., 1995: 844–855.)

Criminal procedure and investigation on corruption cases

Criminal procedure in the Republic of Serbia, contain significant components of adversarial criminal procedure and was established by the Criminal Procedure Code.[13] The public prosecutor is required to conduct a criminal investigation where there are grounds for suspicion that a criminal offence has been committed or that a certain person has committed a criminal offence that is prosecutable ex officio. For certain criminal offences, where so prescribed by law, the public prosecutor may undertake criminal prosecution only on a motion by the injured party. Thus, the public prosecutor is the holder of the function of criminal prosecution for acts that are prosecuted ex officio. He is the head of the pre-criminal procedure for official criminal acts and, as such, he coordinates the activities of state bodies and all other entities, especially when it comes to the police.

The public prosecutor will file an indictment when there is justified suspicion that a certain person has committed a criminal offence. The law also allows the possibility of an indictment to be filed even without having to conduct an investigation, if the data collected about the criminal offence and the perpetrator provide sufficient grounds for filing charges. The non-trial panel of the court will confirm the indictment by a ruling on whether the indictment was made in accordance with the law.

According to art. 161–162 of the Criminal Procedure Code, special evidentiary actions may be ordered against a person regarding whom there are grounds for suspicion that he/she has committed a criminal offence referred to; among others, those criminal offences that we defined above as corrupt criminal offences in a narrower sense. It is an indisputable position of practitioners that, in most cases, the criminal offense of taking bribes is detected with the use of marked banknotes; in other words, with the use of simulated deals as a special evidentiary action provided by the Criminal Code. Apart from using simulated deals, the following special evidentiary actions may be used in the Serbian criminal procedure: covert supervision of communication, covert surveillance and recording, computer data search, controlled delivery and an undercover investigator.

The establishment, organisation, competence and authorisations of state authorities and special organisational units of state authorities for the purpose of detection, criminal prosecution and trial for corrupt criminal offences in a narrower sense was set in the Law on the organisation and Competences of State Bodies in the Suppression of Organised Crime, Terrorism and

[13] The Official Gazette of the Republic of Serbia, Nos. 72/2011; 101/2011; 121/2012; 32/2013; 45/2013; 55/2014; 35/2019; 27/2021.

Corruption.[14] Faster and more concrete changes in the fight against corruption came with the entry into force of that Law since March 1st 2018. With the formation of special departments at higher prosecutor's offices and through financial investigations, the application of this law is starting to give the first results. (PAVLOVIĆ – GÁL, 2020: 304.)

The Prosecutor's Office for Organised Crime is competent to act in the subject matters of the criminal offences of Taking/Offering Bribes, Trading in Influence and Abuse of Office when the defendant, i.e. the person to whom the bribe is given, is an official or responsible person performing a public function on the basis of election, appointment or appointment by the National Assembly, the President of the Republic, the Government, the general session of the Supreme Court of Cassation, the High Judicial Council or the State Prosecutorial Council. For the purpose of acting in the subject matters of the criminal offences in that case, the Higher Court in Belgrade shall be competent, being the first instance one, for the territory of the Republic of Serbia.

For other criminal offences of corruption, the special departments of the higher public prosecutor's offices are competent for combating corruption; the Ministry of Interior is another organisational unit responsible for combating corruption and the Special departments of the higher courts are competent for the suppression of corruption.

Theorists and practitioners especially emphasize, in a positive sense, the possibility of using strike groups and financial forensics for investigating crimes of corruption. Task forces may be established at the Prosecutor's Office for Organised Crime and at the special departments of higher public prosecutor's offices, pursuant to the decision of the Prosecutor, i.e. the decision of the competent senior public prosecutor, upon receiving the consent of the Republic Public Prosecutor for the suppression of corruption, for the purpose of working on detection and prosecution of the criminal offences that are the task force's work.

According to the Law, a financial forensics service may be established at the Prosecutor's Office for Organised Crime and at special departments of higher public prosecutor's offices referred to in this Law. The tasks of the financial forensics service will be carried out by its specialists i.e. the persons helping the Public Prosecutor in the analysis of cash flows and financial transactions for the purpose of criminal prosecution.

The Law on Prevention of Corruption establishes the competence of the regulatory agency - the Agency for the Prevention of Corruption. The basic competences of the Agency are to supervise the implementation of strategic documents, submit a report on their implementation with recommendations for action to the National Assembly, give responsible entities

[14] The Official Gazette of the Republic of Serbia, Nos. 94/16; 87/18.

recommendations on how to eliminate shortcomings in the implementation of strategic documents and initiate amendments to strategic documents, decide on conflicts of interest of the initiates and conduct procedures in which the existence of violations of this law has been determined and impose non-criminal sanctions in accordance with this law. In terms of prosecuting corruption, the basic role of the Agency is, as an expert body, to detect corrupt practices and file criminal charges.

Apart from the Agency for the Prevention of Corruption, within the anti-corruption system of the Republic of Serbia, there is also the Anti-Corruption Council established by the Decision of the Government of the Republic of Serbia on 11th October 2001. The Council is an expert advisory body of the Government, founded with a mission to oversee all the aspects of anti-corruption activities, to propose measures to be taken in order to fight corruption effectively, to monitor their implementation, and to make proposals for creating regulations, programmes and other acts and measures in this area.

The main difference between those two anti-corruption regulatory bodies is that the Agency for the Prevention of Corruption is an independent state body, which is accountable only to the National Assembly for the performance of tasks within its competence. On the other hand, the Anti-Corruption Council has six members appointed by and accountable to The Government.

Measuring corruption

Objective approaches to measuring corruption are usually quantifiable and based on datasets that are verifiable. Examples of these objective indicators of corruption are the number of official complaints to the police, or relevant anti-corruption body, the actual number of convictions, and audits of company accounts. (BROOKS et al., 2013)

Corruption statistics are only partially reliable, comparable and transparent. Public prosecutors and courts publish only annual activity reports and the Ministry of the Interior publishes data on police actions against participants in corruption, together with data on perpetrators of other types of criminal acts, primarily acts of economic crime.

This year, Serbia is still considered as a country where the level of corruption is high because it has 38 out of the ideal 100 points (one point less in relation to the CPI 2019 result). With that score, Serbia, for the second year in a row, takes the place in the lower half of the world list – because it is 94th out of 180 countries and has as many as five points fewer than the global average rating (43).

Corrupt criminal offences in the narrower sense (active / passive bribery, private / public bribery, trading in influence and abuse of public office) are provided for in the Criminal Code in Chapter 33 – *Criminal Offences Against Official Duty.*

According to the Statistical Office of the Republic of Serbia, there were 2642 criminal complaints of criminal offences against official duty in 2015, 2764 in 2016, 2612 in 2017, 1815 in 2018, 1429 in 2019 and 1384 in 2020.

Indictments for criminal offences against official duty were filed 1008 times in 2015, 867 times in 2016, 800 times in 2017, 779 times in 2018, 582 times in 2019 and 515 times in 2020.

Finally, there were 524 convictions criminal offences against official Duty in 2015, 489 in 2016, 490 in 2017, 466 in 2018, 433 in 2019 and 355 in 2020.

Viewed individually, the most common crime of corruption in the narrower sense in official statistics is abuse of office.

Corruption and the local context – corruption profile in practice

In each report by the European Commission, Serbia has received a reminder that "there is no progress" when it comes to final court decisions for "high-level corruption", and recently the European Parliament pointed out some specific cases that it believes should be investigated. Serbian legislation does not explicitly recognize the concept of "high-level corruption". This term is used informally for cases under the jurisdiction of the Prosecutor's Office for Organised Crime. In any case, there has been no conviction for high-level corruption in recent decades. In line with that assertion, the President of the High Court in Belgrade gave an interview at the end of 2020 in which he said: *"Let's not lie, we don't have any single case of high corruption in the High Court. I am not in a position to tell you – we had a member of the Serbian government or we had a director of a public company who is being tried."*

The last two cases that we can define as conducting criminal proceedings for high corruption concerned two former ministers from the previous regime.

> In 2017, a Serbian court sentenced a former government minister to three and a half years in prison for abuse of power. *Oliver Dulic*, Serbia's minister of environment and urban development in the previous Democratic Party-led government, was found guilty of having favoured a Slovenian company when issuing licences for an optical cable network. Dulic has denied the accusations, explaining that it was a political decision.[15] However, the Belgrade Court of Appeals overturned the verdict and ordered a new trial of former Environment Minister Dulic and the case is still pending. The verdict was revoked because

[15] Source: https://www.rferl.org/a/serbian-court-jails-former-minister-dulic-associates-abuse-power-case/28613539.html

the higher court found it incomprehensible and did not explain what the perpetration of the criminal offence of extended duration comprised.

The second case became public on 3 September 2010, when the Anti-Corruption Council of Serbia made public a list of persons facing criminal charges related to the privatisation of the Port of Belgrade Company. The criminal complaint had been filed three months earlier against 17 persons for abusing their official position during the 2005 privatisation. Among them were former minister *Predrag Bubalo* and officials of the Privatisation Agency of Serbia. The group was charged with abuses committed during the September 2005 sale of state-owned shares in the Port of Belgrade (Luka Beograd) company, previously owned by the Stock and PIO Fund, to the Luxembourg-based World Fin, were sold in 2005 to the company World Fin from Luxembourg, owned by *Milan Beko* and *Miroslav Mišković*. Their company then bought the shares of small shareholders in Port of Belgrade. At that time, the prime minister was *Vojislav Koštunica*, and Predrag Bubalo was the minister of the economy and privatisation. Three years after the sale of the Port of Belgrade, *Verica Barać*, in front of the Anti-Corruption Council, submitted a report to the Government, which drew attention to the fact that the state lost 21 million euros during that trade.
Bubalo and Beko were interrogated by the police in early 2013, three years after the report was filed, five years after the Council's report and eight years after the disputed sale. The trial began in July 2014. Bubalo presented his defence in detail and denied accusations of abuse of office.[16]
In 2017, The Special Court in Belgrade acquitted former Economy Minister Predrag Bubalo and the others who stood trial in the Port of Belgrade case. However, in April 2019, the Court of Appeals overturned the acquittal, not accepting the conclusion of the first instance court that the responsible persons of the Privatization Agency and the Share Fund were not liable in the "Port of Belgrade" case, which meant that minister Bubalo had no criminal liability. Finally, in January 2020, the Special Court in Belgrade upheld Bubalo's and the other defendants' acquittal The Prosecutor's Office for Organized Crime announced that it will appeal after receiving a written copy and analysing the reasons given in the court verdict.

In fact, even during the former and current regime, numerous corruption scandals with huge negative consequences remained without a final and enforceable judgment or with the court passing disputable judgments.

For instance, in the sale of *Sartid,* including five subsidiaries which were bankrupt, the Commercial Court actually upheld the agreement between the Minister for Privatization, *Aleksandar Vlahovic*, and the privileged buyer, with a drastic violation of the creditors'

[16] Source: https://www.istinomer.rs/akter/predrag-bubalo/

rights and at the expense of the state. The way in which it was sold casts suspicion of corruption involving the highest executive and judicial authorities. The bankruptcy of *Sartid* showed all the weakness of judicial power in Serbia in relation to executive power.[17]

In the case of the *National Savings Bank, Mladjan Dinkic*, the NBY[18] governor at that time, enabled *Nacionalna stedionica* (*National Savings Bank*), a private bank, controlled by *Vuk Hamovic* and *Vojin Lazarevic*, to use the equipment and office premises of the former Payment Operations Service (ZOP) free of charge, and awarded it, without a tender, the task of paying out a great part of the old hard currency savings and other privileges. At the same time, the NBY failed to find out that related persons had acquired the controlling interest in Nacionalna stedionica, and that, in one day, a significant amount of hard currency had been transferred from Vienna, Moscow and Belgrade on the basis of a fictitious transaction and eventually this transaction was used for the purchase of the shares of the Bank. The statements from the Report were investigated by the special police unit – UBPOK, but the case has never been brought to the court.[19]

We have already mentioned before the "Savamala", "Krušik", "Jovanjica" and "Telekom" cases, which attracted much attention and public interest, but the general impression is that the judiciary listened to the will of politicians when making decisions.

One more landmark case of "high-level corruption" that raised suspicions among the judiciary concerns the former Minister of Defence and current Minister of the Interior, *Aleksandar Vulin*. When questioned by the agency about his ability to afford the 107 square metre property, Vulin's dubious explanations raised suspicion of criminal activity. The anti-corruption agency contended that Vulin couldn't have even paid the first instalment of his Belgrade property with the small amount that he received from his brother and pushed him for another explanation. This time, Vulin told the agency that he had borrowed €205,000 from his wife's aunt in Canada, handing as proof a ten-year loan agreement, signed by his wife, confirming that she received the money. The signature from the purported aunt in Canada was missing, however. The thousands of euros in cash that Vulin claims his wife's aunt lent the couple couldn't have passed international borders without being declared to customs and without an explanation of its origins, KRIK remarked.
The law states that a maximum of €10,000 can be brought into the country without being declared – anything over that amount is a crime. The anti-corruption agency brought

[17] Source: http://www.antikorupcija-savet.gov.rs/en-GB/questions-left-unanswered/cid1013-1465/major-reports-and-initiatives-regarding-the-system-corruption-phenomena-submitted-by-the-anti-corruption-council-to-the-government-and-to-the-prosecutors-office

[18] National Bank of Yugoslavia

[19] Source: http://www.antikorupcija-savet.gov.rs/en-GB/questions-left-unanswered/cid1013-1465/major-reports-and-initiatives-regarding-the-system-corruption-phenomena-submitted-by-the-anti-corruption-council-to-the-government-and-to-the-prosecutors-office

Vulin's case to the Prosecution for Organised Crime in Belgrade but the case was dropped, citing insufficient evidence that the minister had committed a crime.[20]

All the mentioned cases do not send a strong message to potential perpetrators or the public as they point to the slowness and shortcomings of the judicial system in preventing corruption. In this regard, one may easily get the impression that the fight against corruption is still largely driven by political rather than legal motives.[21]

National anti-corruption strategies

The National Anti-Corruption Strategy in the Republic of Serbia and the Revised Action Plan for the Implementation of the National Anti-Corruption Strategy represent a strategic normative framework for the fight against corruption in the Republic of Serbia.

The general goal of the Strategy is to eliminate corruption, as an obstacle to the economic, social and democratic development of the Republic of Serbia, as much as possible. The consequences of corruption are not only the impoverishment of society and the state, and the uncertainty and instability of the economic system, which is reflected, among other things, in the reduction of investments.

The National Anti-Corruption Strategy and the accompanying Action Plan underline key areas for the fight against corruption, such as political activities, public finances, privatisation and public-private partnerships, justice, police, urbanisation and construction, health, education and sports, the media and corruption, prevention, as well as concrete measures to fight corruption in vulnerable areas such as health, taxes, education, customs and local self-government. The implementation of measures in these areas in 2017 was harmonised with the recommendations of the European Commission and with the measures of priority reforms after the adoption of the Action Plan for Chapter 23, through the adoption of the Revised Action Plan for the implementation of the National Anti-Corruption Strategy.

In November 2016, Serbia adopted extensive amendments to the Criminal Code, which revised the chapter on criminal offences against the economy and crimes against official duty. With these changes, the Criminal Code has been modernised, and provides a good framework for the work of the police and the public prosecutors. Also, in November 2016, a new Law on the Organisation and Competences of State Bodies in the Suppression of Organized Crime,

[20] Source: https://www.krik.rs/en/defense-minister-vulin-cant-explain-origins-e200000-cash/

[21] Although the subject of this paper is not confiscation of criminal assets, we think it is good to mention that the scope of the Law on Confiscation of Property derived from a Criminal Offence (*also applies to corrupt criminal offenses*) is not adequate. Based on the data submitted for the needs of the *EU project "Prevention against corruption"*, which relate to 2018 and 2019, the Prosecutor's Office for Organized Crime has brought only two decisions on permanent confiscation of property. See more: MILORADOVIĆ – VUJIČIĆ, 2020.

Terrorism and corruption introduced full specialization of the police, prosecutors and courts, for this type of crime, and introduced modern tools for prosecuting crimes of corruption. Also, the Law on Tax Procedure and Tax Administration[22] prescribes the legal mechanisms for cross-checking property.

In the implementation of the Strategy, the authorities involved in preventing and fighting corruption, are required to exercise their competence in accordance with the following general principles: rule of law, principle of "zero tolerance" on corruption, principle of responsibility, principle of comprehensive application of measures and the cooperation of subjects, principle of efficiency and principle of transparency.[23]

Conclusion

The fight against corruption is a basic precondition for Serbia's accession as a member state of the European Union. The Serbian government has set the task of "zero tolerance" on corruption. Despite that fact, Serbia ranks 91st out of 180 countries according to the Corruption Perceptions Index for 2019.

According to the European Commission's 2019 Report on Serbia, *"Corruption is ubiquitous in many spheres and continues to be a concern. Strong political will is needed to tackle corruption effectively, as well as a strong response from prosecutors and the judiciary to cases of high corruption. Serbia should in particular: improve concrete results on investigations, indictments and final judgments in cases of high corruption, including the seizure and confiscation of criminally acquired property…"*

The fight against corruption in Serbia is still a political mantra and a means of raising political ratings. When it is necessary to present the results of the fight against corruption to the citizens then, as a rule, lower-ranking civil servants or officials who find themselves in disfavour with the most powerful political figures in the country are prosecuted. Many of these cases do not end up with finality at court in the form of a verdict, so one can get the impression that the criminal mechanism is initiated at the request of politicians without a foothold in valid evidence and the law in general. Also, it is not uncommon for proceedings never to be instituted against officials when their actions have aroused great public suspicion.

[22] The Official Gazette of the Republic of Serbia, Nos. 80/2002, 84/2002 – ispr., 23/2003 – ispr., 70/2003, 55/2004, 61/2005, 85/2005 – dr. zakon, 62/2006 – dr. zakon, 63/2006 – ispr. dr. zakona, 61/2007, 20/2009, 72/2009 – dr. zakon, 53/2010, 101/2011, 2/2012 – ispr., 93/2012, 47/2013, 108/2013, 68/2014, 105/2014, 91/2015 – autentično tumačenje, 112/2015, 15/2016, 108/2016, 30/2018, 95/2018, 86/2019 i 144/2020.

[23] National Anti-Corruption Strategy in the Republic of Serbia and the Revised Action Plan for the Implementation of the National Anti-Corruption Strategy.

The number of proactive investigations is worryingly small. The largest number of corruption scandals were discovered through investigative journalism and that seems to be the main reason for extremely bad behaviour by the authorities towards the media that try to expose corruption.

The Republic of Serbia has modern and more or less harmonised its anti-corruption legislation with community law and recommendations. By this we, mean the adoption of new anti-corruption laws, regulations and legal institutions, such as the recent adoption of the Law on lobbying (see more PAVLOVIĆ et al., 2020) or the Law on the protection of whistleblowers. However, it seems that the adequate application of these regulations has been lacking, and that they mostly serve as political promotion. At the end, the main conclusion is that the fight against corruption, especially high-level corruption, remains a political issue.

REFERENCES

BROOKS, Graham – WALSH, David – LEWIS, Chris – KIM, Hakkyong (2013): *Prevention of corruption: Investigation, enforcement and governance.* Basingstoke: Palgrave Macmillan.

IGNJATOVIĆ, Đorđe (2016): *Kriminologija (trinaesto izdanje).* Beograd: Pravni fakultet Univerziteta u Beogradu.

JOCIĆ, Dragan (2018): *Primanje mita u službi i privrednoj delatnosti.* Beograd: Bilten Vrhovnog kasacionog suda, 2.

MARINKOVIĆ, Ivan (2013): Popis stanovništva 2011. godine: osnovne strukture populacije Srbije. *Demografski pregled*, 13(47).

MILORADOVIĆ, Olgica – VUJIČIĆ, Nikola (2020): *Report on the results of application of the Law on confiscation of property derived from a criminal offence, with special reference to the management of seized property* (*EU project "Prevention against corruption"*). Belgrade.

PAVLOVIĆ, Zoran – GÁL, István László (2020): Corruption in Healthcare and New regulations: One step forward, two back. In: KOSTIĆ, Jelena – STEVANOVIĆ, Aleksandar (eds.): *Uloga Društva u Borbi Protiv Korupcije / The Role of Society in the Fight Against Corruption.* Beograd: Institut za uporedno parvo – Beograd Institute of Comparative Law – Belgrade Institut za kriminološka i sociološka istraživanja – Institute of Criminological and Sociological Research, 2020.
http://www.iksi.ac.rs/izdanja/uloga_drustva_u_borbi_protiv_korupcije_2020.pdf

PAVLOVIĆ, Zoran – KOSTIĆ, Jelena – STEVANOVIĆ, Aleksandar (2020): *Komentar Zakona o lobiranju.* Beograd: Službeni glasnik.

(RZS) REPUBLIČKI ZAVOD ZA STATISTIKU (2015): *Popis stanovništva, domaćinstava i stanova 2011. godine u Republici Srbiji: Populacija Srbije početkom 21. veka.* Beograd: RZS.

(RZS) REPUBLIČKI ZAVOD ZA STATISTIKU (2017): *Izbori za predsednika Republike Srbije – 2017. godina*. Beograd: RZS.

(RZS) REPUBLIČKI ZAVOD ZA STATISTIKU (2020): *Izbori za narodne poslanike Narodne skupštine Republike Srbije – 2020. godina*. Beograd: RZS.

(RZS) REPUBLIČKI ZAVOD ZA STATISTIKU (2021a): *Saopštenje: Unutrašnje migracije u 2020. godini*. Beograd: RZS.

(RZS) REPUBLIČKI ZAVOD ZA STATISTIKU (2021b): *Bilten: Anketa o radnoj snazi u Republici Srbiji u 2020. godini*. Beograd: RZS.

SRZENTIĆ, Nikola et al. (1995): *Komentar Krivičnog zakona Republike Srbije.* Beograd: Savremena administracija.

THE CASE OF THE UNITED KINGDOM

BRENDAN QUIRKE*

UK Country Profile

The UK population in 2020 is approximately 67.22 million.

Table 1: Wellbeing data[1]

	Country Average	OECD Median Region	UK Regions & Countries	
			Top 20%	Bottom 20%
HEALTH				
Life Expectancy at birth years (2016)	81.2	80.4	82.7	79.7
Age adjusted mortality rate (per 1,000 people; 2016)	7.7	8.1	6.9	8.6
JOBS				
Employment Rate 15 to 64 years old (%; 2017)	72.8	67.7	76.4	69.8
Unemployment Rate 15 to 64 years old (%; 2017)	4.5	5.5	3.5	5.5
INCOME				
Disposable Income per capita (USD)	20610	17695	25589	17656
EDUCATION				
Labour force with at least upper secondary education (%; 2017)	83.3	81.7	87.5	79.7

The United Kingdom is a parliamentary democracy a market economy subject to state intervention. For example, some of the privatised rail companies have been taken into state ownership, as has Network Rail, which is responsible for the maintenance of the rail infrastructure and was taken back into public ownership after concerns about its performance. The impact of the UK having left the European Union in 2020 and the single market in 2021 is still being felt. There are labour shortages in many sectors, such as agriculture, food processing, transport and the care sector, as these sectors heavily employed citizens from other EU countries. These people have returned either to their home countries or to other parts of the European

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[1] Source: https://www.oecd.org/cfe/UNITED-KINGDOM-Regions-and-Cities-2018.pdf

Union. Unemployment varies between regions, with it being relatively low in the affluent South East of England and higher in the former industrial heartlands of North West and North East England. These areas have seen the decline of shipbuilding, coal mining and the steel industries and have been slower to adapt to new technologies and the digital age.

From the table above, one can see that there are disparities between the most affluent regions (the top 20%) and the bottom 20%. Disposable income per capital is approximately one third lower, there is a difference of approximately 8% in the proportion of the workforce who have experienced upper secondary education and the employment rate is lower and unemployment is higher. There is also a difference in life expectancy of approximately 3 years and the mortality rate is higher in the bottom 20% regions than the top 20%. The bottom 20% of regions in the UK score worse than OECD country average in health, jobs, income and education.

Regional disparities in employment, housing and income are of concern to the UK government. The present Conservative government has a 'levelling up' agenda to try to improve the economic well-being of poorer UK regions.

Corruption profile in law

The main piece of legislation in the UK governing bribery and corruption is the *Bribery Act 2010*. The Act defines the criminal offences of bribery very widely and includes the principal offences of bribing another person (active bribery) – the Act uses everyday language of offering, promising or giving, being bribed (passive bribery) – requesting, agreeing to receive or accepting an advantage. (CPS, 2019)

The Act does not make any distinction between public and private bribery. No distinction is made between public officials and private individuals. The focus of misconduct is the function that the person is performing, regardless of in which sector that function is being performed. Section 3 of the Act defines the scope of a function or activity, and what is defined as 'relevant' for the purposes of Section 1 and 2. There are four possible relevant functions or activities:

- any function of a public nature
- any activity connected with a business
- any activity performed in the course of a person's employment
- any activity performed by on or behalf or a body of persons (whether corporate or unincorporated). (TRANSPARENCY INTERNATIONAL, 2016)

Trading in influence or influence peddling is a situation where a person misuses his or her influence over the decision-making process for a third party, which can be an individual, organisation or government, in return for his/her loyalty, money or any other material or

immaterial advantage. The UK does not criminalise trading influence as such; however, the Bribery Act provides some protection against aspects of this kind of corrupt behaviour. The Act could potentially be used to sanction political bribery, if it could be argued that giving or receiving a financial or other advantage was in connection with the improper performance of a position of trust. The Bribery Act 2010 could also be used to prosecute political bribery if the giving or receiving of a private benefit was connected with the improper performance of a "relevant function or activity". It can also apply if the offer of a bribe is not taken, if the bribe giver knows that acceptance of the bribe would constitute improper performance. It is punishable with a maximum sentence of 10 years imprisonment.

Abuse of office/function has been defined by art. 19 of the United Nations Convention against Corruption (UNCAC), as the *"the performance or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity"*. In the UK, misconduct in public office is defined by the Crown Prosecution Service (which is the main public prosecution body for England & Wales) as when *"a public officer acting as such wilfully neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the office holder without reasonable excuse or justification"* [2].

Misconduct in public office is an offence at common law, which means that this offence has no basis in statute and the law has been developed by the courts. It is committed when a public officer acting as such:

- Wilfully neglects to perform his/her duty and/or wilfully misconducts himself/herself
- To such a degree as to amount to an abuse of the public's trust in the office holder
- Acts without reasonable excuse or justification. (CPS, 2019: 34.)

This offence carries a maximum sentence of life imprisonment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office. In terms of assessing the penalty or sentence, the court will take into account the nature of the role they were performing, the duties carried out and the level of public trust involved.

There are specific offences that are covered by certain pieces of statute. Legal guidance published by the Crown Prosecution Service identifies a number of instances. For example, an offence is committed under the Fraud Act of 2006 – fraud by abuse of position, if a person who occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, and dishonestly abuses that position.

[2] https://www.cps.gov.uk/legal-guidance/misconduct-public-office

The Representation of the People Act 1983, states that illegal campaigning (canvassing) by police officers is an offence. *"No member of the police force shall by word, message in writing or in any other manner endeavour to persuade any person to give or dissuade any person from giving their vote by proxy or as an elector at any Parliamentary election or constituency or local government election for any electoral area wholly or partly within the police area."* (CPS, 2019: 35.)

The Criminal Justice and Courts Act 2015 states that a police officer abuses their function if they exercise the powers and privileges of a constable improperly and if they know or ought to know that the exercise is improper. (CPS, 2019: 35.)

Structure of the UK Criminal Justice System

We must bear in mind that there is not just one legal system operating in the United Kingdom. There is the legal system for England & Wales, one for Scotland and one for Northern Ireland. We will consider the legal system for England and Wales first.

The court system of England and Wales, like most, is a hierarchical one. In the criminal legal system, the lowest level of the hierarchy is the magistrates court. These courts hear all criminal cases in the first instance. Serious cases are transferred to the next level in the system, which is the Crown Court. Less serious cases and those involving juveniles are tried in magistrates courts.

The next level in the criminal justice system is the Crown Court. Crown Courts sit in cities and major towns throughout England and Wales. They deal with indictable criminal cases that are transferred from the magistrates courts, such as murder, rape and robbery. Defendants can sometimes be convicted in a magistrates court, but sent to the Crown Court for sentencing due to the seriousness of the offence. Crown Courts also hear appeals against the decisions made by magistrates courts. Cases are heard by a judge and a jury. The judge does not decide guilt or innocence; this is done by the jury. A jury's decision will usually be unanimous, but the judge may decide to accept a majority verdict if it proves difficult for all 12 jurors to agree. The jury is advised on matters of law by the judge, whose role also includes imposing a sentence if the defendant is found guilty. Decisions of the Crown Court may be appealed to the Criminal Division of the Court of Appeal. (THE JUDICIAL OFFICE INTERNATIONAL TEAM, 2016)

The Court of Appeal is an appellate court. Bringing an appeal is subject to obtaining 'permission', which is usually granted by the Court of Appeal itself. Applications for permission to appeal are heard by a single judge of the Court of Appeal. (THE JUDICIAL OFFICE INTERNATIONAL TEAM, 2016: 8.) The Criminal Division hears appeals in criminal matters from the Crown Court (which is the level below it in the hierarchy of the criminal courts), as well as points of law which may be referred by the government's chief legal office – the Attorney General.

This may happen because there was an acquittal in the Crown Court or where the sentence imposed was viewed by the Attorney General as being far too lenient. The bench (a collection or group of judges) which sits for the appeal usually consists of a Lord or Lady Justice and two High Court judges. The most important Criminal appeal cases are often heard by the Lord Chief Justice (the most senior judge in the legal system of England and Wales), the President of the Queen's Bench Division or the Vice-President of the Court of Appeal Criminal Division, appearing with two judges of the High Court. They may hear appeals against conviction and sentence. The decisions are always unanimous: if, for example, one judge disagrees, he or she will not issue a dissenting judgment; they will follow the judgment of the other two.

The Supreme Court is the final court of appeal for the United Kingdom. It hears appeals on points of law that have been subject to debate and argument which are judged to be of the utmost public importance for the whole of the United Kingdom in civil cases and for England, Wales and Northern Ireland in criminal cases. In Scotland, appeals can be made from the lower courts in criminal cases to the High Court of Justiciary, which is Scotland's supreme criminal court. (THE JUDICIAL OFFICE INTERNATIONAL TEAM, 2016: 7.) Permission to appeal will only be given if the case is judged to raise a point/issue of general public importance. Cases are heard by five, seven or nine of the twelve Justices of the Supreme Court. The justices will reach an individual decision and the overall verdict can be determined by unanimity or a simple majority. Decisions made in the Supreme Court have the power of precedent, which means that they must be followed by the courts in future cases. (THE JUDICIAL OFFICE INTERNATIONAL TEAM, 2016: 7.)

In terms of the relationship between the police and the prosecution service, a complaint regarding criminal action and activity will initially be investigated by the police. The police will gather evidence and then submit the file to the Crown Prosecution Service (CPS), which is the government department responsible for prosecuting criminal cases investigated by the police in England and Wales and is led by the Director of Public Prosecutions. It was created in 1986, and its role is: (THE JUDICIAL OFFICE INTERNATIONAL TEAM, 2016: 21.)

- Advising the police on cases for possible prosecution
- Reviewing cases submitted by the police
- Determining any charges in more serious or complex cases
- Preparing cases for court, and presenting cases at court.

Criminal cases come to court after a decision has been made by the Crown Prosecution Service, to prosecute someone for a crime. Crown Prosecutors must decide whether a case passes the two tests laid down in the Code for Crown Prosecutors: first, whether the evidence against the defendant is sufficient enough to secure a realistic possibility of a conviction and, second, if there is a realistic prospect of a conviction, whether it is in the public interest to prosecute the defendant. (THE JUDICIAL OFFICE INTERNATIONAL TEAM, 2016: 21.)

This concept of public interest is difficult to define. One could pose the question: is it for the common good for such a prosecution to be undertaken.

The Criminal Justice System of Scotland

At the bottom of the criminal law pyramid are the Justice of the Peace courts, which are somewhat similar to the magistrates courts in England and Wales. These courts deal with minor cases and the justices of the peace themselves are not legally qualified but are advised on matters of law by the clerk of the court, who is legally qualified. These courts have limited sentencing powers and are able to impose a custodial sentence of up to 60 days or a fine of up to £2,500. The next level in the courts hierarchy are the Sheriff Courts. These deal with criminal prosecutions of more serious cases and Glasgow Sheriff Court is reputedly the busiest court in Europe. (*The Scottish Legal System…* 2013: 2.)

Appeals from the Sheriff courts, the Justice of the Peace courts and the High Court itself (when it sits as a court of first instance) can be made to the High Court of the Justiciary, which is Scotland's supreme criminal court. As stated above, it also has the power to sit as a court of first instance and a trial court when it hears the most serious criminal cases, such as rape and murder. As a court of first instance, it sits with one judge and jury, but at least three judges may be present when it is sitting as an appeal court.

The head of criminal prosecutions in Scotland, is the Lord Advocate and he/she is assisted by the Solicitor General for Scotland. The Crown Office and Procurator Fiscal Service are the bodies responsible for prosecuting crime and investigating deaths. Their roles are comparable to those played by the Director of Public Prosecutions and the Crown Prosecution Service in England and Wales. In Scotland, a complaint may be made to the police service and they will carry out an initial investigation. If the police believe that they have enough evidence to mount a prosecution, they will submit the case file to the Procurator Fiscal, who will weigh the strength of the evidence and make a decision on whether it is in the public interest to take further action. If the procurator fiscal decides it is appropriate to do so and instigate proceedings in court, they will make the decision as to in which court the action will be launched. Alternatively, the procurator fiscal can issue warnings, and order fines, compensation or intervention from welfare services. (*The Scottish Legal System…* 2013: 4.)

The Criminal Justice System of Northern Ireland

The legal system of Northern Ireland, from the criminal law perspective is very similar to that of England and Wales. There are magistrates courts, crown courts, court of appeal and, at the apex of the pyramid, stands the Supreme Court of the United Kingdom. There is a provision for trial by jury to be suspended in the most serious terrorism cases, harking back to the old "Diplock

Courts" in the 70s through to the 90s, when the rule of law broke down due to communal violence. A jury would not sit because of fears of intimidation, a judge sitting alone would determine guilt or innocence. These courts were abandoned as part of the peace process and the expectation is that serious criminal cases will be tried in the crown courts with a jury sitting to determine guilt or innocence.

Investigation of Corruption Cases

There are a number of agencies in the UK tasked with investigating and preventing corruption. According to the 2014 UK National Anti-Corruption Plan (discussed below), the National Crime Agency (NCA) was established the previous year to lead, co-ordinate and support the operational response to serious and organised crime, which includes economic crime, and to oversee the national law enforcement response to bribery and corruption.

The NCA works closely with local police forces and the Regional Organised Crime Units of the Serious Fraud Office, both of which deal with domestic corruption cases, Police Scotland and the Police Service of Northern Ireland (PSNI) and financial regulators such as the Financial Conduct Authority.

The Serious Fraud Office (SFO) was established in 1987 (Criminal Justice Act 1987) and operates under what is known as the 'Roskill model', whereby teams of investigators, accountants, prosecutors, experts and external counsel (lawyers) work collaboratively on an investigation from the beginning, led by a case manager who will of necessity be a senior official. The exact distinction between the bribery and corruption cases led by the SFO and those led by the NCA remains unclear, which is a recipe for confusion and perhaps duplication and fragmentation. However, the SFO generally leads in cases where corporate offences are being investigated or complex legal or accounting investigative skills are required. There used to be a financial threshold which had to be reached before the SFO would take on a case. Initially, this was £1million and then this was raised to £5 million. This has now been dropped and the SFO will consider those cases that it determines to be serious, which undermine the integrity of the UK financial system and the actual or potential financial loss is high and the economic harm significant. (CPS, 2019: 4.)

To tackle corruption allegations linked to law enforcement bodies themselves, the NCA and all local police forces in England and Wales and Police Scotland and PSNI have dedicated anti-corruption units.

Measuring Corruption

Data have been obtained from the UK Crime survey, which is regarded as being hugely important in terms of understanding the true nature of crime. *"The crucial value of the survey is its ability to find out about crimes which do not get reported to, or recorded by, the police. The survey has previously shown that only 4 in 10 crimes are actually reported to the police, so conducting the survey is incredibly valuable in understanding all of the other crimes which go unreported. Without the Crime Survey, the government would have no information on these unreported crimes. Typically the Crime Survey records a higher number of crimes than police figures because it includes these unreported crimes."* (OFFICE FOR NATIONAL STATISTICS, 2015: 1.)

One of the difficulties about measuring corruption in the UK is that such cases tend to be included with fraud and similar cases and are not separately identified, so it is very difficult to measure in quantifiable terms. There may well be a large amount of domestic corruption in the UK, but it is unquantified at the present time. It appears that the investigation of corruption is not a particular priority for the UK police these days. There is no national police force in the UK; there are 43 geographically based forces and some specialist forces such as the British Transport Police, which polices the railways. The University of Sussex Centre for the Study of Corruption makes the point that corruption is not a stated priority for any police force in the UK, as corruption is omitted from the website of the National Police Chiefs' Council and there is no 'lead' chief officer as there is for terrorism or gang-related violence, for example. The UK Home Office does not gather specific crime data on bribery and corruption. (HICKHS, 2021) As *Hicks* comments, these activities tend to be included in various categories of theft, false accounting or fraud. (HICKHS, 2021: 5)

The following statistics are taken from the UK Crime Survey 2016 to 2020 and are fraud statistics which includes computer misuse and may include corruption cases, but these are not separately identified.

Table 2 [3]

2016	2017	2018	2019	2020
5,398,000	4,615,000	4,625,000	4,625,000	6,128,000

After the total number of incidents appearing to dip somewhat between 2016 and 2020, overall there has been an 13.5% increase in fraud incidents (which may include corruption) since 2016. The increase between 2019 and 2020 is more marked however, as there appears to be an increase of 32.5%. This may well be the impact of the pandemic, where there seems to have been more attempts to commit online fraud due to far more business/shopping having been undertaken.

[3] https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwalesappendixtables

In terms of Transparency International's Corruption Perception's Index, the UK scores very highly – which is encouraging. The index measures the perceived levels of public sector corruption according to business people and experts. In 2020, the UK scored 77 and was ranked 11th. The average score in Western Europe was 66 and overall the average score was 43. This suggests that perceived levels of public sector corruption are relatively low in the UK. The scores from 2015 to 2020 are as follows:

Table 3 [4]

	2015	2016	2017	2018	2019	2020
CPI Score & (Ranking)	81 (11)	81 (10)	82 (8)	80 (11)	77 (12)	77 (11)

The UK has scored consistently in the upper quartile although its score has dipped slightly over the six-year period. It will be interesting to see how the UK scores in the future, given the concerns expressed about irregularities in the award of government contracts.

Overall, the UK is seen as not having a particular public sector corruption problem; however, the low priority which appears to have been given to corruption cases by the police force is quite telling. There is no separate reporting of corruption cases; they appear to have been included in fraud case numbers.

Corruption and local context – Corruption profile in practice

Probably the most fully documented case of fraud against the EU budget, is that of the farmer *Joseph Bowden*. He was a farmer based in Devon in the south-west of England. On October 11th, 2000, he was sentenced at Exeter Crown Court to 30 months imprisonment. He had pleaded guilty to nine criminal charges involving deception, attempted deception and false accounting. A further three charges were directed by the judge to be left on the court's file and not guilty verdicts were directed by the judge to be entered for the remaining six charges. The amount of money involved in the charges to which Bowden pleaded guilty was £157,000, although, had all his fraudulent activities succeeded, he might have received around £415,000 of public monies. *Bowden's case* was one of the largest cases of fraud in the UK involving an individual claiming subsidies under Common Agricultural Policy schemes. (NATIONAL AUDIT OFFICE, 2002: 11.)

Although the case was some time ago, it has been widely documented and is interesting in itself because it demonstrates what can happen when internal controls within an expenditure programme are not applied rigorously and a tick box mentality is adopted.

[4] https://www.transparency.org/en/

Most of the charges involved falsely claiming subsidies and grants from schemes administered by the then Ministry of Agriculture, Fisheries and Food and the Intervention Board Executive Agency, which was the main payment agency for Common Agricultural Policy schemes. The essence of the frauds were that Bowden submitted claims or declarations in respect of two Common Agricultural schemes – the Arable Area Payments Scheme and the Fibre Flax subsidy scheme, which involved him submitting claims for the same areas of land, consequently falsely claiming to have grown crops or to have grown different crops to those actually grown. Under the fibre flax scheme, he provided documentation in support of claims through different contractors for areas of land that were to some degree the same. If different contractors were used then the claim should have been in respect of different areas of land. (NATIONAL AUDIT OFFICE, 2002: 11.)

As the National Audit Office report details, in three years, 1994, 1995 and 1996, Bowden claimed and received subsidy payments under two schemes for different crops which in part covered the same area of land. He claimed for linseed under the Arable Area Payments Scheme administered by the Ministry of Agriculture and claimed via a contractor for fibre flax under the Fibre Flax Subsidy Scheme administered by the Intervention Board. Claiming and receiving payments under two schemes for crops on the same area of land was a breach of European Union regulations and illegal.

Bowden claimed for subsidy under the fibre flax scheme on 89 hectares of land in 1994 and 126 hectares in 1995. He adhered to the requirements of the scheme. He entered into contracts with a flax contractor and supplied maps and references and sowing and harvesting declarations to the contractor(s) as he was required to do. On two occasions, his fields were scrutinised by inspects from the Ministry of Agriculture and passed as satisfactory. Joseph Bowden's flax contractors made claims for payment amounting to £141,000 from the Intervention Board for 1994 and 1995 on the basis of his sowing and harvesting declarations, which were met in full. According to the contract Bowden had with the flax contractors, they were obliged to pass this money on to Joseph Bowden in full. Now, the truth would out when Bowden had to deliver the crop to the flax contractors. Payments had been made to the contractors on the basis of paper declarations, so Bowden then claimed that each year the harvested flax crops were destroyed in barn fires. He certainly appeared to have been a very unlucky farmer to have experienced so many fires. Questions should surely have been asked at this stage, yet none appeared to have been. This offered him protection against accusations of fraud and deception, as he could not have grown as much flax as he claimed, since he had been contracting to grow flax on the same areas of land for more than one contractor. As the National Audit Office report explains, duplicate claims covered about 17 out of 119 hectares, which was about 14% of the total area claimed. A major weakness in the payment scheme was that payment was made on the basis of paper declarations prior to actually physically examining the crop itself and of course prior to processing it. The contractors were obliged to pay Joseph Bowden because, as far as they were concerned, he had completed all of the paperwork correctly.

Bowden also made claims under the Ministry of Agriculture's Arable Area Payments Scheme. As with the flax scheme, the paperwork was correctly completed and provided, including maps, map references and field sizes. When Bowden was investigated for alleged fraud, the fraud investigators found that some of the land claimed under the arable scheme was the same as under the flax scheme.

How were the frauds perpetrated?

Bowden was able to perpetrate these frauds because of major weaknesses in the control systems in the Common Agricultural Payments Schemes. What were these weaknesses.

Cross checks between the two schemes were not carried out

The Agricultural Ministry responsible for the arable Area Payments scheme and the Intervention Board, which was responsible for the Fibre Flax Subsidy Scheme, each had their own systems for administering schemes. No cross checks between the schemes were carried out, on land area for example, nor applicants' names, for instance. (NATIONAL AUDIT OFFICE, 2002: 15.)

Map references were not verified

In order to evidence his declarations or claims for fibre flax and arable area payments, Joseph Bowden submitted, the maps and lists of fields where he was growing crops to the contractors and the Intervention Board or the Ministry of Agriculture, as required by the rules of the schemes. He provided basic information, such as map references for fields, field sizes in hectares and the types of crop being grown.

Whist map references for the Arable Area Payments Scheme were legitimate and were checked, under the fibre flax scheme, map references were not necessarily required and fields could be referred to by name only, such as top field or bottom field. Only 20% of these were checked and thus Bowden was allowed to supply contracted flax processors with different names for the same field. He also devised a unique map referencing system. Basically, he made the references up. They were never checked initially, but when they were checked as part of the fraud investigation, they identified Bowden as being one of the most talented farmers who has ever lived!! Some of his fictitious references were of areas of the North Sea between the UK and Denmark and others were located in Iceland and Greenland. The map references had the correct number of digits and this seemed plausible to the payments agency staff, but they were not checked to see if they were authentic map references. This was a basic, yet cardinal error.

The Intervention Board did not carry out adequate checks on the Fibre Flax Subsidy Scheme

The Board did not check whether a contractor had made contracts with more than one flax grower, or whether more than one contractor could have contracts with a grower for the same area of land. As the National Audit Office report makes clear, Joseph Bowden traded under

different names, such as JSB Farms, Joe Bowden Farms or JH Bowden and Son, which would have made such checking by the Board more difficult – although the names are very similar which surely should have aroused some suspicion. (NATIONAL AUDIT OFFICE, 2002: 16.)

Payment of a subsidy was not dependent on evidence

Controls seem to be incredibly weak. A contractor for flax was required to state an intention to process the fibre removed from flax straw. Production did not have to be verified in order for the subsidy to be paid and contractors were paid on the basis of the declarations for sowing and harvesting which they submitted. The Intervention Board did not carry out checks to ensure that the flax straw was actually produced and processed. This is a control system riddled with holes and weaknesses. Forms correctly completed do not constitute strong evidence, as they can so easily be manipulated. Tangible, primary evidence should have been obtained that the flax did indeed exist and was supplied to the contractor, rather than accepting a tall tale of it having been destroyed in repeated barn fires.

How were the frauds discovered?

What set the ball rolling to lead investigators to begin uncovering the extensive frauds perpetrated by Joseph Bowden? Was it dogged work by a dedicated investigator? Actually, the truth is far simpler and more mundane than this. Bowden's neighbours could not understand why he and his family were able to spend three weeks on holiday in the West Indies every January when they were struggling to earn a living. They assumed that he must have been committing fraud in order for him to be able to do this. It appears that one of them telephoned the local police, anonymously, to allege that Joseph Bowden had been growing potatoes in his fields rather than the crops for which he was claiming subsidy. This allegation was untrue, but an agricultural inspector from the Ministry of Agriculture remembered, from a previous visit to Bowden's farm, that a field in which linseed was being claimed for under the Arable Payments Scheme might earlier have been claimed for under the fibre flax scheme. The possibility then arose that Bowden was claiming for both crops on the same area of land. (NATIONAL AUDIT OFFICE, 2002: 16.)

Once Bowden came under suspicion for fraudulent claims, the Board cross checked all his subsidy claims and found that for two years running, namely 1994 and 1995, he had been claiming for the two schemes for the same area of land.

An investigation was launched by the Intervention Board's Anti-Fraud Unit. Bowden was interviewed under caution, and initially denied making improper claims under the subsidy schemes. After two years of investigation, the papers were submitted to the police, who advised the Board to use its own powers of prosecution.

Bowden was prosecuted jointly by the Intervention Board, the Ministry of Agriculture and the Crown Prosecution Service and initially pleaded not guilty; however, just before his case came to trial, he changed his plea to guilty in nine out of the eighteen offences he had been charged with. (NATIONAL AUDIT OFFICE, 2002: 15.)

This is a sorry tale of greed, deceit and mendacity on the part of Joseph Bowden and gross incompetence and negligence on behalf of the payment agencies. Bowden could only conceal this fraud for so long because the authorities accepted his claims at face value and did not undertake the most basic checks. When a farmer claims that he cannot produce physical evidence of a crop because of repeated barn fires then surely this should start alarm bells ringing and resonate with someone.

Prevention/National Corruption Strategies

The UK launched its national anti-corruption strategy for the period 2017 to 2022 (*UK Anti-Corruption Strategy…*, 2016) with the statement that it set out a vision for a safer, more prosperous and more confident future based on concerted UK action against corruption. The UK view on the challenge of corruption is that *"corruption threatens our national security and prosperity, both at home and overseas. Unchecked, it can erode public confidence in the domestic and international institutions that we all depend on"* (*UK Anti-Corruption Strategy…*, 2016: 2.).

The vision that the UK government espouses is that combatting corruption will contribute to three long-term outcomes:

- Reducing the threat to national security
- Increased prosperity at home and abroad
- Enhanced public confidence in our domestic and international institutions.

The strategy goes on to outline how, once implemented, it will improve the business environment globally, including the environment for UK companies, where corruption is often a barrier to open and competitive markets. The focus is very much a contribution to building a strong, confident global Britain.

The strategy outlines a number of priorities that will be the focus of the UK government's efforts. This section will focus on four of them.

The first of these is reducing the insider threat in high-risk domestic sectors. The strategy defines an insider as *"a person who exploits their position, or access to an organisation's assets, for unauthorised purposes"* (*UK Anti-Corruption Strategy…*, 2016: 13.). There appears to be increasing evidence that criminals, terrorists and others, when they are faced with sophisticated technological

defence and management systems, turn to contacts within the organisations they are seeking to penetrate and exploit in order to commit major crimes that cause significant financial and operational as well as reputational damage. An example of the work of an insider could be a data breach. The UK Government claims that it is rolling out prevention and detection measures to improve awareness of this threat and to ensure organisations have the systems to detect it early and can punish the criminals responsible. The government has reviewed the offence of Misconduct in Public Office to make sure that it is clear and effective.

The priority of the government, or so it claims, is to focus on critical sectors that present the greatest risks. These include UK borders, prisons, policing, the defence sector and local government. The strategy outlines that it will deliver this priority using various strategic approaches such as: *„PREVENT – strengthen professional integrity, PURSUE (strengthening the ability of law enforcement, criminal justice and oversight bodies to investigate, prosecute and sanction wrongdoers and PROTECT – build resilient organisations"* (*UK Anti-Corruption Strategy…*, 2016: 14.)

The second priority is: strengthen the integrity of the UK as an international financial centre. There has long been concern that the UK is perceived as a haven for dirty money. There have been allegations of laundering Colombian cartel drug money and money from various illicit activities in Russia, for example. The UK is a global financial centre, which accounts for 17% of the total value of international bank lending and 41% of foreign exchange trading. The UK government acknowledges that *"whilst the vast majority of financial transactions are entirely legitimate, there are some linked to criminals seeking to launder illicit finance"* (*UK Anti-Corruption Strategy…*, 2016: 15.). There have been attempts to promote a hostile environment with respect to such activities and to strengthen anti-money laundering and financial sector regulations. Whether these have been successful, remains to be seen.

The government indicates that success will mean the following: (*UK Anti-Corruption Strategy…*, 2016: 15.)

- The UK will be more hostile to illicit finance so that citizens have more confidence in their institutions
- The UK will be able to still attract high-quality foreign investment which will safeguard long-term prosperity.

The long-term goals of the UK government in this regard are: (*UK Anti-Corruption Strategy…*, 2016: 15.)

- Greater transparency over who owns and controls companies and other legal entities
- Stronger law enforcement, prosecutorial and criminal justice action
- Further enhanced anti-money laundering and counter-terrorist financing capability
- Stronger public-private partnerships, to share information and improve targeting of those who pose the greatest risk.

The third priority for the UK government is to promote integrity across the public and private sectors. The UK government claims that it is an established international leader in corporate governance and that UK organisations have strong systems which facilitate effective management and control. The strategy goes on to proclaim that *"for the private sector this includes the Corporate Governance Code for our largest listed companies as well as high standards for corporate reporting and audit, which encourage companies to have strong financial controls and make it harder to disguise illicit activity"* (*UK Anti-Corruption Strategy…*, 2016: 15.). This claim will surprise some observers, as the UK has experienced some high-profile corporate governance failures in companies such as Patisserie Holdings and Carillion, amongst others. In the week beginning September 27th, 2021, a major accounting and auditing firm, Grant Thornton, was heavily criticised by financial regulators and fined millions of pounds for failing to report significant corporate governance failures and fraudulent activities at Patisserie Holdings Ltd, which was one of its clients.

The UK government claims that success with respect to this priority will mean that:

- UK public and private sector organisations are less prone to corruption and deliver better services
- UK citizens will have more confidence that these organisations are serving their interests

The long-term goals associated with this priority are:

- Greater public sector resilience against the threat of corruption
- A more open government that is trusted by citizens, with robust protection for whistleblowers
- Strengthened UK private sector integrity
- Greater integrity in domestic and international sport

The UK government believes that the current legal and policy framework deters and tackles unethical behaviour. For example, providers of public services may be excluded from bidding for contracts, not only where they have been convicted of a criminal offence, but also where it can be demonstrated that they have committed an act of professional misconduct. (*UK Anti-Corruption Strategy…*, 2016: 15.)

A fourth priority for the UK government is to reduce corruption in public procurement. This is an important priority for the government, as public sector procurement accounts for around a third of total government expenditure and since the start of the COVID pandemic, this share of public expenditure is unlikely to have decreased. The strategy recognises that the level of expenditure and the inevitable high levels of interaction between officials, business and other stakeholders, create risks of corruption and fraud that need to be effectively managed. This gives some insight into why this area is regarded as a priority by the UK government. (*UK Anti-Corruption Strategy…*, 2016: 21.)

In the strategy, the UK Government claims to have taken significant steps to strengthen its commercial capability, especially in procurement, so that commercial activities deliver value for money and risks are managed effectively. The claim is that strong systems are in place to detect

and tackle corruption. However, recent events as a result of the COVID pandemic tend to bring this claim into question. For example, a number of contracts entered into with the UK government have been identified as questionable – 65 in total according to Transparency International, at least 24 of these being Personal Protective Equipment (PPE) contracts worth some £1.6 billion. Three contracts for COVID testing related services worth £536 million went to companies with political connections to the Conservative Party. (Transparency International, 2021: 5.) A further discussion of the issues surrounding procurement of PPE during the COVID pandemic can be found in Section 6.

The long-term goals that the British Government has set itself are:

- Greater procurement transparency which should enable a more effective identification and mitigation of corruption risks, market distortion and anti-competitive behaviour
- Strengthened awareness and capability within contracting authorities
- Greater confidence in efficient and legitimate contract management

Current performance by the UK government and its procurement agency suggest that these goals are some way from being met. (See Transparency International, 2021)

The fifth priority for the UK government set out in its Anti-Corruption Strategy document is to improve the business environment globally – a very ambitious aim. Is it realistic? Well, the UK government has left the European Union, which is clearly a big player in the global business environment, and in a world that appears to be more interconnected, the UK has chosen to make itself smaller and as a consequence may well have reduced its influence on the world stage – there does appear to be something of a contradiction here.

The UK's long-term goals with respect to this priority are:

- To reduce the impact of corruption on trade and investment internationally
- To secure increased investment with integrity by UK companies in overseas markets
- To encourage strengthened business-led collective action in order to reduce corruption

The strategy calls for other countries to implement international anti-corruption standards and in particular the OECD Anti-Bribery Convention. The UK is prepared to offer support to those countries that aim for accession to the convention, which will include technical assistance and capacity building where this is appropriate. Given that the UK, after Brexit, is aiming to be an independent trading nation, it appears that the intention of the British Government is to promote transparency and anti-corruption policies through bilateral and regional trade dialogues, as well as trading agreements. The UK also will support policy and principles being promoted by the G20 and the G7 that aim to tackle corruption. (*UK Anti-Corruption Strategy…*, 2016: 22.)

How effective this approach will be remains to be seen...

The sixth priority that the UK has established is to work with other countries to combat corruption. The anti-corruption strategy document makes the point that corruption is endemic in many countries, yet external pressure and support can promote change. This support includes

providing expert advice and guidance, collaborating across borders to tackle international networks of corrupt actors, and promoting international standards that guide progress as countries tackle corruption.

The strategy document outlines that great emphasis will be put on what it terms – PROTECT – to build resilient organisations and PREVENT – to strengthen professional integrity. The long-term goals associated with this priority are:

- Enhanced international transparency, especially in beneficial ownership; extractives, public finance and contracting
- Reduced levels of corruption in partner countries
- Enhanced action to address corruption in fragile and conflict-affected states.

Whilst this strategy document may be considered a promising start, Government also needs to focus on gathering data on corruption cases and offences. There is a dearth of these data available to scholars and practitioners at present. It tends to be conflated with the fraud data. There is a tendency to focus on bribery and embezzlement but what about other aspects of corruption, such as nepotism, the revolving door between the public and private sectors, cash for access and so on – these areas need to be included too. This last point is well made by Transparency International. (TRANSPARENCY INTERNATIONAL, 2021b)

Corruption in the UK

In the UK, by and large, the average citizen would be very unlucky to encounter corrupt behaviour in their everyday lives. For example, if as a motorist you are stopped by the traffic police and advised/warned about an aspect of your driving – it could be speeding or carelessness – it is highly unlikely that you would have to hand over money to that police officer in the form of a bribe in order to be allowed to go on your way. This is not necessarily the case in many parts of the world, including parts of Europe. If, when you visit your family doctor and are informed that you would need to consult a clinical specialist based in a hospital, the family doctor will request an appointment for you. It would be very rare, if at all, that you would be required to hand over money to the family doctor in order for the appointment request to be made. If you apply for a job, by and large, you will not have to bribe the organisation officials in order to secure a job offer. This is not to say that nepotism and favouritism do not play a part in some job appointments. Many of us have seen examples of this, but the crude offer and acceptance of a bribe is thankfully rare, as far as one can tell. So, in the UK, it appears on the evidence available that such petty corruption is not a part of everyday life. However, high-level corruption does seem to be more prevalent than the petty variety.

Mihály Fazekas and Elizabeth Dávid-Barrett (2015) argue that the UK is at the forefront of a trend which is seeing the relationship between the state and the private sector being transformed due to the outsourcing of public services having doubled during the Cameron government's tenure between 2010 and 2015. Globally, public procurement is seen as an area that is vulnerable to corruption with politicians and public officials having many opportunities to benefit themselves, their allies and their political parties. The UK Anti-Corruption Plan discussed above in section 5, makes great play of the robust steps it is taking and aims to take to ensure that public procurement is subject to fair and free competition in the tendering process and risks of corruption or opportunities to engage in corrupt behaviour are minimised. Unfortunately, recent evidence from the COVID-19 pandemic tends to suggest that these steps are nowhere near robust enough.

Transparency International (TI) undertook a review of the arrangements for public procurement during the early stages of the COVID-19 pandemic. At this time there was a scramble for the supply of Personal Protective Equipment (PPE) to health workers and other front-line staff. Contracts worth billions of pounds, as discussed in section 5.5.1 were granted to organisations with strong political connections to the governing Conservative Party. (TRANSPARENCY INTERNATIONAL, 2021a: 5.) The government argument is that this was a global emergency with keen competition between countries to ensure a regular and reliable supply of effective PPE. However TI claims to have identified a pattern of behaviour whereby *"critical safeguards for protecting the public purse have been thrown aside without adequate justification"*. It appears that there was an absence of competition in the choice of contractors. One could argue that in an emergency such as this, at least in the initial stages of the pandemic, such an absence is understandable and indeed permissible. (TRANSPARENCY INTERNATIONAL, 2021a: 6.) It appears that those with connections to the governing party were able to "jump the queue" for consideration and award. Indeed there was a VIP Lane or high priority channel for referring PPE suppliers – questions that arise are who knew about this privileged channel, when did they know about it; why did some suppliers and not others know; and who was able to proceed along this VIP "toll road"?

Is corruption in the UK systemic? This question is posed by *Lorenzo Pasculli* (2019). He defines systemic corruption as the normalised resort across different levels and sectors of society to abuses of entrusted private or public power as ordinary means of pursuing personal interests (PASCULLI, 2019: 708.) observes that much evidence would suggest that the UK is not systemically corrupt – its high standing in Transparency International's Corruption perceptions Index, the high esteem that civil servants are held in also the leading role the UK has taken in the international fight against corruption. Yet there are concerns – the PPE issues mentioned above, the collusion between politics and the press, the revolving door between public and private sector, the exaggerations and downright lies peddled by the Vote Leave campaign in the EU referendum of 2016, all raise concerns. Corruption may not yet be systemic, but the watchdog dare not sleep!!

References

(CPS) The Crown Prosecution Service (2019): *Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and the Director of Public Prosecutions. Legal Guidance*
https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and

Fazekas, Mihály – Dávid-Barrett, Elizabeth (2015): *Corruption Risks in UK Public Procurement and New Anti-Corruption Tools.* Budapest: Government Transparency Institute.
http://www.govtransparency.eu/wp-content/uploads/2016/10/Fazekas-David-Barrett_Public-procurement-review_public_151113.pdf

Hickhs, Tristram (2021): *Why are there so few domestic corruption cases in the UK.* University of Sussex–Centre for the Study of Corruption.
https://www.sussex.ac.uk/webteam/gateway/file.php?name=why-are-there-so-few-domestic-corruption-cases-in-the-uk.pdf&site=405

National Audit Office (2002): *Agricultural Fraud: The Case of Joseph Bowden.* Report by the Comptroller & Auditor General, HC 615, HC 615 Session 2001-2002: 22 February.
https://webarchive.nationalarchives.gov.uk/ukgwa/20170207052351/https://www.nao.org.uk/wp-content/uploads/2002/02/0102615.pdf

Office for National Statistics (2015): *About the Crime Survey for England & Wales*
https://www.crimesurvey.co.uk/en/AboutTheSurvey.html

Pasculli, Lorenzo (2019): Seeds of systemic corruption in the post-Brexit UK. *Journal of Financial Crime,* 26(3) 705–718.
https://www.researchgate.net/publication/333175433_Seeds_of_systemic_corruption_in_the_post-Brexit_UK

The Judicial Office International Team (2016): *The Judicial System of England and Wales. A visitor's guide*
https://www.judiciary.uk/wp-content/uploads/2016/05/international-visitors-guide-10a.pdf

The Scottish Legal System in a Nutshell (2017). The Student Lawyer online, 17 June 2013.
https://thestudentlawyer.com/2013/06/17/the-scottish-legal-system-in-a-nutshell/

Transparency International (2016): *Corruption Laws. A non-lawyers guide to laws and offences in the UK relating to Corruption*
https://www.transparency.org.uk/sites/default/files/pdf/publications/Corruption_Laws_May_18_1-1.0.pdf

TRANSPARENCY INTERNATIONAL (2021a): *Track and Trace. Identifying Corruption Risks in UK Public Procurement For the COVID-19 Pandemic* https://www.transparency.org.uk/sites/default/files/pdf/publications/Track%20and%20Trace%20-%20Transparency%20International%20UK.pdf

TRANSPARENCY INTERNATIONAL (2021b): *Untangling the Gordian Knot? The UK's promising start in measuring the progress of its anti-corruption efforts*. https://www.transparency.org.uk/uk-anti-corruption-strategy-update-2017-2022-indicator-dashboard-JACU

United Kingdom Anti-Corruption Strategy 2017–2022 (2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/667221/6_3323_Anti-Corruption_Strategy_WEB.pdf

II. HUNGARIAN RESULTS

CORRUPTION OFFENCES IN HUNGARY

RESULTS OF THE SECOND ANALYSIS

JÓZSEF KÓ*

Corruption is an issue of concern and interest to everyone. It is not only the subject of debate among professionals, but also regularly appears in the media, and corruption cases are repeatedly publicised. Either actual acts have taken place, or there are only allegations of them in the media. These cases arouse the interest of the lay public in the phenomenon, which is also reflected in public discourse and everyday conversations. These news reports themselves often shape the views and perceptions of corruption in a country. In many cases, the media impact can be stronger than the consequences of what actually happens. It is difficult to see clearly in this area, because prejudices and attitudes towards corruption influence the perceptions not only of lay people but also of professionals. The actual data available on corruption do not always support public perceptions.

Moreover, the fact that we have little reliable data on the whole corruption issue makes it difficult to assess the situation objectively. Corruption is typically a crime where latency is very high. Official statistics are only the tip of the iceberg. For every detected case, there are many undetected acts. In addition, the definition of corruption is problematic. It is often difficult to determine whether an act constitutes corruption or not.

One of the basic problems in any research on corruption is its definition. In the social sciences, there is no consensus on the issue, and there are almost as many definitions of corruption as there are people who have studied the issue. (ROTHSTEIN et al., 2014) One source of the problem is that activities of varying importance and magnitude can be included in this category. The forms in which corruption manifests itself vary in terms of social acceptance, perception and significance. We speak of corruption when a police officer, in return for a certain reward, refrains from formally sanctioning a detected violation, and corruption when a high-ranking government official, in return for a multi-million-dollar reward, awards a major government contract to the 'right' company. Corruption can also be gratuities, tips or kickbacks. There are also many forms of political corruption, where past or future "favours" can be used to obtain seats in parliament or committees, and some consider lobbying to be a form of corruption. (NAURO – GIOVANNONI, 2007)

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A precise and clear definition of corruption is not just a problem of academic analysis. Without conceptual precision, operationalisation becomes impossible, and without being able to measure it, we cannot track possible changes or compare corruption levels in different societies. If we do, it leads to endless debates about the interpretation of the results. (NÉMETH et al., 2019; TÓTH – HAJDU, 2018; OLKEN, 2009; HLATSHWAYO et al., 2018; MARTIN, 2019; HEYWOOD – ROSE, 2014; WALTON, 2013)

In addition, corruption is closely linked to other political normative concepts with which political and social philosophy is concerned, such as fairness, justice, honesty and impartiality. Moreover, *"corruption is linked to other important concepts in social science, such as 'good governance' (and 'quality of governance' – QoG), and it is impossible to use terms such as 'good' or 'quality' without linking them to some norm. International 'good governance' and anti-corruption action has not been without its critics since the late 1990s. In this critique, it was stressed that the international anti-corruption agenda represents a particular Western liberal ideal that is not easily applicable in countries outside that part of the world. There are at least three arguments against this type of relativistic conceptual framework. The first is that if we were to accept a relativistic definition of corruption or QoG then any effort to make empirical comparisons across different parts of the world would be futile. This is the problem with the usual definition of corruption as »the private abuse of public power«. Since no norm or principle of abuse is defined, this definition is vacuous and thus invites relativistic notions of corruption."* (ROTHSTEIN et al., 2014)

Public office-centred definitions: definitions of corruption that are essentially linked to the concept of public office and deviations from the norms that are binding on incumbent companies. Corruption, although particularly linked to bribery, is a general term. In this approach, the concept of corruption covers the misuse of public power by appointed or elected public officials for private gain. It is not necessarily linked to financial transactions.

Market-oriented definitions: *"a corrupt public official sees public office as a business activity, and seeks to maximise his income from this business"*.

The office then becomes a "maximizing unit" (VAN KLAVEREN, 1957) or, as Leff (1964) points out: *"Corruption is an illegal institution used by individuals or groups to gain influence in the bureaucracy. Corruption in itself only indicates that the individuals or groups involved in the acts are gaining more influence in the decision-making process than they would otherwise have."*

These definitions, although examined from a slightly different perspective, remain within the concept of official corruption. However, it should be noted that the concept of corruption can be interpreted more broadly. The literature also examines business-to-business (B2B) corruption. (*Business against corruption…* 2011; DEL MONTE – PAPAGNI, 2007) This can arise in situations where the management and ownership of a business are separated, or where one party tries to induce

the other to enter into a transaction that is irregular or illegal. Business corruption can be harmful to the owners of the company or even to society as a whole. Business corruption can also take many forms, ranging from direct financial benefits to the offer of favours and the use of services.

Most corruption studies and policies focus on the public sector, not the private sector. There are many reasons for this. First, the public sector is the medium through which citizens are connected to the state; through the payment of taxes and the provision of public goods.

However, corruption weakens the accountability mechanisms available to citizens of the state, effectively making access to the collective means of action available to the public more difficult, and the use of collective goods unequal, favouring those involved in corrupt incidents. The essence of corruption in the public sector is that those responsible for the 'public goods' of societies transform these goods into private ones and, for the public, this transformation is much more visible and irritating than corruption in business. (SAMPSON, 2010) Corruption in business is even more hidden; the majority of people do not even know about it, but it can cause serious harm, and ultimately the costs of business corruption are paid by consumers in the form of higher prices, which include the costs of corruption.

Corruption exists within and between private companies, within NGOs, in trade unions, in the health sector and in sports clubs. Corruption also exists as a moral and cultural problem and may also affect individuals' interactions. (MILLER, 2005) Private sector corruption is detrimental to the development of a society, but public corruption is more important because *"controlling public sector corruption is a prerequisite for controlling private sector corruption"* (ANDVIG et al., 2001).

Another distinction is related to the forms of corruption. Political or grand corruption can be distinguished from bureaucratic or petty corruption. Grand corruption involves top officials and political decision-makers, is large in scale and often involves great amounts of money. In grand corruption, highly placed individuals exploit their positions to extract bribes, embezzle large sums of money, or tailor regulations to benefit their private interests. (ANDVIG et al., 2001)

Petty corruption is the lowest form of corruption, usually involving low-level public officials or managers who abuse the limited authority of their positions for personal gain. Petty corruption often involves the abuse of entrusted power in exchange for favours or small amounts of money.

Results of the data analysis

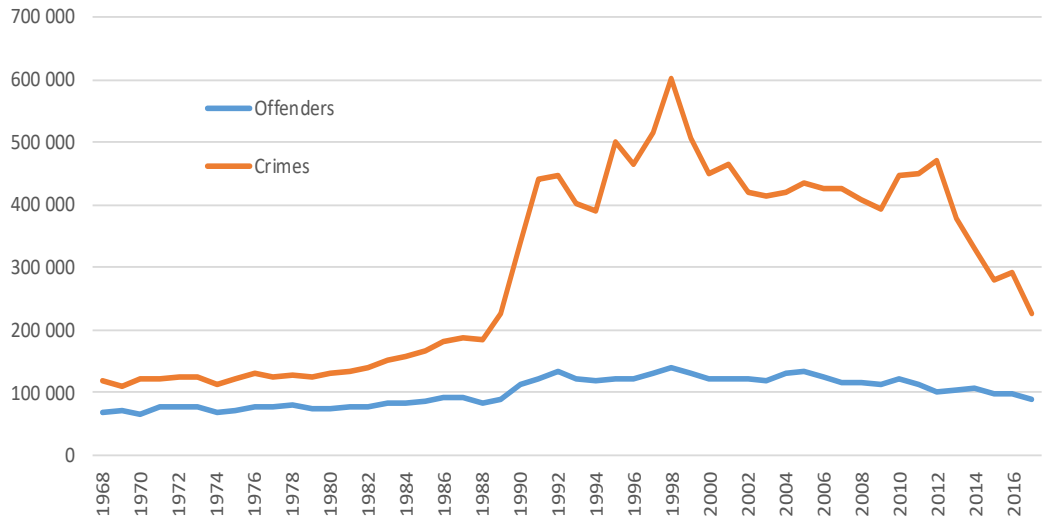
Our aim in the following is two-fold. On the one hand, we want to show how corruption has evolved in the years under study, using data from Hungarian crime statistics and, on the other hand, we want to use empirical data to separate the levels of grand and petty corruption.

One of the most important elements in the study of crime as a mass phenomenon in society is the analysis of crime statistics. Crime statistics record two elements of crime: known crimes and known offenders. The first element records the violation of criminal law as human behaviour; the second element records the persons who violate criminal law. The relationship between the two sets is obvious, but they differ in both content and number.

The content of the statistics on the number of offences detected is clearer: they include the number of offences brought to the attention of the authorities which have been proved to be prohibited by law, regardless of whether the offender has been identified in the course of the procedure. The statistics on offenders include the number of persons who have been found to have committed an offence.[1]

However, an offence may involve more than one offender, if they committed the offence together, and one offender may commit several offences, even dozens, so the data from the two statistical registers are not directly comparable. The following graph shows the evolution of the two sets of crime statistics.

Figure 1: Offenders and crimes 1968–2017



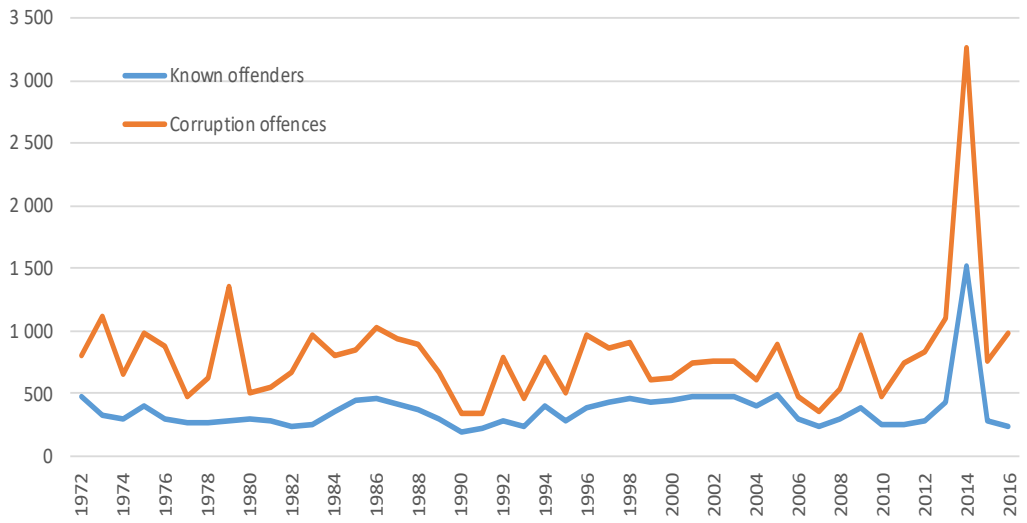
[1] In fact, there is a difference of a few percent between the number of people included in the statistics and the number of proven offenders.

The graph clearly shows that the two data series, which used to move essentially together, diverge in the early 1990s. The rapid rise in the number of crimes was not followed by a rise in the number of known offenders. This can be attributed to a rapid deterioration in investigation effectiveness indicators. While the number of crimes increased by a factor of 4 to 4.5 compared to 1972, the number of known offenders increased by a factor of only 1.7.

In the 1990s, the police were unable to keep up with the accelerating pace of crime, with fewer and fewer cases ending in the detection of offenders. The discrepancy is due to the increase in recorded crime. The decline in the number of detected cases after the turn of the millennium has improved detection rates. The sharp decline in the statistics over the last 3 years has significantly improved the success rate indicator calculated on the basis of the rates.

The data series for corruption offences behaves very differently, as we have already seen that the rising crime wave did not occur for this group of offences, and the detection rates were different from those for other offences.

Figure 2: Trends in corruption offences and number of known offenders 1972–2016



The slope of the two curves is not nearly as smooth as it was for all crimes. However, it is clear that in this case the two curves have tended to converge since the early 1990s.

This means that detection rates have improved here. In the 1980s, on average, the perpetrator or perpetrators were detected in 44% of the crimes that became known. In the nineties, the same rate rose by 9% to 53%. It could be said that police officers are playing it safe, perhaps opening fewer cases, but a higher proportion of cases that are opened end in success, compared with the overall crime figures, which showed the opposite trend at the same time.

Overall, this is true for corruption offences in general, but it is also worth looking at each type of offence separately, because the aggregate covers very different behaviours.

The overall positive development in detection rates is due to the bribery offence group, where the number of known offenders has increased significantly, while the economic bribery group "boasts" a sharply declining detection rate. Related to this, about one third of cases are linked to police corruption. These cases represent a significant proportion of all bribery cases.

Corruption offences behave differently from crime in general. Not only is the trend different from other crimes and not only are the detection rates different, but the perpetrators have different characteristics from those of offenders in general.

The offenders of corruption offences

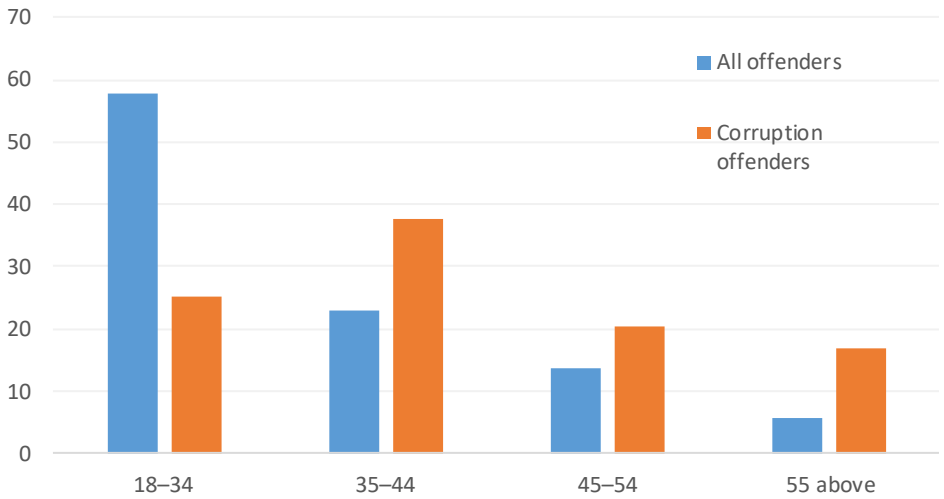
In the course of the research, we examined the prosecution – investigating authority files of corruption cases that became final in 2016. In total, 205 case files were processed.

The vast majority of offenders are Hungarian citizens. Only in a few cases was a foreigner suspected of committing the offence. In the majority of those cases, foreigners tried to bribe border guards but were unsuccessful.

The perpetrators of corruption offences have significantly different social characteristics from the average offender.

Their age is well above the average for the offender population.

Figure 3: Age profile of offenders and perpetrators of corruption offences (%)



Looking at the ages, we find that corruption offenders are significantly older than offenders in general. There is a significant proportion of young males and young adults (18-20 years old) and a much higher proportion of people in their 40s and 50s. In contrast to the average offender, the majority of those convicted of corruption offences were over 34 years old, and 37% were over 50 years old at the time of the offence. The older age is likely to be associated with greater life experience, which may not be helpful in detection.

A particular feature of the 1990s was a significant increase in the proportion of offenders in their 20s. This can be linked to the formation of a new entrepreneurial class. Young aspiring entrepreneurs are often pushing the boundaries of the law, sometimes going beyond it. This assumption is reinforced by the fact that this surplus will disappear in the coming years. By the turn of the millennium, the age composition of offenders will be similar to that of the previous period.

In terms of education, corruption offenders are also a distinct group, significantly better off than the average offender. Almost 60% of those who commit other offences have only primary education and 3-4% have higher education. 17% of those convicted of corruption offences have a higher level education and a high proportion of those with a high school leaving certificate. Only 21% had primary education. Those with lower education tended to commit simpler, less serious offences.

The majority of suspects (75%) had no criminal record at the time of the offence. Those with a criminal record had significantly lower levels of education.

The combination of criminal record and lower educational attainment is a common feature. These perpetrators are characterised by having carried out simpler acts and generally did not have access to the benefits they intended to obtain through corruption. For example, one perpetrator tried to pay in a shop with a foreign credit card "found" on the street. He offered the cashier that if he helped him to draw out the amount on the card, they could share the benefits.

The low educational attainment and socio-economic situation of some citizens can be marginalising, and in such circumstances individuals find it difficult or impossible to function in society, and thus drift into crime. As a counterpoint to 'poverty' or 'livelihood' crime, 'white-collar' crime is emerging, where the perpetrators are those with economic or political power, authority or recognition. Some of the perpetrators of corruption offences have a socio-economic status that is above or well above the social average. In the cases examined, 16% of the offenders were living in good financial circumstances, while 4.5% were living in extremely good financial circumstances. This status also implies a wider network of contacts and a greater capacity for advocacy. The use of better material and relational networks in the defence often makes the work of investigating authorities and prosecutors' offices much more difficult. Mandated lawyers, often 'star' lawyers, do a demonstrably better job than public defenders.

Looking at the educational attainment of offenders, there are also significant differences between offenders of other crimes and offenders of corruption offences.

Among corruption offenders, there are nearly twice as many high school graduates and three times as many tertiary graduates as among offenders in general. This is illustrated in the following charts.

Figure 4: Offenders (%)

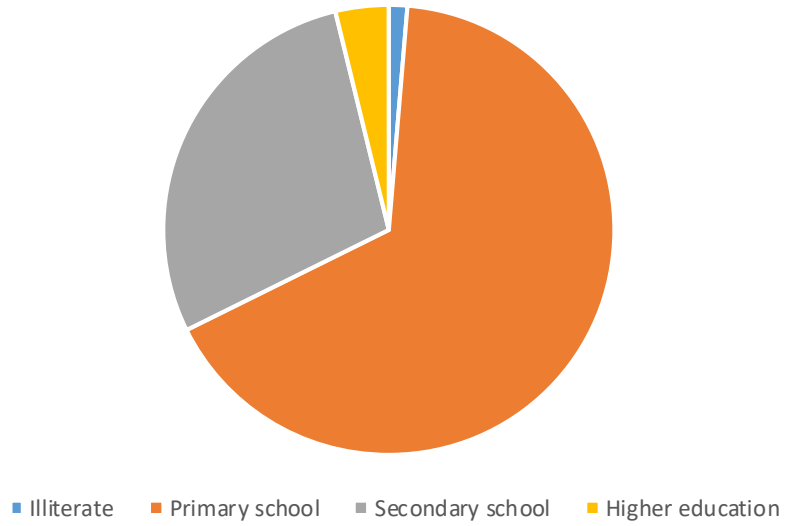
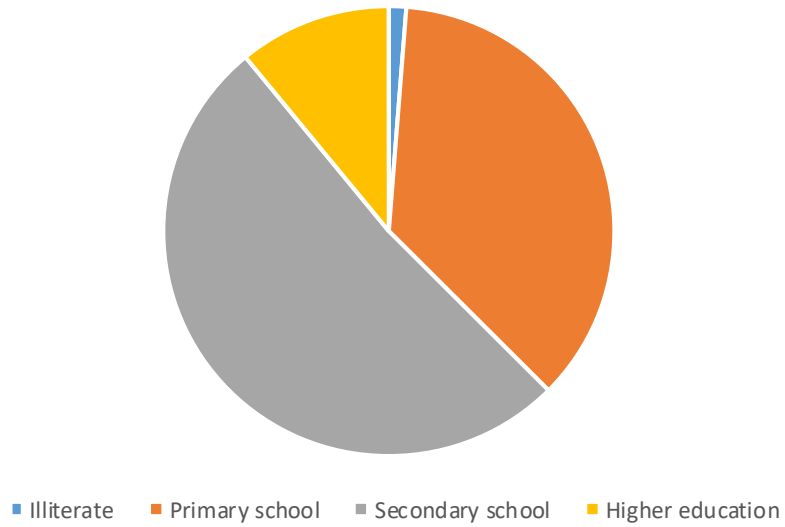


Figure 5: Corruption crimes offenders (%)



Corruption offenders are therefore better educated and typically older than other offenders.

The jurisprudence on corruption offences is also very different from the usual. The rate of imprisonment in these cases is twice the general practice, but a significant proportion of these are suspended, so the proportion of prison sentences to be served is in line with the rate for other offences. Offenders rarely receive other sentences. The following charts illustrate these differences.

Figure 6: All offenders (%)

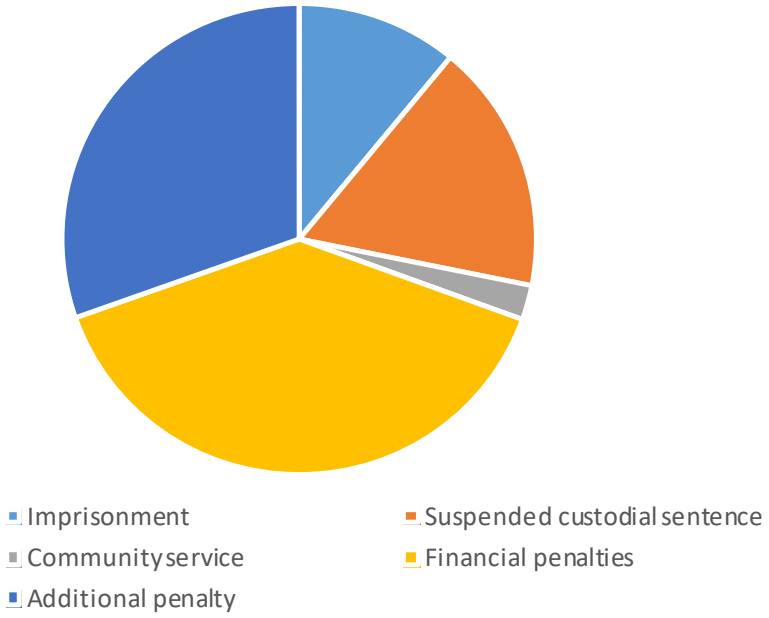
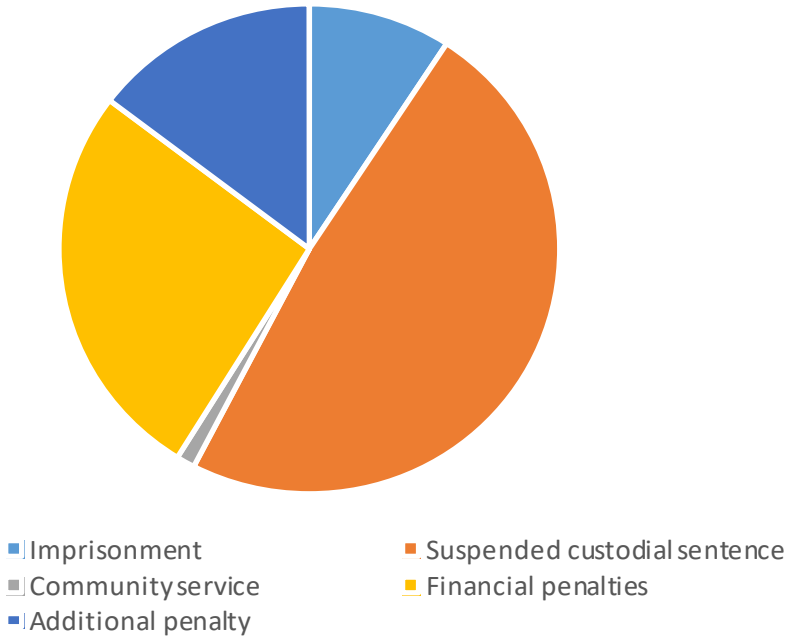


Figure 7: Corruption offenders (%)



The higher proportion of harsher prison sentences and then the significant number of suspensions of these sentences is the manifestation of a duality in the administration of justice for this offence. Harsh sentences are handed down because of the need to convict the perpetrators of these dangerous acts that have a detrimental effect on society as a whole while, at the same time, a large number of sentences are suspended because they are generally not committed by habitual offenders and their higher social status than the average offender also means that they have a certain 'immunity' from punishment. Furthermore, everyone is aware that these cases are only the tip of the iceberg, and there is a certain understanding of this rather widespread phenomenon, which seems to be reflected in the sentencing practice of judges.

However, there has been a significant change in the pattern of known corruption cases since the change of regime. In the early 1990s, although one might have expected an increase in corruption offences in the somewhat chaotic environment of privatisation transactions and many legislative changes associated with the change of regime then, if there was an increase, it was not markedly reflected in the statistics. Cases remained latent. The increase in corruption offences was far below the spectacular increase seen in other offences.

During this period, cases were most often initiated by individuals who were involved in some way in the transaction and later became victims. By the end of the period, there was a significant shift in the initiation of proceedings. The police criminal investigation service and the National Protective Service have become the most frequent initiators, and in the last two years they have initiated 70% of cases. The role of those private individuals who detected the crime and the previously dominant role of victims has diminished.

The investigation phase typically lasts 1.5 years. Interestingly, this is largely independent of the complexity of the cases. Even the more complex investigation involving several suspects are closed after 1.5 to 2 years, while simpler cases take 10-14 months to complete. Some cases take much longer to investigate. In one case closed in 2015, the time elapsed between the date of the investigation order and the date of the end of the investigation was 2278 days. For cases closed in 2016, the maximum was 2105 days.

Prosecutors' offices are working faster; in 2016 half of the cases resulted in a decision on indictment within 60 days, but often it takes several months to prepare an indictment. The maximum was 262 days. In 30-40% of the cases, prosecutors are quite flexible with the timeframes set out in Section. 216 (1) of the Code of Criminal Procedure (Be.). The time spent in the prosecution phase has increased over the last period. In 2000, the average time to reach a decision was 24 days: in 2015, this period increased to an average of 105 days, which was reduced to 60 days in 2016.

Corruption offences are a special category. Both the offence and the offender have different characteristics from other types of crime. The perception of these offences, both among professionals and the general public, is different. Despite their relatively low frequency, these cases are of great importance. The importance of these crimes lies not only in their number but also in their impact on society.

Looking at the start of the procedures, some changes can be observed. In almost half of the cases (47%), the procedure was initiated by a private individual. In half of these cases, the person who reported the offence was the person who detected it. This means a person outside the context of the offence who became aware of what was happening in some way and made a report. In the other half of the cases, the reporting person is listed in the statistics as the victim. This can be a little misleading. There is an agreement between the parties involved on the benefit to be gained and the compensation to be paid. The victim is the actor who becomes dissatisfied with the way the case is going and goes to the police to protect his interests or to seek redress for their dissatisfaction. This is typically the active actor, who promises or gives a quid pro quo, usually a large or small amount of money, in exchange for some benefit. The expected benefit is later not obtained and the disgruntled participant goes to the police to report the harm.

In one case, for example, the person who was later named as victim, handed over 4.5 million forints to the suspect in order to get his brother released from prison. The suspect, citing his connections, promised to arrange his release. However, this did not happen and the 'victim', no longer confident that the promise would be kept or that his money would be returned, filed a complaint.

Under the current legislation, both parties to a corruption transaction, the active and the passive participant, commit a criminal offence and are liable to prosecution but, in practice, the person who makes a detailed confession in order to solve the crime is exempt from prosecution. This situation creates a situation of competition. If one of the parties involved in the corruption act becomes aware that the act has been or may be brought to light, it is in his or her interest to make a confession or denunciation as soon as possible, since, if he or she is the first to do so then he or she may escape the criminal consequences of the offence. In many cases, what the first offender says will be the basis of evidence later in the proceedings. Either the passive or the active party can become the subject of criminal proceedings, depending on which of them is the first to make a statement or confession. This situation is sometimes exploited by the investigating authorities to obtain confessions from the parties.

In several cases, delimitation problems have arisen between the offences of influence-peddling and fraud. "The buyer of influence acts in the knowledge that he can influence the official who is using influence. He wishes to do so, and therefore gives an undue advantage to the official through the influence peddler. He is fundamentally mistaken in the conduct of the profiteer.

Therefore, he is in the position of a sort of victim, but, having wished to influence the official, he commits the offence by providing the unlawful advantage, by promising it. The influence peddler is therefore a fraudster who has no influence whatsoever on the official." In this particular case, the buyer of the influence made the complaint and was placed in the position of a victim in the proceedings, so that, although he committed the prohibited act, no proceedings were brought against him. The perpetrator, who had neither the intention nor the possibility to actually carry out the bribery, was found guilty of 2 counts of the offence of abuse of influence [Criminal Code, 299 § (1), (2) (a) and (c)]. (BALLÁNÉ, 2017: 5)

"If the perpetrator accepts the benefit but does not breach his operational obligations, or is not even involved in an ongoing formal procedure, his behaviour may constitute fraud." This is referred to by the Curia of Bhar.II.720/2012/5. Nevertheless, we have come across several cases where the perpetrators were found guilty of the offence of influence-peddling instead of fraud.

The other half of cases are initiated by an investigating authority. Most corruption cases (20%) are initiated by the police criminal investigation and law enforcement services. The traffic police feature in only 3% of cases, where the police officer who is being bribed reports the case or citizens file a complaint against the police officer who stopped them. In most of the latter cases, the investigation is rejected. In the absence of an external witness or some other evidence, a complaint against the police officer in charge will not lead to a conviction.

More and more cases are also being investigated by the National Protective Service, which initiated 9% of the cases completed in 2016. These cases often involve the use of secret equipment and usually follow a lengthy period of surveillance. In total, covert data collection was used in 12% of cases. There is considerable variation in the documentation of these cases. In some cases, all the relevant documents and all the material of the covert surveillance were included in the file. Typically, however, only relevant information was highlighted, and often the ordering decisions were missing.

It was not always clear why the covert means were used, what tasks were carried out and where the information gathered went. We did not encounter any cases where covert surveillance did not lead to results and the procedure was terminated. It is not always possible to ascertain from court decisions what role the information obtained during covert surveillance played in reaching a conviction. In general, courts take these data into account, but explicit reference is not always made to them.

In one case, the secret surveillance, phone tapping, was ordered to investigate a crime committed a year and a half earlier. The result of the interception was used by the investigating authority in the context of the open procedure and was treated as almost exclusive evidence. The court of second instance finally decided that the results of the subsequent interception could not

be taken into account in the assessment of the previous offences. The court did not take into account the information uncovered during the interception and acquitted one of the defendants, against whom there was no other incriminating evidence. There is currently no standard practice for the use of information obtained by secret methods. The information gathered in this way can assist the investigating authority in open proceedings, but, if these results are relied upon exclusively, they may not always be sufficient to prove guilt in court proceedings.

Among the cases that have been finally closed, we also looked at the terminations of investigations. In general, the reason for these closures is that the offence cannot be established or it is not a criminal offence.

A total of 10 complaints were lodged in cases of dismissal of a complaint, partial non-prosecution, suspension of an investigation and termination of an investigation, of which one was upheld; the majority of complaints were dismissed.

Cases resulting in the closure of an investigation were also examined, but it is difficult to comment on them because the case file is often quite incomplete. The general tendency is for the complainants to lack substantive knowledge. In most cases, they give a very incomplete and confused description of what happened and it is difficult to establish whether a crime has actually been committed. In many cases, there is a personal grievance on the part of the complainant, which is usually unrelated to the actual case.

For example, a procedure was launched because an architect filed a complaint against the architectural authority. He complained that his application had been rejected because he had not included a bribe with his documents. He had heard that this was the custom. He could not name a specific case or a specific person. The case, which had no factual basis, was of course closed.

Duration of cases

There is no statute of limitations on grievances. Often, previously fruitful relationships deteriorate and the aggrieved party seeks revenge by using past actions. Thus, there have been cases where 4-5 years have passed between the offence and the allegation. In the majority of cases (76%), proceedings were initiated either in the year of the offence or in the following year. The investigation phase rarely lasts longer than two years. Typically, it takes 1.5-2 years to complete this stage of the procedure. The exceptions were either due to the complexity of the cases or because there were many suspects involved and interviews were difficult to conduct. The time taken for investigative work was increased if other offences were linked to the corruption case.

However, there were significant differences between the documents produced during the investigation. The different investigative bodies did not follow the same procedure, and some were satisfied with taking witness statements and presenting any physical evidence that might be produced. In many cases, a single incriminating witness statement was sufficient to close the investigation. In other cases, the credibility of physical evidence was more thoroughly investigated, and confrontations and interviews with other witnesses were used to prove guilt. However, the quality of the investigative work had no impact on the prosecution's success.

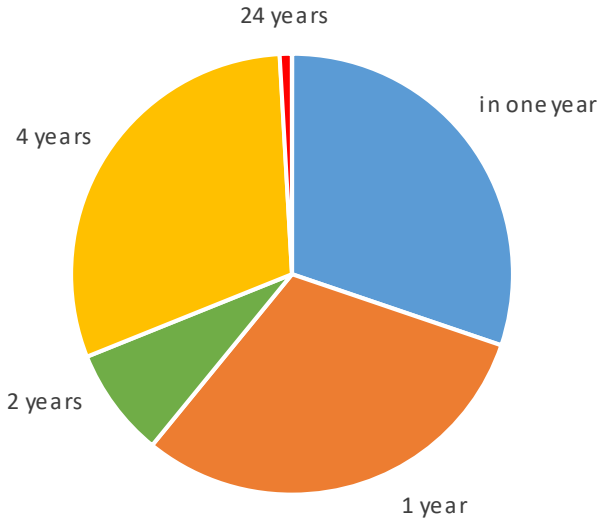
The queen of evidence in corruption cases is the witness. In the vast majority of cases, the prosecution relies primarily on witness testimony. In 97% of the cases we examined, there were one or more incriminating witness. However, the assessment of witness testimonies is not uniform. There were cases where the testimony of one incriminating witness was sufficient to prove the case, while in others the testimony of a single witness was not conclusive. Witnesses are usually not outsiders but are involved in some way in the commission of the crime. Usually one of the parties involved will later become a witness for the prosecution in the proceedings, and often it is complainant who will later become the prosecution witness. When the corruption agreement is not fulfilled for whatever reason, the disgruntled party, usually the active party, goes to the police. Occasionally, the passive party will initiate proceedings, probably when the acceptor is more experienced, more "savvy" than the average citizen, and knows that the initiator is in a better position. Once a confession or accusation has been made by one of the initiating parties, the roles are already assigned. The other party becomes a suspect and, even if he or she makes an incriminating statement against the initiating party, this does not change the situation. In none of the cases we examined has there been a change in the line-up, the suspect remains the suspect, even if it turns out that the other party initiated the corruption transaction.

This practice is acceptable and justifiable for multiple counts of offences, but for offences involving only one act of corruption, it raises ethical questions as to whether impunity should really be granted to the first confessor in order to ensure a successful prosecution.

Corrupt acts based on slightly more secretive master-uncle relationships or personal acquaintanceships are virtually undetected. Only cases where money or, rarely, something of value has changed hands in connection with a corruption transaction have been found. However, cases based on favours or subsequent compensation are not brought to the attention of the authorities. For the justice mechanism to be triggered, at least an incriminating witness or a concrete movement of money is required. More covert, chiselled cases do not trigger the mechanism, even if a report is received from some source. The fate of notifications varies. Most of the time such cases are overlooked, usually in the form of terminating criminal investigations while incomplete, if there is a denunciation. Sometimes, however, the wheels of justice are set in motion and a case is initiated.

The investigation period covered varying periods of time. In a third of cases, it was completed in the year it was launched. Around the same number of cases ended the following year. In one third of the cases, the 3-year statutory time limit was fully used and there were two cases where this stage of the procedure ended in the fourth year after the investigation started.

Figure 8: Investigation time



There is generally a long wait for the final conclusion. Twelve cases were brought to a final conclusion very quickly, in the same year as the investigation was launched, but unfortunately these are the exceptions. A little over half of the cases are completed in 3 years, which is considered to be an average timeframe. However, 15% of cases lasted more than 5 years and delays are not always justified by the complexity of the cases. In three cases, the final judgement was delivered in the 9th year after the investigation was ordered, which is already an extremely long period. In one third of cases, the length of proceedings should be reduced, because years of delays do no one any good.

The length of the proceedings is also detrimental to the credibility of the historical facts and to the provision of evidence. The courts repeatedly refer in their judgments to the time that has elapsed since the offence was committed and the impact of that time:

> *"In other respects, the court accepted that the witness was unable to recall certain details accurately after several years, so his credibility as such was not in doubt, the contradictions being reassuringly explained by his weakened memory."*

> *"Overall, the court found that there were some inconsistencies in the witness's testimony, but these were largely explained by the passage of time and did not affect the witness's credibility."*[2]

[2] From the verdict of the Budapest Metropolitan Court, the act took place in 2008; the verdict was delivered in 2015.

If we compare the time of the offence with the time of the final termination, the picture is even worse. What is the impact of a conviction 8-10 years, or in one case 13 years, after the time of the offence? The sentences show that judges also have doubts about the "usefulness" of such late sentences, because suspended prison sentences are more common in cases of longer duration.

The complexity of the cases partly justifies the long duration of proceedings. Corruption offences are characterised by multiple offences. In 22% of the cases we examined, there was only one suspect or defendant in the case. In 25% of cases, there were 15 or more suspects. The large number of defendants also makes it difficult to conduct cases at the trial stage.

The usual predominance of Budapest is observed when looking at the place of crime. Around one third of the cases were committed in the capital, a surplus above the population rate. This dominance of Budapest is a constant phenomenon; the number of cases per county is very variable and can fluctuate considerably from year to year, so it is not possible to identify any lasting trends by analysing the spatial distribution.

Other related offences occurred in 28% of the cases examined. In 70% of cases, the authorities had to act in purely corruption-related cases.

A single perpetrator is found in the majority of corruption offences (62%), although in some cases there were also very many suspects. The top offender with 61 accused was the entire staff of a border crossing point. Cases with more than 10 suspects occurred in 4% of all cases.

The value of the offence shows a very wide variation. There have been cases of 1-2 thousand forints and those of several million forints. In half of the cases the value of the offence did not exceed HUF 100,000, and only in 20% of the cases was the value of the offence higher than HUF 500,000. This is another indication that the vast majority of registered corruption cases fall into the category of petty corruption. It should be noted, however, that the value of the offence reported in the statistics does not necessarily correspond to the damage caused by corruption. Sometimes, the decision-maker awards the briber an investment worth millions of euros for a few 100,000 HUF bribes.

Even if the amount reported as damage is not always accurate, these figures show that the majority of corruption cases detected do not fall under the heading of grand corruption.

Summary

Corruption is not simply a criminological problem; it is a social phenomenon. It has a wide range of causes, motives and mechanisms of action that go far beyond the criminal law and the judicial system. Corruption is a social phenomenon because its existence, development and characteristics are always determined by the given socio-economic environment, its specific conditions and their changes, and cannot be simplified into a criminological problem. Its criminological appearance and presence in criminal law and legal practice, however, illustrates and reflects the socio-economic conditions in which it takes place.

Our objectives were only partially achieved. The analysis of Hungarian criminal statistics showed that almost all of the registered corruption offences can be classified as petty corruption. Only two cases of grand corruption were found. One was the so-called oil colonels' trial. In this case, senior Ministry of Defence officials were involved in illegal oil trading. The other was a case of economic corruption. One of the victim's employees manipulated the suppliers of a food company, giving orders to suppliers in exchange for a share. The perpetrator obtained a "commission" of more than 100 million forints.

Grand corruption, although presumably present in society, is very rarely detected. In the absence of cases, our objective of comparing the characteristics of petty and grand corruption could not be achieved. Grand corruption must be investigated by other means.

An analysis of cases of petty corruption showed that the perpetrators of corruption offences have very different characteristics from the average offender. They are older than the average, have a higher education level and a better social background. The more favourable socio-cultural background and better advocacy skills often made investigative work more difficult and proceedings took longer than average. There are also significant differences in sentencing practices compared to other offences. There are far fewer prison sentences to be enforced and more suspended sentences than for other offences. Corruption offences represent a specific area of crime, with its own specificities and characteristics.

References

ANDVIG, Jens Chr. – FJELDSTAD, Odd-Helge – AMUNDSEN, Inge – SISSENER, Tone – SØREIDE, Tina (2001): *Corruption. A review of contemporary research.* CMI Reports, R 2001: 7. Bergen: Chr. Michelsen Institute. https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2435853/R%202001%207.pdf?sequence=2&isAllowed=y

BALLÁNÉ SZENTPÁLI Edit (2017): A csalás és a vesztegetési jellegű bűncselekmények elhatárolása. *Büntetőjogi Szemle,* 5(1), 3–10. https://ujbtk.hu/?p=4741

Business against corruption: A framework for action (2011). New York: United Nations Global Compact Office.

DEL MONTE, Alfredo – PAPAGNI, Erasmo (2007): The determinants of corruption in Italy: Regional panel data analysis. *European Journal of Political Economy,* 23(2), 379–396. http://dx.doi.org/10.1016%2Fj.ejpoleco.2006.03.004

HAWKEN, Angela – MUNCK, Gerardo L. (2009): *Do you know your data? Measurement validity in corruption research.* Working paper. https://www.researchgate.net/profile/Gerardo-Munck/publication/228976780_Do_you_know_your_data_Measurement_validity_in_corruption_research/links/0046351e05a81cdf17000000/Do-you-know-your-data-Measurement-validity-in-corruption-research.pdf

HEYWOOD, Paul M. – ROSE, Jonathan (2014): "Close but no Cigar": the measurement of corruption. *Journal of Public Policy,* 34(3), 507–529. http://dx.doi.org/10.1017/S0143814X14000099

HLATSHWAYO, Sandile – OEKING, Anne – GHAZANCHYAN, Manuk – CORVINO, David – SHUKLA, Ananya – LEIGH, Lamin Y (2018): *The measurement and macro-relevance of corruption: A big data approach.* IMF Working Papers, no. 18/195. https://www.imf.org/en/Publications/WP/Issues/2018/08/31/The-Measurement-and-Macro-Relevance-of-Corruption-A-Big-Data-Approach-46157

LEFF, Nathaniel H. (1964): Economic development through bureaucratic corruption. *American Behavioral Scientist,* 8, 8–14.

MARTIN József Péter (2019): Kéz a kézben a lejtőn. *Médiakutató,* 20(3), 7–21. http://epa.niif.hu/03000/03056/00073/pdf/EPA03056_mediakutato_2019_osz_007-021.pdf

MILLER, Seumas (2005): *Corruption.* The Stanford Encyclopedia of Philosophy. http://plato.stanford.edu/archives/fall2005/entries/corruption/ (retrieved May 2009).

NAURO, Campos F. – GIOVANNONI, Francesco (2007): Lobbying, Corruption and Political Influence. *Public Choice,* 131(1), 1–21. https://doi.org/10.1007/s11127-006-9102-4

NÉMETH Erzsébet – VARGHA Bálint Tamás – PÁLYI Katalin Ágnes (2019): Nemzetközi korrupciós rangsorok tudományos megbízhatósága. *Pénzügyi Szemle,* 64(3), 321–337. https://doi.org/10.35551/PSZ_2019_3_1

OLKEN, Benjamin A. (2009): Corruption perceptions vs. corruption reality. *Journal of Public Economics,* 93(7–8), 950–964. https://doi.org/10.1016/j.jpubeco.2009.03.001

ROTHSTEIN, Bo – VARRAICH, Aiysha – VAZ, Bianca M. – KHAGHAGHORDYAN, Aram – DELLA PORTA, Donatella – VANNUCCI, Alberto – SBERNA, Salvatore – TORSELLO, Davide (2014): *State-of-the-art Report on Theories and Harmonised Concepts of Corruption.* http://anticorrp.eu/wp-content/uploads/2014/10/D1.1-State-of-the-art-report-on-theories-and-harmonised-concepts-of-corruption.pdf

SAMPSON, Steven (2010): The anti-corruption industry: from movement to institution. *Global Crime,* 11(2), 261–278. https://doi.org/10.1080/17440571003669258

TÓTH István János – HAJDU Miklós (2018): A korrupció mérési lehetőségei – lehetséges objektív indikátorok bemutatása egy magyar példa alapján. *Magyar Tudomány,* 179(4), 507–528. http://real.mtak.hu/80714/1/5301_2337_u.pdf

VAN KLAVEREN, Jacob ([1957]1989): Corruption as a historical phenomenon. In: Heidenheimer, Arnold J. – Johnston, Michael – LeVine, Victor T.: *Political Corruption: A Handbook.* New Brunswick: Transaction Books. [Originally published: VAN KLAVEREN, Jacob (1957): Die historische Erscheinung der Korruption, in ihrem Zusammenhang mit der Staats-und Gesellschaftsstruktur betrachtet. *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte,* 44(4), 289–324.]

WALTON, Grant W. (2013): The limitations of neoliberal logic in the anticorruption industry: Lessons from Papua New Guinea. *Crime, Law and Social Change,* 60(1), 147–164. https://doi.org/10.1007/s10611-013-9450-1

THE APPEARANCE OF PETTY AND HIGH-RANKING CORRUPTION AT LAW ENFORCEMENT ORGANS OF HUNGARY

ZITA VEPRIK*

Introduction

All societies must know and research the phenomenon of corruption, its characteristic features, reason and effects, since, in addition to having significant negative economic consequences, it also brings disorder to society. It is impossible to eliminate it. We therefore must be prepared for its long-term, so to speak, constant prevention and treatment. A society that is free of corruption is improbable, or at least the costs (LEVI, 2019) of its realization would be too high. Of course, action taken against the phenomenon is necessary in itself to mitigate the indisputably serious negative effects, to which corruption research provides direction. Everyone must be aware of the fact that research into corruption is a very important, but also a difficult task (GÁSPÁR – MOLNÁR, 2015: 170–171.) as well. According to some experts, the target of the fight against corruption, beside prevention and reducing crime – is to increase (INZELT – SZEPCSIK, 2021: 82–83.) the legitimacy and authority of the government, which is indispensable for a long-term and responsible exercise of power.

A special type of corruption is law enforcement corruption, the management of which is also highly important, since the social purpose of law enforcement is to protect society (FINSZTER, 2008: 167.) from human behaviour qualified as unlawful by means of coercion by the authorities – in the possession of a monopoly on legitimate physical violence. Regarding these crimes, one of the perpetrators is a kind of official person, whose task should be not only to keep the rules made by the state but also to enforce them. Besides, their fundamental function is to protect society.

Determining crimes of corruption and law enforcement corruption is varied in both space and time. Different states have different interpretation of which actions legally qualify as a corruption offence and which are within the 'normal extent of a gift'. In the case of the legislator's obvious rulemaking, the law enforcers many times consider the current social judgement of the phenomenon; that is, they react with flexibility and this is how they decide how to evaluate actions of a corrupt nature. An example for this is today's Hungarian case-law, perhaps a little

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generous, which does not consider 'slight thoughtfulness' e.g. a flower, as a benefit, so the legal fact of the crime does not materialise. Of course, in the event of repeatedly accepting such benefits, the law enforcer has to think about it. (GÁL, 2010)

Neither the legislators nor law enforcers are in a simple situation when the line that defines what qualifies as a corruption offence must be drawn.

Let us not forget about the difficulties facing the researchers either, who are working in order to make the actions against corruption more effective. In order to make the appropriate measures, they must try to classify corrupt behaviours and actions and draw up effective preventive steps and surveillance opportunities in a specific way.

Researchers distinguish between petty and high-ranking corruption, but an obvious and sharp delimitation between them is still unavailable. Nevertheless, their differentiation, learning the special features, can be useful for the short-term and the long-term success of actions against law enforcement corruption as well.

An insight into the Hungarian legislation on corruption offences

In the Hungarian criminal law, a separate chapter deals with corruption offences.[1] The chapter lists a total of nine corruption offences including, as a separate fact, active and passive bribery related to the function of economic operator (art. 290–291), to the function of public officer (art. 292–293) and those committed in court or regulatory proceedings (art. 294–295). With regard to corruption offences, the legislators assign the perpetrator (who gives or promises undue advantage in order to influence) of the corruption to be punished in separate facts, or the perpetrator (who accepts the undue advantage or its promise) of the passive briber.

Furthermore, active trading in influence (art. 298) and passive trading in influence (art. 299) qualify as corruption offences by Hungarian law. With these types of offences there is no direct connection between the perpetrator of active bribery and the public officer. The perpetrator of active bribery gets in touch with a kind of person who claims to influence a public officer. The offence is also committed if there is no public officer behind the perpetrator of passive trading in influence over whom he could have influence.

As the last facts of the chapter, the legislator assigns the public officer who obtains, in his official capacity, credible knowledge of the commission of an undiscovered criminal offence and fails to report it to the authorities as soon as he can to be punished in separate facts (art. 300). As you can see, in this case the perpetrator does not commit a corruption offence. Even so, according

[1] Chapter XXVII of Act C of 2012 on the Criminal Code.

to the intention of the legislator, it can be expected of all public officers that they will not turn a blind eye to corruption offences that come to his knowledge, but will do everything they can for the sake of the fairness of public life. This regulation is highly important in order to prevent corrupt acts from being committed by law enforcement staff. They can be particularly characterised by a strong sense of loyalty, but the legislator makes it absolutely obvious that comradeship is only commendable in legal operations. It is absolutely unacceptable when it comes to committing corruption offences.

The staff of law enforcement organs, if their activities belong to the organ's proper functioning, are considered to be public officers, therefore a corruption offence committed by them is considered to be passive bribery regarding a public officer according to art. 294 of Act C of 2012 on the Criminal Code. In the case of the police, proper functioning means the prevention and surveillance of crime and the protection of public security, public order and the state border as well as participation in preventing illegal immigration according to the Fundamental Law of Hungary. However, a significant share of the police staff perform other important tasks related to the operation of the organisation (e.g. management, personnel administration, etc.). Hence, as a lighter penalty, passive bribery (art. 291 of the Criminal Code) can be established against them.

The offence of passive bribery regarding a public officer is fulfilled if the public officer asks for any undue advantage concerning his activities or accepts such advantage or a promise of it. As can be seen, the undue advantage of being in the possession of the public officer or enjoying the benefits of it is not a condition for the criminal offence to be completed. It is enough if he asks for it or accepts it. There is no lower limit to the level of undue advantage. So, by accepting the smallest gifts or favour, the staff of law enforcement organs perform the offence if they receive them in connection with their operation (the acceptance of small gifts among public sector workers is only possible for healthcare workers). The significant measure of undue advantage does not appear among the framework of the qualifying cases. The court primarily assesses, within the framework of the sentence of imprisonment of one to five years, how much the action endangered trust in the proper functioning of public bodies. The extent of the bribery appears in the level of confiscation of property taken in the judgment, the aim of which not to leave any undue advantage in the possession of the convicted person.

The public officer's effectively breaching his obligations is also not a condition for a criminal offence in exchange for accepting undue advantage. If he does this, the qualified case of a criminal offence materializes, which shall be punished more severely by a term of imprisonment of between two and eight years. It has to be recalled at this point that, if the public officer makes the performance of his duties the subject of granting of an advantage, it also is considered to be a breach of his duties according to art. 300/A of the Criminal Code.

The behaviour characteristic of high-ranking corruption offences appears among qualified cases of passive bribery as a public officer. Even committing the basic case of the criminal offence is assigned to be punished more severely by a term of imprisonment of between two and eight years if it is committed by an executive official person. A high-ranking corruption offence committed in a criminal conspiracy or repeatedly is assigned to be punished by a term of imprisonment of between two and eight years, except for offences committed by an executive official person, because in this case the term of imprisonment rises up to between five and ten years. The full force of the law in its all rigour shows that this latter penalty is equal to the level of punishment for armed robbery.

The staff of law enforcement organs are considered as soldiers according to the Criminal Code.[2] This is why the criminal proceedings for corruption offences committed by them are carried out in accordance with the rules applicable to soldiers. During the imposition of a penalty, there is a possibility for imposing demotions or terminating service.

The difficulties of actions against corruption

A general feature of corruption interactions is that at least two parties are facing each other (SCHUBAUER, 2013: 375.), the one who asks for it and accepts it and the other who gives and promises the undue advantage. However, it is not necessarily needed for both parties to act (GÁL, 2013: 183.) in its commission, but both parties have acted inappropriately. (BODROGI, 1981: 324.) *György Lőrinczy* establishes that it has been quickly demonstrated during the application of criminal law that it is extremely difficult to prove corruption offences. (LŐRINCZY, 1987) The most important challenge for criminal investigation science the identification (HAUTZINGER, 2005) of people, objects, scenes and actions that may be related to the offences, which means a serious challenge for the authority during the investigation of corruption offences. The investigation of corruption is assisted by forensics, which makes it easier to identify the corruption situation. Besides, the professional management of the phenomenon becomes simpler, i.e. it makes practical recommendations that help the efficiency of the investigation. (GÁRDONYI, 2021)

Géza Finszter specifies the following as the reasons that corruption belongs to the category of hard-to-detect and hard-to-prove crimes: they have no natural person as a victim, the possibilities of physical evidence are very limited and the forensic value of the crime scene is rare. The behaviour during its performance leaves no physical trace in the environment and many times it is often indistinguishable from the legitimate actions of everyday life. No accurate and reproducible knowledge can be obtained from third parties about the activity unless they are parties to the criminal offence. Their moral rejection of these actions are not obvious. (FINSZTER, 2011a)

[2] According to Subsection (1) of Article 127 of Act C of 2012 on the Criminal Code.

The specific feature of corruption offences is that both parties (the one who gives undue advantage and the one who accepts it) are jointly interested in the concealment of their actions, with the criminal offence staying latent The number of registered criminal offences is of necessity lower than those in practice committed but this difference is extremely big in the case of corruption actions. The degree of law enforcement corruption is closely linked to the risk of general corruption in the particular society. Accordingly, it is definitely necessary to examine the factors influencing the degree of corruption in general. Corruption indices are lower where there is higher economic development. Where democracy and alternating political regime function well and the press is completely free, corruption appears less. Measures taken in order to increase the obligation of control and publicity reduce corruption and the cultural characteristics are important as well, namely how society tolerates corrupt acts and in which direction societal values risk are moving.

Special features of law enforcement corruption

According to Sherman's point of view, police officers become corrupt gradually. They accept smaller favours as a first step. Then they move on to the more serious forms of corruption. He considers that, on the one hand, the guidelines of experienced colleagues and, on the other hand, the desire for acceptance by their superior play a role. (SHERMAN, 1985) Besides, *Bonifacio's* view is thought-provoking, that by means of petty corruption a false belief can evolve in the police officer that the advantages given to him are a way of demonstrating the humility of citizens. This leads to the idea that he regards himself as being above the law. I must mention that this process is true vice versa. That is to say, an organizational culture that suggests that the laws do not have to be fully kept can lead to police corruption. (BONIFACIO, 1991: 39.) You must agree that organizational structure plays a major role in how much the organisation and the persons integrated in it can resist the phenomenon of corruption. Law enforcement corruption is not an optional and unique disorder that can be terminated by temporary and oppressive measures. According to the point of view of the 'new realism', corruption and breach of duty wait as a permanent and repetitive danger in law enforcement organisations. (PUNCH, 2000)

Surveillance and proving of law enforcement corruption offences mean special difficulties because of the following reasons:

- the connection in the staff is strong, so they hardly make incriminating statement on each other,
- they have professional knowledge regarding surveillance and proof of criminal offences,
- regulation is exaggeratedly complicated and complex, the implementable processes are not always obvious,
- their social honour is increasing but it is not high enough. Few are proud of their profession, so they do not always emphasize keeping their integrity and honour.

I must mention that because of the above described, the effective prevention and surveillance of law enforcement corruption require detailed knowledge of service tasks, and through them the identification, measurement and analysis (BALLA, 2019: 19.) of risks. Only in the light of these can the appropriate measures be taken in order to minimise the risks. Corruption risks differ not only according to forms of service of law enforcement organs but also within them. The professional analysis and the professional experience showed that some areas within the public sector hide more integrity risks than others. Those who have intensive connection with t 'customers' (citizens or enterprises) are proven to be more endangered since there can be more opportunities and temptations. (BÁGER, 2015: 6.)

Law enforcement workers can get such an impulse from different directions that lead to corrupt behaviour. For example, if they fill in a position where they can make decisions that influence a citizen's life (e.g. imposing a large fine, denial of border crossing) and there is 'demand' for of the officer not to respect the rules. It may occur that the law enforcement worker decides to commit a corrupt act because of the organisational structure, compliance with his colleagues or in order to facilitate fitting into the community. Another problem is that addressing corruption risks brings about rapidly, almost untraceably changing regulations as regulators of public order. Observing them is a serious difficulty, although with the best intentions. It also makes management control and check more difficult. In some service places, processes affecting staff come from not one but several directions, which increases the likelihood of committing corrupt behaviour, i.e. these persons are subject to multipolar corruption risk.

The effects of law enforcement corruption

The special feature of corruption as a social mass phenomenon is that it elaborates its correcting-distorting effect (HANKISS, 1979: 87.) in the socially dominant and accepted distribution order of the goods produced. An important criterion of social level corruption is that it acts (KRÁNITZ, 1986: 43–44.) as a distribution-redistribution system, in both the material and non-material relations in society. With redistribution, i.e. by using the redeployment of the emerging revenue and goods, among the economic operators, the good state avails itself in order to grow the public good, mitigate market failures and aspire for social justice. So, the question emerges whether this redistribution is necessarily bad. The effect of corruption can obviously be positive individually, occasionally and temporarily, but the result of their additivity is, at the social level, negative in every respect: economic, social, political, ideological, moral and in any other respect, social well-being (CAMARRA, 2001) is diminished and disturbed. In states with a high level of corruption, there is not enough resources for adequate police trainings. The usage of available resources has little effect and the citizen's trust in government and police is missing. (LINSSEN et al., 2014: 51.)

Law enforcement corruption also has other special, serious effects beyond the general corruption phenomenon. I must point out from these that, by this, the international perception of our country is deteriorating; trust in public organs is decreasing, the necessary principle is breaking down and the security deficit is rising.

It leads to serious social consequences if the rules created by the state are not kept by the state's own institutions and authorities. In extreme cases, it may also happen that the inhabitants consider it less obligatory to keep these rules and public institutions lose their acceptance and thereby their efficiency. (LINSSEN et al., 2014: 51.)

Law enforcement is about constitutionality and the appropriate procedure: corruption and any other forms of police deviance endanger the legitimacy of the state and the law enforcement organisation. The a 'clean' i.e. well-functioning police service, is the determinant barometer of a healthy society. (PUNCH, 2000)

If the staff of law enforcement organs commit corrupt actions, they do not serve their purpose. This, among others, generates a security deficit at both individual and social levels. Security has recently become increasingly important, accompanied by the appreciation of the activities of law enforcement organs. I must mention that, as a full member of a Schengen member state, the quality of performance of the tasks of national law enforcement organs significantly influences the security not only of Hungary but also the entire Schengen area.

Pre-corruption measures are also important for public organisations as a socio-political objective, especially for the police, which is a visible and interventional part of the state institutional system. (LINSSEN et al., 2014: 44.) In an extreme case, members of society get to the point where rules are becoming increasingly less respected and they do not keep them because their experiences show that those who respect the rules face disadvantages in numerous areas of life. This increases the 'demand' for law enforcement corruption, which elicits a kind of self-stimulating effect. According to Finszter, corrupt law enforcement acts cause extremely serious harm that 'can hardly be measured, as if the doctors did not heal but would spread the disease'. (FINSZTER, 2003)

The measurement of law enforcement corruption

The latency of corruption offences is so great that the number of crimes actually committed and the harm caused can only be estimated. Many have already drafted that corruption is invisible, which is confirmed (KEREZSI, 2018: 344.) by the data of hectic changing crime statistics. In cases of bribery, because of the intense latency, it is not possible to make conclusions from the crime cases that have come to light of the extent of the infection, but it is instead possible to make

conclusions that the danger of getting caught (FINSZTER, 2011b: 28–29.) is bigger in the specific sector. The General Prosecutor established in his report of 2017 that the number of official corruption (including law enforcement) offences may be caused by the activities of the services funded for their surveillance (e.g. integrity tests) as well. As a result of surveillance and completion of its extensive investigation involving multiple characters, the number of registered corrupt offences may increase multiple times over. There are no objective tools for researching the phenomenon by which we could gain an accurate picture of the methods and degree of corruption. The measurement of perception and experiences, analysing the media and integrity studies (INZELT, 2017: 75.) can be used for measuring corruption crime events.

Regarding the state of corruption, the indexes of perception of corruption also of major importance – due to the intense latency. However, in the case of perception indexes, it must be taken into account that a case that is a matter of public interest may significantly reduce the value of the indicator (KARDOS, 2016: 13.). The most accurate information regarding the extent of corruption can be collection using different methods.

Petty and the high-ranking law enforcement corruption

The corrupt acts can be arranged in different ways in order to handle the phenomenon more easily, to take expedient measures and to make the fight against them more efficient and effective. One type of arranging is based on the degree of decision made by the participants and on the extent of the undue advantage.

In 2011 Géza Finszter already distinguished two groups of the phenomenon along similar principles: the occasional-situational types of perpetration and the institutionalised-structural types of perpetration. The occasional-situational perpetration can be discussed if the participants have unpredictable, unexpected, possible encounters, where the reason for bribery results from defencelessness, personal characteristic features and their superior situation. In these cases, the delict typically occurs in one phase, although it may often be repeated. In the case of the institutionalised-structural type, we can discuss the predictable, expected, regular perpetration of the active and passive briber, in the case of which the reasons do not come from the procedure, organisational culture or deficient management but from other, personal characteristic features. In these cases, the offences happen generally in several phases with complex networks of interest. In these cases, criminal offences are generally multi momentary, complex interest-nets shapes and the perpetration in criminal organisation and the set of other against property or economic interactions. (FINSZTER, 2011a: 76–80.)

According to similar arranging, we can distinguish between petty and high-ranking corruption actions. The phase ‘petty’ corruption refers to everyday life cases of low-level civil servants or

employees and citizens, where small amount of money or smaller favours appear. (VAN DE BUNT – NELEN, 2012: 14.) 'Petty' corruption does not mean that this action would be light-weight. Pellegrini's view is thought-provoking, so 'petty' corruption is a kind of 'surviving' corruption, where the small amount of bribe money is considered as extra income to compensate those who earn little. (PELLEGRINI, 2011: 41.)

Such 'petty' corruption actions represent a great danger to society, because they damage trust in law enforcement organs and thereby the trust in the legal functioning of the state.

This is because, if a police officer commits a corruption act, his behaviour harms the trust in the entire police force. Society does not look at the action as an individual phenomenon but draws negative conclusions regarding the entire police organisation. (INZELT et al., 2014: 13.)

All of the petty corruption acts committed by law enforcement staff have consequences of the risk of becoming high-ranking. For example, when a police officer accepts the money placed in the documents during an a typical procedure, which he considers only a gift, a favour. After this, not because of the given advantage, he does not take the measure with the appropriate caution. Perhaps, it has already happened, due to fatigue, other more important police tasks or just because of irresponsibility, he did his job negligently. This in itself seems to be a petty corrupt action but if it turns out that the subject of the procedure is drunk and later causes a fatal accident or he is a wanted person who commits another crime then this petty corrupt action becomes high-ranking if we look at the consequences.

Over the above described, petty corruption has a negative effect on the member of law enforcement staff who accepts the undue advantage since, after accepting the first favour or gift, he can be blackmailed and forced to be a participant in high-ranking corruption acts.

It is important for the law enforcement staff to be aware of these dangers, so the internal crime prevention organ and the psychologists of law enforcement organs and the direct superiors provide training already to the entrants and later on a regular basis in connection with corruption. Beyond a general description of corruption, specific cases are also processed.

It is also important that the staff not only know these dangers but also live to see it and to be afraid of its consequences. Integrity testing, also used in several other countries in the world, is an effective tool in Hungary for this. During adopting the legal institution, the colleagues of the internal crime prevention organ test the moral strength and compliance of the controlled person in a situation developed artificially but appearing real. The preventive effect of the test is unquestionable in order to crack down on corruption.

Case studies

I present the appearance of petty and high-ranking corruption offences by describing some cases that took place at the Hungarian law enforcement organs.

The first two cases concern the management of the police. Financial considerations have also stressed the risk within the police, since the police is the largest employer in Hungary, with thousands of buildings and other objects as well as thousands of vehicles and other equipment of great value belonging to its management of property. Its annual budget exceeds 350 billion Forints, of which 85 billion Forints are spent on operating expenses.[3] The necessary conditions for operating are provided by the economic directorates established at the central and regional organs of the police.

A good example for the appearance of petty corruption offence in the economic activity of the police is the case of a police major working as a subordinate at a regional organ of the police.

> In 2019, the Military Council of Szeged Regional Court found him guilty of active bribery and sentenced him to one year of imprisonment, a fine of 100,000 Forints and a reduction of rank. The imposition of the punishment was established on an integrity test carried out by the National Protective Service against the police major. The discussion leading officer pretended to be an owner of an individual proprietorship dealing with sale of household appliances. After the networking, at the personal meeting the discussion leading officer handed over a voucher valued at 30,000 Forints to the police major in order to get an advantage for his enterprise during police procurements. The police major accepted the voucher. The police major was aware of the value and usability of the voucher given to him. The officer did not promise to give advantage to the enterprise during the procurements; however, by accepting the undue advantage, the offence was committed. In the judgement the court suspended the enforcement of imprisonment for three years, so if, during this time, the police major does not commit another offence, he will not have to go to prison.
>
> The committed action can be considered as a petty corruption offence in all respects since the police major was not in an executive position, he did not have the right to make decisions on procurements or for financial counter-signing. He could have tried to assert the interests of the active briber (in this case, the interests of the 'enterprise' represented by the discussion leading officer). It is also a characteristic feature of petty corruption that the committed action happens by one phase. Professionalism or a criminal organisation did not appear. The police major was not looking for undue advantage. He only accepted the easy money. However, because of his lack of competence, he probably could not have completed the request of the discussion leading officer, so he could not expect any further income.

[3] Act XC of 2020 on the Central Budget of 2021

In 2018, a head of division at a regional police organ was found guilty by the Military Council of Budapest-Capital Regional Court, of having committed a high-ranking corruption offence. According to the judgment, the police lieutenant colonel was dealing with procurements, took part in procurement procedures, was in contact with the partners, and certified the fulfilment of services and materials on invoices. He carried out his activities with the right as a financial counter-signatory but without the right to independent commitment. In 2012, the police lieutenant colonel accepted a commercial company by getting 10% of the net value of the items invoiced to the police headquarters. In return, he agreed to carry out the procurements by the headquarters – that fitted into the company's profile – at this company. The money transfer and arranging an account took place at the company's headquarters from 2012 to 2016 on a monthly basis. The sentenced police lieutenant colonel was also in contact with another enterprises, from which he regularly received bonuses and other gifts as undue advantage. Because of these, he was found guilty of having committed passive bribery continuously and regularly. He was sentenced to imprisonment for two years and six months, exclusion from participating in public affairs for three years, a financial penalty of 500,000 Forints and forfeiture of assets worth 5,153,000 Forints.

The case of the police lieutenant colonel can be considered as high-ranking corruption offence since he committed the offence as a head of division on a monthly basis and he was in contact with several companies, two of which were proved to have accepted an undue advantage and he gave them undue advantage.

A characteristic feature of Hungarian legislation, and a criticism itself, is that, in the above detailed cases, the judgments were carried out for passive bribery according to art. 291 of the Criminal Code, which is a lighter penalty, and not for passive bribery regarding a public officer according to art. 293, despite the fact that both perpetrators were professional members of the police staff. The reason for this is that, according to the interpretation of subsection (1) of art. 459 of the Criminal Code, a person performing services for police staff means a public officer if his activities are required for the regular operation of the organ concerned. Based on these, the staff of the police services (compliance, finances, office and human resources) are not public officers. It is a particularly adverse situation in the case of the head of division, who is in an executive position according to the regulation of police professional staff but, based on his position, he did not have the right to be a financial counter-signatory. If his actions had been judged according to the regulations for a police officer performing basic task, the penalty range would have been imprisonment for five to ten years, since he committed his actions in one respect as in an executive position and, on the other hand, regularly. In this case, the sentence was 'only' for regular corruption because the court could not accept the police lieutenant colonel being in executive position at the qualification of the case, since subsection (3) of art. 291 of Criminal Code concerns the right of a financial counter-signatory to be qualifying circumstance.

The following two cases affect border policing, where a form of appearance of multipolar corruption risk, corruption risk linked to the global migration can be observed, so risk of corruption among these staff is one of the most significant among police officers.

In 2020, the Military Council of Szeged Regional Court sentenced a police staff sergeant performing service at the Hungarian-Romanian border section to imprisonment of one year and four months, a financial penalty of 100,000 Forints and forfeiture of assets worth 3,310 Forints by finding him guilty of passive bribery regarding a public officer. According to the judgment, the police staff sergeant was carrying out passport administration tasks at a border crossing point. While performing his duties, a Romanian citizen handed over a banknote of 10 Euros and he accepted it. By accepting the money, the criminal office was completed. According to the judgment, the police staff sergeant did not ask for the money and did not give undue advantage to the traveller. The police staff sergeant did not breach his duty; during the procedure he admitted his action. The case carries the characteristic features of petty corruption offence in all respects, since the action happened in one phase, the police staff sergeant was not looking for the possibility of gaining undue advantage. He only accepted the easy money. In the sentence the enforcement of imprisonment was suspended for two years by the court. So if the police staff sergeant does not commit another offence, he will not have to go to prison.
During the study of the judgment, beside the above described action, interesting circumstances emerged from further research. On the basis of the commander's characterisation, the police staff sergeant performing his duty was negligent and wilful, for which he had been punished several times. In addition, a criminal procedure had been started against him, because of the suspicion of another corruption offence, but it was terminated for lack of proof.
In this case, the bribery regarding a public officer was committed with active behaviour, according to the report he asked for money from the passenger applying for border crossing. On the basis of these, it could be questioned whether committing petty corruption offences was characteristic of the police staff sergeant or the action described in the judgment was only one of several and the other offences remained in latency.

In order to prove that this assumption was not delusory, there is a case of another border police officer who performed his duty by carrying out passport administration tasks at the Hungarian-Serbian state border.

The police sergeant first class was found guilty of breaching his official duty by committing 1,735 counts of passive bribery regarding a public officer for generating income and as a public officer committing 1,724 counts of public deed forgery. He was sentenced for imprisonment of five years, exclusion from participating in public affairs for four years and forfeiture of assets worth 52,544,880 Forints. In 2016, an unknown Serbian citizen (who remained unknown during the procedure) offered the police sergeant first class 100 Euros in cash per passport, if the data in the document handed over by him would be recorded in the

Border Policing and Registration System (HERR system) and he would affix a stamp in the passport, without the actual presence of the owner of the document. The aim of the unknown Serbian person was to illegally legalize the stay of third-country nationals within the Schengen area by falsely recording their entry in the database. The police sergeant first class accepted the offer. In 2017, the Serbian citizen handed over altogether 1,735 passports on several occasions. The police sergeant first class satisfied the demand, by breaching his duty, recorded the data of the foreigners without their actual presence at the entry of the territory of Hungary. He also fixed a stamp in every passport. The police sergeant first class received the amount of 170,600 Euros from the Serbian citizen as an undue advantage.

As can be seen, the action of the police sergeant first class cannot be considered as petty offence in any way, even though his position and duty were the same as the previously describe case. The criminal offence is considered to be high-ranking if we look at the number of infringements and the degree of the undue advantage but the danger of the case is that the police sergeant first class 'legalized' the stay of 1,735 third-country nationals in the Schengen area, which endangered public order and the public security of the entire region. It is obvious from the text of the judgment that he committed the actions in a criminal organisation since the unknown person played the role of intermediary in the business, but collecting and returning the passports of people staying in Western Europe illegally and encashing the money from them and counting it requires professional logistics and the involvement of several persons. However, in the specific case, commission as part of a criminal organisation was not judged because the surveillance of the organisation was not implemented.

It is obvious from the above examples that the distinction between petty corruption offences and high-ranking corruption offences does not necessarily depend on the position of the specific person. A much more important factor is the degree of decision-making the person has and the frequency of its application.

Conclusion

Research into law enforcement corruption offences that are hard to monitor has priority in all developed countries because of the negative effects of the phenomenon. During this, the experts arrange the phenomenon according to different points of view in order to make the fight against them group-specific, i.e. more targeted and more successful.

The point of a way of arranging them is to distinguish between petty corruption acts and high-ranking corruption acts. The name suggests that the petty corruption actions are of little significance and researching them is unviable. This is a big mistake. The attribute of petty indisputably means that its social risk could be negligible. I must agree on the point of view that petty corruption can be history of high-ranking corrupt acts. In many cases, 'only' the

surveillance of a minor case is implemented, but in reality we only recognize a tiny part of a much more diverse, multi-person action.

Although the obvious, accurate distinction between petty and high-ranking corruption is not always possible, the group-specific handling of the two different phenomena is useful in the field of prevention and surveillance of crimes. This distinction is particularly important in the fight against law enforcement corruption since other tools and methods are proven to be effective in handling these hard-to-detect delicts.

In order to take effective measures during the fight against corruption, it is important to map the corruption risks of each position, during which we must take into account the degree of the right to decision-making by the person having that specific position and how often he uses it. By knowing this, it is necessary to define the traces of an independent control and the internal control methods in order to reduce the chance of petty corruption actions becoming high-ranking.

Although the illusion of society without corruption is unrealistic, law enforcement organs have to do their best so that the staff carry out their tasks without manipulation and according to the current regulations. One element of this is to detect and punish the petty and the high-ranking corruption actions. More serious punishment is given to those who breach their duties for undue advantage. However, the target is not to deter law enforcement staff from corrupt actions only because of their fear of punishment, but to have such moral strength that they would refuse it out of their own beliefs. To achieve this, it is important for the professional leaders to feel the new solutions as their own and to support the activity. (POLYÁK, 2016: 24.) The closer the law enforcement organs get to the target, the more the number of petty corruption cases can be reduced and the effectiveness of detecting high-ranking corruption offences can be increased.

REFERENCES

BÁGER Gusztáv (2015): *Holland integritás és kockázatkezelés (Az integritási kockázatelemzés módszertani kerete és alkalmazása*) [Dutch integrity and risk-management (The application and methodological framework of integrity risk analysis)] ÁROP-1.1.21-2012-2012-0001 projekt.

BALLA József (2019): *Integritási kockázatok csökkentése a határrendészek körében* [Decreasing integrity risks among border policing officers]. Integritás Tanulmányok 10. Budapest: Nemzeti Közszolgálati Egyetem. https://nkerepo.uni-nke.hu/xmlui/bitstream/handle/123456789/15015/Hatarrendeszet_korrupcio_2019.pdf;jsessionid=64A1DD598D28AE61BBAC20B6C0CBF1AA?sequence=1

BODROGI Károly (1981): A közélet tisztasága elleni bűncselekmények. [The crimes against the purity of public life]. In: Király Tibor (szerk.): *Magyar büntetőjog.* Budapest: BM Könyvkiadó.

BONIFACIO, Philip (1991): *The Psychological Effects of Police Work: A Psychodynamic Approach.* New York: Springer.

CAMARRA, Moussa D. (2001): *Reflections on Corruption*. Paper presented at the Eighth Annual Meeting of the International Police Executive Symposium, May 27–30, 2001, Szczytno, Poland.

FINSZTER Géza (2003): *Korrupció által sújtott rendőrségek. Nemzetközi kitekintés* [Police organs hit by corruption. International outlook]. In: Irk Ferenc (szerk.): Kriminológiai Tanulmányok 40. Budapest: Országos Kriminológiai Intézet. 9–39.

FINSZTER Géza (2008): *A rendészeti szervek működésének jogi alapjai* [The legal basis of law enforcement strategy]. Budapest: Rendőrtiszti Főiskola.

FINSZTER Géza (2011a): A korrupció nyomozása [Investigation of corruption]. *Belügyi Szemle,* 59(11), 75–97.

FINSZTER Géza (2011b): *2011. évi kutatási jelentés* [Research report of 2011]. Kézirat. Budapest: Belügyi Tudományos Tanács.

GÁL István László (2010): Molnár Csaba ügye a Fővárosi Ítélőtáblán. Döntés az Országos Rendőr-főkapitányság Pénzmosás Elleni Osztálya vezetőjének vesztegetési ügyében [The case of Csaba Molnár at Budapest Court of Appeal. Decision in the case of bribery of the head of Money Laundering Division of National Police Headquarters] *Jogesetek Magyarázata,* (1), 33–38. https://jema.hu/article.php?c=31

GÁL István László (2013): A korrupciós bűncselekmények [Corruption offences]. In: POLT Péter (szerk.): *Új Btk. kommentár: 5. kötet: Különös rész.* Budapest: Nemzeti Közszolgálati és Tankönyvkiadó.

GÁRDONYI Gergely (2021): A kriminalisztika szerepe a katonai bűncselekmények nyomozásában [The role of criminalistics at the investigations of military offences]. *Katonai és Hadijogi Szemle,* 9(2), 45–76. https://docplayer.hu/215088586-9-evfolyam-2021-2-szam.html

GÁSPÁR Miklós – MOLNÁR Katalin (2015): Korrupció-ellenesség és integritás a rendészeti tisztképzésben [Anti-corruption and integrity in law enforcement officer training] In: DARGAY Eszter – JUHÁSZ Lilla Mária (szerk.): *Antikorrupció és közszolgálati integritás.* Budapest: Nemzeti Közszolgálati Egyetem. 163–174. https://nkerepo.uni-nke.hu/xmlui/bitstream/handle/123456789/6491/Kis%20Norbert%20Antikorrupci%F3%20%E9s%20integrit%E1s.pdf?sequence=1

HANKISS Elemér (1979): *Társadalmi csapdák – a korrupció* [Social traps – corruption]. Budapest, Magvető.

HAUTZINGER Zoltán (2005): The present and the future of forensic identification. *Juresprudencija*, 66(58), 99–105. https://intranet.mruni.eu/upload/iblock/ed9/014_hautzinger.pdf

INZELT Éva – KEREZSI Klára – LÉVAY Miklós (2014): *Korrupciós bűncselekmények a büntető igazságszolgáltatás tükrében* [Corruption offences in the light of criminal justice]. Budapest: Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar.

INZELT Éva (2017): A rendészeti korrupciós kutatások irányai, megközelítései és módszertana [The directions, approaches and methodology of law enforcement corruption] In: CHRISTIÁN László (szerk.): *Rendészettudományi kutatások. Az NKE Rendészetelméleti Kutatóműhely tanulmánykötete.* Budapest: Dialóg Campus. 73–80. https://docplayer.hu/106399835-Rendeszettudomanyi-kutatasok.html

INZELT Éva – SZEPCSIK Regina (2021): Beszámoló a „Korrupciós kockázat, kockázatos korrupció? A csekély súlyú és a nagy volumenű korrupció elhatárolási szempontjai" című projekt márciusi workshopjáról [Report on the project called 'Corruption risk, risky corruption? The separation standpoints of petty and the high-ranking corruption' from the workshop in March]. *Ügyészek Lapja,* 28(1–2), 81–84.

KARDOS Sándor István (2016): *A rendőri jogsértések között jelentkező korrupció megvalósulási körülményeinek, tendenciáinak vizsgálata a beosztotti állomány körében* [Examination of the circumstances and tendencies of corruption among police staff]. Doktori értekezés. Budapest: Nemzeti Közszolgálati Egyetem Hadtudományi Doktori Iskola. https://nkerepo.uni-nke.hu/xmlui/bitstream/123456789/12371/1/ertekezes.pdf

KEREZSI Klára (2018): A rendészeti korrupció [Law enforcement corruption]. In: DOBÁK Imre – HAUTZINGER Zoltán (szerk.): *Szakmaiság, szerénység, szorgalom. Ünnepi kötet a 65 éves Boda József tiszteletére.* Budapest: Dialóg Campus. 343–359.

KRÁNITZ Mariann (1986): *A korrupció* [Corruption]. Budapest, BM.

LEVI, Michael (2019): Fraud and corruption in the EU – the need for a more multi-faceted approach. *European Court of Auditors Journal,* (2), 8–12. https://www.eca.europa.eu/lists/ecadocuments/journal19_02/journal19_02.pdf

LINSSEN, Ruth – KAMMIGAN, Ilka – PFEIFFER, Hartmut (2014): Korruptionsrisiken in der niedersächsischen Polizei. Vom Wissen, Wollen und wissen wollen – eine repräsentative Dunkelfeldstudie. *SIAK-Journal – Zeitschrift für Polizeiwissenschaft und polizeiliche Praxis,* (4), 44–53. http://dx.doi.org/10.7396/2014_4_D

LŐRINCZY György (1987): A korrupciós bűncselekmények bizonyításáról [The proof of corruption offences]. *Belügyi Szemle,* (2), 93–95.

PELLEGRINI, Lorenzo (2011): *Corruption, Development and the Environment.* New York: Springer.

POLYÁK Zsolt (2016): A külterületek biztonsága is belügy: Három megye összefogása az élhetőbb tanyavilágért [The safety of the outskirts is also home affair: The collaboration of three counties for the more liveable boondocks]. *Belügyi Szemle,* 64(2), 7–25.

PUNCH, Maurice (2000): Police Corruption and its Prevention. *European Journal on Criminal Policy and Research,* 8(3), 301–324.

SCHUBAUER László (2013): A korrupciós bűncselekmények [Corruption offences]. In: BLASKÓ Béla – MIKLÓS Irén – PALLAGI Anikó – POLT Péter – SCHUBAUER László (szerk.): *Büntetőjog. Különös rész I.* Budapest, Rejtjel.

SHERMAN, Lawrence W. (1985): Becoming bent: Moral careers of corrupt policemen. In: Elliston, Frederick – Feldberg, Michael (eds.): *Moral Issues in Police Work.* Totowa, N.J: Rowman & Allanheld. 253–265.

VAN DE BUNT, Henk – NELEN, Hans (2012): *Corruption in various shapes and sizes – some criminological reflections.* International Law and Fight Against Corruption, Asser Press.

DIFFICULTIES OF PROVING IN CORRUPTION CASES IN THE LIGHT OF HUNGARIAN COURT DECISIONS

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Introduction

Dealing with corruption is one of the most difficult challenges a democracy governed by the rule of law could face. There is a basic expectation in modern society that all decisions should be taken on the basis of visible principles and that everyone has equal access to resources. This expectation also applies to the relationship between the authorities and the individual and to the area of economic life. The phenomenon of either petty or high-ranking corruption undermines the functioning of the rule of law and the trust of the individual in society. It is therefore essential for the judicial authorities to step up effectively against all kind of corruption. Since I am a judge myself, who has been dealing with criminal cases for more than 20 years, I have seen a wide range of corruption cases in my own practice. In my experience, handling and solving corruption cases is often more difficult than those of most ordinary cases. The more problems arise during the evidentiary procedure, the higher the possibility that the evidences will be insufficient to prove the crime. That is why I feel it could be useful to introduce the difficulties a judge faces when dealing with a corruption case.

This study is structured as follows: first I would like to introduce the main differences between corruption cases and other criminal cases, then I will describe some recent cases that are capable of illuminating the issues the authorities dealing with corruption cases have to face during the evidentiary procedure. Finally I gather some ideas that could help move these type of cases forward.

Comparing corruption cases with other legal cases

One has to see that an average crime concerns only one or two dimensions of life. Murder or assault, or even sexual abuse are a private issue in the first place but they can touch on social problems too. Theft, embezzlement or fraud can affect one's private property or have a greater economic effect if it concerns a larger sum of money or if there is company property involved. There are specific kind of offences that work in the political field, like abuse of the right of

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association or criminal offences related to elections, referendum and European citizens' initiatives. Corruption however has economic, social, political and cultural dimensions at the same time.

The vast majority of crimes are to be pursued and prosecuted according to public opinion, too. Basically, no one thinks stealing or drink-driving is right. Corruption, on the other hand, is found in many areas of life, and although it is condemned by the majority of people at the level of words, in reality however many consider minor levels of corruption to be acceptable or at least permissible, by which the individual reaches some small benefits. Many people in Hungary also feel that a higher level of corruption is part of the system against which it is pointless to fight. (MAKÓ, 2008)

From the point of view of this study, society's attitude is not indifferent, since the more society disapproves of this behaviour in particular, the clearer the cooperation of external actors in the evidential procedure. However, if the actors in the case do not condemn the act themselves, the process of establishing proof will face difficulties.

Furthermore, there is something significantly different to the procedures for other offences, that in most corruption cases there is a merger of interests, rather than conflicting interests. In most typical crimes, the case involves parties with opposite interests: the thief and the owner of the property, the abuser and the abused, the driver and the pedestrian whom the vehicle hit, the rapist and the victim. However, there are two actors in typical corruption cases, the briber and the taker, and neither of them has an interest in unfolding the case; their interests are intertwined. Moreover, the participants in corruption cases are particularly careful to keep their actions hidden from the public, so the testimony of disinterested third parties can be relied on extremely rarely.

The typical bribery case is a two-player game; the one who gives the advantage and the one who accepts it. If they are both actively involved, it is almost impossible to prove it afterwards. The situation is different, of course, if one of the parties does not wish to participate in corruption, because in this situation there is a person interested in providing the evidence; for example, the perpetrator of the traffic offence who offers money to the policeman, who refuses to accept it and makes a criminal complaint, or the official who asks for money for his intervention, but the client presses charges instead. Cases like these make up the majority of petty bribery cases going to court, as we shall see.

The corruption situation, from this point of view only, is most similar to drug trafficking. The seller and his buyer are also hiding from the public and are both interested in denying that the transaction took place. Examining the possible pieces of evidence, though, there is a significant difference: the result of a drug case is objective and manifestly illegal evidence: the drug itself, which can be found and used as conclusive evidence concerning at least one of the two participants. For the existence of cash, on the other hand, it is much easier to provide an acceptable explanation, so even if it is seized it may not be enough to convict.

As we are approaching from petty to high-ranking corruption, the complexity of proving it is increasing. There are many actors, few of whom see the whole picture; some of them are partly victims of corruption themselves, everyone is interested in denial, there is little physical evidence: this is what characterises large corruption cases. Investigating authorities will have no except using secret service tools: monitoring, eavesdropping and undercover investigation. These tools have almost no use if the crime had already happened, but if the investigating authority knows who to investigate, they can lead to results. Using these secret service tools also has its own procedural pitfalls. For highly understandable and accepted reasons; their application is subject to strict rules and the use of evidence collected by violating these rules is restricted. There are more than a few criminal cases of corruption that failed because the wiretapping, which provided conclusive information, was carried out by violating these rules.

Presentation of court cases

Following the structure in the introduction, I go from simple to complicated by presenting some cases.

The target person refuses to take the bribe[1]

In this case, the offender approached the official administrator of a document office at a bus stop because he mistook her for another person who was also an administrator in the same office at the time of the incident and had previously expressed a willingness to act corruptly. The accused promised the administrator HUF 300,000 per person if the administrator skipped the identification process during the application for a Hungarian passport for naturalised foreign nationals, and disregarded the fact that the applicant did not speak Hungarian. The official rejected the request and no money was handed over. In the present case, the evidential procedure was relatively simple since, in addition to the incriminating testimony of the administrator, there were document office workers who were also informed of the case by hearing it. The bias of the witnesses never occurred. Thus, the defendant's denial was baseless, and the court convicted the accused.

Offered and refused money in an investigation process[2]

The National Tax and Customs Administration investigated a false marking of goods case and was making a search of a market. The offender wanted to make sure that the goods from the checked container were not seized, so he repeatedly offered the detective HUF 500,000. The

[1] Metropolitan Court B.953/2019/16-I.; Metropolitan High Court of Appeals Bf.218/2020/11.
[2] Metropolitan Court B.1622/2013/7.; Metropolitan High Court of Appeals Bf.485/2013/9.

detective flatly rejected the offer and, since the offender kept repeating it, he reported the incident to his superior. The offender then tried another detective, who also refused. In this case, the court had no difficulty in proving it: the judge accepted the testimony of the witnesses against the defendant's denial, which did not match the other pieces of evidence, not even in irrelevant details. The witnesses did not know the accused before, and they reported the bribery attempt immediately to each other and to their superiors. They couldn't hope for an advantage or revenge; bias obviously didn't guide them. More importantly, at first they were specifically trying to dissuade the accused from his intentions, since they did not want to create a case out of the offer, and it was only when he repeatedly said that they decided to report it.

Cultural differences also matter[3]

The Chinese defendant worked in a warehouse in Budapest. The warehouse was broken into by unknown persons, so police action and an on-site inspection took place there. During the inspection, the defendant put two HUF 5,000 notes in the right pocket of one of the CSI team's jackets. The officer returned the notes to the accused and ordered him not to try again, then walked out, while the accused continued to hand over the money to him by saying 'coffee money'. The accused then approached the other officer taking the photographs and put the two HUF 5,000 notes in his jacket pocket, saying: 'Coffee money for you and your colleague'. The officers then notified their magistrate and the money was seized. In this case, although it was corruption, the defendant would not have gained any meaningful advantage, and he did not ask for any either, since he was on the victim's side of the burglary. Although he was found guilty of bribery by the court, it was considered to be a mitigating circumstance that the accused came from a culture other than that of Hungary, in which according his undenied statement it was common practice to feed the officials who took action. His actions were carried out in public and in a way noticeable by others, which also confirms that he was not aware of their criminal nature.

When a public official asks for bribe but he does not get any[4]

The case, which consists of multiple crimes, features the same police officer and in each case he asked for money to disregard certain traffic violations. On the first occasion the man agreed to pay, but said he had to go home for money. The officer escorted him, but the man reported him to the police instead of paying. The same person also reported that, months earlier, the same police officer had asked him for money; he had paid him, but now he'd had enough. The policeman's partner, herself involved in corruption, admitted the incident during the

[3] Metropolitan Court 1024/2009/13.; Metropolitan High Court of Appeals Bf.52/2010.
[4] Metropolitan Court B.1178/2011/10.; Metropolitan High Court of Appeals Bf.33/2012/6.

investigation and even voluntarily reported another case, which was also investigated. In this case, too, the evidence was based on the fact that two of those involved in the corruption case stepped out of their roles and gave evidence. The court stated the facts based on the complaint by the one, who was under verification process and on the basis of a consistent, self-incriminating, revealing confession by the policeman's partner (who also became a defendant) in the first place, supported by objective evidence such as a search warrant, an on-site inspection and a personal search. The court also took in mind that none of them had any detectable reason to give a false confession by which they implicated themselves in a criminal offence, too.

The bigger the case the more the difficulties

The same feature of the above cases is that the establishment of proof did not encounter any particular difficulties. However, this is far from always the case. I will go on to describe in detail two court cases in which the facts were established using a variety of means of proof and through comprehensive discretion. As we will see, in terms of the final result, the evidential procedure was only partially effective, with unexplored details remaining in both cases.

In order to better understand the cases, it is worth highlighting the two important pillars of Hungarian criminal procedure well in advance. In Hungary, like many other countries, the presumption of innocence is fully enforced at the level of principles and in the detailed rules as well.

In our Act on Criminal Procedure[5], this is reflected as follows:

art. 1. No one shall be considered guilty until his guilt has been established by a final decision of the court.

art. 7. (1) The accuser is obliged to prove the charge.

(2) The defendant shall not be obliged to prove his innocence.

(3) No one shall be obliged in criminal proceedings to give a self-incriminating statement or to give evidence against himself.

(4) A fact which has not been proved beyond reasonable doubt shall not be assessed against the defendant.

If any of the elements of the indictment necessary to establish the offence cannot be proved, an acquittal shall be made.[6]

On the other hand, in our procedural law, the principle of free consideration of lawfully obtained evidence through a free system of evidence applies:

[5] Act XC of 2017 on the Criminal Procedure (Be.)

[6] Act on Criminal Procedure (Be.) art. 566. (1) c)

art. 167. (1) All means of proof provided for by law may be freely used in criminal proceedings and all acts of evidence shall be freely applicable. However, the law may order the use of certain means of proof.

(2) In criminal proceedings it is allowed to use the means of physical evidence which an authority has prepared or acquired while performing its statutory tasks before or at the same time as criminal proceedings are opened.

(3) Evidence has no statutorily predetermined probative power.

(4) The court, the public prosecutor's office and the investigating authority shall freely assess the pieces of evidence individually and as a whole and shall determine the results of the evidence in accordance with their convictions.

(5) A fact derived from a means of proof obtained by the court, the public prosecutor's office, the investigating authority […] by criminal offence, by other prohibited means or by a material violation of the criminal rights of participants shall not be regarded as evidence.

Regarding these rules, the judge has to apply the following: the various means of proof in the procedure do not have a predetermined probative value; in each case, the court considers the evidence individually and in total and, if necessary, subjects them to logical analysis. It should be noted that the defendant's guilt can be established on the basis of exclusively circumstantial evidence only if the pieces of evidence constitute a so-called closed chain. (LŐRINCZY, 2008: 215) The judge has to give a detailed account of his way of thinking regarding proof. On the basis of the evidence thus considered, the judge shall indicate in his statement of reasons only the facts which, in his intrinsic conviction, can be established with unquestioned certainty. This is also linked to the issue of judicial independence.

> *"From the point of view of proof and the determination of facts, the essence of judicial independence can be indicated in the fact that this legal institution provides the necessary medium and room for manoeuvre for the free consideration of evidence and the establishment of an internal judicial conviction and guarantees the possibility of revealing the facts on which the judicial decision is based in a true way."* (KÚRIA…, 2017: 39)

In both cases to be discussed below, we will see examples of acquittals in the lack of evidence, as well as the consideration of evidence to declare guilt despite conflicting evidence.

A) Corruption in the political field [7]

This affair is a case of corruption relating to the rental rights of a property owned by a municipality. The prosecutor indicted three people. The subject matter of the charge is active corruption by public officials in accordance with arts. 250 (1) and (2) (a) of the old Criminal

[7] Metropolitan Court B.447/2010/64.; Metropolitan High Court of Appeals Bf. 198/2012/9.

Code[8]. The court conducted the evidentiary procedure for all three defendants, but delivered a verdict on only two of them. The process against Defendant no.1 was isolated and the proceedings against him suspended, taking into account his mental illness that occurred after the crime.

As a result of the evidentiary procedure, the court stated the following:

> Defendant no.1 was the head of the asset management company of the municipality. His tasks included, inter alia, the operation of the municipality's real estate assets, conclusion and termination of lease agreements on the basis of municipal decisions and the enforcement of decisions made by the representative concerning the disposal of real estate. Defendant no.2 was an advisor on the renovation and sale of real estate. Defendant no.3 was the deputy mayor of the municipality. His responsibilities included urban development, strategy and economic issues.
> The later complainant was a tenant of one of the business premises in the municipality for a long time, but he accumulated significant rent arrears. The tenant initiated negotiations with the municipality, in particular Defendant no.1 partly through Defendant no.2 in order to buy the business premises.
> According to the work schedule established by the municipality (and in accordance with the law), the proposal for the sale of real estate was prepared by the asset management company and was submitted by the mayor to the city council, which could decide on the sale by a simple majority. Following the decision, the sales contract was concluded on behalf of the asset management company by Defendant no.1.
> Defendant no.1 informed the complainant that it would "facilitate the decision-making of the owners if some rewards would be handed over". The amount was not yet determined. A little later, he stated that the decision-makers would ask for HUF 18 million for a favourable decision. On the basis of a presentation made by Defendant no.1 the mayor submitted a proposal to the city council, which designated the property to be sold to the tenant on condition that the tenant would not only pay the asking price but the whole amount of the rent arrears. Defendant no.1 also informed the complainant in private in his office that the final sales contract could only be signed if he paid the previously stipulated HUF 18 million.
> The complainant did not pay the rent arrears due to protracted banking issues but told Defendant no.1 that if the final sales contract was not signed, the case would be aired to the press or a lawsuit would be brought. Finally, the complainant confirmed that his loan application was being considered, and the parties signed the sales contract according to which the municipality retained ownership until the full purchase price and the full rent arrears were paid. In the end, the company run by the complainant did not receive the bank loan, and Defendant no.1 withdrew the contract by unilateral declaration.
> It was at this point that Defendant no.2, who had played an intermediary role in similar transactions before, stepped up. With his help, the complainant initiated another round of negotiation on the property. Defendant no.2 informed him that the deputy mayor (Defendant

[8] Act IV of 1978 on the Criminal Code (Btk.) – in force until 30 June 2013.

no.3) insisted on the bribes being paid and that if the complainant handed over the bribe before the next board meeting, the contract's payment deadline would be extended. Defendant no.1 also told the complainant to inquire about the way of transferring funds through Defendant no.2.
Prior to the board meeting, the complainant filed a complaint with the National Bureau of Investigation. A few hours before the meeting began, Defendant no.2 called the complainant and asked him to go to his office in person before the meeting and take the bag with him – by which he meant the money for bribery.
The complainant received from the National Bureau of Investigation the so-called trap money, 227 € 500 banknotes in two bundles with the inscription SAMPLE clearly visible under the paper tape around the bundle. He showed up at the office with a bag containing the trap money and handed the envelope containing the money to Defendant no.2 who unzipped one of the bundles and began counting the money. During the transfer of the money, he was apprehended by National Bureau of Investigation.
The facts of the indictment differed from the above, in that it was indeed the deputy mayor who insisted on the bribe.

The facts above were established by the court on the basis of the testimony of the complainant, which was supported by documents generated by the activities of the national investigative bureau, evidence obtained by secret service means, and the testimony of third persons. The results of the evidence can be summarised as follows:

All three defendants denied any wrongdoing. Defendant no.1 gave a detailed account of the conciliation process, which corresponded to both the documents and the accuser's testimony. However, he strongly denied that he had asked the complainant to pay money or that he had transmitted such a request. Defendant no.2 claimed that the complainant had told him that he had been asked for money in the purchase process and that he had sought advice from him. He claimed the complainant forced him to take over the money even though he carry out mediation, and all he told him was to come into the office and discuss it. He did not dispute however that he had touched the money. Defendant no.3 claimed that he came into contact with the case as deputy mayor, and he was informed by Defendant no.1. His opinion, matching the point of view of his colleague, was that if the rent debt and the purchase price were paid, the property could be sold. He denied asking for bribes or making such a reference to anyone.
The complainant, on the other hand, gave detailed testimony on several occasions in the proceedings and was also questioned in detail at the hearing. In his statements, no substantive contradiction could be discovered, which summed up as the following:
Defendant no.2 approached him by saying that if he agreed to hand over the bribes before the first board meeting next year in exchange for the pre-signed sales contract, the auction would be taken off the agenda of the year-end meeting. He said yes and indeed found that the auction of the property was not on the agenda of the board meeting. In the first days of January 2008, he met again with Defendant no.1 who pointed out that the 'premium' had to

be delivered before the January board meeting and referred to the bribe as 'deficiency'. In the conversations, Defendant no.1 always talked about the bribes going to the deputy mayor and also stated that if he did not hand over the money, the deputy mayor's party would not stand by the case and they would not have a majority of votes. After that, he decided to go to the police to file his complaint. Meanwhile, while he was at the police station, Defendant no.1 called him on the phone and asked him for an urgent meeting for the next afternoon. He showed up at this meeting and recorded the conversation on a recorder provided by the police. Later Defendant no.2 called him to go to his office before the start of the board meeting and to take the bag with him. By "bag" he meant the previously requested HUF 18 million. He received the so-called trap money from the staff of the National Bureau of Investigation, with which he went to the office of Defendant no.2 He went into the room, told that he had brought the specified amount in euros. Defendant no.2 took one of the bundles in his hand and started to count. At this point the staff of the police came in and arrested Defendant no.2.

Twelve of the members of the representative body testified in court. Most of them only reported in general terms about the rules on the sale of real estate and the fact that representatives of two parties opposed all property sales, the deputy mayor's party was generally in favour of tendering, while their coalition partner also supported the sale to tenants. None of the witnesses was able to report about the corruption process, even at the level of reference. There was one representative who gave a more detailed statement and said that, during conversations the complainant mentioned to him his difficulties with the sale and having to pay someone off. He referred to a specific amount, HUF 18 million, that was requested of him, and he referred to the name of Defendant no.1.

The court heard 12 other witnesses, mainly regarding the circumstances surrounding the purchase of the property. Five of them reported that the complainant told them that they were asking him for bribes at the municipality.

A detective of the National Bureau of Investigation testified at the trial. He told that the complainant went to them to press charges. The performance seemed realistic, and he was called on the phone during his hearing, about which he said he was being requested by Defendant no.1 for a meeting. Based on their discussions, with the prosecutor's permission he made sure that the complainant could record a conversation with one of the targeted people. It was later that the complainant was given trap money. Their plan was to try to get to the target person. Given that the meeting was discussed suddenly, the operation could not be prepared any better. As there were fears that it would not be possible to catch the recipient of the money, they did not wait for the potential target to appear. The bunch of money given to the complainant did not consist of real banknotes, and also had a chemical trap. They explained to him that it was necessary for the recipient to take the money in hand, since this is the only way the chemical trap could work. They only had euro banknotes as trap money, so this was handed over instead of forints.

A tape recording of the conversation between the complainant and Defendant no.1 was made, which did not contain any relevant information, but could be obtained as a supporting addition to the other evidence.

The court assessed the results of the covert data gathering as evidence. The interception of the phone conversations was ordered by investigators as a deferred action for 72 hours. Later, the investigating judge allowed the data to be obtained. The encryption of the results of the eavesdropping was declassified, so there was no impediment to the use of covert data gathering in criminal proceedings. The following circumstances clearly emerge from the telephone conversations:

Defendant nos.1 and 2 did not speak to each other on the phone but, from conversations with the complainant or others, they clearly know that the complainant is in contact with someone other than themselves in the case. Although words like bribes, bonuses or equivalents do not appear in the conversations, it is obvious that the complainant has to deliver something that is an object to be collected, that is being delivered to safety, and that all the parties talking about it are speaking indirectly because they feel it is dangerous. It is an extremely important circumstance that there is no intercepted conversation that someone actually had with the deputy mayor (Defendant no.3). Since his phone calls were not intercepted, nor even the list of his phone-calls retrieved, it cannot be verified that he was actually involved in the case. In addition, when Defendant no.1 first referred to the fact that a decision-maker insisted on a bribe of HUF 18 million, Defendant no.3 had not been in contact with the municipality at all and could not take decisions there, so he obviously could not be the same person to whom Defendant no.1 referred. If it could be established with certainty beyond reasonable doubt (though it cannot) that the deputy mayor would have been referred to by Defendants nos.1 and 2 it still would not be possible to state with certainty that Defendant no.3 was in fact that person and was not merely referred to as a cover person.

The direct evidence concerning the deputy mayor is only the complainant's testimony of their two meetings, during which he claimed that the deputy mayor had expressly refused to sell the property.

Overall, the court accepted the complainant's testimony as the basis for the facts, which is fully supported by the documentary evidence, tape recordings and intercepted telephone conversations in the case, as well as the content of the police reports. Indirectly, his claims were confirmed by the testimony of several witnesses, too.

On this basis, the court found Defendant no.2 guilty of the crime of abuse of a function in accordance with art. 256 (1) and (2) (a) of the old Criminal Code (See footnote 8.) He was sentenced to three years in prison, three years' disqualification from public affairs and a fine of HUF 9,000,000. Defendant no.3 was acquitted of the charge of passive corruption by public officers because there was no evidence that he was actually involved in the corruption transaction. In the case of Defendant no.2 the classification of the crime became abuse of a function rather than active corruption, because it could not be justified that there really was a person in the

municipality who had asked for the advantage. According to the old Criminal Code (and the recent one too) abuse of a function is committed by a person who, on the grounds that he influences an official, seeks or accepts an undue advantage for himself or for others. The offence is also punishable by imprisonment of between two and eight years if the offender claims or gives the impression that he is bribing an official.

A final judgment was handed down in 2013 for the offence committed in 2008. As can be seen, despite the lengthy prosecution, the extremely detailed evidentiary procedure, the large number of witnesses interviewed and all the other pieces of evidence, the facts were not fully established. It became unclear whether there truly was a person in the municipality who was in a decision-making position and demanded bribe money, or whether this was the self-inflicted actions of Defendants nos.1 and 2. In this case, the pitfalls of proving corruption cases are to observe well. It is noticeable that if the participants exercise due caution, despite the best efforts of the investigating authority, it is not possible to trace the threads until the full perpetrators are discovered.

B) Corrupt police officer and a net of "clients" [9]

In the following, I will present a case involving a great number of defendants and many criminal cases of corruption which are partly related and partly separate. Given the scope of the case, the presentation confines itself to the main points, in particular to show that non-compliance with the rules on intelligence methods can lead to a fatal error in an evidentiary procedure, which will necessarily result in incomplete, unexplored and unexplorable facts. As a result, the court may also have to acquit actual offenders in the absence of proof.

In this case, a final judgment was handed down in autumn 2019 for a series of offences committed in the years 2011–2013. The prosecutors initially indicted 18 defendants in two indictments for a total of 21 acts. The court merged the cases because same persons were involved. The court made a judgment of first instance in 2016, by which the Defendants nos.1, 2, and 4 were found guilty and the other 14 defendants were acquitted of the charges against them. However, in 2017, the court of second instance annulled this judgment due to procedural and evidentiary errors and ordered the court of first instance to conduct a new procedure. Defendant has since died and the proceedings against him were terminated by the court. In the retrial, the court found, in the final judgment, Defendant no.1 guilty of 3 counts of passive corruption of public officials [art. 294 (1), (3) a), (aa) and (b) of Criminal Code[10]], 2 counts of abuse of a function [art. 299 (1), (2) a) of Criminal Code], 2 counts of abuse of authority [art. 305 a) of Criminal Code] and criminal offence with classified information (art. 265 (1) b), (2) a) and in the first phase of paragraph (3) of Criminal Code] and sentenced him to seven years in

[9] Metropolitan Court B.1057/2017/138.; Metropolitan High Court of Appeals Bf. 1/2019/28.
[10] Act C of 2012 on the Criminal Code (Btk.)

prison and seven years' disqualification from public affairs. The court acquitted Defendant no.1 of the further 4 counts of passive corruption of public officials, a further one count of abuse of a function, one count of extortion and one count of abuse of authority. In addition, the Defendants nos.4, 11, and 13 were found guilty in part and lighter sentences were imposed on them, while the other defendants were acquitted due to lack of evidence.

A brief summary of the facts in the case is the following:

Defendant no.1 served as a lieutenant colonel at the National Tax and Customs Administration (NAV) prior to his arrest. Here he had to keep contacts related to secret information gathering. Due to his position, he had access to criminal records and the NAV's internal registration system. Defendant no.1 had official contact with the late Defendant no.2, who used to be a cooperating person (codename: Bishop) as a contact person.
The two defendants agreed to contact various persons involved in criminal proceedings conducted by the NAV and to obtain money from them by referring to the position of Defendant no.1 the possibilities arising from it. The plan was that Defendant no.2 would contact the persons involved in the criminal cases selected from the register, mostly through intermediaries, and they would also acquire clients through his own and his mediation acquaintances. Once the trust of the "clients" had been gained, they would offer to inform those concerned of the state of the investigation and to ensure that no criminal proceedings were initiated on the basis of the secret investigation. Defendant no.1 did not actually have the opportunity to prevent open prosecutions on the basis of the results of a secret investigation, nor was there any way to influence the direction or outcome of the criminal proceedings already opened, nor did he have any influence on who should or should not be arrested in certain criminal cases. Nevertheless, he made such a promise to several persons through Defendant no.2 and he verified the promise by printing the criminal documents from the police computer system and distributing them to those concerned.

The charges included cases of corruption which, according to the prosecutor's office, arose from the cooperation of the two defendants. Some of these were proved in the proceedings and in others there were acquittals by the court. Here are some examples of both cases:

The NAV investigated a tax fraud case of a cross-border network in relation to the trade in scrap metal. In this case, the investigating authority apprehended and questioned 16 people as suspects on the same day. In the days following the arrest, Defendant no.1 had several times looked into the files of this investigation in NAV's computer system, and on one occasion he printed out the documents available to date. The data and documents thus obtained were provided to Defendant no.2 so that he could offer them to the persons involved in the criminal case or their relatives with the help of contributors in order to ask them for money for the transmission of information. Defendant no.2 contacted Defendant no.4 and sent a

message to the persons concerned, their relatives or lawyers, and offered to sell the evidence in the case. After his arrest he claimed that Defendant no.3, who worked as a lawyer in Győr, was willing to pay for this information. Defendant no.1 asked for HUF 2,000,000 for the documents. In addition to these facts established by the court, the indictment also stated that Defendants nos.3 and 6 (the latter also a lawyer and wife of one of the arrested people) accepted the offer and that Defendant no.2 was handed over EUR 5,000 for this purpose, but this could not be proved, so Defendants nos.3 and 6 were acquitted by the court.
In another case, a person was involved in a procedure at the tax authorities, and was approached by Defendant no.1, who – with the assistance of Defendant no.11 – offered to help so that the case would reach a favourable conclusion for HUF 3,000,000 and a laptop. Defendant no.1 spoke to the person concerned several times on the phone and presented himself as the rapporteur in the tax case, and Defendant no.11 made the same statements by telephone. The offer was rejected by the person concerned.
In a case that ended in a full acquittal, the indictment included that Defendant no.4 told an unknown man by telephone that, in the event of depositing HUF 400-500 million, he could bribe a member of the authority so that the suspected would be released from custody within 8 months in a particular criminal case. Due to the arrest of defendant in the present case, the transaction was not completed.

These are the main pieces of evidence on which the judgement is based:

The phones of several of those involved were tapped in the case between 24 August 2011 and 6 May 2013 under the permission of judges. The vast majority of these were so-called covert information gathering[11] which is to be led prior to the opening of criminal proceedings. The minority of this was so-called covert data gathering[12] which is carried out during criminal proceedings. The rules of the two proceedings are similar but there are significant differences, and the data obtained by the two can be used in criminal proceedings under different conditions. The court examined the legality of all the evidence thus obtained and concluded that, essentially because of the longer time elapsed between the evidence obtained by wiretapping and the denunciation, the results of the covert information gathering could not be used in the proceedings and therefore they were excluded. As to the covert data gathering: the court played the recording of some of the conversations and read the transcripts of the others.
The most important piece of evidence in the case was the testimony of the late Defendant no.2. In relation to him, only the statements made during the investigation were available. In the course of the investigation, he was questioned 20 times. Procedural objections were however raised concerning the limitation of the rights of the defenders, which could influence the usability of what was said.

[11] Act XIX of 1998 on Criminal Proceedings, art. 206/A
[12] Act XIX of 1998 on Criminal Proceedings, arts. 200–206

Concerning the presence of a defence counsel, it should be pointed out that in some cases (like the current one), participation of a defender in proceedings is mandatory. The absence of the defender is not an absolute obstacle to the questioning. However, in order for questioning to take place, it must be demonstrated that the defence counsel has been informed of the questioning at a time that reasonably allows him to appear. In the present case, the defender was present at a number of hearings and did not appear at others, but his notification was regular. However, concerning two hearings, the investigating authority did not prove that the notification had been made and therefore the statements made on these occasions could not be used and were excluded from the scope of evidence by the court. On one of the two occasions, the defendant made a very detailed statement about many acts, some of which were not spoken of in subsequent interrogations, so the only incriminating testimony for them had to be excluded, which had a fundamental effect on the evidentiary process.

The court fully accepted the testimony of Defendant no.2, which was made during the investigation. He did not diminish his own role, risking serious prosecution, and he made confessions to his accomplices, which he persisted with throughout the protracted investigation. His testimonies were supported in all respects by usable evidence at the points where this was legally possible, and in no case did any part of his testimony be refuted on the basis of objective evidence, either by covert data gathering or data from the other criminal cases concerned. Therefore, the court examined in the first place what facts can be established on the basis of Defendant no.2's testimonies, after the results of the covert information gathering had been excluded, compared to other evidence, documents and testimonies. The criminal relationship between Defendant no.1 and Defendant no.2 was confirmed by the results of the searches carried out at their properties too. In some cases, the fact of the crime was supported by other testimonies, but this was not typical of the majority of the charges.

Overall, as already revealed above, a significant part of the conclusive evidence had to be excluded due to procedural errors. There was no doubt about the credibility of the remaining evidence, but this was not sufficient to establish precise facts on all charges. This also led directly to a large number of acquittals for defendants and cases where guilt would probably have been established had the excluded evidence been used.

Summary

These examples above make it clear that effective investigation needs at least one participant in the corruption process who resists in the first place. It may sound naive, but for me this means that the most effective element in the fight against corruption is raising public awareness. Education, information transfer, transparent procedures or campaigns should be provided to reduce the level of acceptance in society. This will help to keep one end of the corruption balance swing always empty, so there would be no room for developing criminal alliances based on mutual interest. I have to agree with the statement: *"[M]easures to reduce corruption, conflict of*

interest and favouritism need to be linked to deep-rooted structural and cultural change in public bodies and wider society, rather than simply adopting legislation and ensuring formalistic compliance with it" (*European Semester Thematic…*). However, until this slow-building process leads to significant results, it is necessary to increase the general preventive effect by increasing the effectiveness of detection and, in proven cases, by imposing penalties within a reasonable period of time. To this end, our current Act on Criminal Procedure offers a good toolkit with which the authorities in criminal matters can hope to succeed.

REFERENCES

European Semester Thematic Factsheet – Fight against corruption https://ec.europa.eu/info/sites/default/files/file_import/european-semester_thematic-factsheet_fight-against-corruption_en_0.pdf

KÚRIA BÜNTETŐ-KÖZIGAZGATÁSI-MUNKAÜGYI ÉS POLGÁRI KOLLÉGIUMAI JOGGYAKORLAT-ELEMZŐ CSOPORT (2017): *Az ítéleti bizonyosság elméleti és gyakorlati kérdései. Összefoglaló vélemény*. https://kuria-birosag.hu/sites/default/files/joggyak/osszefogl_velemeny_iteleti_bizonyossag.pdf

MAKÓ Ágnes (2008): *Az uniós pályázatoktól való távolmaradás okai: a feltételezett korrupció (is) visszatartó erő. Elemzés az MKIK Gazdaság- és Vállalkozáselemző Intézet (GVI) 2007. októberi vállalati adatfelvétele alapján.* Budapest: MKIK GVI.

LŐRINCZY György (1998): Gondolatok a bizonyítási eljárás törvényességéről a büntetőeljárásban. In: *Emlékkönyv Dr. Szabó András egyetemi tanár 70. születésnapjára.* Acta Universitatis Szegediensis, Acta juridica et politica, Tom. 53, Fasc. 1–25. Szeged: Szegedi Tudományegyetem Állam- és Jogtudományi Karának tudományos bizottsága. 209–234.

BUDGET FRAUD AGAINST FINANCIAL SUPPORT FROM THE EUROPEAN UNION'S RESOURCES – AN EMPIRICAL STUDY

FARKAS KRISZTINA*

Introduction

The European Union has a huge amount of its own, independent budget, which is the target of several types of criminal behaviour. The damage to the financial interests of the EU involves various criminal conducts against the expenditure and revenue part of the EU budget. For that reason, the European Union is seriously concerned about crimes committed against the EU budget. (UDVARHELYI, 2014: 170.) The criminal law protection against these behaviours has become increasingly important over the years. The financial interest of the European Union goes beyond the interests of the Member States; it can be regarded as a supranational legal interest of the EU. (UDVARHELYI, 2021: 113.)

The paper aims to demonstrate the practise of budget fraud in Hungary, which was committed against financial support from the European Union's resources through empirical research conducted in 2018 and its follow-up research carried out in 2021.

Basics of the criminal law protection of the financial interest of the EU

The criminal law protection of the financial interest of the EU is the result of a long development.[1] The Founding Treaties of the European Communities (TFEU) did not contain any regulation of criminal law protection of the budget of the communities. The change began in the 1970s, when new financial factors appeared. The fight against fraud became primary law of the EU by the Maastricht Treaty, and the regulation was significantly expanded by the Amsterdam Treaty. The milestone in this protection was the adoption of the PIF Convention in 1995,[2] and its three additional Protocols.[3] The next significant step was the Lisbon Treaty, which

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[1] About the historical developments see in detail UDVARHELYI, 2021:114–119.

[2] Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests [OJ C 316, 27.11.1995, 48–57]

gave broad legislative competences in the field of criminal law, also regarding the financial interest (UDVARHELYI, 2021: 118.), and empowered the EU to adopt secondary legislative acts. The Lisbon Treaty gave legal harmonisation competence, establishing minimum rules in the field of serious crimes [art. 83. (1) TFEU], and ancillary legal harmonisation ensuring the effective implementation of a Union policy [art. 83. (1) TFEU]. It also aimed directly at the protection of the EU's financial interest by providing measures to be taken as a deterrent and be such as to afford effective protection to counter fraud and any other illegal activities affecting the financial interests of the Union (art. 325 TFEU) and gave the basis for the establishment of the European Public Prosecutor's Office (art. 86 TFEU). Based annual PIF Reports, the EU can monitor the implementation of EU laws in Member States [art. 325. (5)]. The last two important steps in the road of EU legislation is the adoption of Directive 2017/1731 (PIF Directive)[4] – which replaced the PIF Convention[5] – and the EPPO Regulation[6].

It is necessary to touch briefly on the system of the EU budget. The budget of the EU comprises – as national budgets of Member States – two parts, revenues and expenditures. The revenues consist of traditional own resources (customs duties, agricultural duties, sugar levies), GNI based contributions and VAT based contributions, furthermore other revenues and own resources. (HORVÁTH, 2011: 270–276.) The expenditure part (for the period 2014–2020)[7] comprises the structural actions (European Structural and Investment Funds (ESIF), European Regional Development Fund (ERDF), the common agricultural policy, and the rural development programmes for countries preparing to join the EU, as well as direct expenditure, and external aid.

The PIF Directive clearly defined the "*'Union's financial interests'*, as it covers all revenues, expenditure and assets covered by the Union budget; of its institutions and of other bodies established pursuant to the Treaties or budgets directly or indirectly managed and monitored by them" [art. 2 (1) a)]. From the revenue part, its scope also extends to VAT own resources, but only in cases of serious offences, which are defined as those connected with the territory of two or more Member States and involving a total damage of at least EUR 10,000,000 [art. 2 (2)].

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[3] Council Act of 27 September 1996 drawing up a Protocol to the Convention on the protection of the European Communities' financial interests [OJ C 313, 23.10.1996, 1–10]; Council Act of 29 November 1996 drawing up, on the basis of art. K.3 of the Treaty on European Union, the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests [OJ C 151, 20.05.1997, 1–14]; Council Act of 19 June 1997 drawing up the Second Protocol of the Convention on the protection of the European Communities' financial interests [OJ C 221, 19.07.1997, 11–22]

[4] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, 29–41]

[5] PIF Directive art. 16.

[6] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') [OJ L 283, 31.10.2017, 1–71]

[7] From the relevant period for the empirical study.

Despite the cross-border dimension, this regulation is controversial, because VAT fraud directly affects the property of each Member State, and only indirectly the property of the EU. (KAIAFA-GBANDI, 2019: 39.) From the expenditure part, there is no set limit to the amount of damage caused.

The Directive defines also the criminal offences of fraud affecting the Union's financial interests and other criminal offences affecting fraud, and also contains provisions on criminal sanctions. There is a distinction in definition of the act of "fraud" between those acts that concern expenditure from those that concern revenue. This study concerns fraud against non-procurement expenditure, which may be committed through *"the misapplication of such funds or assets for purposes other than those for which they were originally granted"* (without further damage required) [art. 3 (2) a)]. (KAIAFA-GBANDI, 2019: 41.) However, the general reference to any act or omission relating to the use or presentation of false, incorrect or incomplete statements or documents, may be associated with a given conduct and could ultimately include any behaviour. (KAIAFA-GBANDI, 2019: 41.)

European Union funds

The European Union's funding system for Member States is based on the principle of programming, whereby the Community focuses on longer-term, complex objectives and priorities that better support development, rather than funding individual projects. The European Commission has been putting forward a number of programmes for jobs, growth, and investment within the European Union. These are based on multiannual financial frameworks for 7-year periods. The EU, through its funds, finances and supports the implementation of many projects by EU tenders. EU funding adds value in a number of areas; from research, employment, regional development and cooperation to education, culture, the environment and humanitarian aid. Significant support can be given to small and medium-sized enterprises, non-governmental and civil society, non-profit organisations, young people, researchers, farmers, administrations and many more. There are several types of funding opportunities, such as grants, loans, guarantees, subsidies and cash prizes. Financing projects in the form of non-repayable grants takes the form of co-financing, so the beneficiary organisation must co-finance the project. Several bodies, usually chained together, take part in the implementation and evaluation of applications, as a result of which their control take place in the same way.

Hungary continuously receives a significant amount of support. In the last, 2014–2020 programming period, Hungary received almost HUF 9 thousand billion (EUR 25 billion) at the September 2020 exchange rate from European Structural and Investment Funds alone. (KARSAI,

2021: 36.) With this sum, Hungary ranks fifth among the Member States.[8] Hungary is one of the top EU countries in terms of aid per capita, with HUF 712,000 in development funding for every Hungarian citizen by 2020.[9] The primary goal is to use as much EU funds as quickly as possible.[10] Due to this objective, projects financed by the EU are typical overbudgeted. Apart from over-budgeting, there is also the inadequate oversight of the projects, both of which contribute to the spread of overpriced projects. (KARSAI, 2021: 37.)

Dealing with these cases requires legal practitioners to have a basic knowledge of the European Union's financial foundations and financing system.

Hungarian regulation

The protection of the European Union's financial interests must be ensured by all EU Member States. Even before joining the European Union, Hungary had to provide this protection of the European Communities. The PIF Convention and the Additional Protocols were among the EU documents which, as a pre-accession Member State, it was required to transpose. The reason for it was that several pre-accession funds were available to candidate countries through which the Community budget could be damaged. (TÓTH, 2002: 452. cited MADAI, 2001: 246.)

The Hungarian legislator complied with the norms of the EU law by creating a new, separate criminal offence in the Criminal Code, namely the *Violation of the financial interest of the European Communities*, which was introduced on 1st April 2002[11] into the Criminal Code in effect at the time.[12] While this criminal offence was solely for the protection of the EU budget, fraud against the Hungarian budget was covered by more offences. This distinction was abolished from 1st January 2012[13] by the integration of the fraud-related crimes into one criminal offence. It was incorporated under the name of *budget fraud*[14]; from the revenue part, tax fraud, employment-related tax fraud, excise violation, illegal importation, VAT fraud and all cases of fraud affecting the budget; from the expenditure part, the unlawful acquisition of economic advantage and the violation of the financial interest of the European Communities and all cases of fraud affecting the budget. (JACSÓ – UDVARHELYI, 2019: 131.) The Criminal Code that

[8] TI-Hungary's calculation based on Eurostat data. The methodology and the results of the calculation are in the possession of TI-Hungary. Cited KARSAI, 2021: 36.
[9] https://www.palyazat.gov.hu/az_europai_bizottsag_altal_elfogadott_operat%C3%ADv_programok_2014_20
[10] https://2015-2019.kormany.hu/hu/innovacios-es-technologiai-miniszterium/europai-unios-fejlesztesekert-felelos-allamtitkar/hirek/magyarorszag-toronymagasan-vezet-a-regioban-az-unios-forrasok-felhasznalasa-teren. Cited KARSAI, 2021: 36.
[11] Act CXXI of 2001 on the modification of Act IV of 1978 on the Criminal Code
[12] Act IV of 1978 on the Criminal Code (hereinafter referred to as the previous CC)
[13] Act LXIII of 2011 on modification of Act of 1978 on the Criminal Code and certain laws related to financial crimes
[14] Art. 310 previous CC

entered into force on 1st July 2013[15] did not bring any material change to budget fraud. Both the revenue and expenditure parts of the EU budget are covered by the Hungarian CC.

The Hungarian regulations comply with the requirements of the PIF Convention, and the later adopted PIF Directive.[16] The financial systems of the European Union is given the same level of protection as the budget of the Member State's own country (art. 396 CC)[17].

Regarding the criminal protection of the financial interest of the EU, there are three periods:
- Violation of the European Communities' financial interests (in previous CC, from 1st April 2002 to 1st January 2012)
- Budget fraud (in previous CC, from 1st January 2012 to 1st July 2013)
- Budget fraud (CC in force, from 1st July 2013.

The definition of 'budget' means – among others, related to the EU – *"budgets and/or funds managed by or on behalf of the European Union"* [art. 396 (9) a]. This means that both the revenue and the expenditure parts of the EU budget are covered by budget fraud on the basis of this legal definition. (JACSÓ – UDVARHELYI, 2019: 132.)

Table 1: Budget fraud, art. 396 CC[18]

art. 396 (1) a)–c)		art. 396 (2)–(5)	art. 396 (8)	art. 396 (9)
1st category	Budget fraud in narrower sense	Aggravating circumstances	Reduction of the penalty without limitation	Explanatory provisions: – budget – financial loss
art. 396 (6)				
2nd category	Budget fraud committed on excise goods			
art. 396 (7)				
3rd category	Administrative budget fraud	---	---	

The offence in a narrower sense is divided into three categories, three types of criminal conduct in the CC, and the offence can only be committed intentionally; negligent conduct is not punishable. Proving intent is often difficult in practice. (CSAPUCHA – GARAI, 2020: 35–36.) Budget fraud is a material delict, so it is only punishable if it causes financial loss to one or more budgets. (JACSÓ – UDVARHELYI, 2019: 133.) Although the study focuses on the practice of

[15] Act C of 2012 on Criminal Code hereinafter referred to as CC
[16] Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, 29–41]
[17] This requirement is formulated in art. 325. (2) TFEU and Hungarian regulation complies with that.
[18] Source: JACSÓ, 2017: 227.

budget fraud committed against financial support from the European Union's resources, the analysis of the pertaining regulation is not included.[19]

Research conducted in 2018[20]

The main purpose of the research was to provide an overview of criminal proceedings related to budget fraud against financial support from the European Union's resources. It also aimed at identifying typical difficulties of proof and finding expedient methods. Through research, it was possible to reveal the Hungarian practice of budget fraud in violation of the expenditure side of the EU's traditional resources.

There is no data on the proportion of EU funding that has been affected by fraud (including VAT fraud) and other criminal activity. There is also no data available on how many cases relate to revenue arising from VAT own resources.[21]

VAT, as part of the revenue or expenditure part of the budget, can be an object of budget fraud, depending on whether it is undeclared and paid or refunded VAT. (POLT, 2019: 27.)

The document-based research involved the examination of 200 criminal cases that ended with final judgement (closed by the termination of proceedings or by court decision) since the introduction of this crime (1st April 2002) until 31st December 2017. In this nearly 15-year period, a total of 473 criminal proceedings were conducted and ended with a final decision. Of these, 200 criminal files were selected, based on random statistical sampling. In the course of the research, the documents of the investigating authorities, the prosecutor's office, and court files were comprehensively reviewed.

Of the 200 cases, 102 were terminated by the investigating authorities, 15 were terminated by the public prosecutor, in 3 cases the public prosecutor postponed the prosecutions, and the public prosecutor indicted in 78 cases. Of the cases prosecuted, 2 were terminated because of the death of the accused, one case ended with acquittal and total of 75 cases ended with a conviction.

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[19] Budget fraud in the narrower sense can be committed by "*Anybody who (a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent; (b) unlawfully claims any advantage made available in connection with budget payment obligations; or (c) uses funds paid or payable from the budget for purposes other than those authorized; and thereby causes financial loss to one or more budgets.*" [section 396 (1) CC]. See the analysis detailed: JACSÓ – UDVARHELYI, 2019: 133–136.

[20] The typical difficulties and practical methods of detecting and proving of budget fraud on financial support from the European Union's resources. (FARKAS et al., 2018.) Research results in English: https://en.okri.hu/images/stories/RESEARCHES_NEW_2016/researches_2018_en.pdf, 19–20. Read the whole research in detail: CSAPUCHA – GARAI, 2020.

[21] PIF Directive art. 2 (2)

Of 102 cases of the investigating authority's termination decisions, the highest proportion (55%) were closed due to finding no crime and 43% due to lack of evidence, while 2 cases were terminated due to the prescription of the crime, the files were sent to the prosecutor's office with the motion of prosecution in just 96 cases (48%), thus, less than half of the cases reached prosecution. From 78 indictments, 75 cases were ended with conviction.

The research included an examination of the following aspects.

The initiation of the proceedings

In the greatest proportion of cases (63), the Office for Agriculture and Rural Development (ARDA) reported the suspected criminal offences, followed by named (39) and anonymous individuals (21). The government offices reported the crime in 10 cases, the national tax authority (the National Tax and Customs Administration, NTCA) and mayors in 8 cases each, the police service within its official competence and development agencies in 7 cases each, and other various organisations in total 27 cases.

It can be observed that the role of the background institutions and intermediary bodies, which have taken the necessary measures in the event of suspected budgetary fraud, is significant.

The length of the proceedings

One of the key problems is the slow progress of proceedings. Not only is the time between the commission of the crime and its detection extremely important, but also the time between ordering the investigation and the conclusion of criminal proceedings. The timeliness of criminal proceedings was extremely mixed during the period under review and was unduly prolonged in a number of cases.

From the initiation of investigation to the completion of the investigation took more than 2 years near in 14% of cases and in 25% of cases it took between 14 months and 2 years. In the most cases the investigation took within 1 year (around 50% of cases). In 10% of cases took the investigation between 12 and 14 months.

Between 14 and 24 months from *the initiation of the investigation to the final judicial decision* was the most common pattern (32%), but not a small number of cases lasted for more than 3 years (26%), followed by criminal proceedings between 2-3 years (21%). Just in 16% of cases the criminal proceeding took between 3 months and 1 year. Just 0.01% (1) of cases lasted less than 3 months, and also 0.01% of cases ended between 12 and 14 months. Therefore, prolongation of proceedings will be assessed in favour of the accused as a mitigating circumstance.

The perpetrators' features

In total, 84 accused are included in the 75 cases closed with a final conviction; they typically committed the crime on their own (61 perpetrators), while 4 of them were accessories. 13 persons committed the crime as an abetter, 2 perpetrators aided the crime and 4 of them were the indirect perpetrator.

Regarding the criminal background of the perpetrators, the vast majority of them (78 people) had no criminal record.

Perpetrators also show a wide range of professions, including entrepreneurs, cultural organisers, primary producers, mechanical engineers, company managers, mayors and the unemployed. The profession or workplace did not establish the nature of the perpetrator in all cases, but in some cases this was causally related. Thus, mostly in the case of company owners, managers, mayors, accountants or a general partner in a limited partnership.

The perpetrators of budget fraud are usually people with a high level of education, often in senior positions. There is an exception of course, when the perpetrators cited earlier involved vulnerable, being hard hit, less educated people to set up fictitious companies and issue invoices, but there is no doubt that the intellectual authors of the crime are usually knowledgeable people. This cannot be considered abnormal, as these persons gain a thorough knowledge of financial law and tax rules when conducting business matters, and they know the loopholes in tenders, which is essential in order to deceive the tax authorities and avoid investigation for tax evasion when committing certain tax frauds.[22]

The stages of the crime

As far as where the offenses took place is concerned, it was not the usual pattern for crimes, as 59% of the cases of all the closed cases with a conviction (75) remained at the attempt phase, only 41% of crimes were actually carried out.

[22] Curia Bfv. III.315/2002., Curia Bfv.I.76/2013. decisions

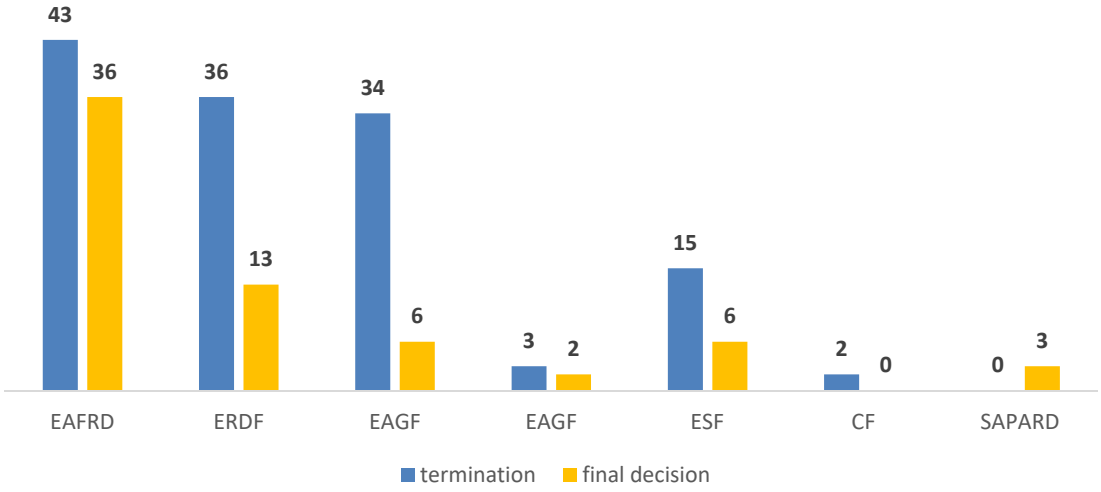
Sentencing practice

Of the perpetrators, 37 received a suspended sentence. Just of those convicted served a term of imprisonment. Fines were imposed on 32, 3 were sentenced community service work, 6 were prohibited from exercising their professional activity – which penalty were always combined with other sanction –, 2 received a warning and 1 had a conditional sentence.

The Unions funds concerned

The research paid special attention to the frequency of each EU fund being mentioned, regardless of the final outcome of the proceedings, so the chart below shows the involvement of the funds not, only for final convictions, but for all cases examined.

Figure 1: EU funds concerned [23]



Based on the data, it can be seen that the European Agricultural Fund for Rural Development was the most frequently affected (40%), but the European Regional Development Fund (25%) and the European Agricultural Guarantee Fund (20%) are also high on the agenda.

The projects are primarily co-financed from the Union's and the Member States' budgets. However, in several final decisions, the composition of the aid, namely the extent to which the crime affects the EU and domestic budgets, was not included. The share of grants varied by type of applications. The projects were mainly financed by the EU; in 50% of these 52 cases 75% was funded by the EU and 25% by Hungary.

[23] Abbreviations see: European Agricultural Fund for Rural Development (EAFRD), European Regional Development Fund (ERDF), European Agricultural Guarantee Fund (EAGF), European Agricultural Guarantee Fund (EAGF), European Social Fund (ESF), Cohesion Fund (CF).

The subject of the projects

The subject of the applications related to single area payment and support for the start-up of young farmers in the largest proportion in the field of. Abuses within the framework of the Social Renewal Operational Program were common. The subject matter of the tenders shows the variety and colour of offerings that law enforcement can encounter in connection with such crimes. These implemented or just partially completed investments and developments must be investigated and reconstructed; the legal or non-intended use must be determined. The main types of applications were:

- agricultural tenders;
- loans, credits, guarantees;
- renovations, improvements, updating;
- constructions;
- environment, nature, health, and animal protection;
- education, training, research, employment; and
- investments, purchases.

Typical difficulties of investigations and evidence

The research revealed the following typical problems during the proceedings: the proof of intent; the reasonable time for proceedings; failure to investigate the facts fully; supply of all tender documents; significant delays in checks; inefficient checks, deciding whether the given issues are legal or factual; proof of uses of funds for purposes other than those authorised; parallel procedures and reports to several authorities; anonymous, unfounded reports, half information; content requirements for invoices issued by contractors; problems of overpricing and overbilling; failure to hear relevant witnesses; impossibility of follow-up on the sale of machines and equipment affected by the tender; lack of accounting materials; impossibility of ex-post controls due to the lack of built-in components; functional implementation of projects – essential and technically justified works, amended budgets; public real estate register, land use register data, and, as the last point, the inconsistencies between land certifications and. registration data.

Eliminating the above listed errors and deficiencies, would improve the investigation and proof of budget fraud. In this it may also be easier to prove that a crime was committed and prevent the termination of the procedure based on the lack of conclusive evidence.

Follow-up research conducted in 2021

The research conducted in 2021 aimed at discovering whether the experience of the case law regarding budget fraud involving financial support from the European Union's resources has changed since 2018. The research involved cases with a final court decision between 1 January 2018 and 31 December 2020, which are the subject of budget fraud in violation of Section 396 of Act C of 2012 committed in respect of the budget or funds managed by or on behalf of the European Union. The document-based analysis covered a total number of 58 cases, against 136 accused persons.

Compared with the research conducted in 2018, this did not include the examination of cases closed by a final termination decision, just final court decisions.

The research was based partly on the same aspects as in the previous research but included new aspects as follows.

The initiation of the proceedings

Two institutions initiated half of the criminal proceedings, in 15 cases (25%) the Office for Agriculture and Rural Development (ARDA) and also in 15 (25%) cases the National Tax and Customs Administration authorities (NTCAH). The willingness of individuals to report the crime is also significant (in 9 cases 15%). The organisations responsible for support measures and intermediary organisations reported in 4 cases each, followed by mayors (3 cases), and governmental bodies (2 cases).

Compared to the previous research, the role of the background institutions and intermediary bodies, which have taken the necessary measures to report the crime, is also significant.

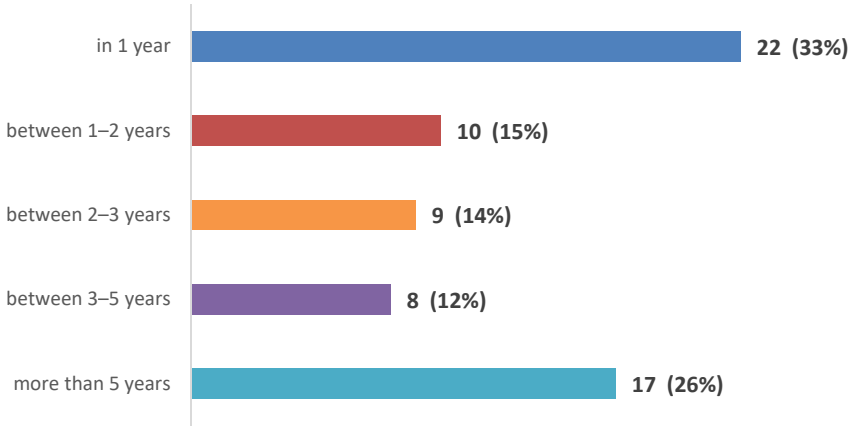
The length of the proceedings

One of the biggest problems was how long the proceedings took, as most of the county prosecutions offices pointed out when they reported their experiences.[24]

The next chart shows much time it took from committing the crime to the initiation of criminal proceedings.

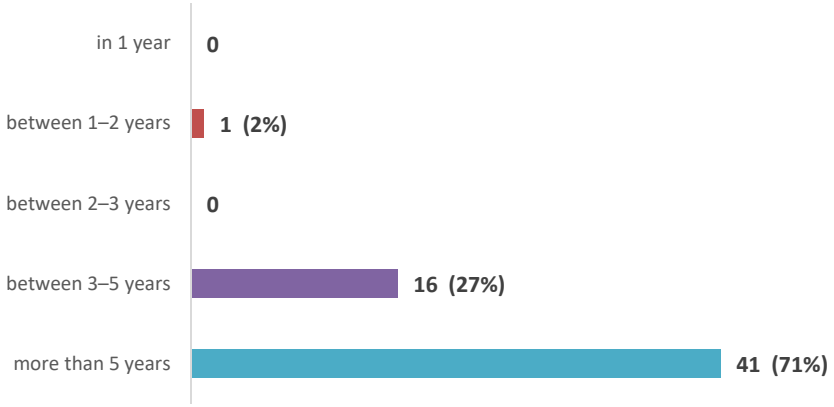
[24] See in detail: 5. point

Figure 2: Length from the commission of the crime to the ordering of the investigation



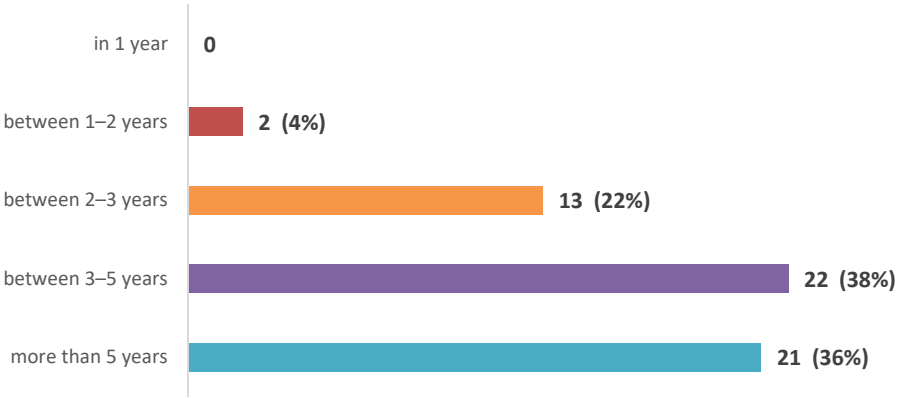
The other feature is how much time it took until the final decision.

Figure 3: Length from the commission of the crime to the court's final decision



Base on the data it can be seen that around 70% per cases after commission until the final decision took more than 5 year (in fact in 12 cases 7 years, in 8 cases 8 years, in 7 cases 10 years, the longest proceeding was 12 years).

Figure 4: Length of the criminal proceedings

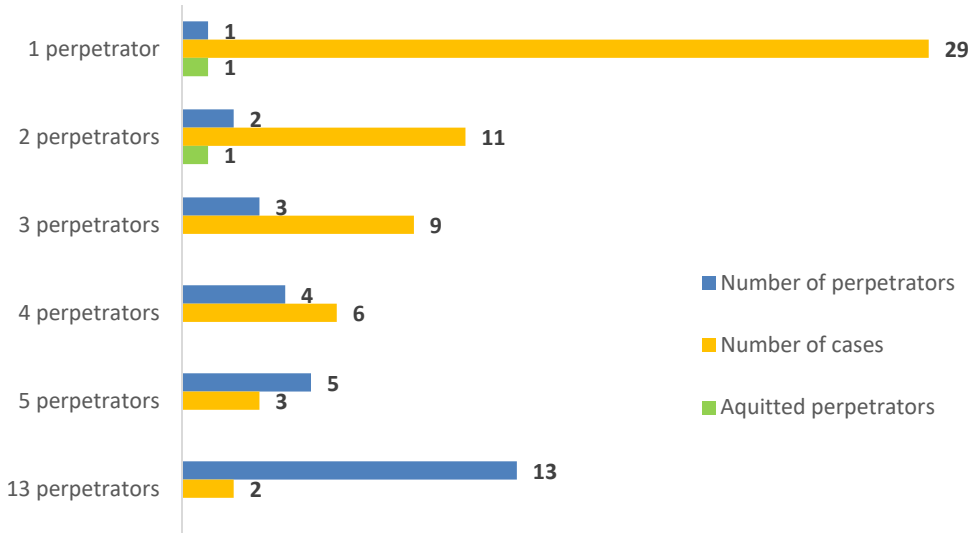


It can be seen, that from the initiation of the investigation to the final decision around more than 70% of proceedings lasted beyond 3 years. This problem has also arisen in the case law of the courts, while the prolongation of the proceedings was assessed as a mitigating circumstance in nearly 40% of judgments.

The perpetrators' features

According to the data, the perpetrators typically committed the crime on their own (50% of cases), in other 50% they were co-perpetrators. Of the total number of 136 accused persons, three were acquitted.

Figure 5: Number of perpetrators per case



In line with the previous research, the vast majority of perpetrators (80%) had no criminal record; just 27 of the accused had previously committed a crime.

It was also examined whether the perpetrators had a position enabling an offender profile to be drawn up. They were usually heads of companies, acting managers of limited liability companies, general partners in limited partnerships, individual entrepreneurs or organic farmers, who committed crimes related to their field of activity. Some were mayors, application writers. The other perpetrators (e.g. unemployed, person being in maternity leave, pensioner) typically provide some form of assistance in committing the crime.

The features of the crime

The typical criminal conduct can be considered as misleading another person, or making false statements [art. 396. (1) a) CC], found in 70% of cases (42). Using funds paid or payable from the budget for purposes other than those authorised [art. 396. (1) c)] occurred in just 15% (9 cases) Less

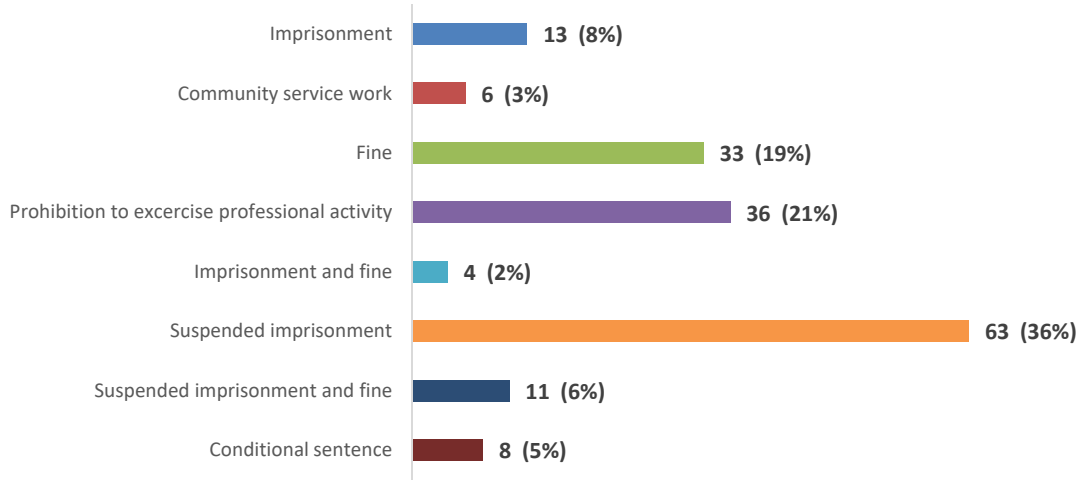
than 10% (5 cases) involved both. There were also a few cases (5) where the settlement, accounting or notification obligations had been violated (administrative budget fraud) [art. 396. (7)]

As far as the stages of the offenses is concerned, nearly 60% of budget frauds were completed, and 30 % of the cases remained in the attempt phase; 2 cases were qualified as partly attempt, partly completed . This ratio was the reverse of the previous research's finding.

The court decisions, sentencing practice

The court found the accused guilty in 97% (57) of cases; in just 2 cases 3 accused were acquitted, in one case because of lack of offence, on other one because of lack of evidence. Most cases (70%) became final at first instance, a smaller part (30%) at second instance.

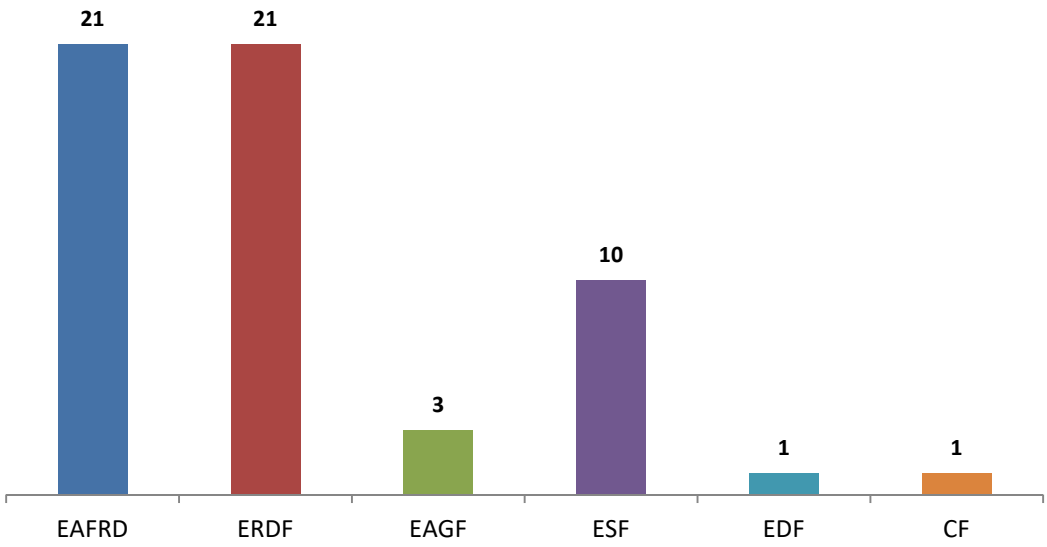
Figure 6: Imposed sanctions per perpetrator



It can be seen that the most commonly used sanction is the suspended imprisonment (63%). Also high is the prohibition on exercising professional activities, which is imposed in all cases combined with other sanctions, mostly with suspended imprisonment. It was typical to ban senior managers from holding such a position, but there were also specific prohibitions on a professional tender writer and a real estate expert in connection with the commission of the criminal offence.

The Union's funds concerned

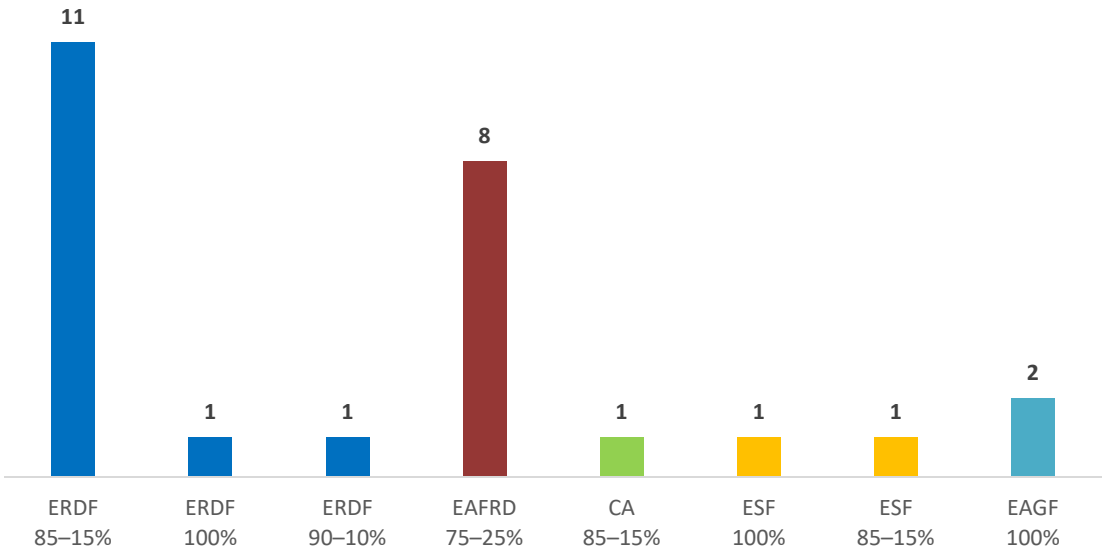
Figure 7: Union's funds concerned per case



The distribution of funds concerned is similar to the previous research. The European Agricultural Fund for Rural Development was the most affected (40%), but the number of cases involving the European Regional Development Fund was higher than before (40%). The European Social Fund was also significant.

Since the projects are mostly co-financed, it is interesting to see the proportion of aid granted.

Figure 8: Proportion of aids per case



Similar to the previous research, in around half the cases, the composition of the aid (neither in the indictment, nor in the judgment), i.e. to what extent the crime affects the EU and the domestic budget, cannot be found. The first number in each proportion in the chart is the EU's contribution, the second number the Hungarian ones, and a wide range of aid rates can be observed. However, it is obvious that the EU contributes much more to the payments, which also damages its budget to a greater extent, than the domestic budget.

The subject of the projects

The main types of applications were very different, in line with the results of previous research. The most common type of projects aimed at developing small and micro-enterprises or taking out micro-credit, loans (19 cases, from ERDF). In the field of agriculture, applications were mainly aimed at young farmers starting up (10 cases, from EAFRD) and receiving single area payments (2 cases, from EAGF) and the development of agricultural roads or farms (12 cases, from EAFRD). Support for various disadvantaged groups (young people, jobseekers, and trainee) and support for wage costs and renovation (8 cases) came from ECF.

Experience of prosecution offices

The experience gained during the proceedings and the law enforcement problems encountered were summarized by some county chief prosecution offices as follows.[25]

According to the practice *in one county,* budget fraud committed in respect of the budget or funds managed by or on behalf of the European Union are typically larger, particular serious cases with complex legal considerations, in which several actors are usually involved, regardless of their position held in the proceedings.

Support, whether for the that application or for financial accounts, is usually based on a complex set of conditions, therefore detecting and proving these cases is longer than in other ones and the judicial authorities have a more difficult task to resolve these cases.

It can also be found that criminal proceedings are very often initiated much later than the crime itself, which makes detection significantly more difficult. (Taking into account that the memories of witnesses and defendants may fade or documentary evidence may disappear.) The passage of time is to be assessed as a mitigating circumstance in the imposition of punishment; as such, the courts do not apply strict provisions of the law against offenders and so the deterrent effect of punishments is not sufficiently enforced.

[25] In Hungary there are 19 counties and the capital. In each county has a chief prosecution office.

The problem of proof is that the projects that are the subjects of criminal proceedings are not found to be irregular by the managing authority in many cases during the audits, and only administrative, irrelevant (in criminal law terms) deficiencies are found, or they state that the project is almost 100% completed. The findings of the audits are repeatedly referred to by the accused, regardless of under which paragraph of the budget fraud the defendant is prosecuted.

Foreign involvement in the cases can also occur. Several foreign limited liability companies were involved in the cases, in which the items covered by the tender were procured through chain transactions by foreign-based companies artificially integrated into the invoicing chain. The involvement of intermediary actors in the procurement of goods – which otherwise belong to a community of economic interests based on family or acquaintance relationships – was not economically rational for the beneficiary company of the aid; the purpose of the involvement of the intermediary is only to increase the purchase price of the goods in order to inflate the amount of aid available.

Other county criminal proceedings conducted for offences against the budget - insofar as they concern acts damaging the financial interests of the European Union – are typically linked to the non- compliance, or non-contractual implementation of tenders financed from the budget of the European Union.

The supported organisation usually has a longer time to implement the project, which is followed by an audit procedure. The findings of these investigations or anonymous reports form the basis for initiating criminal proceedings, so it is not unusual for several years to elapse between the crime being committed and an investigation being ordered. A large number of witnesses (EU-funded wage subsidy workers or people working on a project) who have to be heard during the investigation also leads to delays in the proceedings. Expert evidence is also typically provided, which may also contribute to the length of the proceedings.

During court proceedings, defendants typically do not waive their right to a trial; they submit motions to gather evidence, therefore new witness and expert evidence appears before the court, often followed by second-instance proceedings, until the decision becomes final.

There are typical difficulties of proof in cases where the subject of the grant is a service (e.g. training, education, prevention or catch-up training) and a related acquisition of (typically IT) equipment or other human resources event (trip, fair or teambuilding training). In these cases, perpetrators acquire IT equipment and hold events, but not on a targeted basis, as the service covered by the support is no longer actually implemented, although EU funding is provided through this constraint and not generally for the purchase of an asset or holding an event.

In several cases, it is also typical that the same group of perpetrators are members of several local organisations (Leader communities and local social organisations), so the people involved in each project do not become aware of the EU funding of the project or how an event should be organised. In these cases, special caution must be taken in weighing the evidence when prosecuting.

In the capital city, most of the proceedings are initiated on the basis of an OLAF signal or recommendation; the vast majority of proceedings are investigated by the National Tax and Customs Administration of Hungary (NTCA). A common feature of these proceedings is that, since the OLAF report and its annexes are regarded as documentary evidence in criminal proceedings, the investigating authority has to "repeat" OLAF's often lengthy, multi-year administrative procedure.

In these cases, the investigating authority must again obtain all the documents related to the application from the awarding, supporting and audit authorities, and evaluate them in accordance with the rules of criminal procedure. After analysing the extremely large and complex tender dossier, the investigating authority may be in a position to decide on the further direction of the investigation, thus determining where research needs to be carried out, who needs to be interrogated and what other banking, tax, or telecommunications data must be obtained. After the primary analysis of the documents, the investigating authority identifies the companies/persons participating as subcontractors in each project, for which it also obtains the necessary documents, such as banking, tax and employment data.

This process can take months in even a simpler case, but in a complex case involving several projects and the purchase of machinery, it can take up to several years. As OLAF has an obligation to inform the companies concerned of its proceedings, the documents of the companies involved in the subsequent investigation may not be available or may be incomplete, or the persons concerned may have coordinated their statements and developed their defence for eventual future criminal proceedings.

The length of proceedings may be increased by the time taken to implement the request for legal assistance or European investigation orders, especially in cases where machinery was purchased from abroad or potential offenders used foreign bank accounts or offshore companies.

After all the necessary documents are available and analysed, the investigating authority shall arrange for the examination of witnesses. Witness interrogations are typically designed to clarify the project implementation process. In several cases, the investigating authority faces the problem that the employees of the company under investigation came to their interrogation with the same lawyer and their testimonies were fully coordinated after the interrogation of the first witness.

If the subject of the investigation is, for example, an overpriced purchase of machinery, the aim is to interrogate all actors in the supply chain or the representatives / employees of the companies involved in the sale, bearing in mind that they may be in a position to be charged at a later stage. Witnesses to be questioned later as defendants may not be heard the investigating authority shall reveal their role and intention by obtaining other evidence.

Usually in addition to proving the objective element of the offence *(actus reus)*, in most cases the subjective element, proving guilty intent *(mens rea)*, is the biggest challenge. In the cases of overpriced machine purchase, the applicant works with the last member of the supply chain to develop it and agrees on overpricing in order to win the highest possible aid amount. As this is an agreement between two market participants, the investigating authority faces difficulties of proof similar to that in corruption cases, namely there is no party in the proceedings who would have an interest in revealing the truth.

Establishing proof is slightly easier when the subject of the proceedings is also the purchase of machinery, but the perpetrators list used machinery as new. In this case, it is only "necessary" to prove at which point in the supply chain, with whose knowledge and on whose instructions was the machinery / equipment re-labelled.

In cases related to the creation of an intellectual product or software development, the emphasis is on determining who actually created the given intellectual product or who implemented the software development; in this context where, when, how much work was done, how much was the price, who gave instructions, how the completion was certified and whether any member of the subcontracting chain added anything to fulfilling the project goals.

As a general feature, these cases are extremely complex and time-consuming. There are fewer simple cases; perpetrators sing increasingly sophisticated methods to obtain aid, and they are doing everything they can to conceal traces of irregularities/crime and thus make the work of the authorities more difficult.

The *prosecution office specialising in economic crimes* reported similar experiences. In their practice, these procedures are also characterised by their lengthy duration, which also make finding proof more difficult. The reason for this is that the granting authority makes its findings after a long investigation (either on the spot or after personal evidence), on the basis of which an investigation is ordered. The investigating authority then has to repeat almost all the actions in the Code of Criminal Procedure in accordance with its rules. The analysis of the application material also takes a long time; obtaining it is not automatic, in many cases the authority only sends its findings and acquiring the materials has to be done separately.

The legal classification of the act should also be carefully considered during the proceedings. Primarily in the event of a use other than the purpose (art. 396 (1) c) CC), it must be clarified whether the deceptive conduct has already taken place at the time of submitting the application, because then a suspicion of an Act in violation of art. 396 (1) a) CC arises.

In five counties, law enforcement and legal interpretation problems did not arise.

In practice, however, the investigating authority has difficulty or pays less attention to the specific composition of the applications and to identifying who can be considered as a victim / other interested party in the case.

Where EU financial support is also involved in the crime, the identification of the body responsible for representing the victim is often a problem; regarding the fact that the legal regulations are different for applications with different subjects, it places different bodies in a victim position.

It is also a practical problem that such cases typically result in a large number of investigative documents, which are much more difficult to process and manage electronically. In larger cases, due to the limited capacity of their electronic filing system, the investigating authority often sends procedural documents on CD, which makes it difficult not only for prosecutors but also for judicial authorities to process/ handle the case.

In other counties, in the context of these cases, there is no specific problem of law enforcement, such as a classification or procedural matter, and these cases are investigated in a similar way as more serious forms of budget fraud not covered by EU funding. In general, the investigation in such cases is prolonged, given the significant volume of documents related to aid projects.

Although no law enforcement problem arose in such cases, the lengthy proceedings in the investigation phase commonly occurred.

Other counties, given the small number of cases and the relatively simple adjudication, were unable to report on relevant experiences and on enforcement difficulties. One nonetheless reported that the procedure in these cases is very lengthy, notwithstanding the workload of the investigating authority.

Concluding remarks

The criminal law protection of EU financial interests is of increasing importance. The most common form of criminal offences involving EU funds is budget fraud, the purpose of which is obtaining EU funds through violation of the expenditure side of the EU's traditional resources.

The empirical research presented in this paper aimed to reveal the main characteristics of this crime in Hungarian practice. The results of the studies show, that there are similar characteristics in both research projects. At present there are no data on the number and proportion of offences affecting the revenue part of the EU budget, nor about other criminal offences affecting the Union's financial interests.

One of their main features is that these procedures, considering the complexity of the cases and difficulties of obtaining proof, take a long time. These cases are typically committed by overpricing to unduly inflate the amount of aid that could otherwise be legitimately claimed, or by fictitious transactions aimed at obtaining fundamentally unjustified payments. Various kinds of misuse of the funds awarded also occur. These cases are typically larger, particularly serious cases with complex legal considerations, involving several actors regardless of their positions. The prosecution offices have provided much useful experience.

The task of further research is to reveal the criminal offences committed against the revenue of the EU budget, also other criminal offences affecting the Union's interests, thereby making the criminal law protection of EU financial interests more effective.

References

CSAPUCHA Bernadett – GARAI Renáta (2020): A költségvetési csalás gyakorlati kérdései. Az Európai Unió forrásaiból származó pénzügyi támogatásokra elkövetett költségvetési csalások. [The typical difficulties and practical methods of detecting and proving of budget fraud on financial support from the European Union's resources] *Büntetőjogi Szemle,* 1. 23–44. https://ujbtk.hu/wp-content/uploads/lapszam/BJSz_202001_23-44o_CsapuchaGarai.pdf

FARKAS Krisztina – GARAI Renáta – CSAPUCHA Bernadett (2018): *Az Európai Unió forrásaiból származó pénzügyi támogatásokra elkövetett költségvetési csalások felderítésének és bizonyításának tipikus nehézségei és célravezető módszerei [The typical difficulties and good practices relating to the detection and proving of budget fraud committed regarding financial support received from European Union funds].* Research Report. Budapest: Országos Kriminológiai Intézet. Research results in English: 19–20., https://en.okri.hu/images/stories/RESEARCHES_NEW_2016/researches_2018_en.pdf

HORVÁTH, Zoltán (2011): *Handbook on the European Union*. Budapest: HVG-ORAC.

JACSÓ Judit (2017): Költségvetési csalás. In: HOLLÁN Miklós – BARABÁS A. Tünde (eds.): *A negyedik magyar büntetőkódex: régi és újabb vitakérdések.* Budapest: MTA Társadalomtudományi Kutatóközpont–Országos Kriminológiai Intézet. 267–296. https://okri.hu/images/stories/konyvajanlo/Buntetokodex_2017/buntetokodex-beliv-ok.pdf

JACSÓ, Judit – UDVARHELYI, Bence (2019): Theoretical questions of the fight against budget fraud (VAT fraud) in Hungary. In: FARKAS, Ákos – DANNECKER, Gerhard – JACSÓ, Judit (eds): *Criminal Law Aspects of the Protection of the Financial Interest of the European Union.* Budapest: Wolters Kluwer Hungary.

KAIAFA-GBANDI, Maria (2019): Protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 directive (EU 2017/1371) on the fight against fraud to the Union's financial interests. In: FARKAS, Ákos – DANNECKER, Gerhard – JACSÓ, Judit (eds.): *Criminal Law Aspects of the Protection of the Financial Interest of the European Union.* Budapest: Wolters Kluwer Hungary.

KARSAI, Krisztina (2021): *The European Public Prosecutor's Office in Hungary. Challenge or missed opportunity?* Budapest: Transparency International–Hungary Foundation.

MADAI Sándor (2001): *A csalás büntetőjogi értékelése*. Budapest: HVG ORAC.

POLT Péter (2019): *A költségvetés büntetőjogi védelmének egyes elméleti és gyakorlati kérdései. Hazai gyakorlat és uniós mechanizmusok.* Budapest: Dialóg Campus Kiadó.

TÓTH Mihály (2002): *Gazdasági bűnözés és bűncselekmények*. Budapest, KJK Kerszöv.

UDVARHELYI Bence (2014): Az Európai Unió pénzügyi érdekeinek védelme a magyar büntetőjogban. *Miskolci Jogi Szemle,* 9(1), 170–188. https://www.mjsz.uni-miskolc.hu/files/egyeb/mjsz/201401/14_udvarhelyibence.pdf

UDVARHELYI, Bence (2021): Harmonization or unification? – Instruments for a more effective protection of the financial interest of the European Union. *Studia Iuridica Cassoviensia,* 9(1), 112–129. https://doi.org/10.33542/SIC2021-1-09

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