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Guidelines for effective investigations and appropriate punishment of corruption offences

- **in purpose of unifying the application of law and the case law -**

André Simon

Claudia Simon

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Introduction

The prosecution and punishment of corruption offenses is an important concern of the general public. It is a central task of law enforcement agencies and the courts to face this area of crime effectively and forcefully, to achieve success in solving criminal acts, to lead actionable offenses to the indictment and to ensure adequate sentencing for the offender.

Enlightenment success can only be achieved, if prosecutors and police as well as other institutions involved in the investigations cooperate more closely and trustingly. This presupposes an early exchange of information as well as a far-reaching network.

Necessary is also a collaboration with other authorities, such as financial-, tax- and customs-authorities, therewith also knowledge of its competencies can be obtained and introduced into the investigations.

Furthermore profound knowledge of the relevant procedural rules and of the prerequisites which are essential for the court decisions in order to reach a conviction is required.

A stringent and organized leadership of the investigation already is an important condition for the unification of the application of

the law on the one hand and the case law on the other hand. The trial court in particular can only make those findings and those evidences the subject of litigation, which are the results of the investigations. In addition, errors made when collecting and producing evidence at the worst may cause the uselessness of the evidence in trial.

Additionally, the improvement of cooperation and the knowledge of the appropriate application of law and the jurisdiction have to be ensured by regular joint training, joint working meetings and events for the exchange of experiences.

Ultimately, it is recommended to publish example cases, changes in legislation, case law, contact persons, trainings etc. in a multi-agency internet portal which has to be updated and supplemented regularly. All institutions involved in corruption investigations and criminal proceedings should have access to this portal. This portal could be installed and maintained by the chief prosecutor's office of the beneficiary country.

This short presentation is aimed to those who are immediately concerned with criminal investigations. Thereby the view is also directed to a later corruption crime trial, because effective investigations must be completed by appropriate decisions, which may be convictions by the competent court.

But the presentation is also aimed at those who are responsible for the supervision of the public prosecutor’s offices, those who take care of the organization of the public prosecutor’s offices and the courts and finally both, to the legislative and those who issue the administrative regulations.

Naturally, the most important aspects can be addressed only briefly in this short presentation. An expansion and updating by the local colleagues would therefore be desirable.

1. Definitions, types of corruption

1.1 Corruption is commonly understood as an abuse of a position of trust in administration, judiciary, police, business and politics or even in non-economic organizations or associations (e.g. clubs, associations, foundations) to gain a material or immaterial advantage for themselves or for third parties on which is no rightful claim.

1.2 Punishable corruption or related offences are particularly

- Taking bribes
- Giving bribes
- Taking bribes meant as an incentive to violating one's official duties
- Giving bribes as an incentive to the recipient's violating his official duties
  (All aforementioned statements of facts, in particular in connection with the award of public contracts)

- Bribing delegates
- Bribing voters
- Taking and giving bribes in commercial practice
- Money laundering: hiding unlawfully obtained financial benefits

- Fraud
- Obtaining credit by deception
- Subsidy fraud
- Embezzlement and abuse of trust
- Restricting competition through agreement in the context of public bids
- Making false entries in public records
- Breach of official secrets and special duties of confidentiality
- Tax fraud

1.3 Overlooking prevention and repression, the law for the prevention of conflicts and the law for the protection of whistleblowers are also important.

1.4 In the outward forms of corruption is a distinction between situational corruption and structural corruption.

A characteristic of the situational corruption is that this is done spontaneously out of a situation, but it is not planned or prepared. An opportunity is perceived. The corruption is limited to two or few people and it is not supposed to be repeated.

Example: A drunken driver gets into a traffic control and provides 5000 MKD to the controlling police officer. He

therefore hopes not to be prosecuted and also spared of other sanctions; in particular he wishes to retain his license.

In structural corruption it is characteristic that the corruptive actions are long term ones and are planned and prepared beforehand. The offences usually are based on grown relationships between donors and recipients. Frequently the donor tests by smaller contributions, if the recipient is vulnerable and therefore will remain ready to act corrupt. Thereafter amount and frequency of contributions increase over time, and this creates a grown illegal relationship. Such kind of procedure mostly takes place in the economic area of the donor.

Example: A building contractor often requires construction permits. Thereby he regularly is dealing with the same decision makers of the approval authority. After having received positive decisions, he first gives small gifts to the representatives of the authority and thereafter, in case of acceptance, he tries to influence future authorization procedures in his favour.

An intensified form of structural corruption is the so-called network-corruption, a form of organized crime.

The offenses are committed over several years or decades, they are committed regional, national and sometimes even international. This type of corruption is often operated by or in companies. Thereby frequently other criminal offenses such as restricting competition through agreement in the context of public bids, breach of official secrets, making false entries in public records, embezzlement and abuse of trust are committed besides the classical corruption crimes.

Example: The head of aa approval authority meets with the directors of building enterprises, sometimes for working lunches in fancy restaurants, sometimes for luxury sailing trips or similar, allegedly to learn about the economic situation in general and the situation concerning orders in particular. In fact it will be spoken about pending orders and potential deals, and also possible conditions and prices are agreed.

1.5. Practical experience shows that corruption frequently occurs in the following situations:

- In context with the award of major projects of monopolistic contractors or cartels,
- in context with numerous awards in the medical field,

- in the context with driving license affairs and
- in connection with immigration authorities
  dealing with smuggling activities of organized crime

  (enumeration of examples is not exhaustive).

2. Fundamentals of cooperation with respect to effective prosecution and punishment of corruption offenses

2.1 The swift and effective prosecution of corruption offenses first requires a concerted organization of the law enforcement authorities.

2.2 The public prosecutor's offices must have the responsibility and the leadership for the investigations, because they have the competence to coordinate investigations and gather the investigation results, according to the new Criminal Procedure Code they must even do so. The public prosecutor's offices are also responsible for the drawing of the indictment, which is why only these can assess which investigation results and evidence needs to be collected so that a later conviction by the court is sufficiently probable.

2.3 It is advisable to install special departments for combating corruption crime in the larger prosecutor's offices. A good overview of the situation of corruption crime and special knowledge, inter alia, about possible and targeted investigation measures, the relevant statements of facts and the jurisdiction, that is to say, allow a more effective operation and ensure uniform

treatment of similarly situated case constellations. In addition, specialization leads to better networking with all involved authorities (e.g. with police, customs, tax authorities, financial intelligence units). For the smaller prosecutor's offices a competent centralized department could be set up (an appropriate allocation in the courts also ensures better specialization with the above-enumerated advantages, see below).

2.4 There is also the possibility to establish a central unit at the chief prosecutor's office of the beneficiary country. Its task could be, inter alia, to clarify jurisdictional issues and competences in nationwide investigative complexes, to advice and support on matters of cooperation and mutual assistance and to organize training courses.

2.5 At the police level it also appears necessary to set up specialized agencies or departments in conurbations or in areas heavily affected by corruption. Only so the police can respond to the specific requirements of the corruption investigations.

This provides the advantage that

- corruption-related behaviour is recognized as such,
- it is easier to lead evidences of corruption offences

together,

- a corruption situational report can be created,
- mass-crime phenomena or new crime phenomena are recognized,
- in particular an exchange of information between the public prosecutor's offices, the FIU and the customs authorities and other institutions involved in the fight against corruption takes place.

2.6 Especially the early contact of the police departments with the prosecutor's offices (and possibly with other authorities involved in the investigation) is an essential foundation for effective criminal prosecution. Only so intelligence gathered by the police can be merged early and recognized and declared to be significant for the procedures. The central task of the prosecutor's office thereafter is to coordinate the further steps and to instruct the police with further investigations and, if necessary, to apply court orders for these investigations (e.g. search, telephone tapping).

2.7 Cooperation between public prosecutor's office and police, which goes beyond the handling of a concrete procedure, allows both agencies to acquire an identical level of knowledge about the appearance of corruption crime. Of course specific problems of a concrete

procedure can also be subject of exchange. Thereby common solutions can be developed, which are useful also for future cases. A regular exchange could also give the following knowledge and benefits:

- A regular joint assessment of the situation of corruption crime in the beneficiary country should lead to the ability to distribute the resources properly and if necessary to form main focuses.
- The expected development of the corruption crime could be appreciated much better. So measures to combat corruption could be taken in time.
- Results and experiences from both the investigation procedures und the trial could be discussed and analysed.
- Judicial decisions and therein defined conditions for conviction should be known to the investigating authorities. It is the task of the public prosecutor's office to explain to the police what factual and legal requirements must be satisfied and what evidence must be presented to the court to get a conviction. The case law can only be unified if such standards exist.
- Findings from covert investigations and witness protection should be exchanged.

- Findings about measures of asset recovery should be exchanged, because criminal organizations can only be smashed when they cannot gain benefit from the offences.
- Findings about the cooperation with other authorities at home and abroad should be exchanged. Networks should be tied and extended.
- Ultimately, issues of confidentiality should be discussed. Strict confidentiality especially of covert investigations, is an important condition for the success of the investigations.

3. Indictment and court procedures

3.1 The fundamental precondition for a functioning rule of law is the independence of the courts. Judicial decisions will only be accepted when they are based on the law, the procedures are transparent and the politics does not influence the decisions.

3.2 However, a prerequisite for unified judicial decisions is the implementation of targeted investigation procedures. This has to be clearly documented in the investigation file. The written indictment must be realistic, therefore be based on the investigation results. Only the results of the investigations that are documented in the files and the evidence that is available can be taken into account by the court. Files of preliminary proceedings with similar constellations and comparable evidence that are presented to the trial court must also have a comparable standard. Only by that a unification of the case law can be achieved. Therefore, the public prosecutor's office has a special responsibility for the unification of case law when leading the investigations and drafting the indictment.

3.3 After all the following should be noted when bringing in the indictment:

- The indictment should be realistic, this means only that offences should be charged, for which sufficient evidence is available and for which a conviction is more likely. If serious offenses are charged, for which no sufficient evidence is available, there is the risk of a discharge; in such a case it is better to accuse a less serious offense, which can be proved.
- The indictment should be constructed that way that there is one evidence available for each feature of the legal statement of facts.
- Prosecutors should always take into account the case law of the appellation courts and the Supreme Court. As far as the courts specify definitions for certain features of the legal statement of facts, the prosecutors also have to consider this. This is also a basis of the unification of jurisprudence.
- Next, the prosecutor should seek a limitation of the process substance. Since in the court proceedings the principle of immediacy applies, the trial is the more difficult and protracted the more crimes and parties are subject of the indictment. Prosecutors therefore should limit the charges on the key offences, for which an appreciable punishment can be expected. The same applies to the numbers of defendants. Defendants who are only involved in one

or few offenses of a larger complex or have only made a small contribution to the act should be charged separately.

3.4 In the court organization, it is advisable to set up specific competences for the corruption crime trials. This applies to both the first instance and the appeal. In that regard both is possible, a centralization at only a few courts or a specialization within a court. In the courts, a specialization also enables a faster recognition of the most complex issues. This is the only way to ensure an accelerated processing. In addition, a distribution of corruption cases to a few specialized judges leads to a significant unification of jurisdiction: when distributing the procedures to many judges or courts, necessarily more divergent decisions are expected. Another positive effect of specialization is that the judges themselves encounter with the defenders, who are quite often also specialized, at eye level. Regarding a non-specialized judge, there is the danger that he will be guided from the legal opinion of the expert defender.

3.5 If allowed by capacities of the courts, major corruption cases should be necessarily processed accelerated. Only fast investigations and a rapid criminal conviction have an

increased signal effect. It is therefore the duty of the administration of justice to ensure adequate capacities.

3.6 The appellation courts and the Supreme Court should always publish landmark decisions and precedent cases. As far as the higher courts establish legal principles or decide up to now unsettled legal issues, this also must be communicated mandatory. Both the courts of first instance and the public prosecutor's offices and police departments have become aware of the decisions of the higher courts. Only so the requirements of the higher courts can be taken into account already in the investigation phase. The same applies to the trials of the first instance. Without this knowledge, a further unification of case law is not possible.

3.7 But it is also up to the courts of the first instance, to consider the judgements of the higher courts and ideally to quote from them in their own judgements. This also significantly contributes to the unification of the case law. In addition, it is necessary that the courts themselves have decision collections containing landmark decisions. It does not matter if they are available in print or electronically, as long as they are accessible for all courts and public prosecutor's offices. This is also essential for the unification of the case law.

3.8 Although the independence of the courts is necessary and important for a functioning constitutional state, the communication between the courts and the investigation authorities is not prohibited in principle. An exchange independent by occasion is extremely helpful. A regular exchange with the investigation authorities for example could take place in the context of internships or joint meetings. The courts should be made aware of the problems in the investigations. Conversely, the investigation authorities must become aware of the problems of the trial. Only a comprehensive knowledge of the whole procedures, from the first gaining of the suspicious facts until the final verdict, can lead to optimization and standardization in the application of law. However, this presupposes mutual understanding and mutual recognition.

4. Training

As already pointed out, successful proceedings and unified case law require highest expertise, always up to date, of police officers, prosecutors and judges. This can only be assured by comprehensive and regular trainings. Thereby internal trainings and joint meetings across the institutions are equally necessarily. The training program can be organized both by police, public prosecutor's offices and courts (including their superior authorities and central offices) as well as by the Judicial Academy. Trainings should contain standards but also deal with the current appearance of corruption and their combat. Therefore the following training curriculum would be desirable (the list is not exhaustive, and it must be particularly based on the specific needs):

- Corruption and its appearance.
- Current development of corruption offenses and their control and combat.
- Special features of the investigation of corruption offenses.
- Special features in the court proceedings in corruption offenses.
- Current jurisdiction in criminal law on corruption.
- Special features of the new Criminal Procedure Code.

- Collecting evidence and utilization of evidence.
- Communication between police and public prosecutor’s office.
- Covert investigation measures in corruption crime procedures.
- Interregional cooperation and international legal assistance.

5. Fight against corruption by means of criminal law

It is primarily the responsibility of the state and of politics to ensure the avoidance of corruption by preventive measures. But in the case of already committed acts of corruption, it is also an important task of the law enforcement agencies and the courts to ensure rapid detection, investigation and trial of such offenses. Only in this way signal effects can be achieved and criminal structures can be destroyed. Investigations and criminal proceedings and in particular a conviction have both a special preventive and a general preventive effect. Some measures and objectives for the fight against corruption and the prevention of corruption by criminal proceedings therefore can be:

- The application of covert investigation measures and witness protection has to be intensified.
- Conducted investigation procedures and trials have to be analysed. By this means occurred and recognized errors can be avoided in the future. Positive findings should be manifested.
- The efficiency of the work of the investigation agencies and the courts has to be reviewed and evaluated regularly. If necessary, a change of

competences and a redistribution of resources has to be made.

- As soon as judges and prosecutors consider the present rules as not sufficient or suitable for combatting corruption crime, corresponding recommendations for the legislator should be issued.
- A compilation of persons which may be especially vulnerable to corruption in general because of their position could be created. This should especially include important and influential stakeholders, inter alia of police, judiciary, administration, politics and economy. These persons and their surroundings could be appropriately sensitized for the corruption risk due to their position. Thereby bribe can be better detected and reported.
- In areas in which corruption typically is expected, it should be focused on indicators that may point to the commission of corruption offenses. Such indicators are:

    - Remarkable and inexplicable high living standard, status symbols
    - Remarkable private contacts between employee and claimants respectively bidders and clients

- Great obstruction against change of job or transfer even in case of promotion
- Spare-time work without permission or announcement
- Change in behaviour towards colleagues and superiors
- Taciturnity, atypical and non-explicable behaviour as indication for corruptibility or even blackmail
- Social problems (alcohol or drug addiction, debts)
- Showing off with relations in private or business surroundings
- Benefits because of the relations (special conditions, invitations)
- Loss of identification with the office or the job
- Avoiding or ignoring of rules, accumulation of irregularities
- Aberration between actual procedure and documentation
- Extraordinary decisions without comprehensible reasons
- Different valuations and decisions to same issues with different claimants
- Abuse of authority to decide

- Providing of permissions by bypassing the competent authorities
- Dissimulation of procedures
- Remarkable short process times for advantaging decisions
- Partiality for certain claimants or bidders, iterated preference for certain persons
- Belittlement of the principle of thrifts and of the rules for bidders and other controlling instruments
- Trying to affect decisions out of the own competence (with special interest for third persons)
- No control where it is necessary or obliged
- Manipulation of contracts
- Splitting of orders, no comparing offers
- Considerable and iterated exceedance of prescribed amounts for orders