



**Parliament of Montenegro
Parliamentary Institute
Research Centre**

Comparative overview:
**Criminalisation of illicit enrichment of public officials in
certain European countries**

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FOREWORD

Article 20 of the United Nations Convention against Corruption¹ defines illicit enrichment and stipulates the following: "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income". Illicit enrichment is also prescribed as an offense in the Inter-American Convention against Corruption and the African Union Convention on Preventing and Combating Corruption, therefore, certain countries have, with the purpose of strengthening capacities in the fight against corruption, introduced illicit enrichment as a criminal offence in their legislation as well. However, despite this fact, the criminalisation of illicit enrichment is not universally accepted as an anticorruption measure. Instead, it continues to generate extensive debate and controversy.²

Criminalisation of illicit enrichment, which is very commonly referred to as "disproportionate wealth" or " inexplicable wealth" enables states to, inter alia, prosecute public officials and confiscate the wealth they have acquired by the means of corruption. In such circumstances, it is necessary to prove that an official owns disproportionate amount of funds in relation to his or her lawful source of income, however, there is no need to prove the source of the illegally acquired wealth, by identifying and proving the underlying offenses, such as bribery, embezzlement, trading in influence, and abuse of functions. Specifically, the prosecution must prove the disproportion of the official's wealth in relation to his/her lawful source of income, assuming that it was acquired by the means of corruption. The public official may rebut this presumption by providing evidence of the legitimate origin of his wealth . Failure to rebut the presumption results in a conviction and the imposition of penalties³ Some contend that it is against human rights standards of fair trial and presumption of innocence⁴, while others claim that it is in accordance with the human rights principles, referring to the existence of similar presumptions in the Criminal law.⁵

In addition, some contend that it is in the public interest to demand from a public official to justify the origin of his/her wealth, thus, criminalisation of illicit enrichment would originate from the responsibility of a public official, upon assuming office. Therefore, public officials represent the primary subject of this offense..⁶ A 2012 World Bank publication deals with criminalisation of illicit enrichment, stating that 44 countries⁷ introduced this criminal offence, most of which are developed countries.

At the sitting held on 22 October 2005, the Parliament of Serbia and Montenegro adopted the Law on ratifying United Nations Convention against Corruption.⁸ According to the Convention's

¹ United Nations Convention Against Corruption, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (29.3.2016)

² Lindy Muzila, Michelle Morales, Marianne Mathias, Tammar Berger. *On the Take Criminalizing Illicit Enrichment to Fight Corruption*, International Bank for Reconstruction and Development/The World Bank, 2012, str. xiii, http://www.unodc.org/documents/lpo-brazil/Topics_corruption/Publicacoes/2012_on_the_take_criminalizing_illicit_enrichment_to_fight_corruption.pdf (15.3.2016)

³ *Ibid*, p. 6-7.

⁴ *Illicit Enrichment Regulations*, Transparency International, 2013, str. 2

⁵ Lindy Muzila, Michelle Morales, Marianne Mathias, Tammar Berger. *On the Take Criminalizing Illicit Enrichment to Fight Corruption*, International Bank for Reconstruction and Development/The World Bank, 2012, str. 6, http://www.unodc.org/documents/lpo-brazil/Topics_corruption/Publicacoes/2012_on_the_take_criminalizing_illicit_enrichment_to_fight_corruption.pdf

⁶ *Ibid*, p. 7.

⁷ Algeria, Angola, Antigua and Barbuda, Argentina, Bangladesh, Bhutan, Bolivia, Botswana, Brunei, Chile, Ecuador, Egypt, El Salvador, Ethiopia, Philippines, Gabon, Guyana, Honduras, India, Jamaica, China, Columbia, Costa Rica, Cuba, Lebanon, Lesotho, Macedonia, Madagascar, Malawi, Malaysia, Mexico, Nepal, Nicaragua, Niger, Pakistan, Panama, Paraguay, Palestinian territory (West Bank and Gaza Strip), Peru, Rwanda, Senegal, Sierra Leone, Uganda and Venezuela. *Ibid*.

⁸ Law on ratifying United Nations Convention against Corruption („Official Gazette of Serbia and Montenegro –

recommendations, the 2015 Anti-Corruption Committee's Activity Plan envisaged considering the need for criminalisation of "illicit enrichment of public officials" in Montenegro.⁹ At the Second Joint Meeting of the Anti-Corruption Committee and Committee on Political System, Judiciary and Administration held on 15 May 2015, there was a consultative hearing with regard to the initiative of introducing a new criminal offence "illicit enrichment of public officials", in accordance with Article 20 of the United Nations Convention against Corruption. During the sitting, the members considered introducing the aforementioned criminal offence, stating the reasons in favour and against.¹⁰

In order to collect the data on criminalisation of illicit enrichment of public officials in the EU member states and countries in the region, at the request of an MP, the Research Centre prepared and submitted a questionnaire to European national parliaments, under the title "Illicit enrichment of public officials", through the European Centre for Parliamentary Research & Documentation (ECPRD).¹¹ The questionnaire contained questions whether illicit enrichment of public officials was defined as a criminal offence, and if it was, which provisions of the Criminal Code dealt with illicit enrichment of public officials. In addition, there was a questions whether there were any proposals involving the possibility of criminalisation of illicit enrichment, when it comes to countries which haven't criminalised it.

The following parliaments provided their answers which have been processed and presented in the follow-up of the research paper: Albania, Austria, Belgium, Bosnia and Herzegovina, Denmark, Croatia, Estonia, Finland, France, Germany, Greece, Hungary, Macedonia, Latvia, Lithuania, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain and Sweden.

A chapter entitled: National legislative framework contains processed answers of the Macedonian and Lithuanian Parliament, whose criminal codes recognize illicit acquirement and concealment of assets as a criminal offence (Macedonia), respectively illicit enrichment (Lithuania), followed by the responses provided by Hungary and Romania, where illicit enrichment is regulated by other legal acts, and conclusively, the responses provided by Croatia, Portugal, Serbia and Sweden which have mentioned certain proposals in the area or deliberations on the possibility of introducing this criminal offence.

In order to make valid comparisons with other European countries, the answers provided by the following countries, whose legislation does not contain provisions defining illicit enrichment, but it defines other criminal offences involving corruption, have been processed and presented in the research paper: Albania, Belgium, Denmark, Estonia, France, Greece, Germany, Poland, Slovakia, Slovenia and Spain.

Parliaments of Austria, Bosnia and Herzegovina, Finland and Latvia stated that their legal systems haven't criminalised illicit enrichment of public officials, neither are there any suggestions towards its criminalisation.

In addition to the aforementioned chapter, the structure of this paper covers a part dedicated to relevant international framework, respectively definition of illicit enrichment provided by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances from 1988, United Nations Convention against Transnational Organized Crime from

International Agreements", No. 12/2005

http://www.paragraf.rs/propisi/zakon_o_ratifikaciji_konvencije_ujedinjenih_nacija_protiv_korupcije.html (15 march 2016)

⁹ At the 18th meeting of the Committee on Political System, Judiciary and Administration, held on 14 June 2013, under the discussion on the Proposal for a Law on Amendments to the Criminal Procedure Law, there was a consultative hearing regarding the need to incriminate actions of illicit enrichment of public officials. *Minutes from the second joint meeting of the Anti-Corruption Committee and Committee on Political System, Judiciary and Administration, held on 15 May 2015.*

¹⁰ Further information regarding the consultative hearing may be found in the *Minutes of the Second Joint Meeting of the Anti-Corruption Committee and the Committee on Political System, Judiciary and Administration, held on 15 May 2015.*

¹¹ ECPRD Request 3094, *Illicit Enrichment of Public Officials*, 24 March 2016

2003, United Nations Convention against Corruption from 2005, The Inter-American Convention against Corruption, African Union Convention on Preventing and Combating Corruption, and Council of Europe Framework Decision from 2005.

The research paper also covers the main findings, respectively the summary involving the definition of illicit enrichment of public officials, provided by their criminal codes and other legal acts, as well as the existence of proposals towards its criminalisation in the countries covered by the research.

1. MAIN RESEARCH FINDINGS

Out of 23 countries which provided answers to the questionnaire submitted by the Research Centre of the Parliament of Montenegro, only Lithuania's, respectively Macedonia's Criminal Code have defined illicit acquirement and concealment of assets as a separate criminal offence. The remaining 21 countries (Albania, Austria, Belgium, Bosnia and Herzegovina, Denmark, Estonia, Italy, Finland, France, Greece, Croatia, Latvia, Hungary, Germany, Poland, Portugal, Slovakia, Slovenia, Serbia, Spain and Sweden) do not provide for such specific definition of criminal offence in their relevant legal acts.

Lithuania introduced this criminal offence in 2010, specifically Article 189 of Criminal Code envisages the punishment of public officials and all other physical persons who cannot justify the origin of their assets exceeding the specified limit. The limit is calculated on the basis of a Minimum standard of living (MSL), which amounts up to 500MSL, respectively 60,000 €. A fine, as well as imprisonment of four years shall be proscribed for all persons committing such criminal offence.

Macedonia's Criminal Code establishes illicit acquirement and concealment of assets as an offence. Contrary to Lithuania, Macedonia doesn't have a clearly defined limit, since the acquired income is significantly higher when compared to lawful income. Therefore, in Macedonia, failure to declare the assets, providing false data on the assets of public officials or his/her family members, and acquirement of such assets while in office, shall be punishable. A fine shall be prescribed as a sanction for this criminal offence, as well as imprisonment of six months up to five years in cases when the income is significantly higher than the lawful income, and also imprisonment of one up to eight years if the income is to a great extent higher when compared to lawful income.

There is the particular case of Romania, where the criminal offence of illicit enrichment hasn't been introduced by the Criminal Code. However, this country established by a separate law the National Integrity Council and National Integrity Agency, management authorities tasked to conduct oversight of public officials' assets and assets of their families, in order to prevent their illicit enrichment. Although illicit enrichment in Romania does not involve criminal responsibility, it does invoke the following legal consequences: confiscation of property, disciplinary sanctions, and informing the competent tax authorities thereof. Illicit enrichment was defined as a criminal offence by a separate law until 2010, following which the Romanian Constitutional Court reached a decision declaring such provisions unconstitutional, thus nullifying criminal responsibility for illicit enrichment.

Civil Code of Hungary defines illicit enrichment in the wider sense, where illicit enrichment involves acquisition of benefits through unlawful means, while causing damage to another, and the sanction for performing such action is reimbursement of the acquired assets to the aggrieved party, without defining the action more specifically.

In a number of analysed countries, illicit enrichment was recently considered by legislative

and/or executive power, however, it was not criminalized. Such is the case in Croatia, Portugal, Serbia and Sweden.

Serbia has not criminalised illicit enrichment of public officials, however, the Action Plan for the implementation of the National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018 envisages certain amendments to the Criminal Code introducing this criminal offence. In addition, in December of the previous year, a Proposal for a Law on origin of property was submitted to the Parliament of Serbia, aimed at introducing verification of assets of public officials exceeding the amount of 100, 000 €.

In March of 2015, the Law on verification of the origins of assets and special taxation imposed on illegally acquired assets was proposed to the Parliament of Croatia. However, the Government provided a negative opinion on this proposal, stating as a reason that issues concerning this subject are already regulated by other legal acts concerning taxation. Following the Government's negative opinion, the proposal did not receive the required majority from members of the Legislation Committee, neither members of the Finance and Central Budget Committee.

The same situation is in Portugal, where several legislative initiatives have been introduced during the previous parliamentary mandate by different parliamentary groups with the aim of criminalizing illicit enrichment. The proposal was not supported by the competent committee in one particular case, while the Speaker submitted two proposals for law to the Constitutional Court of Portugal, which declared the proposed solutions unconstitutional.

The Government of Sweden, mindful of the relevant provisions of the United Nations Convention against Corruption, considered the criminalisation of illicit enrichment, however, this was not realized, due to the conclusion that such provisions would impose a burden on the suspect to prove his/her innocence, which goes against the principle of presumption of innocence, as a universally acknowledged principle.

When it comes to the remaining countries covered by the research, despite the fact that each country acknowledges a certain number of related criminal offenses involving prevention of corruption and abuse of official position, their legislation does not recognize illicit enrichment as a criminal offence, neither there have been any deliberations with regard to the possibility of its introduction in their legal systems.

The complete document in Montenegrin language can be found at:

<http://www.skupstina.me/images/dokumenti/biblioteka-i-istravanje/2017/3.pdf>