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Corruption in eastern European judicial systems and its effects on proceedings in other countries

Abstract

In the context of the provision of mutual legal assistance, prosecutors, judges and criminal defence lawyers are frequently confronted with criminal proceedings established in east European countries inside or outside the EU. For this reason, coercive measures are regularly requested and often even taken in western countries on the basis of these foreign proceedings. Allegations that proceedings in some east European countries have been manipulated, or even completely fabricated, have become increasingly common. So far, research and teaching have focused on politically motivated procedures, but this article addresses the influence over legal procedures in western countries resulting from bribes paid to east European officials. Referring overtly to 'eastern Europe' in general, the authors use a field report, drawing on their experience and practice in German-speaking countries, to describe the potential for abuse in this area. They call on judicial systems in western countries to advance cautiously in such proceedings and to pay close attention to the paperwork and procedures in the country which is seeking assistance.

Keywords*: mutual legal assistance, eastern Europe, judicial systems, corruption, bribery,*

Introduction

For prosecutors and courts in countries such as Austria, Liechtenstein, Germany and Switzerland – all German-speaking countries but with an experience that is common across western Europe – requests for mutual legal assistance from east European countries, especially in the area of criminal proceedings for white collar crime, are now part of daily work (Wilkitzki 1995). However, questions arise in particular in relation to legal proceedings in east European states with high rates of corruption as to the circumstances under which these investigating authorities and courts have made their decisions. There are often allegations that judges in these countries have been bribed or even that entire proceedings have been fabricated (Mungiu-Pippidi 2018). For defence lawyers, prosecutors and judges throughout the German-speaking world, such things are starting to form a major challenge (Teichmann 2021).

While there is a legitimate interest in providing legal assistance, as western countries should not become a haven for criminals and their criminal assets, it must also be avoided for foreign criminals to have the opportunity indirectly to control proceedings in western countries via bribes paid to their officials in their own countries (Cape and Namoradze 2012). An example of this would be an accusation of embez-

zlement drawn up in eastern Europe with the seizures, or even independent money laundering proceedings, taking place in German-speaking countries. In a worst case scenario, this could lead to unjustified coercive measures taking place in the latter as a result of corrupt judicial systems in eastern Europe (Schmidt-Pfister and Moroff 2013).

One of the challenges for defence lawyers is to prove that proceedings against their own clients have been influenced by corruption. The prosecution and the court also have a vested interest in not allowing themselves to be instrumentalised in this way. Thus, defence lawyers, prosecutors and judges have an equal interest in questioning how corrupt are judicial systems in eastern Europe and to what extent it is possible for criminals to manipulate proceedings in western Europe. This article takes a look at the circumstances under which it is possible to influence criminal proceedings in east European countries through corruption, or even to have them fabricated entirely, and what effects this could have on judicial systems in western, specifically German-speaking, countries. Conclusions and recommendations for defence lawyers, prosecutors and judges follow.

State of research, the research gap and research objective

The definition of corruption and its causes has been extensively addressed in the existing literature (Shleifer and Vishny 1993; Jain 2001; Treisman 2000). For the purposes of this article, reference is made to the definition of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) (OECD 1997). The definition, set out in Article 1, paras 1 and 2, should also apply to domestic public officials and has indeed been adopted in criminal law throughout the German-speaking world. There is widespread agreement that large parts of east Europe remain corrupt (see the Corruption Perceptions Index)[1] while, in east European judicial systems, corruption is also widely known (Batory 2012). The negative economic effects and associated limitations on legal certainty have also been well examined (Svensson 2005; Mauro 1995; Glaeser and Saks 2006; Bardhan 1997).

It has been acknowledged in the case law that has been developed so far that proceedings in some east Europe countries may sometimes appear artificial. However, the focus has always been on politically motivated proceedings.[2] Media attention has been increasingly concerned with allegations of politically motivated proceedings, resulting in very little attention being paid to proceedings which are contrived or manipulated for reasons other than political ones.

In the context of European and international arrest warrants in particular, it has been shown that the considerable shortcomings encountered in criminal proceedings in eastern Europe pose a major challenge for the judiciary in German-speaking coun-

1 The 2021 Index, accessed 20 June 2022, is available at: https://www.transparency.org/en/cpi/2021.

2 See the various judgments of the European Court of Human Rights in, for example: Navalnyye v. Russia, no. 101/15 (2017); Merabishvili v. Georgia, no. 72508/13 (2017); and Karácsony and Others v. Hungary, nos. 42461/13 and 44357/13 (2016).

tries.[3] It has also been pointed out in the literature that the judiciary in German-speaking countries can, under certain circumstances, be abused by foreign states or criminals.[4] However, such countries continue, for the most part, willingly to provide legal assistance in criminal proceedings right across eastern Europe.[5]

The effects that the weaknesses of judicial systems in eastern Europe may have on criminal proceedings in other countries have not, however, yet been adequately described in the literature. There has also been insufficient analysis of how criminal proceedings in east European countries can be fabricated or manipulated in practice and the impact that this may achieve in the countries providing legal assistance in the sense of the coercive measures that can be applied there.

There is, therefore, a significant research gap. This gap has practical relevance because defence lawyers need to have adequate bases on which to build their argumentation, while prosecutors and courts need to have a reliable foundation for their own decision-making. It is important that the possible effects of corruption in east European judicial systems on the administration of justice in western countries be critically examined and that this research gap be at least partially eliminated. This article aims consequently to discuss the weaknesses of judicial systems in eastern Europe and their impact on the administration of justice in western countries. It aims to provide a basis for prosecutors, defence lawyers and courts to justify the denial of justice in the context of possibly manipulated or rigged proceedings and is also intended to create a starting point for further investigation.

Methodological approach

Quantitative empirical research methods in which to close the research gap we have identified are out of the question as it seems impossible to test suitable hypotheses. It is highly unlikely that judicial officers in eastern Europe would want to provide honest information about their own (criminal) behaviour, even in the context of anonymised, multi-country surveys. For this reason, qualitative research methods are more likely to be the focus of attention (Creswell 2014: 183ff; Crouch and McKenzie 2006; Bowen 2005; Tewksbury et al. 2010; Buckler 2008), with a 'dark field' (Froschauer and Lueger 2003: 17) forming the basis of investigation. It is not sufficient to evaluate files from previous processes; these would have to be respective national files of origin to which access is generally not possible for reasons of availability as well as for the evident linguistic issues that arise. Moreover, it would not be easy to detect manipulations from the perspective of mere file analysis. Interviews with experts, a proven form of qualitative data collection, should also be excluded because the participants would not only be clients of offenders but also judges, police officers and prosecutors who are usually unwilling to report on their crimes, especially if they have not been convicted.

3 *Kuehne* GA 2018, 121; *Kuehne* StV 2018, 571.
4 *Kuehne,* GA 2020*,* 337.
5 See the legal assistance examples cited at the Swiss Federal Administration Index, accessed 20 June 2022 at: https://www.rhf.admin.ch/rhf/de/home/rechtshilfefuehrer/laenderindex.html.

If one does not want to capitulate in the face of these methodological hurdles, then a report on the practical experience gained in the field seems to make sense, at least as a cautious start. In the course of his work as a lawyer, the lead author has advised various very successful businessmen from eastern Europe – so-called 'UHNW individuals'[6] – who regularly have to struggle with the effects of corruption. Furthermore, in the course of his teaching activities,[7] he has held numerous valuable discussions with prospective and experienced prosecutors, judges, police officers and lawyers from various countries in eastern Europe. Discussions in the professional and academic environment have been held with more than fifty representatives from various countries throughout the east European region. Thus, diverse practical and relevant perspectives can be considered within the scope of a field report.[8]

Field report

In order to understand why it is possible to fabricate or manipulate criminal proceedings, one must first consider the process of selection for important posts as public officials which apply in the systems of some east European countries. It is also important to understand how bribery processes work to prevent discovery. It is also necessary to look at how evidence is constructed at the beginning of trials and, finally, to mention how criminals may be able to coordinate these procedures across several courts.

Staffing in east European judicial systems

According to experts, corruption in east European countries usually starts in university law faculties: in countries such as Moldova, Romania or Ukraine, the main obstacles to creating an effective and independent legal profession are the extremely low standards of legal education in universities (Skoryk 2019).

In the Republic of Moldova, for example, the Soviet legal tradition established more of a dictatorship of the law so that legal education did not even set out to produce judges or lawyers with high standards of integrity, but who were equipped rather to act only according to the will of the executive. As a result of Moldova's educational model, its law graduates are often insufficiently prepared to participate in a modern legal profession (Barrett 2021). This situation also applies to other east European countries.

It is therefore important to understand how to become a high-ranking prosecutor, judge or police officer in order to analyse why the judicial systems in these countries are particularly corrupt (Popova and Post 2018). Although it is possible to pass exams through honest study, many students choose to guarantee exam success by mak-

6 Ultra high net worth individuals are those with more than $30 million in assets.

7 At the National Academy of Legal Sciences in Ukraine and at the International Anti-Corruption Academy (IACA) in Austria.

8 It is expressly stated here that the experiences drawn on in this article stem from the academic and professional networks of the lead author; and that he has purposely refrained from sharing experiences from within his private capacity in order to make it impossible to draw conclusions about individuals.

ing a monetary contribution to the examiner (Heynemann et al. 2008). However, it is important to note that the high level of corruption in universities may also be due to university professors in eastern European countries having much lower incomes than those in western countries (Barrett 2021), contributing to an atmosphere in which monetary benefits from students are simply accepted (Heynemann et al. 2008). Entry into the civil service is usually based on possessing an excellent university degree, but this is by no means easy or transparent: it requires the experience of some kind of practical post depending on the desired position. For future judges, for example, this is a post as an assistant to an experienced judge. These traineeships are comparable to legal internships elsewhere. However, the traineeships usually last much longer and there is no moving around between different ones. Getting hold of a vacancy for such highly sought-after traineeships, eventually paving the way to lucrative jobs, usually takes excellent contacts and not inconsiderable financial means as such posts are often filled on the basis of personal recommendation.

To demonstrate gratitude for gaining a post as an assistant to a judge or as a clerk to a court, amounts such as $50 000 may be paid: an investment which is offset by fairly modest monthly earnings of usually around $1000. Aspiring judges who are still in training thus invest, at the beginning of their career, an amount that they are hardly able to earn legally in their chosen profession: the investment is only worthwhile if they can expect to earn this amount over and above providing for the necessities of life, even with the solicitation of bribes. Thus, experience shows that those who decide to enter public administration are primarily those who have the necessary network and financial means to pave their way.

After several years of practice, becoming a judge requires the passing of an exam allowing an applicant to become qualified for judicial office. This can cost between $50 000 and $150 000, depending on the subsequent position. It is of course possible to pass the exam without paying a bribe, but the chances of doing so are much lower; the safest way is to have a contact on the examination board and express gratitude there in the form of a payment.

The next step is to find a vacancy as a judge. This is extremely difficult as the market for such posts is competitive. The exam qualification is a prerequisite but it is not sufficient to guarantee a position as a judge; on the contrary, there is a lively trade in these posts with prices ranging from $50 000 to several million, the prices being negotiated and dependent on the subsequent earnings possibilities, especially from illegal sources, that the judge may make. Thus, positions in remote district courts are significantly cheaper than those in a large city. Commercial courts are considered particularly lucrative and, as a result, positions as a judge here are usually significantly more expensive.

The path described above shows that, in order to become a judge, a person should have sufficient financial resources and an adequate network. Secondly, such a career is likely to be open primarily to people who are prepared to pay for their education and for their subsequent positions of power. Of course, it is not impossible for an honest student from a poor and unconnected background to be able to follow this path. However, such cases are often exceptions. This has been recognised by the relevant ministries of justice: in Ukraine, for example, attempts have been made via a

Council of Europe programme to introduce judicial reforms that should help to eliminate corruption in the system.[9]

In many eastern European countries, and which is particularly the case in Moldova, there is hierarchical control over the career of each judge, both inside and outside the court. As a rule, judges are pressured by the heads of courts to join the system, sometimes in respect of evaluation or tenure. When a judge has the courage openly to criticise the judicial system, he will not have the support of colleagues and risks the loss of opportunities when applying for promotion or tenure (Anti-Corruption Resource Centre 2021).

Under the considerable pressure of EU accession, reviews of judges have been instituted in several east European countries (Coman 2014) based, in addition to theoretical examinations, on discussions with an expert commission. Such discussions were focused, among other things, on the lifestyle of the judges as well as any previous disciplinary violations. These reforms were supposed to contribute to ensuring professional quality and the personal suitability of the judges but, instead, the reforms brought welcome additional income for all the members of the commission: in order to remain a judge, these assessments had to be passed and, according to reports, commission members were open to judges' gratuities. Thus, many ended up bribing the commission and, although the reform was aimed at eliminating corruption in the judiciary, the opposite was achieved (Mendelski 2015). Furthermore, while judges who had consistently demanded bribes for years were able easily to afford to bribe the members of the commission, honest judges who had, after years of refusing to take bribes, only their regular salaries at their disposal thus did not have the financial means to do so. Therefore, it can be said that these reforms did nothing more than clear the courts of the few judges who were not corrupt since the honest ones left the system because they failed the assessment.

Similar mechanisms to those described above exist as regards police and prosecutors. On the basis of significant investments that should, and must, pay off in order to maintain a certain standard of living on a limited salary, a large proportion of those who have become prosecutors or police officers need to recoup their investment in their careers by accepting bribes. This establishes a deep acceptance of corruption as a part of the system.

Although not yet part of the European Union, Moldova, considered one of the most corrupt countries in eastern Europe, has also adopted strong legislation in the attempt to combat corruption and to try to ensure that judges are independent. As a result of these efforts, salaries have been increased considerably while a performance appraisal system has been introduced. However, outdated structures and the persistence of practices of corruption in Moldova show that real independence among the judiciary is far from guaranteed (Anti-Corruption Resource Centre 2021).

9 See 'Support to the implementation of the judicial reform in Ukraine', accessed 20 June 2022 at: https://www.coe.int/en/web/cdcj/co-operation-projects/judicial-reform-ukraine.

The bribery process

A certain caution is now required when paying bribes; in the past, people openly asked for money for certain services, and this was accepted practice, but it is now the case that much more caution is being exercised. It has come to this point because corruption units have repeatedly laid traps for important officials (Chadee et al. 2021).

This raises the fundamental question of the prosecution of instances of corruption, particularly of individuals. In the cases of the rare examples that exist, this can serve noble purposes: corruption investigations may be used to get rid of disagreeable public officials (Herrera and Rodriguez 2007). However, senior public officials have frequently found their own ways around the problem. These explanations apply similarly to prosecutors and senior police officers but, putting the focus again on judges, it is clear that, as a rule, judges only accept bribes from people they know personally and that, when an unknown person tries to offer them a bribe, they will flatly refuse. This makes it much more difficult for investigators to set a trap for public officials. Judges prefer to accept bribes from people they have known personally for many years, for example, lawyers or, at least, their colleagues.

As a result, anyone who wants to bribe a judge they don't know personally will try to contact them via another judge and it can happen that a whole series of judges are involved in a single bribe: lawyer A knows judge A, but needs a favour from judge F. This leads him not to approach judge F directly, but to approach judge A first. Unfortunately, judge A does not personally know judge F and so approaches judge B who, in turn, knows judge C. Judge C personally knows judge D, who is a close friend of judge E, who does know judge F. Such long chains naturally increase the price with each of the judges involved receiving their own share of the cake.

It can also be said that the risk of discovery increases considerably because of the large number of people involved in such operations. But there is a common interest in keeping these strictly secret, as everyone involved would lose their jobs if caught. In our experience, knowledge chains naturally operate not only between judges at the same level, but also between courts. These networks would then also be maintained with senior officials in other agencies.

Often, presidents of courts exert pressure (for a fee) on their judges. For this reason, the judges in charge have the choice of acting according to the instructions of the president of the court or risking their expensive paid job.

It can therefore be said that some judicial systems, especially those in eastern Europe, are extremely corrupt (Chadee et al. 2021). The descriptions of the route to becoming a judge or accessing a senior position in the police or in prosecutors' offices, as well as the procedures for planning bribery, show that corruption is strongly present in these countries. These explanations help understand why a certain degree of caution is necessary when it comes to interpreting decisions in corrupt countries.

The manipulation and fabrication of criminal proceedings

Just because the system is corrupt does not mean that all the decisions made in a country can be questioned: there is the possibility that judges and prosecutors, de-

spite a high level of corruption, may have reached the right decision. However, this article aims to illustrate why, when it comes to decisions in foreign criminal proceedings, great caution is required. In some east European countries it is possible, for personal or economic reasons, to fabricate criminal proceedings against innocent parties and for these to reach a conclusion in which the accused is found guilty (Terziev et al. 2020).

Usually, when a person wants to build a criminal case against another, they first contact the police with a tip-off or an 'anonymous' complaint, leading to the person accused being charged with various offences. The police would begin an ambitious investigation thanks to a generous donation and the first evidence would be built during this investigation. Planting drugs during a seemingly random stop for a traffic violation is one popular approach. The next step is to bring charges against the accused while the prosecutor can also be very ambitious as a result of a financial contribution. Accepting the bribe was not particularly difficult in such a case as the records indicated that the defendant was in possession of narcotics or may even have been distributing them. The bribe to the prosecutor may be useful, however, because the defendant may not as a result be able to buy a way out. The same goes for the judge in charge, who is also grateful for the bribe and finds the defendant's statement that the narcotics were planted in the boot of his car to be an implausible claim. This example shows how easy it is to start a credible criminal case against an innocent person.

For these reasons, the pressure on honest judges in east European countries is growing (Stoyanov et al. 2018). There will always be a risk that they will be replaced by corrupt judges – after all, they are the ones who best serve high-level decision-makers. And honest judges are barely protected from political or other pressures (Terziev et al. 2020). In western countries, a judge who is threatened by a party would usually immediately inform the police and the prosecutor's office, whereas in some cases in eastern Europe we must first ask who has already been bribed by that party. It is common for politicians to try to put pressure on judges.

However, even corrupt judges are not immune to surprises. Not infrequently, anti-corruption investigations seem to serve the purpose of replacing a corrupt judge with one who is even more corrupt: if judge A paid $100 000 for a position and judge B offers $300 000 for the same position, judge A may have to leave the post because of suspicions of corruption, leaving judge B to take over.

Discussion

Dealing with foreign criminal proceedings at home

Western countries often face requests for mutual legal assistance in international economic criminal proceedings in eastern Europe. For this reason, it must also be taken into account that there is a wide spectrum of criminal proceedings being handled in these countries (Coman 2014). The effects of these proceedings, both at home and abroad, are far-reaching. They may, however, be brought into question in the context of particular coercive measures asked for within the framework of the provi-

sion of mutual legal assistance and requests for custody with a view to extradition on the basis of a judgment in a foreign court.

The question automatically arises as to how criminal proceedings in eastern European countries should be treated in western ones: there are a large number of legitimate requests for mutual assistance but, at the same time, it must be assumed that there are also many requests for mutual assistance based on 'facts' which have been contrived or manipulated. At this point, the debate starts on how to distinguish between rigged and legitimate procedures. In politically motivated proceedings, the distinction may still succeed under certain circumstances. On the one hand, these proceedings have the advantage that the presumed political motivation is usually comprehensible on the basis of objectifiable criteria, which is why prosecutors and judges in western countries view foreign criminal proceedings of politically exposed persons with scepticism; on the other, politically exposed persons often also have the resources to challenge foreign criminal proceedings.

For the defence lawyer, the evidence-base in such cases is extremely precarious, as it is difficult to prove in western countries the acts of corruption being described. As a rule, all that remains is careful analysis of foreign submissions with regard to procedural errors but, in particular also, the unsubstantiated submissions of incriminating facts.

The question may be raised of why anyone would try to attack a wealthy citizen who does not have political office. There is a wide range of possible answers such as competitive business battles, envy or personal dislike. It can be very tempting to remove an unpleasant business partner this way. It can be concluded that there is a not inconsiderable risk that foreign criminals will abuse judicial authorities in western countries to get rid of their competitors. Asset freezing with subsequent money laundering procedures, the confiscation of business documents and extradition warrants can serve this purpose. Thus, competitors are kept busy defending themselves in unjustified criminal proceedings in western countries leaving the criminals who initiated these proceedings free to take over their business.

Particular caution is needed with regard to foreign criminal proceedings, as it is already clear that the judicial system in western countries can be misused for dishonest purposes by foreign criminals. Of course, in justified cases, it is important to provide legal assistance. But the judicial system in western countries ought in principle not to be instrumentalised in this way by foreign criminals.

Fabricated and manipulated foreign proceedings in the everyday life of courts in western countries – a realistic scenario?

The reader might well wonder how common the scenarios described above are in practice. Personal experience suggests that they often correspond to practice and local usage. This can be plausibly explained: the potential benefit to foreign criminals is exorbitantly high: disagreeable business partners can be detained; asset freezes restrict the liquidity of competitors; and, at the same time, criminals can gain access to confidential documents that enable them to conduct advantageous business transactions. At the same time, the risks are extraordinarily low. The probability of criminals being caught red-handed and prosecuted abroad is not particularly high. As not-

ed above, corruption within the judiciary in east European countries ensures that judges, prosecutors and police officers can be bribed. Thus, even if criminals are caught trying to bribe a public official, corruption within the judicial systems of these countries will most likely allow them to buy their way out.

In conclusion, it can be said that the model described herein is extremely attractive to criminals. Judicial systems that are corrupt right from the beginning of training and up to the sale of judge positions struggle with natural adverse selection, attracting corrupt office holders and often eliminating non-corrupt officials. Officials who have made significant investments to gain and keep their positions are always open to further earnings.

However, a precise quantification of prevalence cannot be made on the basis of a field report.

Conclusions and recommendations

Of course there are honest prosecutors, judges and police officers in east European countries. However, one can assume that extraordinarily corrupt judicial systems are still being battled in others. Although these countries have recognised the problems that have developed, their previous efforts to fight corruption in the judiciary have, in many cases, failed. This has to do, among other things, with the route to certain posts already being highly corrupt and, consequently, adverse selection taking place. In the context of the reforms which have been made in this area, it has often been the case that only civil servants who have taken substantial bribes in the past have had the resources to pass assessments. It can therefore be said that judicial systems in some east European countries remain highly corrupt.

The question therefore arises of how to deal with the situation in which the national judicial systems of western countries are misused to imprison innocent people and have their assets and documents confiscated at the request of criminals: one which is clearly not in the interests of legal certainty.

Great caution is thus advised when dealing with foreign criminal proceedings, especially in respect of those established in east European countries. While there is a well-founded interest in providing legal assistance in legitimate criminal proceedings, it is not in the interests of western countries for foreign criminals to be able to store and invest criminal assets without hindrance. Nor is there a desire to create a safe haven for foreign criminals in western countries protecting them from imprisonment in countries with a high risk of corruption.

In theory, the answer to these questions would be to provide legal assistance only in the case of legitimate criminal proceedings. However, how should courts proceed when legitimate criminal proceedings can barely – or not at all – be distinguished from ones that have been contrived? This cannot be dealt with conclusively. If an accused person makes a well-founded claim that criminal proceedings against him or her abroad have been fabricated, this must immediately be examined in greater depth instead of simply granting a request for mutual assistance. Nor must the urgency claimed by the requesting state, for the purpose of avoiding loss of evidence, be taken as a reason to decide positively on a request without a more intensive examination. In particular, the observance of procedural human rights (e.g. with reference to

Articles 5 and 6 of the European Convention on Human Rights), as well as the justification structure in the determination of evidence and its assessment, should be examined in close detail.

In order to fight corruption more effectively, one possible solution would be categorically to refuse mutual legal assistance to highly corrupt countries. This could ensure that judicial systems in western countries are not abused. But this solution is far too intrusive and does not favour political discourse between states. It is also very difficult to find a valid index that convincingly establishes the level of corruption required to substantiate such a level of (non-)intervention. Thus, the only approach to address such problems and keep within the rule of law remains the obligation to examine documentation and procedural processes in the requesting foreign country particularly carefully.

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