Der Tatbestand der unerlaubten Bereicherung (illicit enrichment) in Art. 20 des UN Anti-Korruptions-Übereinkommens

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A. Introduction

Over the last years, Germany and other EU Member States have reformed their anti-corruption laws quite substantially. Some of these amendments were driven by current events and corruption scandals, which are the usual catalysts for reforms of the criminal code. Others, however, were necessitated by those countries' ratification of the United Nations Convention against Corruption (UNCAC).[1] However, even 20 years after the adoption of the Convention, not all the criminalisation provisions in Chapter III of the Convention have been transposed into national law. In particular, one

1 United Nations Treaty Series, vol. 2349, p. 41. The Convention was adopted by UN General Assembly resolution 58/4 of 31 October 2003. It currently has 189 parties (at 1 October 2022), including the European Union. All EU Member States are parties to the UNCAC. Ratification is also a requirement for accession to the EU. Germany was the last EU Member State to ratify the EU, as the definition of „*Amtsträger*" was too restrictive compared to the large definition of "public official" in Art. 2(a) of the Convention. In particular, the German notion of *Amtsträger* does not include Members of Parliament (unlike the situation in Austria, where the definition was amended to include parliamentarians). As a consequence, Germany adopted § 108e StGB ("Bestechlichkeit und Bestechung von Mandatsträgern") to bring its legislation in line with Art. 15 UNCAC.

2 The only EU Member State to have done so appears to be Lithuania. In a judgment dated 15 March 2017, the Constitutional Court of the Republic of Lithuania held that Art. 189[1] of the Criminal Code is not in conflict with the Constitution (https://lrkt.lt/en/court-acts/search/170/ta1688/content). However, it should be noted that the Court stated that "an owner's inability to reasonably explain his/her property in relation to his/her legitimate income is not sufficient to hold him/her guilty" (para. 39.4). See also *S. Bikelis*, Chasing criminal wealth: broken expectations for the criminalization of illicit enrichment in Lithuania, Journal of Money Laundering Control 25(1), p. 95-108. Moreover, in France, Art. 321-6 of the Criminal Code provides, under additional circumstances, for criminal liability of a person who is unable to justify the income corresponding to his/her lifestyle. The Court of Cassation has upheld this provision.

article stands out: almost no EU Member State[2] has implemented Art. 20 UNCAC, entitled "illicit enrichment".[3]

According to that article, each State Party to the Convention shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, "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".

The problems with this provision are obvious: a person can be punished for something he or she "cannot reasonably explain". This seems to put the onus squarely on the defendant; a shift in the burden of proof that seems hardly compatible with the presumption of innocence, which prescribes that the prosecution has to prove its case to the requisite standard.

Recognising this problem, the drafters of the Convention have caveated the article with a double proviso: even though the article only contains an obligation to consider the establishment of the offence, any obligation is subject both to the constitution of the respective state party and to the fundamental principles of its legal system.

However, if the provision is so problematic, why was it included in the Convention at all? And does it contain any useful elements that could be implemented? In her 2022 State of the European Union Address, Commission President *Ursula von der Leyen* announced that in the following years, the Commission would present measures to update the EU's legislative framework for fighting corruption. In particular, she said that the Union would "raise standards on offences such as illicit enrichment, trafficking in influence and abuse of power, beyond the more classic offences such as bribery".[4] Interestingly, these are precisely the three offences in the Convention that Germany has chosen not to implement (at least not in stand-alone provisions of the German Criminal Code, StGB).[5] Von der Leyen's words seem to indicate that the offence of illicit enrichment should be studied further and that, EU Member States might have to deal with proposals on that matter coming from Brussels. This would not be the first time that the criminalisation of illicit enrichment has been suggested.

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3 The German translation is „unerlaubte Bereicherung", not to be confused with „ungerechtfertigte Bereicherung" (§ 812 BGB) and „unerlaubte Handlung"(§ 823 BGB), which are both concepts of private law, not criminal law.

4 Speech delivered in Strasbourg on 14 September 2022, accessible here: https://ec.europa.eu/commission/presscorner/detail/ov/speech_22_5493.

5 By contrast, Austria has criminalised "verbotene Intervention", § 308 öStGB, and "Amtsmissbrauch", § 302 öStGB.

The first attempt to criminalise illicit enrichment was apparently made in Argentina in the 1930s.[6] In 1964, Argentina and India became the first countries to establish the offence. In the following years, more countries, mainly in Latin America, Africa, and South-East Asia followed their example. In 1996, the Inter-American Convention against Corruption (IACAC) was the first international treaty to include the concept. Art. 20 is modelled on Article IX of IACAC, which contains an almost identical definition of illicit enrichment but is worded as a mandatory provision ('shall take'), subject, however, to the same double proviso as the Convention article.[7]

From a law enforcement perspective, the advantages of the offence of illicit enrichment are obvious: Corruption offences are notoriously difficult to prove. Unlike more traditional offences, there is no crime scene and no obvious victim. The commission of the offence may be in the interest of both parties and their collusion is further strengthened by the fact that both sides are liable to criminal sanctions. The offence of illicit enrichment thus aims to respond to obvious evidentiary difficulties. This may be particularly relevant for countries whose law enforcement systems are underdeveloped and lacking resources.

While it is not difficult to identify the legal and economic interest that is protected by the offence of illicit enrichment, it is harder to determine what actually constitutes the criminal conduct (*actus reus*) that is criminalised.[8] It could be the possession of illicit assets or the failure (omission) to justify their lawful origin. The problem with the first approach is that the unlawful origin of the assets is only presumed. Likewise, it seems problematic to penalise the failure to rebut a presumption. However, it can be argued that an official has a duty inherent in his position to explain the origin of his wealth. Failure to discharge this duty when there are strong objective indicators that a part of the wealth comes from unlawful sources can be seen as a reprehensible act.

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6 L. Muzila, M. Morales, M. Mathias, and T. Berger (eds.), On the Take: Criminalizing Illicit Enrichment to Fight Corruption (World Bank 2012), p. 7 *et seq*.

7 Art IX reads: 'Subject to its constitution and the fundamental principles of its legal system, each state party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions'. Canada and the US deposited reservations regarding the article.

8 In that regard, there are parallels with the offence of money laundering.

B. Elements of the Crime

Any attempt to criminalise illicit enrichment in the EU would likely be based on Art. 20 of the UNCAC. Although that article comprises only one sentence it is not only the most controversial article in the entire Convention but also much more difficult to implement than it would appear at first glance.[9]

A superficial reading of the provision could suggest that once there is a significant increase in the assets of an official, the increase has to be justified in relation to his or her lawful income.

However, since the assets of an official are very likely to significantly increase over his or her time in office simply as a result of accumulated savings, this would subject almost all officials to the obligation to explain and thus run counter to the intention of drafters to ensure that the article would not be used unreasonably. This is all the more true as in many cases it will be almost impossible to explain the entire increase down to the last cent. Indeed, this would require meticulous bookkeeping of all income and expenditures over years, something that cannot reasonably be expected of a natural person.[10] Finally, this interpretation would further aggravate the reversal of the burden of proof because initially, the prosecution would simply have to prove a significant increase in assets and not that the increase is out of proportion to the lawful income.

Not any increase in the assets of a public official in relation to his or her lawful income is punishable. Rather, the requirement of a 'significant' increase means there is a *de minimis* threshold below which the unexplained increase, although potentially illegal, is not considered illicit enrichment in the sense of the Convention. The burden of proof for establishing a significant increase rests with the prosecution. However, the prosecution does not only have to establish a significant increase in the assets of the defendant during his time in office but also that the increase is significant 'in relation to his or her lawful income'. In other words, it has to prove a significant *unaccounted* increase in assets.[11]

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9 For more details, see *O. Landwehr*, Article 20, in: C. Rose/M. Kubiciel/O. Landwehr (eds.), The United Nations Convention against Corruption: A Commentary, Oxford University Press 2019.

10 Even if the official was subject to an obligation to submit asset declarations, he would also have to keep track of all his expenditures to precisely explain the increase.

11 For more details, see *O. Landwehr*, Article 20, in: C. Rose/M. Kubiciel/O. Landwehr (eds.), UNCAC (Fn. 9), p. 227 *et seq*.

Thus, the unaccounted increase that needs to be explained is the difference between total actual assets and total savings (original assets plus lawful income reduced by the necessary expenditures) accumulated over the period in office. This is what the prosecution has to establish.

In practice, it will be very difficult for the prosecution to prove a significant unaccounted increase in the assets of a public official in the absence of asset declarations.[12] While it should be relatively straightforward to establish the lawful income as a public official, the total assets at any given moment may be far higher because the official already owned some assets when she entered office, or because she had additional income. Even assuming the existence and amount of such assets would have to be explained by the defendant (*quod non*), it would be difficult for the prosecution to disprove.

C. *The Reversal of the Burden of Proof*

Once the prosecution has established its case, the burden shifts to the defendant to explain this significant increase. The accused has to explain the origin of the excess assets, i.e. the unaccounted increase or the difference between total assets and total savings accumulated over the period in office. What the defendant will have to do exactly to discharge this burden depends on the nature of the obligation to explain.

As pointed out earlier, the wording of Art. 20 leaves the *initial* procedural burden of proof untouched: the prosecution has to establish a significant increase in the assets of a public official in relation to his or her lawful income. The prosecution also bears the risk of a *non liquet* with regard to this element. If it is not clear if there was an unaccounted increase in assets or whether it was significant, any doubt has to benefit the defendant. However, once the prosecution has cleared this hurdle, it is up to the defendant to 'reasonably explain' the unaccounted increase. This not only entails a *procedural* obligation to adduce evidence for the lawful origin of the excess assets, but also an obligation to prove their lawful origin to the requisite standard ('reasonably'). If the defendant fails to do so, these assets will be considered to be of illicit origin—even though the prosecution did

12 Tax declarations may be helpful in the absence of asset declarations. However, depending on the tax system, these may only contain information on *income*, not on *assets*.

not prove this—and he will be convicted.[13] Unlike in the case of self-defence, it is not enough for the accused if it cannot be *excluded* that the assets are of lawful origin. If the origin remains unclear (if there is a *non liquet*), he will be convicted. Any doubt in the mind of the judge as to the lawful origin of the excess assets will not work in favour of the defendant but *against* him. The obligation to explain thus entails a reversal of the *substantive* burden of proof. If understood this way, it can also be called a rebuttable presumption.

The question is thus not whether the offence of illicit enrichment infringes the presumption of innocence but whether this infringement is capable of justification. Arguably, presumptions to the detriment of the defendant may only alter the standard of proof or the appreciation of the evidence before the court but may never entail a full reversal of the burden of proof. Moreover, the essence of a human right may never be infringed.[14] If justification is allowed at all, it essentially boils down to a question of reasonableness and proportionality. This will also depend on the values of a society and the socio-economic context of the legal system. Countries where corruption is not so rampant and especially those with advanced legal and economic systems may not see such an overriding need to sacrifice fundamental rights and freedoms on the altar of countering corruption. Due to more advanced investigative capabilities, their evidential difficulties may also be less grave.

D. Better Alternatives

Given the constitutional problems inherent in the criminalisation of illicit enrichment, it may be preferable to find alternatives to the establishment of this offence. For instance, while the pure illicit enrichment offence is only based on the unexplained increase in the official's assets, criminal provisions could drop the obligation to explain and require the prosecution to demonstrate the unlawful origin of the increase. However, such an offence would not remedy the evidentiary difficulties and presents little or no added value.

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13 Unlike money laundering, the prosecution does not even have to show the *existence* of a predicate offence.

14 Cf. e.g. Art. 52(1) EU Charter of Fundamental Rights; *Murray v United Kingdom*, App no 18731/91, 8 February 1996, para. 49.

Indeed, many states believe that the introduction of an offence in accordance with Art. 20 is unnecessary.[15] Quite apart from the difficulties of monitoring the private wealth of public officials, these officials may already be subject to a number of criminal offences such as bribery, fraud, embezzlement, or money laundering (which have no *de minimis* thresholds) as well as an offence of misconduct in public office. The offence of illicit enrichment will not add much to those offences.

By contrast, it may be very effective to introduce an income and asset disclosure system and establish criminal or administrative sanctions for incorrect declarations or non-compliance with the obligation to submit them.[16]

Moreover, confiscation regimes can be very effective tools in the fight against organised crime and corruption: States can introduce value-based confiscation (in case the original proceeds have disappeared) and extended confiscation provisions which allow for the confiscation of any illicit property (i.e. not only the proceeds of the crime for which the accused stands trial)[17] or any property for which the accused cannot prove the licit origin.[18] The former approach means that the prosecution does not

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15 E.g. the United Kingdom, cf. UNCAC review report (cycle 1) of the UK, <https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fgbr.html > (para 139). See also *D. Wilsher*, Inexplicable Wealth and Illicit Enrichment of Public Officials, Crime, Law, and Social Change (2006) 45, p. 27, who argues that there is no need for a specific crime of inexplicable wealth but advocates for a special rule of evidence in corruption crimes.

16 See the experience of Latvia and Romania, in: OECD, Fighting Corruption in Eastern Europe and Central Asia. Asset Declarations for Public Officials. A Tool to Prevent Corruption (2011) http://www.oecd.org/corruption/anti-bribery/47489446.pdf. On asset disclosure in general, see I. M. Rossi, L. Pop, T. Berger (eds.), Getting the Full Picture on Public Officials: A How-to Guide for Effective Financial Disclosure, Washington D.C.: World Bank 2017.

17 Cf. the extended confiscation provision in Art. 5 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union; for an example of implementation see e.g. § 73a StGB (§ 73d StGB old version in force until 2017); § 74c StGB for value confiscation.

18 Art. 31(8) UNCAC. Cf. also Art. 12(7) of the United Nations Convention against Transnational Organized Crime (UNTOC); Art. 5(7) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; for an example of implementation see e.g. UNCAC review report (cycle 1) of Switzerland, https://www.unodc.org/unodc/en/corruption/country-profile/countryprofile.html#?CountryProfileDetails=%2Funodc%2Fcorruption%2Fcountry-profile%2Fprofiles%2Fche.html, (p. 34). Australia, Ireland and the UK have introduced Unex-

have to link specific assets to a specific offence, thus reducing evidentiary difficulties. While the latter provision contains a reversal of the burden of proof, this is less controversial because confiscation is often considered not a penal—but rather a preventive—measure and thus not subject to the same strict guarantees.[19] An increasing number of states parties (especially from the common-law tradition) are introducing non-conviction-based confiscation (also called civil or *in rem* forfeiture).[20]

Finally, it may be possible to establish an administrative offence that does not imply the same degree of moral reprehensibility but can entail substantial fines. Given that the offender can only be an official, it is conceivable to establish not only asset declaration obligations but also an administrative offence in the civil service statute and provide for disciplinary measures.

E. Outlook

From the foregoing, it appears that in most countries, a criminalisation of illicit enrichment in the sense of Art. 20 UNCAC is neither possible nor desirable. In advanced, Western democracies with extensive human rights protection and rule of law guarantees, its implementation is impossible because of the conflict with the presumption of innocence. Even if the infringement of that principle was capable of justification, however, following the interpretation outlined above (i.e. that the prosecution needs to establish not only a significant increase in assets but a significant *unaccounted* increase), the burden for the prosecution would remain considerable, thereby reducing the usefulness of the offence.[21] The latter aspect would, in principle, also apply to countries whose Constitution would allow a reversal of the burden of proof.

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plained Wealth Orders, which compel an individual to explain the source of his wealth.

19 Cf. judgment of the German Constitutional Court of 14 January 2004, Case no. 2 BvR 564/95, on the constitutionality of § 73d StGB (old version in force until 2017).

20 Cf. UNODC, State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation, 2nd ed., Vienna 2017, p. 57–58. For a civil law country, cf. Germany's § 76a StGB.

21 See also *S. Bikelis*, Prosecution for illicit enrichment: the Lithuanian perspective, Journal of Money Laundering Control 20(2), p. 203-214, who finds that collecting sufficient evidence of illicit enrichment satisfying the criminal standard of proof is an extremely difficult task for the prosecution.

Moreover, there exists a certain paradox: if a country is serious about fighting corruption and improving governance – should it employ means that are questionable from the point of view of human rights protection and the rule of law? If at all, this only seems acceptable for a transitional period, for instance after a regime change from a corrupt, autocratic regime to a democratic government that needs to clean up the civil service but lacks the capacity and resources to establish proof of bribery in a great number of cases. In all other cases, the much better alternative is to overhaul the legislative framework for confiscation and allow for value-based and extended confiscation. Even if that does not put criminals behind bars, its sends the powerful message that crime does not pay.