



Delegation of the European
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AMICUS CURIAE BRIEF

submitted pursuant to Article 69 (3) of the Law of Ukraine
“On the Constitutional Court of Ukraine” concerning the
Constitutional Petition (No. 1/12-2017, 12 December 2017) as
to the compliance of Article 368-2 CC of Ukraine with the
Constitution of Ukraine

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Table of contents

1. Interest of the Amicus Curiae	4
2. Summary of Argument	5
3. Argument	9
3.1. INTERNATIONAL STANDARDS AND DISCUSSION REGARDING ILLICIT ENRICHMENT	9
3.2. HISTORY AND DEVELOPMENT OF ILLICIT ENRICHMENT AS A TOOL TO COMBAT CORRUPTION	11
A. Global developments	11
B. Developments in Ukraine	15
3.3. COMPLIANCE OF THE CRIMINAL OFFENCE OF ILLICIT ENRICHMENT WITH CONSTITUTIONAL AND FUNDAMENTAL RIGHTS STANDARDS APPLICABLE IN UKRAINE	16
A. Presumption of innocence	17
B. Protection against self-incrimination	24
C. Principle of Fair Trial / Equality of Arms	28
D. Principle of Legality	29
E. Double jeopardy (non bis in idem)	36
F. Principle of non-retroactivity	41

1. Interest of the Amicus Curiae

As a response to the Euromaidan protests in 2013/2014 in Ukraine, the Council of the EU, after an invitation issued by the Ukrainian government, decided to launch the European Union Advisory Mission Ukraine (EUAM). EUAM formally began operations from its headquarters in Kyiv on 1 December 2014 as a non-executive mission under the common security and defence policy of the European External Action Service of the EU. EUAM supports and assists the Ukrainian authorities towards a sustainable reform of the civilian security sector through strategic advice and practical support for specific reform measures based on EU standards and international principles of good governance and human rights. Anti-Corruption and the strengthening of criminal investigations is at the very core of the EUAM mandate and the Mission has frequently engaged in providing strategic advice on legislative as well as practical aspects related to these issues.

In 2017, the European Union launched the “EU Anti-Corruption Initiative” (EUACI), currently the largest EU-funded and Denmark-co-funded and implemented technical assistance programme in the area of anti-corruption. The overall objective of EUACI is to improve the implementation of anti-corruption policy in Ukraine, thereby ultimately contributing to reduction in corruption. EUACI is a three-year program (2017-2019) for strengthening the capacity of newly created anti-corruption institutions and for enhancing external oversight of the anti-corruption reform process by the Verkhovna Rada, the civil society and the media.

The importance which the EU attaches to the fight against corruption in Ukraine is also reflected in various political processes, including in the EU-Ukraine Association Agreement and the Visa Liberalization Action Plan.¹ Moreover, the State Building Contract provided by the EU to Ukraine in 2014-2015 required, among other things, the alignment of the criminalization of illicit enrichment with UNCAC.² In its First Report under the Visa Suspension Mechanism issued in December 2017, the EU stressed that, despite the fact that the visa liberalisation benchmarks continue to be fulfilled, “immediate actions need to be taken in order to ensure full implementation and sustainability of past reforms, in particular as regards the anti-corruption benchmark.” One of these reforms includes the adoption of the new anti-corruption legislative framework that, among other, entailed the criminalization of illicit enrichment.

The EU Delegation and EUAM believe that this Amicus Curiae prepared by EUAM and EUACI-funded experts can provide the Constitutional Court with a useful analysis and legal arguments on the constitutionality of criminalisation of illicit enrichment, which will help the Court in the deliberation of the constitutional petition at issue.

¹ See particularly Article 3, 14, and 22 of the Association Agreement, Official Journal of the European Union, L 161/3, 29.05.2014.

² European Commission, “Commission Implementing Decision on a Special Measure 2014 in favour of Ukraine to be financed from the general budget of the European Union”, Doc. No. C(2014)2907 final, 29.04.2014.

2. Summary of Argument

The Constitutional Petition of 12 December 2017 argues that Article 368-2, para. 1 Criminal Code of Ukraine (CC) is in contradiction with the following constitutional principles: the protection against self-incrimination, the presumption of innocence, the principle of fair trial / equality of arms, the principle of legality, the principle of non bis in idem and the principle of non-retroactivity.

A general observation with regard to the arguments provided in the Constitutional Petition is the general nature thereof. The Constitutional Petition does not explore the essence and relevance of the respective legal principles with regard to the contested provision of the Criminal Code, nor does it analyse in depth the relevant case law of the European Court of Human Rights (ECtHR) or foreign constitutional practice.

It is submitted that the Constitutional Petition also incorrectly interprets the contested legal provision of the Criminal Code and disregards the presumption of constitutionality, the latter requiring to assess possibilities to interpret the criminal provision at stake in a manner in which it would be compatible with the constitutional requirements.

International standards and recommendations recognise the significance of criminalising illicit enrichment as an effective tool to prevent and combat corruption. A number of international standards recommend and encourage countries to at least consider such criminalisation. It can be argued that by introducing the offence of illicit enrichment into its Criminal Code, Ukraine exercised its sovereign rights in fulfilling obligations deriving from various international treaties and other commitments. Ukraine used its wide margin of appreciation in matters of political, economic and social policy and addressed the public interest in fighting corruption through the criminalisation of illicit enrichment. Such a policy decision is in line with several international treaties (including the United Nations Convention against Corruption - UNCAC) and more than 45 countries globally established criminal liability to combat accumulation of unexplained wealth by public officials. Ukraine first established the offence of illicit enrichment in 2011 and then revised it in 2014 to comply with international recommendations.

After analysing the criminal offence of illicit enrichment in light of the relevant case law of the ECtHR and the foreign constitutional practice, as well as domestic context and developments, the following arguments are provided for supporting the Constitutional Court of Ukraine in its decision making:

■ PRESUMPTION OF INNOCENCE:

The Constitutional Petition submits that Article 368-2 CC violates the right to be presumed innocent because it shifts the burden of proof from the prosecution to the accused. It follows from the specific wording of the illicit enrichment offence in Ukraine and the jurisprudence of the ECtHR and constitutional courts of other countries that Article 368-2 CC does not envisage any reversal of the burden of proof and, therefore, does not violate the presumption of innocence.

Unlike the wording of the UN Convention against Corruption (UNCAC) (“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”), Article 368-2 CC does not require the defendant to explain the origin of his income, nor to provide any other justification or information. The CC provides a higher standard of protection for the defendant compared with the relevant provision in UNCAC. The provision refers to the evidence that should establish the lack of lawful sources of acquiring significant assets owned by a public official. Such evidence, according to the criminal procedure rules of Ukraine, should be collected by the public prosecution and presented to the court. With the illicit enrichment offence, the primary responsibility to present substantiated evidence of the offence remains with the prosecutor. If the prosecution builds a prima facie case and manages to demonstrate that the public official could not have acquired the assets by using lawful sources of income, then the public official is entitled to demonstrate the lawful origins of the assets in question. Only the public official would be in possession of information that can overturn the prima facie case. In this case, the public official is in the best possible position to explain how the assets in question were acquired. Besides, there is a strong public interest in allowing reasonable and proportionate presumptions of law to prosecute corruption, in particular in the form of illicit enrichment, as long as such presumptions are rebuttable and substantiated by prima facie evidence presented by the prosecution.

■ PROTECTION AGAINST SELF-INCRIMINATION:

The Constitutional Petition submits that the offence of illicit enrichment violates the protection against self-incrimination, a constitutional right stipulated in Article 63 of the Constitution of Ukraine. First, Article 368-2 CC does not require from the defendant to provide any explanation nor does it directly compel the defendant to provide information. The defendant has the right but is not obliged to provide an explanation about the origin of assets that the prosecution alleges to be illicit. The Criminal Code provision, as such, does not set any burden of proof for submitting evidence. This is regulated by the criminal procedure rules solely. Second, even if such explanation was required by Ukrainian law, this would not constitute a violation of the right not to self-incriminate. It follows from the ECtHR jurisprudence that this right is not absolute and the law may not be found in abstract violating this principle only because it allows (indirectly in the case of Article 368-2 CC) to draw inferences from the defendant’s failure to provide an explanation to the prima facie case built by the prosecution. Finally, adverse inferences may be drawn from the silence of the defendant when the facts of the case clearly call for an explanation from the person, if such silence is not the main ground for finding the defendant guilty. The level of compulsion and the public interest in investigating corruption make drawing such inferences acceptable. Such presumptions of law, at the same time, do not amount to the reversal of burden of proof that remains on the prosecution.

■ PRINCIPLE OF FAIR TRIAL / EQUALITY OF ARMS:

The Constitutional Petition challenges Article 368 -2 CC for violating the principle of fair trial and equality of arms. Considering that Article 368-2 CC of Ukraine does not envisage a reversal of the burden of proof, it does not compel self-incrimination from the defendant in a criminal case for illicit enrichment

and, therefore, does also not negatively affect fair trial guarantees. The defendant has the right to provide an explanation in response to the prima facie case developed by the public prosecution that includes a rebuttable presumption of unexplained wealth. A court may draw adverse inferences from the lack of such explanation, but such inferences are proportionate and reasonable and cannot be the sole basis for the conviction. Similarly, nothing in the illicit enrichment offence as such denies the suspect/accused any safeguards accorded to him by the criminal procedure rules, including the right to present his defence, employ legal counsel and other guarantees under the equality of arms principle. As the burden of proof is not shifted and remains with the prosecution, no disadvantage is placed on the defendant. It remains his right to testify and provide an explanation that would challenge the case built by the prosecution.

■ PRINCIPLE OF LEGALITY:

The Constitutional Petition submits that Article 368-2 of the CC violates the principle of legality because its disposition is allegedly unclear and ambiguous because it does not provide a clear and comprehensible definition of the grounds of acquisition of assets in ownership.

It is the view of the Amicus Curiae that the mentioned element of illicit enrichment – an increase of assets in significant amount, the legitimacy of which is not confirmed by evidence – is sufficiently clear from the wording of Article 368-2, para. 1 CC: the provision can be interpreted as providing for criminal responsibility only when it is proven that a significant increase in assets could not have been acquired with legitimate income; therefore, only after verifying all possible methods of acquisition of assets, it is proven that the accused person was unable to receive a significant amount of income from his or her activities not prohibited by law. Second, the accused person, if not himself or herself, then with the assistance of a lawyer, is capable of ascertaining the said content of Article 368-2 CC as well as of distinguishing legitimate income from illegitimate, of identifying activities prohibited by law, and of understanding which evidence may be used to prove the legitimacy or illegitimacy of his or her income. Third, the special status of the accused – the status of a person entitled to perform functions of a state or local self-government (a public official) – must also be taken into account: public officials are aware of the standards of higher integrity, applicable to them while in office, as well as the corresponding duties to declare and justify their income according to procedures laid down by national law. In cases where certain legislative ambiguities or contradictions were to arise, it is the primary duty of the judicial authorities to resolve them by consistent and foreseeable judicial interpretation and application of criminal legislation.

■ PRINCIPLE OF NON BIS IN IDEM:

The Constitutional Petition claims that Article 368-2 CC is incompatible with the non bis in idem principle because it allegedly establishes the “repeated responsibility for the action that became the source of such enrichment”. In the view of the Amicus Curiae, the main idea behind the criminalisation of illicit enrichment is to remove the requirement to prove a connection between the action taken by a public official and the eventual benefit received in exchange for the action. This means that the absence of proof of a justified

increase in assets is a sufficient element for criminal responsibility to arise. Criminal prosecution for illicit enrichment does not require a simultaneous prosecution for a predicate crime, i.e. for criminal responsibility to arise under the latter provision only the absence of justification of a significant increase in assets is required, and not the commission by the accused of other concrete crimes or offences.

In addition, the following arguments can be adduced: First, the Petition does not provide sufficient arguments as to the necessary presence of the element of *bis* (duplication of proceedings) in the *corpus delicti* of illicit enrichment. For criminal responsibility to arise only the absence of justification of a significant increase in assets is required but not the commission by the accused of the predicate offence. Second, the Petition does not prove whatsoever the presence of the element of *idem* (the presence of the same offences), even in cases when illicit enrichment is directly connected to other concrete crimes; it is reasonable to suppose that illicit enrichment and other criminal activities, which may be the cause of illicit enrichment, arise from substantially different facts and are distinguished by different *corpus delicti* elements. Third, the Petition also does not address the issue of parallel proceedings that are not excluded by the *non bis in idem* principle. Finally, the determination as to whether the offences are the same is, primarily, the matter of a concrete case and depends on a facts-based assessment.

■ PRINCIPLE OF NON-RETROACTIVITY:

The Constitutional Petition submits that Article 368-2, para. 1 CC possibly violates the principle of legality in the aspect of non-retroactivity of the effect of law, i.e. the criminal offence of illicit enrichment applies to legal relations that existed prior to its adoption.

The relevant element of this offence is the action of acquiring of assets (significant increase thereof), to which the time when it is considered to have been committed is linked. First, Article 368-2 CC should be interpreted in the light of other provisions of the CC, establishing the general rules of the application of criminal law in time. Following such interpretation, there is no ground to assert that the definition of illicit enrichment implies its retroactive application. It should be presumed that the acquiring of assets of a significant amount has to be committed after the entry into force of Article 368-2 CC. Second, the conformity of the contested provision with the principle of non-retroactivity may also be confirmed by qualifying the criminal offence of illicit enrichment as a continuous offence. Criminal responsibility for illicit enrichment can be applied to instances when the acquiring of assets of a significant amount is completed after the date of entry into force of Article 368-2 CC, even if one or more acts of acquisition of parts of such assets had been committed prior to this date. Third, it may be argued that Article 368-2 CC, with respect to the introduction of criminal responsibility for illicit enrichment, is compatible with the principle of non-retroactivity, as Ukraine had, indeed, not introduced any new concept but rather regulated anew, in a more efficient manner, the existing measures aimed at the prevention and eradication of corruption in the public service.

3. Argument

3.1. INTERNATIONAL STANDARDS AND DISCUSSION REGARDING ILLICIT ENRICHMENT

As the Parliamentary Assembly of the Council of Europe noted in its resolution, corruption remains a major problem in Europe, which poses a serious threat to the rule of law; it jeopardises the good functioning of public institutions and diverts public action from its purpose; it disrupts the legislative process; affects the principles of legality and legal certainty; introduces a degree of arbitrariness in the decision-making process; and has a devastating effect on human rights.³ Considering these very severe consequences of corruption, international treaties and other instruments recognise the need to combat corruption through criminal law measures. Some of these instruments, including those to which Ukraine is a state party, call on the member states to implement various effective tools to prosecute corruption offences and deprive its perpetrators of illicit gains through confiscation.⁴ It is against this backdrop that the issue of constitutionality of the illicit enrichment crime should be assessed.

Illicit enrichment is one of such criminal enforcement tools that found its place in the multilateral anti-corruption conventions. Particularly the UNCAC, as the most universally accepted instrument that was adopted in 2003 and entered into force in 2005, stipulates in Article 20 that

“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”.

Unlike other regional conventions, the UNCAC leaves it to the respective State Party to decide whether to criminalise illicit enrichment, thus it is a non-mandatory offence. However, as noted in the Legislative Guide to the UNCAC, the establishment of illicit enrichment as an offence has been found helpful in a number of jurisdictions. It addresses the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where his or her enrichment is so disproportionate to his or her lawful income that a prima facie case of corruption can be made. The creation of the offence of illicit enrichment has also been found useful as a deterrent to corruption among public officials.⁵ The Guide also acknowledges that “the non-mandatory nature of the offence under the UNCAC effectively recognizes that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law. However, the point has also been clearly made that there is no

³ Parliamentary Assembly of the Council of Europe, Corruption as a threat to the rule of law, Resolution 1943 (2013), 26 June 2013. Available at <https://bit.ly/2wu6wc1>.

⁴ Among such instruments that are especially relevant to Ukraine: The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), which entered into force in Ukraine on 1 May 1998; United Nations Convention on Transnational Organized Crime (UNTOC), which entered into force in Ukraine on 21 May 2004; United Nations Convention Against Corruption, which entered into force in Ukraine on 1 January 2010; The 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198), which entered into force in Ukraine on 1 June 2011.

⁵ UNODC, Legislative Guide for the Implementation of the United Nations Convention against Corruption, Second Revised Edition 2012, para. 296.

presumption of guilt and that the burden of proof remains on the prosecution, which has to demonstrate that the enrichment is beyond one's lawful income. It may thus be viewed as a "rebuttable presumption". Once such a case is made, the defendant can then offer a reasonable or credible explanation."⁶

Also the Inter-American Convention against Corruption, adopted by the Organization of American States in 1996, includes as the first regional convention the criminal offence of illicit enrichment. Article IX of the Convention provides that, 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 offence 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. Among those States Parties that have established illicit enrichment as an offence, such offence shall be considered an act of corruption for the purposes of this Convention.

Similarly, the 2003 African Union Convention on Preventing and Combatting Corruption, in Article 8, provides that, subject to provisions of their domestic law, State Parties undertake to adopt necessary measures to establish under their laws an offence of illicit enrichment.

Almost all international organisations consider the offence of illicit enrichment as one of the best practices for combatting corruption. The Organisation for Security and Cooperation in Europe (OSCE), mentions the criminalization of illicit enrichment as a best practice example and an "illustration of how some States Parties are using legal tools to overcome corruption challenges".⁷ The Organisation for Economic Cooperation and Development (OECD) noted in 2016 that an offence of illicit enrichment may be a powerful tool in prosecuting corrupt officials, as it does not require proving that the corruption transaction actually happened and instead allows the court to draw inferences from the fact that an official is in possession of unexplained wealth, which could not have been gained from lawful sources.⁸ The OECD recommended to "consider establishing an offence of illicit enrichment through a rebuttable presumption of the illegal origin of any assets that cannot be explained by the official with reference to legitimate sources".⁹

In September 2017, in its Resolution on corruption and human rights in third countries, the European Parliament noted that the status quo of corruption and illicit enrichment in positions of state power has led to power-grabbing and the perpetuation of kleptocrats in power. It, therefore, stated that misuse of public funds, illicit enrichment or bribery should be punishable by specific additional sanctions under criminal law.¹⁰

Also, the World Bank noted that "there is an increasing tendency to criminalize the possession of unexplained wealth by introducing offences that penalise any (former) public servants who are, or have been, maintaining a standard of living or holding pecuniary resources or property that are significantly disproportionate to their present or past known legal income and who are unable to produce a satisfactory ex-

⁶ *Ibid.*, para. 297.

⁷ OSCE, Handbook on Combating Corruption, 2016, pp. 190 and 196; OSCE, Best practices in combating corruption, 2004, Chapter 12 "Criminal Law.

⁸ OECD, Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2013-2015, 2016.

⁹ *Ibid.*, page 159.

¹⁰ Available at <https://bit.ly/2wsUX17>.

planation for this. [...] the offence of “illicit enrichment” or “unexplained wealth” has become an accepted instrument in the fight against corruption.”¹¹

It is precisely for these reasons that international organisations and monitoring mechanisms have recommended to Ukraine to introduce the illicit enrichment offence in line with the UNCAC. For example, the UNCAC review report on Ukraine welcomed the establishment of the offence of illicit enrichment in the domestic legal order.¹² In its Third Round Monitoring report on Ukraine under the Istanbul Anti-Corruption Action Plan, the OECD’s Anti-Corruption Network for Eastern Europe and Central Asia welcomed the fact that following the amendments in 2014 and 2015, Ukraine revised the offence of illicit enrichment with the wording that “seem to reflect the concept promoted by the UNCAC”.¹³ In addition, the State Building Contract provided by the EU to Ukraine in 2014-2015 required, among other things, the alignment of the criminalization of illicit enrichment with UNCAC.¹⁴ A similar condition was included in the IMF programme of financing for Ukraine.¹⁵

It can be argued, therefore, that by introducing the offence of illicit enrichment into the Criminal Code, Ukraine exercised its sovereign rights in fulfilling obligations deriving from various international treaties and other commitments. According to well-established jurisprudence of the European Court of Human Rights, it is for States to choose, in the first place, how to organise their respective legal systems, including criminal justice procedures¹⁶. States have a “wide margin of appreciation” in matters of political, economic and social policy and the legislator must be given a wide discretion, both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate application of those measures. In this context, it can be argued that the public interest of Ukraine in fighting corruption warranted criminalisation of illicit enrichment.

3.2. HISTORY AND DEVELOPMENT OF ILLICIT ENRICHMENT AS A TOOL TO COMBAT CORRUPTION

A. GLOBAL DEVELOPMENTS

The rise of economic crime, including corruption, during the past decades has posed a new challenge due to the nature of such crimes. Economic crimes are different from other offences because the perpetrators aim to obtain a benefit, seldom cause any direct harm to a victim, and it is difficult to link assets involved to a specific criminal source. Moreover, persons who may have information about the economic crime are

¹¹ World Bank, Anti-Corruption Toolkit, 2001, p. 213.

¹² The review report analyzed the 2011 wording of the offence. The report noted that the national authorities confirmed that the burden of proof to demonstrate that the enrichment is beyond the lawful income of the perpetrator remained on the prosecution. “With the aim to assist the national authorities to fully benefit from their commendable initiative to criminalize this conduct, the reviewing experts also noted the significance of ensuring in future further clarity and consistency in applying article 368-2 CC.” Source: UNODC, Country Review Report of Ukraine, 2013, pages 7-8, available at <https://bit.ly/2jLpvW8>.

¹³ OECD, Anti-Corruption Network for Eastern Europe and Central Asia, Third Round Monitoring Report on Ukraine, 2015, pages 48-49, available at <https://bit.ly/2wtkBX0>.

¹⁴ European Commission, Commission Implementing Decision on a Special Measure 2014 in favour of Ukraine to be financed from the general budget of the European Union, Doc. no. C(2014)2907 final, 29.04.2014.

¹⁵ See e.g. <https://bit.ly/2KP8hDL>.

¹⁶ See e.g. European Court of Human Rights, *Taxquet v. Belgium* [Grand Chamber], application no. 926/05, Judgment of 16 November 2010, para. 83.

often complicit in it. Those who are involved in the criminal action, e.g. public officials, tend to have significant power and resources that they can use to disrupt investigation or hide ill-gotten gains. Thus, challenges to the gathering of evidence and the serious risks posed by corruption prompted the development of new instruments, including the offence of illicit enrichment.¹⁷

The main idea of the criminal offence of illicit enrichment is to remove the requirement to prove a connection between the action taken by a public official and the eventual benefit received in exchange for the action. Bribery and other corruption offences are usually secret acts whose parties are reluctant to reveal them due to obvious reasons. Once an illegal benefit was obtained it becomes a very difficult task to prove that the unexplained wealth of a public official is a result of the specific criminal activity, even though such wealth may be the most visible sign of it. Even if bribery is proven, it is equally difficult to establish that specific assets derived from the offence and should be confiscated.

The offence of illicit enrichment was first adopted in Argentina in 1964.¹⁸ The same year an equivalent of the offence was enacted in India.¹⁹ In 1971, Hong Kong criminalised illicit enrichment (“Possession of unexplained property”) in the Prevention of Bribery Ordinance and has very successfully enforced it since.²⁰ Since then many countries have introduced the offence of illicit enrichment in their criminal laws, and currently about 45 countries worldwide rely on the instrument for tackling corruption.²¹ Examples of national legal frameworks include:

- **Lithuania** established the offence of illicit enrichment in its Criminal Code in 2010 (Article 189-1): “A person who holds by right of ownership the property whose value exceeds 500 minimum subsistence levels [about EUR 19,000], while being aware or having to be and likely to be aware that such property could not have been acquired with legitimate income, shall be punished by a fine, or by arrest, or by the deprivation of liberty for up to four years. A person who takes over the property referred to in Paragraph 1 of this Article from third parties shall be released from criminal liability for illicit enrichment where he/she gives a notice thereof to law enforcement institutions before he/she is served a notice of suspicion and where he/she actively cooperates in determining the origin of the property.” Such property is subject to mandatory confiscation. If the property’s value is less than the established threshold for the person will be ordered to pay taxes from the assets and may be sanctioned in administrative proceedings with a fine from 10 to 50% of the property’s value. Under Article

¹⁷ Jayawickrama et al., Legal provisions to facilitate the gathering of evidence in corruption cases: easing the burden of proof, Forum on Crime and Society, UNODC, Vol. 2 No. 1, 2002, p. 23.

¹⁸ Article 268 (2) CC of Argentina of 1964 provided: “Any person who, when so demanded, fails to justify the origin of any appreciable enrichment for himself or a third party in order to hide it, obtained subsequent to assumption of a public office or employment, and for up to two years after having ceased his duties, shall be punished by imprisonment from two to six years, a fine of 50 percent to 100 percent of the value of the enrichment, and absolute perpetual disqualification. Enrichment will be presumed not only when the person’s wealth has been increased with money, things, or goods, but also when his debts have been cancelled or his obligations extinguished. The person interposed to dissimulate the enrichment shall be punished by the same penalty as the author of the crime.”

¹⁹ Section 5(3) of the Prevention of Corruption Act of India laid out an evidentiary rule permitting the prosecution to demonstrate the perpetration of a corruption offense (bribery, trading in influence, misappropriation of public property, and criminal conduct in the discharge of duty) by showing that the accused (a) possessed assets disproportionate to his known income and (b) he did not have a satisfactory explanation for them. See further World Bank (Muzila L., Morales M., Mathias M., Berger T.), *On the Take. Criminalizing Illicit Enrichment to Fight Corruption*, 2012, p. 8 available at <https://bit.ly/2l56Lj7>. Later, in 1988, India adopted a stand-alone offence (Prevention of Corruption Act of 1988, Article 13) that reads: “A public servant is said to commit the offense of criminal misconduct, ... if he or any person on his behalf is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income. This offense is also punishable with a minimum imprisonment of one year, extendable up to seven years, and also with a fine.”

²⁰ The current wording of the offence (last amended in 2008): “Any person who, being or having been the Chief Executive or a prescribed officer—(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.”

²¹ See for an overview World Bank (Muzila L., Morales M., Mathias M., Berger T.), *ibid.*, Appendix B.

190 CC, the legitimate income referred to in Article 189-1 means income derived from activities not prohibited by legal acts, irrespective of whether or not it has been accounted for in accordance with the procedure laid down by legal acts.²²

- In 2012, **Kyrgyzstan** introduced in its Criminal Code the offence of illicit enrichment (Article 308-1 CC), i.e. a significant increase of the assets of an official that exceeds his legal income and that he cannot reasonably justify. The significant increase of assets means an amount of money, value of securities, other property or benefits of material or immaterial nature that 3,000 times exceeds the estimate indicator established by the Kyrgyz legislation at the moment when the crime was committed. The new Criminal Code of Kyrgyzstan (adopted in 2017, to be enacted on 1 January 2019) will change the wording of the offence to the following: “Acquiring by an official in ownership (use) of property the value of which exceeds his official income confirmed by lawful sources for the full two years, or transfer by him of such property to close relatives” (Article 323). The same article provides for the aggravated offence of illicit enrichment if committed by an official holding a responsible position or if the value of the property exceeds official income confirmed by lawful sources for the full five years.
- **Moldova** enacted Article 330-2 “Illicit enrichment” CC in 2014. It provides that possession by a public official, personally or through third parties, of property the value of which significantly exceeds the funds he received and with regard to which it was established based on evidence that it could not have been received legally. The amount of “significant” excess is not defined in the Criminal Code.
- **Mongolia** first introduced the criminal offence of “improvement in the financial state by illegal means” in 2012. A new Criminal Code of Mongolia (enacted in September 2016) included “Illicit Enrichment” (Article 22.10): “If a public official cannot justify major increase of his/her income and assets as lawful, such income and assets shall be confiscated and the relevant official’s right to be appointed shall be suspended for up to 2 years, and he shall be fined in an amount equivalent to from 450 units to 14000 units [1 unit equals about EUR 1] or the official’s right to travel shall be suspended from one month to three years or be imprisoned for a period from one month to three years.”
- In December 2016, **Armenia** amended its Criminal Code to introduce the offence of illicit enrichment (Article 310.1): “an increase in property and/or a decrease in liabilities, during the reported period, of a person who is obliged under the Republic of Armenia Law on Public Service to file a declaration—when such increase or decrease significantly exceeds his lawful income and is reasonably not justified by such income, and when features of another crime serving as a basis for illicit enrichment are absent”. For purposes of this article, “significant” is an amount (value) that exceeds 5,000-fold the minimal salary established at the time of the crime. The amendment was enacted on 1 July 2017.

From the above examples it follows that the law of Lithuania includes one of the broadest definitions of illicit enrichment, which covers not only public officials but extends to any person. As will be shown below, the Constitutional Court of Lithuania found such provision acceptable and compatible with the Constitution of that country.

²² OECD, *Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges 2013-2015*, 2016, pp. 88-89.

Several countries, while not having a criminal offence of illicit enrichment as provided in the UNCAC, introduced similar offences, for example:

- In **Georgia**, elements of the illicit enrichment can be found in the money laundering offence (Article 194 CC of Georgia). Money laundering is defined in Georgia as “the legalization of illicit income, i.e. giving a legal form to illegal and/or undocumented property (use, acquisition, possession, conversion, transfer or other action) for purposes of concealing its illegal and/or undocumented origin and/or helping any person to evade the legal consequences, as well as concealing or disguising its true nature, originating source, location, allotment, circulation, ownership and/or other related property right.” The “undocumented property” is defined as “property, also the income derived from that property, stocks (shares) [in relation to which] an offender, his/her family members, close relatives or the persons affiliated with him/her are unable to present a document certifying that the property was obtained legally, or the property that was obtained by the monetary funds received from the realization of the illegal property.” Under the Georgian system, there is no legal requirement to prove any predicate criminal act. According to Georgian authorities, the offence applies when the prosecutor shows that there is no evidence to establish the legitimate source of the property.²³

Georgian law also provides procedures for the forfeiture of property that are relevant for the illicit enrichment discussion: “criminal confiscation” and “administrative confiscation”. Criminal confiscation is of a general nature and allows for the deprivation of the objects of an offence and the instrumentalities of and proceeds from crime. It is imposed as part of the sentencing proceedings following a final conviction establishing the person’s guilt (confiscation in personam). The “administrative confiscation” was introduced in 2004 and was governed by the Code of Criminal Procedure and the Code of Administrative Procedure. It specifically allows to recover wrongfully acquired property and unexplained wealth from a public official, as well as from the latter’s family members, close relatives and so-called “connected persons”, even without a prior criminal conviction of the official concerned (confiscation in rem).

In *Gogitidze and others v. Georgia*²⁴, the European Court of Human Rights reviewed the compatibility of the administrative confiscation (civil proceedings in rem) for forfeiture of wrongly acquired property and unexplained wealth derived from proceeds of corruption offences in Georgia. Similar to a stand-alone criminal offence of illicit enrichment, forfeiture of unexplained wealth aims to prevent illicit enrichment through corruption and serves a deterrent purpose. In *Gogitidze*, the European Court dealt in detail with the public interest in fighting against corruption and relied on principles that may also be applicable to the assessment of the criminal offence of illicit enrichment.

- According to Article 321-6 of the Penal Code of **France**, the inability of a person to justify the income corresponding to his lifestyle, when he has authority over a minor who lives with him and who habitually commits felonies or misdemeanours against the property of others, is punished by five years' imprisonment and a fine of €375,000. The fine may be raised beyond €375,000 to reach half the value of the goods handled. Under Article 450-2-1, the inability by a person to justify an income

²³ OECD, *ibid.*, p. 91.

²⁴ European Court of Human Rights, *Gogitidze and Others v. Georgia*, application no. 36862/05, Judgement of 12 May 2015.

corresponding to his way of life, while being habitually in contact with persons engaged in activities set out under article 450-1 [Criminal association], is punished by five years of imprisonment and a fine of €75,000.

B. DEVELOPMENTS IN UKRAINE

It is widely acknowledged that corruption is pandemic and of systemic nature in Ukraine. It permeates all spheres of public life and has been even recognised a threat to national security.²⁵ The 2014 Law on the National Anti-Corruption Strategy determined that solving the corruption problem is one of the priorities of the Ukrainian society at the current stage of its development. It also recognised that corruption was among the reasons that led to the mass protests in 2013-2014. According to a recent national poll, corruption was cited as the most important issue facing the country (48 percent of respondents), followed by the military conflict in the Donbas (42 percent).²⁶

Such assessment is shared by the international organisations. For example, in its January 2017 resolution on Ukraine, the Parliamentary Assembly of the Council of Europe noted that the widespread corruption in Ukraine continued to be a main point of concern.²⁷ The European Parliament also strongly believed that an ambitious anti-corruption programme, including zero tolerance for corruption, was urgently needed in Ukraine; it stressed that the fight against this practice must become one of the top priorities of the new government.²⁸ Numerous other international reports also underline the high level of corruption in Ukraine.²⁹

Ukraine first introduced the offence of illicit enrichment in its Criminal Code in 2011. While it did not reflect properly the UNCAC definition of the offence³⁰, it criminalized the receiving of illegal benefit in significant amount by an official in absence of the elements of bribery or transfer of such benefit to close relatives. The current wording of Article 368-2 CC was introduced in October 2014 by the Law on the National Anti-Corruption Bureau of Ukraine that also amended a number of other legal provisions, including the Criminal Code. The new definition was part of an anti-corruption package that was passed to address the urgent issue of corruption in Ukraine. As was stated in the explanatory note to one of the draft laws which served as a basis for the new wording, “[l]iability for illicit enrichment is one of the most effective tools to counteract corruption, because it does not depend on detection and prosecution of specific corruption offences

²⁵ See, for example, National Security Strategy of Ukraine, Decree of the President of Ukraine no. 287/2015 of 26 May 2015, available at <https://bit.ly/2jQR00h>.

²⁶ IRI, Public Opinion Survey of Residents of Ukraine, January 2018, available at <https://bit.ly/2E3Vahb>.

²⁷ The Assembly also noted that the prolonged absence of marked and concrete progress in this area, including with regard to prosecutions and convictions, could potentially diminish the effects of the ambitious reform agenda of the authorities and, in the long run, undermine public trust in the political and judicial system as a whole. The Assembly welcomed the establishment of the main institutional framework to fight corruption in the country and expected this to lead to tangible and concrete results, including with regard to prosecutions and convictions. Source: Resolution 2145 (2017), 25 January 2017, available at <https://bit.ly/2E3Vahb>.

²⁸ Resolution of 15 January 2015 on the situation in Ukraine, available at <https://bit.ly/1Kl2015>.

²⁹ For example, the IMF in its 2017 analysis, having compared situation in Ukraine with other countries, concluded that the level of corruption in Ukraine was exceptionally high. “This can severely undermine economic growth prospects, in particular by hindering private investment. Reducing corruption is therefore essential to speed up the process of economic convergence to the rest of Europe. ... The Ukrainian authorities have recently adopted important measures that follow some of these best practices. They are, however, facing a number of specific challenges, including the concentration of political and economic powers in a small group of people which may hamper effective anti-corruption efforts.” Source: International Monetary Fund, IMF Country Report No. 17/84, Ukraine Selected Issues, April 2017, available at <https://bit.ly/2prTJh8>.

³⁰ See, among other assessments: OECD, Anti-Corruption Network for Eastern Europe and Central Asia, Third Round Monitoring Report on Ukraine, 2015, pages 48-49.

but is focused on the existence of excessive assets of a public official that cannot be explained by lawful sources of income”.³¹

So far, the enforcement of the illicit enrichment crime remains low. According to the National Report on the Implementation of the Anti-Corruption Policy, only six illicit enrichment offences were detected and investigated in 2016 and one in 2017 (data excludes statistics of the National Anti-Corruption Bureau - NABU). According to the NABU annual activity reports, in 2015-2017, the Bureau indicted two defendants and notified an additional one about suspicion for illicit enrichment.³²

3.3. COMPLIANCE OF THE CRIMINAL OFFENCE OF ILLICIT ENRICHMENT WITH CONSTITUTIONAL AND FUNDAMENTAL RIGHTS STANDARDS APPLICABLE IN UKRAINE

Before exploring specific arguments as to the compliance of the illicit enrichment offence with the constitutional guarantees, as a more general observation in terms of the impact of legal issue at stake, it is argued that the legal position in the case of illicit enrichment should take into account and be based on the anti-corruption potential and the constitutional duty of the State of Ukraine to combat corruption. The Constitutional Court of Ukraine, while examining the concrete issues raised in the Petition, has an opportunity to interpret the Constitution of Ukraine in light of the principles of good governance and transparency, which can be derived from the constitutional limitations on state power and the duty of public institutions to uphold the rule of law. Such legal position, while not replacing the specific arguments that follow, takes due account of the expediency and adequacy of criminal responsibility for illicit enrichment as an anti-corruption instrument.³³

It is also material that Article 368-2 CC does not contradict the requirements of proportionality, as one of the general rule of law principles, because it does not provide for a disproportionate or inexpedient measure of legal liability in light of its overall purpose. In response to a similar argument, the Lithuanian Constitutional Court clarified the proportionality of the criminal offence of illicit enrichment by highlighting that the legislator, exercising its wide discretion by introducing the criminal offence, implemented the criminal policy of the state with the clear purpose of making the commission of corruption unprofitable as well as to prevent damage caused by it on the state and the public.³⁴ Taking into account the factual situation in Ukraine regarding high-level corruption and the widespread existence of illicit wealth, the adoption of the criminal offence of illicit enrichment by the Ukrainian legislator is by no means disproportionate.

³¹ See explanatory note to the draft law No. 4573, available at <https://bit.ly/2rylir8>.

³² Source: <https://bit.ly/2wwEAE8>.

³³ Such approach can also be found in the judgment of the Constitutional Court of Lithuania (cited below) which pointed several times to the implicit constitutional principles of responsible governance and transparency, which are derived from the express provisions of the Constitution of the Republic of Lithuania declaring the constitutional limitations on state power and the imperative for state institutions to serve the people.

³⁴ Constitutional Court of the Republic of Lithuania, Ruling of 15 March 2017, no. KT4-N3/2017, para. 34.

A. PRESUMPTION OF INNOCENCE

Presumption of innocence is a fundamental right protected by global and regional international instruments, including Article 6 (2) of the ECHR to which Ukraine is a state party. The principle of the presumption of innocence requires, among others, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should be to the benefit of the accused. The presumption of innocence will be infringed where the burden of proof is shifted from the prosecution to the defence. According to the Constitution of Ukraine, a person is presumed innocent of committing a crime and will not be subject to criminal punishment until his or her guilt is proved through legal procedure and the verdict of guilt is established by a court. No one is obliged to prove his or her innocence of committing a crime.

(1) JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

With the increase of organized crime, drug trafficking, terrorism, corruption and other economic crime, in many legal systems the operation of statutory presumptions of law or fact have been considered necessary for the effective administration of criminal justice.³⁵ The extent of possible application of such presumptions has been explored in the ECtHR case-law, notably in the Court's judgment in *Salabiaku v. France*.³⁶ In *Salabiaku*, the Court reviewed a conviction based on the French Customs Code provision that criminalized possession of prohibited goods, under which the objective elements of the smuggling offence had been presumed from the proven fact of possession.

The Court noted that presumptions of fact or of law operate in every legal system and that the European Convention does not prohibit such presumptions in principle. The Court explained further:

*[The European Convention] does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. [...] Article 6 (2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.*³⁷

The finding in *Salabiaku* was confirmed in the case of *Falk v. the Netherlands*. The Court held that:

*"[A] person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence. [...] Thus, in employing presumptions in criminal law, the Contracting States are required to strike a balance between the importance of what is at stake and the rights of the defence; in other words, the means employed have to be reasonably proportionate to the legitimate aim pursued."*³⁸

³⁵ Jayawickrama et al. "Legal provisions to facilitate the gathering of evidence in corruption cases: easing the burden of proof", *ibid.*, p. 27.

³⁶ European Court of Human Rights, *Salabiaku v. France*, application no. 10519/83, Judgment of 7 October 1988.

³⁷ *Ibid.*, para. 28.

³⁸ European Court of Human Rights, *Falk v. the Netherlands*, application no. 66273/01, Judgment of 19 October 2004.

The distinction between the case where prima face evidence was provided and not was shown in the ECtHR judgments of John Murray v. UK and Telfner v. Austria. In John Murray³⁹, the Court noted that the

“question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused “calls” for an explanation which the accused ought to be in a position to give that a failure to give any explanation “may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty”. Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt.”

The Court held that, having regard to the weight of the evidence against the applicant, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence at the scene of the crime was

“a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. ... the courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. ... Nor can it be said, against this background, that the drawing of reasonable inferences from the applicant’s behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.”⁴⁰

In contrast, the ECtHR found that the burden of proof was shifted in Telfner⁴¹ where the accused who refused to give evidence to the police or at the trial was convicted of a road traffic violation on the basis that he was the driver of the car, despite the lack of direct evidence thereof. The Court took note of the fact that local courts relied on a report of the local police station that the applicant was the main user of the car and had not been home on the night of the accident. However:

“the Court cannot find that these elements of evidence, which were moreover not corroborated by evidence taken at the trial in an adversarial manner, constituted a case against the applicant which would have called for an explanation from his part. [...] In requiring the applicant to provide an explanation although they had not been able to establish a convincing prima facie case against him, the courts shifted the burden of proof from the prosecution to the defence.”

Hence, the ECtHR jurisprudence shows that presumptions of law or fact are acceptable, and they do not result, as such, in a violation of the presumption of innocence guarantees as long as the State remains within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence. The presumption of innocence is, therefore, not absolute and, if the prosecution builds a prima facie case that calls for an explanation, the accused’s silence can be used to draw inferences. The Court’s

³⁹ European Court of Human Rights, Joh Murray v. UK, application no. 18731/91, Judgment of 8 February 1996, para. 51.

⁴⁰ Ibid., para. 54.

⁴¹ European Court of Human Rights, Telfner v. Austria, application no. 33501/96, Judgment of 20 June 2001. See also European Court of Human Rights, Krumpholz v. Austria, application no. 13201/05, Judgment of 18 March 2010 (“...the drawing of inferences in a situation which did not clearly call for an explanation from the applicant and without sufficient procedural safeguards being applied violated the applicant’s right to silence and the presumption of innocence”).

jurisprudence also indicates that a violation of the presumption of innocence can be established only in a specific case and after analysis of the evidence adduced by the prosecution.

(2) CONSTITUTIONAL JURISPRUDENCE OF FOREIGN JURISDICTIONS

The issue of compliance of the illicit enrichment offence with the presumption of innocence standard was reviewed by constitutional courts of various countries. Most recently, in March 2017, in Lithuania (see definition of the offence above) the Constitutional Court ruled that⁴²:

“20. ... the prosecutor is under the obligation to prove that a criminal act has been committed, including the act referred to in Paragraph 1 of Article 189-1 of the BK [criminal code provision on illicit enrichment], and that the person who has committed it is guilty. The suspect/accused is not obliged to provide evidence and prove that the criminal act has not been committed and that he/she is not guilty of its commission but has the right to do so in the exercise of his/her right to defence. The court, following, inter alia, the principles of impartiality, adversarial argument, the presumption of innocence, and other requirements of the BPK [Criminal Procedure Code], is obliged to examine the case thoroughly, evaluate the evidence, and use it to support its judgment.

The fact that it is necessary to abide by the principle of the presumption of innocence and the resulting requirements when proving the body of the crime ... is also emphasised in the rulings of the Supreme Court of Lithuania. According to the interpretation provided in the rulings of the said court, while proving that property could not have been acquired with legitimate income, the principle of the presumption of innocence must not be violated... Following the principle of the presumption of innocence, the accused has no obligation to prove the legitimacy of his/her enrichment. To prove that the person held the relevant property by right of ownership being aware or having to be and likely to be aware that the said property could not have been acquired with legitimate income is the obligation of the accusing party... Therefore, as such, the owner’s inability to reasonably explain his/her property in relation to his/her legitimate income is not sufficient to hold him/her guilty. For this purpose, it is necessary to assess the data about the circumstances of the acquisition of the property, as well as the data related to the property owner and his/her family members – their life style, the type of, and years in, their working activities, businesses held, income included and, possibly, not included into accounting, loans taken by them, property inherited by them, their expenses, their relations with persons known to be engaged in illegal activities, etc. As far as the ability of the accused person to acquire the property with legitimate income is concerned, account should be taken not only of his/her own income, but also of the income of his/her family members, of the property situation and possibilities of accumulating the existing property over the entire working activities rather than only over a certain period of time...”

⁴² Constitutional Court of the Republic of Lithuania, Ruling on the compliance of paragraph 1 of Article 189-1 CC of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 March 2017, no. KT4-N3/2017, available at <https://bit.ly/2wAjKDM>. The constitutional courts of both Ukraine and Lithuania are members and founders of the Association of Constitutional Justice of the Countries of the Baltic and Black Sea Regions (BBCJ), which is based on the mutual commitment of its members towards the European democratic values and, according to its Statute, continually aims at, inter alia, enhancing the cooperation and the exchange of experience among its members in the implementation of constitutional justice (Art. 4, 5). Therefore, it would be a good practice of members of this organisation to take into due account the case law of the partner constitutional courts when considering constitutional cases of similar subject matter. In this regard, a Resolution of the 2nd BBCJ Congress of 1-2 June 2017 is also relevant, which once more confirmed the importance of exchange of experience between the participating courts.

“39.3. [...] Article 189-1 of the BK does not regulate the process of providing proof of this criminal act. As mentioned above, the said process is regulated by the rules of the BPK, under which the prosecutor is under the obligation to prove that the crime provided for in Paragraph 1 of Article 189 1 of the BK has been committed, while the court is obliged to examine the case comprehensively, evaluate evidence, and use the evidence to support its judgment. Implementing his/her right to defence, the suspect/accused has the right to give evidence and challenge the suspicions (charges) brought against him/her; however, the suspect/accused is not obliged to prove the fact that the criminal act of illicit enrichment has not been committed. It should also be noted that, as such, the situations where the suspect/accused opts to be silent may not be treated as aggravating his/her situation in criminal proceedings. Thus, it should be held that the legal regulation laid down in Paragraph 1 of Article 189 1 of the BK does not shift the burden of proof to a person suspected of (charged with) illicit enrichment, does not compel such a person to give evidence against himself/herself, and does not violate the principle of the presumption of innocence, as set out in Paragraphs 1 and 3 of Article 31 of the Constitution.”

In 2014, the Constitutional Chamber of the Supreme Court of the **Kyrgyz Republic** found no violation of the constitutional guarantee of the presumption of innocence with the offence of illicit enrichment⁴³. It should be noted that the illicit enrichment offence in Kyrgyzstan is similar to the definition contained in the UNCAC and directly refers to the public official not being able to justify the increase in assets as compared with his legal income (“significant increase of the assets of an official that exceeds his legal income and that he cannot reasonably justify”). The Constitutional Chamber ruled that:

“5. The corpus delicti of this offence takes place only when the official cannot justify the significant increase of his assets that exceed his legal income. The process of justification or proving the origin of such assets is carried out outside of the criminal proceedings and is a part of his obligations as an official [...] If the person provides evidence of the lawful nature of acquiring of property, the grounds for his criminal liability disappear. Respectively, the duty of the public official to justify the significant increase of his assets that exceed his legal income is a part of his duties and is performed within his official activity.

The need to prove the origin of his assets, as a duty of the civil servant, stems from his other duty – to disclose his income, assets and liabilities, the purpose of which is to detect and prevent corruption violations. Control over the accuracy of the information provided in the declarations of civil servants is carried out through the mechanism of their verification, which may include the obligation to explain the legality of the significant increase in their assets. Otherwise, the duty of disclosure of official's income becomes hollow and does not reach its goal. In this connection, the official's duty to justify or prove the significant increase of his assets that exceed his income is carried out within his duties following from the specific nature of his public law status and official activity and is not considered as proving one's innocence within the criminal procedure. [...]

“6. Investigation of any crime, including illicit enrichment, is regulated by the Criminal Procedure Code of the Kyrgyz Republic, according to which submission of evidence is a part of the criminal procedure. Any action of the investigative bodies should take into account the presumption of innocence principle and they should collect evidence of the accused's (suspect's) guilt according to the procedure set by law. In this

⁴³ Decision of 25 June 2014, No. 35-p, available <https://bit.ly/2jKLIDF> (in Russian).

regard, the burden of proof, regardless of the subject of the crime, lies on the investigative bodies, while giving testimony is a right, not an obligation of the accused. Otherwise, other understanding of Article 308-1 CC would contradict the constitutional provisions on the presumption of innocence.

Therefore, the disputed provisions CC [...] does not contradict the constitutional principles of the presumption of innocence and equality of all before law and court."

In **Moldova**, where the definition of the illicit enrichment offence is close to the wording contained in the Ukrainian Criminal Code (see above), the Constitutional Court also did not find a violation of the principle of the presumption of innocence.⁴⁴ The Court ruled that:

"107. The Court reiterates its conclusions according to which the burden of proof with respect to the illicit enrichment is attributed exclusively to the state bodies.

108. Thus, the Court finds that the norm of art. [330-2] CC does not request the public servant to "explain reasonably" his/her property in relation to his/her incomes. According to the given regulations, not only the discrepancy between the value of the property and the legally acquired property leads to the conviction of the public servant. The text "was established based on the proofs that these assets could not have been obtained legally" indicates the fact that additional proofs are needed, being presented in the way established by the law by the state authorities, which should prove the illicit nature of the property."

"110. [T]he contested provisions do not exceed the constitutional frame and are grounded by the interests of the state security and corruption fight."

The constitutionality of the illicit enrichment offence was also challenged in **Argentina**. The Federal Criminal Tribunal of Argentina convicted the defendant of the crime of illicit enrichment provided in Article 268 (2) of the Penal Code and imposed a sentence of three years in prison as well as ordered the confiscation of the assets resulting from the crime. The defendant argued that the law violated the presumption of innocence, since it started from a presumption of culpability, the "appreciable asset enrichment" of the public official or an intermediary not being, per se, susceptible to criminal sanction, and reversed the burden of proof by penalizing the lack of justification.⁴⁵ The Supreme Court of Justice of Argentina, in its review of the defendant's appeal referred to the lower court decisions:

"With regards to the alleged reversal of the burden of proof, the lower tribunal concluded that, since the preliminary demonstration of the characteristic increase in assets corresponds to the jurisdictional organ and the Attorney General's Office, the opportunity to explain provided by the summons creates a guaranty in favor of the public official; and the lack of justification or its insufficiency do not provide support for the existence of presumption of guilt, since that is not weighed negatively by the mandate of article 18 of the Fundamental Law, which guarantees not only the right to refuse to testify, but also the right to defense on trial, under which the accused may choose to either prove or not prove the legality of his enrichment."⁴⁶

⁴⁴ Constitutional Court of the Republic of Moldova, Judgment on Constitutional Review of some provisions CC and Criminal Procedure Code (extended confiscation and illicit enrichment), Complaint No. 60a/2014, 16 April 2015, paras. 107 set seq., available at <https://bit.ly/2KaqRVx>.

⁴⁵ See Kofele-Kale, *Combating Economic Crimes: Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment*, 2012, p. 148.

⁴⁶ *Ibid.*, page 151.

In 2012-2013, the Court of Cassation of **France** reviewed several applications of the lower courts to the Constitutional Council of the Republic of France concerning the constitutionality of the regulation of illicit enrichment established in the Criminal Code (inter alia, the issues of clarity in the legal regulation and the presumption of innocence were raised). All applications were dismissed as unfounded. The Constitutional Council found that the regulation of illicit enrichment, as set out in the Criminal Code, clearly and accurately defines that criminal liability is incurred for failure to justify funds and that that it reinforces a specific criminal offence to be proved by the prosecutor rather than a presumption of criminal liability.⁴⁷

In other national jurisdictions, the courts went further and allowed reversing the burden to the defendant once the prosecution built a prima facie case. This means that once the core elements of an offence of illicit enrichment have been proved beyond a reasonable doubt by the prosecution, an evidentiary burden may be imposed on the official to show that his wealth was obtained from legitimate sources. This approach was followed by the U.K. Judicial Committee of the Privy Council in a 1993 appeal from Hong Kong.⁴⁸ The Privy Council examined whether Section 10 of the Hong Kong Bill of Rights Ordinance 1991 had entrenched the presumption of innocence. The Court held that Section 10 casts a burden of proving the absence of corruption upon the defendant. But before the burden is shifted to the accused, the prosecution needs to prove beyond reasonable doubt the following: the accused's public servant status, his standard of living during the charge period, his total official emoluments during that period, and that his standard of living could not reasonably, in all the circumstances, have been afforded out of his total official emoluments. The court observed that where corruption is concerned, there was a need – within reason – for special powers of investigation and an explanation requirement. Specific corrupt acts were inherently difficult to detect, let alone proved in the normal way. Accordingly, section 10 was found consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary.⁴⁹

In its 2006 Green Paper the European Commission noted the Evidence Study that showed that while the prevailing position in the EU was that the onus of proving an accused's guilt rests on the prosecution, sometimes, in exceptional cases, such as document or regulatory offences, once the prosecution has proved the existence of a duty, the accused had a reverse burden to prove that he had complied with it. There were also occasions where the accused had to raise a defence (such as self-defence, insanity or alibi) before the prosecution was required to disprove it.⁵⁰

(3) APPLICATION OF THE PRINCIPLE OF PRESUMPTION OF INNOCENCE IN THE UKRAINIAN CASE

On the basis of the above-mentioned jurisprudence and analysis of the wording of Article 368-2 CC of Ukraine, it is submitted that the illicit enrichment offence in Ukraine does not envisage a reversal of the burden of proof and, therefore, does not violate the presumption of innocence.

⁴⁷ Constitutional Court of the Republic of Lithuania, Ruling on the compliance of paragraph 1 of Article 189-1 CC of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 March 2017, cited above, para. 31.4.

⁴⁸ Attorney General of Hong Kong v. Lee Kwong-kut [1993] A.C. 951. See further: De Speville, Reversing the Onus of Proof: It is Compatible with Respect for Human Rights Norms, Paper presented at the 8th International Anti-Corruption Conference.

⁴⁹ United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, 2004, footnote 33, p. 61, available at <https://bit.ly/2bdNwUv>.

⁵⁰ Commission of the European Communities (2006), Green Paper on the Presumption of Innocence, COM(2006)174 final, page 7, available at <https://bit.ly/2rx2NoO>.

The illicit enrichment offence under the Ukrainian Criminal Code criminalizes “acquiring by a person authorized to perform functions of the State or local self-government in ownership of assets in significant amount, the legality of grounds for acquiring of which has not been established by evidence, as well as transfer by the person of such assets to any other person” [emphasis added]. Unlike the wording of the UN Convention against Corruption (“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”, [emphasis added]), the Article 368-2 CC does not require from the defendant to explain the origin of his income, nor to provide any other justification or information. The provision refers to the evidence that should establish the lack of lawful sources of acquiring significant assets owned by a public official. Such evidence, according to the criminal procedure rules, should be collected by the public prosecution and presented to the court. Article 368-2 CC does not infer in any way that the defendant bears the burden of proving his innocence or disproving the prosecution case.

This is also confirmed by the drafting history of Article 368-2 CC: The current wording was introduced in October 2014. The President of Ukraine proposed relevant draft law no. 5085⁵¹ based on the previous drafts laws on the same subject, namely draft laws no. 4573 and no. 4780 that were submitted by Members of Parliament and included the same wording of the illicit enrichment offence. The explanatory note to the draft law No. 4573⁵² provided the following rationale for the new wording of the offence:

“Liability for illicit enrichment is one of the most effective tools to counteract corruption, because it does not depend on detection and prosecution of specific corruption offences but is focused on the existence of excessive assets of a public official that cannot be explained by lawful sources of income. Such liability in different forms exists in more than 40 countries.

Provisions of the new wording of the article are formulated in such a way to ensure respect for the right to the presumption of innocence and the right not to self-incriminate. According to the case-law of the European Court of Human Rights criminal law allows presumptions of fact or law if such presumption is reasonable, proportionate and refutable and also if it concerns important public interests and the right to defence is guaranteed. [...]

The wording of the illicit enrichment does not provide for the reversal of burden of proof on the defendant – the prosecution body has to adduce evidence of all elements of the relevant offence (crime subject – person authorised to perform functions of the state or local self-government; acquiring in ownership or use of certain assets; lawful sources of income of the person; discrepancy between income received from lawful sources and assets in possession; lack of other lawful sources which could explain such discrepancy, etc.)”

Thus, with the illicit enrichment offence, the primary responsibility to present substantiated evidence of the offence lies with the prosecutor. The public official has the right to explain if the prosecutor built a prima facie case and managed to demonstrate that the official could not have acquired the assets using his lawful sources of income. Only the public official himself may be in possession of information that can overturn the prima facie case. In this case, the public official is in the best possible position to explain how his/her assets were acquired. And it would be unreasonable and against the interests of the public official not

⁵¹ Available at <https://bit.ly/1vkB1W5>.

⁵² Available at <https://bit.ly/2rylir8>.

to provide him/her with such an opportunity. The possibility to explain what is available to the defendant does not, however, negate the burden of proof that remains with the prosecution.

It should also be kept in mind that corruption poses a serious risk to the economic and social well-being of Ukraine as well as its national security (see above). Combatting corruption is, therefore, a pressing social need. Thus, there is a strong public interest in allowing reasonable and proportionate presumptions of law to prosecute corruption, in particular in the form of illicit enrichment, as long as such presumptions are rebuttable and substantiated by strong prima facie evidence presented by the prosecution.

The approach taken by the legislator of Ukraine, therefore, is in line with the ECtHR jurisprudence (see *Salabiaku*). It balances the state interest in prosecuting corruption with the rights of the accused by requiring the prosecutor to make a prima facie case, which creates a presumption that may be rebutted by the accused. Such a presumption is reasonable and proportionate taking into account what is at stake and that no “improper compulsion” is applied on the defendant.

It is also important that the provisions of the CC are applied in line and in close relation with the requirements of the CPC as to the standards of proof and evidence gathering. In particular, pursuant to Article 7 of the CPC, the criminal proceedings must conform, among others, to the principles of the rule of law, legality, equality of arms, the presumption of innocence, freedom from self-incrimination and from double jeopardy. Furthermore, Article 8 CPC provides that criminal proceedings shall be conducted with consideration being given to the practices of the ECtHR and its interpretation of the rule of law principle. Article 9 CPC provides that during criminal proceedings the court, prosecutor and investigator shall comply with the requirements of the Constitution of Ukraine and international treaties of Ukraine. These and other guarantees embedded in the CPC should ensure that Article 368-2 CC is applied in a way that is consistent with the constitutional provisions as well as applicable human rights standards.

B. PROTECTION AGAINST SELF-INCRIMINATION

The criminal offence of illicit enrichment is often challenged also for reasons of infringement of the protection against self-incrimination. Similar to other cases at the foreign national level, also the Constitutional Petition claims a violation of Article 63 of the Constitution of Ukraine, pursuant to which a person should not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives.

(1) JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Although this right is not explicitly mentioned in the Convention, the ECtHR has held:

“The right to silence and the right not to incriminate oneself are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to

the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 [...] The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 (2) of the Convention”⁵³

However, the ECtHR found that freedom from self-incrimination is not an absolute right and that only “improper compulsion” is prohibited. The Court further developed four criteria for assessing whether the compulsion was improper: the nature and degree of the compulsion; the existence of any relevant safeguards in the procedures; the use to which any material so obtained is put; and the weight of public interest in the investigation.⁵⁴

For example, in the case of *O`Halloran and Francis v. UK*, the accused persons were held criminal liable for refusing to provide records indicating who had been driving a taxi at the time of a criminal offence. The Court held, notably, that those who choose to keep and drive motor cars can be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles and, in the applicable legal framework, these responsibilities include the obligation, in the event of suspected commission of road-traffic offences, to inform the authorities of the identity of the driver on that occasion.⁵⁵

Similarly, in the case of *Allen v. UK*⁵⁶ the Court considered that the applicant who was compelled to submit his asset declaration for tax purposes and was convicted of making a false statement in it was not deprived of the right to a fair trial. The Court noted that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions:

“This was not an example of forced self-incrimination about an offence which he had previously committed; it was the offence itself. It may be that the applicant lied in order to prevent the Inland Revenue uncovering conduct which might possibly be criminal and lead to a prosecution. However, the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation by the revenue authorities.” The Court also confirmed that “not every measure taken with a view to encouraging individuals to give the authorities information which may be of potential use in later criminal proceedings must be regarded as improper compulsion”

The Court distinguished the situation in the case of *Funke v. France*⁵⁷ where criminal proceedings were brought against the applicant by the customs authorities in an attempt to compel him to provide evidence of offences he had allegedly committed. The degree of compulsion in that case was found by the Court to be incompatible with Article 6 since, in effect, it violated the very essence of the privilege against self-incrimination.

⁵³ European Court of Human Rights, *Saunders v. UK*, application no. 19187/91, Judgment of 17 December 1996, para. 68.

⁵⁴ European Court of Human Rights, *Jalloh v. Germany*, application no. 54810/00, Judgment of 11 July 2006. The findings were later confirmed in European Court of Human Rights, *O`Halloran and Francis v. UK*, applications no. 15809/02 and no. 25624/02, Judgment of 29 June 2007.

⁵⁵ European Court of Human Rights, *O`Halloran and Francis v. UK*, application no. 15809/02 and no. 25624/02, Judgment of 29 June 2007, para. 57.

⁵⁶ European Court of Human Rights, *Allen v. UK*, application no. 76574/01, Decision of 10 September 2002.

⁵⁷ European Court of Human Rights, *Funke v. France*, application no. 10828/84, Judgment of 25 February 1993.

Furthermore, the ECtHR has also generally accepted that court may draw adverse inferences where the accused has chosen to remain silent, when factual circumstances allow them to do so. In the case of John Murray, the Court held that it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence, a refusal to answer questions, or to give evidence himself.

“On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution [...] It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.”

In John Murray the Court also provided examples of safeguards existence of which make it proper to draw adverse inferences from the defendant's silence: a) if the accused had been cautioned that drawing of adverse inference could follow from his exercise of the right to remain silent; b) there was a prima facie case against the accused that could lead to his conviction if unanswered; and c) the judge both had a discretion as to whether it was appropriate to draw inferences from silence and had to give reasons should he do so.⁵⁸

(2) CONSTITUTIONAL JURISPRUDENCE OF FOREIGN JURISDICTIONS

The Constitutional Court of Lithuania considered the argument of the criminal offence of illicit enrichment contradicting the constitutional guarantee against self-incrimination as ill founded. It held that the respective provision CC:

[...] does not shift the burden of proof to a person suspected of (charged with) illicit enrichment, does not compel such a person to give evidence against himself/herself, and does not violate the principle of the presumption of innocence, as set out in Paragraphs 1 and 3 of Article 31 of the Constitution.”⁵⁹

In Moldova, the Constitutional Court (decision cited above) found that the illicit enrichment offence in the Criminal Code of Moldova did not require the public servant to “explain reasonably” his/her property in relation to his/her incomes:

“According to the given regulations, not only the discrepancy between the value of the property and the legally acquired property leads to the conviction of the public servant. The text “was established based on the proofs that these assets could not have been obtained legally” indicates the fact that additional proofs are needed, being presented in the way established by the law by the state authorities, which should prove the illicit nature of the property.”⁶⁰

⁵⁸ Summarized in Harris, O'Boyle & Warbrick, Law of the European Convention of Human Rights, Third Edition, Oxford University Press, pages 423-424.

⁵⁹ Constitutional Court of the Republic of Lithuania, Ruling of 15 March 2017, no. KT4-N3/2017, para. 39.3.

⁶⁰ Constitutional Court of the Republic of Moldova, Judgment on Constitutional Review of some provisions CC and Criminal Procedure Code (extended confiscation and illicit enrichment), Complaint No. 60a/2014, 16 April 2015, para. 108.

(3) APPLICATION OF THE PRINCIPLE OF PROTECTION AGAINST SELF-INCRIMINATION
IN THE UKRAINIAN CASE

First, Article 368-2 CC of Ukraine does not require the defendant to provide any explanation (unlike Article 20 UNCAC), nor does it compel him directly to provide any information. The defendant has the right but is not obliged to provide an explanation about the origin of assets that the prosecution considers to be excessive. If the defendant can only exculpate himself/herself by exposing another offence, this is a dilemma he/she could face with any other criminal offence. The Ukrainian Criminal Code provision as such also does not set any burdens of proof in the case or rules for submitting evidence, which is regulated by the criminal procedure rules solely.

Second, even if the criminal offence of illicit enrichment, as provided in the Ukrainian criminal law, would have a possible impact on the protection against self-incrimination, such right, as it follows from the ECtHR legal argumentation, is not absolute and that the law may not be found in abstract violating this principle only because it allows (indirectly in the case of Article 368-2 CC of Ukraine) to draw inferences from the fact that the defendant did not provide an explanation to the *prima facie* case built by the public prosecution.

Public officials are aware that when entering into office they submit themselves to special requirements of integrity and control over their activity. In assuming a position of trust, public officials subject themselves to the legal requirements and the administrative and criminal sanctions that arise from the abuse of that trust. Moreover, where countries have an established income and asset disclosure regime – like it is in the case of Ukraine – they also have established the principle that public officials may provide personal information that may be self-incriminating. In this context, providing evidence regarding the sources of income and assets to the court does not appear as a significant additional burden.⁶¹

In addition, as the ECtHR has noted in the case of *Murray v. UK*, adverse inferences may be drawn from the silence of the accused when the facts of the case clearly call for an explanation from the person if such silence is not the main ground for finding the accused guilty. The level of compulsion and the public interest in investigating corruption justifies drawing such inferences from the defendant's lack of explanation as to the origin of his assets in response to the prosecution's *prima facie* case. This does not amount to improper compulsion that would deprive freedom from self-incrimination from its essence.

Moreover, the fact that an explanation by the defendant in an illicit enrichment case may expose him to the prosecution for any related activity (e.g. tax evasion) does not make such explanation contrary to the self-incrimination prohibition as an improper compulsion. As the ECtHR found in *Allen v. UK*, the privilege against self-incrimination cannot be interpreted as giving a general immunity to actions motivated by the desire to evade investigation.

Finally, as was already stressed above with regard to the presumption of innocence, Article 368-2 CC cannot change the procedural rights and duties of the prosecution and of the accused person regulated in the CPC. The CPC is unequivocal that it is a right rather than an obligation of the accused person to defend himself or herself; the defendant may choose to give testimony or to stay silent; the prosecution is not released

⁶¹ World Bank (Muzila L., Morales M., Mathias M., Berger T.), *ibid.*, p. 33.

from the duty to provide proof of the existence of all of the elements of *corpus delicti* of illicit enrichment by any action or inaction of the accused.

C. PRINCIPLE OF FAIR TRIAL / EQUALITY OF ARMS

From the Constitutional Petition it is not sufficiently clear how the illicit enrichment offence affects the fair trial guarantees, including the equality of arms, besides the arguments that have already been raised regarding the presumption of innocence and the right not to self-incriminate. In this context, the Petition mainly repeats the arguments it already used. The claim that the illicit enrichment offence excludes the adversarial principle and abolishes the freedom to provide evidence and to justify it before court is not supported by arguments.

As was argued above, Article 368-2 CC does not envisage a reversal of the burden of proof, nor does it compel in any way self-incrimination from the defendant. Therefore, it does also not affect the fair trial guarantees. The defendant has the right to provide an explanation in response to the *prima facie* case developed by the public prosecution that includes a rebuttable presumption of unexplained wealth. A court may draw adverse inferences from the lack of such explanation, but such inferences are proportional and reasonable and cannot be the sole basis for the conviction.

As far as the equality of arms principle is concerned, which is one of the elements of the broader concept of a fair trial requiring each party to be given a reasonable opportunity to present its case under conditions that do not place a substantial disadvantage *vis-à-vis* the opponent,⁶² nothing in the illicit enrichment offence as such denies the defendant any safeguards accorded to him by the criminal procedure rules, including the right to present his defence, employ legal counsel, etc. As the burden of proof is not shifted and remains with the prosecution, no disadvantage is placed on the defendant. It remains his right to testify and provide an explanation that would challenge the prosecution case. Equally, no interference exists with the right to an adversarial trial that means “the opportunity for the parties to a civil or criminal trial to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court’s decision”⁶³

As it was explained above, there are no legal concerns with the illicit enrichment offence under Article 6 (2) ECHR with regard to the presumption of innocence. The ECtHR also considered the issue of presumptions that are applied outside of the criminal limb of Article 6 (2) of the Convention, because the presumption of innocence is also a part of the “general notion of a fair hearing” in Article 6 (1). In *Phillips v. UK*⁶⁴ the ECtHR reiterated that the right to be presumed innocent is not absolute, since presumptions of fact or law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence. In the case under consideration the ECtHR reviewed the legal provisions requiring the national courts when convicting a defendant of a drug-trafficking offence to assume that any property

⁶² European Court of Human Rights, *Nideröst-Huber v. Switzerland*, application no. 18990/91, Judgment of 18 February 1997, para. 23.

⁶³ European Court of Human Rights, *Vermeulen v. Belgium*, application no. 19075/91, Judgment of 20 February 1996, para. 33.

⁶⁴ European Court of Human Rights, *Phillips v. UK*, application no. 41087/98, Judgment of 12 December 2001.

appearing to have been held by the defendant at any time since the conviction was received as a payment or reward in connection with drug trafficking. In addition to this, also the assumption applies that any expenditure incurred by the defendant during the same period was paid out of the proceeds of drug trafficking. The ECtHR observed that, while the assumption was mandatory when the sentencing court was assessing whether and to what extent the defendant had benefited from the proceeds of drug trafficking, the system was not without safeguards for the defendant because the assumption provided for in the law could have been rebutted if the applicant had shown, on the balance of probabilities, that the property was acquired other than through drug trafficking. Furthermore, the national courts have a discretion not to apply the assumption if it would give rise to a serious risk of injustice.⁶⁵

D. PRINCIPLE OF LEGALITY

Article 8 para. 1 of the Constitution of Ukraine establishes the constitutional principle of the rule of law. It is universally recognized that the principle implies such standards for legal regulation as legal certainty, clarity and foreseeability. As the Venice Commission has noted in its Rule of Law Checklist, law must be formulated with sufficient precision and clarity in order to enable legal subjects to regulate their conduct in conformity with it; these requirements are of utmost importance in criminal legislation.⁶⁶ Concerning criminal responsibility for illicit enrichment, possible doubts with regard its conformity with the principle of legality are, *inter alia*, connected to the fact that, under the definition of illicit enrichment, there is no explicit connection between excessive wealth and criminal activities (corruption, embezzlement, theft, etc.).⁶⁷ Accordingly, the Constitutional Petition submits that Article 368-2 CC violates the principle of legality, i.e. it asserts that the disposition of this article is unclear and ambiguous because it does not provide a clear and comprehensible definition of the grounds of acquisition of assets and does not clearly define the evidence that is required to establish the legitimacy of obtained assets.

In this regard, as follows from international as well as national legal regulation of different countries, the definition of illicit enrichment contains several common distinctive elements, one of which is the absence of justification of a significant increase in assets.⁶⁸ As established not only by Article 20 UNCAC, but also by Article IX of the Inter-American Convention against Corruption, as well as by Article 8 of the African Union Convention on Preventing and Combatting Corruption, this element is essential in defining illicit enrichment and is understood identically as “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]”, i.e. without any reference to specific grounds for such an increase or to evidence required for proving its legitimacy. With regard to the UNCAC, this observation is also supported by the *Travaux Préparatoires* of the Convention⁶⁹: during the negotiations on Article 20 of the Convention, the element of absence of justification did not raise any doubts whatsoever with regard to its legality (clarity and foreseeability of legal acts).

⁶⁵ European Court of Human Rights, *Philips v. UK*, application no. 41087/98, Judgment of 12 December 2001, para. 45.

⁶⁶ Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session, CDL-AD(2016)007-e (Venice, 11-12 March 2016), paras. 58, 59, available at <https://bit.ly/2KaPQle>.

⁶⁷ U4 (V. Maud-Perdriel), *The Accumulation of Unexplained Wealth by Public Officials: Making the Offence of Illicit Enrichment Enforceable*, January 2012.

⁶⁸ World Bank (Muzila L., Morales M., Mathias M., Berger T.), *ibid.*, p. xiii.

⁶⁹ *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption, available at <https://bit.ly/2laalUV>.

(1) JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

In the case law of the European Court of Human Rights, the principle of legality is developed through the interpretation and application of Article 7 of the ECHR, according to which, “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

Thus, Article 7 prohibits the retroactive application of criminal law to the disadvantage of an accused as well as establishes the fundamental principle of “*nullum crimen sine lege*” (“no crime without law”), which means that only the law can define a crime and prescribe a penalty and that criminal law must not be extensively construed to the detriment of an accused, for example by analogy.⁷⁰

Accordingly, being an essential element of the rule of law, the legality principle, as guaranteed by Article 7, not only requires the presence of a legal basis (i.e. a legal provision, which is in force and makes a certain act punishable) in order for a sentence or a penalty to be imposed, but also demands both that the offence and the penalty for the respective offence (including the scope thereof) are clearly defined by law (“law” meaning written as well as unwritten law, including case law and sub-statutory acts).

Under Article 7, the principle of legality attributes law with the qualitative requirements of accessibility and foreseeability.⁷¹ The criterion of accessibility requires the state authorities to prove that the specific legal provision, as well as the related case law, has been accessible to the accused in the meaning that it has been made public in accordance with the procedures set by legal norms.

The criterion of foreseeability of law requires the law to be clear. With regard to the definition of the offence, the ECtHR reiterated that the requirement is satisfied when the accused is able to understand from the wording of the relevant provision of criminal law “what acts and omissions will make him criminally liable”,⁷² or if this becomes known to him or her “after taking appropriate legal advice”⁷³.

Following the jurisprudence of the ECtHR, it must also be taken into account that the wording of legal provisions is, in principle, abstract (i.e., it is not always precise), therefore, it is the role of courts to apply and interpret the law in a foreseeable, uniform manner, in some cases, even ensuring “gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the development is consistent with the essence of the offence and could reasonably be foreseen”.⁷⁴ According to the ECtHR, sufficient clarity of law may be ensured namely through the gradual judicial interpretation of criminal provisions:

⁷⁰ European Court of Human Rights, *Jorgic v. Germany*, no. 74613/01, Judgment of 12 July 2007, para. 100.

⁷¹ See, *inter alia*, European Court of Human Rights, *S.W. v. the United Kingdom*, application no. 20166/92, Judgment of 22 November 1995, paras. 34-35; European Court of Human Rights, *C.R. v. the United Kingdom*, Judgment of 22 November 1995, paras. 32-33; European Court of Human Rights, *Streletz, Kessler and Krenz v. Germany* [Grand Chamber], application no. 34044/96, no. 35532/97 and no 44801/98, Judgment 22 March 2001, para 50.

⁷² European Court of Human Rights, *Kokkinakis v. Greece*, application no. 14307/88, Judgment of 25 May 1993, para. 52; European Court of Human Rights, *Jorgic v. Germany*, *ibid.*; European Court of Human Rights, *Cantoni v. France*, application no. 17862/91, Judgment of 11 November 1996, para. 29; European Court of Human Rights, *Kafkaris v. Cyprus* [Grand Chamber], no 21906/04, Judgment of 12 February 2008, para. 140.

⁷³ European Court of Human Rights, *Del Río Prada v. Spain* [Grand Chamber], application no. 42750/09, Judgment of 21 October 2013, para. 79; European Court of Human Rights, *Jorgic v. Germany*, *ibid.*, para. 113.

⁷⁴ European Court of Human Rights, *S.W. v. the United Kingdom*, *ibid.*, para. 36.

“however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen”⁷⁵

In its judgment in *Del Rio Prada v. Spain*, the Grand Chamber of the ECtHR further stressed that legal acts are of general application, rather than being precise. According to the ECtHR, “general categorisations as opposed to exhaustive lists” is a technique, usually used in drafting laws, therefore:

“many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice [...] whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances [...]. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain”⁷⁶

The Court further explained the role of adjudication in dissipating remaining interpretational doubts. It stressed the importance thereof by adding that:

“the lack of an accessible and reasonably foreseeable judicial interpretation can even lead to a finding of a violation of the accused’s Article 7 rights. Were that not the case, the object and the purpose of this provision – namely that no one should be subjected to arbitrary prosecution, conviction or punishment – would be defeated”⁷⁷

The ECtHR acknowledges that criminal law cannot provide for every eventuality, and that the level of precision required of domestic legislation is dependant, to a considerable degree, also “on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.”⁷⁸ Accordingly, the threshold of foreseeability depends, to a great extent, on the status of the accused, i.e. it requires a lower threshold with respect to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can, on this account, be expected to take special care in assessing the risks that such activity entails.⁷⁹

In summary, according to Article 7 of the ECHR and the corresponding case law of the ECtHR, the principle of legality, inter alia, requires that an offence is clearly defined by law. The requirement of foreseeability is satisfied where the accused, if needed with the assistance of a lawyer, can know from the wording of the relevant provision what acts and omissions will make him criminally liable. However, regardless how clearly

⁷⁵ European Court of Human Rights, *Kokkinakis v. Greece*, *ibid.*, para. 101.

⁷⁶ See European Court of Human Rights, *Del Rio Prada v. Spain* [Grand Chamber], *ibid.*, paras. 81, 82; see also European Court of Human Rights, *Kafkaris v. Cyprus* [Grand Chamber], *ibid.*, para. 141

⁷⁷ Such a conclusion with regard to the constituent elements of the offence was also made in cases European Court of Human Rights, *Pessino v. France*, application no. 40403/02, Judgement of 10 October 2006, paras. 35-36; European Court of Human Rights, *Dragotoni and Militaru-Pidhorni v. Romania*, application no. 77193/01 and no. 77196/01, Judgment of 24 May 2007, paras. 43-44.

⁷⁸ European Court of Human Rights, *Gillian and Quinton v. UK*, application no. 4158/05, Judgment of 12 January 2010, para. 77.

⁷⁹ European Court of Human Rights, *Cantoni v. France*, *ibid.*, para. 35; European Court of Human Rights, *Pessino v. France*, *ibid.*, para. 33; European Court of Human Rights, *Kononov v. Latvia* [Grand Chamber], application no. 36376/04, Judgement of 24 July 2008, para. 235.

drafted a legal provision may be, there is an inevitable element of judicial interpretation in all fields of law, including criminal law. The role of adjudication vested in the courts is namely to make clear the remaining interpretational doubts. The threshold of foreseeability depends, inter alia, on the status of the accused.

(2) CONSTITUTIONAL JURISPRUDENCE OF FOREIGN JURISDICTIONS

The issue of conformity of the definition of illicit enrichment with the principle of legality, in particular with respect to the clarity and the foreseeability thereof, has been addressed before a number of foreign jurisdictions. The main argument in the petitions, which have been with by the constitutional courts, was that criminal responsibility for illicit enrichment is established without a clear definition of the prohibited conduct as a basis of the offence.

In **Lithuania** the Constitutional Court, in its ruling of 15 March 2017,⁸⁰ assessed the issues of clarity and foreseeability of the definition of illicit enrichment, particularly whether it was clear and foreseeable from the provisions of the Lithuanian Criminal Code as to what specific acts of acquisition of property of a significant amount were considered to have been punishable. The petitioners before the Lithuanian Constitutional Court argued that the definition of legitimate income establishes an exclusive and an unintelligible legal regulation, which makes it unclear how it could be possible to become illicitly enriched. In other words, it was argued that this legal regulation was contradictory, unclear, ambiguous and, accordingly, prevented the charges from being formulated in such a manner that counsel for the defence could understand the precise factual and legal basis thereof in order to be able to challenge these charges effectively.

In its ruling, the Constitutional Court recalled what the principle of the rule of law entails when interpreted under the Constitution of the Republic of Lithuania. The Constitutional Court stressed the constitutional principle of a state under the rule of law is especially broad and comprises a wide range of various interrelated imperatives. Moreover, this principle must be followed both in law making and in the implementation of law.

As follows from the official interpretation of the Constitution by the Constitutional Court, the elements of the principle of legality – clarity and foreseeability – are implied by the constitutional principle of a state under the rule of law and comprise the requirements for the legal regulation to be clear, comprehensible and coherent, including a sufficient degree of precision of legal formulations, the consistency and internal harmony of the legal provisions.⁸¹ The Constitutional Court also stressed in this regard that paragraph 2 of Article 31 of the Constitution and the constitutional principle of a state under the rule of law give rise to the right of a person to due process before the court, as well as reiterated what the latter constitutional right entails in criminal proceedings. In addition, the Constitutional Court explained the content of the impugned provision of the Lithuanian Criminal Code, inter alia, the meaning of the phrase “holds by right of ownership”, as well as the object of illicit enrichment.

⁸⁰ Constitutional Court of the Republic of Lithuania, Ruling on the compliance of paragraph 1 of Article 189-1 CC of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 March 2017, no. KT4-N3/2017.

⁸¹ *Ibid.*, para. 31.4.

Against this background, the legal regulation establishing criminal responsibility for illicit enrichment was assessed as sufficiently clear: according to the Lithuanian Constitutional Court, legitimate income is income derived from activities not prohibited by legal acts even if such income has not been properly accounted for in accordance with the procedure laid down by legal acts. Consequently, a person can be held criminally responsible for illicit enrichment where his or her property could not have been acquired with legitimate income, namely when it is proved, after verifying all possible methods of acquiring the property, that the person was unable to receive the amount of income from the activities not prohibited by legal acts that could have been sufficient to acquire the property. Following this clarification of the definition of illicit enrichment, the Court concluded that there was no ground for stating that the legal regulation violates the principle of legality.

Also in **Moldova** the Constitutional Court, in its judgement of 16 March 2015,⁸² assessed the constitutionality of the said provision with regard to its conformity with the constitutional principle of legality.

The argumentation of the Moldovan Constitutional Court was grounded, on the one hand, on the exclusive constitutional prerogative of the Parliament to adopt laws because according to the Court, “criminalization of acts in criminal laws, establishment of punishments for the commitment thereof, as well as other regulations are grounded on rationales of criminal policy”.⁸³ The Constitutional Court, on the other hand, stressed that all laws, including criminal laws, must correspond with certain constitutional principles and standards. First and foremost, legal regulation must always be in conformity with the rule of law, which, in criminal matters, “generates the assurance of the principles of legality of offences and punishments”.⁸⁴ Second, criminal regulation must be “formulated in a clear, concise, and precise manner”.⁸⁵ Third, criminal law must be accessible and the Court stressed the constitutional right of individuals “to be aware of [their] rights and duties”.⁸⁶

The Constitutional Court reinforced these arguments by highlighting the presumption of the legal acquisition of property and stressing the circumstance that the burden of proof with respect to illicit enrichment is to be attributed exclusively to the state bodies.⁸⁷ Accordingly, Article 302(2) CC cannot be interpreted as requiring the public servant to “explain reasonably” his/her property in relation to his/her income; meanwhile, the Court stated that “the text “was established based on the proofs that these assets could not have been obtained legally” indicates the fact that additional proofs are needed, being presented in the way established by the law by the state authorities, which should prove the illicit nature of the property”.⁸⁸ Therefore, Art. 302(2) CC does not only require the existence of clear evidence of illicit enrichment (clear proof that assets could not have been acquired from legal income), but also demands that such proof is presented by the state authorities, in accordance with the procedures established by law.

⁸² Constitutional Court of the Republic of Moldova, Judgment on Constitutional Review of some provisions CC and Criminal Procedure Code (extended confiscation and illicit enrichment), Complaint No. 60a/2014, 16 April 2015.

⁸³ *Ibid.*, paras. 85-87 and 91.

⁸⁴ *Ibid.*, paras. 88-89 and 95.

⁸⁵ *Ibid.*, para. 91.

⁸⁶ *Ibid.*, para. 92.

⁸⁷ *Ibid.*, para. 107.

⁸⁸ *Ibid.*, para. 108.

Finally, the Moldovan Constitutional Court did observe that there were some inaccuracies in the text of Art. 302(2) CC that might lead to certain deficiencies in the process of implementation of the said provision, and decided to address the Parliament in this regard in order for these inaccuracies to be eliminated. With regard to the application of the principle of the rule of law and the principle of legality in the aforementioned case, the Constitutional Court concluded that the legal provision of the CC, establishing criminal responsibility for illicit enrichment, does not exceed them. According to the Court, such legal regulation is rather grounded by the interests of state security and the fight against corruption.

In **France** the Court of Cassation of France has in a number of cases refused to apply to the Constitutional Council of the Republic of France concerning the constitutionality of the regulation of illicit enrichment regulated in Article 321-6 CC. It was addressed with such requests by courts of lower instance, which questioned the clarity of the legal regulation and the conformity of the said provisions of the Criminal Code with the principle of the presumption of innocence. In its decision of 26 September 2012⁸⁹, the Court of Cassation dismissed an application to refer the case to the Constitutional Council as unfounded by concluding that the regulation of illicit enrichment, as set out in the Criminal Code, clearly and accurately defines that liability is incurred for failure to justify funds and that it provides for a specific criminal offence to be proved by the prosecutor rather than a presumption of criminal liability. It must be noted in this regard that the definition of illicit enrichment laid down in the Criminal Code of the Republic of France can be considered even more complex compared to corresponding provisions of the Criminal Codes of Ukraine, the Republic of Lithuania and the Republic of Moldova. In addition to the inability to justify the income in the context of the lifestyle of the accused, or the origin of assets, the criminal offence requires to establish the maintenance of habitual contact with the perpetrator or victim of certain crimes (Article 321-6). Nevertheless, doubts with regard to conformity of the said legal regulation with the principle of legality have been dismissed.

Also in **Argentina** the National Chamber of Criminal Appeals and the Supreme Court of Justice⁹⁰ dismissed doubts regarding the compatibility of the definition of illicit enrichment with the principle of legality. The crime of illicit enrichment was regarded as laid down with a sufficient degree of clarity, consisting of a significant and unjustified enrichment after taking public office.⁹¹

In the **Kyrgyz Republic** the Constitutional Chamber of the Supreme Court, in its judgement of 25 June 2014,⁹² recognized as compatible with the Constitution the definition of illicit enrichment, according to which the significant increase in assets of a public official that exceed his or her legal income is punishable provided that it cannot be reasonable justified. The Court based its argumentation on the specific status of the public officials, which according to the law have a duty to declare their income and assets before the responsible state institutions, an instrument in the fight against corruption related offences. Accordingly, all public officials are aware of the mechanism of the verification of the data provided in such declarations with an aim of establishing the legality thereof. The Court noted that the public official can be held criminally responsible only in instances when he or she cannot justify the significant increase in assets, namely when he or she fails to fulfil the duty to truthfully declare his or her income and assets.

⁸⁹ Decision of 26 September 2012, the Court of Cassation of France. Referred to in para. 31.4 of the Ruling of the Constitutional Court of the Republic of Lithuania on the compliance of paragraph 1 of Article 189-1 CC of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 March 2017, no. KT4-N3/2017.

⁹⁰ María J. Alsogaray, Cjmara Nacional de Casación Penal (National Chamber of Criminal Appeals), 9 June 2005 and Courte Suprema de Justicia de la Nación (Supreme Court of Justice), 22 December 2008.

⁹¹ World Bank (Muzila L., Morales M., Mathias M., Berger T.), *ibid.*, p. 33.

⁹² Decision of 25 June 2014, No. 35-p, available at <https://bit.ly/2jKLIDF> (in Russian).

It follows from the argumentation provided by the Court that the said definition of illicit enrichment is sufficiently clear, bearing in mind that the *corpus delicti* provides for a public official as a special subject of the offence that has sufficient knowledge of the proper declaration and justification of his or her income or assets. In addition, the Court noted that the definition of illicit enrichment is the result of the implementation of international obligations arising from the UNCAC.

(3) APPLICABILITY OF THE STANDARDS OF LEGALITY IN THE UKRAINIAN CASE

On the basis of the analysis of the jurisprudence of foreign constitutional courts and the ECtHR, the following arguments are relevant in the evaluation of the Ukrainian law establishing criminal responsibility for illicit enrichment:

First, one can assert that the mentioned element of illicit enrichment – an increase of assets in significant amount, the legitimacy of which is not confirmed by evidence – is sufficiently clear from the wording of Article 368-2, para. 1 CC. Following the pattern of argumentation of the Lithuanian Constitutional Court, legitimate income can be understood as income derived from activities not prohibited by law. Accordingly, the provision of Article 368-2, para. 1 CC can be interpreted as providing for criminal responsibility only when it is proven that a significant increase in assets could not have been acquired with legitimate income, i.e., when, after verifying all possible methods of acquisition of assets, it is proven that the accused person was unable to receive the significant amount of income from his or her activities not prohibited by law.

Second, Article 368-2, para. 1 CC is drafted in a way that the accused person, if needed with the assistance of a lawyer, should be capable of ascertaining the content thereof, as well as of distinguishing legitimate income from illegitimate, of identifying activities prohibited by law, and of understanding, which evidence may be used to prove the legitimacy or illegitimacy of the income.

Moreover, the special status of the accused – the status of a person entitled to perform functions of a state or local self-government (a public official) – must also be taken into account. Following from settled case law of the ECtHR, the threshold of foreseeability of criminal legislation can be lower for professionals, who are used to having to proceed with a high degree of caution when pursuing their occupation. Therefore, the same rule should apply to public officials who are aware of the standards of higher integrity, applicable to them while in office, as well as the corresponding duties to declare and justify their income according to procedures laid down by national law.

Finally, the principle of reasonableness must be taken into account in the assessment of Article 368-2 CC: it is unreasonable and unnecessary to expect the legislator to provide a single precise definition or an exhaustive list of all methods of acquisition of legitimate or illegitimate income. In cases where some legislative ambiguities or contradictions may arise, it is the primary duty of the judicial authorities to resolve them by consistent and foreseeable judicial interpretation and application of criminal legislation. According to the settled case law of the ECtHR, this is an inevitable element of the role of adjudication vested in the courts.

Two additional subsidiary arguments are provided in support of the conformity of Article 368-2, para. 1 CC with the Constitution: Following the practice of other constitutional courts, the criminalisation of illicit enrichment and its definition follow from the implementation of international obligations, including those under the UNCAC, which may be presumed as compatible with the Constitution, including principles of the rule of law, public order, as well relevant constitutionally justifiable aims of fighting corruption. Furthermore, the constitutionality of the contested provision of the Criminal Code with regard to the principle of legality must also be assessed by bearing in mind that the burden of proof for the criminal offence of illicit enrichment is with the state authorities. It is their obligation to provide clear evidence that assets could not have been acquired from legal income, that is to verify possible methods of acquisition of assets.

Accordingly, it may be concluded that there is no ground to establish that Article 368-2 CC is not sufficiently clear or that it violates the principle of legality in this aspect. This conclusion is supported by the standards of legality formulated by the ECtHR and judicial practices of foreign constitutional courts.

E. DOUBLE JEOPARDY (NON BIS IN IDEM)

Article 61, para.1 of the Constitution of Ukraine prohibits double punishment (non bis in idem), one of the general principles of law and an inseparable element of the rule of law that establishes that no more than one sanction of criminal nature may be imposed for the same offence.

The Constitutional Petition expresses the view that Article 368-2 CC is incompatible with the non bis in idem principle, as it possibly establishes the “repeated responsibility for the action that became source of such enrichment”. According to the argument provided in the Constitutional Petition, illicit enrichment may be viewed as a result of a separate crime, committed by a public official, for which the person may also be brought to responsibility; therefore, Article 368-2 CC possibly allows to bring a person to criminal responsibility twice for the same act (for unlawful activities that constitute the ground of acquisition of assets in significant amount and for the acquisition of assets on this ground).

(1) JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The principle of non bis in idem is stated in para. 1 of Article 4, titled “Right not to Be Tried or Punished Twice”, of Protocol No. 7 to the ECHR: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.” Thus, the provision is applicable with regard to criminal proceedings and prohibits the double criminal trial or punishment for the same offence. The principle of non bis in idem is mainly a concern with due process, which is the object of Article 6 (right to a fair trial) of the ECHR; it aims to prevent the injustice of a person being prosecuted or punished twice for the same criminalised conduct.

In disclosing the principle of non bis in idem it is important to define the criminal proceedings in the light of the ECHR. As follows from the settled case law of the Court, there are three criteria, commonly known

as the “Engel criteria”⁹³, to be relied upon when establishing whether or not there was a “criminal charge” in terms of Article 6 of the ECHR: the legal classification of the offence under national law; the very nature of the offence; and the degree of severity of the penalty that the person concerned risks incurring.⁹⁴ The second and third criteria are alternative and not necessarily cumulative; this, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.⁹⁵ In this regard, it is worth noting that, in applying these criteria, the ECtHR has held a number of times that the proceedings involving certain tax surcharges should be treated as criminal proceedings in nature for the purposes of Article 4 of Protocol No. 7 to the Convention.⁹⁶

In understanding the principle of non bis in idem the definition of bis, or duplication of proceedings, for which a key element is a final judgment, is important: the principle of non bis in idem is applicable only after a person had been finally acquitted or convicted in accordance with the law and penal procedure of the state concerned.⁹⁷ In *Sergey Zolotukhin v Russia* the Grand Chamber of the ECtHR confirmed the aim of Article 4 of Protocol 7 to prohibit the repetition of criminal proceedings that have been concluded by a “final” decision. The ECtHR further explained that, according to its case-law, a decision becomes final when it acquires the force of *res judicata*, i.e. when it becomes irrevocable and no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.⁹⁸

An additional important element of the non bis in idem principle is *idem*, meaning “the same offence”: the second offence can be considered the same as the first one, provided they both arise from identical or substantially the same facts. Accordingly, in *Sergey Zolotukhin v Russia*, the Grand Chamber of the ECtHR stated that Article 4 of Protocol No. 7 prohibits “the prosecution or trial of a second “offence” in so far as it arises from identical facts or facts which are substantially the same.”⁹⁹ The latter is the so-called harmonised approach taken following the review of a variety of approaches relied on in the past.¹⁰⁰

Consequently, the principle non bis in idem does not preclude the possibility to apply an additional penalty for the same offence complementing the criminal conviction:¹⁰¹ states have the right to choose complementary legal responses to socially offensive conduct (such as evasion of taxes) through different procedures forming a coherent whole so as to address different aspects of the social problem involved, provided that the accumulated legal responses do not represent an excessive burden for the individual concerned.¹⁰²

⁹³ See European Court of Human Rights, *Engel and Others v. the Netherlands*, application nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, Judgment of 8 June 1976, para. 82.

⁹⁴ European Court of Human Rights, Factsheet, *Non bis in idem: Right to not be Tried or Punished Twice*, April 2018, available at: <https://bit.ly/2jKNI4f>.

⁹⁵ See also European Court of Human Rights, *Sergey Zolotukhin v. Russia* [Grand Chamber], application no. 14939/03, Judgment of 10 February 2009, para. 53.

⁹⁶ E.g. European Court of Human Rights, *Janosevic v. Sweden*, application no. 34619/97, Judgment of 23 July 2002, paras. 68-71; European Court of Human Rights, *Västberga Taxi Aktieföretag and Vulic v. Sweden*, application no. 36985/97, Judgment of 23 July 2002, paras. 79-82; European Court of Human Rights, *Manasson v Sweden* (dec.), application no 41265/98, Judgment of 8 April 2003; European Court of Human Rights, *Lucky Dev v Sweden*, application no 7356/10, Judgment of 27 November 2014, para. 51.

⁹⁷ European Court of Human Rights, Factsheet – *Non bis in idem: Right to not be Tried or Punished Twice*, *ibid.*

⁹⁸ European Court of Human Rights, *Sergey Zolotukhin v Russia* [GC], *ibid.*, § 107.

⁹⁹ *Ibid.*, para. 82.

¹⁰⁰ *Ibid.*, paras. 70-77.

¹⁰¹ European Court of Human Rights, Factsheet – *Non bis in idem: Right to not be Tried or Punished Twice*, *ibid.*

¹⁰² European Court of Human Rights, *A and B v Norway* [Grand Chamber], application nos. 24130/11 and 29758/11, Judgment of 15 November 2016, para. 121.

Furthermore, the principle of non bis in idem does not exclude the possibility of parallel or dual proceedings regarding the same conduct (including evasion of taxes), provided that certain conditions are fulfilled. The state must demonstrate convincingly that the dual proceedings in question have been sufficiently closely connected in substance and in time: the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, and also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.¹⁰³

In this regard, in *A and B v Norway* the Grand Chamber of the ECtHR provided the following possible material factors for determining whether there is a sufficiently close connection in substance between parallel proceedings: the complementary purposes pursued and addressed by the different proceedings, both in abstracto and in concreto (the involvement of different aspects of social misconduct); the foreseeability both in law and in practice of the duality of proceedings of idem; the interaction between the various competent authorities, in order to avoid the duplication in the collection and the assessment of the evidence; and, most importantly, the existence an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.¹⁰⁴ According to the Grand Chamber of the ECtHR, the connection between parallel proceedings in time must always be present, even where the connection in substance is sufficiently strong.¹⁰⁵ The Grand Chamber of the ECtHR also underlined that this does not mean that the two sets of proceedings have to be conducted simultaneously from beginning to end, however, “the weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings.”¹⁰⁶ Finally, the determination as to whether the offences investigated and examined in different proceedings are the same (idem) depends on a facts-based assessment rather than on the formal assessment consisting of the comparison of only the essential elements of the offences.¹⁰⁷

In summary, according to Article 4 of Protocol No. 7 of the ECHR, the principle of non bis in idem prohibits a double criminal trial or double punishment for the same offence; this prohibition also covers the administrative proceedings and penalties (including for violations of tax laws) where, due to the nature of the offence or the degree of severity of penalty, they may amount to criminal proceedings and sanctions. However, this prohibition is to be applied only if certain conditions are met: bis – if there is already a final judgment by which a person had been finally acquitted or convicted for the offence; idem – when the offence for which responsibility is sought is the same as a previous one, that is it arises from identical or substantially the same facts and is not distinguishable in terms of gravity, consequences, criminal intent or purpose. Consequently, the principle of non bis in idem does not exclude the possibility of parallel or dual proceedings regarding the same conduct, provided that they are sufficiently closely connected in substance and in time, pursue complementary purposes and are foreseeable. In any case, the determination as to whether the offences are the same is the matter of a concrete case, as it depends on a facts-based

¹⁰³ Ibid., paras. 123, 130. The applicants in this case argued that they had been both prosecuted and punished twice in respect of the same tax offence. Due to undeclared taxable transactions, resulting in unpaid taxes in significant amounts, the applicants were charged with imprisonment for tax fraud and respective tax penalties.

¹⁰⁴ Ibid., para. 132.

¹⁰⁵ Ibid., para. 134.

¹⁰⁶ Ibid. See also European Court of Human Rights, *Johannesson and Others v Iceland*, application no. 22007/11, Judgment 18 May 2017, paras. 51, 54.

¹⁰⁷ European Court of Human Rights, *Sergey Zolotukhin v Russia* [Grand Chamber], *ibid.*, para. 84; European Court of Human Rights, *A and B v Norway* [Grand Chamber], *ibid.*, para. 108.

assessment rather than only on a formal assessment; the law enforcement and judicial authorities are not precluded from taking appropriate means to avoid the duplication of proceedings with regard to the same offence.

(2) CONSTITUTIONAL JURISPRUDENCE OF FOREIGN JURISDICTIONS

Unlike the issues of the burden of proof, the principle of legality or the presumption of innocence, the compatibility of the definition of illicit enrichment with the principle of non bis in idem was raised before very few constitutional courts; one such distinctive example is the case the Lithuanian Constitutional Court dealt with in its ruling of 15 March 2017.¹⁰⁸ There the petitioners claimed that the manner in which illicit enrichment is criminalised created the preconditions for violating the principle of non bis in idem in cases where a person, due to the acquisition of the same property and the failure to pay taxes for such property, is subject not only to criminal responsibility but also to a fine under the Law on Tax Administration. As fines imposed pursuant to the Law on Tax Administration of the Republic of Lithuania are criminal in nature, these fines cannot be applied together with criminal liability for the same unlawful act. Thus, the petitioners acknowledged that the issue of double punishment may arise not in all cases, but only when a significant increase in assets can also result in responsibility for a breach of tax laws.

In its ruling the Constitutional Court recalled the meaning of the principle of non bis in idem and concluded that under the said constitutional principle the prohibition to punish a person twice for the same unlawful act means not only the prohibition to apply twice criminal responsibility for the same act, but also to apply for the same unlawful act criminal responsibility, in addition to the administrative responsibility already applied.¹⁰⁹

The Constitutional Court also explored the issue of application of the impugned provision of the Criminal Code in the context of the Law on Tax Administration. The constitutional Court, taking into account the overall legal regulation, concluded that the criminal offence of illicit enrichment does not necessarily pre-determine the second punishment for the already punished violation of tax laws. Therefore, the definition of illicit enrichment does not per se imply identity with violation of tax laws; on the other hand, if in practice a situation arises when, for the same act of illicit enrichment, a person is held responsible first under administrative law, it is the duty of law enforcement and judicial authorities to avoid the violation of the non bis in idem principle by revoking administrative penalty.

When assessing constitutionality of the criminal offence of illicit enrichment with the principle of non bis in idem the Constitutional Court underlined that

“the fact whether illicit enrichment and a violation of tax laws are identical can be ascertained only in the course of considering concrete criminal cases and cases of tax law violations. Consequently, such ascertainment is a matter of the application of law.”

¹⁰⁸ Constitutional Court of the Republic of Lithuania, Ruling on the compliance of paragraph 1 of Article 189-1 CC of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 March 2017, no. KT4-N3/2017.

¹⁰⁹ Ibid., para. 26.5

The Court also recalled that the questions concerning the application of legal acts have to be decided by ordinary courts or institutions that have the powers to apply legal acts. This means that the definition of illicit enrichment, as provided for in the Criminal Code of Lithuania is not in itself problematic with regard to the principle of non bis in idem; all the situations, where the problem of double punishment may arise, must be solved in practice (case law) with due respect to and in compliance with the principle of non bis in idem.

(3) APPLICABILITY OF THE STANDARDS OF NON BIS IN IDEM IN THE UKRAINIAN CASE

As already indicated, a distinctive element of the offence established in Article 368-2, para. 1 CC, is the absence of justification of a significant increase in assets. As has also been mentioned, one of the main ideas behind the criminalisation of illicit enrichment is the elimination of the requirement to prove a connection between the action taken by a public official and the eventual benefit received in exchange for the action. This means that the absence of proof of a justified increase in assets is a sufficient for criminal responsibility to arise. The *corpus delicti* of illicit enrichment has been purposefully construed and, therefore, is separate and distinctive from other criminal activities laid down in the Criminal Code.

Based on the analysis of the foreign practices and the jurisprudence of the ECtHR, the following arguments are provided for supporting the position that the criminal offence of illicit enrichment is in compliance with the principle of non bis in idem:

First, criminal prosecution for illicit enrichment does not require a simultaneous prosecution for a predicate crime, therefore, for criminal responsibility to arise under the former provision, only the absence of justification of a significant increase in assets is required and not the commission by the accused of other concrete crimes or offences.

Further, the presence of the element of *idem* (the presence of the same offences), even in cases when illicit enrichment is directly connected to other concrete crimes (for example a significant increase in assets is a result of other criminal activities) is not established either. As has been mentioned, the element of *idem* is present when both offences arise from identical or substantially the same facts and are not distinguishable in terms of their gravity and consequences, the social value being protected as well as the criminal intent and purpose. Illicit enrichment, composed of a significant increase in assets that cannot be justified, and other criminal activities, which may be the cause of illicit enrichment (e.g., bribery, illegal trade in influence, abuse of power, etc.), arise from substantially different rather than from identical or substantially the same facts; they are distinguished by different *corpus delicti* elements, including gravity and consequences.

In addition, the Constitutional Petition does not address the issue of parallel proceedings that are not excluded by the non bis in idem principle. As has been mentioned, dual or parallel proceedings, including administrative and criminal, are allowed as long as they are sufficiently connected in substance and in time, are foreseeable and pursue complementary purposes.

Finally, the principle of non bis in idem is mainly concerned with due process and aims to prevent injustice of a person being prosecuted or punished twice for the same criminalised conduct. In essence, it is not the

law that contradicts the said principle but the application of the law in practice, which could, in theory, be in conflict with it. Such conflicts are, however, easily avoidable on a case-by-cases basis: the determination as to whether the offences are the same is primarily a matter of a concrete case and depends on a facts-based assessment; the law enforcement and judicial authorities are obliged by law to avoid the duplication of proceedings with regard to the same offence. No arguments to the contrary are provided in the Constitutional Petition.

F. PRINCIPLE OF NON-RETROACTIVITY

The constitutional principle of the rule of law stipulated in the Constitution of Ukraine implies the principle of legality, according to which “laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person” and “no one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence”. The Venice Commission in its Rule of Law Checklist stressed the significance of the *nullum crimen sine lege* and *nulla poena sine lege* (no crime, no penalty without a law) principles in criminal law by indicating that the rule that people must be informed in advance of the consequences of their behaviour implies foreseeability and non-retroactivity especially of criminal legislation.¹¹⁰

The Constitutional Petition submits that Article 368-2, para. 1 CC possibly violates the principle of legality in this aspect of non-retroactivity of the effect of law, therefore the criminal offence might possibly apply to legal relations that existed prior to the adoption of this provision. According to the argumentation provided, the moment of acquisition of assets in ownership must be distinguished from the moment when circumstances for such acquisition are obtained or emerge. This might negatively impact the capabilities of proving the legality of grounds for the acquisition of assets in significant amount for those who acquired it before criminal responsibility for illicit enrichment was introduced, as they, at the time of acquisition of assets, had no possibility of knowing that such proof would be needed in the future.

(1) JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

According to developed case law of the ECtHR, the principle of non-retroactivity prohibits the retroactive application of legislative provisions to offences committed before such provisions came into force. It is against Article 7 of the ECHR to extend the scope of existing offences to acts which previously had not been considered as criminal offences.¹¹¹ However, no violation of Article 7 is found where the acts in question were already punishable under the Criminal Code applicable at the material time, even if they had been punishable under other provisions of the Criminal Code¹¹² or if they were only punishable as an aggravating circumstance rather than an independent offence¹¹³.

¹¹⁰ Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session, CDL-AD(2016)007-e (Venice, 11-12 March 2016), para. 62.

¹¹¹ See European Court of Human Rights, Guide on Article 7 of the European Convention on Human Rights. No punishment without law: the principle that only the law can define a crime and prescribe a penalty, updated version of 31 December 2017, available at <https://bit.ly/2luXQXq>.

¹¹² See, e.g., European Court of Human Rights, *Veeber v. Estonia*, application no. 45771/99, Judgment of 21 January 2003, paras. 33-35, 39; European Court of Human Rights, *Korbely v. Hungary* [Grand Chamber], application no. 9174/02, Judgment 19 September 2008, paras. 72-73.

¹¹³ See European Court of Human Rights, *Ould Dah v. France*, application no. 13113/03, Judgment of 30 March 2009.

In the case of *Gogitidze and Others v. Georgia*¹¹⁴, the ECtHR dismissed the arguments of the applicants concerning the alleged violation of the prohibition of the retrospective application of law with regard to the application of legislative amendments (aimed at strengthening the efforts to combat criminality, especially economic offences and those committed in the public service) adopted by the Parliament of Georgia on 13 February 2004. The applicants had argued that one of these amendments, which concerned the Code of Criminal Procedure and the Code of Administrative Procedure and regulated the mechanism for the forfeiture of wrongfully acquired property, was the ground for the confiscation of their property, which had been found to have been unlawfully obtained during the period from 1994 until May 2004. The state authorities had found that this time span was the same as the time that one of the applicants had held high positions in public office, but, taking into account his remuneration received, it could not have been sufficient to finance the acquisition of the property by himself, his two sons and his brother.¹¹⁵

Regarding the argument of the applicants that it was arbitrary to extend retrospectively the scope of the confiscation mechanism to the property that they had acquired prior to the entry into force of the amendments of 13 February 2004 of the Code of Criminal Procedure and the Code of Administrative Procedure, the Court noted that „the amendment in question was not the first piece of legislation in the country which required public officials to be held accountable for the unexplained origins of their wealth.”¹¹⁶ It stressed that other earlier laws had addressed issues like corruption offences, as well as

“the obligation of public officials to declare and justify the origins of their property and that of their close entourage, subject to possible criminal, administrative or disciplinary liability the exact nature of which was to be regulated by separate laws governing breaches of those anticorruption requirements. [...] the amendment of 13 February 2004 merely regulated afresh the pecuniary aspects of the existing anti-corruption legal standards.”

The ECtHR concluded that, according to the established case law, the “lawfulness” requirement, which is established by Article 1 of Protocol No. 1 of the ECHR (guaranteeing the right to property) cannot normally be interpreted “as preventing the legislature from controlling the use of property or otherwise interfering with pecuniary rights via new retrospective provisions regulating continuing factual situations or legal relations anew.”¹¹⁷ It, therefore, found the confiscation of the property in the said instance to have been lawful and in accordance with the standards of legality established by the ECHR.

Illicit enrichment may, under certain circumstances, be characterized as a continuous offence (also referred to as a “continuing offence”): the offence of illicit enrichment is often a result of multiple rather than a single act of obtainment of assets (the constituent parts thereof), connected by the same intent and taking place over a certain period of time. According to the ECtHR, with respect to continuous offences, understood as a type of crime extending (committed) over a period of time, a conviction under new criminal provisions, even for acts committed prior to the entry into force of these provisions, may not amount to retroactive application of criminal law to the disadvantage of the accused. On the basis of a comparative survey, the ECtHR has distinguished that the Council of Europe member States can be divided into three different

¹¹⁴ European Court of Human Rights, *Gogitidze and Others v. Georgia*, application no. 36862/05, Judgment of 12 May 2015.

¹¹⁵ *Ibid.*, paras. 8-11.

¹¹⁶ *Ibid.*, para. 99.

¹¹⁷ *Ibid.*

groups: (a) thirty member States where the concept of a continuous criminal offence is enshrined in the law, including Ukraine; (b) fourteen member States where the concept of a continuous criminal offence has been developed by legal theory and practice; and (c) three member States which do not report the existence either in the law or in legal theory of the notion of a continuous criminal offence as understood in the present case.¹¹⁸ The ECtHR concluded that there is a broad consensus arising out of a long European tradition with regard to the features of a continuous criminal offence, which include both objective (*actus reus*) and subjective (*mens rea*) elements testifying to the legal unity of the acts concerned:

“(a) the perpetrator commits a number of identical, similar or different criminal acts against the same legally protected interest (Rechtsgut, bien juridique, bene giuridico); in addition, it is often required that the identity of the perpetrator and of the victim be the same on each occasion;

(b) there is at least a similarity in the manner of execution of the individual acts (modus operandi), or there are other material circumstances connecting them which constitute a whole (actus reus);

(c) there is a temporal connection between the different individual acts, which is to be assessed in the particular circumstances of each case;

(d) there is the same, repeated criminal intent or purpose (mens rea) for all the individual acts, although they do not all have to be planned ab initio;

(e) the individual acts comprise, either explicitly or implicitly, the constituent elements of the criminal offence(s).”¹¹⁹

The ECtHR also found that there is an agreement among the Council of Europe member States on the principle that the law in force at the time of the cessation of the continuous criminal activity is applicable to the facts which occurred prior to its entry into force, provided that these facts satisfy the conditions of the new law, and in most countries also of the previous law. This also applies, in the majority of member States, when the new law is more severe since the perpetrator is presumed to have tacitly agreed to a harsher sentence by continuing his unlawful conduct after the change in the law.

The ECtHR has, accordingly concluded, that the concept of a continuous criminal offence confers two benefits on the offender:

(a) he or she is given only one single sentence instead of a cumulative, consecutive or concurrent sentence imposed for several offences; and

(b) there is a requirement that the constituent elements of the offence defined by the new law, if any, be made out from the onset of the criminal conduct, that is, also with regard to the facts which occurred before the entry into force of the new law.¹²⁰

In *Rohlena v. the Czech Republic*, the ECtHR upheld the judgments of the national courts, which had convicted as charged the applicant for committing an offence – abuse of a person living under the same roof

¹¹⁸ European Court of Human Rights, *Rohlena v. the Czech Republic*, application no. 59552/08, Judgment of 27 January 2015, para. 32.

¹¹⁹ *Ibid.*, para. 33.

¹²⁰ *Ibid.*, para. 37.

within the meaning of Article 215a CC of the Czech Republic, as in force since 1 June 2004, and had applied that provision to the abuse perpetrated by the applicant against his wife before that date, i.e., for having, at least between 2000 and 2006, repeatedly physically and mentally abused his wife while he was drunk (due to which his wife had sustained serious injuries obliging her to seek medical assistance in 2000, 2003 and 2006).¹²¹

The conclusion of the ECtHR was supported by the following findings of the case.¹²² First, the national ordinary courts, including the Czech Supreme Court, had thoroughly examined the national law, including the definition of the continuous offence, and had correctly applied it to the factual circumstances of the case. Second, the national courts had clearly determined that even before the new legal provision came into force, the applicant's conduct had amounted to punishable criminal offences under other article of the Criminal Code.¹²³ Therefore, the new provision of the Criminal Code, which came into force on 1 June 2004, applied to the earlier assaults as well.

Third, the national courts had found that the concept of a continuation of a criminal offence developed by the case-law was introduced into the Criminal Code in 1994, i.e., prior to the first criminal act of the applicant of which he was convicted. Under this provision, a continuation of a criminal offence was defined as consisting of individual acts driven by the same purpose, which constituted the same offence and were linked by virtue of being carried out in an identical or similar manner, occurring close together in time and pursuing the same object. The latter had to be assessed under the rules in force at the time of completion of the last occurrence of the offence, provided that the acts committed under any previous law would have been punishable also under the older law. Fourth, the position had been substantiated in the light of its conformity with the national Constitution, i.e., it was reviewed by the Czech Constitutional Court.

The ECtHR concluded that the law and the case law of national courts was consistent and foreseeable as proscribed by Article 7 of the ECHR. It also came to the same conclusions as regards the penalty imposed on the applicant.¹²⁴ In conclusion, the ECtHR confirmed that the fact of holding the applicant liable under the said provision also in respect of acts committed before that date did not constitute retroactive application of more detrimental criminal law as prohibited by the ECHR. It also concluded that it was consistent with the principle of legality: the offence of which the applicant was convicted not only had a basis in the relevant national law at the time when it was committed; this law defined the offence sufficiently clearly to meet the quality requirement of foreseeability flowing from the autonomous meaning of the notion of law.

In summary, according to Article 7 of the ECHR, the principle of non-retroactivity of criminal law prohibits the retroactive application of criminal law to the disadvantage of an accused; this prohibition applies both to the provisions defining the offence and to those which define the penalty. The principle of non-retroactivity prohibits the retroactive application of legislative provisions to offences committed before such

¹²¹ European Court of Human Rights, *Rohlena v. the Czech Republic*, *ibid.*, 58.

¹²² *Ibid.*, paras. 57-73.

¹²³ Article 215a CC had introduced criminal responsibility for the abuse of "a person living under the same roof", applicable to "anyone who abused a relative or other person living under the same roof", aggravated circumstances being when (a) the acts of a particularly brutal manner or against several persons or (b) the conduct in question continued over a lengthy period, and came into force on 1 June 2004. Assaults of the applicant committed before that date were punishable under other provisions CC: those, which established criminal responsibility to "a person who threatened to kill another person or to cause him or her bodily harm or other serious harm, in a manner giving reasonable grounds for fear" (Art. 197a) or those, which laid down criminal responsibility for the offence of assault with intent to cause bodily harm, aggravated circumstances being where, among other factors, the perpetrator caused serious bodily harm to the victim or where the perpetrator's conduct resulted in death (Art. 221, para. 1).

¹²⁴ European Court of Human Rights, *Rohlena v. the Czech Republic*, *ibid.*, paras. 65-69.

provisions came into force, i.e., it is against Article 7 of the ECHR to extend the scope of existing offences to acts which previously were not criminal offences.

However, no violation of Article 7 is found where the acts in question were already punishable under the Criminal Code applicable at the material time, even if they had been punishable under other provisions. Also, there is no violation of Article 7 of the ECHR with regard to the principle of non-retroactivity in cases of continuous offences: a continuous criminal offence is considered as a single act; its legal classification in criminal law is assessed under the law in force at the time of completion of the last occurrence of the offence. Therefore, new criminal provisions may also be applicable to acts committed prior to the entry into force of these provisions, which are a constituent part of a continuous offence, if the national law establishing criminal responsibility for such an offence (acts which constitute it) is clear and foreseeable. Accordingly, the latter may be applicable to illicit enrichment, which, in some instances, may be characterised as a continuous offence.

(2) CONSTITUTIONAL JURISPRUDENCE OF FOREIGN JURISDICTIONS

The compatibility of the definition of illicit enrichment with the principle of non-retroactivity was also raised before the constitutional courts of the Republic of Lithuania and the Republic of Moldova.

In Lithuania the petitioners argued before the Constitutional Court that the impugned legal regulation can potentially violate the prohibition of the retroactivity of law because the applicability of the criminal offence of illicit enrichment has been linked only with the possession of the property referred to therein after the entry into force of the law rather than with its acquisition that could have taken place before the entry into force of the latter provision.

The Lithuanian Constitutional Court stressed that the principle of *nullum crimen, nulla poena sine lege* is a fundamental constitutional principle and stems from the constitutional principle of a state under the rule of law, meaning that no person may be punished for an act that was not punishable by law at the time when it was committed. The Court stressed that the constitutional principle of *nullum crimen, nulla poena sine lege* would be disregarded if criminal laws provided that they have retroactive effect on crimes defined exclusively under national law. Second, the Constitutional Court further interpreted the disputed criminal provision by means of systematic analysis in the context of the relevant legal regulation established by the Criminal Code and the Law Amending the Criminal Code, namely the legal provisions, which laid down the terms of implementation, the validity and the entry into force of the questioned provisions on illicit enrichment. Accordingly, the Constitutional Court concluded that the discussed provisions of both the Criminal Code and the Law Amending the Criminal Code are to be understood exclusively as meaning that they are applicable only to the assets, referred to in the criminal provision of illicit enrichment, which were acquired not earlier than on the date of its entry into force. Therefore, no one may be held criminally liable under this provision, if they had illicitly acquired the assets before the entry into force of the said provision, even if they held such assets after this date. Taking into account the latter conclusion, the Constitutional Court found the impugned legal regulation to be in compliance with the principle of non-retroactivity.¹²⁵

¹²⁵ Constitutional Court of the Republic of Lithuania, Ruling on the compliance of paragraph 1 of Article 189-1 CC of the Republic of Lithuania with the Constitution of the Republic of Lithuania, 15 March 2017, no. KT4-N3/2017, para. 41.3.

Also in Moldova the Constitutional Court assessed the constitutionality of the said provision with regard to its conformity with the constitutional principle of the rule of law, *inter alia*, the principle of legality construed through the principle of non-retroactivity.¹²⁶

As established in the case, in addition to the offence of illicit enrichment and the criminal responsibility for this offence, the Criminal Code foresees that in respect of persons convicted for crimes provided, *inter alia*, for illicit enrichment, the following punishment applies extended confiscation of assets acquired by the convicted person within 5 years prior and following the commission of crime, before the delivery of the judgement, if these assets substantially exceed the income legally obtained by the person concerned. The petitioners, therefore, argued that with regard to the imposition of extended confiscation, the latter provision is contrary to the principle of non-retroactivity, as, by allowing confiscation of assets acquired 5 years prior and following the commission of a crime, it allegedly provided the court with the possibility to confiscate the assets acquired before the crime was committed.¹²⁷

In assessing this argument, the Constitutional Court stressed that the principle on non-retroactivity is expressly established in the Constitution of the Republic of Moldova, according to which “no one shall be sentenced for actions or omissions, which did not constitute an offence at the time they were committed”. The latter principle, when applied in criminal law, is understood as the general principle of *lex retro non agit* (according to which the law cannot be retroactive), as well as the principle of *lex mitior* (according to which the more lenient criminal norm has to be applied when the laws relevant to the offence are amended). The latter principles are also laid down in the Criminal Code of the Republic of Moldova, as well as supported by the case law of the Constitutional Court.

Accordingly, the argumentation of Constitutional Court with regard to the application of criminal responsibility for illicit enrichment was interpreted in the light of the principle of non-retroactivity. The Court found no contradiction of the measure of extended confiscation with the Constitution. According to the Constitutional Court, the possibility of confiscation of assets acquired five years prior and following the commission of a crime is aimed at avoiding the abuses and the divergencies of interpretation in establishing the disproportion between the assets acquired and the illicit revenues. However, taking into account the constitutional principle of non-retroactivity, the Constitutional Court concluded that the provisions of illicit enrichment cannot be applied retroactively to the assets acquired before the entry into force of the given provisions.¹²⁸

(3) APPLICABILITY OF THE STANDARDS OF NON-RETROACTIVITY IN THE UKRAINIAN CASE

With regard to the principle of non-retroactivity, the relevant element of the offence of illicit enrichment, as established by Article 368-2, para. 1 CC of Ukraine, is the obtainment of assets (significant increase thereof), particularly the time when it is considered to have been committed.

On the basis of the analysis of the jurisprudence of foreign constitutional courts and the ECtHR, the following arguments are relevant in the evaluation of the Ukrainian law establishing criminal

¹²⁶ Constitutional Court of the Republic of Moldova, Judgment on Constitutional Review of some provisions of the Criminal Code and Criminal Procedure Code (extended confiscation and illicit enrichment), Complaint No. 60a/2014, 16 April 2015.

¹²⁷ *Ibid.*, para. 28.

¹²⁸ *Ibid.*, para. 109.

responsibility for illicit enrichment with regard to its compatibility with the principle of non-retroactivity:

First, Article 368-2, para. 1 CC is to be interpreted in the light of other provisions of the Criminal Code, establishing the general rules of the application of criminal law in time. Under Article 4, para. 2 CC, the criminality and possibility to punish an act is determined by the law on criminal responsibility that was in effect at the time of commission of the act; according to Article 5, para. 2 CC, the law that criminalizes an act or imposes a heavier criminal responsibility cannot be retroactive in time. Taking into account these and other relevant provisions, there is no ground to assert that the definition of illicit enrichment implies its retroactive application. On the contrary, against the background of the overall regulation of the CC, it is to be presumed that the obtainment of assets of a significant amount has to be committed after the entry into force of Article 368-2, para. 1 CC. Criminal responsibility for illicit enrichment applies namely to the act of obtainment of assets rather than the circumstances leading to the acquisition of these assets (as indicated in the Constitutional Petition).

Second, the conformity of the contested provision with the principle of non-retroactivity may also be confirmed by qualifying the criminal offence of illicit enrichment as a continuous offence, in terms of Article 32 CC, under which a continuous offence is understood as an offence comprised of two or more similar acts connected by one criminal intent. Accordingly, the offence of illicit enrichment is a result of multiple, rather than a single act of obtainment of assets (the constituent parts thereof) connected by the same intent and taking place over a certain period of time. Taking this into account, criminal responsibility for illicit enrichment could be applied when the obtainment of assets of a significant amount is completed after the date of the entry into force of Article 368-2 CC, even if one or more acts of acquisition of parts of such assets had been committed prior to this date. In the context of the relevant case law of the ECtHR, this would be compatible with the principle of non-retroactivity. As already mentioned, the latter principle allows for new criminal provisions to be applied to acts committed prior to the entry into force of these provisions, which are a constituent part of a continuous offence, if certain conditions are met, for example the national law establishing criminal responsibility for such an offence is clear and foreseeable. In this regard, as, according to the Article 368-2 CC, criminal responsibility applies to public officials, it must be reiterated that the threshold for clarity and foreseeability is lower with regard to them (taking into account that public officials are aware of the standards of higher integrity, applicable to them while in office, as well as the corresponding duties to declare and justify their income according to procedures laid down by national law).

Furthermore, in the context of similar foreign practices and the case law of the ECtHR, it may be argued that Article 368-2 CC with respect to the introduction of criminal responsibility for illicit enrichment is compatible with the principle of non-retroactivity, as Ukraine had, indeed, not introduced any new concept but rather regulated anew, in a more efficient manner, the existing measures aimed at the prevention and eradication of corruption in the public service. As already outlined, the provision which supplemented the Criminal Code with Article 368-2 was not the first legislative measure that required public officials in Ukraine to be held accountable for the unexplained origins of their wealth. In particular the provisions must be taken into account, which had required public officials not only to declare their property, but also to show that the declared property had been acquired lawfully.

