Strasbourg / Warsaw, 24 October 2022 **CDL-AD(2022)029**

Opinion No. 1096/2022 Or. Engl.
OSCE/ODIHR Opinion No. CRIM-MDA/448/2022

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

REPUBLIC OF MOLDOVA

JOINT AMICUS CURIAE BRIEF RELATING TO THE OFFENCE OF ILLICIT ENRICHMENT

Adopted by the Venice Commission
at its 132nd Plenary Session
(Venice, 21-22 October 2022)

On the basis of comments by

Ms Angelika NUSSBERGER (Member, Germany)
Ms Janine OTÁLORA MALASSIS (Substitute Member, Mexico)
Mr Cesare PINELLI (Substitute Member, Italy)
Mr Andrew DORNBIERER (Expert, OSCE/ODIHR)
Ms Tetiana KHUTOR (Expert, OSCE/ODIHR)
Mr Jeremy McBRIDE (Expert, OSCE/ODIHR)

Opinion co-funded by the European Union

Table of Contents

I. Introduction

1. On 28 July 2022 and on 4 August 2022 respectively, the President of the Constitutional Court of the Republic of Moldova requested an *amicus curiae* brief from the European Commission for Democracy through Law of the Council of Europe (hereinafter, "the Venice Commission") and the OSCE Office for Democratic Institutions and Human Rights (hereinafter, "the OSCE/ODIHR") relating to the offence of illicit enrichment. In accordance with standing practice when receiving the same request, the Venice Commission and the OSCE/ODIHR decided to prepare the *amicus curiae* brief jointly, of which they informed the Constitutional Court of the Republic of Moldova.

2. For the present *amicus curiae* brief, Ms Angelika Nussberger, Ms Janine Otálora Malassis and Mr Cesare Pinelli acted as rapporteurs for the Venice Commission. Mr. Andrew Dornbierer, Ms Tetiana Khutor and Mr Jeremy McBride were appointed as legal experts for the OSCE/ODIHR.

3. This *amicus curiae* brief was prepared on the basis of comments by the Venice Commission's rapporteurs and OSCE/ODIHR legal experts. It is based on an unofficial English translation of Article 330^2 of the Criminal Code of Moldova provided by the Constitutional Court of the Republic of Moldova (hereinafter, the "Constitutional Court"). Inaccuracies may occur in this *amicus curiae* brief as a result of errors from translation.

4. The purpose of this *amicus curiae* brief for the Constitutional Court of the Republic of Moldova is not to take a final stand on the issue of the constitutionality of Article 330^2 of the Criminal Code of Moldova but to provide the Court with materials as to relevant applicable international and European human rights standards and OSCE commitments as well as with elements from comparative law in order to facilitate the Court's own consideration under the Constitution of Moldova. It is the Constitutional Court of Moldova that has the final decision as regards the binding interpretation of the Constitution and the compatibility of national legislation with it.

5. The amicus curiae Brief was adopted by the Venice Commission at its 132nd Plenary Session (21-22 October 2022).

II. Request

6. This request for an *amicus curiae* brief comes in the context of five applications brought to the Constitutional Court between April and July 2022 contesting the constitutionality of Article 330^2 of the Criminal Code of Moldova on illicit enrichment. Article 330^2 of the Criminal Code, which was introduced by Criminal Law 326 of 23 December 2013, reads as follows:

> *"(1) Possession by a person with a position of responsibility or by a public person, personally or through third parties, of goods, if their value substantially exceeds the means acquired and it has been found, based on the evidence, that they could not be obtained lawfully, is punishable by a fine in the amount of 6000 to 8000 conventional units or by imprisonment of 3 to 7 years, in both cases with the deprivation of the right to occupy certain positions or to exercise a certain activity on a term from 10 to 15 years.*
>
> *(2) The same actions committed by a person holding a position of public dignity are punishable by a fine in the amount of 8000 to 10000 conventional units or by imprisonment from 7 to 15 years, in both cases with the deprivation of the right to occupy certain positions or to exercise a certain activity on a term from 10 to 15 years."*

7. In the requests to the Venice Commission and the OSCE/ODIHR, the Constitutional Court noted that the applicants claim,[1] *inter alia*, that in order to prove the commission of the offence of illicit enrichment, the commission of an act generating illicit income must first be proven. They argue that if such a qualified act is to be proven, holding a person accountable based on Article 330[2] of the Criminal Code violates the *ne bis in idem* principle, because the person eventually acquitted or convicted for the act of generating illicit income would risk being charged again for the same act. The applicants further submit that by incriminating illicit enrichment through Article 330[2] of the Criminal Code, the principle of *ultima ratio* is not observed as the intended goal may be achieved by less intrusive yet equally effective measures, such as, for example, administrative confiscation. They also assert that the way in which the provision is phrased violates the principles of presumption of innocence and of legality.

8. In this context and for this *amicus curiae* brief, the Constitutional Court has requested the Venice Commission and the OSCE/ODIHR to answer the following three questions:

1. *Does Article 330[2] of the Criminal Code comply with the principles of presumption of innocence, legality of the offence, and ne bis in idem from the perspective of the European Convention on Human Rights and international standards?*
2. *Is the Constitutional Court able to rule on the observance of the ultima ratio principle by the Parliament in criminal matters? In other words, may the Court declare as non-constitutional an offence, because there are non-criminal means to achieve the goal pursued by the Parliament?*
3. *What would be the applicable standard of proof for the offence of illicit enrichment: proving a defendant's guilt beyond reasonable doubt, or proving on a balance of probabilities or a high probability of illicit origins?*

III. General Remarks

9. Corruption undermines the rule of law, weakens public trust in public institutions and has adverse effects on the exercise of human rights and fundamental freedoms. The overall objective of illicit enrichment laws is to address corruption. It must be noted that the definition of "illicit enrichment" varies significantly across the Council of Europe and OSCE regions, both when it is taken as a basis for administrative measures and when it is understood as a criminal offence, and the scope and nature of the constitutive elements of the criminal offence also differ amongst jurisdictions.

10. Article 20 of the United Nations Convention against Corruption (UNCAC)[2] provides that "*[s]ubject 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*." Article 20 UNCAC is non-mandatory and leaves it up to the State to decide on the criminalisation of illicit enrichment, which Moldova has done in this case. The 2004 OSCE Ministerial Council Decision on Combating Corruption encourages OSCE participating States to sign and ratify the UNCAC as well as to fully implement the Convention but also without prescribing a criminalisation of illicit enrichment.[3]

---

[1] Available at <https://constcourt.md/ccdocview.php?tip=sesizari&docid=1984&1=ro>;
<https://constcourt.md/ccdocview.php?tip=sesizari&docid=1991&1=ro>;
<https://constcourt.md/ccdocview.php?tip=sesizari&docid=2018&1=ro>;
<https://constcourt.md/ccdocview.php?tip=sesizari&docid=2036&1=ro>;
<https://constcourt.md/ccdocview.php?tip=sesizari&docid=2054&1=ro>.

[2] *UN Convention against Corruption*, adopted by the UN General Assembly on 31 October 2003. The Republic of Moldova ratified the UNCAC on 1 October 2007.

[3] OSCE Ministerial Council, *Decision No. 11/04 on Combating Corruption*, MC.DEC/11/04.

11. The fight against illicit enrichment can be part of a State's strategy to eradicate corruption, using the criminalisation of illicit enrichment as a legal tool to combat corruption.[4] However, criminalising illicit enrichment can pose a number of challenges in light of international and European human rights standards and OSCE human dimension commitments. The Organisation for Economic Co-operation and Development (OECD) noted in a 2016 report that such challenges could be overcome by carefully drafting the relevant legislation and that *"[a]n 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*".[5] The report 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*."[6]

IV. Analysis

12. Human rights and constitutional arguments often arise in discussions surrounding the criminalisation of illicit enrichment as attested by the applications to the Constitutional Court. In order to address the questions raised by the Constitutional Court, international and European human rights standards and OSCE human dimension commitments pertaining to the principles of presumption of innocence, *ne bis in idem*, and legality should be considered as well as the principle of *ultima ratio* and the standard of proof required in criminal cases.

13. Article 4 of the Constitution of the Republic of Moldova provides that:

> *"(1) Constitutional provisions on human rights and freedoms shall be interpreted and are enforced in accordance with the Universal Declaration of Human Rights, with the conventions and other treaties to which the Republic of Moldova is a party.*
> *(2) Wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations."*

14. In addition, the Constitution of the Republic of Moldova guarantees the presumption of innocence and the non-retroactivity of the criminal law in, respectively, Articles 21 and 22[7] of the Constitution. More precisely, it provides that "*[a]ny person accused to have committed an offence shall be presumed innocent until found guilty on legal grounds, brought forward in a public trial, safeguarding all the necessary guarantees for his/her defence*". Pursuant to Article 26 of the Constitution ("Right to defence"), *"(1) The right to defence is guaranteed" and "(2) Everyone shall be entitled to respond independently by appropriate legitimate means to an infringement of his/her rights and freedoms*." Furthermore, Article 46(3) of the Constitution provides that "*No assets legally acquired may be seized. The legal nature of the assets' acquisition shall be presumed*". In addition, Article 106 (1) of the Criminal Code provides for "*extended confiscation*" of property of a person convicted of the criminal offence of illicit enrichment under Article 330[2] of the Criminal Code. Moreover, the Law on National Integrity Authority No. 132 dated 17 June 2016[8] of Moldova establishes the procedure of control of assets and personal interests of public officials (see further below).

---

[4] OSCE, *Handbook on Combating Corruption*, 2016, p. 190.
[5] OECD, *Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges*, 2016-2019, p. 216.
[6] *Ibid.*, p. 159.
[7] Article 21 of the Constitution provides that "Any person accused to have committed an offence shall be presumed innocent until found guilty on legal grounds, brought forward in a public trial, safeguarding all the necessary guarantees for his/her defence" and Article 22 provides that "No one shall be sentenced for actions or drawbacks which did not constitute an offence at the time they were committed. No punishment more severe than that applicable at the time when the offence was committed shall be imposed".
[8] <https://www.legis.md/cautare/getResults?doc_id=131218&lang=ru#>.

A. Compatibility of Article 330[2] of the Criminal Code with the principles of presumption of innocence, legality of the offence, and *ne bis in idem*

1. Presumption of innocence

15. Article 6 (2) of the European Convention on Human Rights (ECHR)[9] and Article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR)[10] provide that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law. This principle is also enshrined in Article 11 of the Universal Declaration of Human Rights. In this regard, the European Court of Human Rights (ECtHR) has noted that the presumption of innocence means that *"(1) 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; (2) the burden of proof is on the prosecution, and (3) any doubt should benefit the accused".*[11]

16. The essential nature of this presumption has been clearly outlined by the UN Human Rights Committee in its General Comment No. 32 on Article 14 of the ICCPR, stating that "*The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle*."[12]

17. While assessing the compatibility of Article 330[2] of the Criminal Code with the right to be presumed innocent, it must be noted that this is not an absolute right.[13] The ECtHR has considered as being compliant with the principle of presumption of innocence the introduction of rebuttable presumptions of fact or law, providing such presumptions are "*within reasonable limits which take into account the importance of what is at stake*" and "*maintain the rights of the defence*".[14] In other words, as stated by the ECtHR, "*the means employed have to be reasonably proportionate to the legitimate aim pursued*".[15] The ECtHR has also underlined that a presumption would not be compliant with Article 6(2) if it "*ha[d] the effect of making it impossible for an individual to exonerate himself from the accusations against him, thus depriving him of the benefit of Article 6 § 2 of the Convention"*.[16]

18. According to the Legislative Guide for the Implementation of the UNCAC, illicit enrichment legislation respects the principle of presumption of innocence where the primary responsibility for proving matters of criminal substance against the accused rests with the prosecution (i.e., the prosecution has to demonstrate that the enrichment is beyond one's lawful income) and the

---

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, ETS No. 005). The ECHR entered into force in Moldova on 12 September 1997.
[10] UN International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Moldova acceded to the ICCPR on 26 January 1993.
[11] See ECtHR, *Barberà, Messegué and Jabardo v. Spain*, Application no. 10590/83, 6 December 1988), para. 77, which states that: "*Paragraph 2 [Article. 6-2 of the ECHR] embodies the principle of the presumption of innocence. It requires, inter alia, 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 benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him*".
[12] UN Human Rights Committee, *General comment no. 32, Article 14 of the ICCPR, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32, para. 30.
[13] ECtHR, *Salabiaku v. France*, Application no. 10519/83, 7 October 1988. In this case, the Court considered a provision in France's Customs Code that presumes that a person in possession of an imported suitcase is legally liable for its undeclared contents, and assessed whether the presumption contained in this law was incompatible with the presumption of innocence principle contained in Article 6(2) of the ECHR. In determining that the statutory presumption was compatible, the Court held that the presumption of innocence principle is not an absolute right, and should not be seen to prevent individual legal systems from implementing legislation that contains rebuttable presumptions of fact or law, providing such presumptions are within "*reasonable limits*" and "*maintain the rights of the defence*". This position was confirmed in ECtHR, *Falk v. the Netherlands*, Application no. 66273/01, 19 October 2004.
[14] *Ibid.,* para. 28 (ECtHR, *Salabiaku v. France*).
[15] ECtHR, *Falk v. the Netherlands*, Application no. 66273/01, 19 October 2004.
[16] ECtHR, *G.I.E.M. S.r.l. and Others v. Italy* [GC], Application no. 34619/97, 23 July 2002, para. 243.

presumptions are rebuttable (i.e. it is then for the defendant to offer a reasonable or credible explanation about the licit origin of income).[17]

19. As the Council of Europe's Multidisciplinary Group on Corruption has pointed out: "*In the context of fight against corruption, it has been discussed to enact laws against illicit enrichment. Such laws could contain rules to the effect that public officials who possess wealth beyond what can be explained as the result of lawful activities might risk that their property be confiscated. Such laws could be extended to the finances of their family. These laws should not be confounded with the reversal of the burden of proof in criminal cases and the presumption of innocence. What has been discussed in the context of fight against corruption is the reversal of the burden of proof of the licit origin of property. Notwithstanding that such laws have been accepted by the European Court of Human Rights under certain circumstances (see, for instance, the Salabiaku Case [*[18]*]), they may still lead to constitutional problems in certain countries."*[19] However generally, this does not amount to a reversal of the burden of proof of the commission of the criminal offence of illicit enrichment, which rests fully with the prosecution, but rather that the burden is on the accused to disprove one or several of the constitutive material elements of the said offence, such as the illicit origin of the wealth or income or assets and/or the claimed ownership of the assets.

20. Caution must be exercised in this context, however, as illicit enrichment laws "*generally permit a court to make a presumption that certain items of wealth have not come from lawful sources if the court has not seen evidence of an adequate amount of lawfully sourced income to justify the total value of the evidenced wealth*" and "*many illicit enrichment laws expressly require a person to satisfactorily 'explain' how certain items of wealth have been derived from legal sources once they have been established by the state to be disproportionate to the person's known sources of income*." [20]

21. An element to take into account is whether the introduction of the presumption of facts or law is reasonably proportionate to the legitimate aim pursued looking for instance at the nature and effectiveness of the public aim pursued, and whether these considerations outweigh the infringement on the rights of the accused.[21] In the present case, this would mean assessing whether the public interest of fighting corruption (and specifically the difficulty faced by law enforcement agencies to detect and prove these types of offences) would justify introducing such a presumption, but also whether, and to what extent, this presumption would be rebuttable.

22. Then, when the presumption applies, another consideration that arises is the nature of the burden of proof that falls on the accused/defendant to rebut the presumption, and whether s/he should provide evidence that brings into question the truth of the presumed facts as presented by the prosecution (so-called evidentiary burden of proof) or convince the court that the presumed fact is untrue (legal burden of proof).[22] In short, to what extent an accused/defendant will be required to rebut the presumption.

23. Requiring a defendant to prove his/her innocence would violate the principle of presumption of innocence, also noting that Article 8 (2) of the Criminal Procedure Code of Moldova provides that "no one has to prove his or her innocence". It should be enough for the accused to adduce

---

[17] UNODC, *Legislative Guide for the Implementation of the UNCAC (2012),* para. 297, where it is stated that the offence of illicit enrichment "*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 presumption of guilt and that the burden of proof remains on the prosecution, as it has to demonstrate that the enrichment is beyond one's lawful income. It may thus be viewed as a rebuttable presumption*".

[18] ECtHR, *Salabiaku v. France*, Application no. 10519/83, 7 October 1988.

[19] Multidisciplinary Group On Corruption (GMC), *Programme Of Action Against Corruption, adopted by the Committee of Ministers*, Directorate General of Legal Affairs (DG I), September 1995, p. 67.

[20] Basel Institute on Governance, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (2021), Author: Andrew Dornbierer, p. 122.

[21] See e.g., ECtHR, *Falk v. the Netherlands*, Application no. 66273/01, 19 October 2004. As regards the proportionality of the measures, see also ECtHR, *Todorov and others v Bulgaria,* Application no.50705/11, 13 July 2021, where the Court refers to a number of cases concerning the forfeiture of proceeds of crime, examining the purpose of the legislation under review and the applicable substantive and procedural guarantees, to assess the proportionality of the measure (see paras. 190-199).

[22] See e.g., UNODC and World Bank, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (2012), pp. 24-25.

evidence sufficient to raise a doubt regarding the submissions of the prosecution with respect to the proof of the material elements of the criminal offence.

24. In *Salabiaku v. France*, the Court looked at the case-law of the national courts to assess whether they resorted automatically to the presumption and whether they exercised their power of assessment, to determine whether in practice the presumption was rebuttable or not.[23] It is important that the accused has had a reasonable opportunity of putting forward his/her arguments.[24]

25. An appropriate formulation of the constitutive elements of the criminal offence will ultimately depend on the legal and procedural systems available in each country but also in the broader context of the criminalisation of corruption. At the same time, overall, "*it is helpful for the legislation to be as specific as possible in defining the elements of the case so as to clarify the objectives of the legislators and the roles of the court, prosecution, and defense when dealing with an illicit enrichment offense. Accordingly, jurisdictions that consider the reasonable explanation a defense may find it helpful to specify this in the provision.*"[25]

26. Of note, it is not the first time that the Constitutional Court of Moldova addresses the human rights compatibility of the criminal act of illicit enrichment. In 2015, the Constitutional Court did not find a violation of the principle of the presumption of innocence. It 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 "it has been found, based on evidence, that they could not be obtained lawfully" 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."*[26]

27. Article 330[2] of the Criminal Code of Moldova does not explicitly prescribe any obligation on the targeted person to provide any evidence whatsoever, and there is no express reverse onus mechanism provided for in its text and thus is not explicitly formulated in terms of a rebuttable presumption. This provision requires proof of possession of goods the value of which substantially exceeds the means acquired and proof that they could not have been lawfully obtained. It is thus not excluded that a defendant could be able to adduce evidence rebutting issues relating to the actual possession of the goods, their value as well as the illicit origin or unlawful acquisition. At the same time, the Moldovan regulation ascertains that the mere discrepancy between income and expenditures is not sufficient by itself to lead to the conviction of the public official. Therefore, the addition of the words "*it has been found, based on evidence, that they could not be obtained lawfully*" suggests that the pre-trial investigation authorities' should provide additional convincing evidence to exclude the possibility that the assets could have come from lawful sources or could have been acquired lawfully). The current wording *prima*

---

[23] ECtHR, *Salabiaku v. France*, Application no. 10519/83, 7 October 1988, para. 30. See also in this respect, ECtHR, *Todorov and others v Bulgaria*, Application no.50705/11, 13 July 2021, where the Court considered whether the national courts carried out a proper assessment of the individual case and, as a consequence, whether the judicial proceedings had been deficient (see paras. 192-196).
[24] *Ibid.*, para. 195.
[25] UNODC and World Bank, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption* (2012), pp. 24-25.
[26] 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>.

facie does not seem to require such authorities to demonstrate that there is a reasonable suspicion, or a reasonable belief that criminal activity may have occurred, before an illicit enrichment law can be applied, as is done in some jurisdictions.

28. Also, Article 8 (1) of the Criminal Procedural Code (CPC) of the Republic of Moldova provides that a person charged with the commission of a crime shall be presumed innocent until his/her guilt is proved in the manner set out in the Code and Article 8 (2) provides that no one has to prove his or her innocence.[27] Also, Article 8(3) of the CPC envisages that "*[c]onclusions on a person's guilt in the commission of a crime may not be based on suppositions. By proving guilt, all doubts that cannot be eliminated under this Code shall be interpreted in favour of the suspect/accused/defendant"*.-Nothing in the text of Article 330[2] of the Criminal Code provides that criminal proceedings under this article shall take place according to rules other than those established by the CPC regarding other crimes, including the principles of presumption of innocence and *in dubio pro reo*.[28]

29. Insofar as it is possible for Article 330[2] of the Criminal Code to be interpreted consistently with all the foregoing requirements – i.e., proof of possession of goods the value of which substantially exceeds the means acquired and proof that these goods could not have been obtained lawfully, which can be rebutted by the accused/defendant by adducing evidence sufficient to raise a doubt regarding the submissions of the prosecution with respect to the proof of the material elements of the criminal offence – which is a matter for the Constitutional Court to determine, it should not be considered contrary to the presumption of innocence principle.

2. Legality

30. The principle of legality is one of the core international human rights principles. The principle of "*nullum crimen sine lege, nulla poena sine lege"* (no crime without law, no punishment without law) derives from the legality principle. It is codified in a number of universally recognised international instruments, including Article 11(2) of the Universal Declaration of Human Rights, Article 15 of the ICCPR and Article 7 of the ECHR. As emphasised by the UN Human Rights Committee, the principle of legality in the field of criminal law requires both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty.[29]

31. In the ECHR, this principle is embodied in Article 7(1), which provides that 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. Clear interpretation of the scope of this article was provided by the ECtHR in *Jorgic v. Germany*,[30] where the Court ruled that Article 7 not only prohibits the retroactive application of criminal law to the disadvantage of an accused but also establishes the

[27] See also: Constitutional Court of The Republic of Lithuania, *Ruling on the Compliance of Paragraph 1 of Article 189[1] of the Criminal Code of the Republic Of Lithuania with the Constitution of the Republic of Lithuania*, 15 March 2017, No Kt4-N3/2017 available at: <https://lrkt.lt/en/court-acts/search/170/ta1688/content>.

[28] In comparison, for instance, Article 368 (2) of the Criminal Code of Ukraine defined the illicit enrichment as the "*acquisition by a person authorized to perform the functions of the state or local self-government into the ownership of assets in a significant amount, the legality of the grounds for the acquisition of which is not confirmed by evidence, as well as the transfer of such assets by him to any other person"*. The wording "*the legality of the grounds for the acquisition of which is not confirmed by evidence"* became one of the grounds for challenging the constitutionality of this provision, in particular compatibility with the presumption of innocence. The Constitutional Court of Ukraine ruled that this provision was unconstitutional, amongst others for violating the latter-mentioned principle. Case No. 1-135/2018(5846/17), Decision of the Constitutional Court of Ukraine in the case upon the constitutional petition of 59 People's Deputies of Ukraine on conformity of Article 368.2 of the Criminal Code of Ukraine to the Constitution of Ukraine (February 26, 2019); an unofficial translation of the decision provided by the Constitutional Court of Ukraine is available at: <http://web.ccu.gov.ua/en/docs/2541>. The decision was met with controversy, and Ukraine's own anti-corruption body, the National Anticorruption Bureau of Ukraine, released a statement alleging that the decision was 'politically motivated', see Basel Institute on Governance, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (2021), Author: Andrew Dornbierer, fn. 422.

[29] UN Human Rights Committee, *General Comment no. 29 on Article 4 of the ICCPR* (2001), para. 7.

[30] ECtHR, *Jorgic v. Germany*, Application no. 74613/01, 12 July 2007, para. 100.

fundamental principle of "*nullum crimen sine lege, nulla poena sine lege*" ("no crime without law, no punishment 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. Therefore, as the ECtHR ruled, a criminal offence must be clearly defined in the law, this requirement being satisfied where an individual can know from the wording of the relevant provision what acts and omissions will make her/him criminally liable, if necessary, with the assistance of the courts' interpretation of it[31] or with appropriate legal advice.[32]

32. The Venice Commission in its Report on the Rule of Law defines the legality principle as follows: *"It [legality] first implies that the law must be followed. This requirement applies not only to individuals, but also to authorities, public and private. In so far as legality addresses the actions of public officials, it requires also that they require authorization to act and that they act within the powers that have been conferred upon them. Legality also implies that no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity..."*.[33]

33. The principle of legality not only precludes the retroactive application of criminal law, as prohibited by Article 7 of the European Convention and Article 15 of the ICCPR but also requires that the relevant offence should have a sufficient legal basis in domestic law and satisfy the requirements of accessibility and foreseeability.[34]

34. The *accessibility* requirement implies that the law on which the conviction is based, shall be accessible to the defendant, meaning that it has been made public in accordance with the procedures set by legal norms. This requirement covers not only national legislation but also case-law[35] and international treaties on which the conviction is based.[36] The *foreseeability* requirement, in turn, requires that the law be clear enough so that an average person can predict, to a degree that is reasonable in the circumstances, the consequences which a given conduct might entail.[37]

35. While the requirement of *foreseeability* requires that provisions of criminal law should be clearly defined, the ECtHR has also emphasised that "*[i]t is a logical consequence of the principle that laws must be of general application that the wording of statutes is not always precise. One of the standard techniques of regulation by rules is to use general categorisations as opposed to exhaustive lists. Accordingly, 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 [...] However clearly drafted a legal provision may be, in any system of law, including criminal law, 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. Again, 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.*"[38] The ECtHR further emphasised the importance of the judicial interpretation in the case *Del Rio Prada v. Spain*, ruling 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*".[39] The Court also specifically held that "*an inconsistent case-law lacks the*

---

[31] *Ibid.*, para. 100.
[32] *Ibid.*, para. 113; see also ECtHR, *Chauvy and Others v. France* (dec.), Application no. 64915/01, 23 September 2003.
[33] Venice Commission, *Report on the Rule of Law,* CDL-AD(2011)003rev, 4 April 2011, para. 42; see also specifically on "*nullum crimen sine lege*": Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, II.b.7.
[34] ECtHR, *S.W. v. the United Kingdom*, Application no. 20166/92, 22 November 1995, paras. 34-35, Series A no. 335-B; ECtHR, *C.R. v. the United Kingdom*, Application no. 20190/92, 22 November 1995, paras. 32-33, Series A no. 335-C; and ECtHR, *Streletz, Kessler and Krenz v. Germany* [GC], Application nos. 34044/96, 35532/97 and 44801/98, para. 50; ECtHR, *Custers, Deveaux and Turk v. Denmark*, Application no. 11843/03, 3 May 2007.
[35] ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, 25 May 1993, para. 40.
[36] ECtHR, *Korbely v. Hungary* [GC], Application no. 9174/02, 19 September 2008, paras. 74-75.
[37] ECtHR, *Kononov v. Latvia* [GC], Application no. 36376/04, 17 May 2010, paras. 187, 235 and 238. See also: Venice Commission, *Report on the Rule of Law,* CDL-AD(2011)003rev, 4 April 2011, para. 44 and further, and the *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, II.b.1 and II.b.3.
[38] ECtHR, *Del Río Prada v. Spain* [GC], Application no. 42750/09, 21 October 2013, para. 92.
[39] *Ibid.,* para. 93.

required precision to avoid all risk of arbitrariness and to enable individuals to foresee the consequences of their actions".[40]

36. The key elements of the offence in Article 330[2] of the Criminal Code – "*possession… of goods, if their value substantially exceeds the means acquired and it has been found… that they could not be obtained lawfully*"– do not, on their face, appear unclear. It is assumed that not only the notion of "*possession*", but also "*possession through third parties*" is to be understood as a reference to the Civil Code where the respective notions are clearly defined. The subjective applicability of the provision is clear. Notions such as "*person with a position of responsibility",* "*public person*" and "*person holding a position of public dignity*" are defined in Article 123 of the Criminal Code (as complemented by Law 199/2010 on the status of persons holding public office). To assess the foreseeability of the said provision, it is also essential to see whether its interpretation by national courts may lead to inconsistent case-law, which would demonstrate the need to clarify the provision, in order to avoid diverging judicial interpretations.

37. Further, there is no suggestion that Article 330[2] of the Criminal Code has been adopted in violation of the requirements for legislation in the Republic of Moldova or that its provisions are not accessible. However, it is for the Constitutional Court to determine whether any aspects of these elements are such that an individual could not know from the wording of Article 330[2] of the Criminal Code - if need be, with appropriate legal advice and the assistance of any interpretation available by the courts - what acts and omissions would make her or him criminally liable.

38. Insofar as that determination reaches an affirmative conclusion that an individual could not know what acts and omissions would make her or him criminally liable under Article 330[2] of the Criminal Code, it would then be open to the Constitutional Court to find that this offence fails to satisfy the requirement of foreseeability and that its application would thus be contrary to the principle of legality.

39. An issue that arises in this particular context is the potential overlap between the Law of the Republic of Moldova on National Integrity Authority No. 132 dated 17 June 2016[41] and the Criminal Code. In order to establish that the prosecution of illicit enrichment as a crime pursues a legitimate aim and meets the legality requirements, a clear distinction should be established between the criminal and non-criminal procedure regarding its constitutive elements and applications: amount of substantial difference between the value of assets/property and legitimate incomes, characteristics of persons undergoing the procedure etc. Otherwise, if it may be established that these procedures have the same effect and the same material and personal scope, issues may arise as to whether the interferences are reasonably foreseeable and comply with the principle of legality and *ne bis in idem*.

40. Therefore, it is important to clarify whether the objective of Article 330[2] of the Criminal Code overlaps with the Law on National Integrity Authority, which aims at establishing the substantial difference between the means acquired and value of the goods obtained, and confiscation of the property acquired beyond legitimate incomes.

41. Regarding the non-retroactivity of criminal law, Article 330[2] of the Criminal Code entered into force in December 2013. Whether it is intended to be applicable to possession of goods obtained unlawfully before such entry into force is not directly discernible from the provision. If the latter is indeed the effect of the provision, then, even though the obtaining of the goods unlawfully could lead to criminal liability on some other basis (such as bribery and money laundering, as the applicants have suggested), the application of Article 330[2] of the Criminal Code to such obtaining would lead to the possibility of a person being prosecuted and convicted for an act that was not criminalised at the time of commission. In this latter case, issues may arise as the criminalised act may not have been foreseeable.

42. As to the former, the only exception to the prohibition of such retrospective effect for Article 330[2] of the Criminal Code in this regard would be if the conduct covered by that provision was

[40] ECtHR, *Žaja v. Croatia*, Application no. 37462/09, 4 October 2016, para. 103.
[41] <https://www.legis.md/cautare/getResults?doc_id=131218&lang=ru#>

the same as the constituent elements of a previously existing offence. In the latter circumstances, the fact of holding someone liable under Article 330[2] in respect of acts committed before that date would then not constitute retroactive application of more detrimental criminal law as prohibited by the ECHR or the ICCPR so long as any penalty imposed in respect of those acts did not result in a more severe penalty than would otherwise have been the case.[42]

43. In a case before the Constitutional Court of Lithuania on the compatibility of the crime of illicit enrichment with certain legal principles and human rights, the Constitutional Court held, amongst others, that the provision under review[43] "*is interpreted as applicable to situations where a person acquired the property referred to in paragraph 1 of Article 189[1] of the Criminal Code not earlier than on the day (11 December 2010) of the entry into force of Article 189[1] of the Criminal Code…*" and that "*it should also be stated that the person may not be held criminally liable under this article of the BK [Criminal Code] if he/she acquired the ownership of the property referred to in Paragraph 1 of Article 189[1] of the Criminal Code before the entry into force and held/holds it after the entry into force of this article."* It concluded that the impugned legal provision did not have retroactive effect. In addition, it noted that "*the fact that a person may not be held criminally liable under Article 189[1] of the Criminal Code if he/she acquired the ownership of the property referred to in Paragraph 1 of Article 189[1] of the Criminal Code before the entry into force of this article and held/holds it after the entry into force of this law does not mean that state institutions and officials are released from the duty to investigate other criminal acts or other violations of law if characteristics of such acts or violations are detected*."[44]

44. Similarly, in a case concerning confiscation of property, the Constitutional Court of Moldova held that the provisions concerning extended confiscation came into force on 25 February 2014 and thus, based on the principle of non-retroactivity of criminal law, only the property acquired after the entry into force of the Law (25 February 2014) may be seized.[45] In the present situation there appears no reason to depart from those considerations with respect to illicit enrichment.

45. The fact that the illicit enrichment under Article 330[2] of the Criminal Code is a continued offence does not change this finding. While it is necessary to differentiate between "*rétroactivité proprement dite*" (application of the new law to past facts) and "*rétroactivité impropement dite*" (application of the new law to facts which are going on after its entry into force) in the case of illicit enrichment the possession cannot be punished if the illegal acquisition happened before the entry into force of the law. This would be a case of rétroactivité proprement dite.

3. Ne bis in idem

46. The *ne bis in idem* principle entails that once a person has been finally convicted or acquitted of a certain offence, the person cannot be brought before the same court or before another tribunal in respect of the same offence. The principle is guaranteed in Article 14(7) of the ICCPR and Article 4 of Protocol no. 7 to the ECHR.[46]

47. Article 4 of the Protocol no. 7 to the ECHR provides that 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 s/he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. As the UN Human Rights Committee has emphasised, the principle of *ne bis in idem* "*prohibits bringing a person, once convicted or acquitted of a certain offence, either*

[42] See ECtHR, *Rohlena v. Czech Republic* [GC], Application no. 59552/08, 27 January 2015.
[43] In the case of Lithuania, paragraph 1 of Article 189[1] of the Criminal Code.
[44] See the Constitutional Court of The Republic of Lithuania, *Ruling on the Compliance of Paragraph 1 of Article 189[1] of the Criminal Code of the Republic Of Lithuania with the Constitution of the Republic of Lithuania*, 15 March 2017, No Kt4-N3/2017 available at: <https://lrkt.lt/en/court-acts/search/170/ta1688/content>. It is noted that while there are some offences that are specifically allowed to apply retroactively under Article 3 of Lithuania's Criminal Code, the illicit enrichment offence is not specifically listed in this article and therefore the Constitutional Court was not permitted to apply this law retroactively.
[45] See a summary of the case: <http://codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.
[46] Protocol No. 7 to the ECHR entered into force in Moldova on 1 December 1997. See also in respect of *ne bis in idem*, Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, 18 March 2016, II.b.8.

before the same court again or before another tribunal again for the same offence."[47] This makes it clear that the prohibition is not confined to the right not to be punished twice but extends also to the right not to be prosecuted or tried twice for the same office.

48. In order to avoid significant barriers which could block criminal proceedings, the ECtHR has established limits to the application of this principle in the defence strategy and has clarified what amounts to bringing a person before a court or tribunal for the same offence in respect of which s/he has already been acquitted or convicted.

49. In order to identify whether the person is being tried or punished for the second time, the previous final judgment should exist as the mandatory key element. The ECtHR ruled in the *Sergey Zolotukhin v. Russia* that "*the aim of Article 4 of Protocol No. 7 is to prohibit the repetition of criminal proceedings that have been concluded by a 'final' decision*".[48] In order to indicate which decision shall be deemed as "final", the ECtHR referred to the Explanatory Report to Protocol No. 7 where it is provided that a decision is final, when *"it is irrevocable, that is to say when 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*".

50. In order to identify whether the offence is the same, the ECtHR ruled in the *Sergey Zolotukhin* case that the Court may not establish that the offences are not the same based just on their different legal classification as it would just undermine the guarantee established by Protocol No. 7 to the ECHR.[49] As emphasised by the Court, the approach to be followed for this purpose is to focus not on the legal characterisation of the two offences concerned but on whether or not the second offence can be said to arise from "*identical facts or facts which are substantially the same*", regardless of any distinction in the penalty that can be imposed.[50] This case-law has been further developed and differentiated in a series of cases leading up to the Grand Chamber judgment in the case of *A and B v. Norway*.[51]

51. A comparative analysis of different laws on illicit enrichment and practice of their application,[52] shows that one of the common features of the criminal laws on illicit enrichment is that such laws do not require the state to demonstrate that a person has already been convicted of a criminal offence, that any underlying or separate criminal activity has even taken place or that any wealth was provably derived from crime. Neither prosecution, nor the court are obliged to establish the source of generating these goods and establish the crime committed. Consequently, the nature of the offence, the constitutive elements – *actus reus* and *mens rea* – differ substantially from the *corpus delicti* of bribery, money laundering and other related crimes. In this context it has also to be taken into account that the aim of the illicit enrichment provision is to avoid impunity in situations where the prosecution has carried out a thorough investigation into the origin of unjustified wealth but could not identify an underlying offence.

52. There are circumstances where the prohibition on bringing a second set of proceedings following an acquittal is not applicable, for instance where either the second set of proceedings are not criminal[53] or that was not the character of the first set of proceedings.[54] Moreover, the prohibition does not apply where the second set of proceedings constitutes part of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice.[55]

---

[47] UN Human Rights Committee, *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007, para. 54.
[48] ECtHR, *Sergey Zolotukhin v. Russia* [GC], Application no. 14939/03, 10 February 2009, para. 107.
[49] *Ibid.*, para. 81.
[50] *Ibid.*, para. 82.
[51] *A. and B. v. Norway* [GC], Application nos. 24130/11 and 29758/11, 15 November 2016.
[52] Basel Institute on Governance, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth* (2021), Author: Andrew Dornbierer, Sub-section 1.3.2.
[53] See, e.g., ECtHR, *Matveyev and Matveyeva v. Russia* (dec.), Application no. 26601/02, 14 December 2004.
[54] See, e.g., ECtHR, *Paksas v. Lithuania* [GC], Application no. 34932/04, 6 January 2011.
[55] See, e.g., ECtHR, *A. and B. v. Norway* [GC], Application no. 24130/11, 15 November 2016.

53. Furthermore, the prohibition is not applicable where there is, in fact, no second set of proceedings, such as where there is only the execution of an order previously made[56] or just a resumption of previously discontinued proceedings.[57] In addition, the existence of two sets of parallel proceedings will not be problematic so long as one of them is not continued after the other one has become final.[58]

54. It is, at least in the first instance, for the Constitutional Court of the Republic of Moldova to assess whether an acquittal or conviction in proceedings for the act generating an illicit income (such as ones for bribery or money laundering as suggested by the applicants) would be duplicated and thus contrary to the *ne bis in idem* principle by the bringing of subsequent proceedings for the offence under Article 330[2] of the Criminal Code.

55. There is, however, no need to consider for the purpose of this *amicus curiae* brief whether there would be any such duplication in the two sets of proceedings. This is because the applicants only assert that the existence of Article 330[2] of the Criminal Code means that there is a risk of being charged again for committing the same act after having been acquitted or convicted for the act of generating an illicit income.

56. In the event that other proceedings - after having been instituted - lead to an acquittal or a conviction, there would then need to be an assessment as to whether the institution of a second set of proceedings (either for generation of the illicit income or under Article 330[2] of the Criminal Code, depending on the specific circumstances) could be said to arise from identical facts or facts which are substantially the same as those in the first set of proceedings. Only where there is an affirmative conclusion to that assessment, would the principle *ne bis in idem* require that there should not be any institution of the second set of proceedings or that those proceedings be discontinued if already instituted. This should be assessed on a case-by-case basis.

B. Is the Constitutional Court able to rule on the observance of the ultima ratio principle by the Parliament in criminal matters?

57. The *ultima ratio* principle – whereby criminal liability should only be applied as a last resort, when other legal or non-legal means are not sufficient to stop the conduct concerned – is a common principle in the criminal justice systems of many Council of Europe member States and OSCE participating States. Although this principle has been referred to in submissions to the ECtHR in a number of cases, this has not generally been in the context of assessing the compatibility of criminalising certain acts with the requirements of the ECHR.[59] The principle of ultima ratio is also reflected in the EU approach to Criminal Law as follows: "*Whereas in view of its being able by its very nature to restrict certain human rights and fundamental freedoms of suspected, accused or convicted persons, in addition to the possible stigmatising effect of criminal investigations, and taking into account that excessive use of criminal legislation leads to a decline in efficiency, criminal law must be applied as a measure of last resort (ultima ratio) addressing clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures and which causes significant damage to society or individuals*".[60] The Venice Commission and the OSCE/ODIHR have also commented on the use of criminal law sanctions as an *ultima ratio* instrument on several occasions.[61]

---

[56] See, e.g., ECtHR, *Zeciri v. Italy* (dec.), Application no. 55764/00, 18 April 2002.
[57] See, e.g., ECtHR, *Smirnova and Smirnova v. Russia* (dec.), Application no. 46133/99, 3 October 2002.
[58] See, e.g., ECtHR, *Garaudy v. France* (dec.), Application no. 65831/01, 24 June 2003 and ECtHR, *Lucky Dev v. Sweden*, Application no. 7356/10, 27 November 2014, paras. 59-60.
[59] See, e.g., ECtHR *Neulinger and Shuruk v. Switzerland* [GC], Application no. 41615/07, 6 July 2010 (return of abducted children); *Schüth v. Germany*, no. 1620/03, 23 September 2010 (dismissal from employment); *Vona v. Hungary*, Application no. 35943/10, 9 July 2013; and *El Kashif v. Poland*, Application no. 69398/11, 19 November 2013 (deprivation of liberty)
[60] See e.g., European Parliament, *Resolution of 22 May 2012 on an EU approach to criminal law (2010/2310(INI))*", P7_TA(2012)0208.
[61] See e.g., OSCE/ODIHR, *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework* (2018), pp. 39-40; Venice Commission, *Report on the Relationship between Political and Criminal Ministerial Responsibility*, CDL-AD(2013)001, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013),

58. The approach of the ECtHR is that the scope of the criminal law is generally a matter for individual member States of the Council of Europe to determine, subject only to the requirement for criminal offences to safeguard rights and freedoms under the ECHR[62] and the need for any restrictions on those rights and freedoms to be prescribed by law and necessary in a democratic society and thus not to amount to a disproportionate restriction on them.[63]

59. In this regard, the context in which the state resorts to implement criminal policy should be taken into account. The offence of illicit enrichment specifically could be part of a set of legislative measures that implement a state criminal policy against the rise of organized economic crime and corruption. The aim of the illicit enrichment provision is to avoid impunity in situations where the prosecution has carried out a thorough investigation into the origin of unjustified wealth but could not identify an underlying offence to the relevant standard of proof. In this sense, the illicit enrichment offence could constitute the last resort (*ultima ratio*) of the criminal justice system to punish a behaviour that has led to an increase in the official's assets.[64] Legislatures should have a wide margin of appreciation to decide on criminal policy, also taking into account the national context. At the same time, when the adopted legislation has an impact on the exercise of human rights and fundamental freedoms, such an impact should be assessed in light of the applicable international human rights standards, particularly whether they comply with the principle of legality, are necessary in a democratic society and thereby are not disproportionate, and are non-discriminatory.

60. In the aforementioned case before the Constitutional Court of Lithuania, the Court held on this very subject-matter that "*the legislature, seeking, inter alia, to make economically not viable the commission of crimes related to corruption, […] and to prevent such acts and damage inflicted on the state and society, has chosen to establish the legal measure – criminal liability for illicit enrichment – and has thereby implemented the criminal policy of the state. […] Thus, by establishing criminal liability for illicit enrichment […] the legislature has implemented its wide discretion to choose the norms of a particular branch of law in order to define certain violations of law and to impose concrete sanctions for these violations; considering the dangerousness of illicit enrichment and the important overall objective to protect society from dangerous criminal attempts, the legislature implemented its wide discretion in the area of criminal policy and, having criminalised illicit enrichment, categorised it as a less serious crime… establishes alternative punishments – a fine, arrest, or the deprivation of liberty…there is no ground for stating that, as a legal measure, criminal liability established for illicit enrichment is disproportionate… It should be noted that once it comes to light that milder legal measures than criminal liability are possible in the fight against illicit enrichment, it may not be held that this fact alone means that the regulation set out in Paragraph 1 of Article 189[1] of the [Criminal Code] violates the constitutional principle of proportionality, which is one of the elements of the constitutional principle of a state under the rule of law…In the opposite case, the legislature would be unable to exercise the wide discretion granted to it under the Constitution to pursue national criminal policy, inter alia, regulate the relations pertaining to the establishment of criminal liability*."[65]

61. Still, by the decision of the Constitutional Court of Moldova dated 16 April 2015, Article 330[2] of the Criminal Code has already been found constitutional. It is for the Constitutional Court to

---

paras. 96-98; and Venice Commission, *Russian Federation - Opinion on the Compatibility with international human rights standards of a series of Bills introduced to the Russian State Duma between 10 and 23 November 2020, to amend laws affecting "foreign agents",* CDL-AD(2021)027, adopted by the Venice Commission at its 127th Plenary session (Venice and online, 2-3 July 2021), para. 87.

[62] As the Court observed in *Engel and Others v. Netherlands* [P], Application nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, 23 November 1976, *"the Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects*" (para. 81) See also, e.g., ECtHR *Osman v. United Kingdom* [GC], Application no. 23452/94, 28 October 1998 and *Hristovi v. Bulgaria*, Application no. 42697/05, 11 October 2011 as regards, respectively, the right to life and the prohibition of torture and inhuman or degrading treatment or punishment.

[63] See, in particular, as regards the right to freedom of expression: ECtHR *Lehideux and Isorni v. France*, [GC], Application no. 24662/94, 23 September 1998 and ECtHR *Szima v. Hungary*, Application no. 29723/11, 9 October 2012.

[64] Dornbierer, A., 2021. *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*. Basel: Basel Institute on Governance. <https://learn.baselgovernance.org/course/view.php?id=65>.

[65] See the Constitutional Court of The Republic of Lithuania, *Ruling on the Compliance of Paragraph 1 of Article 189[1] of the Criminal Code of the Republic Of Lithuania with the Constitution of the Republic of Lithuania*, 15 March 2017, No Kt4-N3/2017 available at: <https://lrkt.lt/en/court-acts/search/170/ta1688/content>.

assess, where the applicants have raised such issues, whether the imposed measure for the finding of an offence of illicit enrichment complies with the principle of legality (see above), and is necessary and proportional in light of the objective of strengthening the legal framework to deter and fight corruption of public officials, taking into account the wide margin of appreciation for states to pursue criminal law policy.[66]

C. The applicable standard of proof for the offence of illicit enrichment

62. In the context of Moldova, Article 101 of the CPC provides that *"[a] representative of the criminal investigation body or the judge evaluates the evidence in accordance with his/her own conviction, formed after examining it as a whole, in all aspects and objectively, guided by the law*". Article 330[2] of the Criminal Code of Moldova does not provide for any peculiarities of criminal proceedings regarding the crime of illicit enrichment; it does not explicitly prescribe any obligation on the targeted person to provide any evidence whatsoever, and there is no express reverse onus mechanism provided for in its text. Therefore, such proceedings shall be conducted under the general rules provided by the CPC of Moldova, such as Article 8(2) and 8(3) of the CPC, prescribing respectively that no one has to prove his/her innocence and that conclusion as regards a person's guilt may not be based on suppositions (see also paragraph 28 above),[67] in line with international standards.

63. The designation of the burden of proof in criminal proceedings directly derives from the principle of the presumption of innocence which in practical terms requires in particular, that the guilt beyond reasonable doubt must be proved by the prosecution, except to the extent that presumptions of law or fact might be permissible.[68] According to the UN Human Rights Committee the presumption of innocence "*imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt* (…)".[69]

64. Moreover, offences of illicit enrichment are subject to general rules of criminal proceedings, as established by relevant national criminal procedure codes, and particularly the parts they include on applicable standards of proof. As the ECtHR held in the case of *García Ruiz v. Spain*, "*while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts*".[70] The Court has not prescribed that any particular standard of proof is required to support a conviction. Nonetheless, the ECtHR has recognised that the standard in criminal cases will be more exacting than in civil ones.[71] Moreover, the ECtHR itself applies the standard of "beyond reasonable doubt" – a standard often used in criminal cases - in determining whether or not there has been a violation of a provision of the European Convention, while making it clear that its task is not to rule on criminal guilt or civil liability.[72]

65. Additionally, in *Hadjianastassiou v. Greece*, the ECtHR ruled on the right to a fair trial stating that "national courts must, however, indicate with sufficient clarity in the grounds on which they based their decision. It is this, *inter alia*, which makes it possible for the accused to exercise usefully the rights of appeal available".[73]

---

[66] <https://www.constcourt.md/public/ccdoc/hotariri/en-JCC62015engfinal546ee.pdf>.
[67] See <https://www.legis.md/cautare/getResults?doc_id=133060&lang=ro>.
[68] OSCE/ODIHR, *Legal Digest of International Fair Trial Rights* (Warsaw, OSCE/ODIHR, 2012), pp. 91–93. <https://www.osce.org/files/f/documents/1/f/94214.pdf>.
[69] UN Human Rights Committee, *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007, para. 30.
[70] ECtHR, *García Ruiz v. Spain*, Application no. 30544/96, 21 January 1999, para. 28,
[71] See, e.g., ECtHR, *Ringvold v. Norway*, Application no. 34964/97, 11 February 2003; "*while exoneration from criminal liability ought to stand in the compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof*" (para. 38).
[72] See, e.g., ECtHR, *Nachova and Others v. Bulgaria* [GC], Application no. 43577/98, 6 July 2005, para. 147.
[73] See, e. g., ECtHR, *Hadjianastassiou v. Greece*, Application no. 12945/87, 16 December 1992, para. 33.

66. At the same time, the ECtHR has also underlined that its task is not to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by domestic courts. It thus considers that it is the role of national courts to interpret and apply the relevant rules of procedural or substantive law and that they are best placed for assessing the credibility of witnesses and the relevance of evidence to the issues in a particular case.[74]

67. The issue of applicable standards of proof in cases related to illicit enrichment offences has been raised by constitutional courts in various countries.

68. For instance, the Lithuanian Constitutional Court ruled that "*39.3. [...] Article 189[1] of the BK [Criminal Code] 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 [Criminal Procedure Code], 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.*"[75] The same approach was stated by the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic: "*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".*[76]

69. The *Legislative Guide for the Implementation of the UNCAC* of the UN Office on Drugs and Crime (UNODC) notes that "*the point has also been clearly made that there is no presumption of guilt and that the burden of proof remains on the prosecution, as it 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*".[77]

70. However, according to the ECtHR and international standards, the application of the standard of proof beyond reasonable doubt does not mean that only a prosecution party shall exclusively file and process the evidence. When the offence is proven beyond a reasonable doubt by the prosecution, the accused usually has (depending on the approach) the right to refute the arguments of the prosecution, for instance by contesting the possession of the goods, the fact that their value substantially exceeds the means of acquiring them and their illicit origin or unlawful acquisition. However, this should entail for the defendant no more than adducing evidence sufficient to raise a doubt regarding the submissions of the prosecution with respect to those issues since a defendant cannot be required to prove her/his innocence of an offence.

71. Furthermore, there will be a need to ensure that a defendant has had the opportunity, consistent with the procedural standards required for a fair trial, to exonerate her/himself from the accusations against her/him. This would prevent situations where the defendant had no opportunity to provide evidence to the court to establish the reality of the facts and her/his lack of guilt before the court ruled.

---

[74] See, e.g., ECtHR, *Melnychuk v. Ukraine* (dec.), no. 28743/03, 5 July 2005.

[75] <https://lrkt.lt/en/court-acts/search/170/ta1688/content>. Relying on the interpretation of the Supreme Court of Lithuania, the Consttituional Court stated that "*the principle of the presumption of innocence must not be violated when proving that property could not have been acquired with legitimate income, therefore, as such, an owner's inability to reasonably explain his/her property in relation to his/her legitimate income is not sufficient to hold him/her guilty; among other things, 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, and their relations with persons known to be engaged in illegal activities*" (para. 39.4).

[76] <https://constsot.kg/wp-content/uploads/2014/06/Reshenie-po-Saatovu-25.06.14-111.pdf>.

[77] UNODC, *Legislative Guide for the Implementation of the UNCAC* (2012), para. 297.

V. Conclusion

72. In an *amicus curiae* brief, the OSCE/ODIHR and the Venice Commission provide the requesting Constitutional Court with relevant international and European standards and comparative practices on the questions raised in the request so as to facilitate the Court's consideration of the issue(s) at hand. It is, however, for the Constitutional Court to determine the final interpretation of national laws and the Constitution of the country concerned. In interpreting national laws regarding the offence of illicit enrichment, the Constitutional Court should *inter alia* follow a systemic interpretation bearing in mind that the impugned provisions of the Criminal Code should be seen in the light of the relevant rules of the Criminal Procedure Code.

73. From what has been laid out above, the following observations can be made for the purpose of the questions raised by the Constitutional Court in their request.

74. Article 330^2 of the Criminal Code would not be contrary to the principles of the presumption of innocence, legality of the offence and *ne bis in idem* from the perspective of the European Convention on Human Rights and international standards if respectively:

a) this provision could be interpreted as requiring the proof of possession of goods the value of which substantially exceeds the means acquired and proof that these goods could not have been obtained lawfully, while allowing defendants to rebut any *prima facie* case established against them by adducing evidence sufficient to raise a doubt regarding the submissions of the prosecution with respect to the proof of the material elements of the criminal offence of illicit enrichment, including by contesting the possession of goods, their value and proving the licit origin or lawful acquisition of the goods -- and, for the purpose of so doing, s/he has had the opportunity, consistent with the procedural standards required for a fair trial, to exonerate her/himself from the accusations against her/him;
b) the Constitutional Court can conclude that (i) an individual could know from the wording of this provision - if need be, with appropriate legal advice and the assistance of any interpretation available by the courts - what acts and omissions would make her or him criminally liable and (ii) this provision is not intended to be applicable to possession of goods obtained unlawfully before its adoption or to lead to a more severe penalty than would otherwise have been the case because of including constituent elements similar to those of a previously existing offence;
c) there has been neither an acquittal or conviction in respect of a similar crime/offence nor the institution of any proceedings under this provision or, in the event of both having occurred, the second set of proceedings is discontinued.

75. It is up to the Constitutional Court of the Republic of Moldova to decide whether the Constitution of the Republic of Moldova allows for a ruling on the observance of the *ultima ratio* principle by the Parliament of the Republic of Moldova. However, the imposition of criminal liability by Article 330^2 of the Criminal Code would *a priori* not be contrary to the discretion left to individual member States of the Council of Europe and to OSCE participating States to determine the scope of their criminal policy.

76. The applicable standard of proof should be in line with international standards as well as the Criminal Procedure Code of Moldova. The defendant should be able to rebut any *prima facie* case established against them by simply adducing evidence sufficient to raise a doubt regarding the submissions of the prosecution with respect to any of the constitutive elements of the criminal offence.

77. The Venice Commission and OSCE/ODHIR remain at the disposal of the Constitutional Court of the Republic of Moldova for any further assistance in this matter.