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Official Corruption and criminal offences against official duty

Specific Guidelines

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Specific Guidelines

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I. Introduction:

Bribery and corruption are damaging to democratic institutions. They discourage investment and undermine attempts by citizens to achieve higher levels of economic, social and environmental welfare and impede efforts to reduce poverty.

Prosecution and adjudication of corruption is a difficult endeavor and very challenging. The difficulty arises from the secret nature of corruption and, in most instances, the lack of individual victims that would come forward with information about an act of corruption and thus trigger an investigation. A person, in seeking to uncover instances of bribery, may fear the vengeance of the accused, especially when his or her reporting leads to the launching of an investigation and possibly the conviction of the criminal. While offering a bribe to a public official is considered a serious offense, cases where a public official takes or solicits a bribe, severely damage the public trust in institutions.

Particular difficulties arise when an investigation involves prominent politicians and wealthy businessmen. Investigation of high-profile cases is often characterized by a high degree of sophistication concerning the methods of committing and camouflaging the crimes. Too frequently, “white collar” crime can appear to be harmless and victimless. However, it is anything but that. All our society as a whole, are victims when public officials breach the trust placed in them.

II. Implementation of the Guidelines and the legislative framework

In accordance with Article 26, paragraph 1.4 of the Law on Courts[1], the Supreme Court of Republic of Kosovo, as per the recommendation of the Advisory Sentencing Commission adopts the following Specific Guidelines for Official Corruption and Criminal Offences against Official Duty.

The Guidelines provide for specific starting points, relevant mitigating and aggravating factors for the offences under this chapter as well as other alternative and accessory punishments. The present Guidelines is not intended to replace the General Sentencing Guidelines of 2018 or the Guidelines for imposing criminal fines of 2020, but to build on them by providing details about the specifics of offenses of this nature. Therefore, the principles and concepts of the previous Guidelines continue to apply to criminal offenses from this Chapter.

This Specific Guidelines is mainly based on criminal offenses under Chapter XXXIII, Official Corruption and criminal offenses against official duty under the Criminal Code of the Republic of Kosovo. Nevertheless, the concepts and principles incorporated in this document also apply to other provisions of this Code, which refer to misuse of official duty, as well previous Criminal Codes, which are applicable for the crimes committed at the time when such codes were in force. These same guidelines apply also to other criminal legislation relevant to the sentencing issues for various forms of misuse of official duty.

III. Some of the key elements of criminal offenses against official duty

[1]Law No.06/L-054 on Courts, Official Gazette of the Republic of Kosovo, 18 December 2018.

In order to understand more clearly the offenses sanctioned in Chapter XXXIII, it is necessary to clarify some of the key elements of such offenses. Definitions for some of the elements are already provided in the Criminal Code as well as in various commentaries that elaborate these definitions, therefore the intention is not to repeat them but rather to provide a more specific elaboration of elements in the context of offenses from this chapter.

1. Official person

Unlike previous Codes the CCRK provides a detailed definition of who is considered an official person. Such definition is contained in Article 113 Par.2. of this Code as following:

Official person *- means:*

2.1. a person who performs official work in a state body;

2.2. a person ***elected*** *or* ***appointed*** *to a State Body, to a local government body or a* ***person who permanently or temporarily*** *carries out duties or official functions in those bodies;*

2.3. a person in an institution, enterprise or other entity ***entrusted with the performance of public authorizations that decides*** *on the rights, obligations or interests of natural or legal persons or for the* ***public interest****;*

2.4. an official person is also considered a person who ***is entrusted with the actual performance*** *or certain official duties or works;*

2.5. a military person, except, when it comes to the provisions of Chapter XXXIII (Criminal Offenses against official duty) of this Code.

There is no specific definition of who can qualify as an official person and this should be assessed on a case-by-case basis, by taking into account the nature of the position, function and with special emphasis on tasks performed by that person. This is due to the fact that the Republic of Kosovo has an extremely large number of special laws that regulate very specific areas, so they can also include more details than those that can be found within the general definitions. Also, it should be borne in mind that depending on which criminal offense within this Chapter is in question and there is a need to amend that definition, we need to see how those issues are addressed by special laws or other provisions. When we talk about the official person, it should be understood that the qualification as an official person includes not only the official person as an active subject but also as a passive subject. So, along with the additional

protection provided by the legislation to these officials comes the additional responsibility for any misuse of the duties and powers assigned to them.

An official person can be considered only the individual who has been directly (being employed in public institutions) or indirectly (a person who can exercise a function outside public institutions) delegated public authorizations, public money management or actual exercise of official duties/affairs. The moment he manages the public goods, it does not matter what position he/she holds, it is important that he/she has misused public funds, respectively that he has abused his/her authorizations and official duties or works which he actually exercises. Persons who manage goods or private capital official persons, unless they have been delegated public authority as explained below.

In order to determine whether a person with a status of an official person has abused his/her official duties, it is necessary to look at whether the person has used such duties and authorizations for purposes other than those allowed by the function, respectively duty.

For situations where, despite the case file and the explanations below about this definition, it is still unclear whether a person is considered an official within the meaning of the Criminal Code, it is recommended that the judge reviews and analyzes the special laws governing the field or issue in question in order to determine whether a person is an official person or not, based on the nature of the authorizations or even factual works that such a person may perform or even authorizations he/she may abuse. Below we will provide some examples to further illustrate this aspect.

According to the definition provided and regulated above, it is important and necessary to break down the following elements:

1. **Position held by the person**.- The person in the state body, local government body, institution, enterprise or other entity. In a word these are state officials, members of various boards, official persons performing administrative, professional duties etc. Our legislation mainly provides for the authorizations of institutions, authorities and public bodies and not those of the persons working in them. It is therefore necessary to make a breakdown of what we mean by institution, authority or public body in order to further break down whether the employees in these institutions are considered official persons. Of course, due to the fragmentation of the regulation of similar issues in many laws in the Republic of

Kosovo, usually, the analysis should be based on the relevant laws and how they complement each other to be able to clearly understand this issue. -

- According to the Law on Public Financial Management and Accountability, " *Public Authority" - means any of the following: (i) any public body, authority or agency that exercises, pursuant to an authorization in a law or an UNMIK regulation, executive, legislative, regulatory, public administrative or judicial powers, and includes (ii) any department or other part or subunit of such a public body or authority.*[2] While almost all of the above competencies that a body may have are clear, the only dilemma in this definition is what is meant by administrative-public competence and whether public services are included in this definition? This is not clarified in the above law. However, according to the Law on the Organization and Functioning of the State Administration[3] the administrative function includes:
    - **The function of policy drafting** - (preparation of public policies, drafting of legal acts, adoption of secondary legislation and setting mandatory standards)
    - **The function of providing public services** (the activity of providing services or producing material goods, defined by law as public services which the Government or a municipality has a legal obligation to provide for the citizens of the Republic of Kosovo, such as public health care service, public education, water supply, wastewater treatment, waste collection or other services in the field of culture, youth, art, social care, etc.);
    - **Policy implementation function** (is the implementation of legislation, policies and the provision of public services); and
    - **Internal support function** (human resource management, financial management, general property management, assets, information technology, logistics, auditing, as well as other similar support functions, which enable the normal functioning of institutions).
- Regarding enterprises as mentioned in par. 2.3 it is suggested to include the list of public enterprises provided by the **Law on Public Enterprises** as a reference.[4]
- **Law on General Administrative Procedure**[5] on the other hand refers to the term "public body" and the public authority of this body when:

[2]Law No. 03/L-048, on Public Financial Management and Accountability, Article 1.par.1, Official Gazette of the Republic of Kosovo/Pristina: Viti Iii / No. 27/03 June 2008.

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[3]Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies, Article 2 Definitions, Official Gazette of the Republic of Kosovo/No. 7/01 March 2019, Prishtinë

[4]Law No. 03/L-087 on the Public Enterprices, Official Gazette of the Republic of Kosovo/No. 31/15 June 2008, Prishtinë

[5]Law No. 05/L-031 on General Administrative Procedure, Article 2 Scope, Official Gazette of the Republic of Kosovo/No. 20/21 June 2016, Prishtinë

- it decides on the rights, obligations and legal interests of persons, as well as any other case where the law expressly provides for the issuance of an administrative act, or
- enters into an administrative contract, or
- exercises its competencies through real acts, which have to do with the rights, obligations and legal interests of persons.

According to the same article, *"This Law shall also apply whenever another public entity, or private person acting in the pursuance of public organ upon an explicit authorization by a law or based on a law, decides in accordance with paragraph 1. of this Article."*[6]

This regulation in the above paragraph is also related to the following 2nd element which has to do with the type of authorization given to a person.

2. **The type of authorization that** person has.- The person who has the competence and authorization for the preservation and protection of public goods, who performs official duties within the state body, decides on the rights, obligations or interests of individuals or the public interest.

As stated above, the above paragraph clarifies the issue of authorization for public entities but also for private persons vested with public authorizations. The Law on the Organization and Functioning of the State Administration has also foreseen the possibility that "*State administration may delegate specific tasks for the performance of administrative functions according to the law to natural or legal for-profit or not-for-profit persons.... Delegation may be done only for areas explicitly defined by the applicable legislation for public private partnership or any other special legislation."*[7] Although the scope of this Law is the State Administration which consists of hierarchical structures organized under the direction, control and supervision of the Government,[8], this article, combined and compared to paragraph 2, Article 2 of the Law on General Administrative Procedure, leads to the same conclusion for all public bodies and persons to whom these public authorizations are delegated.

[6] Ibid. par.2.
[7]Law No. 06/L-113 on the Organization and Functioning of the State Administration and Independent Agencies, Article 33 Delegation of tasks, par 1 and 2, Official Gazette of the Republic of Kosovo/No. 7/01 March 2019, Prishtinë
[8] Ibid. Article 8 par.2.

If e.g. we refer to the private enforcement agents, according to the Law on enforcement procedure[9] more precisely in Article 2 par.1.11 of this law is Private Enforcement agent is *"the natural person appointed by the Minister of Justice in accordance with the provisions of the present law, who* ***in the performance of public authorizations entrusted to him/her as provided by the present law****, decides on the actions arising from his/her competency in the enforcement of allowed enforcement, and undertakes enforcement actions."* As it can be observed in this provision, it is clear that the private enforcement agent falls within the definition of an official person as provided for in particular in paragraph 2.3 of Article 113. It is clear according to the same logic that this includes the deputy enforcement agent and persons authorized by him/her who act in the name and on behalf of the private enforcement agent. The role of the enforcement agents is extremely big since they according to Article 340 have the obligation "... ***to perform the official acts to which he is authorized*** *in the territory of the Basic Court for which he has been assigned*."

Another example is the case of geodesy surveyors who according to the Law on Cadastre[10] and Administrative Instruction on licensing of surveying companies and surveyors[11] exercise public function. This finding is enshrined in Article 6 par.1 of this Law which states; "When ***carrying a public function,*** *the licensed companies and licensed surveyors carry out their responsibilities in cooperation with KCA and MCO.*" To further strengthen this position the related AI, namely in its Article 23 par.1.3 indicates the following a reason for dismissal of licensed physical person: *"when* ***convicted for a criminal offense of embezzlement in office*** *with a final court judgment or ...."*. Thus, even the secondary legislation, considers without a doubt that licensed surveyors are official persons, due to the fact that they exercise public function, respectively cadastral and geodetic work with impact on the rights, obligations or interests of natural or legal persons or public as required by par.2.3 of the definition of official person according to Article 113 of the Criminal Code.

The same logic as in the case of surveyors also applies to notaries. Even the Law on Notaries[12] indicates that the notary service is a public service[13] and one of the reasons

[9]Law No. 04/l -139 on the Enforcement Procedure, Official Gazette of the Republic of Kosovo/No. 3/31 January 2013, Prishtinë.
[10]Law No.06/-L0-13 on Cadastre, Official Gazette of the Republic of Kosovo/No. 13/1 September 2011, Prishtinë.
[11]Administrative Instruction No.13 on licensing of surveying companies and surveyors, Ministry of Environment and Spatial Planning, 21.11.2019.
[12]Law No.06/L-010 on Courts, Official Gazette of the Republic of Kosovo/No.23/ 26 December 2018.
[13] Ibid. Article 2 par.1

provided for the dismissal of the notary service is if he/she is sentenced for a criminal offense of embezzlement in office[14].

3. **The form in which a person receives the authorization to perform the above** duties.- The person can temporarily or permanently exercise the above functions and duties by being: elected, appointed, appointed, authorized person or entrusted the same in any form. E.g. Observing the Law on Mediation[15] it is important to break down the different tasks that the mediator exercises. According to this Law, more precisely Article 8 par.1, there are four forms in which the mediator engages in mediation. Three of these are related to the referral of the case by: a Court, a Prosecutor or the competent administrative body, while the fourth form is related to the self-initiation by the parties. While the situation is clearer for the first three forms of initiation, since the mediator is authorized by the relevant institution to conduct mediation which implies an official job/task, dilemmas can arise in cases when we are dealing with self-initiation since this process is carried out by a private mediator between **two private parties** which have not initiated any procedure before these bodies. However, even in this case it should be borne in mind that at the end of the procedure this document becomes an executive document and if it relates to the rights, obligations or interests of natural or legal persons it falls within the scope of this task. par.2.3. of the definition of official person.

One of the novelties of the Criminal Code of 2019 has to do with the actual exercise of certain official duties or tasks in par.2.4. This means that in order to assess the status of an official person it is not necessary to have a formal requirement e.g. decision or something similar, it is sufficient that he/she actually exercises certain official duties of a public character within a certain position or authority. In this context, it is important to mention that paragraph 2.4 of this article should be read in conjunction with any of the previous paragraphs (2.1-2.3) in terms of the duties they exercise in state bodies, local government, or other duties, for the public interest. In addition to the forms included above, the purpose of this provision is to include any other form through which an official can be appointed to perform the above tasks. This also does not leave any possibility of avoidance in the title that a person is given the opportunity to exercise an official job.

[14]Ibid. Article 22 par.1.4
[15]Law No.06/L-009 on mediation, Official Gazette of the Republic of Kosovo/No.23/ 20 December 2018.

The examples provided above do not provide an exhaustive list of who can be characterized as an official person, but are provided in order to clarify the logic of ascertaining whether a person is characterized as an official person.

It is worth noting that for the criminal offenses under Articles 414, 416, 417, 418, 419, 421, 425, 426, 427, 428, 429 and 430 from Chapter XXXIII Official Corruption and Offenses against Ex officio it is required to first determine the status of official person, while the same requirement does not apply to criminal offenses under Articles 415, 420, 422, 423 and 424.

2. Criminal Responsibility

Article 17 of the CCRK provides the following definition:

1. A perpetrator of a criminal offense is criminally liable if he or she is mentally competent and has committed the criminal offense intentionally or negligently.

2. A person is criminally liable for the negligent commission of a criminal offense only when this has been explicitly provided for by law.

The subjective elements of intent and purpose to commit the offense are expressed in most of the offenses in chapter XXXIII of the CCRK. For this reason, it is very important that these elements are clearly understood and argued in determining the guilt of the perpetrator. These elements come into play in offenses committed both with action and omission.

It is characteristic of these criminal offenses against official duty that they are considered to have been committed only if they were committed with intent or knowledge and with a certain purpose. This is implicit when we consider e.g. the criminal offense of Abuse of official position or authority under Article 414, as it usually means an illegal willful act committed by an official person, followed as a rule by the wording, for the purpose of benefiting for oneself or others, respectively to cause damage to another person. Of all the offenses in this Chapter, it is only in Article 426 Disclosure of official secrecy, that the Code provides explicitly that the perpetrator will be punished even when such offense is committed by negligence.

3. Intent

Article 21 of the CPCK

1. A criminal offense may be committed with direct or eventual intent.

2. A person acts with direct intent when he or she is aware of his or her act and desires its commission.

3. A person acts with eventual intent when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission and he or she accedes to its occurrence.

Intent represents the basic form of guilt along with negligence. Intent represents the perpetrator's mental relationship to the offense. This relationship is expressed in the consciousness and will of the perpetrator. Intent exists when the perpetrator has considered the consequences, has been aware that his/her actions can cause the consequence, regardless of whether he/she wanted such a consequence or not.

In order for the offense of abuse of official duty to exist, the purpose of the perpetrator is also needed in addition to the intent, meaning that the purpose of the commission of this offense should be to gain something or cause certain harm. The perpetrator of the criminal offense does not commit an offense only for the sake of doing it, but the intention is to achieve another aim through the commission, as a reason for committing the offense.

In practice there were frequent misinterpretations if an action of a public official consists of a criminal offense or administrative violation. Such analysis led to situations where an offense was treated as criminal offense although it was not in fact an offence of such nature. It should be clear that it is the **intent** in particular is what qualifies an action of a public official as a criminal offence which distinguishes it from other violations of administrative nature. The aim of criminal proceedings is to assess and investigate an individual for purposes of determining whether he/she abused the entrusted duty or authorizations to bring benefits for himself/herself of other persons. If such an intent is missing, or if an official acted in certain manned led by public interest, in that case even if we determine violations or procedure or provisions of other non-criminal laws, such violations should be treated from the angle of administrative,

disciplinary or other responsibility (depending on the concrete case) and through bodies foreseen in the relevant laws rather than criminal one.

The defendant who acts with intent, intentionally engages in behavior of that nature and desires the intended outcome. A person acts **intentionally** in relation to the essential element of the criminal offense: (i) where the element relates to the nature of his/her conduct or the consequence caused, the person knowingly engages in conduct of that nature or in order to cause that consequence; and (ii) where the element relates to the accompanying circumstances, the person is aware of the existence of such circumstances or either believes or hopes that they exist.[16]

4. Knowledge

Implies that the defendant is aware of the nature of the action and its possible consequences. "Knowledge" differs from "intentionality" in that the defendant does not act to cause a certain result but acts with the knowledge that the consequence will certainly occur. The model penal code describes knowledge as follows: A person acts **knowingly** in relation to the essential element of the criminal offense: (i) where the element relates to the nature of his/her conduct or the accompanying circumstances, the person is aware that the conduct is of that nature or that those circumstances exist; and (ii) where the element relates to the consequence of his/her conduct, the person is aware that he/she is practically certain that his/her conduct will cause such consequence.[17]

5. Motive

Motive in criminal law means something that has prompted the perpetrator to commit a criminal offense. The motive does not fall within the conditions that must be met for culpability as the latter exists regardless of what are the motives underlying the commission of the criminal offense. Purpose should not be confused with motive. A person's motive is not taken into account in determining whether a person had a "criminal mind" and committed the offense.

[16]American Law Institute, Model Penal Code Model: Model Penal Code:Sentencing § 2.02 (2) (a), 10 April 2017.
[17] Ibid.§ 2.02(2) (b).

The motive is of particular importance in calculating the sentence. The offense can be committed for low, immoral or inhuman motives, while it can also be committed for moral reasons (e.g to help a person). However, for certain offenses there may also be qualifying circumstances making it a more serious offense.

6. Negligence

Article 23 of the CPCK

1. A criminal offense may be committed by conscious or unconscious negligence.

2. A person acts with conscious negligence when he or she is aware that a prohibited consequence can occur as a result of his or her act or omission but recklessly thinks that it will not occur or that he or she will be able to prevent it from occurring.

3. A person acts with unconscious negligence when he or she is unaware that a prohibited consequence can occur as a result of his or her act or omission, although under the circumstances and according to his or her personal characteristics he or she should or could have been aware of such a possibility.

The commentaries of the Criminal Code include sufficient break down of the two forms of negligence, therefore, considering that negligence is only foreseen for one Article under this chapter, respectively Article 426 this Guideline will only provide explanations explicitly related to it.

We will take Article 415 of the CCRK as, an example, whereby (throughout the Article) the use of the element of intent was observed, using expressions such as **"consciously", "intentionally"**, **"intentional"** all of which add to the burden of proof and highlight that it shall not be considered as such if committed unknowingly or negligently respectively. In this case, since the article did not sanction the commission of the offense by negligence, it is implicit that the commission of the offense by negligence is excluded from Article 23 paragraph 2 of the CCRK.

We will also incorporate at the end the definition of the Model Penal Code for these two forms of responsibility.

Conscious recklessness or frivolity.- A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[18]

Unconscious recklessness or negligence. - A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.[19]

7. Knowledge, intention, negligence or purpose

Article 22 of the CPCK

Knowledge, intention, negligence or purpose required as an element of a criminal offense may be inferred from factual circumstances.

This article by its content is the same as two Articles of the UN Convention against Transnational Organized Crime[20] as well as the UN Convention against Corruption.[21]

Of course, offenses such as bribery and trading in influence can be difficult to disclose and prove due to the secret nature and as both parties to the transaction do not want the offense to be exposed. Therefore, the perpetrator's mens rea may have to be inferred from the factual

[18] Ibid.§ 2.02(2) (c).
[19] Ibid.§ 2.02(2) (d).
[20] UN Convention against Transnational Organized Crime and the Protocols thereto [Article 4 par.2), criminalization of organized criminal groups (Article 4 par 2) criminalization of the laundering of proceeds of crime (Article 6 par.2 (f)), New York, 2004.
[21]United Nations Convention against Corruption (UNCAC), Knowledge, Intent and Purpose as Elements of an Offense (Article 28), New York 2004.

circumstances. For example, a supplier submits a bid for a tender for a contract. Shortly after, he/she offers an expensive trip abroad for the official person who will make the selection of the successful bidder. From this it can be inferred that the supplier intended to influence the decision-making of the official in the process of selection of winner by the official person. It is vital for the rules of evidence in the Criminal Procedure Code to allow this form of evidence.[22]

According to the OECD, each Member State must have a legal framework which allows for the knowledge, intent, purpose, goal or agreement referred to in Article 5 (1) to be inferred from objective factual circumstances. If the rules of evidence in a State do not allow such circumstantial evidence to be used to establish the mens rea, that State should revise its laws in order to comply with this paragraph. This requirement is of particular importance as it is often impossible to produce subjective evidence of the accused's mens rea and this could lead to unmerited acquittal from the sentence.[23]

States would fail in the fight against public corruption and financial crime if they were to insist that such offences can only be proven by direct evidence and plea of the defendant as a way to prove the intent for commission of such crimes. Despite the fact that the standard of proving beyond grounded suspicion is very difficult in such cases, if we look into Article 22 we can observe that such standard it is not unreachable if courts would resort to factual and circumstantial evidence to that end.

The intent is the same in all criminal offences. What distinguishes is the manner of proving these criminal offences since proving intent with offences of corruptive nature is not always an easy task since direct evidence (such as admission) are usually not available. The court should make its conclusion based on two factors:

- Is there evidence to prove the act, namely action/omission?;
- Was there a natural consequence aimed by that action/omission

[22]Organization for Economic Co-operation and Development (OECD), Corruption, Compendium of International Criminal Standards, 2002, p.27 See the link, http://www.oecd.org/corruption/anti-bribery/39532693.pdf
[23]United Nations Office on Drugs and Crime (UNODC), Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, Chapter B. Criminalization of Participation in an organized criminal group, Section (c) Provision of mens rea (Article 5 (2)), Par.101. pg 31.

The above factors can be established through circumstantial evidence that support factual circumstances. It should be clear for the Court that establishment of intent through circumstantial evidence does not lower the standard of proof.

8. Proving intent through factual circumstances according to case law

In most instances we do not know what the individual thinks, and we should rely on circumstantial evidence or conclusive facts. It would be very easy if a person is making a statement or assertion. However, this rarely happens in this category of offenses. If the prosecution and the Court would make criminal prosecution respectively trial only on the basis of a plea, the number of convicted persons in this category would be extremely low. It is this category of offences that gives meaning to Article 22 of the CCRK as explained above.

Hereunder we will present some examples of cases adjudicated in the international caselaw, in order to see how and why in different natures, intent was ascertained through factual circumstances rather than direct plea and that was sufficient for the court.

The first case is from the International Criminal Tribunal for Rwanda (ICTR) in the case of the Prosecution against Clement Kayishmea, deciding whether or not there is an intent:

"*The Trial Chamber found that Kayishema possessed the necessary intent to destroy the Tutsi group in whole or in part," which was established by the following circumstances: (i) the number of victims killed; (ii) the manner in which the killings were carried out (methodology); and (iii) the terms used by Kayishema during and after the massacres ....In determining the mens rea, the Trial Chamber assessed and weighed all the relevant evidence presented before the Court, based on other aspects of the testimony of O. Based on this evidence, he found beyond reasonable doubt that the necessary mens rea was present*."[24]

The Appeals Chamber, meanwhile, decided on the appeal in the same case[25] regarding the lack of explicit manifestation of the intent with the understanding that the proof of this circumstance must be derived from the factual circumstances, thereby concluding as follows:

[24]Prosecutor against Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-I, Judgment of the Appeals Chamber, par.148, p.58, 1 June 2001.
[25] Ibid. Par. 158 -159, pg.61.

The Appeals Chamber initially notes that while recognizing the "difficulties in finding the explicit manifestation of intent" the Trial Chamber, has generally concluded that such intent can be demonstrated through a series of intentional actions and inferred from words and deeds or facts… As stated by the Trial Panel, explicit manifestations of criminal intent are, for obvious reasons, very rare to be found during criminal proceedings. In order to prevent the possibility of circumventing liability due to the absence of such a manifestation, the necessary intent can usually be inferred from the relevant facts and circumstances. Consequently, the Trial Chamber's approved approach to determining whether Ruzindana possessed the necessary mens rea for the crime of genocide corresponds to the way in which courts would generally resolve such a case."

Challenges to find evidence of these elements exist everywhere in the world, so the courts in different countries, just like in the aforementioned case of the Rwandan Tribunal, through their decisions have provided their interpretation regarding the level of responsibility of an individual based on the assessment of their criminal intent and it did so through factual circumstances and circumstantial evidence.

Let's take as an example an offence of tax evasion. The fact that the defendant has falsified financial registers represents a powerful evidence that he/she had the intention to defraud. The Court can ascertain the presence of intent or mens rea by assessing that there were falsified registers, that the defendant was aware but decided to hide the information, that the defendant was warned about such a conduct and despite this fact he/she continued with the same actions, the presence of unusual conduct outside of the scope of the usual one for that business or profession.

Such examples from the American caselaw are included hereunder, considering that such cases give detailed explanations provided by courts on how they ascertained the intent.

***United States v. Toll*[26]**

The chief financial officer of a company called InnoVida challenged the sufficiency of evidence to support his ten convictions (conspiracy to commit wire fraud, wire fraud and related violations, and false statements) for schemes to defraud investors and the United

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States. The defendant, Toll, was found to have made a variety of misrepresentations to lenders, investors, board members, and the United States. Chiefly, he assisted in preparation of two sets of financial statements—one set using accepted accounting principles ("GAAP") that showed InnoVida operating at a loss, and another so-called "pro forma" statement that showed InnoVida operating at a substantial profit. Toll regularly presented the "pro forma" statement to investors, board members, and lenders, while not disclosing to them the presence of the other statements that would have shown the company operating at a loss, or explaining how the "pro forma" statement might have been misleading. He reserved the GAAP statement for external audits. He was also found to have misled a lender about how the loan funds were being spent, and how the company's operations were faring.

On appeal, Toll argued, among other things, that there was insufficient evidence to support his convictions for fraud and conspiracy to defraud. He argued that there was no evidence that he had entered into an agreement with a coconspirator to defraud investors or that Toll had knowledge of such a conspiracy

The court rejected all these arguments, holding that the government's evidence was sufficient.

The court in particular found the following evidence to support the necessary inferences:

1. Toll oversaw the preparation of the two sets of financial statements, presented only the "pro forma" statements to investors, and failed to qualify the numbers presented in the pro forma statements;
2. in contrast, Toll presented the GAAP statements to external auditors;
3. although Toll presented some evidence of trying to make the accounting system more transparent, the Court found that the government put on evidence suggesting that he wasn't truly at cross purposes with the coconspirator and that in any event, he presented the misleading statements to investors, which, given his education level and experience, could lead the jury to infer that he must have known that he was working toward misleading investors in furtherance of the scheme;
4. it did not matter that the government did not prove that the "pro forma" statements did not comply with accounting principles, because the evidence demonstrated that those statements were materially misleading (in part because Toll did not qualify the rosy picture they painted);

5. it did not matter that Toll never directly received the proceeds of the scheme, because by playing along, he was able to remain gainfully employed as CFO;
6. regarding the loan fraud, evidence showed that Toll knew that his representations about how loan proceeds were spent, InnoVida's equity contribution, and contracts InnoVida had won were false, because others at InnoVida flagged the falseness of these representations to Toll, he revised or doctored relevant documents (or knew that such revisions/doctoring happened), and, as CFO, could reasonably be inferred to know about such matters as how the loan funds were spent, whether InnoVida contributed the equity required under the loan agreement, and how much money InnoVida's contracts were worth.

Finally, the court stated that it was permissible to establish participation in the fraudulent conspiracy through inferences based on circumstantial evidence.

United States v. Hansen[27]

On appeal, the defendant ("Hansen"), a general partner of a hedge fund, challenged his conviction for mail fraud, wire fraud, and conspiracy to commit those offenses. Hansen argued that the trial court should have granted his motion of acquittal because the government lacked sufficient evidence to prove the charges against him, and also that the trial court should not have instructed the jury on the "willful blindness" theory (among other arguments).

The court held that the government provided sufficient evidence to show that Hansen had "an intent to defraud." This way he defrauded many investors who lost millions of dollars. Hansen argued that the state did not have sufficient evidence to prove the charges against him since this was an unfortunate case of loss of investments which is normal in this line of business.

The court found that Hansen had the "intent to defraud". The court found the following evidence sufficient to conclude that Hansen possessed criminal intent to defraud:

1. Investors lost millions of dollars as a result of investing in Hansen's hedge fund;
2. Hansen played a prominent role in the hedge fund's activity and possessed significant control over its operations;
3. Hansen told investors many things about the hedge fund that were patently false or later turned out to be false;

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4. Hansen prepared and sent out earnings statements that contained false numbers and falsely told recipients that the statements were prepared by an accounting firm;
5. Hansen failed to tell investors that an accounting firm had ceased conducting an audit on the hedge fund after the firm learned of irregularities;
6. Hansen failed to tell investors that the hedge fund's law firm stopped representing it after learning of irregularities;
7. Hansen failed to tell investors that his hedge fund partners faced criminal and civil allegations of securities fraud; and
8. when the economy went bad in 2008 and investors began demanding the return of their funds, Hansen used his personal wealth to offset payments out of the hedge fund and in one instance used a new investor's investment to repay other investors (like a Ponzi scheme).

The court stated that even though Hansen argued he did not know the hedge fund was fraudulent and that he relied on his partners' assurances that everything was aboveboard, the above evidence could lead a reasonable factfinder to disbelieve him and find an intent to defraud.

The court also held that, even if, as Hansen argued, he lacked actual knowledge of the fraud, and that he acted in good will, the court concluded that in this case we might be dealing with the "willful blindness towards the truth"

To reach its final conclusion the Court used a Supreme Court precedent whereby a defendant can be convicted on a willful blindness theory if two requirements are met:

- the defendant must subjectively believe that there is a high probability that a fact exists and

- the defendant must take deliberate actions to avoid learning of that fact.

Therefore, the court found the following evidence to be sufficient to establish willful blindness:

1. the accounting firm's discontinuance of its audit;
2. the law firm's withdrawing its representation after the accounting firm ceased its audit;
3. Hansen's admission that after the law firm's withdrawal he "became concerned about [the hedge fund's] lack of transparency";
4. Hansen's learning about the securities fraud allegations against his partners;

5. Hansen's knowledge that lots of investors left the hedge fund after learning of those allegations;
6. that the hedge fund was unable to meet customers' withdrawal requests; and
7. that Hansen made Ponzi scheme payments.

The court also found evidence that Hansen deliberately failed to make inquiries, intending to remain ignorant:

1. Hansen refused to allow the accounting firm to see a brokerage statement concerning the hedge fund's investments and never found another auditor after the firm withdrew;
2. Hansen spoke with his partner to ask about the hedge funds investment holdings and confirmed that the partner had a trading account but did not request information on the hedge fund's particular holdings, as Hansen's law firm instructed him he must do;
3. Hansen did not learn more information about the fraud allegations against his partners;
4. Hansen never confirmed the hedge fund's investment strategy even when the fund began to be unable to satisfy investors' withdrawal requests; and
5. in spite of all of the above, Hansen, who was the fund's "general partner and the man responsible for reporting the fund's performance to investors, never once confirmed [the fund's] investments and continued to rely on [his partners] to provide the fund's performance numbers.

Such cases are very common in the US caselaw due to the fact that as a rule the admission of perpetration of crimes of corruptive nature and financial crime happen only in rare cases. Such examples have been presented in order to show how in such complex cases such as financial crimes, where defendants usually try to leave no trace, it is still possible to find sufficient evidence to prove culpability.

Two additional selected cases of corruptive nature from the US caselaw that are related to intent, knowledge and intentionality of the perpetrator were presented hereunder.

US v. Victor Kozeny and Frederic Bourke[28]

Thus, in the Bourke case, in its instructions to the Jury, according to the rules of procedure, the Court has emphasized: "In *terms of conscious disregard, Bourke's knowledge can be ascertained when the person is aware of the high probability of the existence of a fact and has*

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consciously and deliberately avoided confirmation of that fact. Knowledge can be proven in this form, but only if the person has suspected this fact and has understood its high probability, but has not received the final confirmation because he then wanted to be able to deny this knowledge. "On the other hand, knowledge is not ascertained in this way if the person has simply failed to understand this fact through negligence or if the person has in fact believed that the transaction was lawful." While deciding on the appeal of the defendant Bourke, the District Court stated that "*, by finding that Bourke was aware and intended to violate the rules of the FCPA by bribing foreign officials the jury necessarily concluded that he had a deliberate corruptive purpose and intent."*[29]

United States v. Abovyan[30]

A medical doctor challenged his conviction for participation in a healthcare fraud scheme. The scheme involved the doctor writing phony prescriptions and ordering superfluous urine and saliva tests at one of two substance-abuse treatment centers in order to fraudulently procure profits from insurance and Medicare payments.

On appeal, the doctor ("Abovyan"), argued (among other things) that insufficient evidence supported his conviction because there was no direct evidence that he agreed to participate in the conspiracy. One of the doctors involved in this case alleged that he was sincerely concerned about the health of his patients and that is why he recommended these tests.

The court rejected this argument, in essence, because the evidence demonstrated that "Abovyan's full cooperation with [the leader of the conspiracy], along with Abovyan's own medical conduct, advanced the healthcare fraud scheme."

The court found the following evidence to be particularly supportive of the fraud conviction considering that Abovyan:

1. created Smart Lab standing orders so that the Facilities could order expensive and medically unnecessary lab urine tests three times per week per patient;
2. pre-signed requisition forms so that the Facilities could order even more unnecessary testing from other labs, like Ally;

[29]The District Court of New York Soutrh District, in a case USA against Viktor Kozeny and Frederic Bourke, JR, New York, October 13, 2009. Pages 44 and 48, regarding the decision to find Bourke guilty of violating the Foreign Corrupt Pracitices Act or FCPA.

[30]

3. statistical data showed that he forwent lab testing for uninsured patients, by proving this way that he acted differently when financial benefit was involved, and totally different when there was no benefit involved;
4. reviewed and signed off on certain lab test results without discussing them with the patients;
5. admitted the Facilities would "test for everything," even non-addictive drugs not ordinarily tested in addiction treatment;
6. provided his medical record log-in and pre-signed prescription pads for his nurses to prescribe drugs to patients without him being present;
7. received a letter at early stages alerting him that insurance billing issues existed and did nothing. So the mere fact that he was warned about the wrong actions and he still went along with them make it clear that he acted with intention.
8. admitted that he allowed Chatman to make all testing decisions even though Chatman had no medical training and the testing was excessive; and
9. admitted that he received $5,000 per month for Chatman to use his medical license to bill insurance for "treatment" at the Facilities."

According to the Court evidence showed that Abovyan's participation "was central to the criminal conspiracy and its success, that he consistently participated in the scheme throughout his tenure, and that he made significant financial gains from the scheme.

9. Concrete definitions under the Council of Europe Convention on the criminal offense of bribery

In contrast to the general elaborations above on the various forms of criminal liability, the Council of Europe Convention on Corruption provides more detailed explanations of the specific elements of the criminal offense of active bribery. Under this Convention, intent is the only form of criminal liability for active bribery and must be included for all essential elements of the offense. Intent must relate to a future result: the public official acting or refraining from acting as the briber intends.[31]

The criminal offense is considered to have been committed with the very fact of requesting or accepting a gift or any other benefit by the official person. This means that it is not necessary

[31] Council of Europe Explanatory Report to the Criminal Law Convention on Corruption, No.173, Strasbourg, 27.1.1999, Par.34. See link https://rm.coe.int/16800cce441999

for the act or omission to perform official duties to occur. The latter is important in the case of sentencing or to ascertain whether the elements of any other criminal offense have been met.

- **Requesting** for a gift or other benefit can be done in different ways. "Requesting" should be implied as any statement (verbal or writing) as well as any action that leaves no dilemma that the official person is requesting a gift or any other benefit. **"Requesting"** may for example refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he will have to "pay" to have some official act done or abstained from. ***It is immaterial whether the request was actually acted upon, the request itself being the core of the offense.*** Likewise, it does not matter whether the public official requested the undue advantage for himself or for anyone else.[32]
- **Receiving** may for example mean the actual taking the benefit, whether by the public official himself or by someone else (spouse, colleague, organization, political party, etc) for himself or for someone else. The latter case supposes at least some kind of acceptance by the public official. Intermediaries may be involved: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the official, necessarily involves identifying the criminal nature of the official's conduct, regardless of whether the intermediary has been good faith or bad faith.[33] Receiving the gift exists even when the perpetrator rejects the gift in a declarative form while through his/her further actions shows that he has accepted the same (through putting the gift in his pocket, expenses, etc.) As observed the gift can be given in direct or indirect form. For the giving of the gift or any other benefit indirectly, the number of intermediaries is not important, nor if the giver of the gift, who does this through the intermediary, knows the recipient of the gift by name, it is enough that the intermediary has appointed the circle of officials who will receive the gift.
- **Accepting a promise** exists when the perpetrator clearly expresses his willingness to accept a gift or any other benefit that will be given to him later. In this case it is necessary that the gift or other benefit be promised to him/her and this can be done in various forms, direct or indirect.
- **Illegal benefit** is usually of an economic nature but may also be of an nonmaterial nature. What is important is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offense and that he is not

[32] Ibid. Par.41.
14 Ibid par.42

entitled to the benefit. Such advantages may consist in, for instance, money, holidays, loans, food and drink, a case handled within a swifter time, better career prospects etc.[34]

"Undue" Benefit for the purposes of the Convention should be interpreted as something that the recipient is not lawfully entitled to accept or receive. For the drafters of the Convention, the adjective "undue" aims at excluding advantages permitted by the law or by administrative rules as well as minimum gifts, gifts of very low value or socially acceptable gifts.[35]

If there is a unilateral request or a corrupt pact, it is essential that the act or the omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offense under the Convention to receive a benefit after the act has been performed by the public official, without prior offer, request or acceptance. Moreover, the word "receipt" means keeping the advantage or gift at least for some time so that the official who, having not requested it, immediately returns the gift to the sender would not be committing an offense under Article 3. This provision is not applicable either to benefits unrelated to a specific subsequent act in the exercise of the public official's duties.[36]

10. Expression of different forms of culpability according to the Criminal Code

The model penal code, in addition to defining each of the different forms of culpability mentioned above, also elaborates how they are ascertained in different situations when they are explicitly provided or not provided by a legal provision[37].

- When the culpability required to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

- When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements

[34] Ibid.Par.37
[35] Ibid. Par.38
[36] Ibid. Par.43
[37] American Law Institute, Model Penal Code Model: Penal Policy [Model Penal Code: Sentencing] § 2.02 points (3)-(9), 10 April 2017.

thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

- When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly.
- When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly.
- When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.
- When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.
- When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.
- A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.
- Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

11. Causal link between illegal behavior and the consequence

The question is whether the criminal offense of abuse of official duty by an official person is considered attempted or committed, when the same person has misused the position for the purpose of bringing benefits to himself or others, but when such benefit has not materialized? In such cases we are always dealing with an offense committed, regardless of whether or not such a benefit has successfully materialized. This is due to the fact that the official person consciously wanted to commit the offense and undertook certain actions to carry it out, respectively refrained from taking actions required of him by official duty when the offense is committed by omission. The provision in question does not require that the benefit be materialized but only requires that the benefit be the motive for committing this offense. If the

provision would be constructed differently namely if instead of saying "*for the purpose of obtaining material benefit* …" it would say "… *realizing material benefit*" and according to the latter if the benefit would not materialize, the offense would be considered as an attempted one. An example of this is the provision of Article 420 (Unauthorized Use of Property) which explicitly requires that money, securities or other movable property be used in order for the offense to be considered as committed.

In the context of these clarifications, the example from par. par 2 according to which the provision stipulates that this offense can be committed **either for profit** or **by causing budgetary damage,** automatically means that the offense is considered committed even if the responsible person has not benefited anything from the offense but only has caused budgetary damage, of course always for as long as the elements of another criminal offense are met.

According to the Model Penal Code the behavior is the cause of a consequence when[38]:

- it is an antecedent but for which the result in question would not have occurred; and
- the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

- the actual result differs from the probable result only in the respect that a different person or different property is injured/damaged or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
- the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

[38]American Law Institute, Model Penal Code (Selected provisions): Causal relationship between conduct and result; divergence between result designed or contemplated and actual result or between probable and actual result [Model Penal Code (Selected provisions): § 2.03, 10 April 2017. Link: https://www.inazu-crimlaw.com/model-penal-code, last viewed on January 21, 2021.

When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

- the actual result differs from the probable result only in the respect that a different person or different property is injured/damaged or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
- the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.

When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

III. Calculation of Sentence in Steps

1. Finding the starting point

The first step in determining the sentence for the offence, is to first check the starting point for the respective offence category. The court should bear in mind that the starting point for the offenses of this chapter is regulated in more detail in the tabular part of this guide. While the General Sentencing Guidelines refers in each case to the starting point as the middle of the sentence from the minimum and the maximum provided by law for that article/paragraph, this Guide goes into more detail. This was done with the following intention: The court should distinguish between the amount of the sentence depending on the degree of liability and the damage caused as two of the most important elements/circumstances for the offenses of this chapter. Criminal offenses against official duty are acts committed for profit and acts with the potential for a high damage both in financial terms and in other forms as described below. It should be clarified that this specific Guideline does not go beyond the framework of the General Guidelines but builds on it. Like the general guidelines, according to this guideline the court is required to find the starting point, but now the starting point is within a foreseen range. For example, if the sentence range provided in the table for a high-ranking official who has caused substantial damage is 10-12 years, the starting point would be 11 years. Whereas when there is uncertainty whether a perpetrator should be classified in high or middle responsibility, then the starting point is considered the minimum range provided for high responsibility and the maximum extent for medium responsibility. The same principle applies to the ratio between medium and low liability. For further clarification we are presenting a graphic illustration of this break down in the table below:

	Responsibility		
	A (High)	**B (Medium)**	**C (Low)**
Damage	**Sentence range**	**Sentence range**	**Sentence range**
Categ 1 (High)	10-12 years	7-9 years	3-6 years

Starting point 11 years – in high responsibility

Starting point 9-10 years – when not certain if the responsibility of the perpetrator is medium or high

:

If the defendant is being sentenced for multiple offences, the court should find the starting point for each of the individual offences. The starting point applies to all offenders irrespective of plea or previous convictions, since this is calculated later on where within the range should the final sentence be. Credit for a guilty plea is taken into consideration only after the appropriate sentence has been identified. The same principles apply also for offences for which the Code foresees also a fine sentence whether as individual sentence or a aggregated prison and fine sentence.

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the overall offending behavior.

The court should consider further features of the offence or of the offender that warrant adjustment of the sentence, including the aggravating and mitigating factors.

2. Aggravating factors

2.1 Relevant aggravating factors under the Code

The CC contains a number of aggravating factors on Article 70 par.2, which should be considered in assessing the seriousness of the criminal offence. The aggravating factors most relevant for this category of offences include:

2.1 A high degree of participation of the convicted person in the criminal offense;
2.2 A high degree of intention on the part of the convicted person;
2.3 The presence of actual or threatened violence in the commission of the criminal offense;
2.5. if the criminal offense involves several victims.
2.8. The extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;
2.9 Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense;

2.10 Evidence of a breach of trust by the convicted person;

2.11. Whether the criminal offense was committed as part of the activities of an organized criminal group;

2.13 Any relevant prior criminal convictions of the convicted person.

Generally, factors from paragraphs 2.4, 2.6, 2.7, 2.12 will not necessarily apply to Official Corruption and Criminal Offences against Official Duty. This does not mean that they will never be present, but may simply be less common for them to be applicable.

2.2 Detailed elaboration of important aggravating circumstances relevant to corruption cases

The purpose of this part is to further elaborate on the scope of aggravating circumstances provided by the Criminal Code and to look at how they will be translated into the assessment and reasoning of cases when used. In general, for the purposes of individualizing the sentence, more attention has been paid to measuring the culpability of the perpetrator, as a key component in moving up or down when calculating the sentence for this category of perpetrators. This does not mean that other legal circumstances pertaining to the perpetrator are not relevant, but only emphasizes that the circumstances referring to culpability should have more weight in sentencing.

The level of culpability is determined by weighing all the circumstances of the case to determine the role of the perpetrator and the degree to which the offense was planned as well as how sophisticated it was. When there are characteristics that fall into different levels of culpability, the court must balance these characteristics to achieve a fair assessment of the perpetrator's culpability.

Another very important category for sentencing is the assessment of the damage caused by the offense committed. The Criminal Code in Article 113 has divided the type of damage into different categories depending on its weight.[39] Damage is assessed in relation to any impact caused by the criminal offense (whether through identifiable victims or harm in the broader context) or to the actual or intended benefit to the perpetrator. Criminal offenses related to corruption in the CC, for the most part, have defined the criminal offense based on the level of damage caused by that offense, assigning a specific weight to the damage caused. This means

[39] Criminal Code of Republic of Kosovo, No.06/L-074, Article 113, par 31-34, Definitions Official Gazette of the Republic of Kosovo, 14.01.2019.

that unlike the circumstances of culpability, the circumstances relating to harm/damage for most offenses in this category are already included as an element of the criminal offense. In such cases, the damage assessment should be done by assessing the level of damage within the limits set by law, but not by double counting. For more details about the division of damages according to the Criminal Code, you can also refer to the specific Guidelines for fines.[40]

The risk of causing damage includes consideration of the likelihood of causing damage and the extent of that damage if it were caused. The risk of causing damage is less serious than the existence of actual damage. When the offense has endangered causing a damage but when in reality such damage has not been caused (or has been caused on a very small scale), the normal approach would be to move on to the next lower category of damage. This may not be appropriate if the likelihood or extent of potential damage is particularly high.

Same as with for all criminal offenses, the aggravating circumstances under Article 70 paragraph 2 are not limited to those mentioned in the Criminal Code ONLY. They generally refer to all criminal offenses in the Code, so there is a need for a broader interpretation of the same to ensure that they are given due relevance according to the category of criminal offenses included in this Guidelines.

Hereunder you will find a more detailed explanation of the aggravating circumstances mentioned above, which when combined with the specific characteristics of this type of criminal offense give a better understanding of the level of culpability and damage, which ultimately leads to better consistency in punishing perpetrators for similar offenses in similar circumstances. To this end, the aggravating circumstances stated in the law will be divided according to the level of culpability and damage.

The overall circumstances of culpability and harm/damage for this category of criminal offenses are demonstrated but not limited to the following circumstances:

Criminal Code, Article 70 par 2:
2.1. A high degree of participation of the convicted person in the criminal offense; **2.2. A high degree of intention on the part of the convicted person;**

[40]Specific guidelines for imposing a fine as a sanction for criminal offenses under the Criminal Code of the Republic of Kosovo, approved by the Supreme Court on 27 February 2020.

2.11. Whether the criminal offense was committed as part of the activities of an organized criminal group;

Circumstances included in this category include cases where more than one perpetrator is involved in the commission of a criminal offense and/or when they are of a more sophisticated nature. All three of these elements are described in great detail in the Supreme Court's General Sentencing Guidelines[41] whereby judges and other legal professionals are encouraged to carefully consider the elaboration of these circumstances based on the Guidelines as it also contains practices of the International Criminal Tribunal for the former Yugoslavia. The elaboration provided in the General Sentencing Guidelines for each of the above circumstances is very relevant to offenses of corruption. Therefore, the purpose of the summary provided hereunder is not to repeat the concepts expressed in that Guidelines, but rather to identify the sub-categories of the above circumstances that may be more specific to corruption and abuse of office offenses. The sub-categories described below have also taken into account some of the circumstances described in the UK Sentencing Commission's Corruption Offenses Guidelines.[42]

- Sophisticated nature of the offense/high degree of planning.- This is an element that is particularly related to the element of the offense or co-perpetration. It is a very common element especially in criminal offenses involving abuse of authority for the purpose of substantial gain and very significant circumstance to be taken into account during aggravation. **It is often associated with cases where the offense has been committed over a long period of time.** There is the possibility of overlapping the circumstance - high degree of participation with the high degree of intent. The court must attribute the planning element to this circumstance. This is based on the fact that planning is just one of the issues that affect the degree of participation. While the existence of planning is direct proof of intent. **An element which further indicates a higher sophistication and greater participation of the perpetrator is both the perpetrator's attempt or engagement in concealing or destroying evidence.** The new Criminal Code foresees the latter as a separate criminal offense.[43]

[41] Sentencing Guidelines, adopted by the Supreme Court on 14 February 2018. Par.5.1; 5.2 and 5.6
[42]Final Guidelines for Fraud, Bribery and Money Laundering, Sentencing Commission, UK, October 2014.
[43] Criminal Code of the Republic of Kosovo, No.06/L-074, Article 389, Tampering with evidence, Definitions Official Gazette of the Republic of Kosovo, 14.01.2019

However, if it is not possible to include it as a separate criminal offense, the court may include it as an aggravating circumstance as it is related to the high degree of intent and often with greater degree of planning in the commission of the criminal offense.

- Leading role when the commission of the offense is part of a group activity.- The existence of the element of co-perpetration or organized group should have a greater weight when sentencing. The judge must always take into account the role of the individual perpetrator in the commission of the criminal offense. As a general rule, the perpetrator with a leading role in the commission of this criminal offense should be punished more severely rather than treating everyone equally, regardless of the individual role of each.

- The offense committed to facilitate other criminal activity.- This type of circumstance is very common in corruption-related offenses and in particular in offenses involving organized criminal groups. Whenever such a circumstance is not listed as an element of the offense, it should be considered for aggravation. This circumstance is very well explained in the Sentencing Guidelines more precisely in section 5.1 of the Guidelines.[44]

- Offenses of a transnational nature.- This is another aggravating element of specific importance in sentencing as it includes the transnational element of the criminal offense. The existence of this circumstance shows a higher degree of sophistication, which necessarily requires a higher punishment for the perpetrator.

- **Involvement of others through pressure.-** Unlike leadership position as part of group activity, this circumstance focuses on the defendant's use of other persons or officials, who are not criminally charged, in the preparation or execution of the criminal offense. It is irrelevant whether the actions taken by other officials were legal or not. This circumstance is further aggravated if the officials involved are subordinate to the defendant or the position of the defendant, in relation to the other official, was a significant motivating circumstance for taking action. The aggravation is based on the increased damage caused to the institution(s) including the impact on individuals. There might be overlapping with the offense from Article 419 of the Criminal Code (Fraud in office) if an indictment has been filed for this offense and the use of other officials involves fraud - in which case this circumstance cannot be used for aggravation.

[44]Ibid. supra note 5, p.59.

Criminal Code, Article 70 par 2
2.3. The presence of actual or threatened violence in the commission of the criminal offense; **2. 5 if the criminal offense involves several victims;** **2.8 The extent of the damage caused by the convicted person, including death, permanent injury, the transmission of a disease to the victim, and any other harm caused to the victim and his or her family;**

These circumstances are grouped into one category as they generally refer not only to the gravity of the offense but also to the level of damage. In general, these circumstances may be related to offenses against life and body or sexual integrity, however they may also apply to corruption-related offenses if given a broader interpretation. The following is a summary of some of the sub-circumstances, which can be considered as an elaboration of legal circumstances presented above.

- Steps undertaken to prevent the injured party or other persons from reporting, assisting or supporting prosecution. In addition to the circumstance of concealing or destroying evidence, the perpetrator may go further and take specific action to prevent 'potential whistleblowers' from reporting this phenomenon which would contribute to prosecution of these perpetrators. The presence of such an element is very important for the aggravation of sentence. These can be actions taken against witnesses or potential victims prior to the discovery of the offense. There may be situations where the threat of violence in addition to the victim, can be directed to third parties. In these cases the court must examine the relationship between the general offense and the threat of violence. If the threat of violence against third parties has something to do with the general offense, then the court should consider it as an aggravating circumstance, even if the threat was not addressed to the victim. This circumstance does not distinguish between the victim of the crime and the third party.

As indicated in the above reference, the court should be careful about overlapping the aggravating circumstance with elements of a criminal offense when there are charges brought against specific offenses such as:

- Obstruction of evidence or official proceedings (Article 386);
- Intimidation during criminal proceedings (Article 387);
- Retaliation (Article 388);

- Tampering with evidence (Article 389); etc.

- Motivated by expectations for financial, commercial or political gain.- In some of the criminal offenses related to corruption it is not possible to determine the level of benefit due to the nature of the criminal offense. In such criminal offenses when this circumstance is not an element of the criminal offense, but it is found that the defendant committed it for the purpose of gaining some other favor or benefit for himself/herself, it is very important to consider aggravation of the offense. For example, if an official person using his/her duty or authority directly or indirectly commits an action that would be in contradiction to his/her duties, in exchange of a certain value, the same has committed the criminal offence of abuse of official duty. If sue to such action the same person benefits later on from the same action in political aspect, e.g. by gaining votes in the next political process, such a circumstance should be included as aggravating circumstance (if such a connection can be established).

- Wider impact on the society.- In corruption-related offenses, this category of circumstances includes the assessment of harm not only to the individual, but more so to society in general. Nevertheless, the court must take into consideration that use of this circumstance as "one size fits all" is not recommended. Usually, a higher standard or argument is required for inclusion of aggravating circumstances in comparison to mitigating circumstances. In this case we are not dealing only with number of crimes of such nature, but with their wider impact that an action of an individual can have in a society. A concrete example would be expropriation without any criteria and to a wide extent of arable land for construction of road infrastructure with an impact in degradation of lands, and consequently with an impact in the wellbeing of residents of a certain region or Kosovo in general if it is of a wide extent. As a summary of aggravating circumstances one can provide a summary of the extent of such an action rather than looking merely at the benefit that may have been acquired by an individual or a group of individuals.

- Impact on vulnerable categories of society or funds related to these categories. Although the State is often the victim of a crime, the loss of funds can have a side effect on the beneficiaries of those state funds who may be vulnerable. Aggravation is applied when the abuse or violation is committed by an official employed within institutions or when the damage is caused within a sub-sector/institutional department that provides direct public assistance to the citizens of Kosovo in a form of services or funding for:

- Medical services supported exclusively or to a considerable extent by public funds;
- Social assistance programs for poor families or individuals;
- Support for people with mental or physical disabilities;
- Pension funds distributed or maintained by public institutions;
- Public education institutions including University;
- Any other situation whereby the court finds impairment of the institution's ability to provide services to vulnerable persons.

- **Threat to public health** - If the criminal activity poses a threat to public health, the court should consider this as an important circumstance for aggravation. A typical example might be the provision of substandard goods or services that come as a result of a corrupt behavior. This may include trading in goods with an increased risk to public health. This can be a direct and immediate threat or that develops over a longer period of time affecting the safety and lives of the citizens of Kosovo. The aggravation will depend directly on the number of citizens exposed and the urgency and seriousness of the potential damage. There are numerous documented cases where corruption results directly in the exposure of Kosovo citizens to questionable goods or low standards. These are often related to procurement fraud and may include:

- Purchase of construction materials or construction services;
- Purchase, distribution or licensing of medicines below the required standard or counterfeit;
- Purchase, distribution or licensing of food products below the required standard;

As in the above references, the courts should always take into account whether the actions of the perpetrator meet the elements of the relevant offenses under Chapter XXII of the Criminal Code (Criminal offenses against public health), to ensure that we do not have double counting, both as a circumstance and as element, if the defendant is charged with abuse of official duty and with any of the offenses under this Chapter. However, the impact on public health should never be overlooked, always taking it either as an aggravating element or as a separate criminal offense depending on the specifics of the case.

- **Impact on the environment -** this circumstance is similar in nature to that described above, but is often overlooked in prosecuting and trying corruption-related offenses. Although the Criminal Code contains a separate chapter on criminal offenses against the environment, animals, plants and cultural objects (Chapter XXVII), in cases where not all elements of such

an offense are confirmed, the court should consider this circumstance for aggravation. The impact on the environment must always carry weight in the aggravation of the sentence. How much weight will be awarded depends on the severity of this impact. Given the major global climate change, the EU in particular has advanced its Environmental Protection Directives by requiring that issues such as investment in the economy, trade and other issues also comply with EU environmental legislation. As Kosovo still remains a country aspiring European integration, it may be a target for those companies that tend to invest in Kosovo at a low cost regardless of the impact their investments may have on the environment. Such companies may be predisposed to corrupting actors in Kosovo that will enable such an investment. Therefore, when conducting investigations and handling these cases in the justice system, it is important to consider the element of environmental impact, not only for the purpose of investigating corruption but also to serve as a general prevention for any investment without proper criteria in Kosovo. Potential indications for corruption are elaborated through more detailed examples in the 1st part of this Guidelines.

Criminal Code, Article 70 par 2
2.9 Any abuse of power or official capacity by the convicted person in the perpetration of the criminal offense; **2.10 Evidence of a breach of trust by the convicted person;**

In cases where the misuse of power is a visible and obvious element, this circumstance should not be considered for aggravation due to double counting. However, the nature of the aggravating circumstances from paragraphs 2.9 and 2.10 in relation to official corruption and criminal offenses against official duty will generally be minimal. In determining whether paragraph 2.9 has already been considered in the context of a criminal offense, the Court must take into account that abuse includes both acts and omissions, as well as the exercise of powers beyond those provided for by the law.

The following is a summary of some of the sub-circumstances, which can be considered as an elaboration of legal circumstances presented above:

- Abuse of a position of considerable power, trust or responsibility;

- Targeted corruption (direct or indirect) of a senior public official;
- Targeted corruption (direct or indirect) of a judge, prosecutor or a law enforcement officer;
- Blaming others erroneously

Investigation of high-profile cases is often characterized by a high degree of sophistication concerning the methods of committing and camouflaging the crimes. The position of the perpetrator is the most important circumstance for this category of criminal offenses as it determines the gravity of the criminal offense. The higher the position of the perpetrator (in the Government or other institutions), the harsher the punishment should be. As such, it is estimated that the most serious form of corruption and bribery means bribery of judges, prosecutors and police officers and other vulnerable positions. Lack of trust in justice is especially fatal to democracy and development and encourages the recurrence of corruption. Accepting bribery or attempted bribery of a person who is in a position to directly influence the administration of justice is an extremely serious matter and the overall prevention and discouragement of committing these acts is very important. Looking beyond the actions themselves, due to the fact that the public often tends to see the judiciary as a corrupt authority, any act of corruption in the justice system is particularly serious. When the purpose of bribery is to disrupt the course of justice, especially in cases of serious criminal offenses, the perpetrators should receive a severe punishment.

For purposes of illustration, we will take the example related to bribery however this time in conjunction with Article 422 (Giving bribes) which can be exercised by anyone for the purpose of influencing an official person. In these cases, bribes are given by one official person to another official person, whereby the circumstance of abuse of authority or official position should be taken into consideration, since the official person is not mentioned as an element of the criminal offense. In this case, this circumstance should have much higher weight in sentencing due to the position and the influence he/she has exercised by being a person vested with official authority.

Criminal Code, Article 70 par 2
2.12. if the offense is an act of hatred, which means any offense committed against a person, group of persons, or property, motivated by race, color, sex, gender identity, language, religion, national or social origin, affiliation with any community, property, economic status, sexual

orientation, birth, disability or any other personal status, or due to closeness to persons with the above characteristics, unless any of these characteristics constitute an element of the offense;

Even in cases of criminal offenses from Chapter XXXIII, respectively official corruption and criminal offenses against official duty, there are cases where the criminal offense from this chapter can be committed against a person or group of persons or property due to ethnic origin, citizenship, language, religious beliefs, lack of religious beliefs and other differences. This difference can be manifested by the official person either explicitly or implicitly during the exercise of official duty, thus being in violation of Articles 414 par.3 subparagraphs 3.2, 3.5 and 3.6 of the Criminal Code of the Republic of Kosovo.

Criminal Code, Article 70 par 2
2.13 Any relevant prior criminal convictions of the convicted person;

Previous convictions are a very important circumstance in sentencing. When sentencing perpetrators who have been convicted before, the court should consider:

- the nature of the criminal offense to which the sentence relates and its significance or similarity to the actual offense;
- the time that has elapsed since the previous conviction;

This assessment should also include any non-compliance with court orders (for as long as it is not treated as a separate criminal offense under Article 393, Court Contempt), bail, suspended sentence, etc.

3. Mitigating factors as per the Criminal Code

3.1 Relevant mitigating factors under the law

The Criminal Code contains a number of aggravating factors on Article 70 par.3, which should be considered in determining the adequate sentence for the criminal offense. Almost all

mitigating circumstances listed in paragraph 3 can be considered applicable to this category of offenses, but need to be broken down in more detail to those that are relevant to the types of offenses covered in this Guidelines. The following is a list of mitigating circumstances that are most applicable to this category as defined under the Criminal Code:

3.3. personal circumstances and character of the convicted person;
3.4. evidence that the convicted person played a relatively minor role in the criminal offense;
3.5. the fact that the convicted person has participated in the criminal offense not as the main perpetrator but through assistance, encouragement or by assisting another person in any other way;
3.6. the age of the convicted person, young or old;
3.7 evidence that the convicted person has compensated or restituted the victim;
3.8. general cooperation of the convicted person with the court, including voluntary surrender;
3.9. general cooperation of the convicted person in criminal investigation or prosecution
3.10. The entering of a guilty plea;;
3.11. remorse expressed by the convicted person;
3.12. the conduct of the convicted person after the conflict;

The following paragraphs serve the purpose of grouping similar mitigating circumstances into the same category, explaining their importance and including more details about other sub-circumstances that fall into those categories.

3.2 Factors related to personal circumstances of the perpetrator

Criminal Code, Article 70 par 3
3.3 personal circumstances and character of the convicted person; **3.6 the age of the convicted person, young or old;**

These circumstances include various circumstances that usually indicate a certain quality or situation of the perpetrator, which carry weight in the amount of sentence imposed. The circumstances are elaborated in more detail hereunder:

- Good character and/or exemplary behavior;
- Age;
- Remorse;
- Severe medical conditions requiring urgent, intensive or long-term treatment;
- Single or primary caregiver of dependent family members;
- It is not motivated by personal gain;
- Limited awareness of the gravity of corruptive actions.
- Time elapsed since the discovery, when the passage of time was not as a result of the perpetrator's action or behavior.

What has been observed from the analysis of court decisions is that the court usually refers only to various mitigating circumstances and in particular those related to the perpetrators' personal circumstances without attempting to establish the truth behind a personal mitigating circumstance such as requesting evidence or supporting documents for the defendant's financial situation, provision of support for family/children, medical conditions, etc.[45] While the above circumstances may be very important in individual cases, their weight should be assessed at sentencing and as a general rule the same should have much less weight compared to the circumstances related to the damage caused or/and the culpability of the perpetrator. Considering that use of mitigating circumstances of this category is prevalent in all categories of criminal offences, it is considered that further break down thereof should take place in the general Sentencing Guidelines and the court should make reference to those guidelines. Nevertheless, one thing that should be mentioned, and which was constantly noted, is that with criminal offences from this chapter, such circumstances should play a minimal role at sentencing and should not even closely be compared to the weight of circumstances related to the damage and responsibility of the perpetrator. Of course, as was repeatedly pointed out, an adversarial system requires greater involvement of the parties (prosecutor and defense) in providing evidence in order for the court to make a determination as to whether such circumstances are substantiated and whether they contain sufficient weight to affect the sentence reduction. Referring again to the Sentencing Guidelines, there are a number of examples provided in particular those of the ICTY that refer to decisions of this tribunal regarding the personal circumstances of the perpetrator.[46] The characteristic is that the caselaw

[45]Supreme Court of the Republic of Kosovo, Analysis of the Sentencing Guidelines in cases of corruption, pg. 17, Prishtina 2019.
[46] Ibid. supra note 5, pg..110-121.

of the courts in Kosovo still did not manage to provide a clear definition of what is considered young and what old age. A person of young age is considered someone who has reached the age of 21, 35 or even 40, while age as a mitigating circumstance also refers to the age of over 55.

Criminal Code, Article 70 par 3
3.4 evidence that the convicted person played a relatively minor role in the criminal offense; **3.5 the fact that the convicted person has participated in the criminal offense not as the main perpetrator but through assistance, encouragement or by assisting another person in any other way;**

The above circumstances are of such nature so as to indicate a lower culpability of the defendant. The same are elaborated together in the General Sentencing Guidelines, more precisely in point 6.5 of this Guidelines.[47] They are particularly significant because these categories of offenses can often be committed as part of group activity. The court must determine the level of culpability for the individual perpetrators and set the sentence based on the level of culpability. As such indicators of the lowest level of culpability would be:

- Minor or peripheral role in organized activity;
- Involved through coercion, intimidation or exploitation;
- Very little or no planning;
- Opportunistic criminal offense, committed once;

Of course, when referring to the circumstance that the offense was committed through coercion, intimidation or exploitation, we must also take into account provisions of the Criminal Code which exclude liability in the event of unbearable violence, coercion or intimidation. The above circumstance refers more specifically to Article 14 paragraphs 2 and 3 and Article 15 paragraph 3 which provisions explicitly state that these circumstances may affect sentence mitigation.

[47] Ibid. supra note 5, pg.115.

Criminal Code, Article 70 par 3
3.7. evidence that the convicted person has compensated or restituted the victim; **3.8. general cooperation of the convicted person with the court, including voluntary surrender;** **3.9. general cooperation of the convicted person in *criminal investigation or prosecution*;** **3.10. the entering of a guilty plea;** **3.11. remorse expressed by the convicted person;** **3.12. the conduct of the convicted person after the conflict;**

It is a known fact that corruption related offences are the most difficult offences to prove because in most cases both parties have some sort of interest or there are some other factors which make it difficult for the potential victims or even co-perpetrators to report them. Because of the above reasons the proceeding-related circumstances listed above may play a significant role in the decision-making process in sentencing and thus on the final penalty imposed. Nevertheless, their use just as with other factors must be properly reasoned.

- **Correct conduct of the perpetrator.-** is one of the most commonly used circumstances by the courts. As explained in the General Sentencing Guidelines[48] it is a confusing mitigating circumstance at best. This circumstance has become part of the court terminology at sentencing without specifying at any of the cases what this circumstance in fact means and in particular in the corruption cases addressed in the analytical report of the Advisory Sentencing Commission. Appearing in court as ordered, not disrupting the proceedings and treating others with minimal respect are basic obligations of being a citizen of the Republic of Kosovo and not deserving of a reward in mitigation. Of course, the law allows the use of this factor, but it must be properly understood and used in limited circumstances.[49]

- **Restitution.-** payment of compensation or restitution by the perpetrator is an important circumstance that may affect a lower sentence even for criminal offenses under this chapter. However, it is important to distinguish whether compensation or restitution has been made

[48]Supreme Court of the Republic of Kosovo, Sentencing Guidelines, pg. 30, February 15, 2018.
[49]The Supreme Court of the Republic of Kosovo, Analysis of the Sentencing Guidelines in cases of corruption, pg. 17, Prishtina 2019.

voluntarily and meritoriously by the perpetrator before it has been ordered by the court. In this case it would also be considered as an expression of remorse by the perpetrator.

- **In the co-perpetrator's co-operation with the court,** including voluntary surrender, it is important that this co-operation be sincere and minimize the court costs of bringing the perpetrator to court, in order to be taken as a mitigating circumstance at sentencing.

- **The circumstance of admission of guilt** and that of remorse expressed by the convicted person can often be double-counted in the calculation of the final sentence. This is because the remorse shown is a kind of admission of guilt. Admitting guilt as a mitigating circumstance is important and is given due weight depending on the time of admission. Considering the economization of the trial, i.e the avoidance of large costs of the judicial proceedings, the early admission of guilt is the basis for greater mitigation of sentence than it would be if it occurred at the last moment of the trial when the defendant is convinced that based on the administration of all evidence it is likely that he will be found guilty and convicted and therefore decides to plead guilty in order to benefit from mitigation of the sentence.

IV. Categorization of circumstances and their weight in determining the sentence for offences of this category

Following a detailed breakdown of the provisions of the CCRK relating to mitigating and aggravating circumstances that may be relevant in sentencing the offenses of this category, the table below provides for two categories in order to make it easier for the Court to weigh these circumstances as well as the manner in which different elements of the criminal offense are manifested. The following tables provide an overview of how different circumstances can be weighed in terms of their importance. The tables serve to guide judges on which of the circumstances elaborated above fall within the circumstances relating to the perpetrator's culpability or the extent of the damage caused, regardless if they are expressed as circumstances or elements of the criminal offense- namely by analyzing and weighing them using the same logic. It is important to understand that the following circumstances refer only to the degree of culpability and harm, which according to the General Sentencing Guidelines are considered the most important circumstances in sentencing. For the purpose of easier calculation these circumstances are grouped into categories. The combination of categories leads to a sentence range.

The following categories refer only to culpability and damage and do not include:

- **Recidivism.** This is due to the fact that this is elaborated more clearly in the provisions of the Criminal Code related to aggravation beyond the maximum range provided for that offense.
- **Defendant 's personal circumstances or**
- **Procedural circumstances**.

The latter two can affect the severity of the sentence within the sentence range foreseen in the tables provided in the second part of this Guidelines where the tables for each criminal offense are included separately. This way, this step-by-step guidelines starts from the most general part of sentence calculation and goes on to concrete recommendations and illustrations on how to calculate the sentence according to the sanction provided for by each article and paragraph under this Chapter.

1. Culpability-

The following table provides a breakdown and at the same time a grouping of circumstances which relate to the culpability of the defendant or differencing when they are expressed as elements of the offense or when they can be expressed as circumstances for weighing the sentence. E.g. the fact that someone is an official person is an element of the crime in most of criminal offenses from this chapter, however it is important (as mentioned in the narrative part and expressed in the following table), to know what is the position held by the official person. Is it a senior position with influence? In criminal offences where the official person is not presented as element of t he criminal offense (Article 415, 420, 422, 423 and 424) the fact that the person involved in that criminal offense is an official person in senior/influential position or lower position with less influence, is presented as a circumstance within paragraph 2.9 Article 70 of of the CCRK, and according to the breakdown of this circumstance in these Guidelines, it should have an impact in weighing the punishment according to respective tables expressed in those articles. The table is intended to assist judges in determining the weight they can place on circumstances surrounding the culpability based on the expressed intensity/degree of culpability. This is achieved by weighing all the circumstances related to the case as well as determining the role and degree of involvement of the defendant, as well as the efforts undertaken in planning and committing the offense. In cases where the judge finds circumstances of culpability separately in different categories of culpability, the court will assess which of those circumstances is more dominant and then calculates the sentence according to the relevant table for that dominant category.

Culpability is demonstrated by one or more of the following circumstances:

A - High culpability
Making of a request
Leading role, when the commission of a criminal offense is part of a group activity
Involvement of others through pressure, influence
Abuse of a position of considerable power, trust or responsibility
An official person in a senior local or central position or holding an important function (senior official, prosecutor, judge, law enforcement officer etc.)
The sophisticated nature of criminal offense / high level of planning/transnational crime
Criminal offense committed over a continuous period of time
Effort or engagement to conceal or destroy evidence
The offense committed to facilitate another criminal activity

B - Secondary culpability
Important role wen the commission of a criminal offense is part of a group activity
Involvement of others through deception
Other cases that fall between categories A or C because:
Factors that are present in A and C balance each other or
The culpability of the perpetrator falls between the factors described under A and C.

C - Low culpability
The perpetrator involved through coercion, intimidation or exploitation
Minor or peripheral role in organized activity
It was presented as the first opportunistic offence;
An official in a very low position
It is not motivated by personal gain
Very little or no planning

2. Damage/Harm

The damage is not only demonstrated by the severity of the quantified damage but circumstances can also contain one or more of the following circumstances. In most articles from this Chapter, the gravity of the damage expressed in monetary value in Euro represents an element of the criminal offense. Although this element leads to change in the range of the punishment from one paragraph to another, the CCRK does not make the connection between damage range expressed in money with who causes the damage in order to weigh it properly. At the same time in most paragraphs it only refers e.g. to a damage of over 5000 € bot does not make a separate differencing for considerable, substantial or large scale damage as done by Article 113 par 3.1-3.4 of the CCRK. This is the reason why each table provided for each paragraph and Article in the last part of the present Guideline we have made such differencing, in order for the imposed damage to be as proportional as possible to the damage caused and related to the responsibility of the perpetrator.

Nevertheless, as expressed above, the damage is not necessarily expressed in monetary value only. The table below includes a series of circumstances broken down either in a narrative form or presented in the table below. The more circumstances are present in a case, the more serious the damage is within a category itself and consequently deserves maximum sentence within the range or transfer to a higher category of the range. Damage is assessed on the basis of the impact that the commission of the offense has had in an individual or wider context and the intended or concrete benefit[50] . The same principle applies to the degree of damage when it is not only financial, or has nothing to do with financial circumstances but with other circumstances expressed below separately. In cases where the judge finds circumstances of culpability separately in different categories of culpability, the court will assess which of those

[50]UK Sentencing Council, Fraud, Bribery and Money Laundering Definitive Guidelienes, p.42, 1 October 2014.

circumstances is more dominant and then calculates the sentence according to the relevant table for that dominant category.

Category 1 (high)
Large scale damage, large scale destruction or loss (>50.000€) and/or
Serious detrimental effect on individuals (for example by providing standard goods or services resulting from corrupt behavior)
Serious environmental, urban or public health impact
Wider impact on society
Impact on vulnerable categories of society or funds related to these categories.
Motivated to a great extent by financial, political, economic benefit or commercial advantage
Damage related to documents/issues of major importance (e.g. national security, state budget etc).

Category 2 (medium)
Grave damage, substantial damage, or substantial loss - (15.000€ - 50.000€) - and/or
Significant detrimental effect on trade, business, budget or other on individuals, institutions or organizations
Significant environmental and urban impact
Significant misuse of the proper function of local or central government
Gain a significant commercial advantage
Risk of damage from category 1

Category 3 (low)
Considerable damage or considerable loss (5.000€ - 15.000€) - and/or
Limited detrimental impact on individuals, environment, government, business or public services
Limited financial gain
Risk of causing the damage from category 2

Category 4 (minimal)
Small scale damage or up to or less than 5.000€ and/or
Minimal detrimental impact on individuals, environment, government, business or public services
Aim for limited profit
Risk of causing the damage from category 3

V. Accessory punishments:

With the entry into force of the new Criminal Code, the judges under provisions of Article 62 and 63 has very specific guidance in terms of rendering accessory punishments for officials who have misused their duty. The expansion of these provisions was made due to the importance and frequency of criminal offenses related to official functions and the need to remove the perpetrator from that environment for a period of time beyond that specified in the main/alternative sentence. Such prohibitions for public officials are essential not only to ensure public confidence in the administration, but also serve as an individual and general measure to prevent such acts in public administration.

1. Prohibition on exercising public administration or public service functions[51]

It is important for the court that Article 62 of the Criminal Code establishes a multi-level system regarding the exercise of public function after the imposition of a sentence for an offense, depending on the type of sentence and the criminal offense. Below are the main provisions that include an explanation of the accessory punishments, as well as some important interpretations.

1. *The court shall prohibit a perpetrator from exercising public administration or public service functions for one (1) to five (5) years after the punishment of imprisonment has been served, if such person has abused these functions and has been punished by imprisonment.*
2. *The court may prohibit a perpetrator from exercising public administration or public service functions for one (1) to three (3) years, if such person has abused these functions and has been punished by fine or suspended sentence.*
3. *The court shall prohibit an official person from exercising his function in public administration or public service functions for one (1) to ten (10) years after serving the imprisonment, if the person has been convicted of any of the offenses covered in Chapter XXXIII of this Code.*

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[51]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 62 Prohibition on exercising public administration or public service functions, published in the Official Gazette of the Republic of Kosovo, 14.01.2019

- **Paragraph 1** –

Requires from the Court when sentencing the defendant to imprisonment, to prohibit him/her from exercising public functions for 1-5 years.

The period commences after serving the imprisonment sentence. The provision requires some form of abuse of public administration or public function in the commission of a criminal offense. It is important to note that abuse is not required to be one of the elements of the offense or that there be a formal charge for abuse of authority. In fact, there is no qualifying way of how important or significant the exercise of public authority for the commission of a criminal offense is, or does not require any connection between the two. However, there must be a link between the two, and as long as the abuse aids the offense in any way, suspension is necessary.

Finally, paragraph 1 requires prohibition on exercising public administration or public service functions. It is important for the Court to keep in mind that this is NOT limited only to the position the defendant held at the time the offense was committed. The provision requires a general ban on exercising the function in the administration or public service. For example, if the defendant abuses his/her powers as a construction inspector, the Court is required to prohibit him/her from exercising functions throughout the public administration and public service.

- **Paragraph 2 -** includes all the criteria of paragraph 1, except:
  - The discretion for imposing a ban
  - The ban period is 1-3 years and commences at the moment the judgment becomes final, and
  - The sentence imposed is a fine or suspended sentence.

- **Paragraph 3 -** represented a novelty in accessory punishments in 2019 and should be interpreted as follows:
  - The defendant must be an official person,
  - The main sentence should be imprisonment and the accessory punishment commences after serving the sentence,

- The period of suspension is 1-10 years and is NOT restricted to the suspension for the position in which the defendant was serving at the time of the commission of the offense, and
- The defendant is convicted of a criminal offense under Chapter XXXIII. It is important for the Court to bear in mind that the sole criterion is the sentence for a criminal offense under this Chapter. There is no criterion for the criminal offense to be related or directly related to the official position held by the defendant at that time or at the time of exercising official powers.

Given that Chapter XXXIII contains some criminal offenses with the possibility of alternative sentences (for more details on such offenses see below) and Paragraph 3 applies only to sentences of imprisonment, when imposing a fine or suspended sentence, the Court may and must strongly take into account the prohibition under paragraph 2.

2. Prohibition on exercising a profession, activity or duty[52]

1. The court may prohibit a perpetrator from exercising a profession, an independent activity, a management or administrative duty or duties related to the disposition, management or use of publicly owned property or the protection of such property, if such person has abused his or her position, activity or duty in order to commit a criminal offense or if there is reason to expect that the exercise of such profession, activity or duty can be misused to commit a criminal offense.

4. The court shall prohibit an official person from exercising a profession, independent activity, managerial or administrative duty of one (1) to ten (10) years, if the person has been convicted of any of the offenses in Chapter XXXIII of this Code.

While articles 62 and 63 are somewhat similar in the prohibition of forms of employment, they differ in one key aspect - the object of the prohibition. While Article 62 focuses on the prohibition relating to person's current position, Article 63 allows the court to extend the prohibition to a wider scope of a individuals od a particular profession or activity namely

[52] *ibid*. [Article 63, Prohibition of exercising a profession, activity or duty]

persons that are not currently serving in public office and who cannot exercise a duty related to systematization, management or use of publicly owned assets. Below are the main provisions that include an explanation of the accessory punishments, as well as some important interpretations.

- **Paragraph 1 –**
  - **The perpetrator exercises an independent profession/activity, managerial or administrative duty related to the sale, management or use of public property or its protection.** The important thing here that the sole criterion is that the position be related to the sale, administration or use of public property or its protection. Defendant is not required to serve in a position in public service or administration. Therefore, the employee of a state-contracted private contractor meets the prohibition criteria as long as there is a connection to public property or its protection.
  - **(1) if such person has abused his or her position, activity or duty in order to commit a criminal offense OR (2) if there is reason to expect that the exercise of such profession, activity or duty can be misused to commit a criminal offense**. Here again, (1) the element of abuse of power or level of special significance is not required for the abuse to play a role in the commission of the offense. There abuse is required only in the commission of the criminal offense. Regarding the following part (2), what we have there is a complete disconnection between the criminal offense and the abuse of any authority. Here the Court only has to conclude that there is reason to believe that the defendant may misuse the relationship to commit a criminal offense.

- **Paragraph 4** –
  - Essentially similar to Article 62, in paragraph 4 the primary criteria focus on the perpetrator as an official person and the commission of a criminal offense under Chapter XXXIII, regardless of whether there is any connection between the criminal offense and the position of the defendant.
  - Where this paragraph differs greatly, is in the ability of the Court to prohibit the exercise of any profession, activity or duty beyond what the official person holds at the time of the commission of the criminal offense. Although the two will usually be related, if the Court believes that a larger or more comprehensive prohibition is necessary, it can impose one.

According to this legal provision, the Court has no discretion since the norm is of imperative nature. In addition, it should be emphasized that this accessory punishment is not related to the type of the main punishment imposed. Thus, regardless of the type of the main punishment (imprisonment, fine or alternative punishment) the court has the obligation to impose it in cases where official persons commit criminal offences foreseen under the chapter of criminal offences against corruption and criminal offences against official duty.

The accessory punishments from the above articles are considered as a very important step for the integrity of public positions and in particular in relation to the procurement processes which are most criticized by the public. While the general prohibition on corruption-related offenses is set out in the above articles, the lawmaker has also provided for more specific prohibitions on procurement-related offenses including Article 415 par.4 for the criminal offense of "The abuse and the fraud in public procurement" provision stating that "*In cases when the perpetrator is found guilty, in addition to the punishment,* ***the court shall impose on the perpetrator the prohibition on taking part in the procedures for awarding public procurement contracts.****"* Apparently, for procurement-related offenses, the legislature has provided for this prohibition regardless of the severity of the sentence.

Law on Liability of Legal Entities[53] provided that such prohibitions could also be made against legal entities. In addition to the fine, the Law also stipulates that the Court may issue other security measures[54], which include confiscation.

3. Compensation orders

Article 61 of the CC requires from the Court to order restitution or compensation for any criminal offense involving "theft, loss, damage or destruction of property". This is an accessory punishment for all offenses that meet the above criteria and should always be assessed when the defendant has the ability to pay. Compensation orders should take precedence over fines set as the main punishments if the Court finds that the perpetrator is unable to pay both, and that the fine should be replaced by another main or alternative punishment.

[53]Law on Liability of Legal Entities published in the Official Gazette of the Republic of Kosovo, Article 12 Suspended Sentence, 14 September 2011.
[54] *ibid*. [Article 13 – Security measures]

In most cases, the victim of criminal offenses under Chapter XXXIII will be the state, but the Court must look at it from the perspective that ultimately the victims of these offenses are the Kosovo taxpayers themselves. Therefore, the recovery of those funds should be a priority for the judiciary.

In many cases, the material benefit of the perpetrator is equal to the amount of damage caused to the victim. In these situations, the Court must confiscate the material benefit and with it fulfill the compensation/restitution claim. However, failure to implement the request for confiscation of material benefits should not affect the ability of the Court to award the amount as compensation to the victim when both are the same, if the victim has sufficiently met the requirements for a property claim. Finally, it is possible that the compensation claim is larger and greater than the amount of the confiscation if there is additional harm beyond the amount of material benefit from the crime.

VI. Suspended Sentence

Along with the crime prevention principle, another fundamental principle of sentencing is the contribution to comply with the law and maintain a just, peaceful and safe society. Proper use of suspended sentence is an important component of this principle and creates a mechanism to make sentencing proportionate and compassionate when appropriate. However, if used too much, or used indiscriminately and without reason, it can cause the public to lose confidence in the justice system and its deterrent effect. The imposition of a suspended sentence without mentioning the circumstances that present extremely mitigating circumstances that would lead to mitigation of the sentence and without justifying them represents an excess of powers that a court has by law.

Although the Criminal Code permits the use of suspended sentences for a wide range of crimes, including some serious ones, yet judges need to keep in mind the principles and objective of sentencing before they decide to render such a sentence to a defendant in corruption related offences. Just because the Code allows such a possibility does not mean that there is an absolute possibility of imposing a suspended sentence. In particular, Courts should explain why the

threat of punishment as the main purpose of the suspended sentence, is sufficient to rehabilitate a particular defendant and still serve other purposes of the sentence.

In addition to the imposing other obligations, in offenses related to corruption and abuse of official duty, it is equally important to impose an accessory punishment related to the prohibition of exercising the function, even in the case of imposing a suspended sentence, which is now mandatory for the court under the new code.

Finally, when suspended sentence is rendered, it must be associated with other obligations for the defendant. Such obligations are listed in Article 56 of the Code and the most relevant obligations for this category of perpetrators would be the following three obligations[55]:

1.12. to compensate or restitute the victim of the offense;

1.13. to return the material benefit acquired from the commission of the criminal offense;

1.15. to provide financial reports as directed by the court.

Suspended sentence is stipulated also under the Law on liability of legal persons, which in this case would mean suspending the fine punishment of 50.000€ with a verification time of 2 years if the crime was committed for the purpose of material benefit.[56]

As important as the Court's reasoning for suspended sentence and imposing of conditions, is also the readiness of the Court to impose effective imprisonment when the defendant fails to comply with the terms of the suspension. Finally, the suspended sentence contains a period of imprisonment that is kept suspended for as long as the defendant meets the conditions set by the Court. While legitimate reasons may require the sentence to be extended, failure must be accompanied by immediate imprisonment to prevent further damage to the purposes of the sentence and the credibility of the Court.

[55]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 56 Types of obligations set forth in a suspended sentence, published in the Official Gazette of the Republic of Kosovo on 14.01.2019.

[56]Law on Liability of Legal Persons, Article 12, suspended sentence, published in the Official Gazette of the Republic of Kosovo on September 14, 2011.

VII. Confiscation

1. Confiscation of material benefit and compensation order

Whether the sentence is imprisonment, suspended sentence, community service, a fine and/or any accessory punishment, the Court must ensure that confiscation and restitution are carried out independently and in accordance with the CPC. In situations where the defendant is unable to meet all the financial obligations set forth by the Court, the priority is as follows:

1) restitution of victims,
2) confiscation of proceeds of crime and
3) fine.

2. Confiscation of instrumentalities and proceeds of crime

Stripping crime from profits is an important and significant deterrent to corruption and organized crime, and the Court needs to be more determined in imposing confiscation measures. Furthermore, Article 92 of the Criminal Code provides for a mandatory provision of substitution of property which means that any fund or property in the possession of the defendant may be used to comply with the confiscation order, even if the defendant has acquired the funds. or property through legitimate means, legal means. [57]

While the confiscation provisions apply throughout Chapter XXXIII, the Court should pay particular attention to Article 414 "Abuse of official position or authority", Article 416 "Misusing official information", Article 418 "Misappropriation in office" and Article 429 "Unlawful appropriation of property during a search or execution of a court decision." In all of these criminal offenses, the intent to obtain material benefit (or benefit) is an element of the offense, and in some cases actually obtaining the benefit will aggravate the punishment. In all of these situations, the Court must be particularly sensitive to see if there has indeed been material benefit and to address appropriate issues with the prosecutor if the CPC provisions on confiscation have not been met, but it is clear that the perpetrator has materially benefited from the commission of a criminal offense.

[57]Criminal Code of the Republic of Kosovo, No. 06/L-074, Article 92 Confiscation of means and material benefits of criminal offences, published in the Official Gazette of the Republic of Kosovo on 14.01.2019.

Of course, everything that was discussed above refers to the confiscation of property in criminal aspect. When the complexity of these procedures is added to the applicable legislation on the extended powers of confiscation of property, then it becomes even clearer that this is a separate topic which has been addressed and requires special treatment. An important thing is that no matter which procedure is followed, it is relevant in cases of criminal offenses of corruption and abuse of office, to always primarily look at the potential for confiscation of assets. Is would also be valuable to clearly specify if the criminal offence is committed for personal benefit, benefit to third persons, or to cause damage to another person. This facilitates decision-making to a great extent on what should be confiscated and by whom.

VIII. Reasoning

Article 370 of the CPC imposes the duty to give reasons for, and explain the effect of, the sentence. This is not only compliant with human rights criteria and provides the defendant with the required notice of how and why the sentence was imposed, but also gives the public greater knowledge about the functioning and logic of the justice system and also the belief that the interests of justice are being served. This is especially important when tackling corrupt practices that provoke strong public reaction. The example below is used for the purpose of demonstrating a proper reasoned decision in a very serious corruption case in the U.S.:

In U.S vs. Joseph Paulus case[58], the court sentenced the defendant to 58 months imprisonment, which was an upward departure from the guideline range of 27 to 33 months. Paulus was a former district attorney who accepted 22 bribes over the course of a two-year period for agreeing to favorable treatment of a defense lawyer's clients. The court justified their upward departure based on the nature of the trust breached, the number of bribes over a substantial period of time and the difficulty in detecting corruption.

"Bribery, by its very nature, is a difficult crime to detect. Like prostitution, it occurs only between consenting parties both of whom have a strong interest is concealing their actions. And often, when it involves public corruption as in this case, one of the parties occupies a position of public trust that makes him, or her, an unlikely suspect. In light of these facts, it is unusual to uncover even one instance of bribery by a public official, let alone twenty-two. This

[58] Unites States v. Joseph F. Paulus. No. Nr. 04-3092, US Court of Appeals, Seventh District, 22 August 2005

fact takes the case outside of the heartland …. That there was interference with a government function to an unusual degree and a loss of public confidence in government as a result of his offense are facts that this court has found."

Lack of reasoning, or insufficient reasoning of the sentencing decision is an indicator of the fragility of the justice system and a key element in the loss of public confidence in the justice system, especially given the nature of the criminal offenses covered in this Guidelines. As it was pointed out in the General Sentencing Guidelines there have been several cases in the Republic of Kosovo where the highest court has reversed decisions of the lower courts precisely due to lack of reasoning. The lack of reasoning was also treated recently in the decision of the Constitutional Court as one of the findings of this Court: "*Regarding the lack of a reasoned court decisions, the Court found that by issuing Judgment Pml. No. 253/2019, of 30 September 2019, the Supreme Court failed to reason the Applicant's substantive allegations and did not reason its decision regarding his qualification as an official person*.[59]

[59] The Judgment in Case No. KI230/19, Assessment of Constitutionality of the Supreme Court of Kosovo Judgment, Pml. No. 253/2019, dated 30 September 2019, ref. No. AGJ1691/21, paragraph 162, Prishtina, on 08 January 2021.

IX. Particular offenses in Chapter XXXIII and sentence calculation

The sentences for offenses in Chapter XXXIII vary from the provisions in which the qualification of the offense is made in generic manner without expressing the amount of the punishment in Euros (€) to provisions in which such damage is explicitly emphasized. The latter constitute most of the articles under this Chapter. Therefore, we will present hereunder each of the offenses provided for under this chapter and a table with penalties provided for the offenses covered in this Guidelines as well as the range of sentence for the provided sanctions.

The ranges provided in the above tables are completely within the minimums and maximums provided by law and never go beyond them. It is at the discretion of the Court to assess in each case individually whether the sentence below the minimum or above the legal maximum is justified by extremely mitigating, respectively aggravating circumstances. The same applies to the assessment of the court whether other alternative sentences should be imposed. However, what is of particular importance is the additional requirement that the court provides an adequate reasoning as to why it has reached such a conclusion.

As mentioned above, the Court should bear in mind that these ranges do not include other issues relevant to sentencing, such as: Recidivism, personal circumstances of the defendant or circumstances relating to procedural matters.

Before clarifying the tables it is important to clarify the different variations of the sentence within the same paragraph, calculating the sentence depending on the variations in the severity of the damage and culpability. This will be explained in more detail in Article 414 being the first article of Chapter XXXIII to continue with the same methodology in other articles as well.

Considering that the legislator has provided the sentence of 1-8 years for the offense from paragraph 1, the following table divides this offense into three ranges depending on the degree of culpability of the perpetrator and the damage caused, which is not quantified in this paragraph. The situation with paragraph 2 is different where the legislator has specified that in addition to the damage from paragraph 1, always when the value of the material damage can be determined and when that damage is over 5000 € then the offense falls under paragraph 2 of Article 414. This consequently leads to the reasoning that any amount of material damage below this value falls under paragraph 1.

Another difference between the two paragraphs is that in paragraph 2 the legislator has provided that in addition to the minimum and maximum there should also be a cumulative sentence of imprisonment and a fine. In this case the amount of the fine must be determined in accordance with the principles for calculating the fine under the Sentencing Guidelines. Paragraph 1 however does not provide for a fine at all.

ARTICLE 414 - ABUSING OFFICIAL POSITION OR AUTHORITY

Par.1. Fine and imprisonment 1-8 years.

Article		Responsibility		
414	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.1. (1-8v)	Up to 1000 €	3-5 years	2-3 years	1-2 years
	1000-25000 €	5-7 years	3-5 years	2-3 years
	2500-25000 €	7-8 years	5-7 years	3-5 years

The table above is broken down into several divisions within the same category. It should be noted at the outset that this paragraph itself does not explicitly state the extent of the damage (as is the case with most paragraphs 1 of articles in this Chapter), however this is implicit due to the fact that paragraph 2 of this article itself makes such reference by stating 'if the damage is over € 5000'. The division in the table is done with the aim of avoiding situations where the same sanction is imposed for a very large difference between the value of the damage. The logic of division into other categories is generally followed as demonstrated in paragraph 2 below. Take as an example, a middle ranking official who by abusing his/her official position causes damage in the amount of € 50, then the adequate sanction only in terms of culpability and the amount of damage would be 2-3 years months. Of course, the other accompanying circumstances presented in the general part of this Guidelines would also be part of the further considerations of the court to impose the sanction on him/her. It is important to emphasize not only in this article but also other articles of this nature especially in such cases where the value of the damage is not mentioned as in the case of paragraph 1, that the damage is not necessarily related to the monetary value, but can be related to other circumstances which are included in the general table and which may have the same degree of damage. The court must keep in mind that in this case the envisaged sanction is itself a reflection of the weight that the commission of such an offense has, since we are not dealing with a violation of a simple legal norm, but

with the violation of legal norms by an official entrusted with public duties and powers. Therefore, the misuse of those authorizations, regardless of the value of the damage, is serious enough and deserves a sanction. The following tables have been broken down in order to make it easier for the court to measure the sentence based on the principle of proportionality. It is always understood that the court has many other circumstances at its discretion to assess, based on the purpose of the sentence, the behavior and circumstances of the perpetrator as provided for by Article 69 of the CC.

Par.2. Fine and imprisonment 3-10 years.

Article		**Responsibility**		
414	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
		Sentence range	**Sentence range**	**Sentence range**
Par.2. (3-10v)	**Categ. 3 (Low)**	5-6 years	4-5 years	3-4 years
	Categ. 2 (Medium)	7-8 years	5-6 years	4-5 years
	Categ. 1 (High)	9-10 years	7-8 years	5-6 years

ARTICLE 415- ABUSE AND FRAUD IN PUBLIC PROCUREMENT

Par 1 and 2 Fine and imprisonment up to 5 years.

Article		**Responsibility**		
415	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
	Categ. 4 (Minimum)	**Sentence range**	**Sentence range**	**Sentence range**
Paragraphs 1 and 2 (up to 5y)	Up to 1000 €	2-3 years	1-2 years	1 month - 1 year
	1000-25000 €	3-4 years	2-3 years	1-2 years
	2500-25000 €	4-5 years	3-4 years	2-3 years

Par.3. Fine and imprisonment 1-8 years.

Article		**Responsibility**		
415	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
		Sentence range	**Sentence range**	**Sentence range**
Par.3. (1-8v)	Categ. 3 (Low)	4-5 years	3-4 years	1-3 years
	Category.2 (Medium)	5-6 years	4-5 years	3-4 years
	Category1 (High)	6-8 years	5-6 years	4-5 years

ARTICLE 416- MISUSING OFFICIAL INFORMATION

Par.1. Fine and imprisonment 6 months to 5 years.

Article		Responsibility		
416	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Paragr.1. (6m-5y)	Up to 1000 €	2-3 years	1-2 years	6 months –1 year
	1000-25000 €	3-4 years	2-3 years	1-2 years
	2500-25000 €	4-5 years	3-4 years	2-3 years

Par.2. Fine and imprisonment 2-8 years.

Article		Responsibility		
415	Damage	A (High)	B (Medium)	C (Low)
		Sentence range	Sentence range	Sentence range
Par.2. (2-8y)	Categ. 3 (Minimum)	4-5 years	3-4 years	2-3 years
	Category.2 (Low)	5-6 years	4-5 years	3-4 years
	Category.2 (Medium)	6-8 years	5-6 years	4-5 years

The intention of the legislator in this paragraph seems quite confusing. In fact this paragraph would probably be much better suited in Article 415 as it refers to activities related to public procurement. It is clear that in paragraph 2 the legislator wanted to emphasize the activities related to public procurement, wanting to impose a more severe sanction namely imprisonment of 2-8 years. What was not clear during the division of the tables was whether the legislator in this article was talking about the damage that could be caused up to the value of € 5000 or more? However, the analysis of the subsequent paragraphs leads to conclusion that the amount of damage that can be included within this paragraph cannot be higher than € 50,000. Any amount above that value is calculated according to paragraph 3 which caries a sentence of 3-12 years. This is also justified by the fact that it is impossible for the legislator to have thought that this paragraph includes only damages of up to € 5,000 (as is the case with paragraphs 1 and 3) and to sentence a person to imprisonment of 1-8 years under paragraph 3 for values above this amount, when it is known that the sanction according to paragraph 2 is higher (at least in terms of the legal minimum) namely 2-8 years. That would be contrary to the principle of aggravation of the sanction by the legislator, embodied in paragraph 2.

Par.3. Fine and imprisonment 1-8 years.

Article		Responsibility		
416	Damage	A (High)	B (Medium)	C (Low)
		Sentence range	Sentence range	Sentence range
Par.2. (1-8v)	Categ. 3 (Low)	5-6 years	3-4 years	1-2 years
	Categ. 2 (Medium)	7-8 years	5-6 years	3-4 years

Par.4. Fine and imprisonment 3-12 years.

Article		Responsibility		
416	Damage	A (High)	B (Medium)	C (Low)
		Sentence range	Sentence range	Sentence range
Par.4. (3-12v)	Categ. 1 (High)	10-12 years	7-9 years	3-6 years

Based on what was elaborated above, paragraph 3 also includes offenses committed in connection with public procurement or auction. Within the framework of complying with the principle set by the legislator, the court should keep in mind that when dealing with the latter, the sentence calculation should be within the maximum limits of each range, compared to the offense from paragraph 1.

Example.

- in cases where official information relates to damage from Category 1 and Culpability is A, the sentence can be up to 10 years.
- In cases where the official information relates to the damage from Category 1 and Guilt is A but when we are dealing with a procurement or public auction action, then the amount of the sentence only in terms of damage and culpability would be a maximum of 2 years.

ARTICLE 417 CONFLICT OF INTEREST

This and subsequent articles under this chapter represent cases where the qualification of the offense in the Criminal Code is done in generic terms without expressing the amount of damage in Euros (€). It is considered that the division into the main categories (1-4) is sufficient for this article without having to go further into the sub-divisions of the minimum category. This is due to the nature of this offence and also due to the margin between the minimum and maximum which is still quite small. It is therefore considered that a further breakdown in the case of this provision is unnecessary.

Par.1. Fine and imprisonment up to 3 years.

Article		Responsibility		
417	Damage	A (High)	B (Medium)	C (Low)
		Sentence range	Sentence range	Sentence range
Par.1 (Up to 3 years)	Category 4 (Minimum)	1-1.5 years	6 months - 1 year	1-6 months
	Category 3 (Low)	1.5-2 years	1-1.5 years	6 months - 1 year
	Categ. 2 (Medium)	2-2.5 years	1.5-2 years	1-1.5 years
	Category 1 (High)	2.5-3 years	2-2.5 years	1.5-2 years

Par.2. Imprisonment of 1-5 years.

Article		Responsibility		
417	Damage	A (High)	B (Medium)	C (Low)
Par.2 (1-5 years)		Sentence range	Sentence range	Sentence range
	Category 4 (Minimum)	2 – 2.5 vite	1.5 - 2vite	1 - 1.5 years
	Categ. 3 (Low)	2.5-3 years	2-2.5 years	1.5-2 years
	Categ. 2 (Medium)	3-4 years	2.5-3 years	2-2.5 years
	Categ. 1 (High)	4-5 years	3-4 years	2.5 - 3years

ARTICLE 418- MISAPPROPRIATION IN OFFICE

Par.1. Fine and imprisonment 6 months to 5 years.

Article		Responsibility		
418	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Paragr.1. (6m-5y)	Up to 1000 €	2-3 years	1-2 years	6 months –1 year
	1000-25000 €	3-4 years	2-3 years	1-2 years
	2500-25000 €	4-5 years	3-4 years	2-3 years

Par.2. Fine and imprisonment 1-8 years.

Article		Responsibility		
418	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
Par.2. (1-8v)	Categ. 3 (Low)	**Sentence range** 5 -6 years	**Sentence range** 3 -4 years	**Sentence range** 1 -2 years
	Categ. 2 (Medium)	7-8 years	5-6 years	3-4 years

Par.3. Fine and imprisonment 3-12 years.

Article		Responsibility		
418	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
Par.3. (3-12v)	Categ. 1 (High)	**Sentence range** 10-12 years	**Sentence range** 7-9 years	**Sentence range** 3-6 years

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ARTICLE 419- FRAUD IN OFFICE

Par.1. Fine and imprisonment 6 months to 5 years.

Article		Responsibility		
419	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
	Categ. 4 (Minimum)	**Sentence range**	**Sentence range**	**Sentence range**
Paragr.1 . (6m-5y)	Up to 1000 €	2-3 years	1-2 years	6 months –1 year
	1000-25000 €	3-4 years	2-3 years	11-2 years
	2500-25000 €	4-5 years	3-4 years	2-3 years

Par 1 and 3 Fine and imprisonment 1-8 years.

Article		Responsibility		
418	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
Par.2 & 3 (1-8y)	Categ. 3 (Low)	**Sentence range** 5 -6 years	**Sentence range** 3 -4 years	**Sentence range** 1 -2 years
	Categ. 2 (Medium)	7-8 years	5-6 years	3-4 years

Par.4. Fine and imprisonment 3-12 years.

Article		Responsibility		
419	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
Par.4. (3-12v)	Categ. 1 (High)	**Sentence range** 10-12 years	**Sentence range** 7-9 years	**Sentence range** 3-6 years

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ARTICLE 420- UNAUTHORIZED USE OF PROPERTY

Fine and imprisonment up to 3 years.

Sentence depending on responsibility and degree of damage				
Article		**Responsibility**		
420	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
Par.1. (Up to 3)	Categ. 4 (Minimum)	**Sentence range** fine or 1 year	**Sentence range** fine or 9 months	**Sentence range** fine or 6 months
	Category 3 (Low)	1.5-2 years	1-1.5 years	6 months –1 year
	Categ. 2 (Medium)	2-2.5 years	1.5-2 years	1-1.5 years
	Kateg.1 (High)	2.5-3 years	2-2.5 years	1.5-2 years

ARTICLE 421 ACCEPTING BRIBES

Par.1. Fine and imprisonment 1-8 years.

Article		**Responsibility**		
421	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
	Categ. 4 (Minimum)	**Sentence range**	**Sentence range**	**Sentence range**
Par.1 (1-8y)	Up to 1000 €	2-3 years	1.5-2years	1-1.5 years
	100-1000€	3-4 years	2-3 years	1.5-2 years
	1000-25000 €	4-5 years	3-4 years	2-3 years
	2500-25000 €	5-6 years	4-5 years	3-4 years
	Categ. 3 (Low)	6-8 years	5-6 years	4-5 years

In contrast to the above tables that refer to the value up to 5000 €, in accepting bribes we have larger range of this value due to more frequent cases where the amount of bribe can be minimal, up to 100€ in order to distinguish the ones above that value.

Par.2. Fine and imprisonment 3-12 years.

Article		**Responsibility**		
421	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
	Categ. 4 (Minimum)	**Sentence range**	**Sentence range**	**Sentence range**
Par.2 (3-12y)	Up to 1000 €	4-5 years	3.5-4 years	3-3.5 years
	100-1000€	5-6 years	4-5 years	3.5-4 years
	1000-25000 €	6-7 years	5-6 years	4-5 years
	2500-25000 €	7-9 years	6-7 years	5-6 years
	Categ. 3 (Low)	10-12 years	7-9 years	6-7 years

Par.3: Fine and imprisonment 5-15 years.

Article		Responsibility		
421	Damage	A (High)	B (Medium)	C (Low)
Par 3 (5-15y)		Sentence range	Sentence range	Sentence range
	Categ. 2 (Medium)	10-12 years	7-9 years	5-7 years
	Categ. 1 (High)	13-15 years	10-12 years	7-9 years

422- GIVING BRIBES

Par.1: Fine and imprisonment up to - 5 years.

Par.2: Fine and imprisonment 6 months to 5 years.

Article		Responsibility		
422	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.1. (- 5y)	Up to 1000 €	1-1.5 years	9Months -1y	6-9 months
	100-1000€	1.5-2years	1-1.5 years	9 months –1 year
Par.2. (6m-5y)	1000-25000 €	2-2.5years	1.5-2 years	1-1.5years
	2500-5000€	2-3 years	2-2.5 years	1.5-2years
	Categ. 3 (Low)	4-5 years	3-4 years	2-3 years

Clarification: Since in this case there is a very small difference between paragraphs 1 and 2, the two paragraphs have been merged into one table.

Par.3: Fine and imprisonment 1-8 years.

Article		Responsibility		
422	Damage	A (High)	B (Medium)	C (Low)
Par.3. (1-8y)		Sentence range	Sentence range	Sentence range
	Categ. 3 (Medium)	5 -6 years	4-5 years	1 -3 years
	Categ. 2 (High)	7-8 years	5-6 years	4-5 years

ARTICLE 423- GIVING BRIBES TO FOREIGN PUBLIC OFFICIAL OR FOREIGN OFFICIAL PERSONS

Par.1: Fine and imprisonment 1-8 years.

Article		Responsibility		
423	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.1 (1-8y)	Up to 1000 €	2-3 years	1.5-2 years	1-1.5 years
	100-1000€	3-4 years	2-3 years	1.5-2 years
	1000-25000 €	4-5 years	3-4 years	2-3 years
	2500-5000€	5-6 years	4-5 years	3-4 years
	Categ. 3 (Low)	6-8 years	5-6 years	4-5 years

Par.3: Fine and imprisonment 3-12 years, in conjunction with par 1.

Article		Responsibility		
423	Damage	A (High)	B (Medium)	C (Low)
Par.3. (3-12y)	Categ. 3 (Medium)	Sentence range 8-10 years	Sentence range 6-8 years	Sentence range 3 -6 years
	Categ. 2 (High)	10-12 years	8-10 years	6-8 years

Par.2: Fine and imprisonment 3-12 years.

Article		Responsibility		
423	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.2. (3-12y)	Up to 1000 €	4-4.5 years	3.5-4years	3-3.5years
	100-1000€	4.5-5 years	4-4.5 years	3.5-4 years
	1000-25000 €	5-5.5 years	4.5-5 years	4-4.5 years
	2500-5000€	5.5-6 years	5-5.5 years	4.5-5 years
	Categ. 3 (Low)	7-8 years	5.5-6 years	5-5.5 years
	Category.2 (Medium)	9-10 years	7-8 years	5.5-6 years
	Categ 1 (High)	11-12 years	9-10 years	7-8 years

ARTICLE 424- TRADING IN INFLUENCE

Par.1: Fine and imprisonment 1-8 years.

Article		Responsibility		
424	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.1 (1-8y)	Up to 1000 €	2-2.5 years	1.5–2 years	1-1.5 years
	1000-25000 €	2.5-3 years	2-2.5 years	1.5-2 years
	2500-5000€	3-4 years	2.5-3 years	2-2.5 years
	Categ. 3 (Low)	5-6 years	3-4 years	2.5-3 years
	Category.2 (Medium)	6-7 years	5-6 years	3-4 years
	Category1 (High)	7-8 years	6-7 years	5-6 years

Par.2: Fine and imprisonment 6 months to 8 years.

Article		Responsibility		
424	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.2 (6m-8v)	Up to 1000 €	1.5-2 years	1-1.5 years	6Months –1year
	1000-25000 €	2-3 years	1.5-2 years	1-1.5 years
	2500-5000€	3-4 years	2-3 years	1.5-2 years
	Categ. 3 (Low)	5-6 years	3-4 years	2-3 years
	Category.2 (Medium)	6-7 years	5-6 years	3-4 years
	Category1 (High)	7-8 years	6-7 years	5-6 years

ARTICLE 425 ISSUING UNLAWFUL JUDICIAL DECISIONS

Imprisonment of 6 months to 5 years.

Article		Responsibility		
425	Damage	A (High)	B (Medium)	C (Low)
		Sentence range	Sentence range	Sentence range
6muaj. 5years	Categ. 4 (Minimum)	1.5-2 years	1-1.5 years	6 months –1 year
	Categ. 3 (Low)	2-3 years	1.5-2 years	1-1.5 years
	Category.2 (Medium)	3-4 years	2-3 years	1.5-2 years
	Category1 (High)	4-5 years	3-4 years	2-3 years

The above break down is simplified by the fact that in this case we are clearly dealing with only one category - that of judges. Therefore, we have simplified the amount of damage in 4

main categories (without subdivisions). In terms of responsibility, in this case it reflects the instances of the judiciary starting from the basic, appeal and supreme levels. Such a break down on the basis of instances is logical due to the fact that the decision of a basic court can be corrected when the case is brought before the Court of Appeals. The same logic applies to the relationship between the decisions of the judges of the Court of Appeals and the Supreme Court.

ARTICLE 426- DISCLOSING OFFICIAL SECRETS

Par.1: Imprisonment of 6 months to 3 years.

Article		**Responsibility**		
426	Damage	**A (High)**	**B (Medium)**	**C (Low)**
		Sentence range	**Sentence range**	**Sentence range**
Par.1 (6m-3y)	Category 4 (Minimum)	1-1.5 years	9 months –1 year	6-9 months
	Category 3 (Low)	1.5-2 years	1-1.5 years	9Months – 1year
	Category.2 (Medium)	2-2.5 years	1.5-2 years	1-1.5 years
	Kateg.1 (High)	2.5-3 years	2-2.5 years	1.5-2years

Par.2: Fine and imprisonment 1–10 years.

Article		**Responsibility**		
426	Damage	**A (High)**	**B (Medium)**	**C (Low)**
		Sentence range	**Sentence range**	**Sentence range**
Par.2 (1-10 years)	Category 4 (Minimum)	3-4 years	2-3 years	1-2years
	Category 2 (Low)	5-6 years	3-4 years	2-3 years
	Category 2 (Medium)	7-8 years	5-6 years	3-4 years
	Category 1 (High)	9-10 years	7-8 years	5-6 years

Par.3: Fine and imprisonment up to 3 years.

Since par.3 provides for cases where the offense is committed by negligence, in this case the breakdown cannot be done the same as for the first two paragraphs as we cannot have different levels of negligence. In the case from par.3 the calculation of the sentence is valid based on the sentence calculation table according to the general Sentencing Guidelines and the principles clarified in this Guideline regarding the conscious negligence and the unconscious negligence.

ARTICLE 427- FALSIFYING OFFICIAL DOCUMENT

Imprisonment of 6 months to 5 years

Article		Responsibility		
427	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
6Months -5year	Up to 1000 €	1.5-2years	1-1.5 years	6 months –1 year
	1000-25000 €	2-2.5 years	1.5-2 years	1-1.5 years
	2500-5000€	2.5-3 years	2-2.5 years	1.5-2 years
	Categ. 3 (Low)	3-3.5 years	2.5-3 years	2-2.5 years
	Category 2 (Medium)	3.5-4 years	3-3.5 years	2.5-3 years
	Category 1 (High)	4-5 years	3.5-4 years	3-3.5 years

ARTICLE 428- ILEGAL COLLECTION AND PAYMENT

Par.1: Fine and imprisonment up to 3 years.

Article		Responsibility		
428	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
Par.1. up to 3y	Up to 1000€	9 months –1 year	6-9 months	3-6 months
	1000-25000 €	1-1.5 years	9 months –1 year	6-9 months
	2500-5000€	1.5-2years	1-1.5years	9-1 years
	Categ. 3 (Low)	2-3 years	1.5-2 years	1-1.5 years

Par.2: Imprisonment up to 3 years.

What should be noted about this paragraph is that the amount of imprisonment is the same as in paragraph 1, despite the fact that the amount of damage under paragraph 2 is significantly higher than that in paragraph 1. From this it can be concluded that it is more of a technical error in calculating the sentence for this provision by the legislator. This conclusion is further reinforced if we mention the fact that while paragraph 1 includes fines and imprisonment, paragraph 2 on the other hand contains only imprisonment. Of course, since this Guide is limited to the provided minimum and maximum, the division of the table for this paragraph is not possible. The Guidelines cannot provide a table with the same sentence as in the cases from paragraph 1 when the maximum value of the damage can be € 15,000 as well as in paragraph 2 where we are potentially dealing with amounts of over € 15,000 respectively over

€ 50,000. However, despite the legal maximum, if the payment or collection is related to amounts higher than € 15,000 and especially if the amount is over € 50,000 the court has always the discretion to imposed a sentence above the legal maximum if the existence of extremely aggravating circumstances is established.

ARTICLE 429- UNLAWFUL APPROPRIATION OF PROPERTY DURING A SEARCH OR EXECUTION OF A COURT DECISION

Imprisonment of 6 months to 5 years

Article		Responsibility		
429	Damage	A (High)	B (Medium)	C (Low)
	Categ. 4 (Minimum)	Sentence range	Sentence range	Sentence range
6Months -5year	Up to 1000 €	1.5-2years	1-1.5 years	6 months –1 year
	1000-25000 €	2-2.5 years	1.5-2 years	1-1.5 years
	2500-5000€	2.5-3 years	2-2.5 years	1.5-2 years
	Categ. 3 (Low)	3-3.5 years	2.5-3 years	2-2.5 years
	Category 2 (Medium)	3.5-4 years	3-3.5 years	2.5-3 years
	Category 1 (High)	4-5 years	3.5-4 years	3-3.5 years

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Although in the concrete article the value of the damage is not expressed in money, it is nevertheless implied that in this case we are dealing with the benefit of a certain value which has not been reported. Also, considering that according to the Law on declaration of assets, the declaring subject is generally obliged to report any asset or material benefit that exceeds the value of € 3000, it is not considered necessary to make subdivisions as in the above Articles to the Minimum Category as in this case we are not dealing with small values as it was the case of other articles.

Par.1: Fine and imprisonment up to 3 years.

Article		Responsibility		
430	Damage	**A (High)**	**B (Medium)**	**C (Low)**
		Sentence range	**Sentence range**	**Sentence range**
Par.1 (Up to 3 years)	Category 4 (Minimum)	1-1.5 years	6 months - 1 year	1-6 months
	Category 3 (Low)	1.5-2 years	1-1.5 years	6 months - 1 year
	Categ. 2 (Medium)	2-2.5 years	1.5-2 years	1-1.5 years
	Category 1 (Top)	2.5-3 years	2-2.5 years	1.5-2 years

Par.2: Fine and imprisonment 6 months to 5 years.

Article		Responsibility		
430	**Damage**	**A (High)**	**B (Medium)**	**C (Low)**
		Sentence range	**Sentence range**	**Sentence range**
6muaj. 5vite.	Categ. 4 (Minimum)	1.5-2 years	1-1.5 years	6 months –1 year
	Categ. 3 (Low)	2-3 years	1.5-2 years	1-1.5 years
	Category 2 (Medium)	3-4 years	2-3 years	1.5-2 years
	Category 1 (High)	4-5 years	3-4 years	2-3 years
