

**On the occasion of the 12th Assembly of the EULEX  
Judges, held in Mitrovicë/a on 23 September 2010**

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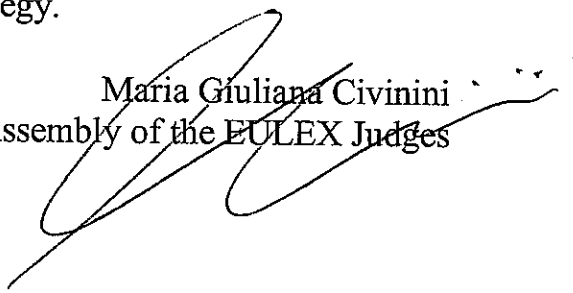
**The Assembly composed of the following Judges:**

Maria Giuliana Civinini, President of the Assembly of EULEX Judges, Gerrit-Marc Sprenger, Antoinette Lepeltier-Durel, Arkadiusz Sedek, Caroline Charpentier, Charles Smith, Christine Lindemann-Proetel, Dragomir Yordanov, Esmā Erterzi, Ferdinando Buatier de Mongeot, Francesco Florit, Gianfranco Gallo, Gunnar Oyhaugen, Hajnalka Karpati, Harri Katara, Johanna Schokkenbroek, Jonathan Welford-Carroll, Karen Asphaug-Warg, Klaus Huner, Klaus Jung, Ingo Risch, Lars Dahlstedt, Nikolay Entchev, Richard Winkelhofer, Rositza Buzova, Torsten Koschinka, Vitor Pardal.

Adopts the DECISION

*With 25 votes in favour, 2 abstentions, to approve the present report on corruption definition and anti-corruption strategy.*

Maria Giuliana Civinini  
President of the Assembly of the EULEX Judges





## WORKING GROUP DEFINITION OF CORRUPTION Outcome of August 2010

### Introduction

During the 10<sup>th</sup> Assembly of the EULEX judges and a discussion concerning the anti-corruption training on 1<sup>st</sup> June 2010, the issue of defining corruption was raised in order to determine the scope of activities of EULEX Judges' Unit in this respect. An Anti-corruption strategy as part of the OPLAN 2010 was adopted by the Council of European Union on 29 April 2010.<sup>1</sup>

The fight against corruption in Kosovo is not limited to monitoring and mentoring activities. It includes as well activities relating to awareness, transparency and accountability of those entrusted with power. In practice, the activities of EULEX Judges in this field are broader than a strict monitoring of *corruption cases*. They may involve different areas of EULEX mandate (monitoring of criminal cases, mentoring of the Kosovo judiciary, reporting any allegations of corruption...). It could also include the monitoring of procedures of disciplinary/administrative measures against the judiciary.

With respect to the monitoring of cases, it may be undertaken at different stages of criminal proceedings (investigation, prosecution and adjudication). Further, EULEX Judges' Unit should exercise its functions in this area in close cooperation with the EULEX Anti-Corruption Task force.

Consequently, EULEX Judges' Unit shall carry out activities in this area in close cooperation with the relevant actors within EULEX structure (SPRK, Special Advisor on Corruption to the Head of Mission, EU Prosecutors' Unit etc..) as well as international/European and Kosovo entities participating to the Anti-corruption strategy.

### Definition of Corruption

There is no common approved definition at the international or European level. In particular, a *stricto sensu* legal definition of corruption would narrow the scope of EULEX's activities in the Rule-of-law area. Therefore, the definition of corruption that may be used as basis of MMA activities on corruption by EULEX Judges should be broad as to take into account the social, cultural and political aspects of this phenomenon.

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<sup>1</sup> See *inter alia*, Part 1.2.1.7; Part 2.2.4 and 6 on Strategic Objectives of the Mission, Part 3.1. on EULEX KOSOVO HoM's intent, Part 3.3.2.3 on Cross-cutting issues, OPLAN 2010

## **Proposed guidelines on activities in the corruption field by EULEX Judges' Unit**

The definition of corruption shall not be narrowed to a legal definition and shall take into consideration social, cultural and political context of Kosovo. The activities of the Judges' Unit relating to the corruption cases shall comprise four sub-activities:

- **Training on Anti-corruption**

Selected EULEX staff received an Anti-corruption training. Training of all EULEX staff is ongoing within the different components (until end of 2010). EULEX training on corruption should focus on the indicators of corruption, the way to report on it, and the presentation of the remedies (disciplinary measures/ administrative procedure/ criminal procedures).

- **Monitoring, mentoring and advising activities**

MMA activities on corruption issue may be undertaken *via* the outputs on court administration (Output 1), on judicial misconduct and disciplinary measures (Output 2), and on criminal cases (Output 3), pursuant to the new MMA Action fiches. EULEX Judges shall thus be involved in the monitoring and mentoring of Kosovo judiciary, (notably by mentoring of the Kosovo judges on the principles of good governance, transparency and accountability).

- **Executive functions**


In accordance to the conditions of selection and taking over of cases under the Law No. 03/L-053 on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in-Kosovo dated 13 March 2008,<sup>2</sup> EULEX judges should focus/prioritize the exercise of executive functions on corruption cases.

- **Reporting to the Special Advisor to the Head of Mission**

The staff of EULEX Judges' Unit shall immediately report to the Special Advisor to the Head of Mission in charge of corruption matters (Anti-corruption Advisor) and to their line manager *any indicators of corruption*.<sup>3</sup> EULEX Judges' activities should thus comprise the verification of allegations of corruption.

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<sup>2</sup> See inter alia, Article 3.3(l) and (p) Law on Jurisdiction; see also Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *Article 3(d)* and (f)

<sup>3</sup> See Annex E, part 3.2 and in particular Part 3.4 : 

In addition EULEX Judges' Unit should submit comments and recommendations on amendments to the CCK to EU experts in charge of law drafting with respect to the criminal offences that may fall under the category of *corruption*.

**Annexes:**

- Annex 1: Note on definition of corruption;
- Annex 2 : List of criminal offences under the Criminal Code of Kosovo;
- Annex 3: Minutes of meeting on the Working group on Definition of corruption (23 July 2010)

## **Annex 1 Definition on corruption – MMA activities**

It is relatively difficult to define a concept such as Corruption. A common sense definition of Corruption would be ‘Giving or obtaining advantage through means which are illegitimate, immoral, and/or inconsistent with one's duty and/or the rights of others’. The commentators of this phenomenon are reluctant in drafting a strict definition.

Nonetheless, several definitions of corruption can be found. The NGO Transparency International has chosen a clear definition of Corruption as “the abuse of entrusted power for private gain”.<sup>4</sup> The one adopted by the Global Programme against Corruption run by the United Nations, reads as follows: “abuse of power for private gain”, including thereby both the entire public and private sector.<sup>5</sup>

A more precise definition is to be found in the Civil Law Convention on Corruption of 4 November 1999. Article 2 of the Convention states that “For the purpose of this Convention, “corruption” means requesting, offering, giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.”<sup>6</sup>

The GMC (Multidisciplinary Group on Corruption) set up by the Committee of Ministers of the Council of Europe which prepared a draft Programme of Action against Corruption started its work on the basis of the following provisional definition: “Corruption [...] is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates their duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others”.<sup>7</sup>

In its October 2006 Anti-Corruption Action Plan, OSCE proposes to define corruption as “a violation of duties of civil (public) servants or responsible persons in private and public sectors as well as the benefiting from such activities, caused directly or indirectly as the result of promise, offered, expected or given reward for yourself or other persons.”<sup>8</sup>

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<sup>4</sup> See Website <http://www.transparency.org/>

<sup>5</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption, COM(2003) 317 final, 28 May 2003

<sup>6</sup> Council of Europe, Civil Law Convention on Corruption, Strasbourg, 4 November 1999

<sup>7</sup> Criminal Law Convention on Corruption, 27 January 1999, Explanatory Report, paragraph 24

<sup>8</sup> OSCE Anti-Corruption Action Plan: Social and economic Necessity for Kosovo, October 2006, “The danger from corruption: Opinions and reality”, Habit Hajredini, Director of the Office of Good Governance, page 40; see also Anti-corruption Strategy 2009 – 2011, Kosovo Anti-Corruption Agency, Part v, “defining corruption as ‘abuse of power / responsibilities given in public or private sector for personal gain’”, page 6


Finally the Law No. 2004/34 on Suppression of corruption law<sup>9</sup> provides a definition of corruption in its Article 2: “every violation of duty of official persons or responsible persons in legal entities and every activity of initiators or beneficiaries of such behavior, committed in response to a directly or indirectly promised, offered, given, demanded, accepted or expected reward for oneself or some other person.”

Corruption manifests itself in various ways and involves different actors of the public office entities, governmental agencies and also private entities at different level of the decision-making.

Then, in the light of the above considerations and the mandate of EULEX regarding the fight against corruption, the working group proposes to adopt a broad definition of corruption, embracing acts committed either in the public or private sector by/involving persons entrusted with responsibilities, as a basis of MMA activities of EULEX Judges’ Unit in this field. The definition reads as follows:

‘Abuse of entrusted power for private gain’

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<sup>9</sup> Law No. 2004/34 on Suppression of corruption law, adopted by the assembly of Kosovo on 22 April 2005; see also OPLAN 2010, Annex E, Part 2.1: ; this definition is mentioned in Kosovo Anti-corruption Strategy, adopted by the Government of Kosovo on 17 March 2004.

**Annex 2 List of criminal offences under the Criminal Code of Kosovo that may fall under the category of corruption cases<sup>10</sup>**

#### **CHAPTER XXII: CRIMINAL OFFENCES AGAINST THE ECONOMY**

- **Article 235 Damaging Creditors**
- **Article 236 Misuse of Economic Authorisations**
- **Article 237 Entering Into Harmful Contracts**
- **Article 238 Unauthorised Communication of Trade Secrets**
- **Article 249 Tax evasion**
- **Article 250 Unjustified Acceptance of Gifts**
- **Article 251 Unjustified Giving of Gifts**

#### **CHAPTER XXIII: CRIMINAL OFFENCES AGAINST PROPERTY**

- **Article 261 Fraud**

#### **CHAPTER XXVII: CRIMINAL OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE**

- **Article 309 Obstruction of evidence**
- **Article 310 Intimidation During Criminal Proceedings for Organized Crime**
- **Article 311 Violating Secrecy of Proceedings**

#### **CHAPTER XXVIII: CRIMINAL OFFENCES AGAINST PUBLIC ORDER AND LEGAL TRANSACTIONS**

- **Article 316 Obstructing Official Persons in Performing Official Duties**
- **Article 332 Falsifying Documents**
- **Article 333 Special Cases of Falsifying Documents**
- **Article 334 Legalisation of False Content**

#### **CHAPTER XXIX: CRIMINAL OFFENCES AGAINST OFFICIAL DUTY**

- **Article 339 Abusing Official Position or Authority\***
- **Article 340 Misappropriation in Office\***
- **Article 341 Fraud in Office\***
- **Article 342 Unauthorized use of property\***
- **Article 343 Accepting Bribes\***
- **Article 344 Giving Bribes\***
- **Article 345 Trading in Influence\***

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<sup>10</sup> The criminal offences marked by an asterisk are mentioned in OPLAN,2010, Annex E, part 2.2 referring to Chapter XXIX on Criminal offences against official duty of CCK; further these criminal offences, except the ones mentioned in Articles 235 (Damaging Creditors) and 236 (Misuse of Economic Authorisations) of CCK are mentioned in the approved anti-corruption strategy of EU Prosecutors' Office

- **Article 346 Issuing Unlawful Judicial Decisions\***
- **Article 347 Disclosing Official Secrets**
- **Article 348 Falsifying Official Documents**
- **Article 349 Unlawful Collection and Disbursement**
- **Article 350 Unlawful Release of Persons Deprived of Liberty**
- **Article 351 Unlawful Appropriation of Property During a Search or Execution of a Court Decision**

### **Annex 3 Minutes of meeting of the Working group on definition of Corruption, 23 July 2010**

During the meeting of the working group, focus was made by the participants on the definition of corruption within EULEX's mandate, on EULEX activities in this field (training, MMA, executive and reporting) and the interaction between different actors in the fight against corruption present in Kosovo.

During the 10<sup>th</sup> Assembly of the EULEX judges and a discussion concerning the anti-corruption training on 1<sup>st</sup> June .2010, the issue of defining corruption was raised in order to determine the scope of activities of EULEX Judges' Unit in this respect. In practice, the activities of EULEX in this field are broader than a strict monitoring of *corruption cases*. They may involve different areas of EULEX mandate (monitoring of criminal cases, mentoring of the Kosovo judiciary, reporting any allegations of corruption...). It could also include the monitoring of procedures of disciplinary/administrative measures against the judiciary.

With respect to the monitoring of cases, it may be undertaken at different stages of criminal proceedings (investigation, prosecution and adjudication).

Further, EULEX Judges' Unit should exercise its functions in this area in close cooperation with the Anti-Corruption Task force.

The fight against corruption in Kosovo is not limited to monitoring and mentoring activities and includes as well activities relating to awareness, transparency and accountability of those entrusted with power. Georgi Rupchev referred to the new Anti-corruption legislation package which was adopted by the Assembly of Kosovo, notably Law no. 2010/03-L-151 on declaration and origin of the property and gifts of senior public officials dated 11 February 2010 and Law No. 03/L-155 on amending and supplementing the Law no. 02/L-133 on Preventing conflict of interest in exercising public function, dated 19 November 2009.

There is no common approved definition at the international or European level. In particular, a *stricto sensu* legal definition of corruption would narrow the scope of EULEX's activities in the Rule-of-law area. Therefore, the definition of corruption that may be used as basis of MMA activities on corruption by EULEX Judges should be broad as to take into account the social, cultural and political aspects of this phenomenon.

With respect to the criminal offences that could fall under the scope of *corruption cases*, the need to include financial and economic crimes as per in the Criminal code of Kosovo, notably Unjustified Acceptance of Gifts (contrary to Article 250 CCK) and Trading in influence (contrary to Article 345 CCK) was expressed.

Georgi Rupchev and Natalia Berkowitz pointed out several issues concerning the criminal offences relating to corruption under the Criminal Code of Kosovo were pointed

out, notably the disproportion between the gravity of the offence and the sanction, the statutory limitations provided for these offences, the concept of 'effective regret'.

George Mills mentioned the need to increase the coordination within EULEX components (notably Police and Justice) and suggested to focus the MMA activities on judicial misconduct and disciplinary measures. In addition, he proposed to the participants for EULEX Judges' Unit to adopt an anti-corruption strategy.

The participants referred to the MMA activities on court administration that may be a way of monitoring the Kosovo judiciary and detecting elements of corruption. They agreed that MMA activities relating to the fight against corruption will include the monitoring and mentoring of court staff, not only the judges.

**Participating members to the Working Group:** George Mills (Special Advisor to the Head of Justice), Caroline Charpentier (Legal Assistant to the President of the Assembly of EULEX Judges), Charles Smith (EULEX Judge at the district court level), Dragomir Yordanov (EULEX Judge at the district court level), Nathalia Berkowitz (EU Expert), Georgi Rupchev (EU Expert) and Chiara Rojek (Legal Officer at the district court level)