

CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN KAZAKHSTAN

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I. UNCAC

The Republic of Kazakhstan ratified the UN Convention against Corruption on 4 May 2008. Already having anti-corruption legislation in place, Kazakhstan is nevertheless continuing to improve it to achieve its declared policy of “zero tolerance for corruption”.

In accordance with Article 4 of the Constitution of the Republic of Kazakhstan, universally recognized norms and principals of international law and ratified international conventions are part of the legal system of Kazakhstan and prevail before any conflicting national legislation.

II. CRIMINALIZATION OF CORRUPTION IN KAZAKHSTAN

In 2014, Kazakhstan had a major reform of criminal, criminal procedural and administrative legislation. Accordingly, three new codes (laws) were enacted. The Criminal Code (“CC”) provides the group of the articles characterized as corruption crimes. They all have several obligatory features so that they could be counted as corruption.

These features are that the offence:

- 1) Should be committed by a person who is authorized to perform state functions or hold official public position
- 2) Should involve the execution of state (public) function
- 3) Should result in obtainment by such person of intangible profit or advantages for him/herself or a third party

Corruption crimes includes:

- embezzlement of funds or property committed by the public (official) person (imprisonment from 5 to 10 years with confiscation)
- fraud committed by a public (official) person (imprisonment from 3 to 7 years with confiscation)
- false business activity committed by a public (official) person (imprisonment from 3 to 7 years with confiscation)
- creation and management of a financial pyramid committed by a public (official) person (imprisonment from 5 to 12 years with confiscation)
- money laundering committed by a public (official) person (imprisonment from 3 to 7 years with confiscation)
- smuggling committed by a public (official) person (imprisonment from 3 to 8 years with confiscation)

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- raiding committed by a public (official) person (imprisonment from 7 to 10 years with confiscation)
- abuse of power (imprisonment up to 2 years with confiscation, aggravated – up to 8 years with confiscation)
- exceeding the limits of power (stretch of authority) in order to receive profit for him/herself or a third party (imprisonment from 4 to 8 years)
- illegal participation in business activity (imprisonment up to 1 year with confiscation, aggravated – up to 4 years with confiscation)
- obstruction of legal business activity (imprisonment up to 2 years with confiscation, aggravated – up to 7 years with confiscation)
- receiving a bribe (imprisonment up to 5 years with confiscation, aggravated – up to 15 years with confiscation)
- giving a bribe (imprisonment up to 3 years with confiscation, aggravated – up to 15 years with or without confiscation)
- intermediation in bribery (imprisonment up to 2 years with confiscation, aggravated – up to 6 years with or without confiscation)
- official forgery (imprisonment up to 2 years with confiscation, aggravated – up to 6 years with confiscation)
- inaction of service (imprisonment up to 2 years with confiscation, aggravated – up to 8 years with confiscation)

The new edition of the CC concerning bribery provides a system of fines corresponding to the sums of the bribe, which in turn provides a flexible and balanced approach to punishment for the bribery. Depending on the seriousness of the crime, the fine could range from, for example, for a simple bribe (receiving) the fine is 50 times the sum of the bribe; for an aggravated bribe, it is from 60 to 80 times the sum of the bribe. For bribe giving, the fine is from 20 to 50 times. For intermediation in bribery, it is from 10 to 20 times.

Nevertheless, other sanctions were significantly toughened. Mandatory life restriction against holding public official positions and positions in companies with state participation in a case of the conviction for corruption crimes was imposed for all corruption crimes.

Officials of foreign states and international organizations under the new CC are included as subjects of corruption crimes.

In case of corruption crimes, the property obtained by criminal means or purchased using funds obtained by criminal means, passed by a convicted person to third parties can also be confiscated from these third parties. The procedural confiscation of the property which was used or intended to be used during the crime commission, including money and other valuables, raised by criminal means is also allowed. The new Criminal Procedure Code (“CPC”) introduces the confiscation of property before conviction if the suspect is the subject of an international search or criminal proceedings were terminated due to an act of amnesty, time limit of prosecution expired or the death of the suspect.

Criminal responsibility of legal entities was declared inexpedient due to the principle of personal criminal responsibility. The code of administrative offences introduces corruption administrative offences (which are not crimes). They are:

- provision to persons authorized to perform state functions of the illegal material remuneration (presents, discounts or services)

- reception of illegal material remuneration by a person authorized to perform state functions
- failure to take anti-corruption measures by management
- hiring a person who was previously convicted for corruption

The Code also punishes legal entities. Meanwhile, the legislation of Kazakhstan does not contain any provisions criminalizing trading in influence.

The new CC also does not directly criminalize “promise of bribe”. Deeming the intention to commit a crime as a completed offence is unacceptable according to the criminal law doctrine of Kazakhstan. Crimes can only be actions (inaction) that pose danger to the public, entail public injury or create immediate threat of such injury. Pursuant to the Legislative Guide for the implementation of UNCAC, the Convention treats promise as reaching an agreement to give (take) a bribe. Such actions could be defined by the legislation of Kazakhstan as conspiracy and are treated as preparation.

The new CC waved the statute of limitations for persons committing corruption crimes.

III. INTELLIGENCE

The CPC provides several causes when the investigation should be started. Such leads include statements of citizens; the report of the official of a state body or the person carrying out administrative functions in the organization; appearance of the guilty; reports in the mass media; direct detection of a crime by officials and bodies competent to investigate criminal cases.

The major source of the leads is the *complaints of people* who become victims of corruption. For this reason, the agencies responsible for tackling corruption use various call-centers and mailboxes to facilitate the direct communication with people.

For example, from the beginning of 2014 the call-center has been established within the Department of Internal Security of the Ministry of Internal Affairs. The call-center has a short telephone number (1402) which is free to call from any place within the country. This call-center works 24/7 and has an operative officer on duty. Any signal about corruption is taken seriously by organizing a swift check and if the lead is valid it will then be developed into a fully fledged investigation.

Another major source of the leads is the work with informants, who, if they receive any information about an already committed crime or preparation of the crime, would pass it to its contacting officer. The officer after checking the validity of the information received will register the lead and proceed with the investigation.

The CPC provides a number of measures to provide security for any persons involved in criminal process. In the investigation stage, such measures include:

- official warning (caution) to a person who poses any threat
- limiting access to the information of the protected person
- provision of personal physical security
- arrest, detention of the accused which excludes the possibility of harmful actions towards the protected person
- restraining order that prohibits any attempt to approach or communicate with the protected person

During the trial the judge could provide further measures of security. They include:

- the witness or victim statement without disclosure of their personal information and with the use of

nicknames

- the witness or victim statement in the conditions that exclude the possibility of recognition by voice, accent, sex, nationality, age, etc.
- the witness or victim statement without visual contact, including the use of video conferencing

In addition, the judge can prohibit the video or audio recording during testimony or can have the defendant leave the courtroom, except his/her counsel.

The State Protection of Persons Involved in Criminal Procedures Act (2000) provides additional measures such as personal protection, confidentiality of data, relocation, the change of the place of study, the change of the place of job, and assistance in work placement.

Kazakhstan also is a party to the Agreement on Protection of the Participants of Criminal Procedures (2006), which provides relocation of protected persons to another country.

Kazakhstan encourages whistle-blowing. According to the Government decree on approving the Rules on rewarding those who disclose facts of **corruption offences** or otherwise assist in the fight against corruption (2012), whistle-blowers receive monetary rewards for providing the leads on corruption activities. However, the legislation does not provide any additional protection measures for whistle-blowers, as everybody is considered to be equal and has the equal right to be protected.

All the proactive measures can be used in the process of investigation of corruption cases.

IV. INVESTIGATION

The power to proceed with criminal investigation is given only to four agencies:

1. Police (the Ministry of Internal Affairs)
2. The Committee of National Security
3. The Anticorruption Office (Civil-service and Anti-corruption Agency)
4. The Office of Economic Investigations (The Ministry of Finance)

The CPC provides clear division of what type of crimes should be investigated by each of the four agencies. All corruption cases are investigated by the Anticorruption Office. However, all other agencies, if they detect corruption, can start investigation so that no evidence is lost. Then the prosecution office will direct the case to the Anticorruption Office for further investigation. The prosecutor could, nevertheless, leave the case to the agency that started investigation. The General Prosecution Office has the Special Prosecution Department that also can investigate corruption cases.

Any investigation starts by registration of the information about the crime in the single register of pre-trial investigations. After this registration, the investigator could conduct investigative steps to collect evidence.

Investigative measures:

- Interrogation and cross-interrogation (video recording could be used)
- Deposition and interview
- Crime scene investigation/examination
- Search and seizure (need warrant from the prosecutor)

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- Forensic examination
- Covert investigation

Covert investigation measures include:

- Controlled delivery
- Wiretapping (telephone, computer)
- Bugging (person, place)
- Penetration of offices, houses or other places
- Physical control of a person or place

Sting operations are not available for corruption cases as any provocation by the investigators of other persons to commit corruption is prohibited by the CC.

All covert investigation measures require warrants from the prosecutor. Nevertheless, the accused and all the parties of the investigation have the right to challenge the decisions and measures taken to the court. The investigative judge has to consider the challenge within 3 days.

Information, which is the subject of commercial and bank secret protection (Art. 122 of the CPC), can be obtained by law enforcement agencies on the basis of the prosecutor's sanction or on the basis of the court's decree.

The accused and his/her counsel have a very active role at the stage of investigation. They can petition an investigator to take the investigative measures they consider necessary to establish or refute his/her guilt. The investigator is obliged to consider the necessity of such measures and give an answer in writing. If the investigator considers such measures unnecessary, then the accused could petition the prosecution office or the court, which if they consider it necessary, could direct the investigator to take such measures.

The person could be arrested up to 72 hours without a warrant. During this time the investigation should send all material to the prosecutor to consider whether it is necessary to ask the court to give the warrant for detention of the accused. If the prosecutor finds it necessary, then he/she will apply to the court for the warrant. The judge decides whether to issue warrant or not. The length of the detention is two months, but could be prolonged. If the judge decides not to issue the warrant for detention, bail or house arrest could be used.

The normal length of investigation is two months, but could be prolonged by the prosecutor up to 18 months. However, if the accused admits his/her guilt, the investigation could take the form of an expedited investigation, which is 15 days.

After the completion of all the investigating actions, the investigator invites the victim(s), accused(s) and their counsel to examine all the evidence collected. The accused could take as much time as necessary for the examination of the evidence. However, if the time asked for is unreasonable, the investigator on the approval by the prosecutor could make a timetable for the examination of the evidence.

The accused has the right to petition the investigator to take additional investigative actions to collect evidence that denies his/her guilt. Upon the completion of such actions the accused again is invited to examine the evidence. Thus, the disclosure takes place before the prosecution and trial.

V. PROSECUTION

After the investigation is completed, the case is then sent to the prosecution office. Having considered and evaluated all the collected evidence, the prosecution office then decides whether to support the prose-

cution or to drop the case. The only test is the sufficiency of the collected evidence to convict and the reasonable prospect of conviction. There is no such test as public interest.

If the prosecutor is not satisfied with the sufficiency of collected evidence, the prosecutor could terminate the investigation and prosecution or send the case for additional investigation. The prosecutor has to make the decision whether to proceed with the prosecution in 10 days and in the case of an expedited investigation, in 3 days.

Recently, *plea bargaining* has been introduced to the Kazakhstan criminal procedure in the form of *the procedural agreement*.

It can only be used if three conditions are fulfilled:

1. The accused voluntarily pleads guilty and initiates the conclusion of a procedural agreement.
2. The accused does not contest (dispute) the charges against him/her, the collected evidence and the character and scale of the damage caused.
3. The victims should consent to the agreement.

The procedural agreement **cannot** be considered if the crime has the maximum sentence of more than 12 years of imprisonment. The plea bargain gives the accused a 50% discount on the maximum sentence possible for the crime committed and shortens the time when he/she could be released on parole.

The procedural agreement should be signed by three sides: the accused, the prosecutor and the victim(s). The agreement can be initiated by the accused/defendant or the prosecutor at any stage of the investigation, prosecution or trial, but before the judge(s) retires for deliberation, and the accused/defendant has the right to revoke the agreement at any time before the judge(s) retires for deliberation. After the agreement is signed, the victim cannot ask to increase the amount of the damages caused by the crime.

The procedural agreement is then sent to the court for the judge to decide whether to uphold it or discharge and initiate a full investigation. This is the monitoring system to prevent any facts of misuse of procedural agreements. However, the procedural agreement has not been used for corruption cases yet.

Some categories of public persons have immunity from arrest, detention or criminal prosecution. The list of such persons is limited by those specified in the Constitution of the Republic of Kazakhstan. The procedure for lifting such immunity is established by the Criminal Procedural Code.

VI. TRIAL PROCEDURE

The trial system of Kazakhstan can be characterized as adversarial as the prosecution and defence have equal rights at the trial. The trial is conducted orally, and it is open for the general public to attend. The burden of proof lies on the prosecution. The standard of proof for conviction is beyond a reasonable doubt.

The defendant enjoys a wide range of rights, such as the right to remain silent, to the presumption of innocence, to present any exculpatory evidence, to know and examine all the evidence and to receive the copies of any documents collected during investigation, prosecution and trial, to the treatment of any doubt in his/her favour, and the right to counsel (provided at the expense of the state).

Pretrial procedures are obligatory for especially grave crimes and take 10 days but could be prolonged for an additional 20 days. At the pretrial stage, the judge considers all the petitions from the defendant and the prosecution.

The trial has the following stages: opening, examination of evidence, closing arguments, the last word of the defendant and judgement. The trial should be completed within a reasonable time. On average it takes 2-3 months for a first instance trial. Appellate procedures could take another 2-3 months. If the

defendant voluntarily pleads guilty, the trial will be in form of an expedited trial which takes 10 days and could be prolonged for an additional 20 days. The jury trial, which does exist in Kazakhstan, is only available for a certain number of crimes (those punishable by capital punishment or life imprisonment); therefore, corruption cases are not subject to jury trials.

VII. EVALUATION AND RECOMMENDATIONS

In general, the criminal justice response to corruption is adequate and balanced. The simplification of the criminal procedures, regulating collection of evidence, increases the number of detected cases of corruption and the conviction rate of such cases. The priority of procedural norms is to guaranty the certain level of protection for the innocent facing criminal charges. The early disclosure of evidence expedites the criminal procedure.