Section 11

Towards an equitable and effective investigation and adjudication of financial criminality and corruption in the public sector

I. Introduction

Any debate on improving the effectiveness and ensuring the fairness of criminal repression against financial criminality and corruption in the public sector is necessarily linked to broader challenges for Greek law enforcement restructuring.

The necessity to establish, e.g., a reliable legal framework on expert opinions is very important for the herein discussed issues, but may nevertheless be justified with reference to other fields, such as the drug-related criminality.

The above assumption seems questionable in recent times. In light of the drastic upgrading of the related conducts' demerit in social consciousness, the procedural legislation attempts to introduce special provisions for the specific offenses, exactly to intensify the sense of a responsive criminal mechanism to the demand for effective counteraction.

Although the expediency of individual special provisions is undeniable, the general trend for special treatment of financial criminality and corruption in the public sector is both utterly unjustifiable and dangerous. For example, one cannot understand why priority is always granted to the investigation and adjudication of such cases over, e.g., robberies or even organized financial offenses in the private sector. In view of limited resources and potentials, the criminal enforcement apparatus can definitely prioritize with reference to specific perpetrations, but to the extent that such decisions are justified by particular characteristics and are taken on the basis of rational and generalizable criteria.

Moreover, the point here is not to circumvent the pathogeneses of law enforcement for specific offenses by creating a two-tier criminal justice system, but to utilize the crisis as an opportunity for the general improvement of this mechanism.

II. Relativisation of the legality principle in crime prosecution

The aptitude of criminal justice to meet its functional role largely depends on the volume and type of cases it is called to handle. In this context, the principles governing the motion of prosecution exercise significant influence.

The Greek criminal trial is traditionally governed by the legality principle. Adopting individual provisions by way of its derogation is only exceptional, and under the current regime generally refers to crimes entailing a relatively small demerit and whose prosecution and reprimand is not associated with particular anticrime gains. However, relativisation of the legality principle in the initiation of prosecution seems to be a consistent trend in most modern legal orders. Moreover, the now systemic adoption of provisions for the conditional "limitation" of minor misdemeanors and

small-scale sentences suggests that the rigid application of the legality principle exceeds the capacities of both the criminal judicial apparatus and the prison system.

In view of the above, one could adopt relevant theoretical proposals to extend abstention from suspension of prosecution:

a) Temporary abstention from prosecution by the public prosecutor at the Court of First Instance - CFI (: with the approval of the prosecutor at the Court of Appeals - CoA) for misdemeanors threatened with imprisonment of up to three years, provided that the perpetrator will meet certain conditions, such as conciliation with the victim, donation of a certain amount to charity or public benefit fund, etc. Fulfilling these terms should lead to permanent abstention from prosecution. With the exception as to the threatened penalty, relevant conducts that could be handled in this manner include, inter alia, small-time tax evasion, debts to the State (if the legislature chooses not to decriminalize them), etc.

b) Abstention from prosecution and case closure by the prosecutor at the CFI for misdemeanors threatened with imprisonment of up to one year, with the approval of the prosecutor at the CoA, provided that the initiation of prosecution does not serve a major public interest and special circumstances applied at the time of perpetration (e.g. victim's contributory fault or lack of volition to prosecute, minor consequences) or the offender has specific conditions (e.g. illness, old age, disability) or immediately attempted to restore his/her transgression.

Such an alternative procedure of abstention from prosecution would require the following minimum guarantees:

(i) Sufficient evidence for prosecution, as their absence leads to the inevitable dismissal of the complaint or closure of the case under Articles 43 and 47 GCCP.

(ii) Suspect's consent for the implementation of these procedures, as its lack compromises the right to a fair trial. This consent should also be usable against him/her as a confession upon failure to fulfill the terms of the temporary suspension of prosecution.

(iii) Informing the victims for the procedure of temporary suspension of prosecution and accounting for their interests by the public prosecutor when he/she imposes the relevant terms upon the suspect.

(iv) Supervision of the relevant activities of the prosecutor at the CFI by the prosecutor at the CoA.

(v) Prohibition of further application of these beneficial terms for the same offender in repeated suchlike behaviors, even after the final abstention from prosecution.

III. Upgrading the quality of pre-trial investigations

1. Introductory remarks

Obviously, the abovementioned efforts to rationally relieve the anti-crime apparatus do not affect -at least directly- the core of the relevant offenses. It may indeed help facilitate the workload of the Misdemeanor Courts, but cannot drastically change the image of criminal justice, whose major problems relate to the investigation and adjudication of felonies.

As for the latter, the most critical issue probably lies in improving the quality of pre-trial investigations. In the area of financial criminality in the public sector, preliminary investigation deficiencies together with the complexity of cases seem to be one of the main causes of many practical setbacks.

2. Special prosecuting structures for financial criminality and corruption in the public sector

Establishing special prosecuting structures to investigate and indict financial crimes and corruption in the public sector was one of the key legislative initiatives in the discussed field in the midst of the financial crisis, principally headed to the right direction. The rapid increase in such crimes together with the complexity of cases actually favor their handling by specialized prosecutors and endorse the development of special investigating agencies, manned by officials with the knowledge and experience to grasp the evidentiary requirements of each case.

A Prosecutor of Financial Crime and a Prosecutor of Corruption Offenses have been established; however their area of activity is not well-defined.

It would be better to merge the two “special” Prosecutors into one Prosecutor of Financial Crime and Corruption, who will hold overall jurisdiction for all violations against public property and for corruption in the public sector. This competence should be legally clarified, include money laundering whenever the predicate offense is subject to it, and not dependent on the status of the suspect/defendant. The frequent cooperation of private operators and public officials in offenses against the public property or corruption cases corroborates this argument.

In terms of territorial jurisdiction, Prosecutors of Financial Crime and Corruption should be stationed in each appeal court district. A deputy prosecutor and an assistant deputy prosecutor should be assigned at each Prosecutor’s Office at the CoA, acting as Prosecutors of Financial Crime and Corruption and assisted by at least two (in Athens and Thessaloniki) or one (in other court districts) deputy prosecutors at the CFI. All will be supervised by a specially appointed deputy prosecutor at the Supreme Court.

The creation of special investigation units supervised by the local Prosecutor at the CoA, that will cooperate with administrative control authorities, is critical to the efficient function of the proposed structure.

In this way, all (or, to begin with, the most significant) preliminary investigations for the discussed offenses will be assigned by the Prosecutor of Financial Crime and Corruption on the basis of qualitative criteria (: large damage or/and pecuniary gain, more persons involved, complexity of investigated conduct, etc.) for handling by the above special prosecutors who will be aided by a sufficient number of specialized

investigating officials (preferably economists with a legal background and police officers specialized in corruption) to facilitate the documentation, central monitoring and better communication with the administration to ensure the scrutinization of cases before initiating prosecution. The supervision of the whole procedure by the Deputy Prosecutor of the Supreme Court may also contribute to the adoption of best common practices in the whole process, to the dissemination of relevant experience and to a uniform methodology of the anti-crime apparatus, while retaining the personal independence of prosecutors.

3. Interventions in the field of the preliminary and main investigation

3.1. The crucial substantial enrichment of assessment in initiating criminal prosecution

Laws 3160/2003 and 3346/2005 attempted an essential institutional shift in the initiation of prosecution, by establishing a compulsory preliminary investigation for felonies, rendering greater protections to the rights of defense of the accused. However, despite this development, the role of the preliminary investigation as a stage of substantive examination and designation of noteworthy criminal issues does not seem to be confirmed in practice.

The preliminary investigation, especially when assigned to general investigating officials, usually develops into a purely formalistic and throughput-bureaucratic process. However, it is obvious that this vital reconstruction calls for the active supervision and guidance of the prosecutor, but also the ability of the investigating official to understand the evidentiary requirements in order to ask the appropriate questions to witnesses and defendants and collect all the crucial evidence, so that the case may actually be reliably assessed before initiating prosecution. Otherwise, it is likely to cause a "deceleration", to the extent that yet another meandering investigative phase is added to the criminal pre-trial stage.

Of course, this is a general problem. However, this detrimental situation (particularly in the discussed field) can be alleviated or averted by the herein articulated proposal for the Prosecutor of Financial Crime and Corruption and the accompanying structure of investigating officials.

Along the same lines, functional proposals could include:

- Stronger co-assessment of case closures and dismissing orders when reviewing and evaluating prosecutorial work;

- Improving Article 585 GCCP and its practical application by envisaging and imposing a pecuniary sanction that is proportionate to the income of the complainant (obliged to submit his/her tax statement when filing a complaint) in case of intentional deceptive accusation.

- Establishing regular meetings between prosecutors and investigating officials, to guide the fact-finding activities of the preliminary investigation.

3.2. The necessary restoration of reliability of expert opinions

Failure to properly investigate cases of financial offenses in the preliminary stage is often due to the absence of an expert opinion. However, the very institution of expert opinions needs upgrading (due to excessive delays, "ex officio" appointments are seen as pointless inconvenience by appointed experts, skepticism on the impartiality and proper documentation of expert opinions, particularly in the fields of graphology and economics).

In view of the above, it is necessary to establish criteria for a better evaluation of designated experts as to their scientific training and ethos; to address the relevant delays, short deadlines should be imposed, and threat of reprimand (e.g. non-reappointment) envisaged for unpunctual experts.

Furthermore, the processes of education, training, and appointment of experts should be modernized, with approaches such as:

- Establishing relevant departments or post-graduate programs at tertiary education institutions, with particular reference to the science of graphology.

- Establishing an independent Agency of Judicial Experts with ample infrastructure and staffing it with an adequate number of civil servant experts.

- Extending the -now administrative- regulatory framework for asset control of experts.

3.3. Effective and equitably demarcated asset control for involved individuals

The timely and effective asset control of involved persons and their relatives can become an important tool for the effective and fair investigation and adjudication in the relevant field. The abovementioned special prosecutors and their specialized staff can help ensure the improvement of communication with public authorities. Special software should be developed, allowing for a uniform electronic transmission and easy processing of data from all banks.

The State's capability to assure a timely and effective documentation of the assets belonging to involved persons and their relatives is often of vital importance. This distinct targeting should be envisaged in preliminary investigations and not always viewed as a necessary preliminary stage of asset-freezing. The creation and operation within each prosecution office (or at least within the offices of the Prosecutor of Financial Crime and Corruption) of a Special Department for Asset Control and Recovery of Criminal Assets should be considered, accompanied by an institutional framework of cooperation with all the aforesaid departments and agencies.

It is also vital to generally modernize administration: exploring the usefulness of relevant tools of the tax mechanism, such as the "asset registry" (under formation), should be fruitful. The same objective could also be promoted through developing an institutional framework for the permanent cooperation of prosecutorial and judicial authorities with the Financial Crime Unit and/or the Hellenic Financial

Intelligence Unit - HFIU (Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority, according to Law 3691/2008), e.g. by establishing a standardized e-form to record the assets of investigated individuals.

These records should be accessible during preliminary investigations upon a relevant order of the Prosecutor at the CoA or upon suspect's request. The Prosecutor's decision for early freezing of assets should be available at the investigation stage if it relates to a felony; the suspect should hold the right to appeal against it or apply for its revocation, if new evidence surfaces. This model should be adopted via general provision of the GCCP and encompass all the herein discussed offenses, including money laundering. Both in confiscation and in asset freezing, the maintenance of fragmented provisions with different terms and defenses according to individual investigated offenses does not seem justifiable.

To materialize such a model would require the practical realization of the onerous nature of this procedural measure and its equitable regulation.

In particular, a single proposed general scheme of competence for seizure can be summarized as follows:

- Preliminary investigation: Prosecutor's decision, with the possibility of appeal and application for revocation upon new evidence;

- Main investigation: investigating magistrate's order and prosecutor's approval, with the possibility of appeal and application for revocation upon new evidence;

- "Early" freezing: decision of the HFIU President with limited effect (two months) and the prospect of its preservation throughout the impending preliminary examination by ordinance of the Judicial Council of Misdemeanors; possibility of appeal and application for revocation upon new evidence.

In all these cases, each measure of procedural coercion will be ratified, recalled, or imposed for the first time by the judicial body that is competent for the substantial effective conclusion of the main investigation.

Furthermore, uniform provisions should regulate significant problems in the field, such as the possibility to impose more seizures against participating defendants, resulting to total seized assets over-exceeding the alleged pecuniary benefit or damage, or even violations against bona fide third-party rights, e.g. in joint ownership of real estate or -mainly- joint bank accounts or other financial products. The mandatory "preferential" seizing of personal assets of the defendant is a valid solution, once relevant requirements apply that fulfill the aims pursued.

A special provision should also be envisaged for the State's obligation to full reparation of the suspect or accused when the competent court finds him/her not guilty or decides that no confiscation or deprivation of property should be imposed, despite the conviction.

If the abovementioned conditions on State access to assets of non-offending third parties apply, competent bodies may impose such a seizure, but also grant the third parties the same defenses envisaged for suspects and defendants.

This dedication of the anti-crime apparatus to seek and secure the criminal gains calls for a sturdier resource management. The herein proposed measures often raise the issue of coexisting victim claims (including the State) to third-party ones; with the specific exception of seizure and confiscation of direct criminal proceeds, this makes it imperative that the asset management be entrusted to a Central Agency, that will allow stakeholders to claim their statutory redress.

Any long-term seizure of cash and/or real-estate property of the defendant should not deprive him/her of the right to reimburse the victim at any stage of the process.

3.4. Specific improvements in the main investigation stage

Deadlines to conclude the main investigation stage for financial criminality and corruption in the public sector are often very short, resulting to case files that are incomplete and lack sufficient evidence. Instead of that, it would be better to establish short deadlines for the transmission of the requested information by the investigating magistrate, e.g. in lifting of banking secrecy.

It is necessary for qualified experts to assist the investigative work. However, this is expected to gradually recede once the Office of the Prosecutor of Financial Crime and Corruption has been established and staffed by special preliminary investigators.

The defendant should also be granted the right to conditional (i.e. upon income criteria) free access to a technical advisor.

Furthermore, investigating magistrates dealing with cases of financial criminality and corruption in the public sector should be relieved from any other duty.

4. Equitably enhancing the application of special investigative measures

In recent years, the scope of special investigative acts has been widely extended over numerous criminal behaviors. Law 4254/2014 further expanded the application of such measures (: covert investigations, confidentiality lifting, recording of non-domestic activities, correlating or linking personal data) on passive and active bribery and trading in influence.

Such special measures may be justified when the investigation of the relevant crimes renders their application absolutely essential, while not contradicting (stricto sensu) the proportionality principle. The resulting substantial infringement of civil liberties dictates the establishment of strict application safeguards to ensure the preservation of fundamental principles of the rule of law. Such minimum guarantees include:

a) Ex officio appointment of a defense counsel authorized to monitor the legality of the secret investigative acts against the defendant, without the latter’s knowledge of them.

b) Ensuring the factual justification of conditions to initiate such investigations by: a) assessing the reasoning behind the relevant judicial decisions and b) acknowledging invalidity of the process if evidence derived from secret investigative acts is utilized without upholding specific institutional guarantees.

c) In cases of covert investigations, the required order of the competent prosecutor with a prior notice to the coordinating Deputy Prosecutor of the Supreme Court should be "empowered" with extra guarantees of judicial supervision, by bringing the case before the competent judicial council to issue a judgment allowing or forbidding the implementation of such special investigative activities.

d) In undercover operations and covert investigations, reliable practices should be followed for through the utilization of modern technology (: videotaping and sound recording), so that no doubt is left regarding the covert agents' modus operandi in carrying out these special investigative activities.

e) In the same context, the law should explicitly envisage that these investigative acts cannot be considered as secret questionings of the suspect or defendant, to avoid abolishing the right to silence and the right to non-self-incrimination; otherwise, the proceedings should be rendered void.

f) Clearly delimiting all abovementioned undercover investigations to avoid indirect elimination of professional secrecy rights (e.g. of doctors or attorneys).

g) Establishing remedies or the subsequent balancing of procedural secrecy to restore the equality of arms principle, the defendant's right to a hearing, and the rights of affected third parties. To achieve this, it is necessary to enact provisions on the compliance with protocols on investigation results.

h) Adding a provision to the GCCP, whereby each piece of evidence or information gathered through special investigations may be used only for the purposes set by the judicial council.

i) In view of the ECtHR case-law, the wording of Article 253B pt. a GCCP should better be replaced by the phrase "and actively facilitate the offender who expressed his/her determination to commit the offense."

j) Article 253B GCCP is problematic, primarily its part that permits covert investigations "upon strong indications that ... the commission of any of the offenses of § 1 (: Articles 159, 159A, 235, 236, 237, and 237A GPC) will be repeated, and its uncovering is otherwise impossible or very challenging." The affirmation of serious indications of guilt (as an element of justification of the decision issued in the abovementioned manner) must be based on objective factors, e.g. the systematic activity of the investigated person or the discovery of unjustified assets. Such features should be explicitly included in the scope of Article 253B GCCP.

IV. Empowering the evidential documentation of financial criminality and corruption in the public sector via witness protection measures

The detection of corruption and -to some extent- of financial criminality in the public sector often stumbles on a veil of silence that conceals the acts committed. As for bribery, silence is the result of complicity, which is inherent in these offenses. The interpersonal nature and inability to discover concrete evidence makes it very difficult to prove corruption offenses, unless one ensures the testimony of witnesses who are aware of the transaction and possibly afraid to participate in legal proceedings that can render them targets to "retaliation."

Therefore, it is no coincidence that the international debate on financial criminality and corruption almost constantly includes the issue of the so-called "public interest witnesses." Nowadays, protecting such witnesses (at least in crimes of corruption) is also an international contractual obligation, e.g. through Article 33 of the UN Convention against Corruption.

Promoting incentives for the so called "witnesses of public interest" to provide information sometimes leads to immoderations, such as the exorbitant rewards in USA.

However, it is not easy to choose a system of provisions that furthers the unraveling of such criminality. The legislature needs to balance the purposes of efficiency on one hand and safeguarding the fundamental principles of the rule of law on the other. Such an equilibrium requires a clear understanding that these provisions cannot aim at "purchasing" witness cooperation with the pretext of an askew sense of "public interest", but at protecting them against unfair (or illicit) acts of "reprisal" for their participation in uncovering the truth. Moreover, it is obvious that the implementation of a protection system for "witness of public interest" (ή σύμφωνα με την πρόταση «μαρτύρων ειδικού καθεστώτος») both requires and will consolidate a new perception for the role of the conscientious citizen that witnesses perpetrations.

Practical deliberations also become respectively important: for example, introducing witness protection by means of a criminal procedural provision has limited significance if it lacks coordination with procedures of administrative (especially disciplinary) and labor law. Moreover, evaluating the possibility for a favorable treatment of the informant by abstaining from prosecution requires a meticulous correlation with existing measures of substantive criminal law, to avoid criminal conciliation and full compensation (or even active repentance) becoming practically quashed. Finally, compliance with fundamental rules of the law of evidence is crucial, especially with those serving the defendant's rights.

Given its integration into the wider context of the so-called expediency principle, abstention from prosecution for "witnesses of public interest" is accompanied by the prior's problems. However, this is not a typical "tug of war" between the principles of legality and feasibility: in other words, in the case of "witnesses of public interest", relativizing the obligation to prosecute an offense should be based upon a priority to the discovery of the principal truth against the search for a (less substantial) part of it. In this perspective, the following observations can be articulated on abstention from prosecution for "witnesses of public interest":

(i) As to the scope, one could accept its extension beyond the limits of the current Article 45B § 1 GCCP. According to this provision, a person may be considered as a "witness of public interest" in cases involving active and passive bribery of political officials, civil servants, and judges, and trading in influence. It could be appropriate to also encompass crimes against State ownership and property, as their revealing and prosecution raises similar issues to those met in crimes of corruption.

(ii) As to the crimes of "witnesses of special status" for which abstention from prosecution will apply, these should be limited to offenses such as breach of official secrecy or violations of personal data. For principals or participants in such acts (e.g. active bribery in its current form), a case-by-case application of provisions relating to each crime separately should be implemented. This will draw a clear boundary between the protection of "witnesses of public interest" and relevant measures of substantive criminal law such as active repentance or leniency.

(iii) The decision to definitively abstain from prosecution should not be left on the hands of a single prosecutor. Therefore, if the prosecution is initiated by the Prosecutor at the CFI, his/her labeling of individual persons as "witnesses of public interest" should be subject to approval by the Prosecutor at the CoA.

(iv) Such a decision should always be revocable, therefore temporary. Abstention from prosecution becomes final only after the irrevocable conviction for the offense(s) which were revealed through the witness' substantial contribution. This would prevent "manipulation" of prosecution by perpetrators who falsely claim to hold information for criminal corruption.

Finally, we should exclude any form of financial compensation for witness cooperation. Actually, those seeking pecuniary gains are correctly disqualified (Article 45B § 1 point a GCCP), since their testimony does not guarantee honesty.

Besides abstention from prosecuting "witnesses of special status", measures for their police protection are significant, and imposed by international legal documents.

Regarding the special measures for the overall witness protection:

(a) Guarding by trained policemen should be available beyond the temporal limits of the criminal proceedings.

(b) The possibility of filing testimonies via electronic audiovisual media seems to uphold both the principle of immediacy and the defendant's right to directly question witnesses (Art. 6 § 3d ECHR), a fundamental constituent of a fair trial. Hence, it is clearly preferable to the reading during trial of testimonies gathered at the preliminary or main investigative stage. However, the witness' voice should not be transformed by technical mean, as this deprives both the defendant of the above rights, and all the participants in the proceedings of the opportunity to question the reliability of the witness.

A "secret" testimony essentially conceals the witness identity from relevant documents. Anonymous testimonies obviously directly affect the defendant's right to question the accusing witness and confront him in court. If the two

abovementioned measures are combined to enable examination by audiovisual or audio means of the anonymous witness, the defense rights are clearly undermined. Therefore, the relevant provision should be abolished. It would also be useful to add a provision stipulating that the protected ("anonymous") witness testimony alone is not sufficient to justify referral.

(c) Current administrative measures intended to protect public officials who testify as "witnesses of special status" are suitable. They include:

- Indefinite reassignment, transfer, or posting;

- Prohibition of any unfavorable treatment (disciplinary or not);

- Reversing the burden of proof in disciplinary procedures in favor of employees who contributed significantly to the uncovering and prosecuting of acts of corruption.

However, these measures should be repealed if the contributed information is false.

(d) Finally, these protective provisions should be extended to anyone substantially contributing to the disclosure of criminal corruption or (if necessary) their relatives.

V. Specific interventions in the interim stage

In the discussed field, provisions regarding the substantial completion of the main investigation stage are very complicated, with four different reference models of referral. This does not help simplify the interim stage, and also creates the impression of a two-speed procedure, depending on the crime or defendant status.

For these reasons, it is necessary to establish a single method of referral for such cases, to the extent that this criminality field shows no particular discrepancies in evidentiary issues that would adequately justify a different method to substantially conclude the main investigation.

In the "interim procedure" that follows the evaluation of the evidence gathered in the investigation, it is decided if the accused will be referred for trial. The relevant key issue in any procedural system is who assumes this task.

In the last thirty-five years in Greece, the "interim" procedure underwent successive and extensive legislative interventions, all in the name of a "speedy trial." The end result, unfortunately, was the exact opposite.

The regularly inconsistent and conflicting legislative approaches explain the unjustified multiple referral options for financial crimes and corruption in the public sector. This system must be amended. The judicial council of the CFI should hold competence for the substantive conclusion of the main investigation for these offenses; its decisions should be appealable under the current provisions (: only for fundamental nullity or erroneous application or interpretation of substantive criminal provisions). Articles 29 of the GCCP and 10 of Law 3213/2003 should bring the only exceptions to this rule. When the main investigation is handled at the Court of Appeals, it is procedurally consistent that its conclusion be declared via an

irrevocable decision of the judicial council of the CoA. Furthermore, in all misdemeanors, referral to trial by direct summons (: following the preliminary examination, the -practically immaterial- preliminary investigation, or the main investigation) seems to be the only way forward considering the demand for speedy referral to trial (: given sufficient evidence). The prosecutor's obligation to file a brief justification of his/her estimation on the indications that spurred the initiation of criminal proceedings can empower the substantive nature of the prosecutorial opinion, especially in the vast majority of cases where direct summons coincides with the launching of prosecution, following the preliminary investigation.

It is necessary to restore the provision for mandatory in-person appearance and hearing of parties before the judicial council (upon their request), to ensure that the referral review is not a mere throughput process. This will prevent the unwelcome overflow of courts with criminal cases due to effortless and inessential referrals, thus ensuring the factual acceleration of criminal proceedings.

VI. Main procedure

1. Material competence

Felonies relating to financial criminality and corruption in the public sector are typically tried by the Three-Member Assize Courts (a.k.a. Three-Member Court of Appeals for Felonies), according to Article 111 GCCP and Law 1608/1950.

The overall demotion of mixed jury courts does not currently promote the discussion on the feasibility of assigning them with relevant cases.

However, the serious legal issues and evidentiary complexity of financial offenses are seen over time as sufficient arguments for their exclusion from the competence of both the mixed jury courts and the recent Single-Member Assize Courts (a.k.a. Single-Member Court of Appeals for Felonies).

The latter were established under Law 4055/2012, and were granted competence to try all tax and smuggling felonies. In practice, Single-Member Assize Courts often loyally adopt the examination reports prepared by expert investigators, thus substantially weakening the defendant's position. Moreover, tax cases often contain critical legal issues that cannot be easily addressed by a single judge; additionally, in smuggling cases the high stakes and inherent complexity require a multifaceted formation to better understand the defendant modus operandi. Hence, these felonies should be tried by Three-Member Assize Courts.

2. The trial stage

Law 4022/2011 includes special provisions for the main proceedings, aiming to accelerating adjudication. These are constructed in two axes: a) Earlier court dates for cases of Law 4022/2011, b) Prohibition of trial postponement, save for failure to address incidental hindrances and subsequent trial sojourn.

Despite the undeniable necessity to accelerate criminal proceedings, enacting relevant procedural regulations and introducing a special category of "express criminal trials" cannot be justified in terms of legislative policy, and negates fair trial without any guaranteed practical collateral.

General criteria should be established by amending Article 320 § 1 GCCP, securing earlier court dates for specific cases. Beyond the implicit priority to cases where the defendant is a pre-trial detainee or ample time passed since the perpetration, the same could apply for cases where assets were seized or temporary disciplinary measures were imposed against public officials,. Similar criteria could apply for misdemeanors.

During the main proceedings, the legislature has occasionally tried to introduce special hearings for specific categories of crimes as a means of accelerating and facilitating criminal proceedings. A similar provision traditionally applies to drug legislation and was recently adopted in the GCPP for cases where defendants are pre-trial detainees and also for tax felonies of Law 2523/1997. However, these provisions have practical implementation problems and are not uniformly applied in all Greek courts. Besides the desired acceleration, these special hearings may be justified for reasons of more adequate preparation and judicial assessment of the case file, and also uniform application of the law.

3. Witness examination of persons who carried out sworn administrative inquiries

In the criminality field discussed herein, the issue of court witness admissibility for individuals who carried out sworn administrative inquiries (SAI) arises very often. The relevant provision of Article 211 point a GCCP states that "under penalty of nullity of the proceedings, the following individuals may not be examined as witnesses before court: a) those who assumed prosecutorial or investigative duties or served as secretaries during the case investigation..." The purpose of this provision focuses on the possibility of bias and partiality of these persons against or in favor of the defendant.

This issue was accentuated after the functional simulation of the preliminary investigations to SAIs as to the initiation of prosecution, under Law 3160/2003. Following a short hesitation of its criminal chambers, the Supreme Court erroneously concluded (decision no. 4/2000 in plenum) that "assuming investigative duties" does not encompass implementation of SAIs.

Hence, the law should explicitly include those who carried out SAIs to the prohibition of Article 211 point a GCCP.

4. State civil claims

Several special rules apply to State civil claims that introduce variations to the general provisions for filing civil claims by private individuals, service of applications, and deadlines for appealing against decisions.

Article 7 § 2 point c of the Presidential Decree 282/1996 is the only special procedural provision that should remain in force. It refers to the service of

applications to the President of the Legal Council of State, and takes precedence as a more specific provision over Article 84 point b GCPP. The law should not discriminate as to State requirements for filing civil claims, disclosing its witnesses, and deadlines for appeals.

On the other hand, it is necessary to ensure the effective representation of the State as a civil claimant in criminal proceedings, even by employing free-lance attorneys to handle cases with considerable legal or substantive complications.

VII. Towards a rationalization of the preferential treatment in investigating and prosecuting offenses of ministers and deputy ministers

As for crimes committed by members of the cabinet in the exercise of their functions, Art. 86 of the Constitution and executive Law 3126/2003 envisage a preferential treatment of ministers and deputy ministers compared to other citizens. This constitutional and legislative privilege is manifested in two main areas: a) granting judicial powers to a political body (parliament) in deviation from the separation of functions, and b) establishing competence of a special criminal court for such cases, and introducing substantial procedural exceptions in the investigation and referral processes.

The rationale behind the constitutional provision for a special approach to the criminal liability of Cabinet members promoted the need for institutional guarantees of protection from improper prosecutions and the prevention of threatened criminal prosecution becoming a weapon in the hands of political adversaries.

Despite historical grounds or reasons related to our contemporary political culture (e.g. scandal-mongering, litigiousness, turning political disputes to litigation, etc.) that support the special provisions on criminal liability of Cabinet members, current constitutional and legislative regulations are unsatisfactory, not only because they express an unjustified distrust in the impartiality of the judiciary, but also because they very often lead to impunity of serious criminal offenses due to deliberate or unintended filibustering of Parliamentary majority. Thus, it is obvious that the constitutional and legislative framework on criminal liability of Cabinet members should be amended by implementing the following actions:

a) Clearer description of the offenses included in the special constitutional provision to avoid uncertainties about its scope. The constitutional legislator should refer to acts (i) committed within the ministerial duties, i.e. through which public authority is essentially exercised (e.g. infidelity), (ii) committed “in view” of the exercise of ministerial functions (e.g. bribery). This will eliminate any special treatment of ministers and deputy ministers for acts performed during their ministerial tenure that are unrelated to the exercise of their duties.

b) Disengagement of the Parliament from prosecution and pre-judicial investigation (screening) of such cases, via a corresponding future amendment of Article 86 of the Constitution, and the assignment of prosecution to senior prosecutors (i.e. at the CoA) following a decision of the Court of Appeals in plenum.

c) Abolition of the prosecution deadline (: Articles 86 § 3 of the Constitution and 3 § 2 of Law 3126/2003), the expiry of which eliminates punishability for relevant acts.

d) Elimination of the special statute of limitations for crimes committed by Cabinet members and deputy ministers.

e) Handling of the main investigation by an investigating judge of the CoA (: not by a Supreme Court magistrate) authorized to issue subpoenas for forced internment, arrest, or pre-trial detention of current or past ministers or deputy ministers.

f) Assignment of the substantial completion of the main investigation to the Judicial Council of the CoA, which will irrevocably decide on the defendant's referral.

g) Granting of hearing competence to the Three-member Assize Courts according to the standard procedure (: for felonies) and activation of the exceptional competence of Article 111 § 6 GCCP (: for misdemeanors).

VIII. On upgrading international judicial cooperation

Optimizing international cooperation is a vital prerequisite for tackling financial crime and corruption, such behaviors being often transnational in nature. The aim is to simplify and accelerate the relevant procedures in order to ensure a satisfactory level of cooperation to the benefit (inter alia) of national enforcement authorities.

Especially in this field, coordination is required at a higher level, particularly within the EU. Even so, the Greek legislature could take measures (mainly organizational), regardless of the initiatives undertaken at a "central" (supranational) level.

At a first level, the GCCP's provisions on judicial assistance (Articles 457-461) and extradition of requested persons (Articles 436-456) should be amended.

Moreover, a full discrimination between various types of international cooperation (e.g. police and judicial) is not assuredly fruitful, while a confusion between judicial and administrative assistance gradually emerges, both generally and as regards the handling of corruption in particular. Accordingly, some issues must be conjointly regulated, particularly those on envisaged guarantees and rights of individuals under investigation, suspects, and defendants.

Therefore, the regulatory consolidation of individual processes under the umbrella of a single set of provisions is advised, to cover issues such as judicial and police cooperation in crime investigations and to include regulations on:

- Adopting provisions for the surrendering of persons when executing a European Arrest Warrant;

- Mutual judicial assistance;

- Police cooperation, especially as regards the activities of joint investigation teams;

- Enforcing foreign judgments, particularly within legal orders of EU Member States;

- Other procedures that are not self-regulated in current Greek law, but should anyway be incorporated into national legislation, such as the submitting criminal case files, prisoner transfers, etc.

Given the extent of relevant issues (and the consequent volume of required provisions), the relevant regulations should be integrated in a special Code of International Cooperation in Criminal Matters. Such a codification would allow for the elaboration of a single general part that will include principles applying equally to all forms of international cooperation in criminal matters. Moreover, the single regulation of these procedures will enable a uniform addressing of important issues (e.g. the preservation of rights of involved individuals) but also of “technical” problems, such as summonses abroad. Moreover, such a code could distinctly arrange discrete the material substance of judicial cooperation between EU Member States (under a special status) and with third countries.

From an organizational point of view, a central body to “manage” cooperation requests should be established and become operational. It will channel requests to competent departments (e.g. the territorially competent Prosecutor) for handling. This body could function under a special division of judicial cooperation within the Justice system, acting as a unit in the Supreme Court and labeled “Support Office for International Legal Cooperation.” A number of “technical” facilitations require the existence of a central agency (Central Translators Office) to serve the establishment of single uniform protocols for the transmission and translation of all such requests from and to Greek, etc. Such an agency could also assist the investigating or preliminary inquiring authorities in international cases.

In the field of international cooperation, it is obvious that the computerization and adoption of electronic applications for managing such requests is an essential prerequisite for the system’s effectiveness.

At a legislative level, an explicit provision should be enacted to regulate the issue of reciprocity, a principle governing transnational relations in the field of international cooperation procedures (inter alia). It is certainly clear that such a clause would play a part in the cooperation with third (non-EU) countries. Accordingly, a list of “partner” and “non-partner” States should be drawn for each individual international cooperation procedure, in order to better monitor the general, non-ad hoc observance of the reciprocity principle.

On the other hand, it is clear that the Greek contribution to improving international cooperation mechanisms presupposes the fulfillment of the country’s international obligations, particularly in relation to the normative EU documents. Lately, the rate of transposition of EU legislation into national law has accelerated (the last examples being Directives 2010/64/EC “on the right to interpretation and translation in criminal proceedings” and 2012/13/EU “on the right to information in criminal proceedings”, transposed by Law 4236/2014). Still, a number of normative documents have not yet been integrated, although their provisions would facilitate the coordination between Greek and foreign authorities to tackle cross-border criminality. A typical example is Directive 2014/41/EC “on the European Investigation Order”, which replaced the Framework Decision 2008/978 “on the European

Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters" and Framework Decision 2003/577 "on the execution in the European Union of orders freezing property or evidence."

Integrating these texts in the context of a comprehensive approach will allow the uniform addressing of similar issues, but could also establish the respect for fundamental rights of involved persons, the fortification of which is grounded upon principles recognized in primary EU law.

One of the key issues in the field of judicial cooperation (already raised in the debate on the 4th Directive on money laundering) is to achieve broader international cooperation especially in the field of criminality associated with the operation of offshore companies. Beyond Greece's unilateral interventions, initiatives can be undertaken only via consultation with EU partners, other international organizations (e.g. OECD), and countries considered as "tax havens." These include not only fiscal measures (e.g. imposing high charges to all banking transactions of offshore companies), but also initiatives related to the discovery of "actual beneficiaries", and the transmission of data concerning them.

Of course, efficiency could hardly be understood in this field without improving the regulatory framework at a supranational (EU) level. Such vital improvements would include:

- A consistent view on the ne bis in idem principle and any exceptions therein.

- Rules to prevent conflicts of jurisdiction between Member States and between the latter and EU agencies.

- Explicit establishment (and specification) of the ne bis in idem principle as a "restrictive" clause for international cooperation, and regulation of "international lis pendens" in the EU.

- Explicit establishment of the proportionality principle, and specification of its implementation scope (e.g. in the field of confiscation).

- Minimum standards for the gathering and utilization of evidence, soon to be discussed after the recent Directive on the European Investigation Order.

- Regulation of the hitherto unregulated forms of cooperation.

- Safeguarding of fundamental rights and guarantees for involved persons in pending initiatives regarding international financial criminality, such as the recent proposal of the Commission for a Regulation establishing a European Prosecutor.

IX. **Addendum: Accelerating criminal proceedings (for financial crimes and corruption in the public sector) through plea bargaining?**

The constant exacerbation of delays in criminal justice (especially in the last two decades), the ineffective relevant legislative interventions, and ECtHR's multiple

convictions imposed on Greece for violations of Article 6 of the Convention on failure to ensure "reasonable time for criminal trials, have brought plea bargaining as a subject of public debate, depicting it as an ambitious measure to decongest criminal courts. As made clear in the proposed Draft GCCP, plea bargaining will include the cases discussed herein.

Already enacted initiatives may be incorporated in this broader direction, such as the expansion of repentance and the introduction of criminal conciliation for property offenses, which were discussed previously along with abstention from prosecution. The question is whether the acceleration of criminal proceedings can be promoted through plea bargaining.

In any of its alternative forms, plea bargaining is hardly aligned with fundamental principles of the traditional continental criminal procedure. Legal theoreticians have repeatedly stressed its inconsistency to the constitutional requirements of Article 96 § 1, to the principle of substantial truth-seeking, to the presumption of innocence, to the nemo tenetur se ipsum accusare principle, to the principles of publicity, orality, and immediacy, both in general terms and as to its attempted formulation within Greek law.

Firstly, the Court's obligation to ratify a "conciliation" settlement and to impose the sentence agreed between the prosecutor and the defendant without any discretion to differentiate or even reject the deal violates the constitutional Article 96 § 1, as sentences are essentially imposed by the prosecutor and not by the criminal court.

Moreover, the mere ratification by the criminal court of such a settlement without the defendant's confession but simply upon his/her acceptance of the agreed penalty can hardly be understood as "legitimate proof of guilt". Hence, the criminal court's exemption from the obligation to search for the substantive truth results to an unjustified violation of the presumption of innocence.

Finally, the prosecutor's capacity to take initiative for negotiations with the defendant appears to conflict with the nemo tenetur se ipsum accusare principle, to the extent that the defendant is likely to be forced to accept the penalty proposed by the prosecutor, believing that a disagreement will trigger a harsher penalty.

On the other hand, the direct and indirect pressures for an "extortionate" confession linked to "consensual" criminal justice are likely to affect persons who might reasonably support their innocence but also weigh the probability of a conviction, in cases whose understanding and fair handling requires properties that do not always characterize the Greek law enforcement mechanism. This possibility is certainly exacerbated in cases of persons with reduced access to an effective defense (e.g. foreigners, underprivileged).

In light of these general concerns about the introduction of plea bargain, if the legislature decided in favor of this option, it should be launched in a limited version that certainly ought to account for the following considerations:

a) *On the persons involved in the negotiations*: In any case, negotiations take place between the defendant and the prosecutor, as the participation of a judge carries

intense psychological pressure on the defendant and also challenges his/her impartiality if the agreement fails and a "typical" trial ensues.

b) *On the initiative to negotiate*: This should be exclusively acknowledged to the defendant and not the prosecutor, to ensure both the independence and self-determination of his/her decision and a minimum conformity of the relevant provision with the presumption of innocence.

c) *On the negotiation subject*: From known strategies, only sentence bargaining (where the defendant confesses in exchange for lighter penalty) could be discussed; if the negotiation includes in itself the charges against the accused, there is a danger of overcharging.

d) *On the scope of plea bargaining*: In the new Draft GCCP, the basic criteria were court jurisdiction and the threatened sanction. This obstructs the relationship between criminal conciliation and plea bargaining: For a property felony that may be subject to both procedures, it is likely that the defendant will choose the latter (: even if it entails a slightly harsher penalty), aiming to even a sentence suspension without compensating the victim. Therefore, end especially for felonies under plea bargain, it is recommended that the prosecutor may impose a term of full or partial reimbursement by the defendant.

e) *Acceptance of penalty - confession*: With the exception of Italy, all continental procedural systems require a confession to conclude a plea bargain, and not a mere declaration of agreement. If plea bargaining is enacted, two conditions should apply to the defendant's confession: i) the prohibition of its utilization in any proceedings in case of non-agreement, with the mandatory destruction of relevant documents and audiovisual material, and ii) the criminal judge's competence to verify the reliability of the confession (as in the German system) in order to satisfy the principle of truth-seeking.

f) *Representation by counsel - trial transcripts*. Ensuring an effective protection of the defendant's rights requires the latter's mandatory representation by counsel in the plea bargain for both felonies and misdemeanors. Otherwise, the defendant who lacks legal knowledge will be unable to participate in the process on equal terms, although the negotiation could to include legal issues such mitigating circumstances. For reasons of transparency, the process should be recorded in video.

g) *Prosecutor and court competence to decline the negotiation*: The prosecutor must be enabled to discard negotiations if e.g. the act is confessed or a flagrante delicto. On the other hand, the court's capacity to reject the negotiation and pursue a typical trial procedure where the judge maintains a dominant role is a constitutional imperative in the Greek penal system.

h) The accused should be granted the right to appeal against the penalty imposed, as envisaged in Article 2 § 1 of the 7th ECHR Protocol, ratified in Greece by Law 1705/1987.