

**DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA
No. U-III-4149/2014 of 24 July 2015**

S U M M A R Y

This decision does not examine whether the applicant is guilty of the criminal offence of war profiteering and criminal offence of accepting a bribe for which he was convicted by a final judgment, since the said issue is not within the jurisdiction of the Constitutional Court of the Republic of Croatia. Rather, the Constitutional Court should examine whether in the applicant's case the legislative framework of the state was respected, and in particular whether the said framework was interpreted in accordance with the Constitution of the Republic of Croatia and the Convention for the Protection of Human Rights and Fundamental Freedoms and whether, within the limits guaranteed for accused persons by the Constitution and the Convention, the applicant was provided with all the guarantees of a fair trial and all the legal protection mechanisms provided for by the Croatian legislation currently in force.

This decision, whereby the judgments of criminal courts in the Hypo and INA-MOL cases were quashed, must not be taken as proof that the applicant was a victim of political persecution or judicial conformism, as claimed unfoundedly in the constitutional complaint.

Criminal courts have exclusive jurisdiction to examine whether the applicant is guilty of the criminal offences with which he is charged in the Hypo and INA-MOL cases, and they have the obligation to abide by the legal views of the Constitutional Court expressed in this decision.

Meaning of abbreviations:

Crimes/31-1 – the criminal offences within the meaning of Article 31(1) of the Constitution that were prescribed and legally established in CCRC/1977-1991 and CC/1997 in the period from 30 May 1990 to 15 January 1998, set out in the Act on Exemption (reference "/31-1" = Article 31(1) of the Constitution)

ECtHR - European Court of Human Rights in Strasbourg

Criminal Court – The County Court in Zagreb, along with the Supreme Court of the Republic of Croatia that confirmed that the first-instance proceedings were duly conducted and that the legal positions of the first-instance court in the cases Hypo and INA-MOL were correct.

CCRC/1977-1991– the 1977 Criminal Code (in force until 1 January 1998)

CC/1997 – the 1997 Criminal Code (entry into force on 1 January 1998)

CC/2011 – the 2011 Criminal Code (entry into force on 1 January 2013)

Corruption Agreement – refers to an arrangement between the person offering and the person accepting a bribe, as established in the jurisprudence of the Supreme Court

Change of the Constitution/2010 – the fourth change of the Constitution of the Republic of Croatia (Official Gazette 76/10), which entered into force on 16 June 2010

State of war – a state of war or immediate danger to the independence and territorial integrity of the state

WP and TP crimes/31-4 - the criminal offences of war profiteering and crimes committed in the process of ownership transformation and privatisation within the meaning of Article 31(4) of the Constitution (WP = war profiteering; TP = transformation and privatisation; reference "/31-4" = Article 31(4) of the Constitution)

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THE HYPO CASE

FACTS AND CIRCUMSTANCES OF THE CASE

The applicant was declared guilty by a final judgment of having committed a criminal offence against official duty – by abuse of power and authority (crime/31-1) with the features of war profiteering (WP and TP crime/31-4).

According to the final judgment, the perpetrator committed the criminal offence in the Hypo case during the Homeland War in Croatia in Zagreb and in the Republic of Austria in the period from the end of 1994 to 22 March 1995.

The crime/31-1 consisted of the fact that the applicant as deputy foreign minister of the Republic of Croatia, further to an order issued by his superior (the minister), in a period during the preparation of a credit transaction with Austrian Hypo Bank, represented the Government of the Republic of Croatia (hereinafter: Government) as negotiator concerning the terms and conditions of a loan agreement (by which Hypo Bank would grant a loan to the Government for the purchase of embassy buildings for the Republic of Croatia throughout the world). The applicant, with the intention of generating considerable financial gain during the negotiations, and taking advantage of his position as negotiator, agreed that the bank in question should pay him a commission fee in cash – in an amount equivalent to 5% of the granted loan – for taking part in the negotiations and as a return favour for its entry on the Croatian market, and the deal was carried through.

QUESTIONS OF CONSTITUTIONAL LAW

1) Rule of a more lenient penalty (more lenient law)

Article 31(1) of the Constitution prescribes that "no one may be punished for an act which, prior to its commission, was not defined as a punishable offence by domestic or international law, nor may such individual be sentenced to a penalty which was not then defined by law. If a less severe penalty is determined by law after the commission of said act, such penalty shall be imposed".

It is a general rule of substantive criminal law that the law applied against a perpetrator is the law that was in force at the time the criminal offence was committed. It is only when, after the commission of a criminal offence, and before the issuing of a final judgment, the law is amended one or more times that the law which is more or the most lenient for the perpetrator is applied. The statement of reasons of court sentences must include serious, sufficient and relevant grounds based on which it is possible on a case-by-case basis to establish with certainty whether the rule of the more lenient law was respected.

In connection with the rule of the more lenient law, in the Hypo case, Article 31(1) and Article 29(1) of the Constitution were breached.

Summary of the statement of reasons for the breach

1. The County Court in Zagreb applied CC/1997 as the applicable substantive criminal law.

The Supreme Court of the Republic of Croatia, by reference to the rule of the more lenient law, applied CC/2011 as the applicable substantive criminal law.

2. Neither of the two laws was in force at the time the crime was committed (from the end of 1994 to 22 March 1995).

At the time the crime was committed, the law in force was CCRC/1977-1991.

3. CCRC/1977-1991 is not mentioned in the first- or in the second-instance judgment.

The disputed first-instance judgment does not include an explanation of why CC/1997 was applied in the criminal proceeding before the County Court in Zagreb instead of CCRC/1977-1991 – which was in force at the time the criminal offence was committed.

The disputed second-instance judgment does not include an explanation of why, in the appellate proceedings, the Supreme Court, by applying the rule of the more lenient law, put CC/2011 in correlation with CC/1997, but not (also) with CCRC/1977-1991.

4. As it was consequently not possible to establish with certainty whether the rule of the more lenient law was respected in terms of the applicant, the following rights of the applicant were breached:

- the rules of the more lenient law together with the constitutional guarantee of the more lenient penalty in Article 31(1) of the Constitution;

- the constitutional right to a court judgment that includes a statement of reasons in the part relating to the rule of the more lenient law (Article 29(1) of the Constitution).

2) Legal establishment of the criminal offence of war profiteering

Article 5 of the Change of the Constitution/2010 amends Article 31 of the Constitution by adding a new paragraph 4, which prescribes: "The statute of limitations shall not apply to the criminal offences of war profiteering, nor any criminal offences perpetrated in the course of economic transformation and privatization and perpetrated during the period of the Homeland War and peaceful reintegration, wartime and during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law..."

The criminal offences of war profiteering relate to perpetrators who, in the period from 30 May 1990 to 15 January 1998, generated disproportionate financial gain illegally by abusing the state of war through criminal offences enumerated in the Act on Exemption (for example, by fraud, tax evasion, money laundering, embezzlement, abuse of position and authority, bribery, etc.). All such offences, enumerated in the Act on Exemption, were already prescribed in the legislation as criminal offences also in the period from 30 May 1990 to 15 January 1998 (these are referred to as: crimes/31-1)

The Act on Exemption prescribes in Article 7(1) that the crimes/31-1 become the criminal offences of war profiteering (WP and TP crimes/31-4) "if they were used to **generate**

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disproportionate financial gain by raising prices in the case of product shortages, selling state property at a price much lower than its value, **or in some other way taking advantage of the state of war** and the immediate danger to the independence and territorial integrity of the state“. Thus, the Act normatively expresses strict condemnation of all perpetrators of such criminal offences on the grounds that they contributed to the general destruction of the national economic system, unscrupulous devastation of national property and global impoverishment of the nation during the most sensitive period of Croatia's recent history.

Acknowledging the requirement imposed by the rule of law that states may not interfere retroactively in cases barred by the statute of limitations related to criminal prosecution, the Constitutional Court established in its decision that the new paragraph 4 of Article 31 of the Constitution had allowed – with *pro futuro* effect – unlimited temporal possibilities for the criminal prosecution of perpetrators of the crimes/31-1 even after they become barred by the statute of limitations related to criminal prosecution, provided that the offences in question are not barred by the statute of limitations on the day of the entry into force of the Change of the Constitution/2010 (16 June 2010) and that they meet the legal requirements prescribed in Article 7(1) of the Act on Exemption.

In view of the failure of the courts to legally establish if in the Hypo case existed the criminal offence of war profiteering, the constitutional rights of the applicant set out in Article 31(1) and Article 31(4) in conjunction with Article 31(1) of the Constitution were breached.

Summary of the statement of reasons for the violation

1. Neither the County Court in Zagreb nor the Supreme Court examined whether the crime/31-1 (i.e., the criminal offence of abuse of position and authority with which the applicant was charged) was barred by the statute of limitations on the date of the entry into force of the Change of the Constitution/2010 (16 June 2010).

Thus, they actually failed to determine whether it was at all possible to conduct criminal prosecution, to try and to punish the applicant in the Hypo case. Namely, if on the date of the entry into force of the Change of the Constitution/2010 the crime/31-1 was barred by the statute of limitations, it would not be possible to pursue criminal prosecution for the criminal offence of war profiteering within the meaning of Article 7 of the Act on Exemption.

2. Further, neither the County Court in Zagreb nor the Supreme Court examined whether the Hypo case was marked, along with the characteristics of the crime/31-1, by other legal characteristics of the criminal act of war profiteering set out in Article 7(1) of the Act on Exemption. This primarily relates to "disproportionate" financial gain that, along with other characteristics set out in Article 7(1) of the Act on Exemption, constitutes an important characteristic of the criminal offence of war profiteering.

3. The "disproportionality" of financial gain generated in such a manner must be the result of conscious exploitation of the state of war; and it must also always be generated at the expense or to the detriment of the material living conditions of the population during war, the economic potential of society, or at the cost or to the detriment of state property or other financial interests or well-being of a state at war. Namely, when by legal or actual activities, ventures or actions within the meaning of Article 7(1) of the Act on Exemption the crime/31-1 is committed, resulting in considerable financial gain through

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exploitation of the state of war (thus making the material living conditions of the population more difficult, destroying the economic potential of society or weakening the property-related substrate of the state), then such illegally generated considerable financial gain has to (additionally) be also "disproportionate" to enable the realisation of the criminal offence of war profiteering. In relation to which values this disproportionate financial gain is measured and examined depends on the circumstances of each individual case, determined by the criminal courts in judicial proceedings.

In the Hypo case, the Criminal Court went no farther than "considerable" financial gain generated by the crime/31-1; it derived the existence of the criminal offence of war profiteering from the legal concept of financial gain (as "considerable"), which concept is included in criminal laws, but not in the Act on Exemption. The Criminal Court did not mention anywhere in the disputed judgment the new legal concept of financial gain (as "disproportionate") in the case of the criminal offence of war profiteering.

4. The Act on Exemption states in Article 7(1) that disproportionate financial gain can also be generated "in some other way" (other than by the ways expressly stated in the provision concerned). Thus, any incriminated legal or factual transactions, ventures or actions must be placed in correlation with the required disproportionality of the unlawfully generated gains.

The Criminal Court interpreted the provision in a way that it did not place such "other way" in any correlation with the required "disproportionality" of the generated gains (which, as previously stated, must always be the result of the conscious exploitation of the state of war at the cost or to the detriment of the material living conditions of the population, the economy, or well-being of a state at war).

THE CASE OF INA-MOL

FACTS AND CIRCUMSTANCES OF THE CASE

The applicant was found guilty and sentenced by a final judgment for having committed a criminal offence against official duty by accepting a bribe, described and punishable under Article 347(1) CC/1997.

According to the final court judgment, in early 2008 the applicant, as the prime minister of the Government, and Zsolt Tamás Hernádi, chairman of the board of the Hungarian oil company MOL, agreed in Zagreb that for the amount of EUR 10 million (EUR 10,000,000.00) he would use his best efforts to bring about the conclusion of an Amendment to the (2003) Shareholders' Agreement relating to INA, by having the Republic of Croatia ensure for MOL a majority interest in INA and conclude an agreement on the exclusion of gas operation from INA in the part causing losses to INA, which would be assumed in full by the Republic of Croatia. The Criminal Court held that the Government thus adopted a decision against the interests of the Republic of Croatia, because the concluded contracts resulted in the dependence of a company of special interest for the Republic of Croatia on a foreign legal person.

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QUESTIONS OF CONSTITUTIONAL LAW

1) The Prime Minister and President of a political party as "official persons" – persons accepting a bribe

The criminal offence against official duty by accepting a bribe belongs to a group of *delicta propria*, i.e., special criminal offences which can be committed only by persons having a certain capacity. To commit the criminal offence against official duty by accepting a bribe, the following criteria must be fulfilled:

- a) the offence was committed in the capacity of official or responsible person;
- b) the person accepted a gift or some other financial or non-financial benefit (hereinafter: bribe), or accepted the promise of a bribe;
- c) the person accepted a bribe or the promise of a bribe to perform an official or other action within the limits of his authority that he should not perform.

If a person does not have the capacity of an "official or responsible person", then all the characteristics of the criminal offence of accepting a bribe are not met as a condition for establishing other elements of the criminal offence, especially unlawfulness and guilt.

The term official person was defined in Article 89(3) CC/1997. The said provision lists exhaustively state officials who may have the capacity of "official person". The prime minister of the Government of the Republic of Croatia is not listed. Nevertheless, the Criminal Court applied Article 89(3) CC/1997 to the applicant as the prime minister, without stating any reasons.

With respect to the establishment of the applicant as an "official person", the following were breached in the INA-MOL case:

- Article 29(1) of the Constitution, in the part relating to the absence of an explanation of the application of Article 89(3) CC/1997 to the applicant as prime minister;
- Article 31(1) of the Constitution, in the part of the INA-MOL case relating to the activity of the applicant as the president of a political party.

Summary of the statement of reasons for the violation

1. In the INA-MOL case, a person who performed the office of prime minister was indicted and sentenced for the first time in Croatian legal history. Considering this was the first such case in case law, the Criminal Court was obligated to interpret and explain why it held that a prime minister should be covered by Article 89(3) CC/1997, even though a prime minister was not listed there. Bearing in mind that this is a field of criminal law, the authority of a body of criminal prosecution and the Criminal Court to automatically apply Article 89(3) CC/1997 to state officials, although they are not listed there, cannot be self-explanatory, and even less justified in terms of constitutional law, where not a single word on the matter is mentioned in the court judgment, especially because the capacity of "official or responsible person" is a constitutive element of the criminal offence of accepting a bribe as stated in Article 347 CC/1997.

Since a full court clarification of the relevant issue is missing, the constitutional right to a court decision that includes a statement of reasons was breached in the part concerning

the application of Article 89(3) CC/1997 (and consequently Article 347(1) CC/1997) for the applicant in his capacity as prime minister.

2. The Criminal Court also sentenced the applicant for actions taken in the INA-MOL case as the then president of a political party, although the president of a political party is not and cannot be an "official person" within the meaning of Article 89(3) CC/1997, and cannot commit the incriminating official act. From the point of view of constitutional law, in a democratic multiparty system (Article 3 of the Constitution) it is not permitted to equate state political functions with party political functions, because doing so eliminates the distinction between state and party politics.

Therefore, the constitutional right of the applicant to the legal establishment of the criminal offence of accepting a bribe within the meaning of Article 31(1) of the Constitution was breached in the INA-MOL case in the part relating to the applicant's actions as the president of a political party.

2) Proof of accepting a bribe: assessment of the Criminal Court that the contracts concluded with MOL by the Government are contrary to the interests of the Republic of Croatia

On 29 January 2009, the Government issued its approval and, on 30 January 2009, it concluded two agreements with MOL: the First Amendment to the (2003) Shareholders' Agreement relating to INA and the Main Agreement on Gas Operation.

While hearing the evidence, the Criminal Court examined as the first "disputable" question whether the contracts were "contrary to the interests of the Republic of Croatia". The Criminal Court then used its own assessment of the prejudicial nature of the contracts for the Republic of Croatia as evidence that the applicant had accepted a bribe.

Given that in the criminal proceedings the accepting of a bribe was subject to a hearing of evidence through the preliminary assessment that the contracts concluded between the Government and MOL were contrary to the interests of the Republic of Croatia:

- the lines between the criminal responsibility of the applicant for accepting a bribe and the political responsibility of the Government for contracts concluded were blurred within the meaning of Article 112 of the Constitution;
- Article 29(1) of the Constitution was breached because the Criminal Court used an inadmissible method for proving the individual guilt of the accused for accepting a bribe.

Summary of the statement of reasons for the violation

1. In criminal proceedings where a prime minister is tried for an act of corruption that involves the acceptance of a bribe with the aim of influencing the conclusion of a legal transaction within the competence of the Government, the question whether the legal transaction was "contrary to the interests of the Republic of Croatia" is not "disputable question" which needs to be proven in the criminal proceedings.

The very fact that a person performing the office of prime minister offers or accepts a bribe to influence the conclusion of a legal transaction within the competence of the Government – within the limits of his authority – makes the legal transaction concerned corruptive *a priori* in the substantive sense, and its very corruption is proven *prima facie*. Therefore, each such transaction is *per definitionem* contrary to the interests of the

Republic of Croatia, regardless of whether by its effects or dominant political assessments it was (more or less) advantageous or disadvantageous for, or extremely prejudicial to the Republic of Croatia.

Therefore, in the criminal proceeding it should be shown the existence of the corruption agreement, i.e. that the prime minister accepted a bribe, or the promise of a bribe, to influence the conclusion of a particular legal transaction within the competence of the Government. In view of the constitutional position and functions of the prime minister, that would also prove that the legal transaction concerned was contrary to the interests of the Republic of Croatia.

2. In the INA-MOL case, the Criminal Court – in order to show that the applicant was guilty of accepting a bribe in this case – set up a presentation of evidence in a way that the question of whether the contracts between the Government and MOL were contrary to the interests of the Republic of Croatia was declared “disputable”. Thus, the said question became an independent question that should be subject to proceedings where evidence is presented; and so the Criminal Court first subjected the question to a presentation of evidence in the criminal procedure.

Thus, in the criminal proceeding, in which the individual criminal responsibility of the prime minister for accepting a bribe should have been the exclusive subject matter of deliberation, the Criminal Court assumed – if we are to paraphrase the words of the ECtHR – the authority of a “democratic Croatian State” to examine whether the contracts are “prejudicial to its economic interests” (*Stran Greek Refineries and Stratis Andreadis v. Greece, 1994, § 72*). Further, the assessment of the Criminal Court was basically the result of a free judicial assessment of the evidence presented within the framework of the criminal proceedings, and not the “public interest test” built in the case law of the ECtHR, in which the Act on the Privatisation of INA – by which the Croatian Parliament set out the limits of the interests of the Republic of Croatia in relation to INA – would occupy the central position.

By proving in the criminal proceedings that the contracts concluded between the Government and MOL were contrary to the interests of the Republic of Croatia, at the same time not taking into account the protected area of the interests of the Republic of Croatia set out in the Act on the Privatisation of INA (where the courts dealt neither with the issue of whether the activities of the Government were legal, that is, whether the disputed contracts were contrary to this Act), the courts in the INA-MOL case unnecessarily opened up the questions like: are the criminal justice bodies allowed to interfere in such a way in the constitutional tasks of the legislative and executive branches (Article 4 of the Constitution), and where does the criminal responsibility for accepting a bribe of the prime minister of the Government end, and where does the political responsibility of the Government for concluding disputable contracts begin (Article 112 of the Constitution)?

3. After it proved in the criminal proceedings that the contracts concluded with MOL by the Government were contrary to the interests of the Republic of Croatia, the Criminal Court used its assessment as evidence that the applicant had accepted a bribe.

Along with signifying the using of state interests for the purpose of proving the individual guilt of the accused person for accepting a bribe, the said approach created a strong external impression that the prime minister was being incriminated, along with the criminal offence he was indicted and sentenced for (acceptance of a bribe), also for much graver crime, i.e. for deliberate actions against the interests of the Republic of Croatia. However, it should be taken into account that the applicant in the INA-MOL case was never incriminated for any other criminal offence other than acceptance of a bribe. Further, the criminal prosecution authority dropped the charges that the applicant in the case of INA-MOL committed the criminal offence of abuse of office and official authority as prime minister. However, at the same time, the criminal prosecution authority kept in

the indictment (which only stated the offence of accepting a bribe) the description of facts related to the offence as it was described in the order to conduct investigation (which stated two offences, that is, accepting a bribe, and abuse of office and official authority). The County Court accepted the same legal qualification of the offence as it was established by the criminal prosecution authority in the indictment (only accepting a bribe).

The procedure of proving the specific criminal offence of accepting a bribe (by proving that the contracts between the Government and MOL were contrary to the interests of the Republic of Croatia) was set up in a way that ultimately compromised the entire procedure of presenting evidence to an extent that must be qualified as a violation of the applicant's right to a fair trial referred to in Article 29(1) of the Constitution.

4. In view of the way in which the entire procedure of presenting evidence was compromised as described above, it was not necessary in the Constitutional Court proceedings to deal with objections filed by the applicant concerning the admission and examination of certain pieces of evidence in the conducted criminal proceedings.

In terms of the arbitration procedure in the PCA Case No. 2014-15 before the Geneva Arbitral Tribunal further to the complaint filed by the Republic of Croatia against MOL of 17 January 2014, the data which were provided to the Constitutional Court by the competent ministry show that the statement of claim of the Republic of Croatia is directed at declaring null and void the Main Contract on Gas Operation of 30 January 2009 and the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, which is not the subject matter of the judicial criminal proceeding against the applicant or of the proceedings before the Constitutional Court.

The subject matter of this decision of the Constitutional Court is not a review of the conformity of the concluded contracts (the contract between INA and MOL of 17 July 2003, the First Amendment to the Shareholders' Agreement INA-MOL of 30 January 2009, the Main Agreement on Gas Operation of 30 January 2009, and the First Amendment to the Main Agreement on Gas Operation of 16 December 2009) with the applicable Croatian laws and other legislation, rules and benchmarks of the European Union and the European standards in the field of national and international commercial law and other related legal fields.

Decisions by national courts, including those by the Constitutional Court, cannot in general have an impact on arbitration proceedings initiated or conducted by the Republic of Croatia in the field of international commercial law. It is a general principle that arbitral tribunals are not bound by final judgments of national courts, or decisions issued by national constitutional courts, because such judgments and decisions are regarded as facts by arbitral tribunals. Such tribunals examine matters in the case before them on their own.