



PRAVOSUDNI FORUM

za Bosnu i Hercegovinu

Judicial Forum for Bosnia and Herzegovina

The role of the highest courts and the Constitutional Court of Bosnia and Herzegovina in the harmonisation of case law in prosecuting organised crime and corruption cases

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The conclusions of the Eighth Conference of the Judicial Forum for BiH provide guidelines for further cooperation as well as advancement of the capacities of the judicial institutions in BiH, particularly in the context of complex criminal cases. These recommendations represent a step toward the strengthening of legal certainty and transparency and toward a more efficient fight against organised crime and corruption in the country.

CONCLUSIONS:

- The European Convention constitutes a part of our constitutional order as it is incorporated directly in our Constitution. Article II(2), (3) and (6) and other provisions confirm this.
- The Constitutional Court follows the case law of the European Court of Human Rights (ECtHR), but is also the first protector of the rights guaranteed by the European Convention. The complexity of our state organisation and national system has an effect on application of laws. However, the courts must ensure a uniform application of laws and, it is, therefore, necessary that they have access to legal opinions they will follow and apply when making their decisions. The

availability of decisions of the ordinary courts and the Constitutional Court, in terms of their public pronouncement, does not only constitute a part of the guarantees under Article 6, but also effectively helps the harmonisation of decisions.

- Organised crime presents a significant challenge, both in terms of its detection, prosecution and punishment, and of confiscation of 'fruits of a crime'. Considering the complexity of the proceedings, the need for a consistent respect of the rights of suspects, convicted persons or third parties guaranteed by the European Convention and the Constitution of BiH presents an additional challenge. For that reason, further advancement of the institutional resources and protocols could be considered, in order for the process of confiscation of assets to be more efficient and harmonised with the guaranteed rights of all parties concerned.
- The right to liberty of person, which is often "triggered" in organised crime cases, requires conduct in accordance with law, as well as compliance with additional conditions. Reasonable suspicion and reasons for the special detention grounds therefore constitute a protection from arbitrariness as well as a necessary element of each decision on detention.
- The trend in the harmonisation of case law is a decrease of detention cases and an increase in the imposing of prohibiting measures. This approach contributes to a decrease of the violations of rights found by the Constitutional Court, as there is an increased compliance with the ECtHR's standards. Imposing prohibiting measures in lieu of detention is of key importance for protecting the rights of suspects in accordance with the European Convention, ensuring proportionality in criminal proceedings and reducing adverse effects of detention on suspects, especially on the ones who will not get convicted.
- Criminal proceedings, particularly in organised crime cases, must be conducted in line with the guarantees of the right to a fair trial, notwithstanding the desire that they should result in "condemnation of crime" and punishment of the perpetrators and send the message to the public that "crime does not pay". Having followed the case law of the ECtHR, the Constitutional Court dealt with the issues of unlawful evidence and who may be a witness, admissibility of evidence obtained through international legal assistance, equality of arms, adversarial procedure, the right to be informed of the charges and so on.
- The Constitutional Court acts as a corrective mechanism for judicial authority by examining judicial decisions. However, each violation found by the Constitutional Court in the proceedings does not necessarily lead to "acquittal". In addition, enforcement of the Constitutional Court's decisions means that the ECtHR's

standards have been accepted. Compliance with the standards of the ECtHR and the Constitutional Court is a clear way toward harmonisation of case law.

- The challenges of combating organised crime should be solved "as one goes along", in the manner acceptable and in accordance with the guarantees under the European Convention, taking into consideration technical and technological development. The novelties in the proceedings are financial investigations, digital evidence and so on.
- Court orders for taking special investigative measures must contain sufficient statutory reasons, as well as substantiated arguments that the evidence could not be obtained in another way.
- It is necessary to continue with a consistent implementation of the positions taken in the *Dragojević v. Croatia* judgment.
- Inter-institutional cooperation and exchange of information and knowledge make some of the tools of the combat against organised crime and should, therefore, be continuously advocated and promoted.
- Particularly important in combating organised crime and corruption is confiscation of illegally obtained assets.
- A system that will efficiently respond to challenges arising in the context of criminal offences of organised crime and corruption should be created by amending criminal legislation. National laws must follow contemporary trends.
- It is necessary to strengthen judicial capacities for the publishing of judicial decisions and positions taken in case law, and to conduct regular training on the use of IT tools for the search thereof with the aim of enhancing the quality of the reasons and adequate references to the case law.
- It is necessary to promote the importance of case law and the international standard of harmonisation of case law prior to rendering a judicial decision.
- When prosecuting organised crime and corruption cases in which crimes were perpetrated by the use of new technologies, it is recommended, in the absence of national case law, to resort to the case law of the ECtHR and to continuously conduct training about the confiscation of assets, with reference to the specific case law examples.

