˝LAW ON PREVENTION AND COMBATING OF CORRUPTION˝OF THE REPUBLIC OF MOLDOVA – EXPERT OPINION

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I. Introduction

Corruption is a phenomenon that affects all states, from those at the beginning of their development to the most developed countries of the world. All of them fight corruption by using different means and with different levels of success. However, they all have something in common: they use methods and means, which correspond to their economic and social situation. It makes no sense to use modern and very sophisticated methods to fight corruption in a country, where, due to its economic situation, corrupt behaviour is one of the ways to survive. Moreover, it is also an already lost battle to use the very basic tools of anti-corruption efforts in countries where corrupt behaviour is "only" a crime that helps people to improve their already not-so-bad economic situation. In addition, using improper methods in the fight against corruption also means that the state using such methods is not aware of its problems and, perhaps, that it does not want to fight corruption in a proper way.

Different countries are choosing different ways to fight corruption. The traditional concept of fighting corruption with repressive means only has been left behind years ago, since it became evident that repression is just one way of fighting corruption, which usually does not change anything in the area of conditions and circumstances, which enable the existence and development of corruption. More and more countries reached out for new means and methods to fight corruption, or simply said, means of “prevention”. This fact was slowly but constantly recognised by different international legal documents, including conventions, which among other things also established an obligation for countries to develop and implement different preventive measures. Countries started to enact different pieces of legislation in addition to the existing criminal legislation, very often with putting the accent on preventive measures. Of course, solutions are varying from country to country, but so do the levels and faces of corruption in those countries.

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The Law on Prevention and Combating of Corruption of the Republic of Moldova clearly shows that Moldova has chosen an advanced approach and is ready to fight corruption in a serious manner. The basic ideas of the law are on a par with those of many other European countries, sometimes they are even more direct and much better. Of course, there are some inconsistencies in implementing the basic ideas of the law and turning them into concrete Articles and paragraphs, but that does not mean that the law is not good. It only means that with some additional help or "precise tuning" this law will really be a useful tool in the fight against corruption, underlining the efforts of the whole Moldova to develop its legal environment and to join older states at the same level of the suppression of corruption.

In the present expertise there are only some remarks to concrete Articles and some general suggestions at the end. The law is generally good, but in due time it will be possible to improve many open questions. Certainly, the author of the remarks and general suggestions does not expect that they must or will be taken on board completely. It is up to the country to decide which remarks and suggestions will be observed, as it has its own experts with appropriate knowledge and the necessary experience in fighting corruption. The present expertise just attempts to help them both - domestic experts and their country.

The remarks listed below follow the numbering of the Articles. Where there is no indication of an Article or paragraph that means that the expert does not have any remark on it.

It might happen that some problems will be a result of translation, especially in the cases where English words were used, which are usually not used in the international legal documents. Expert would like to apologise in advance for such cases.

I. Comments, remarks, proposals to the text of the law

II.1. Chapter I

Article 2

Corruption: There are so many definitions of active and passive bribery in international conventions, which would serve much better the purposes of the first part of the definition

given in this Article[2]. Three largest problems of the definition given in this Article are the following ones:

- "giving" of a bribe is not included – maybe the word "transmission" was used for that but this word has slightly different meaning than the word "giving";
- also the acceptance of an offer or a promise (not only of a materialised bribe) are not being punishable in the law, contrary to the international conventions;
- international conventions are usually using the term "undue advantage" while in the definition the words "illicit income" and "unmerited advantage" are used. Hopefully, they cover all possible notions of the words "undue advantage". The term "illicit income" is defined in the next line but the term "unmerited advantage" is not defined in this law.

Illicit income: obtainment of the offer is penalised here (it is not in the first line) but there is a much more serious problem: all kinds of illicit income have to be "obtained directly or indirectly in result of committing an offence…". Hopefully, this definition and especially the words "in result of" do not mean that we can talk about "illicit income" only if it was obtained after the commitment of the corruption offence or illicit action.

National public agent: the term "person holding a responsible position" is very wide and it would be very useful to define it more precisely – of course, only if there is not a proper definition given already in other legislative acts

Article 4

Definition given in the first paragraph is referring to the term ˝agents of the state˝, which is not defined in this law.

The term ˝persons offering such advantages˝ would be much more complete, if description of all punishable actions from the definition of corruption in Article 2 would be used.

[2] Article 2 of the Council of Europe's Criminal Law Convention on Corruption (ETS 173) is criminalising »promising, offering and giving«, Article 3 of the same Convention is criminalising »request or receipt of an undue advantage« and »acceptance of an offer or a promise of such an advantage«.

II.2. Chapter II

Careful reading of this Chapter shows that it is of a very general and declarative nature. Basically, this chapter just gives the list of measures for the prevention of corruption. It does not say anything about the institutions for the adoption and implementation of these measures, and nothing on the concrete procedures for the monitoring of the implementation of the measures is pointed out. There is no large practical value of such chapter, especially having in mind that not all possible measures for the prevention of corruption are listed here.

Article 5

In point d) it is not clear to what activities the term "active participation of civil society" refers. In addition, "access to official information" and "active participation of civil society" are two very distinct measures and they could be split into two different bullet-points.

In point e) only the private sector of national economy is mentioned. Corruption occurs more frequently in the public (state) sector of national economy and it would be worth mentioning explicitly this point here, too (for example in the form of "public and private sector of national economy").

Article 6

Hopefully, in point c) the concept of "conflicts of interest" is also included – if not, the latter will have to be included.

In point d) it would be worthwhile to include words "non-partisan and objective" before the words "performance of activities".

It would be extremely wise if some text on meritocratic criteria for selection and promotion of public agents would be included in this Article.

Article 9

Again, problem of the area of participation of civil society (see comments to Article 5) appears. There is nothing in this Article on real active participation of civil society in the decision-making process except on the participation in accessing public information.

Article 10

Text under point a) is a very general one: "Non-admission of the use of…˝ and it looks much more as a set of general goals or wishes than a set of real and concrete measures – if it recognises that there are "improper procedures", which will not be allowed to be used, why not to foresee the measure on changes of such procedures.

In point b) the assurance is given on "compulsory publication of normative acts regulating the entrepreneurship activity" – does it mean that those acts were not published until now? If this is the case, than a very serious problem has been identified, which puts under the question validity of all normative acts that were not published.

In point d) the term "conflict of interest" is explicitly mentioned, which makes this part of Article 10 a very valid one, but also opens the question of why "conflicts of interest" are not mentioned in Articles 6, 7 or even 8?

Article 11

In this Article "declaration of incomes" is mentioned twice: first, under a), where all "private individuals" have to declare their incomes and second, under c), where "public agents, state officials, judges, prosecutors, public officers and other persons holding responsible position" have to declare their incomes and property. Probably (it is not sure!) point a) establishes the declaration duty for the tax purposes and point c) for the purposes of monitoring the assets of certain categories of public employees. If this is the case, than again the problem of a very open definition (if there is any?) of "persons holding responsible position" appears. It would also be advisable to change the wording (maybe in the original language distinction is clear) in order not to confuse the reader reading about "declaring the incomes" twice.

Article 12

It might be a problem due to translation, nevertheless, words "organization of activity" in point a) indicate that the state is establishing rules for organization of activities of political parties. This is intermeddles far too deep into the rights of citizens gathered in political parties – political parties have to be free in organization of their activities. It would be much better if the term "rules on activities" of political parties would be used.

It would be advisable to add a word “improper” before the word “influence” – not all forms of influence are forbidden, just the improper ones.

In point c) it would be better to use word “fair” instead of “loyal”.

II.3. Chapter III

This Chapter establishes a two-wheel system for the fight against corruption: first, there is a Centre for Combating Economic Crimes and Corruption – CCECC (as specialised preventive and law enforcement body) and second, there is a Coordinating Council on Combating Corruption and Criminality - CCCCC (as a coordinative body in the area of public administration). Yet, there is not a single word on the powers of the CCCCC and on relations among two main anti-corruption institutions in the country. Even more, despite the fact, that the CCCCC is the coordinative body for the public administration authorities, the public administration authorities have to, accordingly to the Paragraph 3-c, report to the CCECC. This may cause quite significant problems in the area of co-ordination of all anti-corruption efforts in the country.

Article 13

In this Article tasks of the Centre for Combating Economic Crimes and Corruption are listed not in the best possible way. Substantially the tasks mentioned are good ones but, technically, tasks like “development of relations with the similar services in the foreign states” and “elaboration of proposals for bringing the national normative acts in accordance with the relevant international provisions” do not fit together in the same sub-paragraph.

Article 14

Paragraph 3

In the point b) it would be useful to add the word “administrative” before the word “examination” in order not to confuse daily administrative tasks of all public administration with the criminal investigation of (specialised) law enforcement services, including Centre for Combating Economic Crimes and Corruption (CCECC).

In the point c) it would be advisable to add a time-span for presentations (one year, two years...) to the CCECC.

II.4. Chapter IV

Article 15

a) It will be extremely difficult to prove that the appearance of conflict of interests is a result of the abuse of authority but from the theoretical point of view ("simple" abuse of authority is not a sufficient amount of information for statistically significant corruption behaviour facts, thus, it has to be complemented by the existence of the conflict of interests) the definition given here is a good one.

d) Again, it will be very difficult to prove that preferences of private or legal persons in the elaboration and issuance of decisions are unjustified, but a question has to be asked if there are justified preferences at all?

g) If a person uses information for the sake of his/her own personal interests, in majority of criminal systems such use of information would be considered as an intentional criminal offence and not only as corruption behaviour fact. Normally, already "abusive" use of official information is enough to be considered as corruption behaviour fact.

i) If a person uses public material and financial resources for his/her own private interests, in majority of criminal systems such use of resources would be considered as an intentional criminal offence and not only as corruption behaviour fact.

j) Description given here in some parts (...acceptance of gifts... from any private person… as remuneration for the performance of one's service duties…) is criminalised in some countries as a criminal offence, although there is no international legal obligation to follow such solutions.

Article 16

In this Article, a list of corruption criminal offences is given. It follows the text of the Criminal Code; therefore, it is uncertain if the list of offences stated in the paragraph 2 does not have some translation failures, namely, "passive corruption" has usually the same meaning as "bribe taking, "official bribery" can be either "active corruption" or "passive corruption"…

Article 17

First bullet-point of this Article is establishing responsibility for the Commission of different actions (acts of corruption, corrupt behaviour), if "such actions do not contain all the constitutive elements of the violation". This can be a very tricky provision since it establishes

weaker forms of responsibility (civil, administrative, and disciplinary) for different violations (where usually criminal responsibility is provided) without all of the constitutive elements of these violations. It must not be forgotten that for each category of punishable behaviour (criminal offences, misdemeanours...) responsibility has to be established separately and in accordance with rules in force for that specific category. When the lack of constitutive elements of violation would simply mean automatic replacement of the criminal responsibility with other forms of responsibility, then a solution may cause serious problems even at the European Court of Human Rights.

Article 18

The idea if this Article is a good one but it contains a serious loophole. Why there is no provision that public Agents, at least in specific cases, may report their suspicions on corrupt behaviour to external authorities? Sometimes situations will occur when public agents would stand under the duty to report their superior to him/her-self. It would be strongly advisable to insert a possibility for passing information on corrupt behaviour also to proper authorities (police, prosecution service...) outside of the institution in question.

II.5. Chapter V

Article 20

This is an Article on general powers of the authorities empowered to combat corruption, which does not establish any special or additional powers for those institutions. It is also difficult to assess the content of the powers since they are just listed and not explained. Especially, the term "preventive punishment" is not understandable at all given that it does not exist in any of European legal systems.

Article 21

Does this Article mean that authorised anti-corruption authorities can also demand information considered to be banking, professional or commercial secret? Hopefully, they are not entitled just to obtain this information. Quite often, law enforcement agencies are the ones starting corruption investigations, thus, they can not just sit and wait to receive information from other organisations.

III. Conclusion

Having in mind all remarks, comments and proposals to concrete Articles of the law the following could be said:

Law on Prevention and Combating of Corruption of the Republic of Moldova is a law of a very general nature. There are only few Articles, which can be directly applied. The value of the law is placed in several definitions (on corruption, corruption behaviour facts...) and lists of different actions for the prevention (Articles 5 – 12) and suppression (Articles 20-22) of corruption. Although the lists are not complete, they show a variety of possible anti-corruption measures. More concrete provisions on the institutions, which are empowered and responsible for introduction and the implementation of these measures, are missing. There are also no provisions on the procedures and guarantees for the implementation of these measures. Sometimes the reader of the law gets the impression that it is just a catalogue of already existing anti-corruption efforts of the country in different areas.

Despite the fact that it is not clear if the Centre for Combating Economic Crime and Corruption is a new institution, it is very important that it is exposed (again) as the central and special authority for the fight against corruption. It also has to be acknowledged that country's most important public institutions are listed as institutions also responsible (within the limits of their competences) for the fight against corruption.

So called "corruption behaviour facts" are not very often mentioned in the country's anti-corruption legislation, however, the list of forms of behaviour, which could mean that there is corruption involved, is a very useful tool for all institutions and individuals fighting corruption

Also the system for the improvement of integrity in the public service (Articles 14, 17 – 19) is mentioned at a general level, and it will need some additional by-laws for its implementation. Therefore, it would be extremely useful if the government would as soon as possible – if it has not been done yet – follow the instruction given in the Article 25 on taking measures for the appropriate application of the law.

General conclusion on the Law on Prevention and Combating of Corruption of the Republic of Moldova could be the following one: the law gives more than solid grounds for really efficient and effective fight against corruption, yet the main ideas of its provisions will have

to be additionally regulated and made much more concrete[3] in order to achieve their sound, impartial and consistent implementation.

[3] Concerning institutions, their powers, procedures, liability…