



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Economic Crime Division
Directorate of Co-operation
Directorate General of Human Rights and Legal Affairs
July 2008

Support to the Anti-corruption Strategy of Georgia (GEPAC)

CoE Project No. 2007/DGI/VC/779

Outcomes of the Training on the Implementation of the Amendments to the Criminal Code of Georgia related to the Liability of Legal Persons

8 July 2008, Tbilisi, Georgia

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Introduction

Following an invitation on 30 June 2008 from the Head of the Technical Co-operation Department (Directorate of Co-operation, Directorate General of Human Rights and Legal Affairs, Council of Europe), the CoE expert took part in a training for prosecutors on the implementation of the amendments to the Criminal Code of Georgia related to liability of legal persons, held in Tbilisi on 8 July 2008 within the project "Support to the anti-corruption strategy of Georgia" (GEPAC).

The training took place in the Prosecutor's Office Training Centre in Tbilisi. More than thirty prosecutors from Tbilisi and different regions of Georgia participated in the training.

The purpose of the training was to examine the amendments of 2006 to the Georgian Criminal Code related to the liability of legal persons and to discuss the methods of their implementation.

Before the training, the Economic Crime Division (GEPAC Project) prepared a Background Paper including the relevant extracts from the CoE Criminal Law Convention on Corruption (ETS 173), GRECO Second Round Evaluation Report on Georgia and Criminal Code of Georgia.

1 Presentation of international standards in the field of liability of legal persons and the relevant provisions of the Criminal Code of Georgia

In the beginning of the training the CoE expert made a presentation of the international standards and best practices in the field of liability of legal persons and the relevant provisions of the Georgian Criminal Code (CC).

The presentation reflected the level of compliance of the provisions of the Georgian Criminal Code with the standards of the international instruments adopted by the Council of Europe, United Nations, European Union and Organisation for Economic Co-operation and Development (OECD).¹ Besides that, references were made to the best practices and national legislation of some member-states of the Group of States against Corruption (GRECO).

In the beginning of the presentation, the CoE expert provided information on the different approaches concerning the nature of the liability of legal persons for criminal offences (criminal, administrative or civil liability) and the scope of corporate liability in relation to the crimes (reference to the specific provisions of the Special Part of the Criminal Code-Art.107.2 CC).

Following the above introductory remarks, the CoE expert gave a presentation of the international standards (especially Art.18 and Art.19, paragraph 2 of the CoE Convention) concerning: (i) the definition of legal person; (ii) the conditions for establishing liability; (iii) the link between proceedings against legal and natural persons; and (iv) the sanctions applicable to legal persons.

Within the presentation of the international standards and national best practices, the CoE expert made references to the relevant provisions of the Georgian Criminal Code (Art 107.1-107.7) in order to determine their level of compliance with the international requirements and to clarify the exact scope of the provisions.

In particular, the following problems were considered by the CoE expert during his presentation:

(i) in relation to the scope of definition of legal person (Art.107.1, paragraph 1 of the CC):

- the exceptions provided by the CoE Convention concerning the state, public bodies exercising state authority and public international organisations;
- the inclusion of public enterprises and non-governmental organisations in the scope of the provision.

(ii) in relation to the conditions for establishing liability (Art.107.1, paragraphs 3 and 4 CC):

- the connection between the criminal offence and the legal person (on behalf of, through or for the benefit of the legal person);
- the leading position of the natural person who commits the criminal offence (differentiation between the identification theory and vicarious theory);

¹ The Council of Europe Criminal Law Convention on Corruption (CoE Convention), the United Nations Convention against Corruption (UN Convention), the United Nations Convention against Transnational Organised Crime (UN Convention on Organised Crime), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests (Second Protocol) and the Recommendation No.R(88) 18 of the Committee of Ministers to Member States of the Council of Europe concerning the Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities (CoE Recommendation No.R(88) 18).

- the lack of supervision or control (“due diligence” concept) under the CoE Convention (Art.18, paragraph 2) and some national practices - US, France, Italy (the concept is not covered by the Georgian legislation and this shortcoming is subject to a recommendation of GRECO²).

(iii) in relation to the link between proceedings against legal and natural persons (Art.107.1, paragraphs 5 to 7 CC):

- the principle that the liability of legal person does not exclude individual liability of the physical perpetrator (mandatory requirement established by the CoE Convention, UN Convention and Second Protocol reflected by Art.107.1, paragraph 7 CC); and

- the principle that the legal person should be liable even where a natural person who committed the crime can not be identified or prosecuted (optional requirement reflected by Art.107.1, paragraphs 5 CC). With respect to the latter standard, the CoE expert provided information about the reasons for its adoption by the OECD Working Group on Bribery.

(iv) in relation to the sanctions applicable to legal persons and confiscation (Art.107.3-107.7 CC):

- the international standard for application of effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions;

- the concerns expressed by GRECO concerning the lack of proportionality (see the observations in the Second Round Evaluation Report on Georgia³): (a) because of the very high minimum fine applicable to legal persons – Art.107.6, paragraph 1 CC; and (b) where liquidation or deprivation of license must be applied in case of recidivism within three years– Art.107.6, paragraphs 3 and 5 CC;

- the possibility to confiscate proceeds of crime or property the value of which corresponds to such proceeds under Art.52 CC.

2 Issues related to the implementation of the relevant legislation

During the discussion following the CoE expert’s presentation, several issues were clarified in relation to the provisions of the Georgian Criminal Code, including:

- the exact scope of the definition of legal persons (Art.107.1, paragraph 1 of the CC);

- the circle of persons who could be physical perpetrators of the criminal offence (Art.107.1, paragraphs 3 and 4 CC);

- the problem of proportionality of the fines imposed against legal persons under the Criminal Code (Art.107.6, paragraph 1 CC); and

- the possibility to confiscate proceeds of crime or property the value of which corresponds to such proceeds (Art.52 CC).

In addition, the representative of the Ministry of Justice (Mr. Ucha Gogokhia) informed that the Georgian authorities have started the preparation of amendments to the Criminal Code in order to cover the cases where the lack of supervision or control by a natural person in a leading position within the legal person has made possible the commission of the criminal offence by a natural person under its authority and, thus, to address the recommendation of GRECO.

During the general discussion following the presentation of the expert from the Georgian Ministry of Justice (this presentation dealt also with the amendments to the Georgian Criminal Procedure Code concerning the liability of legal persons⁴)

² GRECO Second Round Evaluation Report on Georgia, paragraph 90

³ GRECO Second Round Evaluation Report on Georgia, paragraph 90

⁴ Art.54 of the Georgian Criminal Procedure Code contains provisions concerning: the initiation of the criminal proceedings against legal person; the circumstances to be proved/identified; the

and in reply to the questions raised by the participants, the CoE expert provided additional information and explanations concerning:

- the applicability of the provisions of the Criminal Code on corporate liability in relation to cases where the criminal offence has been committed by a Georgian citizen abroad (examples related to the implementation of the provisions on the bribery of foreign public officials in international business transactions);

- the practical difficulties related to the implementation of the standard under which the corporate liability should be established even where the physical perpetrator could not be identified (Art.107.1, paragraph 5 CC); and

- the possibility to implement administrative sanctions in cases which are not covered by the provisions of the Criminal Code, i.e. in the cases where the offence constitutes breach of the administrative regulation but not a criminal offence.

3 Conclusions and remarks

The Georgian authorities can be commended for their efforts to address the issues relevant to the corporate liability in conformity with the international standards and the recommendations of GRECO, as well as to provide appropriate training for prosecutors on the implementation of the criminal liability of legal persons.

However, the following circumstances would require further training in order to introduce the provisions on the criminal liability to all prosecutors and judges who could deal with such cases:

- the fact that the criminal liability of legal persons constitutes a new concept affecting the fundamental principles of the criminal law and the need of clarification of the possibility to apply traditional criminal law institutes to the corporations;

- the adoption of some high standards concerning the establishment of the corporate liability (Art.107.1, paragraph 5 CC) which could lead to difficulties in the implementation of the respective provisions;

- the need to establish appropriate practice concerning the application of the system of sanctions in order to guarantee the principle of proportionality (concerning this problem it could be also advisable to consider the possibility for further legislative amendments in compliance with the observation of GRECO);

- the forthcoming amendments to the Georgian Criminal Code aimed at introducing the concept of lack of supervision and control as a condition for establishing liability of legal persons (in compliance with the recommendation of GRECO).

For the purpose of future expertise and reporting (e.g. the situation report to GRECO within the established compliance procedure) it is strongly advisable to ensure translation into English of all the relevant domestic legal provisions, including Art.29 and Art.30 of the Civil Code (definition of legal person) and Art.54 of the Criminal Procedure Code (amendments in relation to the procedural aspects of the liability of legal persons), as well as to ensure correct translation of the provisions of the Criminal Code (for example, Art.52 CC was only partly translated into English). It should be noted that the lack of translation of all relevant legislative texts could significantly impede the expertise and evaluation of the legislation by international experts.

participation of a legal counsel; and the grounds for ending prosecution. It also provides for publication of the judgment imposing a sanction against the legal person.

Besides that, for the purpose of the forthcoming trainings, it could be recommended to ensure translation into Georgian of extracts from the relevant international instruments and explanatory reports dealing with corporate liability.⁵ Such texts would be very useful for the proper interpretation of the domestic legislation which has been adopted in compliance with the international standards.

⁵ E.g. Explanatory Report on the CoE Criminal Law Convention on Corruption, paragraphs 31 and 84-94.