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Support to good governance: Project against corruption in Ukraine – UPAC

Expert opinions on the Draft Law of Ukraine on Responsibility of Legal Persons for Corruption Offences

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I. EXPERT OPINION BY BOŠTJAN PENKO

1. EXECUTIVE SUMMARY

First, a clear distinction has to be established in the Ukrainian legal system between corruption-related criminal offences and other corruption offences (possibly administrative, civil, or those from the Law on the Principles of Prevention and Counteraction of Corruption).

Corruption-related criminal offences should all (as a strict rule with no exemptions) be included in the Criminal Code; they still have to be changed and amended to comply with international standards. Mentioning liability of legal persons for criminal offences in the future can only mean liability for criminal offences from the Ukrainian Criminal Code. Ukraine may, of course, legitimately decide to establish the responsibility of legal persons in any other area, but borderlines and distinctions between different areas have to be evident and clear. As I have already mentioned: The international documents used as a reference in this work clearly demand establishing responsibility for criminal offences (active and passive bribery in the public and private sector, trading in influence). The modern approach is promoting development of "criminal" liability of legal persons – through establishing adequate grounds for liability that correspond to the specific nature of the legal person on the one hand, and traditional principles of criminal law on the other hand. The idea is reflected in my proposal how to balance those, often contradictory, concepts and formulate legitimate grounds for "criminal" liability of a legal person.

Second, from a systematic point of view, it would be a good idea to create one (or more) very fundamental provision(s) that would stipulate fundamental rule(s) on liability of legal persons and include them in the general part of the Ukrainian Criminal Code next to basic principles dealing with liability of natural persons.

Third, in my opinion, a new draft law on liability of legal persons should be prepared, rather than changing the current one. The drafters should consider introducing liability of legal persons for all (relevant) criminal offences and not just those related to corruption. The draft should be more comprehensive than the existing one and could include: specific provisions on grounds for liability of a legal person, restrictions in the liability of legal persons, liability in the case of statutory changes, provisions on necessity, attempt, complicity...etc. of legal persons, provisions on sentences and other sanctions, safety measures, statute of limitation, scope of application of the general provisions of the Criminal Code, special procedural rules, scope of application of Criminal Procedure Code, to mention the most relevant.

2. INTRODUCTION

I have been requested to present an opinion on the Ukrainian draft Law on Responsibility of Legal Persons for Corruption Offences. Views and opinions expressed in this work are personal, and do not represent official views or positions of the institutions I regularly work for in my country.

In order to remain as practical as possible, without entering scholastic and theoretical never-ending discussions and argumentations related to the common traditional principle: "*Societas delinquere non potest*", I will generally limit myself to the comparison of the draft to relevant international documents. I will restrain myself from entering too deep into the theory of the nature of liability of legal persons. No ultimate

solution, at least in civil law countries, has been reached so far on the issue. The area of responsibility of legal persons for criminal offences is recognized as complex and controversial - still it is a relatively new and developing topic for a number of countries - and not only for so-called transitional countries, but for many other countries as well.

With this draft, Ukraine has decided for the first time to join those states that have set up a system where responsibility of legal persons for criminal offences is part of criminal legislation. This is a modern approach that is obviously going to prevail also in countries with civil law tradition. Although international law in the last decade has established some solid standards that are used as a reference in this document as well, there is still no one, single solution to some conceptual questions related mainly to the standards of liability of a legal person. There are not even two exactly the same concepts in European legislation concerning this question. But recent approximation of laws in this field is a reality.

None of the relevant international instruments, which I will refer to later, specifies whether the liability of legal persons should be criminal, administrative or civil, although their commentaries provide some indications.[1] However, it is clear that for a number of criminal offences, especially those related to organized crime, corruption and money laundering, countries should undertake to establish a certain form of liability for legal persons, engaging in criminal activities, which in my view should not be constituted as penal (criminal) liability of legal persons (this term always creates a certain risk of confusion) but rather liability (or responsibility) of legal persons for criminal offences.

It is, on the other hand, no longer disputed that liability of legal persons in this area, on the bases of international documents I am referring to in this opinion, has to be established in relation to criminal offences and not for other prohibited acts, administrative or civil torts, violations and misdeeds. Criminal offence is therefore in the focus of our consideration. The draft is speaking of the responsibility of legal persons for the perpetration of corruption offences. The attention needs to be drawn to the fact that a deed arising as a result of actions carried out by a legal person may objectively or on the basis of its consequence appear to be a criminal offence, but it may not comprise all necessary elements of a specific offence - in any case it is necessary to discover and identify the physical person – perpetrator of the criminal offence and prove the existence of legally required form and degree of his/her guilt. Let me provide the example of the corruption-related criminal offence of bribe giving, where on the part of the perpetrator a ”colored” intent – *dolus coloratus* - is sought in respect to legal indications of a criminal offence, and even in respect to a prohibited consequence – a bribe given in exchange for an official service. It is not sufficient for the imposition of the liability to a legal person to have an official person receiving a benefit (money, gift, non-property gain) from the leading person in exchange for the performance of an official act, but it has to be proved that the leading person who “dragged” the legal person into the area of potential liability, has also in subjective terms fulfilled all legal characteristics and elements of the particular criminal offence in question.

If we go further into this theme, we may even say that a criminal offence cannot exist at all, unless all of its objective and subjective characteristics have been identified in relation to an actual, physical perpetrator.

[1] Commentary 20 to the OECD Convention states that “In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.” Similarly, the explanatory report to the CoE Convention states that “Article 18, paragraph 1 does not stipulate the type of liability it requires for legal persons.

In this case, no liability of legal person may exist, either, although the prohibited consequence has occurred. This discussion will be continued in relation to specific provisions of the draft – especially Article 2. Here, I just want to stress that my considerations are dealing exclusively with liability for criminal offences *stricto sensu*.

The identification of the international documents that might be considered as the most relevant with regard to their substance and possible implementation in the Ukrainian legislation is based on the following facts:

First, Ukraine is a Council of Europe member state and already has, or is expected, to sign and ratify a number of Council of Europe conventions that also include obligatory provisions on liability of legal persons for specific criminal offences for the areas covered by these documents. Among these (binding) international documents are: the Criminal Law Convention on Corruption, the Convention on Cybercrime, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 2005, the Convention on Action against Trafficking in Human Beings, and the Convention on Prevention of Terrorism, both from the same year. Second, Ukraine is involved in the Partnership and Co-operation Agreement with the EU; one of the priorities from the Ukraine – EU Action plan 2005 – 2007 is gradual approximation of Ukrainian legislation, norms and standards with those of the EU and further reinforcing administrative and judicial capacity. Third, Ukraine might take into consideration the rules of the OECD in this area, if it wants to be seen as a competent and reliable partner in international business transactions. Ukraine has also ratified the United Nations Convention against Corruption, including the provision on liability of legal persons for corruption-related criminal offences.

The three documents that are the most detailed and comprehensive in the area of responsibility of legal persons for criminal offences with their relevant provisions are listed below. The majority of other conventions just repeat relevant provisions from the former. Basically, these documents request from the States to establish the liability of legal persons engaging in corrupt practices, and to establish effective, proportionate and dissuasive sanctions, be they criminal or non-criminal (including monetary sanctions). In my opinion, these documents establish fundamental and universally applicable international standards in the area of responsibility of legal persons for criminal offences. I will therefore compare the draft with relevant provisions of:

The Council of Europe Criminal Law Convention on Corruption (hereafter referred to as the CoE Convention),

The OECD Convention on Combating Bribery of Foreign Public Officials of 17 December 1997 (hereafter referred to as the OECD Convention) and

The Second Protocol to the Convention on the Protection of European Communities' Financial Interests of 19 June 1997 (hereafter referred to as the EU 2nd Protocol).

In principle, I will try to compare this draft to three sets of provisions of the above listed treaties/protocols:

- articles on definitions of terms used in these instruments (EU 2nd Protocol and CoE Convention, only),
- articles on the standard of liability of legal persons, and
- articles on sanctions applicable to legal persons.[2]

[2] The relevant provisions are:

In my opinion, if a particular state fulfills the requirements from these documents, one can say with a high degree of certainty that its legislation complies with all relevant international standards in the area.

3. GENERAL OBSERVATIONS

Before analyzing the content of specific provisions, their comparison and level of compliance with the above documents, I would like to set the context by offering some observations of a more general character.

My first general observation relates to the concept of this draft. The scope of the draft is very limited, dealing exclusively with responsibility of legal persons for corruption offences. On the one hand, I see reasons for this partial approach to the issue. As one can understand from the background documents and information received from Ukrainian colleagues, this draft has been elaborated in accordance with the "Concept of Overcoming Corruption in Ukraine", approved by Decree of the President of Ukraine in September 2006. The Section dealing with liability and punishment for corruption offences requires "taking into account international standards of liability for corruption deeds and other corruption- related offences, clear separation of criminal, administrative, disciplinary and civil liability for corruption offences, enlargement of the range of subjects of corruption, introduction of the liability of legal persons…" From the information received it is clear that this draft is the first introduction of the notion of liability of legal persons for criminal offences in the Ukrainian legal system. This, to a certain extent, explains the fragmented approach, which in my opinion, however, ought to be criticized, not because of a lack of good intentions, but for several other reasons.

The legal system of a particular country has to be internally and externally harmonized, consistent and coherent – this is especially relevant for criminal legislation. In my view, Ukraine first needs a special law properly dealing with all fundamental principles and rules of liability of legal persons for criminal offences – from both the substantive as well as from the procedural aspects. Before that, a new provision should be introduced in the Criminal Code, defining the fundamental grounds and conditions for this kind of liability, according to international standards and Ukrainian legal tradition.

On the basis of this fundamental (one or more if needed) provision, a special law could be elaborated: a law that should be applicable for all relevant, i.e. not just corruption-related criminal offences. As I have already mentioned, there are several areas of criminal activities where the establishment of such liability is either already mandatory, or will become mandatory in the future. It is in my view not the best idea to adopt a special law for every particular criminal offence or group of these offences. This finding is even more correct if we take into consideration that at present, no common denominator exists in Ukraine that would ensure compliance with international standards as well as internal harmonization. The common denominator should therefore be introduced first in the form and substance of necessary amendments to the general (fundamental) provisions of the Criminal Law, and the consequent special law proscribing all

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- CoE Convention: article 1 on the definition of legal persons, article 18 on the liability of legal persons and article 19 on sanctions on legal persons;
- EU 2nd Protocol: article 1 on the definition of legal persons, article 3 on the liability of legal persons and article 4 on sanctions on legal persons;
- OECD Convention: article 2 on the liability of legal persons and article 3 on sanctions on legal persons.

relevant material and procedural rules concerning liability of legal persons for criminal offences could be introduced simultaneously, or immediately afterwards.

As I have mentioned before, the scope of criminal offences for which legal persons may be held liable should in my view not be limited to corruption offences. Such a solution only means that a number of new special laws in the area of liability of legal persons would be needed in the near future. To give just one example: Ukraine is already a State Party to the CoE Cybercrime Convention, the treaty that is also requesting from the Parties to establish the liability of legal persons for cyber crime-related criminal offences (Article 12 of the Convention). Does this mean adoption of another special, separate law? I would not recommend such an approach. Instead, Ukraine might consider the possibility of listing of all relevant offences from different areas or, what is in my view even better, introduce a basic rule in its criminal legislation stipulating that where grounds for liability (as indicated above and further in the text) exist, legal persons shall be responsible for any criminal offence from the Criminal Code – this is a legitimate 'all crime'-model, used in a number of legislations. In this case, the only logical limitation would be the nature of the crime – it is obvious that due to its content (subjective and objective elements), not every particular criminal offence can be committed in the name of, on behalf of, or for the benefit of the legal person.

My next general observation concerns the question of a definition of legal person. The EU 2nd Protocol and the CoE Convention stipulate the same rule with respect to the definition of this term[3]. This rule indicates that the concept of legal persons which should be used is the domestic one, with the exclusion of states or other public bodies in the exercise of state authority. It is not entirely clear where and to what extend legal persons are defined in the current Ukrainian legal system; what is obvious is that this concept is not defined in the criminal law for the purposes of imposing liability for criminal offences on legal persons. There is a partial definition of a legal entity in the Civil Code referring to the notion of Legal Entity as an organization established and registered according to the procedure specified by the law (Article 80 of the Civil Code). I am not sure whether this definition (which, as a matter of fact, is not a substantive definition but rather another reference) is applicable in criminal law as well. If the situation is not entirely clear in this respect, I would recommend either the inclusion of an autonomous definition of a legal person, comprising all necessary elements, in this draft, or explicit reference to relevant substantive legislation. In criminal law, the meanings of terms have to be absolutely clear and concise (*lex certa*). Another possibility is reference to the fact that an entity is listed in the Ukrainian State Register of Legal Persons.

4. SPECIFIC COMMENTS

Article 2 of the draft, the central and fundamental material provision reads as follows:

"Principles of the responsibility of a legal person for a corruption offence

1. A legal person takes the responsibility for illegally granting, or offering, by his/her superior or any other authorized person on behalf of and in the interests of the legal person of benefits (advantages, privileges, services) of material and/or non-material character to the persons specified in article 2 of the Law of

[3] Legal person shall mean any entity having such statues under the applicable national law, except for states or other public bodies and public international organizations (Article 1 of the CoE Convention and of the EU 2nd Protocol).

Ukraine 'On the Principles of Prevention and Counteraction of Corruption', to a body of the government, [and/or] to local government institutions in cases stipulated by articles 3 to 5 of this Law.

2. Imposing a penalty on a legal person for the perpetration of a corruption offence does not exclude the responsibility of officials who operated in the interests of such a legal person."

Article 2 of the OECD Convention provides that "each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official". Article 18 of the CoE Convention and Article 3 of the EU 2nd Protocol develop a more comprehensive standard of liability. There is no fundamental difference between what they require. Basically, the standard set forth by the EU and CoE documents comprises three main elements: the concept of "leading person", the types of involvement of the leading person, and the link between the legal person and the natural person.

According to the CoE Convention and the EU 2nd Protocol, legal persons shall be held liable if two conditions are met: the first condition is that the offence must have been committed for the benefit of the legal person and the second one requires the involvement of any person who has a leading position.

Article 2 of the draft includes a definition of a leading person. The provision provides for two possibilities: either is the leading person "a natural person who is a superior or any other authorized person.

The first option seems to be clear and in line with the definition of a leading person, defining the latter as "any person who has a leading position within the legal person, based on an authority to take decision on behalf of legal person."[4]

The international instruments I am referring to also request that responsibility of a legal person should exist in situations where the offence has been committed by a "person (having a leading position), acting either individually or as a part of an organ of the legal person" and by a leading person having a power of representation of the legal person[5]. It seems these two situations could be covered in the current draft through the term "any other authorized person"

The next condition which has to be fulfilled in order to implement Article 3 of the EU 2nd Protocol and Article 18 of the CoE Convention is the establishment of the link between the liability of a legal person and the person whose leading position is based on authority to exercise control within the legal person. Using the definition "any other authorized person" again may adequately respond to this condition, too.

Following this line of thinking, one may encounter a danger of losing the idea of a leading person through extensive interpretation of the term "any other (authorized) person". In my understanding, and if one compares this phrase to the first option in this provision (i.e. 'a superior'), in this manner logically excluding superiors from the category of "other authorized persons", any employee working for the legal person may be perceived as being authorized to act on behalf of a legal person. Such a situation would lead to no distinction being made between leading persons (the "brain" of the legal person) and the rest of the employees working for the legal person. Saying this, I have in mind primarily situations where acting on behalf of a legal person is based on the individual authorization (not the law, internal rules or the statute of

[4] Second line of the first paragraphs of Article 3 of EU 2nd Protocol and Article 18 of the CoE Convention.

[5] First line of the first paragraphs of Article 3 of EU 2nd Protocol and Article 18 of the CoE Convention.

the legal person) of superiors. In such a situation the definition “any other authorized person” is leading towards an extensive interpretation of the term “leading person”. Such an interpretation is in itself not negative (it almost endlessly widens the scope of application of this provision), but it is for the same reason not in line with the general concept of a leading person envisaged in international law.

5. STANDARD OF LIABILITY

Article 2 (in conjunction with Articles 3 to 5) should define the principles (standard) of responsibility of legal persons for a corruption offence. I will restrain myself from repeating concerns that I had already expressed with regard to the concept of this draft and the very limited scope of offences covered by it. Instead, I will try to analyze relevant provisions in existing circumstances and draw the attention of the drafters to some, in my view important issues, especially if the Ukrainian authorities decide to maintain this partial approach to the problem of liability of legal persons for criminal offences.

Looking closely at the wording of Article 2 poses a question: are the grounds for liability of a legal person (Principles of responsibility) actually construed as elements of a new criminal offence sui generis? It seems that we are not dealing here with the universally applicable definition of grounds for liability of legal persons for criminal offences (from the Criminal Code), but with an introduction of new corruption-related crimes, where the perpetrators are leading persons of the legal person on the active side, and fonctionnaires, or public officials, of different ranks on the passive side (Articles 2 to 4). In Article 2, granting and offering a bribe (material and non-material) is incriminated. Actual bribe-giving is added in Article 3, whereas Article 4 is only speaking about “bribing”. I fail to understand the ratio, the intention and the motive for such a construction of provisions that should not introduce new criminal offences, but rather clearly and concisely define grounds for liability of legal person for existing criminal offences (with necessary improvements, changes and amendments). My concerns are even bigger if the content of Article 5 (Commercial bribery) is added to this list.

In my opinion, there is another serious concern with respect to the standard of liability of the legal person. Namely, the second paragraphs of Articles 3 of the EU 2nd Protocol and 18 of the CoE Convention both require an additional type of involvement of the leading person (beginning with “Apart from the cases already provided for in paragraph 1…”) to be implemented by State Parties. They explicitly request that each State Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph one (leading person) has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

Situations where criminal offences are committed by other natural persons than the leading person, either for the benefit of the legal person or in a causal link with the lack of supervision or control by a leading person, which in itself does not constitute a criminal offence, do not seem to be covered by the draft (unless we follow the extensive interpretation of the term “authorized person”, although this is probably not the ratio of the draft).

After resolving the problem of proper connection between Article 2 of the draft and criminal offences from the Criminal Code as mentioned above, the concept of this provision (and the draft as a whole) postulating a criminal offence, committed by a leading person as an exclusive and only condition for establishing the responsibility of a legal entity should be changed. What I would recommend is a solution where

responsibility for the criminal offence could be attributed to the legal person also in situations where criminal offences are not committed by leading persons, but (in the circumstances of lack of supervision of a leading person) by any natural person, acting either on behalf or for the benefit of the legal person.

Of course, leading persons themselves could also be perpetrators of criminal offences, for which legal person could be found responsible if we, at the same time, recognize that such a situation is just one of the bases of responsibility of legal persons.

In accordance with compared provisions of the international law, there should be two types of involvement of the leading person incriminated in the draft: the leading person can either be the physical offender himself (this situation seems to be covered), or be involved through his lack of supervision or control over persons in a subordinated position. If these natural persons (any person) committed criminal offences for the benefit of the legal person, due to the lack of supervision or control by a leading person, the legal person should be held liable for these offences as well.[6]

It is therefore logical that the concept of this draft dealing with the standard of liability ought to be broadened by introducing and establishing the responsibility of legal persons also for criminal offences, committed for the benefit of the legal person by any natural person (with or without a leading position in the legal person). Lack of supervision or control by a leading person could be introduced as a cumulative criterion or - in my view preferable - could constitute a separate, additional basis for the liability of a legal person.

To summarize: The substantive grounds for liability of legal persons should not be replaced with elements of new criminal offences that tend to involve (incriminate) the activities of a legal person (through its leading person). Instead, they should clearly and concisely define legal bases on which liability of legal persons for criminal offences (from the Criminal Code) may be established.

I will try to put forward a suggestion: Grounds for liability of a legal person should exist when a criminal offence has been committed by the perpetrator (physical person) in the name of, on behalf of, or for the benefit of the legal person in the following (one or more) circumstances:

- the offence has been committed by a leading person in the course of activities of the legal person;
- the committed criminal offence meant carrying out an illegal resolution, order or endorsement of its management or supervisory bodies;
- the management or supervisory bodies influenced the perpetrator or enabled him to commit the criminal offence;
- the legal person had at its disposal illegally obtained property gains or used objects gained through a criminal offence;
- its management or supervisory bodies omitted mandatory supervision of the legality of the actions of employees subordinated to them.

[6] This is the second modality of involvement of the person, having a leading position, that the parties to the European instruments have to include in their legislation. The CoE report indicates that paragraph 2 expressly mentions Parties obligation to extend corporate liability to cases where the lack of supervision within the legal person makes it possible to commit the corruption offences. Similarly the EU report indicates that “Member States can obliged to provide for measures against legal persons in such cases if the commission of the offence has been made possible by the lack of supervision or control by one of the persons in a leading position”. Both reports highlight the obligation for countries to implement both modalities in their legislation.

6. SANCTIONS

The EU 2nd Protocol and the CoE Convention (as well as the majority of other documents mentioned in this work) contain a specific article on sanctions for legal persons, whereas the OECD Convention provides for a general article on sanctions, applicable to both natural persons and legal persons indiscriminately.

Basically, all international documents require that effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, be imposed on legal persons.[7]

Additional civil or administrative sanctions are recommended by OECD and EU provisions. Both the EU 2nd Protocol and commentary 24 to the OECD Convention propose sanctions such as: exclusion from entitlement to public benefit or aid, temporary or permanent disqualification from participation in public procurement or from the practice of commercial activities, placing under judicial supervision and a judicial winding-up order.

There are sanctions and other measures in the proposed changes of the Ukrainian legal system that in my opinion comply with the requirements just mentioned. In this draft, according to Articles 3 to 5, sanctions such as the imposition of a fine on the legal person up to one hundred times the amount (sum) of the bribe, as well as the prohibition to carry out the kind of activity that is related to the bribing, for a period of up to three years, or the liquidation of the legal person are envisaged. In addition, there are some relevant provisions in the draft Law on the Principles of Prevention and Counteraction of Corruption, e.g. Article 17,

[7] **OECD: Article 3 – Sanctions**

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Council of Europe: Article 19 – Sanctions and measures

2 Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

3 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with this Convention, or property the value of which corresponds to such proceeds.

European Union: Article 4 – Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:
   (a) exclusion from entitlement to public benefits or aid;
   (b) temporary or permanent disqualification from the practice of commercial activities;
   (c) placing under judicial supervision;
   (d) a judicial winding-up order.
2. Each member State shall take he necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) is punishable by effective, proportionate and dissuasive sanctions or measures.

dealing with limitations and restrictions in providing budgetary funds to legal persons convicted for corruption-related criminal offences, prohibitions in contracting with the state, and setting up a black-list of convicted legal persons Another provision from the draft same draft law is important with respect to sanctions, namely Article 23 on forfeiture of illegally gained property. Relevant provisions on forfeiture and confiscation of proceeds of crime from the Criminal Code and procedural measures, dealing with procedural aspects of the application of sanctions and measures, provisional and final, should also be taken into consideration.

Although after the package of draft laws is adopted, the area of sanctions (and other punitive measures) might be satisfactory covered, it would in my view be advisable if the whole chapter on sanctions for legal persons, together with specific procedural provisions (as far as general laws are not applied by analogy) becomes part of this specific law – sanctions and related measures that are envisaged for the imposition on the legal person liable for a criminal offence ought to be put together in one law, in a uniform and consistent system.

7. CONCLUSION

If Ukraine wants to harmonize criminal legislation in this area, internally and externally, following international standards on the one hand, and making it useful, operational and efficient on the other hand, the totality of circumstances has to be realized and taken into consideration.

First, a clear distinction has to be established between corruption-related criminal offences and other corruption offences (possibly administrative, civil or those from the Law on the Principles of Prevention and Counteraction of Corruption). Corruption-related criminal offences should all (as a strict rule with no exemptions) be included in the Criminal Code; they still have to be changed and amended to comply with international standards (to my knowledge, other experts are simultaneously dealing with this issue). Mentioning liability of legal persons for criminal offences in the future can only mean liability for criminal offences from the Ukrainian Criminal Code. Ukraine may, of course, legitimately decide to establish the responsibility of legal persons in any other area, but borderlines and distinctions between different areas have to be evident and clear. As I have already mentioned: The international documents used as a reference in this work clearly demand establishing responsibility for criminal offences (active and passive bribery in the public and private sector, trading in influence). On this side the door for other options is closed; the alternatives are given only with respect to the nature, and the form of liability (civil, administrative, criminal). The modern approach is promoting development of “criminal” liability of legal persons – through establishing adequate grounds for liability that correspond to the specific nature of the legal person on the one hand, and traditional principles of criminal law on the other hand. The idea is reflected in my proposal how to balance those, often contradictory, concepts and formulate legitimate grounds for “criminal” liability of a legal person.

Second, from a systematic point of view, it would be a good idea to create one (or more) very fundamental provision(s) that would stipulate fundamental rule(s) on liability of legal persons and include them in the general part of the Ukrainian Criminal Code next to basic principles dealing with liability of natural persons.

Third, in my opinion, a new draft law on liability of legal persons should be prepared, rather than changing the current one. The drafters should consider introducing liability of legal persons for all (relevant) criminal offences and not just those related to corruption. The draft should be more comprehensive than the

existing one and could include: specific provisions on grounds for liability of a legal person, restrictions in the liability of legal persons, liability in the case of statutory changes, provisions on necessity, attempt, complicity etc. of legal persons, provisions on sentences and other sanctions, safety measures, statute of limitation, scope of application of the general provisions of the Criminal Code, special procedural rules, scope of application of Criminal Procedure Code, to mention the most relevant.

II. EXPERT OPINION BY MARIN MRCELA

1. EXECUTIVE SUMMARY

After careful consideration of the Draft, the main findings are as follows:

The Draft represents a valuable paper that could serve as a starting point for further elaboration and preparation of the concept of corporate criminal liability in Ukraine. It contains a lot of international legal standards in this filed (most criminal offences required by the Criminal Law Convention and United Nations Convention against Corruption).

Still, some criminal offences from both Conventions are not included in the Draft (Embezzlement, Obstruction of Justice, Trading in Influence, Money Laundering). That is because the Draft enumerates criminal offences. To avoid a lengthy law where the danger of duplication and vagueness could occur, it is possible just to make references to criminal offences prescribed in the Criminal Code of Ukraine.

The definition of 'official person', 'service [and] a particularly responsible position', and notably 'responsible person' could significantly improve the understanding of the Draft. The same applies to the definition of the 'bribe'.

The Draft should follow the types of fines prescribed by the Ukrainian Criminal Code instead of introducing new types of fines ("…one hundred times the amount [sum] of the bribe offered…").

All types of punishment should be determined in the Draft in one single Article.

The model of responsibility of legal persons should be clear from the Draft. Is it the autonomous responsibility which prevails in Anglo-Saxon countries, i.e. the principle of objective responsibility, or derived responsibility which prevails in continental law countries?

It is not clear from the Draft whether or not there is a responsibility of the State. Most countries do not allow responsibility of the State.

The responsibility of a legal person should be based on the guilt of the responsible person (principle of guilt, Article 23 of the Criminal Code of Ukraine).

It is not clear what type of procedure applies. The procedure should be "attached" to the Ukrainian Criminal Procedure Code, because the Draft deals with liability for criminal offences and foresees involvement of the public prosecutor.

In any case, there should be one proceeding: the guilt for the physical person and liability of the legal person should be determined at once. One proceeding would avoid unnecessary spending of time and human resources consumption which would inevitable occur if there were two separate proceedings.

2. ARTICLE 1

Article 1, paragraph 1. – Paragraph 1 seems too long. It might be unnecessary to mention the Law is in accordance with international Conventions and domestic law. The paragraph could be shorter and still clear and precise. One should not imagine a situation in which the Ukrainian authorities would pass a law

which is not in accordance with relevant international Conventions which Ukraine has signed or ratified. Therefore, paragraph 1 could read as follows:

This Law establishes the prerequisites of the responsibility of legal persons for the perpetration of corruption offences, punitive measures and (criminal)8 proceedings for criminal offences of legal entities.

Article 1, paragraph 2 seems to be in line both with the Council of Europe Criminal Law Convention (Article 18, hereafter: CLC) and the United Nations Convention against Corruption (hereafter: UNCAC).

It is not however, clear from the Draft which rules are prescribed for the proceedings for criminal offences of legal entities. From Article 7 of the Draft one could conclude that the proceedings are criminal ones. It is up to the Ukrainian authorities to decide what kind of proceedings they wish to apply (criminal, civil or something else), but in any case it should be clear from the Draft. Since there is an involvement of the public prosecutor, and the Draft is dealing with criminal offences after establishing the guilt of a physical person, it might be appropriate to consider applying criminal proceedings.

3. ARTICLE 2

Article 2, paragraph 1. – According to the CLC, a state party shall adopt such legislative and other measures as to ensure that legal persons can be held liable for the criminal offences of:

1. Active bribery,
2. Trading in influence (Article 12) and
3. Money laundering (Article 13).

The UNCAC stipulates in Article 26 that each party shall adopt such measures to establish the liability of legal persons for participation in the offences established in accordance with this Convention. The UNCAC has two standards for establishing offences:

A State Party **shall adopt** such legislative and other measures, and

A State Party **shall consider adopting** such legislative and other measures.

According to this wording, the first mentioned standard is an obligation for a State Party to adopt legislative and other measures. The second standard ("consider") means a State party shall think about implementing legislature or measures regarding the introduction of specific offences. It is not an obligation for a State Party to introduce such legislative or other measures.

In conformity with the UNCAC, a State Party **shall adopt** legislative and other measures to establish the following criminal offences:

Bribery of national public officials (Article 15 UNCAC);

Bribery of foreign public officials and officials of public international organizations (Article 16 UNCAC);

Embezzlement, misappropriation or other diversion of property by a public official (Article 17 UNCAC);

[8] More about proceedings see below paragraph 7, page 10 - 12.

Laundering of proceeds of crime (Article 23 UNCAC);

Obstruction of justice (Article 25 UNCAC).

If the approach of the Article 2 of the Draft is to enumerate offences, or acts that are subject to the Draft, the Article 2 should be significantly longer and should include all offences required by the CLC and UNCAC which are not enumerated in the Draft (Embezzlement, Obstruction of Justice, Trading in Influence, Money Laundering).

Taking into consideration the Criminal Code of Ukraine (hereafter: CC), and the Draft Law of Ukraine on the Introduction of Changes to Certain Legal Acts Regarding the Liability for Corruption offences (hereafter: LUIC) one could conclude that CC and LUIC cover the following CLC and UNCAC provisions:

1. *Active bribery of domestic public officials (Article 2 CLC, Article 15 UNCAC), members of domestic public assemblies (Article 4 CLC), foreign public officials (Article 5 CLC, Article 16 UNCAC), members of foreign public assemblies (Article 6 CLC), in the private sector (Article 7 CLC), officials of international organizations (Article 9 CLC), members of international parliamentary assemblies (Article 10 CLC), judges and officials of international courts (Article 11 CLC) – Article 369 CC respectively reworded Article 369 (page 7 and 8 LUIC), Article 235, Commercial Bribery (page 3 LUIC), Bribery of a Person which… (Page 4 LUIC), changes regarding term of "responsible person" (pages 6 and 7 LUIC), Article 2 On the Principles of Prevention and Counteraction of Corruption.*
2. *Trading in influence (Article 12 CLC) – Article 369 (page 6 LUIC)*
3. *Money laundering (Article 13 CLC, Article 23 UNCAC) – Article 209 CC*
4. *Obstruction of justice (Article 25 UNCAC) – Article 376 and 377 CC*[9]

In view of those lines and in order to avoid unnecessary enumeration (where possibility to omit relevant acts exists) [SENTENCE NOT CLEAR], it might be useful to consider a different approach for the entire Law for corporate criminal liability. Enumeration of all criminal offences and regulation of all related provisions necessary to establish responsibility of legal persons would inevitable lead to a lengthy law where the danger of duplication and vagueness could occur. The solution could be just to make references to criminal offences prescribed in the CC and possible to provisions in the Law of Ukraine on the Principles of Prevention and Counteraction of Corruption.

Therefore, the Article 2 of the Draft could read:

Unless otherwise prescribed by this Act, the provisions of the Criminal Code, the Criminal Procedure Code and the Law on the Principles of Prevention and Counteraction of Corruption shall apply to legal persons.

It is noted that the Draft opts to accommodate the UNCAC (and CLC) provisions outside the Criminal Code. This approach seems to be insufficient in order to adapt the Ukrainian legal system regarding the responsibility of legal person for criminal offences because, as stated before, the Draft does not have Articles that would cover responsibility of legal persons for a number of criminal offences (Embezzlement,

9 But only partly, since those Article do not cover a situation as prescribed in Article 25(a) of UNCAC (The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with UNCAC).

Obstruction of Justice, Trading in Influence, Money Laundering). This would be the main reason to consider "attaching" responsibility of legal persons to CC.

Article 2, paragraph 2 is in line with both Conventions (UNCAC Article 26, paragraph 3, CLC Article 18 paragraph 3).

4. Article 3

Article 3 – It is noted that the terms 'official' and 'service person' are applied in the meaning as determined by the CC concerning service persons occupying a responsible, [and] a particularly responsible position.

In the text of the Ukraine Criminal Code, there is a definition of an official person regarding criminal offences in office[10] and a definition of officials who occupy responsible positions[11]. There is also a draft amendment to Article 364 CC in a way to add Note 5 in order to define officials holding positions of responsibility[12]. Having in mind all those documents, the definition of "service person" remains unclear. It would thus be desirable to make a clear definition of "service person."

The CC does not, however, provide a legal definition of a 'responsible' or a 'particularly responsible position'. The reference made in the notes to the CC appears not to be a legal text. This lack of legal definition could lead to uncertainty and therefore, a legal definition would be welcome.

Although the definition of 'bribery' could be derived from the LIUC, the definition of a bribe according to the CC and the LIUC it still not quite clear. As a result, it remains vague what bribery is according to the Draft. The introduction of a definition into the CC would thus be helpful. The wording of both CLC and UNCAC could be helpful as a guidance, and one should consider including the definition in the description of the criminal offences of bribery (active bribery) - the promising, offering or giving by any person, directly or indirectly, of any undue advantage[13] to /official, service person, responsible person/ for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions. Passive bribery - the request or receipt by any of its /official, service person, responsible person/, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions [ADD FOOTNOTE].

Taking into consideration of the legal text of the CC, it seems the wording of the prescribed punishment should be "…shall be punishable by a…" instead of "… triggers the imposition of a…" [THIS MIGHT BE A TRANSLATION ISSUE – THE TRANSLATION WAS EDITED BY ME, AND I THINK THAT THE WORDING YOU SUGGEST IS WHAT THE UKRAINIAN ORIGINAL MEANS. I WOULD THEREFORE PROBABLY DELETE TEND TO DELETE THIS POINT, BUT LEAVE THE DECISION UP TO YOU]

The Draft defines punishments in the following way: "… double the amount [sum] of the bribe offered…" or … "one hundred times the amount [sum] of the bribe offered…" This does not follow the types of

[10] Notes 1 and 2 to the Article 364 CC. Although from the text received, one should conclude that these notes are not legal text.

[11] Note 2 to Article 368 of the CC.

[12] Page 7 of the Draft Law of Ukraine on the Introduction of Changes to Certain Legal Acts Regarding the Liability for Corruption Offences.

[13] Instead of text that starts with "the promising" and ends with "advantage", it could be "gift or some other gain".

punishment defined in the CC (see Article 51, and Articles in the Special Part of the CC). The fines in the CC are either in a certain range (500 to 1000 tax-free minimum incomes), or are defined with a maximum (up to 50 tax-free minimum). Therefore, the Draft should follow the types of fines prescribed by the CC. This is especially important, because there could be a situation where it could be impossible to execute a fine, or it could even look ridiculous. For instance, if the bribe offered in the case foreseen by Article 3, paragraph 4 of the Draft is 10 Million Euro, the fine should be one hundred times the amount of the bribe offered, that is, 1.000.000.000 €.

An official or a service person who occupies a responsible position is mentioned in Article 3, paragraph 3 of the Draft. It would seem advisable to have this paragraph read the same way as the previous two paragraphs. Otherwise, one could argue that the official or service person who occupies a responsible position is not answerable for a particular criminal offence, which is in contradiction to the intention of the Law.

In Article 3, paragraph 4, there are two other types of punishment (a prohibition to carry out a certain activity, and liquidation of the subject of economy). For the sake of consistency, it should not read "subject of economy" (because there is no legal definition of such a term), but rather "legal person" which is internationally recognized terminology. Furthermore, "termination of legal person" would sound better then "liquidation". Finally, the Draft should follow the terminology from the CC: “deprivation to engage in certain activities”.

The law should have one article which establishes all types of punishment that could be imposed on a legal person. From the Draft, one could conclude that there are three types of punishments (i.e., fine, prohibition to carry out certain activity and liquidation of the legal person). Since the CC has 12 different types of punishment[14], it is desirable to include some of these types in the Draft. Of course, some punishments simply can not be imposed on a legal person, because the nature of the punishment does not allow the execution of certain types of punishments[15]. But forfeiture of property should be imposed on legal person, because such a requirement does exist in international legal instruments[16]. Therefore, an article regarding punishments could read as follows:

For their criminal offences, legal persons may be punished with fines, deprivation to engage in certain activities, forfeiture of property and the termination of the legal person.

“The repeated giving of a bribe to an official” (paragraph 3) seems to be almost a casuistically approach[17]. One should try to avoid such a method, because it could create a legal vacuum. The casuistically method of prescribing criminal offences is almost abandoned in contemporary criminal law. Instead, a specific range of fines could comprise all conducts which need to be punishable, and such an approach is more advisable from the nomotechnical point of view.

[14] Article 51 of the CC.

[15] There is no possibility to execute a legal person: revocation of a military or special title, rank, grade or qualification class, service restrictions for military servants, arrest, restraint of liberty, custody of military servants in a penal battalion, imprisonment for a determinate term and life imprisonment. For community service and correctional labor additional elaboration would be required, however, this paper is not the appropriate place to do it.

[16] See: Principle 4 in the Council of Europe Resolution (97) 24 On the Twenty Guiding Principles for the Fight against Corruption; Article 23 of the CLC; Article 31 of UNCAC.

[17] In criminal law, a casuistical method is applied when criminal offences are defined mainly by describing concrete cases, rather then by a method of general abstraction.

Two basic models of responsibility of legal persons exist in comparative law. One is 'autonomous responsibility', which prevails in Anglo-Saxon countries (also called 'principle of objective responsibility'). The second one is the model of 'derived responsibility', which prevails in continental law countries[18]. From the Draft, it is not quite clear what the model suggested for Ukraine is. Yet, Article 7 of the Draft could lead to the conclusion that the Draft opts for a model of derived responsibility, because it stipulates that proceedings shall be initiated 'upon the availability of a guilt sentence … which establishes the guilt of a physical person'. Such an important issue should be addressed and stressed not leaving any scope for doubt in the legal text. The foundation of responsibility of a legal person should definitely be part of the Draft, and the Article could read as follows:

The legal person shall be punished for a criminal offence of a responsible person if such offence violates any of the duties of the legal person or if the legal person has derived or should have derived illegal gain for itself or third person.

5. Responsible Person

The above proposal requires a definition of a 'responsible person'. Considering what is stated above[19] [WHERE PRECISELY?], there is a need to define 'responsible person' according to the Draft. The suggestion would be:

The responsible person within the meaning of this Law is a natural person in charge of the operations of the legal person, or entrusted with the tasks from the scope of operation of the legal person.

This definition could cover an official person, a person holding a responsible position and a 'service person'. Nevertheless, the need for a definition of 'service person' in the CC still remains.

Furthermore, if this concept is acceptable, the question of attributing the guilt of the responsible person to the legal person should be answered. Here is one possible way for that:

(***1) The responsibility of a legal person is based on the guilt of the responsible person.***

(2) The legal person shall be punished for the criminal offence of the responsible person also in those cases when the existence of legal or actual obstacles for establishing of responsibility of the responsible person is determined.

The solution suggested here in paragraph 2 is in accordance with the Council of Europe Recommendation R (88) 18 from 20 October 1998 [ADD FULL TITLE FOR EASE OF REFERENCE].

6. Other general provisions

The Draft should also consist of at least two other general provisions: are all legal persons responsible, including, for example, the State? What happens in the case of change in the status of a legal person?

[18] Most of the countries in Europe have this model of responsibility of legal persons (Denmark, Finland), but in some countries, the liability of a legal person is not derived from the physical person's guilt (Belgium, for instance).

[19] Paragraph 3, page 4 [OF THE DRAFT?].

If the solution is that the State may not be liable for criminal offences, one Article should read as follows:

The Republic of Ukraine as a legal person may not be punished for a criminal offence.

Depending on the form of government in the 24 regions of Ukraine, the Draft should also solve the question of responsibility of the regions, municipalities or other existing forms of units of local and regional government. One solution could be that those units may be punished only for criminal offences that have not been committed in their execution of public authority.

The Draft should also deal with a situation when a legal person ceases to exist before the completion of the proceedings. The solution where any type of punishment could be imposed on the legal person which is the general legal successor of the ceased legal person could be an appropriate one. This could apply also to the situation where the legal person ceases to exist after the judgment becomes final.

If the legal person is in bankruptcy, a solution could be that such a legal person shall be punished for the criminal offences committed before filing for bankruptcy or during the bankruptcy proceedings.

An additional issue to be addressed in the Draft is the statute of limitation for the prosecution and for the execution of final judgments. For the prosecution, the statute of limitation could be linked to the predicted statute of limitation in the Ukrainian Criminal Procedure Code. For fines, there should be a specific time in which it cannot be claimed after pronouncement of the judgment (e.g. three or five years). One of the solutions could be to not having a statute of limitations for termination of the legal person at all.

Keeping records of legal persons convicted for criminal offences is important. The Draft should specify an obligation of the court to inform the competent body once the judgment has become final.

7. Procedure

As stated above[20], the Draft should elaborate a criminal procedure for the establishment of liability of the legal person for criminal offences which is adumbrated in Article 7 of the Draft. This would be a logical consequence of the model of 'derived responsibility' for the legal person. Since there is a need to establish the guilt of a physical person (Article 7 of the Draft), probably the best way to do so would be joined (criminal) proceedings[21]. In this case, there is no need for two separate proceedings which would consume more time and human as well as technical resources than one process. The prosecutor would file one indictment, in which usually one defendant would be (a) physical person(s), and another would be the legal person[22]. The rule could be:

For a criminal offence committed by a legal person and a responsible person, joined proceedings shall be conducted and a single judgment shall be passed.

In this case, the need for the protocol noted in Article 8 of the Draft should be carefully considered. In the indictment, besides the requirements predicted in the Criminal Procedure Code, one should consider to add certain parts such as: the company name, its registered seat, the company registration number, name and surname of its representative, date of birth, and address and citizenship, the number of passport, if the representative is a foreign national etc.

[20] Page 2, footnote 2.

[21] According to the provisions of the Ukrainian Criminal Procedure Code.

The draft should also foresee situations in which no criminal proceedings may be instituted or conducted against the responsible person for legal or any other reasons whatsoever. In this case, an appropriate way to tackle this problem would be to have proceedings against the legal person only, because this is a logical consequence of the solution stated above[23].

Territorial jurisdiction should be decided according the Criminal Procedure Code because of the determination regarding criminal proceedings[24]. The draft should deal only with a situation where an offence has been committed outside the territory of the Republic of Ukraine, or if it is uncertain within which jurisdictional territory the criminal offence has been committed. In such a case, the jurisdiction should be for the court within the jurisdictional territory of which the domicile or residence of the accused is located, i.e. the accused legal person is seated. It could also be considered to establish the possibility of the jurisdiction of the court within the jurisdictional territory in which the accused legal person is seated.

The representative of the accused legal person (Article 10 of the Draft) should be able to undertake all actions which can be undertaken by the accused. In this case, which is the general norm, there is no need for all details currently listed in the Draft. For practical reasons, it would be appropriate to predict the possibility of only one representative for the legal person. It should also be determined who should designate the representative, and to oblige the legal person for submitting a brief to the court, by which it has designated its representative, and the proof of his/her authority. The representative could not be a defense lawyer[25], defendant and the witness who is in the same case for reasons which do not require further explanation. In the first summons, the court should be bound to warn the legal person that it is obliged to designate its representative within a certain period of time upon receipt of the summons (for instance, eight days). If the legal person fails to follow the court warning, the representative should be designated by the court. It would be desirable to consider measures to ensure the appearance of the representative in front of the court for the trial (a warrant to bring in the representative).

The trial should be conducted according to the Ukrainian Criminal Procedure Code. Some changes of the course of proceedings (who presents evidence and when) could be stipulated. There should be a provision according to which the court may decide that the main trial could take place in the absence of the representative of the legal person who was duly summoned, provided that his/her presence is not crucial.

The verdict should contain all parts prescribed by the Ukrainian Criminal Procedure Code. One should add the same parts as for the indictment (the company name, its registered seat, the company registration number, name and surname of its representative, date of birth, and address and citizenship, the number of passport if the representative is a foreign national etc.).

[23] Page 8, paragraph 5.

[24] Page 1, paragraph 1.

[25] The need for a so-called mandatory defense (a legal obligation that the defendant must have a defense attorney present during a trial) should be carefully considered.