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Support to Good Governance: Project against Corruption in Ukraine (UPAC)

TECHNICAL PAPER - EXPERT OPINION ON THE DRAFT LAW OF UKRAINE ON LIABILITY OF LEGAL ENTITIES FOR CORRUPTION OFFENCES

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Table of Content

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1 INTRODUCTION

Two international experts[1] have already given their opinion on one of the previous versions of this draft law so there is no need to repeat the basic introduction on the importance of coherent and consistent anti-corruption legislation regulating liability of legal entities for corruption offences. According to Article 18 of the Council of Europe Criminal Law Convention on Corruption, Article 3 of the Second Protocol to the EU Convention on the Protection of European Communities' Financial Interests and Article 2 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, legal entities (conventions are using the term "persons) have to be held liable for some types of offences. There is no other possibility to achieve full compliance with international legislation in the area of fighting corruption. There are also some other conventions in force, which demand liability of legal persons for other types of offences[2].

International legal instruments, which are mentioned above, were taken as basis for the reassessment of the draft law. Of course, in some cases the expert will refer to the expertise of the previous experts in order to underline his own findings.

At the beginning it has to be stated that the expert fully shares the concerns of previous experts on a special law dealing with liability of legal entities for (some) corruption offences only. Of course, this will have a consequence: for other categories of offences several other laws will have to be adopted. In the expert's opinion, one piece of legislation should cover liability of legal entities for all criminal offences.

The methodology used in this opinion is the following one: remarks listed below follow the numbering of articles. Where there is no mention of an article or paragraph, it means that the expert does not have any remark on it and that in principle he agrees with the idea and form of the given legal provision.

2 REMARKS IN RELATION TO SPECIFIC PROVISIONS

Article 1
Paragraph 2

In this paragraph it is stated that legal entities "fully maintained at the expense of the state or local budget" are not covered by the provisions of this law. This is not in compliance with Article 1 of the Council of Europe Criminal Law Convention on Corruption (hereinafter: CETS 173) since it is only excluding the states, other public bodies and public international organizations. Legal entities "fully maintained at the expense of the state or local budget" do not correspond to those exemptions. Only the state ownership of the company does not give the character of a public body. Therefore, this paragraph will have to be amended.

In addition, there is no definition of a "legal entity" in this draft law. The expert hopes that in other appropriate Ukrainian laws there is such a definition.

[1] Mr. Boštjan Penko and Mr. Marin Mrčela

[2] In the area of cybercrime, terrorism, trafficking in human beings,..).

Article 2

It is the central and most important material provision in this draft law, providing grounds for the liability of legal persons.
As precondition for liability of legal persons international conventions are mentioning acting of "leading persons" in legal persons. The terms "manager" and "any other authorised person" are in compliance with this requirement (term), the term "owner" is not. In a regulated legal and business community the owners cannot influence operational behaviour of the legal persons, which is the task of the management. Even if in some cases this might happen, the owners will also need to have formal managerial positions and tasks in order to serve as a basis for liability of legal persons. Therefore, the word "owners" can be deleted.

Two different types of managerial behaviour are given here as a basis for the liability of legal persons:
acting on behalf of the company
acting in the company's interests,
but there is no third type of behaviour, required by Article 18 of the CETS 173:
the lack of supervision or control by a manager, which enabled the commission of the criminal offence in the legal entity.

Without adding this type of activity this draft (and later the law itself) will not be in compliance with the CETS 173.

Only 5 articles of the Criminal Code (CC) are mentioned as the ones (if committed by the managers) establishing liability of legal entities: 209, 235-4, 235-5, 369 and 376. There are many more corruptive criminal offences in the CC: for example, 235-1, 235-2, 235-3 … Such minimalist approach will hardly satisfy international community. Therefore, the list of offences serving as a basis for liability of legal persons has to be extended.

Article 3

It is rather surprising that immediately after the crucial substantive provision the list of sanctions (and not "fines" as translated in the English version of the text!) is given.

The expert has only one problem relating to this: "confiscation of property" (as described in Article 6) is not considered in majority of legal systems to be a sanction but a special measure aiming at the assets' recovery.

Article 4

Are definitions of terms "insignificant", "crime of an average weight", "grave crime" and "especially grave crime" given somewhere in the Ukrainian penal legislation? If not, this should be done in this draft.

It is recommended to assure that the lower level of fines given in this Article will at least correspond to the damage caused by the perpetration of the offence.
In para 2 "owner" should be deleted.

Article 8

It is probably an issue of translation, but does this provision mean that at the end (after applying several sanctions) the court will apply one – the one from the applied sanctions, which will be the most severe? This is a solution, which is not very often found in the national legislations – usually in the case of several sanctions, the final

sanction will be something close to the sum of all applied sanctions.

Article 9

This Article starts a procedural part of the draft law. Insertion of some procedural rules is important but it deserves a special chapter in the law.

Paragraph 3

It is referring to "grounds indicated in Article 11". In Article 11 there are no grounds envisaged since it describes jurisdiction. It is probably Article 10 and its grounds, which are meant in this paragraph.

Article 10

Usually (in majority of legal systems) in order to be rational, both proceedings – the one against natural and the one against legal person – are running in parallel. Article 10 establishes different rule: the proceeding against the natural person will have to be closed and the sentence will have to be final, and only then the procedure against the legal person will start. Practically, this provision does not make any sense: the proceedings against the natural person can take very long and in this period of time the legal person can cease to exist, it can merge with other entities…

What is the reasoning behind the idea to have two completely different procedures? There is hardly any possibility to bring the case against the legal entity to an end – for example, if the prosecutor will draw up his protocol at the end of six months' period (Article 9, para 4) there will be almost no possibility to apply the sanction having in mind period of limitation mentioned in Article 3, para 3 !!

Article 11
Paragraph 4

This provision runs completely against the practice and very good experience of other countries: cases against natural and legal persons are most often dealt with by the same judge/s. They know the accusations, they know the case, and they are familiar with factual and legal challenges of the case…In the case of two judges everything will have to start from the beginning – why? To protect whom or what? Independence of the new proceedings? In such way the possibility for committing mistakes becomes a double one, much more time is consumed…

Article 15

Will 15 days really be enough to start with the case? What if the file will be a complicated one? How the judge will familiarise him/her-self with the case and related documentation in such short period of time? At least a possibility for extension will have to be added.

Article 16

The term "owner" should be deleted from all paragraphs.

Paragraph 4

This provision strongly supports the concerns of the expert expressed in relation to Article 10.

3 SUMMARY

Although it is evident that the Ukrainian authorities have invested significant efforts in the improvement of the draft, it is still a draft that will hardly enable any legal entity to be held liable for the criminal offences of its management in Ukraine. There are some solutions provided by the draft law, which raise the most serious concerns of the expert. Namely, those are the following:
no real conceptual solution on the grounds for liability of legal entities in Ukraine (Article 2 of the draft law),
limitation concerning the list of criminal offences, which can be taken as grounds for liability of legal persons (Article 2),
doubts on the list and categories of legal entities, which can be held responsible (Article 1),
two completely separate proceedings against the legal entity and its leading persons.

There are also some areas, which are not dealt with at all with the present draft and simply cannot be avoided:
restrictions in the liability of legal persons,
liability in the case of statutory changes,
provisions on necessity, attempt, complicity... of legal entities.

At the end, the expert cannot do it otherwise but again to suggest to cover in one law liability of legal entities for all criminal offences, including corruption ones.