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Expert Opinion On the "Methodology for expert examination of normative and legal acts and draft normative and legal acts concerning corruption"

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I. Introductory Remarks

1. The “Methodology for expert examination of normative and legal acts and draft normative and legal acts as to corruption” (“Methodology for expert examination of normative and legal acts on corruption risks”), hereinafter – the Methodology, presented to the expert of prevention of corruption Dr. Laurynas Pakstaitis by the Council of Europe.
The expert possesses relevant experience accumulated acting as the specialist and legislation assessment officer of Department of Prevention of Corruption, Special Investigations Service of Republic of Lithuania and scientific researcher of corruption acts. Expert opinion is provided on the basis of relevant international standards, on good practices implemented in Lithuania as well as on professional experience in the field of prevention of corruption and anti-corruption assessment. Accumulated knowledge executing comparable expertise during the period of expert’s activities enables to present relevant findings. The expert provides original opinion completely free of any external instructions and it is based on his best knowledge as of time of expertise.

2. Anti corruption proofing or anti-corruption expert examination, anti-corruption assessment is analyzed as one sphere of corruption prevention. This measure might lead to positive social results only in cooperation with other measures of preventive character and the significance of anti-corruption examination and discovering corruption inducing factors should not be over estimated. As the experience of implementing of comparable measures shows, the regulative basis is on a constant change; thus, ‘incorrupt’ or ‘relatively incorrupt’ laws might be overshadowed by the amendments or supplementary legislation. It should be also stressed that proper legislation (adequate regulation) is not the major factor circumcising corruption as a social phenomenon.

3. Differences in languages in which the methodology was designed and was reviewed present relative challenges for the expert. The variations of definitions of legal concepts and variations of wordings of same concepts might necessitate inadequate understanding of the original meanings intended by the designers of methodology. The differences were overcome by using methods of systematic analysis, dogmatic analysis, formal logic, analogy, comparison, confrontation, linguistic analysis. The expert made his best efforts to avoid ‘linear’ examination. Stressing the essence was the main goal.
The lingual differences cannot undermine the significance of Methodology as instrument of prevention of corruption.

II. Scope of Application

I. The “Methodology for expert examination of normative and legal acts and draft normative and legal acts as to corruption” presents detailed guidelines for assessment of legal acts and draft legal acts according to Ukrainian legislation. The Methodology provides that (Paragraph, hereinafter - Par., 1.2) expert examination of normative legal acts is aimed at three main goals: (1) identification of corruption factors in the text of legal act; (2) assessment of the degree of their corruptibility; (3) development of

recommendations on their elimination or offset of risk of corruption induced by the said factors. Methodology provides a complete list of corruption factors.

II. The General Part of the Methodology does not provide clear list of cases and instances what kind of legal and draft legal acts are to be examined. Neither does it make clear what bodies execute the expert examination. Expert jurisdiction, subordination, independence, skills and conclusive documents provided by the expertise are not listed in the Methodology. It might be suggested, procedural requirements are provided in additional acts.

III. Instances of when and what legal acts are to be examined would provide a much desired basis, for a undetermined expertise of any act at any time might not present valuable results in creating systematic preventive approach. The hierarchy of legal acts, documents, and the jurisdiction of federal, local authorities should be defied as to help achieve the desired results, i.e. create a non-corrupt legal framework. Political will and political pressure in creating legal mechanisms might present a challenge, as new regulations without prior discussions or wider approval might appear on the legislator's agenda; as a result no regards to anti-corruption examination would be made in such instances.

III. Detailed Analysis of the Provisions. Relevant Comments

(1) The designers of the Methodology tried to put down all relative aspects creating in some ways a very formal document (common observation). This has strong sides but present weaknesses as well. On the strong side are strict definitions, clear objectives, and clear listings; however it is not possible to foresee all of the upcoming aspects of legislation.

(2) Thus shortcomings of what to be analyzed might occur, e.g. paragraph 1.5 describes "corruptive acts" as acts by authorized persons aimed at illegal acceptance of pecuniary remuneration, property, property rights and other material values using their official powers" and acts of other individuals "aimed at illegal granting of money, property, property rights and other material values to the said officials or other persons in behalf thereof". From our point of view corrupt acts are to be described in the widest way possible (according to the conventions on the subject[1]) which means including all aspects of misuse of office, not only graft relations. In addition to that, any activities of intermediary in bribing, as well as promises, deals, settlements, contracts of future bribing should be included. From our point of view the term "material values" in this definition is not correct and rather confusing (advantage of corrupt transactions might have 'immaterial' form e.g. money wiring, bank transactions while paying a bribe; huge discounts for valuables and services etc.; and it is not 'a property right' in given case. In some cases advantage of a corrupt behavior might even not be related to direct material form, e.g. rights for future contracts in public procurement, privatization preferences and

[1] (1) United Nations Convention against Corruption. Chapter III, articles No. 15 – 27. (2) Criminal Law Convention on Corruption, ETS No. 173. Strasbourg, 27.1.1999. Chapter II, articles No. 2 - 15.

advantages, future contracts, clientelism, granting permissions etc.). From our standpoint, too formal of an approach is suitable for legal act but is not suitable for the Methodology.

(3) Paragraph 1.3 declares that "Corruption of normative and legal acts and draft normative and legal acts means that the legal act contains one or more corruption factors" thus creating a statement too categorical. Considering descriptiveness of the paragraph 1.3 however it seems that real corruption in social sphere is what counts most. "Corruption of legal acts" is only an assumption which might not lead to corruption in real life. Analysis of the Methodology shows that there is lack or no regard to social factors that create or are related to corruption. The stress in the Methodology is being made on legal definitions and legal acts as instruments of social regulation.

(4) Paragraph 1.6 (second indent) states that the assessment might estimate three levels of the degree of corruption: low-scale, middle-scale, and high-scale. However it is not clear what importance such estimation would carry, as the provisions in the following chapters do not provide clear outcomes. Does the stated level mean that the legislator or body responsible for the adoption of legal act should carry additional analysis or provide additional regulations? Or might it only be a factor for the orientation of the expert?

(5) Paragraph 1.7 (second sentence) states that "defects of legal acts shall not be subject to anti-corruption examination: 1) legal conflict of normative prescriptions contained in one legal act or in different legal acts, including non-compliance of normative prescriptions with provisions of the superior legal act". From our point of view such statement should be considered too restrictive. Such determination cuts the way for the expert to analyze the legal act (draft legal act) in coordination with other legal acts. The expert is being thus isolated within the text of legal act (draft legal act). In addition to that, such notion in a way contradicts to other articles of the Methodology which state that the relations of norms are important: (e.g. Paragraphs 2.5, 4); 2.8, 1) c), especially 4.7). Paragraph 1.10 stipulates, that "Defects in the legal act relating to problems in the normative prescriptions and failure to comply with the requirements of law designing technology are not corruption factors *per se*, but may be considered as an indicator of their presence". Thus it is not clear how expert is to conclude indicator of the presence of the corruption factor while he was not obliged to (or was suspended from) examine legal conflicts of normative prescriptions (according to supra. Par. 1.8). Moreover, corruption factors, such as defects of administrative procedures might directly arise from legal conflicts of judicial acts.

(6) According to Par. 2.5, 4) discretionary powers may be embodied in the legal acts by means of normative prescriptions containing only certain elements of the hypothesis or dispositions the uncertain hypothesis or deposition) of the law; this means that the design of the legal act (draft legal act) has certain value for expert's activity.

(7) It is not clear in what ways anti-corruption expert examination as defined in the Methodology is related to "legal expert examination" (Par. 1.7, last sentence). The legal expert examination is a different examination of its own right which might suggest its

own findings about deficiency of regulations, defects of design of draft act. It would be desirable to have relations of these examinations clearly defined.

(8) Maximum efficiency of the assessment might be reached only by analyzing legal regulations as a system of correlating legal mechanisms which might present ground for corruption relations. In the sense of existing legal system of our given countries and prevailing legal tradition, the importance of the hierarchy of legal acts and their subordination is of utmost importance. Even presuming that legal regulations contain no defects regarding administrative procedures, functions, duties and responsibilities and are well defined, a slight difference in law and other act of lesser significance (decision of the Government, order of a minister) that is related to the aforesaid law might lead to different interpretation and deliberate use of the regulation/power in a corrupt way.

(9) Paragraph 1.9 presents the complete list of corruption factors which present a system of five major social determinant factors: improper establishment of discretionary powers for bodies of public authority and officials; excessive requirements for individuals and organizations; lack or defects of administrative procedures; improper formulation of functions, obligations, rights and responsibilities of civil servants. Such factors present significant basis for the anti-corruption assessment. However they in no way represent particular, specific social circumstances in which these factors might occur. The methodology does not raise any requirements for the expert to take into consideration concrete social circumstances in particular spheres (e.g. healthcare or customs). Thus such anti-corruption examination might become another “legal expert examination” which would only point out number of paragraphs and incomplete wordings, formal deficiencies of the regulation. Such examination would achieve rather limited result as it is not related to social conventionality.
As our experience shows, anti-corruption examination of the texts of legal acts (draft legal acts) gives better results when it is related to social circumstances in which the regulation (regulation-to be) has been designed. As the social circumstances change, instances of corrupt behavior and social relations involving corruption switch from one sphere to another.

(10) The Methodology (Par. 1.13) empowers the expert to use additional assessment criteria (as an addition to corruption factors). Such additional criteria (Par. 1.13, 1) - 7)) are to be considered grounds of high importance and be analyzed in any case for they provide much needed background for social relations (from 1) to 5)); only some of them (“6)”, “7)”) might be considered as additional assessment criteria.

(11) The Methodology states that elimination or offset of the corruption factor shall be carried out by the body or the official authorized to adopt and amend the normative and legal act (Par. 2.12). Such provision seems to be appropriate, however from our point of view the Methodology lacks more detailed and precise clarifications of how this should be accomplished. Paragraphs 2. 13 - 2. 15 suggest some ways of achieving the goal; however it is not clear if an expert in a particular case will be able to present some suggestions.

(12) Chapter III of the methodology “STEEP DEMANDS” (or excessive requirements as in Par. 1.9, 2)) provides the list of the signs by which the expert might suppose that requirements for the individuals are exaggerated (Par. 3.2). However it seems that the listed instances are too abstract in most cases and the expert either will be unable to specify the sign or will find numerous signs (for example using such wording of evaluating character as (Par. 3.2, 1)) “imposition of the legal obligations on individuals and organizations in scope which is *considerably higher than that of required* for ensuring proper exercise of subjective right”. Without respect to social circumstances and data on current social relations in social life the expert in no way will be able to present formal answer. It could be also noted that there are many examples of considerable requirements, imposed by the regulations while there is or little corruption.

(13) Paragraph 3.6 directs an expert to analyze “legal, organizational, technical conditions that make it possible for individuals or agencies to evade the established requirements, including entering into corruptive relations with the authorized decision-makers”. Such direction is valuable, however it is too abstract and (in some aspects) lacks of meaning (e.g. conditions to offer a bribe, evade established requirements exist anytime and anywhere regardless of legal, organizational and technical conditions). Thus the expert should be encouraged to forecast possible corrupt relations (formation of corrupt relations in the early stages) with regard to existing social conditions, not only analyzing the text of the act.

(14) As to lowering the level of requirements, the Methodology presents a list of valuable methods (Par. 3.9); however some of them, e.g. carrying over legal duties from individuals (organizations) to civil servants and other officials might result in even greater risk of corruption (e.g. the civil servants might delay their duties and wait for the bribe to “speed up”). The most valuable suggestion of an expert would be related to the naming of unnecessary procedures that can be removed from the legislation (draft legal act).

(15) Paragraph 4.7 emphasizes the need to asses not only the main legal document but other related documents. This provision has great importance, as the laws do not function without supplemental legislation. The supplemental legislation might become even greater factor generating corruption. As it was stated before (vide supra, (5)) paragraph 4.7 should be important making required amendments to paragraph 1.7. Paragraph 4.7 recommends that blanket regulatory prescriptions shall not be treated as corruption factors, however this type of norms, as well as the simplified dispositions, uncertain hypothesis or dispositions are to be examined carefully by the expert and in many cases are to be subjects to change for more advanced legal definitions.

(16) Paragraph 4.10 presents valuable indicators proving defective administrative procedures. Thus the expert should be encouraged to use the indicators with regard to particular social relations, data about corruption occurrence and social spheres of greater risk of corruption occurrence.

(17) Paragraph 4.12 specifies different degrees of corruption but even though they are clearly described it does not seem to be any objective need for such classification.

(18) Chapter V of the Methodology deals with absence or defects in tender (auction) procedures. The question presents significance. Yet a uniform legal act prescribing auction procedures is to be provided. From our point of view auction procedures in one or another way are implemented in special laws so evaluating such procedures every time the auction is being held seems disputable. It is not clear how the tender procedures are executed according to Ukrainian legislation and it is not clear what legal acts are subject to evaluation. The particular procedures of auctioning might present even greater importance.

(19) Some paragraphs in the Chapter V seem to be questionable (e.g. 5.7 2) a): low level of informing the potential participants on holding the tender). Paragraph 5.9 states that "When assessing the degree of corruption of tender procedures defects, the expert should take into account the amount of material benefits obtained by the winner". It is questionable if the expert might get an answer to such questions in many instances. And even getting the answer could not prevent the social sphere from formation of corrupt relations; thus the question has only a limited relevance. It seems that the same tender procedures should be applied for all tenders, federal as well as municipal.

(20) Proper organization of duties of officials and public servants are the most important factors (Chapter VI). The questions and answers even thought they are important might not lead to positive results. The Methodology lacks a much needed emphasis on provisions for the responsibility of public officials. Paragraph 6.6 states that "most legal acts lack special provisions on liability of public officers". The expert should be oriented to examine the situation of the responsibility and its adequacy for the given circumstances. Paragraph 6.9 presents valuable questions regarding functions, obligations, rights and responsibilities; the questions somehow seem to be not satisfactory. It remains unclear if the point system established herein would be helpful in finding the drawbacks of the legislation (draft legislation). What should be the outcome of such thorough counting of the points remains unclear. If the evaluator states a shortcoming of the regulation, he should present means of elimination thereof; thus counting points might be beside the purpose.

IV. Suggestions and Recommendations

1. From our perspective, vulnerable side of the Methodology is possibility of examination of the text of legal act without regard to social and economic conditions in particular sphere. Economic conditions are not even mentioned. Keeping the social and economic conditions out of scope might stipulate that important evaluation data might be left unnoticed; thus the effectiveness of the examination lessens.
The expert should take into consideration the favors of social groups. In this regard it is important to notice that the expert during anti corruption expert examination must also analyze supportive documentation to the text of draft legal act (explanatory reports, supplementary documents, expertise undertaken during elaboration of the draft, results of

the legal expert examination etc.). Such data might present a valuable asset discovering discrepancy between the aims of the legal act (draft legal act) stated within the act and the social realities.

2. Besides the fundamental discovering of corruption factors the expert should be oriented to start expertise with a) Discovering the aims of the act (draft legal act); b) Establishing the place of the legal act (draft legal act) in the judicial hierarchy; c) Finding out if the aims of the legal act are possible to reach within proposed regulation; d) Finding out discrepancies between different steps in the judicial hierarchy (e.g. redundancy of functions of different bodies according to different acts); e) Finding out the possibility according to the draft act to impose responsibility (disciplinary, administrative or criminal) for the particular official or official executing his power within a collegial body; f) Discovering if the proposed regulation is in line with modern international standards of fight of corruption (norms of relative conventions).

3. The methodology should leave the space for the expert to forecast formation of social relations in the problematic sphere. Such forecast would be supported by the arguments, relative to the situation of anti-corruption expert examination. Such forecast should not be considered as subjective opinion and should not be feared because the right of decision of adopting the legal act remains outside the expert's ability.

4. While designing the anti-corruption expert examination methodology it is important to have the idea of procedural matters such as: What bodies the expert will be belonging to (state, municipal, non-governmental, privately-funded, academic etc.)? Will the expert be related to drafting of legal acts? What competence and scope of duties the expert will posses; in what extent the expert will be able to forecast future relations under new regulation? What basic skills and education of the person are required to be qualified as an anti-corruption expert? What responsibilities the expert will posses? Will there be a specialization of the experts? Will the experts have special training for anti-corruption expertise execution? What time frame the expert will have to provide the expertise? What guarantees for the independence the expert will posses? What information resources the expert will be given for execution of his/her duties? The efficiency of the anti-corruption examination directly relies upon stated factors. Without appropriate specifications the efficiency of such methodology might be significantly decreased.

5. Draft legal acts and existing legal acts might in some way contradict the judicial practice. Thus the expert should take consideration of the court practice in appropriate cases. Statistical data and sociological surveys might also present importance for the expert, thus the expert has to take consideration to such factors.

6. The expert must be good not only in legal knowledge but also at analytical skills; thus besides the dogmatic analysis the expert should be able to provide functional analysis in the cases when new institutions or bodies are created, functions of such bodies are provided, detailed regulations of their activities are prescribed in the new regulations.

V. Conclusions

Methodology presents a valuable asset and might be employed in the process of legislation.
However the lack of regard to social factor might lead to a limited effect during the implementation.
Some work on improvement of the Methodology might help to boost its effect.