TRANSPARENCY INTERNATIONAL MOLDOVA

Comments
on the Draft Law for Preventing, Combating and Sanctioning Corruption

This is to let you know that in response to solicitation of the CCECC, the Transparency International – Moldova has examined the *draft Law for Preventing, Combating and Sanctioning Corruption*. Assessment of different aspects of the draft law was done bearing in mind both international and national experience accumulated to date as well as of the fact that the Republic of Moldova is a signatory to the United Nations Convention against Corruption, Council of Europe Civil and Criminal Conventions and other relevant international documents.

It is worth noticing that in its prior conducted studies as well as in the framework of different meetings, TI-Moldova was drawing attention to the apparent existence in the Moldovan legislation of certain gaps and shortfalls adversely contributing to the activity displayed in the field of preventing and combating corruption. A logical step to do for the exclusion of such gaps would be introducing changes and amendments to the effective legislation and/or adopting a totally new law that would set grounds for conducting efficient activity in the field of preventing and combating corruption in the Republic of Moldova.

It is our understanding that the scope of the present draft law was to move towards adoption of the new law that would replace the currently effective *Law of Combating Corruption and Protectionism No. 900-XIII dated 27.06.1996*. It is true too that in the aforementioned draft an attempt was made to work out a law with new contents. As compared to the effective law the new draft included new sections, for example Article 9 titled "Corruption offences", Chapter III titled "Authorities vested with the competencies of preventing and combating corruption", Article 20 titled "Preventing corruption in the field of public procurements", Article 21 titled "Preventing corruption amongst political parties and other social-political organizations", Article 22 titled "Preventing corruption of elections", Article 23 titled "Instituting proceedings against corruption", Article 24 titled "State protection of the law enforcement bodies staff, persons cooperating with the law enforcement bodies, witnesses and victims of corruption", Article 26 titled "Responsibility of natural persons", Article 27 titled "Responsibility of legal entities" and other aspects, through which, in principle, the present draft differs from the effective law. Nonetheless, the draft low reveals some gaps, shortfalls and inaccuracies. To clear these we came up with the following objections and suggestions:

1. Since the notion of combating corruption contains corruption sanctioning we suggest excluding the word "sanctioning" appearing in the title of the law.
2. The notion of "corruption" stipulated in Article 1 is not exhaustive. Corruption is not just the "abuse of the official position and of possibilities offered by such with the scope of obtaining illegal gain…", but it is also the case when a person that does not hold any official position but makes promises, offers or gives some goods or other undeserved advantages to another person and by so doing affects bona fide performances of the latter. However, it is not always that the aforementioned scope is

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present, because otherwise this scope needs to be demonstrated. In this case the action is very important. We suggest that the wording of the notion is revised.

3. Arising from the contents, such notions as "corruption", "corruption offence", "act of corruption" appearing in Article 1, represent different interpretations of the notion of corruption and it is not clear why is it necessary. At the same time, Article 6 gives another notion of corruption, which differs from that appearing in Article 1. The reason of giving another notion is not clear. We suggest merging the notions appearing in Article 1 and 6.
4. The notion of "protectionism" (Article 1) is not exhaustive and unclear; it is also partially incorrect. Some time ago, TI-Moldova prepared a draft for making changes and amendments to the legislative acts that was circulated to the Center for Combating Economic Crimes and Corruption and to the Ministry of Justice. In this draft we suggested the notion of "nepotism" (or "protectionism" as accepted in the Republic of Moldova). We suggest revising the wording of the notion of protectionism taking into account our prior recommendations.
5. Likewise unclear is the notion of "corrupt behavior" (Article 1). What is the reason for suggesting such notion in the presented formulae? Arising from the text of the notion, it seems to come in contradiction with the presumption of innocence principle. On the one side "corrupt behavior" is an action or failure to take action by the subjects of corruption… that prove their desire to enter into corruption relations with other persons", which is rather an intention or an act of corruption subject to criminal prosecution, while on the other side, such actions or failure to take actions "do not contain features of an offence or contravention", and which should probably be part of observance of the requirements set forth by the Code of Ethics of Conduct. We suggest excluding this notion.
6. Included in Article 1 are two notions of "public servant" and "public functionary". Unfortunately, acceptance of these two notions in the Republic of Moldova has lead to artificial distinguishing of public servants and public functionaries. Probably that was done out of desire to highlight superior level of state servants. The Law of Public Service reads that public functionaries are only part of the totality of functionaries and stipulates that the present law applies only to these categories of public functionaries rather than to the public servants. This provision creates additional barrier for combating corruption. It is now the time to adopt unique notion for all the categories of public functionaries so as to simplify this issue. For example, accepted in the United Nations Convention against corruption is the unique notion of "public agent", which includes functionaries of all public structures and levels. We therefore suggest accepting unique notion of "public functionary" that should include public functionaries of all structures and levels, including the ones that are currently termed as "public servants".
7. Article 1 (Notions) does not include such notions as "foreign public functionary", "functionary of international public organization", "goods", "product of offence", "Seizure or sequester", "confiscation", "supervised delivery", "active corruption", "inactive corruption", "traffic of influence", "abuse", "money laundering", etc., which fact may give raise to different interpretation of the text of law and impede its application. These notions shall be included into the text of the law and at the same time harmonized with the text of other laws, including Criminal Code.

8. Article 2 (Scope and application of law) is not exhaustive and partially incorrect. We believe that the main scope of the law is to promote and strengthen measures targeted towards efficient prevention and combating corruption, and therefore we suggest that this very scope is accepted as the main one for this law. For example, establishing "properties of corruption" mentioned in the draft law could sooner be the object of a study rather than of a law. At the same time, we believe that it is wrong to list concrete domains of activity covered by the law (as it appears in Article 2) since the phenomenon of corruption could spread over all domains of activity rather than only to such identified in the draft law. Here it is necessary to stipulate that the law applies to prevention, investigation and prosecution in regard to corruption as well as to seizure, sequester confiscation and restitution of the product of corruption offence. Hence, this article needs to be amended.

   The word "properties", as a rule, are used to characterize substances (the so-called chemical or physical properties). Therefore it is suggested to replace the term "properties of corruption" in the contents of Article 2 and in the name of Chapter II.

9. The subjects of corruption listed in Article 7 are repeated for more than one time. Moreover, they differ from such appearing in other laws. For example, appearing as subjects of corruption in Article 7 are "persons that exercise public function", "persons that exercise controlling functions", "public servants", "elected persons", etc. At the same time, the Criminal Code is using the notions of "persons in charge of responsible functions", "persons in charge of functions of high responsibility", "a person not in charge of responsible functions", which differ from the first ones and thus create barriers to application of the law. We suggest that the list appearing in Article 7 is considerably simplified and harmonized with the notions appearing in the respective articles of the Criminal Code and other laws; i.e. ensure using of unified and explicit notions.

10. Article 8 (Forms of corruption) presents forms of corruption and in principle, stipulates the notions of "active corruption", "inactive corruption", "traffic of influence", "money laundering", "protectionism", and "political corruption". These notions shall be revised and included in Article 1 (Notions). Also here, in the text of the notions of corruption offences it is necessary to highlight these are the acts done intentionally. Although this article contains enumeration of corruption offences, by the use of word "including" the author has in principle escaped from listing all of the known types of corruption offences; at the same time wrongly included into corruption offences was "money laundering". We suggest including into the law the following corruption offences: "appropriation, embezzlement or any other unlawful use of assets by the public functionary", "abuse of office position", "unlawful personal gain", "corruption of foreign public functionaries and functionaries of international public organizations", "appropriation of assets in private sector" that are knows arising from the international experience.

    The notions of corruption offences appearing in this draft shall be identical with or correspond to such appearing in the respective articles of the criminal Code and other relevant laws. Therefore, concomitantly with submitting this draft law it is necessary to submit in a package drafts for making changes and amendments to the Criminal Code and other laws. Also here it is necessary to revise criminal responsibility for corruption offence provided for by the Criminal Code and in case of lack of provisions for responsibility in regard to some of these forms of corruption offenses – to envisage

respective amendments. Hence, in regards to corruption offences it is necessary to envisage criminal responsibility for the aforementioned corruption offences.

Conclusion that "money laundering" cannot be deemed as corruption offence arises from its notion: money laundering is an act of legalizing illegally obtained (criminal) money... The like criminal ways of obtaining money could be acts of corruption as well as acts of any other type of offence: theft, plunder, robbery, fraud, forgery of documents, economic offences, trafficking drugs, weapons, human beings, etc. As a consequence, in our case "money laundering" (or "laundering product of offence") is an offence which is indirectly related to corruption offence and therefore money laundering shall be governed by the respective law (AML Law). Likewise, same law shall serve to regulate other offences indirectly related to the corruption offences: "concealment", "impeding proper functioning of justice".

Article 8 para 3 describes political corruption, which fact requires inclusion into Article 1 the notion of „political corruption" and defining responsibility for the act of political corruption.

11. Arising from the contents, it follows that Article 9 shall be moved to Chapter V (Sanctioning corruption) and stipulate that corruption offences are subject to criminal charges without specifying the respective number of the Criminal Code.
12. It would be logic that after stating the forms of corruption there should follow a section on prevention and combating corruption. Therefore Chapter IV should follow after Article 8.
13. We believe that Chapter IV represents a very important part of this law. Listed in this chapter shall be the measures or mechanisms of corruption prevention in general, irrespective of the fact to which domain of activity it applies. Actually, all these measures or mechanisms are practically missing in this chapter. We believe these measures or mechanisms could be as follows:
    - Promoting efficient personnel selection policy in public sector. Strengthening the system of taking public functions on competitive basis based on the principles of efficiency and transparency and such objective criteria as: merits, impartiality, aptitudes. Protection of employees.
    - Ensuring transparency of activities (organization, functioning, decision making processes) displayed by central and local public administration bodies. Ensuring access to information representing public interest within the limits of restrictions stipulated by the effective legislation and international conventions;
    - Sensibilizing public opinion in regard to threat of corruption. Implementing programs for dissemination of legal anti-corruption knowledge, educating population, improving qualification (through education and training) of public functionaries;
    - Attracting or encouraging participation of civil society, non-governmental organizations, private sector in the process of corruption prevention;
    - Promoting integration into public sector and into business. Adopting and implementing Codes of ethics (conduct) and introducing disciplinary sanctions for non-observance of such. Instituting Commission or Agency for the Ethics

vested with competencies to conduct control over the observance of the Code of ethics in pubic sector;

- Encouraging cooperation between government bodies with the civil society and private sector;
- Instituting within public organizations and institutions the structures responsible for receipt and examination of information, applications and claims on the observance of legal requirements by the public functionaries;
- Implementing mechanism of declaring income and estate owned by the functionaries of different level and control over such declarations; declaring other activities, presents, advantages that may lead to conflict of interests;
- Informing public on diverse aspects of anti-corruption activity through mass media with strict observance of freedom of expression and of the principle of presumption of innocence;
- Conducting periodic assessment of the legal instruments and administrative measures with the scope of excluding conditions encouraging corruption. Attracting scientists, experts, civil society and private sector to working out regulatory acts, promoting efficient and well-coordinated practices for preventing corruption;
- Ensuring recuperation of prejudices inflicted through corruption;
- Ensuring protection of people that have communicated on the acts of corruption and cooperated with the specialized corruption combating agencies;
- Full implementation of the principles of the state of law. Ensuring observance of human rights and freedoms proclaimed by the Constitution and International documents to which the Republic of Moldova is a signatory;
- Applying mechanisms of good management of political problems. Ensuring transparency of financing political parties and election campaigns.
- Promoting transparency and accountability in managing public finances and assets;
- Promoting cooperation between the authorities;
- Adequate remuneration of public functionaries;
- Implementation of mechanism for prevention of conflict of interests;
- Implementing a system of public procurements based on transparency, competitiveness and objective demand;
- Preventing money laundering;
- Ensuring international cooperation;
- Ensuring independence and impartiality of prosecutors and judges, etc.

All herewith listed measures and mechanisms shall be implemented through other laws or regulatory acts through which the present law is directly linked with the totality of regulatory acts governing each domain of activity. For example with the Law of Public service, Law of public procurements, Code of ethics, Law of declaring income and estate and control over such declarations, etc. By so doing it

become possible to achieve prior mentioned scope of promoting and strengthening measures targeted towards efficient prevention and combating corruption. From here one could easily observe that if certain measures or mechanisms are not stipulated by the law such shall be worked out and made effective. For example, conflict of interests is not sufficiently regulated by the law at the moment. Hence, it is necessary to work out and implement the respective law; or for example in the law of public procurement, conflict of interests is not regulated when talking about implementation of public procurement procedures; it will be necessary to amend this law with respective provisions, etc. Adoption of the aforementioned list of measures and mechanisms sets foundations for strengthening already existing measures and mechanisms as well as such that have yet to be worked out an implemented.

14. Articles 16, 17 and 18, de facto represent stipulations referred to the law on declaring income and estate or some restrictions to public functionaries that need to be regulated by the Law of public service, or some aspects of the conflict of interests, the law on which needs to be drafted and implemented. Therefore, these articles in the presented formulae cannot be accepted. Basically, these articles shall stipulate measures for prevention of corruption in public sector: personnel consolidation issues (such as recruitment, hiring, stimulating, promoting, ensuring pension provisions), issues of ensuring integrity and sensibilization of corruption risks, implementation of codes of conduct, electing to a public mandate, observing requirements of financing political parties and election campaigns, ensuring transparency, preventing conflict of interests, transparent management and accountability of public finances, stimulating persons to communicate information on the acts of corruption, implementing systems of signaling through public functionaries acts of corruption known in exercising respective functions

15. Article 20 represents an aspect of conflict of interest in the domain of public procurements, stipulations that should be used to amend the Law of procurement of goods, works and services for the state needs No. 1166-XIII dated 30.04.1997.

    Public procurements as well as public finances seem to be rather attractive for corruptions. Therefore, arising from the international experience, public procurements and managing public finances need to be strictly regulated. We believe that the present law shall stipulate the general principles of public procurements and management of public finances that could allow to prevent corruption, and let the basic mechanism of public procurements and managing public finances be regulated by other laws (already existing). In what concerns public procurements, these principles are confined to ensuring transparency, competitiveness and objective criteria for making decisions, efficient measures for preventing corruption that should comprise public dissemination of information concerning public procurements, timely setting up conditions of participation, use of objective and predetermined conditions, an efficient system of internal recourse, and preventing conflict of interests. In what concerns management of public finances, these principles are confined to promotion of transparency and accountability in managing public finances; these should include the following measures: procedures of adopting the national budget; timely communication of expenditures and revenues; accounting, auditing and control standards; risk managements and internal control as well as the measures on protecting integrity of registers and balance sheets, financial statements and other

documents referred to public expenditures and revenues, and preventing forgery of such documents.

16. Arising from the text, political corruption was subdivided (through Articles 21 and 22) into "corruption of parties and other social-political organizations" and "election corruptions", which comes in contradiction with Article 8 para 3 of the present draft law. Basically, these articles of the draft law suggest regulation of financing of political parties and election campaigns. We believe that these stipulations could be regulated by the Law of parties and other social-political organizations and Electoral Code or by some other laws of financing parties and election campaigns, bearing in mind prior intentions in regard to possible working out such draft law.

    Also, arising from the contents of the draft law, actions envisioned under Article 21 para 6 (carrying out financial operations through the accounts opened by the parties and other social-political organizations with the banks displaying their activity in the territory of another state) and Articles 22 para 4 (buying or selling in any form votes of the electorate) are qualified as acts of corruption. However, these "acts of corruption" are not regulated by Article 8 (Forms of corruption) and Article 9 (Corruption offences).

17. Contents of Article 19 (Facts of corrupt behavior) represent continuation of the notion of "corruption offence" stipulated in Article 1. Listed in Article 19 are "the facts of corrupt behavior", although from the text of this article it is not clear for what purpose these are enumerated and what should be done with these next. Generally speaking, "enumerated facts of corrupt behavior" represent some more narrow aspects or some ways of manifesting certain forms of corruption prosecuted by Criminal or Administrative Codes and/or some infringements of the Code of ethics. For example, item a) refers to abuse of office position; item j) refers to the theft of pubic funds; item k) refers to inactive corruption, etc., while item l) refers to infringement of deontological code. However, the law cannot regulate every possible way of manifestation of acts of corruption. Therefore, regulated through the law shall be the notions and the indicators of the respective forms of corruption while in case when allegedly committed was an act of corruption, each deed (in the form it manifested itself) shall be qualified in compliance with the respective notion" facts of corrupt behavior" we are placing in the same "basket" both different forms of corruption and other different actions banned by the codes of ethics. This creates misunderstanding and barriers in the activity targeted towards prevention and combating corruption. Therefore, in addition to the notion of "corrupt behavior" we also suggest to exclude stipulations referred to the "facts of corrupt behavior".

18. Measures of prosecution of corruption offences listed in Article 23 differ from such listed in the Law of operative activity and investigation. Therefore it is necessary to bring them in conformity with this law as well as with the Code of Criminal Procedure, laws on specialized bodies for combating corruption and criminality. Paragraph 3 of this Article shall be excluded.

19. From the provisions set forth under Article 25 it follows that the Coordinating Council and Commission on Ethics have access to information referred to banking or commercial secret. These provisions are incorrect and therefore shall be excluded.

20. We believe that the following measures need to be additionally stipulated in Chapter IV (Measures for preventing and combating corruption):

- Measures for preventing corruption in private sector;
- Preventing money laundering or product of corruption offence;
- Participation of civil society, non-governmental organizations and mass media in corruption prevention;
- Measures targeted towards discouraging perpetration of corruption offences;
- Informing public (information referred to criminal prosecution of corruption offences and that could be divulged so as not to create divergences between prosecution bodies and representatives of mass media);
- Furthering integration of prosecution services and judges;
- Cooperation between public authorities and corruption prosecution bodies;
- Cooperation between private sector, civil society and mass media with the prosecution bodies;
- International cooperation;
- Using method of supervised deliveries;
- Immunity of public functionaries (regulating procedure of lifting immunity, adequate balance between immunity and possibility to investigate, prosecute and effectively trying corruption offences) as well as immunity of persons substantially cooperating with the investigation. We also suggest that in cases of lifting immunity of public functionaries, it should be done by the judiciary instance so as to impede political influence;
- Implementation of the codes of ethics;
- Seizure, sequester and confiscation of product of offence as well as of funds used or meant for corruption offence;
- Possibility of revoking, suspending or transferring public functionary accused of corruption offence;
- Restitution of assets and prejudices.

21. In what refers to Chapter III titled "Bodies vested with the competencies to prevent and combat corruption" it is evident that the author of the draft is well aware of the fact that involved in the process of preventing and combating corruption shall be all the stakeholders (i.e. all bodies and persons implementing measures targeted towards prevention and combating corruption), which is laudable, but still it is necessary to make more clear delimitation of these bodies and their competencies otherwise in the totality of listed bodies it will be much more difficult to determine which of them are responsible for the specific sector on the one side and on the other side to prevent and combat corruption in general. For example, listed in Article 10 are the bodies vested with competencies to prevent and combat corruption. Amongst these appear the Coordination Council, Commissions for control of declarations and the Commission of Ethics. All these institutions are playing their role in anti-corruption activity but they cannot be vested with the competencies of combating corruption same as the procuracy and the Center.

    Taking into account international experience as well as the current status of things in this domain in Moldova we believe that Art. 10 shall stipulate specialized bodies

vested with the competencies to combat corruption: the Anti-Corruption Procuracy affiliated by the Procuracy General of the Republic of Moldova and Center for Preventing and Combating Corruption – bearing in mind recommendations of the Council of Europe experts on freeing the Center from carrying out criminal prosecution on other types of offences if such are not associated with the acts of corruption. Likewise, vested with the competencies of combating corruption shall be Information and Security Service Bodies in cases when the acts of corruption are disclosed by the latter and when the state security is at stake; and the Internal Affairs Bodies in cases when the acts of corruption are disclosed by the latter and provided they coordinate their actions with the Center for Preventing and Combating Corruption. At the same time, the Center shall be also vested with the competencies of preventing corruption (including organizational) so that all the activity in preventing corruption in the territory of the Republic of Moldova is coordinated by this Center. Thus, the Center shall become responsible for preventing and combating corruption in the Republic of Moldova.

Also, it is necessary to stipulate in this chapter the need to institute and basic competencies of the Coordination Council in the issues of Preventing and Combating Corruption, Commission for examination and control of declarations on income and estate and Commission for Ethics – all highly important for anti-corruption activity. The draft law stipulates the competencies of the first two although there is noting said about the need to institute and competencies of the Commission for Ethics. Hence, this chapter needs to be accordingly amended to stipulate institution and competences of the Commission for Ethics.

In the same chapter it is necessary to stipulate basic competencies of the Court of Accounts as the authority vested with higher control over the management of public finances and public assets.

Also included in this chapter shall be a section referred to the competencies of the legal education in anti-corruption, primarily the Ministry of Education and Academy of Public Administration in cooperation with the Ministry of Justice, Center for Preventing and Combating Corruption and other law enforcement bodies

Likewise, in this chapter it is necessary to stipulate basic anti-corruption competencies of the central and local public administration bodies (strengthen personnel selection system, ensuring integrity and transparency, etc.), competencies of the state and private sector management, non-governmental organizations and mass media.

Hence, accordingly modified shall be Articles 10, and 11 through 15.

22. We suggest amending Chapter V (Sanctioning corruption) with the following:
    - Corruption offences are subject to sanctions commensurable with the gravity of such;
    - Sanctioning corruption offences includes sanctioning the fact of participation in an offence, intention to perpetrate such and the fact of preparing an offence;
    - Term of prescription, extension of the term of prescription or suspending prescription;
    - Responsibility of the state.

We suggest that the draft law is subjected to substantial changes and amendments. We believe that the aggregate of objections and suggestions on this draft law will contribute to drafting efficient and viable law for most efficient preventing and combating corruption in the Republic of Moldova.

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