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Programme to Support the National Anti-Corruption Strategy of Moldova (PACO Moldova)

REVIEW OF COMPETENCIES OF THE MAIN ENFORCEMENT INSTITUTIONS IN THE INVESTIGATION AND PROSECUTION OF CORRUPTION OFFENCES

Recommendations resulting from a PACO experts mission
Chisinau, Moldova (11-15 April 2005)

Council of Europe
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Programme against corruption and organised crime in South-eastern Europe

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These recommendations have been prepared by joint working group of Council of Europe experts participating at the review of competencies activity under PACO-Moldova project and do not necessarily reflect official positions of the Council of Europe.

1. INTRODUCTION

Within the framework of the PACO Moldova project the Government of the Republic of Moldova invited the Council of Europe to review the competencies of the law enforcement agencies investigating corruption offences. The Council of Europe project manager led a team of three technical experts on a visit to Chisinau from 11-15 April 2005. The team consisted of:

- Mr. Bertrand de Speville, UK, independent anti-corruption consultant.
- Mr. Jean-Marie Lequesne, Belgium; Conseiller de Direction, Police fédéral, Direction de la lutte contre la criminalité ECOFIN.
- Mr. Bostjan Penko, prosecutor, Slovenia; former Director of the Office for the Prevention of Corruption of the Republic of Slovenia.
- Ms. Natalia Kravchenko, project manager for PACO Moldova, Council of Europe, Strasbourg.

The team held a series of meetings with representatives of the Government, investigating, prosecuting and control authorities, the judiciary and civil society. Towards the end of their visit they were able to discuss their preliminary recommendations with these representatives and take account of their comments.

The conclusions and recommendations that follow are the joint views of the experts. They do not necessarily reflect the official position of the Council of Europe. The experts note that a large measure of support for their main recommendations seemed to have emerged during the final plenary meeting.

The recommendations aim to clarify functions of main law-enforcement institutions. It is understandable that some of them might be subject to further examination and discussion by national authorities.

2. CONTEXT

The prevention and suppression of corruption are priorities of the Government of Moldova. Pursuant to these objectives a number of legal texts have been enacted and are in force. The Government has undertaken a comprehensive effort against corruption, starting with the establishment in 2002 of a Centre for Economic Crime and Corruption to which it allocated substantial resources. The Parliament recently adopted an amended National Anti-corruption Strategy and Action Plan which focuses specifically on anti-corruption, as opposed to wider good governance.

Up to now the fight against corruption has concentrated on the enforcement element of the strategy. Little has been done about prevention and public education and support, except for what has been achieved by civil society, notably Transparency International Moldova. With regard to investigation of corruption, five agencies consider that they have the necessary competencies and specialised skills.

In order to put an anti-corruption strategy into effect, several elements are necessary:

- a legal framework shaped for the fight against corruption;
- an anti-corruption institution, independent and adequately funded, and accountable to the authorities and the community for its implementation of the strategy;
- investigators, prosecutors and judges, well trained, sufficiently independent and credible;
- the opportunity for the public and the institutions of the administration easily to report instances of corruption;
- the support of policymakers for the implementation of the strategy and the allocation of adequate funds;

- media participation and the sensitising and education of the community.

In the context of this mission, the experts were required to focus mainly on the first three of these elements.

3. ANALYSIS

The legal framework has been significantly updated:

- a new Criminal Procedure Code
- the Law on Fighting Corruption and Protectionism
- the Law on the Public Prosecutor Office
- the Law on the Centre for Fighting Economic Crime and Corruption.

No major amendments would be needed to put the recommendations that follow into effect. They could be implemented with a minimum of delay and without waiting for any legislative amendments.

The Centre is a young institution which has yet to reach its full potential and prove its worth. As is to be expected, adjustments to the institutional and practical arrangements for fighting corruption are needed from time to time, especially to the institution created as the specialist anti-corruption body in the early stage of its existence.

The Centre has been functioning for long enough for it to become evident that the Centre has had difficulty in establishing effective relations with the other institutions that at present also have responsibilities for investigating corruption, namely the Prosecutor General's Office (particularly the Anti-corruption Office) and the Ministry of Internal Affairs (the police), the Information and Security Service and the Customs Department.

Furthermore, according to the information presented by civil society, the level of corruption in the country has not improved during the last few years. That raises the question of the effectiveness of these initial measures.

This situation in part results from overlapping competencies, a perceived dissipation of resources and the leakage of information which combine to obscure the global vision needed to fight corruption successfully. Institutions are not complementing each other in performing their activities but rather they are competing in each of these areas in a duplicative and inefficient way. The reasons for this non-productive behaviour on the part of the relevant institutions as regards harmonised and efficient joint activities are not obvious, but they cannot be legitimate or justifiable.

Several institutions are capable of successfully conducting corruption investigations and the quality of the work is not in issue here. But a rationalisation is required, particularly in order to make it clear who is responsible for what is done and for what is not done in this fight against corruption.

4. CONCLUSIONS AND RECOMMENDATIONS

Having considered the relevant legislation and had meetings with officials of the three institutions most closely concerned who provided valuable and privileged information about their activities, the experts have formed their views and make recommendations as follows:

The Centre

1. The Centre was created as the leading institution in the fight against corruption in order to investigate corruption and economic crime. It is intended to be the specialist body for fighting corruption in Moldova. It should focus on that anti-corruption role.

2. Fighting corruption successfully requires more than investigation; it also requires prevention and public education and support. It is essential that these three elements of Moldova's recently endorsed National Anti-corruption Strategy should be advanced together, at the same time and in a coordinated way. It follows that the Centre should have an expertise not only in investigating corruption but also in prevention and in public education and support.

3. The Centre's structure should reflect its responsibility for these three elements of the national anti-corruption strategy. Therefore, in addition to its existing investigating capacity, it should have a prevention department and a public education and support department.

4. As regards investigation, the Centre should deal only with corruption offences and corruption-related offences. It should not deal with cases that have no connection with corruption.

5. It is necessary that the mandate to investigate corruption should include the mandate to investigate other criminality that is suspected of being connected with corruption. The reason is that much criminality, especially organised crime and economic crime, is facilitated by corruption. Often the only way to get at the underlying corruption is to deal with the obvious criminality.

6. The Moldovan authorities should consider whether it continues to be necessary for the Centre also to be responsible for investigating economic crime, tax evasion offences, legalisation of assets and money laundering where there is no corruption involved. These areas of responsibility should be transferred to the police and the Ministry of Finance. If, however, the Government decides not to return those responsibilities to the police and the Ministry of Finance, the Centre should be structured so that economic crime and tax evasion are dealt with by separate departments of the Centre. As regards money laundering, there is good reason for leaving that specialised unit as a separate part of the Centre. Much money laundering is facilitated by corruption and the unit draws on operational support from the Centre. It provides services both to the Centre and to other law enforcement agencies, and, since it is established satisfactorily at the Centre, there seems to be no reason to move it.

7. The fight against corruption should be conducted in the whole country. It is therefore necessary that the Centre should have a presence in the main centres of population in Moldova. One possibility might be that the eight branches that did exist until recently should be reinstated, not for fiscal audit and control as before but for effectively fighting corruption.

8. It is necessary that the Centre should investigate all reports of corruption that it receives and that it should not try to select only important cases to investigate. The reason for this investigating policy are:

- First, putting aside a minor allegation will deter the complainant from ever returning, perhaps with a much more important matter.
- Second, what at first appears minor quite often turns out to be important when investigated.
- Third, picking and choosing what to investigate and what not to investigate raises suspicions that the anti-corruption body is motivated by improper or political motives, if not by corruption.
- Fourth, ignoring some complaints gives the impression that some corruption is tolerated, that double standards apply.
- Finally, the fact is that widespread small scale corruption can do serious damage to the wellbeing of a country and that a single small act of corruption can have disproportionately serious consequences.

The investigation department is therefore demand led and needs to have sufficient investigators to meet the demand. The amount of resources put into investigating what is indeed a minor matter will, of course, be small in comparison to the resources put into investigating a major matter. What is important is that in both cases the public should feel the investigation has been properly done, even when it does not lead to a prosecution before the courts.

9. As a specialised anti-corruption body, the Centre should ensure that its personnel is specialised in the different areas of expertise for investigating and preventing corruption. Induction at senior management level should be undertaken at the earliest opportunity, with external assistance if required. That would enable the senior management to take the policy and management decisions needed to reposition the Centre as the implementing engine of Moldova's strategy against corruption. Thereafter phased training for the staff of the Centre should follow. In time the Centre can be expected to develop its own training capability.

10. If public support, an essential requirement for success, is to be developed, the Centre will need to be properly accountable for its leading role in implementing the National Anti-corruption Strategy. The Monitoring Group and the Coordinating Council receive reports from the Centre at regular intervals. Parliament receives an annual report of the Centre's activities. That annual report should be made available to the public.

11. The Centre cannot be expected to undertake the national fight against corruption on its own. It is essential that it should develop over time the active cooperation of all sectors of the community. For that purpose close liaison with civil society is desirable. In particular the Centre should work with the non-governmental organisations that are already carrying the anti-corruption message to the community.

12. It is probable that the adjustments recommended to the structure and composition of the Centre can be achieved by the redeployment of existing resources. Redeployment should be done first; over time it will become clear whether an adjustment to the existing level of resources is necessary.

The Prosecutor General's Office

13. The role of the Anti-corruption Office and the allocation of tasks between that office and the Prosecutor General's Office did not appear clearly to the experts. The Anti-corruption Office currently is not a part of the structure of the Prosecutor General's Office but has the status equivalent to a District Prosecutor's Office. Furthermore, for reasons that are unclear to the experts, the Anti-corruption Office is not the unit that supervises the Centre. Another unit in

the Prosecutor General's Office appears to have that responsibility. In order to create a proper balance between the Centre and the Prosecutor General's Office, the structure that previously existed should be restored, namely the Anti-corruption Office should be reintegrated into the Prosecutor General's Office.

14. The prosecutors working in the Anti-corruption Office should be specialised in prosecuting corruption cases and properly supported in the efficient performance of their functions. Their terms and conditions of employment should be comparable to Centre personnel at similar seniority.

15. The experts understand from the discussions with the representative of the Minister of Finance that the public prosecution service is itself competent in preparing its budget and submitting it to the Ministry of Finance. It is not entirely clear whether the Prosecutor General's Office takes part in the subsequent budget negotiations. The prosecution service should take part in this process to ensure that its case for a proper share of budget resources is made and taken into account.

The Police

16. In consequence of the recommendation that all allegations and suspicions of corruption should be investigated by the Centre, the police should not continue to investigate cases of corruption. In order to develop the expertise needed to deal effectively with corruption and to ensure the security of information, it is necessary that operational investigations should be centralised in one agency.

17. There would remain a practical problem to resolve about "street corruption" especially in the border areas and in customs, for the reason that the Centre's structure and establishment is at present unsuited for that kind of case. The Centre's structure needs adjustment as soon as possible so that it has a presence in the main centres of population and can deploy investigative personnel as required. In the meantime, referrals from the local police should be acted on from the Centre's branches at Chisinau, Balti and Cahul.

18. The police use article 272 of the Criminal Procedure Code to assume responsibility in corruption cases ("urgent" cases). This article is being misinterpreted and, if necessary, its wording should be clarified. The same point applies as regards article 273 of the Code concerning the control and audit services.

19. Taking into account their role in the detection of corruption, it is necessary to pay particular attention to the Directorate of Internal Security in the police and to the ISS as regards their necessary cooperation with the Centre. Where those inspection services become suspicious, or receive allegations, of corruption against police officers or judiciary officers, they should be required to refer them uninvestigated to the Centre. Conversely, an allegation of non-corruption crime, such as fraud, theft or rape against an officer of the Centre should be investigated by the police, just as such an allegation against a police officer would be investigated by the police. The appointment of liaison officers in these services could be helpful for the purpose of these referrals.

20. The Ministry of Internal Affairs' best corruption investigators should be transferred to the Centre if they are suitable in all other respects. Conversely, personnel of the Centre not required for anti-corruption duties should be transferred to other law enforcement agencies.

21. Recognising that each service has particular specialists, the Procurator General should, if necessary, be able to assemble joint investigation teams (MIA and CCECC) in complex criminal investigations (where for example corruption is involved in human trafficking or smuggling). Joint teams are an inevitable consequence of the specialisation of services.

22. Different units of the Ministry of Internal Affairs have an important role in uncovering instances of corruption and there seems to be an insufficient exchange of information between these units and the Centre

23. The possibility of creating a standing operational liaison committee involving the CCECC, the MIA and the General Prosecutor's Office should be explored. One of its functions should be to ensure that investigations done by the Centre that no longer contained a corruption element would be completed by the appropriate agency.

Relations between law enforcement institutions, particularly with the Prosecutor General

24. The competencies of the five institutions that currently involve themselves in investigating corruption offences overlap. The result is, not that one of these institutions tries to pass investigations to another, but that they compete to retain the cases they have identified. They manage to achieve that objective because the Prosecutor General's Office, on grounds of efficiency, naturally allocates the work of criminal investigation to the institution that referred the case. The result is that corruption investigations, recognised as needing attention by a specialist agency, are being investigated by agencies that either do not have a specialist mandate or do not have the expertise required.

25. The converse also applies. The specialist anti-corruption agency, the CCECC, is dealing with matters that do not involve corruption. The result is that the Centre tries to develop expertise in tax evasion offences, for example, and thus duplicates the expertise needs of the Ministry of Finance.

26. It seems clear that the effective and efficient investigation of corruption requires all investigating agencies to refer allegations of corruption to the specialist body, the Centre, and for the Centre to refer allegations that are unconnected with corruption to the appropriate investigating agency, whether the police or the tax authorities or the prosecuting authorities.

27. It would probably be unnecessary for the Criminal Procedure Code to be amended. The existing competence provisions in that Code need only to be applied consistently with the underlying policy. That would clarify who does what as regards the investigation of offences.

28. The Prosecutor General (more exactly the Anti-corruption Office) is striving for competencies that are either already included in the powers of the Centre or are not typical of a public prosecutor (for example, corruption prevention). It is an attitude that ignores the existence of the Centre. The only prevention that the public prosecutor should perform is the maximum use of efficiency, professionalism and competence in conducting prosecutions resulting in convictions for corruption.

29. The Anti-corruption Office has a superior power in relation to the other two institutions (the Centre and the police), so it also bears a correspondingly heavy responsibility for the outcomes. It can always either assign a case to another institution or take it over and carry out its own investigation.

30. A public prosecutor is as a rule not substantially capable of carrying out investigations by itself. Prosecutors are criminal lawyers, not trained as investigators. Public prosecutors are capable of doing things that expert investigators cannot, and vice versa. This should be understood and respected in Moldova, as it is elsewhere.

31. It is certainly the function of a public prosecutor always to take into account the merits of the case when it assigns it to a particular law enforcement institution. The fact that a particular agency first identified a case is not of itself a justifiable reason under article 271(4) of the Criminal Procedure Code for assigning it to that agency. Decisions of the public prosecutor based upon the application of article 271(4) should clearly set out the reasons for assigning the case to a particular institution. The decision should be part of the case file and should be subject to judicial review regarding the competency of the agency to whom the case was assigned. There should be a procedural sanction imposed by the court where article 271(4) has been applied for reasons that cannot be properly justified (this would mean that the investigation had not been carried out by a competent body). Courts should be aware of this and strictly apply this rule.

32. Prosecutorial decisions in this respect should lead to a clearer situation where all corruption cases would be assigned to the Centre and all others to other relevant institutions. This could be done without changing the law relating to competencies. The law needs only to be interpreted correctly and in conformity with national policy in order to overcome any overlapping. The Prosecutor General's Office should normally refrain from allocating corruption files to the police. In accordance with the Criminal Procedure Code it should do so only exceptionally and for good reason.

33. These actions need the active participation of the Centre and the MIA. They should ask the PGO for the assignment of cases in conformity with the recommendations that the Centre should exclusively investigate corruption and that the MIA should investigate all other offences not involving corruption, including economic crime.

34. Applying articles 269, 271 and 272 of the CPC as they are currently being applied creates a continuous state of conflict of competencies which is, according to article 271 of the CPC, inadmissible. This state of affairs could be entirely avoided by acting in accordance with these recommendations.

35. For the future the position should be as follows:

    a. All allegations of corruption should be referred, uninvestigated, to the Centre which should carry out the preliminary investigation, if necessary under the supervision or direction of the PGO. Investigations should be done by the Centre, prosecutions should be conducted by the PGO;
    b. The MIA or some other investigating body should deal with all other crimes;
    c. The PGO should not on its own carry out investigations.

36. The audit and control of taxpayers is a matter best performed by the tax authorities. It should not be done by the anti-corruption agency. That agency should become involved only when a suspicion arises of corruption between taxpayer and tax official.

37. A clear demarcation of responsibilities has the advantage of improving the prospects of accountability. The agency responsible for investigating an area of criminality is identifiable and can properly be held accountable.

38. The demarcation of investigating responsibility does not imply a cessation of operational cooperation or policy coordination. On the contrary, the specific requirements of operational cooperation would become clearer and could more readily be provided.

39. Article 270 of the Criminal Procedure Code does not appear to prevent the Centre from carrying out preliminary or operational investigations in connection with the persons listed in that article, subject to any constraints that may be imposed by the immunities enjoyed by those persons. It is noted that a recommendation of GRECO addresses the question of these immunities.

Corruption offences

40. There needs to be a clear understanding of what constitutes a corruption offence. Without such an understanding there is a tendency to regard many forms of criminality as corruption. Essentially corruption offences all involve the abuse of one's position in exchange for an improper advantage from another. At the centre are bribery and extortion. Closely connected are abuse of official position, unauthorised gifts, trafficking in influence and illicit enrichment.

41. The investigative mandate of an anti-corruption agency should cover the anti-corruption offences contained in the Criminal Code but should not cover other offences unless those other offences are connected to corruption in a particular case. If this distinction were applied to the articles of the Criminal Code currently falling within the competency of the Centre, articles 191, 195, 236-242, 244-261, 328, 329, 331 and 336 would be excluded from that competency as not being corruption offences. However, these offences, as all other offences in the Criminal Code, would fall within the Centre's competency if in a particular case corruption were suspected to be involved. To this limited extent it would probably be necessary to amend the Criminal Procedure Code to make clear that the mandate of the Centre included offences suspected of being connected with corruption.

42. Article 330 of the Criminal Code appears to criminalise passive bribery committed by a servant who is not an official. Article 333 appears to criminalise passive bribery by a person who administers. Neither article appears to apply to a person who is not a servant or administrator but an agent. These articles should be amended to include that aspect.

43. The soliciting or acceptance of gifts by public officials is a significant cause of corruption in the public service, not least because it often cannot be shown to have been solicited or given as a bribe. The Moldovan authorities should consider whether gift should be an offence, albeit not as serious an offence as bribery, for a civil servant to solicit or accept a gift without the general or specific permission of the head of the Administration.

44. They should also consider whether an offence of illicit enrichment (or unexplained wealth) referred to in the United Nations Convention Against Corruption should be added to the Criminal Code.

45. Generally there are no problems in applying the relevant provisions of the Criminal Code by public prosecutors. However one situation has been pointed out concerning article 327 (The abuse of power or of an official position). Prosecutors consider the wording of this article an obstacle to effective prosecution of corruption.

46. The problem is that, in applying article 327, the public prosecutor has to prove not merely "bare" intent but so called "dolus coloratus" in relation to the act "resulting in substantial harm to the public interests or to the legally protected rights and interests of individuals and

legal entities". Prosecutors often fail to do so, in spite of the existence of all other elements of the offence. Prosecutors believe that the definition of this offence in unnecessarily burdened with this element and that this article might be amended. The experts share that view and suggest that the definition of this important offence should be reconsidered.

47. Article 6 of the Law on Operative Investigation contains no guidance on the activities of "agents provocateurs" and entrapment in relation to corruption offences. It is therefore unclear if there is a legal basis for this important method of revealing corruption offences. This question should be clarified.

48. The interception of communications can be done only in relation to a "grave offence" (Law on Operative Investigation, article 8(1). The experts were informed that corruption offences are not characterised as grave in the Criminal Code and the Criminal Procedure Code. That limits the use that can be made of interception in corruption cases or corruption-related cases. The authorities may wish to reconsider that policy.

5. SUMMARY OF PRINCIPAL RECOMMENDATIONS

In order to improve the efficiency and effectiveness of Moldova's fight against corruption:

A. The Centre should focus on leading the implementation of the national strategy against corruption and should be accountable to the people of Moldova for its part in the implementation of the strategy.

B. The Centre should investigate only corruption cases and corruption-related cases.

C. The Centre should not investigate cases that do not involve corruption but should refer such cases to the appropriate investigating agency.

D. All agencies, ministries and departments of the Administration of Moldova should refer all allegations or suspicions of corruption, uninvestigated, to the Centre.

E. The Centre should adjust its structure and composition so that it can implement the two other essential elements of the national anti-corruption strategy, namely prevention and public education and support, which includes active cooperation with the community.

F. Since the national anti-corruption strategy applies to the whole country and to all sectors of the community, the Centre should have a presence in all major centres of population.

G. Steps should be taken to ensure that the Centre recruits only the best for the tasks it has to perform, including recruitment from among those who are currently engaged in anti-corruption work.

H. Appropriate induction and training for the directors and other personnel of the Centre should be undertaken so that they are better able to carry out their functions.

I. The police should no longer investigate allegations or suspicions of corruption but should refer them to the Centre. The police should continue to investigate all other forms of criminality.

J. The Prosecutor General's Office (PGO) should continue its traditional role of guiding and directing criminal investigations, including corruption investigations. If the PGO is to have a specialised unit dealing with cases from the Centre, there should be only one such unit.

K. By and large the framework of laws dealing with competencies is satisfactory. Its application in conformity with the underlying policy would ensure the appropriate separation of competencies. It may be necessary to make other changes to relevant legislation relating to offences and procedure.

L. The Moldovan Government should continue to make substantial investment in the fight against corruption. In particular, it should ensure that the prosecuting and judicial services dealing with corruption are adequately funded. As regards the Centre, a redeployment of existing resources is all that is required for the time being.

6. NEXT STEPS

If the Government of Moldova decides to proceed along the lines suggested, a Governmental instruction could be issued to all parts of the Administration redirecting the investigation of all corruption offences to the Centre and of all non-corruption offences to the other law enforcement agencies. To avoid misunderstanding, the instruction could refer to the corruption offences contained in the Criminal Code and, for readers who are unfamiliar with legal provisions, could explain what is meant by corruption in this context, namely the abuse of one's position in exchange for a improper advantage from another.

The necessary adjustments to the structure, organisation and composition of the Centre should follow. In this process of adjustment the first step should be a senior management induction consisting of a 2 day retreat with an external facilitator. Immediately after the retreat the senior management should make the operational policy decisions that will reshape the organisation, structure, composition and operational procedures of the Centre.

7. ACKNOWLEDGEMENTS

The experts are indebted to those who gave so generously of their time to discuss candidly the situations facing them. The concentrated series of meetings would not have been possible without the assistance of the Director and staff of the Centre, the Special Representative of the Secretary General of the Council of Europe and the Council of Europe's Moldova Project Manager. The experts are grateful to each of them for the unstinting help they gave.

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ANNEX: RECOMMENDATIONS RELATED TO CORRUPTION OFENCIES

1 The GRECO First Evaluation Report of October 2003 noted that the new Criminal Code of Moldova (adopted in 2002) dealt with the anticorruption offences required by the Criminal Law Convention on Corruption, with the possible exception of imposing criminal liability for corruption on legal entities. This report follows up on the GRECO report and suggests some additions and amendments to the Criminal Code that would make the armoury of offences more complete. It also suggests two amendments to the Law on Operative Investigation that would increase the effectiveness of corruption investigations.

2. In the context of Moldova's National Anticorruption Strategy, there needs to be a clear understanding of what constitutes a corruption offence. Without such an understanding there is a tendency to regard many forms of criminality as corruption. Essentially corruption offences all involve the abuse of one's position in exchange for an improper advantage from another.[1] At the centre are bribery and extortion. Closely connected are abuse of official position, unauthorised gifts, trafficking in influence and illicit enrichment.

3. Article 330 of the Criminal Code appears to criminalise passive bribery committed by a servant who is not an official. Article 333 appears to criminalise passive bribery by a person who administers. Neither article appears to apply to a person who is not a servant or administrator but an agent. These articles should be amended to include that aspect. An offence along the following lines would achieve that object by covering all situations relating to employers and employees and to principals and agents:
"In relation to his employer's or principal's business or affairs, the soliciting or accepting by, or offering to, a servant or agent of any advantage without the prior approval of the employer or principal is an offence."

4. The soliciting or acceptance of gifts by public officials is a significant cause of corruption in the public service, not least because the gift often cannot be shown to have been solicited or given as a bribe. The Moldovan authorities should consider whether it should be an offence, albeit not as serious an offence as bribery, for a civil servant to solicit or accept a gift without the general or specific permission of the head of the Administration. General permission for accepting certain categories of gifts would be given by decree or other appropriate administrative direction. The wording of such an offence could be along the following lines:
"A public official who, without the general or special permission of the head of the Administration, solicits or accepts any advantage commits an offence."

5. In view of the difficulty of obtaining evidence of bribery, particularly against senior public officials, the Moldovan authorities should consider whether an offence of illicit enrichment (or unexplained wealth) referred to in the United Nations Convention Against Corruption should be added to the Criminal Code. The wording of such an offence could be as follows:
"Any person who, being or having been a public official, maintains a standard of living out of keeping with his present or past official earnings or is in control of property in excess of his present or past official salary commits an offence unless he gives to the court a satisfactory explanation of how he was able to maintain such a standard of living or how he came to control such property."

6. Article 63 of the Criminal Code appears to attach criminal liability to legal entities. There seems to have been some doubt, however, whether such liability extends to corruption offences.[2] The Moldovan authorities should take steps to resolve any such doubt.

7. Generally there are no problems in applying the relevant provisions of the Criminal Code by public prosecutors. However one situation has been pointed out concerning article 327 (The abuse of power or of an official position). Prosecutors consider the wording of this article an obstacle to effective prosecution of corruption.

[1] See article 2 of the Law on Combating Corruption and Protectionism (No. 900 of 1996). The meaning of corruption given in that article appears to exclude private sector corruption by referring to the "public service" but it is clear from the Criminal Code that private sector corruption is an offence in certain circumstances.
[2] Paragraph 9 of the GRECO report of October 2003 refers.

8. The problem is that, in applying article 327, the public prosecutor has to prove not merely "bare" intent but so called "dolus coloratus" in relation to the act "resulting in substantial harm to the public interests or to the legally protected rights and interests of individuals and legal entities". Prosecutors often fail to do so, in spite of the existence of all other elements of the offence. Prosecutors believe that the definition of this offence in unnecessarily burdened with this element and that this article might be amended. The experts share that view and suggest that the definition of this important offence should be reconsidered. It may be sufficient simply to delete the words of the article quoted above.

9. Article 6 of the Law on Operative Investigation contains no guidance on the activities of "agents provocateurs" and entrapment in relation to corruption offences. It is therefore unclear if there is a legal basis for this important method of revealing corruption offences. This question should be clarified in accordance with the criminal jurisprudence of Moldova.

10. The interception of communications can be done only in relation to a "grave offence" (Law on Operative Investigation, article 8(1). The experts were informed that corruption offences are not characterised as grave in the Criminal Code and the Criminal Procedure Code. That limits the use that can be made of interception in corruption cases or corruption-related cases. The authorities may wish to reconsider that policy so as to enable an application to be made for an interception order in corruption cases or corruption-related cases.

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