NORLAM
THE NORWEGIAN MISSION OF RULE OF LAW ADVISERS TO MOLDOVA

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Ministry of Justice of the Republic of Moldova

Informative note: *REGARDING DIFFERENT ISSUES CONNECTED TO „ILLICIT ENRICHMENT"*

1. Is it rational to include in the Moldovan Criminal Code the offence of „illicit enrichment" (as it is provided for in Article 20 of the UN Convention on Against Corruption)? If yes, then is it necessary to specify that the „illicit enrichment" may be imputed only if there are no signs of other crimes, or should the „illicit enrichment" be a separate offence?

Article 20 of the Convention reads:

Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

The question put forward by the MoJ was also debated in Norway in relation to the ratification of the Convention. In the preparatory works from 2005-2006 the demands in Article 20 are assessed and discussed, and the conclusion of the Norwegian approach to the question of whether to make "illicit enrichment" a separate offence, is given. The preparatory works state:

> "Article 20 obliges the States in accordance with the constitution and the fundamental principles of its legal system to consider criminalizing so-called illegal enrichment. Illicit enrichment is defined as a significant increase in a public official's assets, which he cannot reasonably explain in relation to his or her lawful income.
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> In the consultation document, the Ministry expressed the following opinion on Article 20 (Section 3.6 page 21):
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> "As the Ministry of Justice interprets this provision, it places the burden of proof on

the accused, who must demonstrate that the significant increase in assets stems from legitimate income to avoid penalties for illegal enrichment. Such a penal provision would give rise to difficult questions regarding the relation to the presumption of innocence as embodied for example in the European Convention on Human Rights Article 6, paragraph 2: Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law. In the Ministry's opinion, it is not desirable to propose such offenses as a separate offence. The Ministry believes that the purpose of Article 20 is better met through other means than by establishing such offenses. Tax, accounting, corporate and public policy, wage and compensation systems, guidelines for external work, etc. will help both to prevent illicit enrichment of public officials and make it difficult to hide any attempt to acquire such assets. Further - rules on extended confiscation (Penal Code § 34 a) decrease the need for an offense described in Article 20. If a public official is found guilty of a criminal offense and other conditions in § 34 a are met, all assets belonging to the offender will be revoked if he fails to produce evidence that they have been legally acquired. "

Consultative bodies were still asked to consider whether it would be appropriate to adopt a penal provision against illicit enrichment as set forth in the Convention.

The Ministry of Trade and the Ministry of Foreign Affairs, the Police Security Service, the Bar Association and other official bodies have commented on article 20 and all support the Ministry it it's view that it should not propose a separate penalty provision of illegal enrichment.

The Ministry of Justice proposes after this not a separate penalty provision of illegal enrichment."

It is Norlam's view that the mentioned reference to ECHR Article 6 paragraph 2 is of special relevance and importance, and we agree in the assessments and conclusion given. We presuppose that the Republic of Moldova also has – at least partly - similar instruments as mentioned, in order to prevent illicit enrichment by public officials.

As for the extended confiscation as mentioned in the Norwegian Civil Criminal Code Article 34 a (see the attachment), we advise a similar regulation also in Moldova. It has a rather broad scope, and is a very effective instrument in securing the forfeiture of illegal assets which has been gathered from criminal offences. It also applies where the direct assets gained from the crime committed has been substituted into other assets. If you would like Norlam to give a more detailed note regarding this regulation, we will be happy to do so.

With reference to the above mentioned assessment, Norlam proposes to <u>not</u> regulate "illicit enrichment" as a separate penal provision.

2. What would be the optimal way of setting the punishment for corruption offences (provided for in Chapter XV of the Criminal Code):

A. <u>alternatively</u>: fine <u>**or**</u> imprisonment
B. <u>cumulatively</u>: fine <u>**and**</u> imprisonment?

Chapter XV of the Moldovan Criminal Code covers quite diverse types of offences – with the joint condition that they are committed by official persons. The solution today – regarding the use of imprisonment and fines differs – and consists of fine as an alternative to imprisonment and also in addition to imprisonment. We have no information about the basis for the different solutions, but it can be assumed that this – as a starting point – is related to the seriousness of the offence.

In general, in Norlam's opinion, it should be on the Court's discretion to measure out the punishment according to the framework in the Article in question, but also taking into account the seriousness of the offence and the degree of guilt, and also taking into consideration various mitigating and aggravating circumstances in the concrete case. We think it is important that the Courts are given the necessary tools to measure out an adequate punishment in each case, based on relevant factual circumstances in the case.

Regarding the use of fines, we understand that the scope of using fines, and also the framework of measuring out the fine, has a close connection to the graveness of the crimes committed, also taken into account the gain – or the potential gain, from the crime in question. It is also an imperative that the financial situation of the offender is regarded as a central element to assess when the amount of the fine is set.

In general, Norlam finds it to be the best solution that gain from a crime is revoked, but instead of using fine as an instrument, we think this should be done by using "confiscation". This will better fulfill the purpose – to prevent or offset illegal enrichment from criminal offences. It will in a transparent way illustrate that crimes of this kind do not pay, and can also in an efficient way – if illegal gain is sufficiently proved – without limits, have such gain revoked from the offender.

On the other hand - where the crime only consists of an attempt, or where the gain from the crime committed is impossible to determine, it will be useful to use fines as a mean to underline and counter the effect of gain as motive for the offences, and to prevent possible speculations from the offender in this respect.

Regarding the legal framework in meeting out the punishment, we think it should be divided into several alternatives:

> <u>Firstly</u>, for the minor offences, we think it would be appropriate with fines only as a penal reaction. We assume that this is only valid for first time offenders, and only when small amounts are involved – and only in cases with lesser consequences from the crime committed.
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> <u>Secondly</u>, if the offences are of more grave character, and imprisonment should be applied, we think it will be unfortunate to have only fines as an alternative. The limitations and conditions for the use of imprisonment in these cases should be a choice of the legislator – on the basis of an objective description of the severity of the different offences.
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> <u>Thirdly</u>, for the offences where imprisonment should be applied, we think this should be within the discretion of the court to determine whether a fine should be used in addition to the imprisonment, and that the legislation facilitates this as an option but not as a binding instruction. This will make it easier for the court to conclude with an adequate penal reaction – based on the concrete circumstances in each case.

We think it is important to have in mind that fines – in combination with a long term imprisonment – might not always be an adequate solution. We think that both the individual and general preventive considerations are well met with a punishment of imprisonment. In addition it is often so, that offender will have a family, who in reality will face severe consequences if also a large fine is given as complementary punishment. First from the fact that the family member (and often the person who is the provider of the family) is being imprisoned with a subsequent loss of income, and secondly by the fine that has to be paid. Such third party consequences of the punishment should be avoided, unless it is necessary – to reach the purpose of the regulations, but this should be assessed and decided by the Court in each case based on the concrete circumstances of the case.

3. Is it rational to increase the amounts of fines only for passive corruption (Art. 324 of the CC) and active corruption (Art. 325 of the CC) or should such an increase also apply to other offences provided for in Chapter XV, including corruption in the private sector (Chapter XVI of the CC)?

Regarding the amounts of the fines, Norlam is of the opinion that it is important to match the frames for each type of offence with other similar types of offences. This is important, due to the predictability and correlation in the penal system.

If the fines are to be risen for passive and active corruption in Art. 324 and 325, we think this also should go for other offences of a similar character in chapter XV. I addition, we see no reason not to have a corresponding adjustment for corruption in the private sector. It is the same type of offences, and it should not be decisive whether the crime is committed by a public official or a private person. The motive of the crime will normally be the same – and also the potential of an outcome from the crime committed. Corruption (active or passive) in private sector, have the same negative consequences for society as similar offences made by public officials.

4. Taking into account the fact that in the Moldovan criminal law *confiscation* is regarded as a security measure (Art. 106 of the CC), and provided that the new offence of „illicit enrichment" is included in the CC, would it be necessary to amend this Article in order to ensure confiscation of goods resulting from such an enrichment?

As far as we can see, it is not necessary to amend Article 106 in the Moldovan Criminal Code to ensure confiscation of goods resulting from" illicit enrichment". In our assessment we have taken into account that you will include "illicit enrichment" as a separate offence in the Criminal Code. In our opinion the use of confiscation will be covered by Article 106 no 1, 2 and 3 – which all refer to goods resulted from an act set forth in the present code/resulted from crimes.

Chisinau, 26th of November 2012

Bjørn Larsen
Police prosecutor