CENTRUL DE RESURSE JURIDICE DIN MOLDOVA

*Translation from Romanian language. Original version is available here.*

**Subject:** Legal Opinion on the draft Law No. 464 on the amendment of certain legislative acts (easing the pressure of law enforcement agencies on the business environment).

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This opinion is presented in the context of the public consultations on the draft law on the amendment of certain legislative acts (easing the pressure of law enforcement agencies on the business environment, hereinafter referred to as the draft Law No. 464).

On 12 January 2018, at the meeting on the new version of the draft law, the representative of LRCM mentioned the importance of distinguishing between the two important aspects of the draft law: the general regulatory framework for the business environment and the legal framework related to the amendment of the Criminal Code and the Criminal Procedure Code. Our reservations refer exclusively to the second group of amendments. We urge the authors of the draft law to avoid radical changes in the powers of investigation agencies and in the ways of applying pretrial restrictions in criminal cases. We also recommend improving the wording of the text referring to tax evasion offenses.

In this opinion we only refer to those initiatives that in our view are particularly problematic, namely:

a. The new ground for releasing from punishment for some offenses should be excluded or their applicability should be reduced;
b. The prohibition on applying provisional arrest to persons who have committed economic crimes is inadmissible, as it is discriminatory and can lead to unjustified solutions;
c. The change of the powers to investigate certain offences is neither legally justified nor compliant with the public policies promoted by the Republic of Moldova.

**a. The new ground for releasing from criminal punishment for some offenses;**

The draft law proposes a new ground for the release from criminal punishment, which will apply to 18 types of offenses. The release will apply if the person has not previously been released from criminal punishment for the same crime, has repaired the damage, and has paid, in the state budget, the double amount of the maximal fine prescribed by the Criminal Code for the offense. In addition, the draft law specifies that the release from criminal punishment does not apply if the perpetrator acted under

psychological or physical constraint, the deed resulted in harm to the life and health of a person, or the perpetrator acts as part of an organized criminal group or criminal organization.

Such an exception of criminal punishment is acceptable when the offence does not pose a high risk to the public and if this is duly justified. However, it cannot be accepted in several offenses listed in the draft law. **We strongly recommend amending the list of offenses to which the new ground for the release of punishment may apply, by excluding those offences that:**

1. involve nonfeasance by representatives of authorities, individuals, or legal entities in connection with economic and social activities with environmental impact – Articles 223 – 226 of the Criminal Code;
2. harm the protection of natural resources – Articles 227 – 230 of the Criminal Code;
3. violate the regime imposed on terrestrial ecosystems – Articles 231 and 232 of the Criminal Code; and
4. violate the regime of state-protected areas – Article 235 of the Criminal Code.

The offenses described in points 1 – 4 above are environment crimes set forth in Chapter IX of the Criminal Code, which pose in fact a tremendous danger, even if committed once. Protecting the fundamental human right to an environment that is ecologically safe for life and health is one of the most burning issues of modern days. The importance and necessity of criminalizing the deeds that affect the integrity of the environment in the Republic of Moldova needs no demonstration, taking into account the latest research and investigation into the precarious situation of the national ecosystems. Environmental pollution and violations of the regimes imposed on terrestrial ecosystems seriously endanger the lives of people and the welfare of future generations.

Most environment crimes are material crimes. As a result, it is imperative to establish the causal link between the injurious act and the injurious effects in the classification of the offense. Thus, it is difficult to ascertain when such a crime was committed, who the subject was and, most importantly, the damage caused, because the effects of this deed may become known in a few decades and cause damage to the health of the population. The principle *non bis in idem* will not allow punishing a person for damages that occur under the above conditions after previously releasing this person from criminal punishment according to Article $91^1$ of the Criminal Code.

Furthermore, the secondary legal object of ecological crimes is always the health and life of persons, which means that release from punishment will not apply to such crimes, pursuant to the exception set forth in Article $91^1$ (2) of the Criminal Code. Moreover, the offense specified in Article 224 of the Criminal Code is a conduct crime. To commit it one has not only to carry out an action or inaction described in the object part, but also to create the danger of essential damage to the health of the population or to the environment. Otherwise, administrative liability would apply. As a result, this article will never apply the offense described in Article $91^1$ of the Criminal Code.

The fact that the draft law specifies that the release will apply if the person has not previously been released from criminal punishment for the same deed does not affect the above comments, given the social danger of the deed. Moreover, any of the offenses described in Articles 223 – 235 of the Criminal Code may have a legal entity as the subject and many such offenses are committed in the interest of legal entities. They may at any time find other individuals who would commit the offense, or even set up another legal entity who would commit a similar offense.

**b. The impossibility of provisional arrest for certain types of crime**

The draft proposes the impossibility of applying preventive arrest for offenses for which the law prescribes a prison term of less than 3 years, and for economic offenses – more than 5 years (the current ceiling is one year). There is no justification for a different approach to economic crimes. The draft law does not explain the reasons for such preferential treatment for economic crimes, which in fact represents discrimination rather than stimulus for the business environment. **We propose a more thorough analysis of this issue to consider all the possible offenses to exclude the situation where arrest is potentially justified, but practically impossible due to the proposed amendment.**

The Republic of Moldova has serious issues with the observance of the right to freedom, mainly due to an excessive application of the provisional arrest. However, this problem is primarily due to the practice of insufficient justification of the motions for the application of provisional arrest and their almost mechanical acceptance by investigating judges. Therefore, the limitation of the categories of offences which allow provisional arrest will not solve this issue. In 2016, the Criminal Procedure Code has already seen amendments related to provisional arrest, but their effect is slow in coming. Judges and prosecutors should ensure proper enforcement of the law. This is the solution to the problem. **We recommend conducting a thorough analysis to determine the causes of unjustified arrests, regardless of who the arrested person is, and developing solutions to address those causes.**

**We propose returning to the version of Article 176 of the Criminal Procedure Code that existed prior to 2016, where the arrest could not be applied to offenses for which the criminal law prescribed a prison term of less than 2 years.**

**c. The change of the powers to investigate certain offenses**

The draft law proposes several novelties in this respect, including:

a. the introduction of the right of the Anticorruption Prosecutor's Office to delegate the National Anticorruption Center to conduct some criminal prosecution actions (Article 269 of the Criminal Procedure Code);
b. the increasing of the number of crimes transmitted into the exclusive competence of prosecutors;
c. the increasing of the number of crimes transmitted into the exclusive competence of the Anticorruption Prosecutor's Office;
d. the transfer of competences to investigate the money laundering (Article $270^2$ of the Criminal Procedure Code);

As concerns the right of the Anticorruption Prosecutor's Office to delegate the National Anticorruption Center to conduct some criminal prosecution actions (Article 269 of the Criminal Procedure Code), **we do not think that this is a good initiative.** Anticorruption prosecutors should have their own criminal prosecution and investigation officers, sufficient to deal with their workload. In fact, this amendment paves the way for anticorruption prosecutors to always address to the National Anticorruption Center instead of recruiting sufficient personnel. One can recall that this problem persisted almost two years after the adoption of the new Law on the Prosecutor's Office. Developing a law for the establishment of the Anticorruption Prosecutor's Office makes no sense if things go on as they used to, without allocating sufficient personnel for specialized prosecution offices. **Furthermore, the draft law excludes, in effect, criminal prosecution from the exclusive competence of the National Anticorruption Center. In such circumstances, it is not clear why the National Anticorruption Center would need a criminal prosecution body.**

As for the increasing of the number of crimes transmitted into the exclusive competence of prosecutors, the new crimes include the violation of the work safety rules (Article 183 of the Criminal Code), crimes related to the protection of intellectual property and copyright (Articles $185^1$ – $185^3$), ecological and economic crimes (Articles 223 – 254), consumer fraud (Article 255), substandard construction works and the violation of home renovation rules (Articles 257 and 258), and cybercrimes (Articles 259 – $261^1$). The informative note does not justify this amendment in any way. **This proposal seems to be very dangerous, as the new Law on the Prosecutor's Office proceeds from the opposite concept – to reduce the exclusive powers of prosecutors to investigate certain categories of cases to limit undue workload and, respectively, to increase the quality of the prosecutors' work. Transmitting these offenses into the exclusive competence of the prosecutor's office will greatly increase the workload of prosecutors to the detriment of quality. Moreover, it is not reasonable to vest prosecutors with exclusive powers of criminal prosecution in cases of consumer fraud, substandard construction, substandard home repairs, etc., because they do not have sufficient knowledge to efficiently handle them. The informative note of the draft law did not offer any reasoning or estimation regarding the increasing of prosecutors' workload and the decreasing of the workload at the Ministry of Home Affairs.**

**The draft law provides for transfer all corruption cases, including those on petty corruption, into the competence of the Anticorruption Prosecutor's Office (Article $270^1$ has been revised). This is exactly the opposite to the public policies, and the legislative amendments adopted in 2016, and is contrary to the Republic of Moldova's anticorruption commitments.** One of the main changes during the reform of the prosecutor's office was exactly the distinction of petty corruption from grand corruption. The draft law excludes this distinction and tasks the Anticorruption Prosecutor's Office with criminal prosecution in all cases described by Articles $181^1$, $181^2$, $242^1$, $242^2$, 324-329, 332-$335^1$ of the Criminal Code. **This concept appeared after the 2016 reform of the prosecutor's office and will, in effect, burden the anticorruption prosecutors with minor corruption cases. As a result, they will not allocate sufficient time to grand corruption cases, which will never be examined properly.**

The draft law proposes increasing the number of crimes transmitted into the exclusive competence of the Anticorruption Prosecutor's Office. Thus, its competence will also cover the misrepresentation in accounting documents (Article $335^1$ of the Criminal Code). There is no apparent reason for this initiative. This crime is too petty to be in the exclusive competence of the Anticorruption Prosecutor's Office.

Additionally, **Article $270^1$ of the Criminal Procedure Code needs to be reworded because it generates confusing interpretations**. Currently, all cases of large-scale embezzlement and fraud committed by using job position, even if the perpetrator is the CEO of a private company, go for examination to the Anticorruption Prosecutor's Office. This is absurd. Given the role and purpose of the Anticorruption Prosecutor's Office, it should examine only the cases of fraud or embezzlement committed by civil servants. We propose clarifying this in Article $270^1$ (1) point 2 of the Criminal Procedure Code.

Furthermore, **it is not clear why this draft law amends the regulatory framework regarding the jurisdiction of anticorruption authorities**, when its stated purpose has nothing to do with the reforming of anticorruption mechanisms. The informative note does not provide a clear answer in this respect.

For any further clarifications, please contact us.

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