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Anti-Corruption Expertise of Draft Legislation: The Experience of Some European Countries and Canada

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Abstract: this paper examines the existing mechanisms for detecting and eliminating corruptogenic norms in some European countries, as well as Canada. Examples of the use of the well-known term “anti-corruption expertise of draft legislation”, as well as the lack of its application, which does not exclude the use of anti-corruption expertise mechanisms in the framework of other procedures of the rule-making process, are described. The author considers the positive experience of some countries (Moldova, Lithuania and Canada), the norms of which are proposed to be implemented in national legislation. In particular, the multilevel systems of "filtering" of developed projects, in which both state organizations and the non-state sector take part, deserve special attention. Also, a positive experience is the well-established system of joint work and close interaction between state bodies authorized to conduct anti-corruption expertise of draft regulations, with public organizations representing the interests of the population of certain territories or other persons. At the same time, the opinions of foreign experts are given regarding certain issues in the field of anti-corruption expertise, as well as on the fundamental issues of applying the concept of "anti-corruption expertise of draft legislation" in general. At the same time, the opinion of the author regarding the studied topics and the presented work is given.

Keywords: combating corruption, European countries, anti-corruption expertise, projects, legislation, policy, reforms, corruption-inducing norms, government organizations, public associations.

The specifics of the ongoing anti-corruption policy in Europe and Canada shows that corruption in its broadest sense is seen as a threat that has two directions: external and internal. At the same time, V.A. Nomokonov divided corruption into two aspects: political and economic. “The development of political corruption can lead to the uncontrollability of the political situation in the country and poses a threat to democratic institutions and the balance of various branches of power. Economic corruption reduces the effectiveness of market institutions and the regulatory activities of the state. It is important to note that efforts to limit corruption in these countries tend to be institutionalized and impressive in their scope.[1]”

As many studies show: the practice of studying and analyzing the legislation of foreign countries, as well as the practical experience of advanced countries, in the relevant field is useful and effective. In our case, this area of corruption prevention, aimed at identifying and eliminating corruption-causing factors in draft regulatory legal acts, as we usually call it, is anti-corruption expertise of draft regulatory legal acts. It should be noted right away that in European countries such a concept is not used in view of certain circumstances, which we will discuss a little later.

Returning to the importance of studying foreign experience, first of all, we believe to note the benefit of analyzing the system for identifying corruption factors in general, and secondly, the usefulness of studying the methods and mechanisms used in the course of identifying corruption factors, their effective aspects, as well as the problems that we had to face during the development of this area.

The fundamental goal of studying these areas, in our opinion, is the possibility of implementing into national legislation the norms that have proven themselves and have shown the best efficiency, as well as mechanisms in the field of identifying and eliminating corruption factors.

Anti-corruption expertise of draft legislation, although not in the usual sense for us, but as a system for identifying and eliminating norms in draft legislative acts that create conditions for the manifestation of corruption, is actually found in most foreign countries. This also applies to developed foreign countries, which are reluctant to talk about such domestic problems and position themselves as minimally at risk of corruption. Although, according to some estimates, the states of the European Union annually lose 323 billion euros from corruption, which in turn is almost a third of the EU budget for 2014-2020 (according to the anti-corruption agency OLAF) [2].

According to a number of scientists (D.U. Balgimbekov, B.U. Seitkhozhin, B.Sh. Sarsembaev and others): “anti-corruption expertise is perhaps the best form of assessing the corruption risks of a legislator”[3]. Many researchers also emphasize that most European countries, such as the UK, Germany, Denmark, Italy, the Netherlands, Norway, France and Sweden, perceived the content of paragraph 3 of Article 5 (the need for an assessment of regulations) of the 2003 UN Convention against Corruption, perceived as the need to deepen and expanding the range of legal review mechanisms.

Presumably, the reason for this approach of these countries is the relatively stable state of affairs in the field of combating corruption, as well as the well-established system of the rule-making process. We can observe a different state of affairs in the countries of Eastern Europe (Moldova, Lithuania), whose anti-corruption policies are similar to those of the CIS states and other countries of the post-Soviet space. These countries had a different attitude to the norm of the UN Convention against Corruption regarding the need for an assessment of normative acts. In our opinion, this approach proceeded in view of its specific historical development. In most of these countries, the relevant anti-corruption bodies or those implementing state policy in the field of rule-making have been empowered to conduct anti-corruption expertise of draft regulations and existing legislation.

Not meeting in the usual format for us, i.e. as an independent institution for identifying corruption norms, at least we can see the implementation of such procedures in the course of legal or legal expertise, as a rule, carried out in the administrations of heads of state, governments or parliaments, as well as by other interested parties (non-governmental organizations, scientific expert circles, initiative civil groups, etc.). Of course, given such versatility, as well as the inclusion of an analysis of legislation in order to identify corruption-prone norms in a procedure of a different main focus (legal, legal or other expertise), the regulation of such relations is completely different in nature, characteristic of each country separately.

Thus, most of the European countries, as well as Canada, do not have a specific provision, procedure or rules that would fix such procedures at the legislative level, this also applies to the regulations of parliaments, as well as decisions of the governments of these countries. At the same time, as noted above, some European countries still provide for such an opportunity, but it is only possible to implement it through a legal examination. Thus, the regulations of the parliaments of such countries as Portugal, Poland and Spain provide for the possibility of conducting a legal examination in certain cases. For example, parts two and three of Article 34 of the Rules of the Seimas of the Republic of Poland provide for the need[4]:

assessing the expected impact of the prepared draft regulatory legal act on the activities of the relevant direction. Such an assessment should be included as a separate part of the attached project justification;

inclusion in the substantiation of the draft of the results of the consultations and information on the options presented and the opinions of authorized persons and organizations, and, we believe, including those authorized in the field of combating corruption. In the absence of such approvals, the Marshal of the Seimas, before sending the draft act for the first reading, submits it for appropriate approval.

The importance of such a component as anti-corruption expertise is undeniably inherent in all European countries, which is emphasized by some European researchers. As the German researcher Hans Claussen noted at one time: “It would be possible, without very risky, to say that if the rules of law were even better than they are now, those who want to violate them will find their way Nevertheless, practice investigations of criminal cases in the last few years shows that corruption is greatly facilitated by the incompleteness and imperfection of legal prescriptions. Meanwhile, the more viciously the norms are formulated, the easier it is to get around them and the more difficult it is to effectively control them. It is necessary to remake such norms and, moreover, regularly, and not only from the point of view of the most effective possible counteraction to abuses. There are other aspects that must be taken into account”[5].

Representative of Russian scientific community A.M. Tsirin emphasizes in his writings regarding the above opinion that by such a statement, Hans Claussen is aware of the existence of a problem, but does not have an idea of how to solve it outside of legal or legal expertise.

Thus, anti-corruption expertise as an independent institution or as a component in this sense, in most cases, is found in post-Soviet countries, including the CIS countries, the Baltic countries. In this context, it is considered possible to voice the opinion of the expert of the Council of Europe, the representative of Great Britain Simon Goddard, who noted at the round table organized within the walls of the State Duma of the Russian Federation and dedicated to the subject: "The practice of application and prospects for the development of legislation in Russia, countries of Eastern Europe and Asia, regulating the issues of anti-corruption expertise of legislative acts and their projects." According to him, “There is nothing like this in the UK, nothing like what you talked about in the area of risk assessment when drafting legislation. I will say this - there is not even a name for it. But still, there are processes that, we hope, help us to identify the risks of corruption [6]”. It should be noted that in advance of the round table, the Council of Europe, through its international organization GRECO (Group of States to Combat Corruption, which includes about 40 European countries), asked all countries to provide experience in conducting anti-corruption expertise. No response was received to this request.

The next one is invited to consider the experience of one of the few European countries, which is characterized by anti-corruption expertise of draft legislation, and this is the Republic of Moldova. It can even be said more that the Moldovan experience is very interesting, given their experience of development in this direction.

The fundamental beginning of the development of anti-corruption expertise, in our opinion, was laid in connection with the adoption in 2004 of the National Strategy to Prevent and Combat Corruption. This document of a strategic and long-term focus, in particular, provided for the following areas:

“in the field of legislation, regulations containing effective anti-corruption measures should be developed in accordance with international norms, recommendations and standards.

At the same time, it is necessary to amend the anti-corruption legislation in accordance with the provisions of international acts; improve the legislative system; eliminate contradictions and ambiguities that lead to ambiguous interpretation of the legislation”[7].

Some researchers argue, while it is difficult to disagree with them, that the authors of the Moldovan concept for the prevention of corruption outlined the specific components necessary for the creation and functioning of an effective system for conducting anti-corruption expertise:

1) awareness and acceptance of the fact that the legislation can create conditions for the commission of corruption offenses;

2) a strong-willed step of a political orientation, providing the necessary opportunities for the mandatory and independent anti-corruption expertise;

3) creation of a multi-layered anti-corruption barrier, by organizing a parallel anti-corruption expertise by a state body, as well as an independent non-state sector. In this case, the experience of Moldova seems to be very interesting and perhaps more applicable in our case.

The mechanism for the phased implementation of the National Strategy seems interesting, and more specifically, annual approvals for each six months of measures for its implementation. Thus, according to paragraph 2 of the Decree of the Government of the Republic of Moldova "On the implementation of the National Strategy for the Prevention and Combating of Corruption in the first half of 2006", the Center for Combating Economic Crimes and Corruption, together with the Ministry of Justice, was instructed to develop and submit to the Government within 15 days several draft regulations. Among them, we propose to single out the Law on Amendments and Additions to the Legislation, which provides for an adequate regulatory framework for conducting an examination of the corruption potential of draft legislative acts, the draft Methodology for the examination of the corruption potential of draft legislative acts, as well as the composition and Regulations on the activities of the Interdepartmental Group for the examination of draft legislative acts. corruption potential of draft legislative acts [8].

The next step was the adoption of the Regulations on the organization of the process of conducting corruption examination of draft legislative acts, as well as the personal composition of the Commission for coordinating the process of conducting anti-corruption examination of draft legislative and regulatory acts [9].

It should be noted that due to the need for further development, in 2012 the Center for Combating Economic Crimes and Corruption was renamed the National Center for Combating Corruption. In addition, one of the most important components of the ongoing reform was the resubordination, or rather, the acquisition of independence of the National Center from government bodies and the definition of accountability to parliament, and the latter was given the right to appoint and dismiss the director of the National Center. Of fundamental importance is the legislative basis of the National Center – the Law of the Republic of Moldova "On the National Center for Combating Corruption", which has been in force since 2002.

In our opinion, the Republic of Uzbekistan should also regulate the activities of the Anti-Corruption Agency by developing and approving a specialized law on such a body, and of course providing for the granting of broader powers in the field of combating and preventing corruption, including the transfer of part of the powers for the mandatory conduct of anti-corruption expertise of draft legislation.

Deserves special attention Law Republic of Moldova "On Preventing and Combating Corruption". In accordance with this Law, anti-corruption expertise of draft legislative acts and draft regulatory acts of the Government, public discussion of the developed drafts and assessment of institutional risks of corruption are classified as guarantee measures to prevent corruption. The obligatory anti-corruption expertise of projects has been established, as well as its criteria, which include:

a) the proportion of reference and blanket rules in the content of the project and the possible consequences of their application;

b) the level of regulatory duties transferred to the competence of public authorities;

c) identification of contradictions in legal norms;

d) the level of responsibility and duties imposed on civil servants;

e) assessment of administrative control procedures (internal or by higher authorities);

f) the level of requirements for holders of certain rights;

g) the level of transparency in the activities of public authorities [10].

At the same time, the two-level system for the prevention of corruption, created in Moldova, deserves special attention, consisting of two independent centers, one of which represents the public sector, and the second is a public organization. In this case, we are talking about the above-mentioned National Center for the Fight against Corruption and the Center for Research on the Prevention of Corruption. An important point is that the Center for Corruption Prevention Research is in no way subordinate to either the Government of the country, or even the Moldovan Parliament.

In this context, it is suggested to note the following:

1. Both centers function independently of each other;

2. The Research Center, being a public organization, is independent of all branches of government;

3. Each draft of the developed Law is subject to mandatory consideration by both centers, without the conclusion of which the draft in Parliament is not subject to discussion.

It is this experience, in our opinion, that is effective and possible for implementation in national legislation, which will create a significant impetus in the development of national mechanisms for anti-corruption expertise of draft regulatory legal acts.

In this case, one can consider the study carried out within the framework of the project "Fighting Corruption by Building Integrity in the Republic of Moldova", which was implemented by the United Nations Development Program in the Republic of Moldova with the support of the Norwegian Ministry of Foreign Affairs.

The analysis concerned the use of corruption prevention tools by state bodies, and also consisted in assessing the content of draft legislation in accordance with national and international anti-corruption standards.

Thus, in 2016-2018, the National Anti-Corruption Center conducted an examination of 2,697 draft regulatory legal acts. The study showed that in 2016, 34% of the considered projects promoted certain private interests, while in 2018 such interests were reflected only in 10% of cases.

Given the increase in corruption prevention practices in the rule-making process, we can see the use of "workarounds" on the part of developers. The following data are more specific: in 2016, 21% of draft decisions of the Government included norms lobbying the interests of private individuals, while in 2018 this figure dropped significantly to 3%. These circumstances forced lobbyists to look for ways to bypass the anti-corruption expertise, which we can observe in the following data: in 2016, 25 decisions, and this is 7% subject to expertise, were made without an anti-corruption expertise, while in 2017 the figure for such "bypass" projects reached 82 (19%), and in 2018 - 15% [11].

These indicators, in our opinion, testify to the successful experience of the Republic of Moldova, which was "not to the taste" of some representatives promoting the private interests of certain circles, which forced them to look for ways around.

According to the estimates of this study, the amount of prevented damage to the republican budget of Moldova amounted to more than 1.3 billion lei, in this case we are talking about cases where the final recommendations were accepted in part or in full.

Further, it proposes to consider the experience of Lithuania, where the Law of the Republic of Lithuania "On the Prevention of Corruption" has been in force since 2012 and provides for such a mechanism as an anti-corruption assessment of legal acts or their drafts, which is an assessment of the current and / or planned legal regulation from an anti-corruption point of view and identification of shortcomings in legal regulation, which may create preconditions for corruption. More specifically, the anti-corruption expertise of legal acts or their drafts is defined as one of the eight main measures to prevent corruption.

In Lithuania, the anti-corruption expertise of a draft legal act is carried out by the public administration entity that prepares such a draft, in the manner determined by the Government of the Republic of Lithuania, as well as by the Special Investigation Service in the manner determined by its director. Thus, in Lithua, a double-scanning model similar to that of Moldova is used, but unlike Moldova, both filters are made up of state bodies, which, in our opinion, is one-sided and not as effective as compared to the experience of the Republic of Moldova.

The obligation to conduct an anti-corruption expertise in Moldova depends on the subject of the project being prepared. Thus, projects providing for the regulation of public relations related to:

1) management, use or disposal of state or municipal property;

2) payment of subsidies, grants, compensations, rents, allowances, bonuses and other payments from the state or municipal budgets;

3) provision and use of financial support, including financial support from the European Union or other funds;

4) provision of charitable assistance and support;

5) financing of political parties or political campaigns;

6) public procurement, procurement or granting of a concession in the field of water management, energy, transport and postal services;

7) organizing competitions for the position of a person working in a public sector entity, establishing, canceling or changing requirements for reputation, qualifications, certification and rotation of persons working in a public sector entity;

8) supply of goods or provision of services under public contracts;

9) the issuance or cancellation of licenses, permits, the establishment, cancellation or change of requirements for the qualification and business reputation of subjects of licensed economic and commercial activities or economic and commercial activities, for the implementation of which a permit from a state or municipal institution is required;

10) production, storage, use, acquisition, sale and control of excisable goods;

11) investigation of offenses, changing the terms of liability for offenses;

12) land management, territorial planning, construction;

13) establishment, cancellation or change of product safety requirements;

14) health protection;

15) environmental protection;

16) use of energy resources;

17) issues of migration, acquisition and loss of citizenship;

18) tax administration;

19) provision of administrative and public services;

20) development of infrastructure of republican or regional significance.

As can be seen from the above list, the regulation of all the most important areas is not complete without anti-corruption expertise at the stage of their development. In addition, the subject of public administration has the right to conduct an anti-corruption expertise of a draft normative act prepared by it, if such an act does not provide for any of the above areas, but the legal regulation of which may create corruption risks.

At the same time, the anti-corruption expertise of draft legal acts regulating the listed public relations, as well as other legal acts, including the current one, is carried out by the Special Investigation Service on behalf of the President, the Seimas, the Seimas Collegium, the Seimas Committee, a commission or a faction, as well as on their own initiative.

The state administration entity that has developed, adopted or initiated the adoption of a legal act, having received the conclusion of the anti-corruption expertise of the Special Investigation Service, within two months from the date of its receipt, must publish information on taking into account or rejecting the comments and proposals submitted, indicating the specific reasons and grounds for their rejection. Subsequently, this information is published in the information system of legal acts of the Seimas of the Republic of Lithuania, and also sent to the Special Investigation Service for this publication.

Regarding the experience of Canada, we initially consider it acceptable to note that the experience of a united fight against corruption in the countries of America has a relatively long history. Thus, since 1948, the Organization of American States (OAS) has been operating in the countries of America, the participants of which are 35 independent states of North and South America, including Canada. By joining forces, 8 years before the adoption of the UN Convention against Corruption in 2003, in 1996, the member states of the Organization of American States adopted the Inter-American Convention against Corruption [12]. This Convention, like the UN Convention, does not contain direct instructions regarding the need for anti-corruption expertise, but it has fundamental principles for the use and development of the tools of this institution. Thus, according to paragraph 9 of Article 3 (Preventive Measures), States Parties must consider the applicability of measures within their own institutional systems to establish, maintain and strengthen oversight bodies in order to implement modern mechanisms for preventing, detecting and eradicating corrupt practices.

When studying the experience of Canada, as in most European countries, the use of the term “anti-corruption expertise of draft legislation” that we use was not reflected. At the same time, special attention should be paid to the peculiar system of the triple filter of draft legislation being prepared.

Thus, the primary filter is the Ministry of Justice of Canada, which carries out legal expertise, which includes both the detection and exclusion of corruption norms. “The Attorney General of Canada shall, in accordance with the instructions of the Governor General of Canada, examine every legal act that passes through the Privy Council of Canada, the President of the Privy Council for registration under the existing Statutes Act, and every bill submitted or introduced in House of Representatives of Canada. Such an examination should establish any possible violation of the provisions of the Canadian Charter of Rights and Freedoms, or inconsistency with its purposes and provisions. In case of violations, the Minister is obliged to report this fact to the House of Commons at the "first opportunity" [13].

It is proposed to include the Bureau of the Privy Council, which ensures the activities of the Government of Canada, as a secondary filter. In the course of the study, an opinion appeared that this body is similar in its functions to the executive apparatus of our Cabinet of Ministers, but at the same time it is endowed with broader powers, one of which is “coordination and prioritization of bills put forward by various ministries”[14].

Each ministry that intends to introduce any draft legislation must submit to the Bureau of the Privy Council relevant information on the prepared draft, which requires that the ministry conduct an appropriate analysis, which includes, among other things, an assessment of possible consequences, including corruption risks.

The tertiary filter is proposed to include the non-profit non-governmental organization Parliamentary Center, consisting of current and former representatives of both houses of the Parliament of Canada (House of Commons and Senate), as well as leading theorists and practitioners.

The Parliamentary Center has very important tasks and functions, among which it is proposed to note the following:

conducting an in-depth analysis of all draft laws, following which a detailed information note is prepared;

evaluation of the draft law for its impact on certain social relations;

conducting an examination of the submitted projects for the presence or prerequisites for corruption components;

organization of events to improve the skills of employees of the Canadian Parliament, whose activities are directly related to the information support of this body;

preparation of proposals for amendments and additions to the submitted draft laws.

Summing up, we can say that the absence in most European countries and Canada of such a thing as anti-corruption expertise of draft legislation, as well as specific regulations and procedures for conducting analysis to identify corruption-prone norms, does not mean the complete elimination of corruption-related problems in these countries, and even does not exactly mean that such an analysis is not carried out there. We confidently believe that at present the need for anti-corruption expertise of projects being prepared exists absolutely everywhere, and the absence of a specially approved procedure in this area does not exclude such an analysis, but simply does not single it out as an independent institution.

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