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REGIONAL ANTI-CORRUPTION INITIATIVE

REGIONAL ACTIVITY: DEVELOPMENT OF NATIONAL METHODOLOGIES ON ANTI-CORRUPTION ASSESSMENT OF LAWS

"Methodology for Conducting Anti-corruption Expert Review of Draft Legislative and Regulatory Acts" by the Moldovan National Anti-Corruption Centre – NAC; Article 28 of the draft Integrity Law

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1 Summary

The draft Methodology of 2016 by the National Anti-corruption Centre (NAC) compiles 10 years of profound experience with corruption proofing. The draft document contains detailed, but concise instructions that go in several aspects well beyond the Regional Methodology on Anti-Corruption Assessment of Laws (Corruption Proofing).[1] This concerns inter alia:

- Detailed instructions on how to **analyse** the draft legal act (Chapter IV; Annex 2);
- Detailed instructions on how to draft the corruption proofing **report** (Chapter V; Annex 1);
- Instructions when to **repeat** an assessment (Chapter III.16);
- Collection of **statistical** data on corruption proofing (Chapter III.18) – such as authors, sectors, number of recommendations, etc.;
- Assessment of the **efficiency** of corruption proofing (Chapter III.19) – comparing recommendations with their actual implementation.

The list of 37 **corruption-risks** is comprehensive and contains very instructive parts. All risks are explained in detail in an Annex to the Methodology. The list of risks mixes technical risks, which can also occur out of negligence, with corrupted legislation, which never occurs out of negligence. From a didactical perspective, this might not work in all contexts, but does so in Moldova, as experts are used to this approach.

Chapter 3.5 of this Assessment contains **recommendations** on how to simplify and shorten the description of some corruption risks. Furthermore, practical examples for at least some of the risks could be illustrative to readers not familiar yet with each description of risks.

The draft Integrity Law of 2016 contains in Article 28 a provision that puts corruption proofing on a sound **statutory basis**. The draft Law or at least the Methodology could probably benefit from mentioning the joint responsibility of public entities for corruption proofing starting at the early **drafting stage**.

The Methodology has the clear potential to serve as a concrete **example** of good practice and to complement the Regional Methodology as a template for other methodologies, as

[1] http://rai-see.org/anti-corruption-assessment-of-laws/.

well as a **training document**. Its final version could thus be published in English on the RAI website as well as translated into other languages in the region in preparation of trainings.

2 Terms of Reference

In 2014, RAI and the Regional Cooperation Council (RCC) developed and published the **Regional Methodology** on Anti-corruption Assessment of Laws (corruption proofing of legislation). Following up on the Regional Methodology, RAI intends to facilitate the introduction or strengthening of anti-corruption assessment of laws in at least three beneficiary countries until end of 2018.

The Republic of Moldova has been implementing and refining a comprehensive practice on anti-corruption assessment of legislation **since 2006**. The National Anti-corruption Centre (NAC)[2] developed its methodology in close cooperation with the civil society organisation the Centre for Analysis and Prevention of Corruption (CAPC). NAC piloted its methodology in 2007 on several draft laws, adopted a revised version of it the same year and has applied it continuously ever since. In 2013, the NAC updated the methodology.

Following the activities by RAI on corruption proofing in 2014, NAC decided to expand its methodology. The update was also an opportunity to take into account the profound practical experience of almost 10 years that Moldova accumulated. In this context, the NAC has asked RAI to review the **draft Methodology** of September 2016.

A draft report was sent to the NAC in October 2016. In September 2017, the draft report was discussed at an in-country **workshop** in Chisinau. This final version is the result of discussions at the workshop.

[2] Until 2013 called the Centre for Combating Economic Crimes and Corruption (CCECC).

3 Assessment

3.1 Legal basis

The new draft Integrity Law contains in Article 28 "Anticorruption expertise" a statutory basis for corruption proofing (see Annex). The Article regulates in particular the following aspects:

- Scope (legal acts covered);
- Main categories of corruption risks;
- Obligation by public entities to submit drafts for corruption proofing to the NAC;
- The information on which corruption proofing is based on;
- The deadline for the report to be available;
- The binding nature of the corruption proofing reports (meaning that authors of draft legal acts need to consider them);
- The adoption of a methodology by NAC on corruption proofing;
- Online publication of corruption proofing reports.

The draft Law has been up for public consultation until end of August 2016.[3] If it would be adopted, it would provide a strong legal basis for corruption proofing regulating all essential aspects of corruption proofing.

3.2 Scope

The Methodology (and its underlying Article 28 of the draft Law) covers only **draft** legal acts. In countries that introduce corruption proofing, this would pose a problem. However, Moldova has been applying the tool for years. Therefore, in light of the high turnover of legislative reforms during the past 10 years, one can assume that more or less all laws currently in force have actually already undergone corruption proofing. Therefore, the limitation to draft legal acts is acceptable to some extent. However, it would be preferable if at least the Methodology would also include enacted laws. This would concern inter alia laws which had not been sent to NAC in the past. NAC would probably have the competency of conducting corruption proofing of these enacted laws under its general risk assessment competency. As a commendable feature, the Methodology not only covers draft statutes, but all draft "legislative and regulatory acts".

[3] http://www.parlament.md/Actualitate/Noutati/tabid/89/NewsId/1585/language/ro-RO/Default.aspx.

The Methodology and the draft Law cover legal acts drafted by all **public entities**, which includes **Parliament** (according to a separate definition of "public entities" in other laws). This further supports an existing instruction by the Parliament's President regarding laws drafted by Members of Parliament, who in the past tended to disregard the necessity of corruption proofing (see Regional Methodology, Part 1, 2.2.8).

3.3 Timing

According to the draft Law and to the draft Methodology, corruption proofing will take place after the final draft has been subject to **public consultations** based on the Law on transparency in decision-making.[4] This seems to be an opportune time, since it allows the NAC to consider feedback by other stakeholders, in particular civil society.

Nonetheless, corruption proofing should not take place only at one single stage. While the draft Law and the Methodology focus on the time of public consultations, corruption proofing will also take stage at other places. According to information by the NAC, the Methodology will be **distributed** to public entities and will be available **online** (as previous versions). This will allow for the corruption proofing taking place at all stages of the legislative process, including when drafting or at the parliamentary level. Public entities are aware of legislative corruption risks, not least by having had faced corruption proofing reports for almost 10 years. Furthermore, the Methodology explicitly foresees repeated assessments during one and the same legislative process (at no. 16). The draft Law or at least the Methodology could probably benefit from mentioning the joint responsibility of public entities for corruption proofing starting at the early drafting stage.

The regular time limit is **10 days**, which is in line with the Regional Methodology. The time limit can be extended (at no. 11). As a commendable feature, the Methodology regulates also the cases, when the corruption proofing should be **repeated**, for example, because the draft changed substantially (at no. 16). The Methodology also foresees **working groups** in order to straighten out any differences between the authors of the draft legal acts and the NAC experts (at no. 17).

3.4 Further procedural details

The Methodology goes beyond the Regional Methodology in the level of addressing procedural details. This is proof of the profound experience the NAC has accumulated over the last 10 years with the tool. This includes inter alia the points mentioned in the Summary

[4] www.right2info.org/resources/publications/laws-1/Moldova-Law%20on%20transparency%20in%20the%20decision.doc/at_download/file.

and additionally the integration of the "e-expertiza **software**" into the Methodology ("computer software for the distribution among experts of the legislative and regulatory drafts submitted for anti-corruption expert reviews, for the verification of the reports prepared by the experts, for the assessment of the efficiency of the anti-corruption expert review, and for the record keeping of the activities related to the anti-corruption expert review").

3.5 Corruption risks

The Methodology contains a useful **one-page overview** in form of a chart of all corruption risks. The risks are **numbered** from 1 to 37, which is useful for referencing them. Risks number 1 to 7 follow by and large the system of the Regional Methodology of linguistic ambiguity. Risks 8 to 37 follow in parts the Regional Methodology, and in parts combine it with additional categories of risks (human rights) or labelling the risks in a different way. Risks 8 to 37 furthermore combine corruption risks from lack of prevention with risks from corrupted legislation. The Regional Methodology treats both categories separately. This approach seems more structured and didactical from an international perspective. However, given that Moldovan experts are used to the approach, it is certainly also possible to combine both risks of categories. The list of corruption risks is comprehensive and there is no need to follow the Regional Methodology, as Moldova developed its own tradition and practice in systemizing the risks.

The **titles** of the risks are rather **lengthy** and could be cut down by almost half. For example, "Excessive competences that are not characteristic of or run counter to the status of public entities" states the same thing twice – "excessive competencies" by definition are "not characteristic or run counter to the status of public entities". It is thus simply enough to call them "excessive competencies of public entities". The short title grasps both the essence of the risk while alerting the reader to its potential harmful impact. The shortened titles would help in particular domestic and international practitioners outside NAC grasping the structure:

I. LINGUISTIC FORMULATIONS	
1.	Undefined ~~The introduction of~~ new terms ~~which are not defined in the existing or the draft legislation~~
2.	Non-uniform use of legal terms
3.	Ambiguous wording ~~that allows for abusive interpretations~~
II. LEGISLATIVE COHERENCE	
4.	Deficient ~~rules of~~ references

5.	Deficient delegation of competence ~~delegating norms~~
6.	Conflict of legal norms
7.	Legal loopholes
III.TRANSPARENCY AND ACCESS TO INFORMATION	
8.	~~Lack of/i~~Insufficient access to information ~~regarding~~ on regulatory acts
9.	~~Lack of/i~~Insufficient transparency ~~in the functioning of~~ on public entities
10.	~~Lack of/i~~Insufficient access to general information ~~of general interest~~
IV. THE EXERCISE OF HUMAN RIGHTS AND THE PERFORMANCE OF OBLIGATIONS	
11.	~~Norm implementing costs that are u~~Unreasonable costs ~~when balanced~~ against the public benefit
12.	The pursuit of private interests at the expense of the public interest
13.	The infliction of damage on legitimate private interests at the expense of the public interest
14.	Demands that make the exercise of rights excessively difficult/excessive obligations
15.	Unjustified derogations from the exercise of rights/performance of obligations
16.	Unjustified restrictions on human rights
17.	Discriminatory provisions
18.	Excessive powers that are not characteristic of or run counter to the status of private entities
19.	The encouragement of unfair competition
20.	Legal norms whose application is impossible
V. THE EXERCISE OF THE COMPETENCES OF PUBLIC ENTITIES	
21.	Extensive regulatory competence
22.	Excessive competence that are not characteristic of or run counter to the status of public entities
23.	Parallel competences
24.	Indeterminacy concerning the competent public entity/the persons subject to the provision
25.	Competences that allow for derogations and abusive interpretations
26.	Conferring a right to a public entity instead of imposing an obligation
27.	~~The a~~Accumulation of ~~the~~ competences that should be put separately ~~to set legal requirements, exercise control over the observance of these requirements, and inflict sanctions~~
28.	Non-exhaustive/ambiguous/subjective grounds for the refusal of public entity to fulfill actions

29.	Lack/ambiguity of administrative procedures
30.	Absence of clear time limits/unreasonable time limits/unjustified extensions of time limits
VI. CONTROL MECHANISMS	
31.	~~Lack/i~~Insufficiency of ~~mechanisms of~~ oversight and control (hierarchical, intern, public)
32.	~~Lack/i~~Insufficien~~tcy~~ appeal ~~of~~ mechanisms ~~of contesting the decisions and actions of public entities~~
VII. ACCOUNTABILITY AND SANCTIONS	
33.	Conflation/double counting of different types of legal accountability for the same infringement
34.	Non-exhaustive grounds for accountability
35.	Lack of clear accountability of public agents/entities for infringements of the provisions of the draft
36.	Lack of clear sanctions ~~for infringement of the provisions of the draft~~
37.	The lack of proportion between infringement and sanction

Representatives of NAC explained that **Chapter IV** "The exercise of human rights and the performance of obligation" focuses on how norms affect citizens/persons, while **Chapter V** focuses on how norms enable public entities/officials to commit corruption. To some extent, both overlap by addressing the same risk from two different perspectives (e.g. a restriction on human rights under Chapter IV can also be the result of excessive powers under Chapter V.

Regarding **Risk no. 16** "Unjustified restrictions on the exercise of human rights" it is not fully clear when this risk would be fulfilled, without any of the other risks applying. There are doubts whether this risk has a distinct field of application, or could be dropped. In other words, it seems as if any of the other risks is an "unjustified restriction on the exercise of human rights". Here, an illustrative example would help to show to the reader that the explicit mentioning of the risk is justified.

Sentences describing the risks tend to be rather **long**. For example, under Risk no. 12, there is a sentence counting even 116 words, and under Risk no. 15, one sentence contains 119 words, under Risk no. 16, it is 113 words in one sentence. Ideally, sentences should have between 3 to 15 words. The Regional Methodology notes in this context: "use short sentences (one thought one sentence); […] only one main clause and no more than one subordinate clause (if possible)" (Part 2, at 4.1).

The Methodology contains highly instructive parts on corruption risks and could be used for **trainings** in other countries. For example, at no. 24.1, the Methodology lists possible red flags for private interests

The risks are not illustrated with practical **examples**. However, in the case of Moldova this would not appear necessary as the NAC has about 12 staff working on the issue and thus there is already sufficient institutional capacity on the issue to train incoming stuff, in particular based on the many examples of past assessments. Still, for any civil society stakeholder or legal drafter in a public entity new to the issue, it appears to be rather challenging to embrace the structure of these risks without examples. For instance, Risk no. 26 "Confusing rights with obligations" would become very clear, if there was an example of a badly worded provision juxtaposed with a correctly worded provision.

3.6 Civil society

Civil society conducts corruption proofing in Moldova since 2006 based on its **own methodology** (see Regional Methodology, Part 1, 2.2.8). The Law on transparency in decision-making provides for a basis to feed corruption proofing reports into the legislative process and to elicit feedback by public authorities. In addition, the Methodology foresees that civil society representatives can be asked for an opinion when drafting the corruption proofing **reports** (at no. 13.2) and they can be members of the **working groups** (at no. 17). This is a positive feature of the Methodology.

4 Annex: Law excerpt

Excerpt from the draft Integrity Law (no. 267) of 2016:

Article 28. Anticorruption expertise

(1) The anticorruption expertise shall cover the identification of corruption risks which may occur in relation to promotion of draft legislative and normative acts by public entities (corruption regulatory risks) and the development of recommendations for eliminating their effects. The categories of corruption regulatory risks refer to: linguistic formulations, legislative coherence, transparency and access to information, exercise of people's rights and obligations, exercise of public authorities' duties, control mechanisms, liability and sanctions.

(2) The public entities entitled for legislative initiative (draft authors) shall submit for anticorruption expertise the draft legislative and normative acts (draft), except for:

a) policy documents;

b) individual acts for personnel reshuffle;

c) Government decrees;

d) Government decisions for approving draft laws and decrees of the Republic of Moldova President;

e) international treaties, acts for awarding full power and expressing the Republic of Moldova consent to be bound by the international treaty.

(3) The anticorruption expertise shall be carried out by the National Anticorruption Center for the final draft, based on the proposals and objections expressed during the endorsement of the draft by public entities and its consultation with the interested stakeholders, based on the Law on transparency in decision-making. The anticorruption expertise report shall present on binding basis the analysis of risks for corrupting the legislative process, the general and detailed analysis of the corruption risks for the draft provisions and expert's conclusion. When private interests are promoted contrary to the public interest, the anticorruption expertise report may include information about the links between the draft author and the persons affiliated to commercial and noncommercial organizations (founders, administrators, etc.), if such links were established.

(4) The deadline for performing the anticorruption expertise shall be 10 working days since the moment the draft is sent to the National Anticorruption Center. If the draft is big or complex, the deadline may be extended up to 30 working days, about which the draft author is informed.

(5) The anticorruption expertise shall be carried out based on the Methodology for performing anticorruption expertise for draft legislative and normative acts, approved by the National Anticorruption Center Board, which sets forth the objectives and the stages of the anticorruption expertise for draft legislative and normative acts, describes the typology of corruption regulatory risks and the detailed structure of the anticorruption expertise report. The methodology for performing the anticorruption expertise of draft legislative and normative acts shall be published on the web page of the National Anticorruption Center.

(6) The anticorruption expertise reports shall be signed by the expert who has concluded them, sent to the draft author and published on the web page of the National Anticorruption Center.