

Position note
on the initiative concerning
”decriminalization of economic crimes”

(Initiative of the Ministry of Justice no. 443)

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Introductory Note

The Moldovan banking sector has always been the target of some interest groups, the struggle for the control of the most important banks goes over the years, and regardless of the governing regimes and parties. The culmination was reached by the end of 2014 when the banking system of our country has experienced a systemic crisis, which, through the scale of the results, has even led to the perplexity of the international community. Shortcomings of the corporate governance, malfunctions within state institutions, including those responsible for ensuring financial stability, or malicious decision-makers, allowed the robbing of three banks and misappropriation of billions of lei. As the last resort to stabilize the situation, it was decided to grant government-backed emergency credits with their conversion into the state debt in case of failing to fulfil obligations¹.

The initial absence of response by the authorities and, subsequently, the slow process of investigating the fraud and damage recovering determined the activation of the issued guarantees and the conversion of evaded amounts into state debt. Thus, under Law no. 235 as of 3 October 2016², the Government has ensured the enforcing of the payment obligations derived from previously granted guarantees and empowered the Ministry of Finance to issue government bonds in the total amount of approximately 13.6 billion MDL (690 million USD³). In essence, this mechanism involves nothing more than the use of public money to cover the damage caused by private individuals to private banks. Under these circumstances, the huge amount of public money required to stabilize the situation in the banking sector remains the direct consequence of that greatest economic fraud in the history of our country. Besides, a number of other consequences and collateral damages of economic and social nature make their presence felt. Among these, we can mention the crisis of confidence in the banking sector and the prospects of the national economy, the distortion of the crediting process or even the loss of public confidence in the political class and state institutions.

A series of investigations have begun in the period following the banking frauds. Even so, until December 2017, they are lacking transparency, and the recovery of the damage only takes place through the liquidation of the three robbed banks and sale of the assets they hold. Internally, it was decided to create an inter-institutional platform for monitoring and controlling the status of the banking fraud investigation and the recovery of defrauded assets⁴, but there is no publicly available information about its meetings, decisions or results. Externally, the contract with the investigating company Kroll, the actions of which are aimed at identifying assets bought with fraudulent means and their subsequent recovery, was extended. From periodically issued information notes, we find that there was a significant group of companies acting in concert that organized a fraud scheme for several banks through dubious loan agreements. However, there are just few details, and this mechanism will be presented to the public only in the event of the publication of the second report by Kroll, and it is unclear whether it is going to be published.

¹ Government Decision No. 938 as of 13 November 2014 and Government Decision No. 124 as of 30 March 2015

² Law no. 235 as of 03.10.2016 on the issuance of state bonds for enforcing by the Finance Ministry of payment obligations derived from state guarantees no. 807 as of 17 November 2014 and no. 101 as of 1 April 2015

³ According to the official exchange rate of MDL/USD on the date of the issuance of government bonds by the Ministry of Finance

⁴ During the meeting of the Standing Committee for monitoring of cases of increased social interest as of 18 September 2017 the composition of this platform was approved. It includes representatives of the Parliament, Government, NBM, General Prosecutor's Office, NAC, NCFM, other institutions.

In recent times, the legislative initiatives that can lead to the legalization of fraudulent funds or exemption from liability of those involved in banking fraud proliferate. Thus, following the initiative on capital liberalization and fiscal stimulation and amendments to the Law on Citizenship, that allow obtaining of Moldovan citizenship in exchange of some investments in so-called „strategic areas“, a series of amendments are proposed to the criminal legislation regarding exemption from criminal liability, namely the suspension of the prison sentence enforcement, for the majority of crimes concerning the banking system and financial and insurance market. Thus, in the context of the so-called „*substantial improvement of the investment climate, attraction of foreign investments and reduction of the pressure on the business environment by the law enforcement bodies*“, a new ground is proposed for the exemption from criminal liability for a number of crimes, **including crimes in the domain of lending and bank management, crimes related to the securities market, securities, breach of the shareholders' rights and competition**, in other words, the main crimes that facilitated banking fraud.

Defining the problem

On 31 October 2017, the Ministry of Justice (MJ) proposed for public consultation the draft law on amending and supplementing of certain legislative acts (Criminal Code, Code of Penal Procedure, Misdemeanors Code, etc.), hereinafter, draft Law no. 443⁵. This legislative initiative follows the announcement made by the representatives of the ministry during the economic event „Moldova Business Week 2017“, according to which the MJ should propose amendment of the legislation in order to contribute substantially to the improvement of the investment climate in our country⁶. According to the draft law, it was designed to substantially improve the investment climate by new, more permissive regulating approaches that will lead to development and attract foreign investment.

The draft proposes amendments to several legislative acts, some of which will undoubtedly contribute to the increase of interest of foreign investors. However, among the proposed series of amendments, some seem to have nothing to do with attracting foreign investors or improving the investment climate. Thus, some amendments require closer scrutiny and broad consultation with representatives of the judiciary, financial and banking system, business and external partners. Respectively, it concerns proposed major changes to the conditions for the exemption from criminal liability for crimes characteristic of the last period of the domestic financial environment.

(i) The new ground for the exemption from criminal liability

The draft proposes a new ground for the exemption from criminal liability (in the case of the commission of a crime for the first time) for a series of crimes specified in the Criminal Code, including offenses in the field of lending and bank management, those related to the securities market, breach of the shareholders' rights or obstruction of banking supervision

- **art.239** – violation of crediting rules, loan granting policies or rules for granting damages/insurance allowances;
- **art. 239¹ – 239²**– malpractice or fraudulent management of the bank; obstruction of banking supervision;

⁵ <http://www.justice.gov.md/pageview.php?l=ro&idc=192>

⁶ The Ministry of Justice announces legislative initiatives that will improve the investment climate, <http://www.moldova.org/ministerul-justitiei-anunta-initiative-legislative-ce-vor-imbunatati-climatul-investitional/>

- **art. 245³–245⁴**– the abusive use of privileged information on the securities market or the violation of the provisions regarding the way to conclude transactions with the assets of the commercial company;
- **art. 245⁶**– practicing professional activities on the non-banking financial market without a license;
- **art. 245⁹**– preventing the exercise of rights by the associates (shareholders) of the commercial company and unlawful deprivation of these rights.

At the same time, the exemption will be applied if the crime was committed for the first time, the person repaired the damage and paid to the state budget double of the maximum amount of the penalty provided by the Criminal Code for the crime, namely as follows:

- a) the crime was committed for the first time;**
- b) the person remedied the infringement and repaired the damage within the time limit set by the state control body on the entrepreneurial activity or another competent body on the control of compliance with the provisions of the legislation in the domain;**
- c) paid to the state budget an amount equal to the amount of the material damage caused, but not less than double of the maximum amount of the fine provided by the sanction of the corresponding article in the special part.**

Although the draft law is at an early stage of coordination and endorsement by the competent institutions and the final text has not yet been finalized, we consider it useful to present a firm position regarding its sensitive elements, namely amendments that could generate significant risks and implications in the context of the banking fraud investigation and accountability of guilty persons.

The position of principle

Taking into account the embezzlements that have taken place in recent years in the banking sector and the frauds in the insurance system, the draft in its proposed version risks to significantly reduce the efforts of the investigating authorities and send dangerous signals for the future regarding the acceptance of similar illegal behaviour. Thus, we attest at least 5 issues associated with the nature and manner in which these amendments are proposed:

- 1. There is no need for such an initiative** – The draft does not justify in any way why these crimes should be subjects to the exemption from criminal liability. Taking into account the way these crimes are committed and the widespread phenomenon of these deviations, including taking over businesses by raider attacks, the exemption from criminal liability is unjustified. It is unacceptable that a person who has been involved in banking fraud, obstruction of banking supervision, in manipulations with securities escapes criminal liability by paying a fine. In fact, in this part, the draft introduces milder sanctions for defrauders, which by the nature of things is unacceptable. A state that has been the victim of huge banking fraud should, on the contrary, tighten sanctions for such deviations, discouraging any new attempts of this kind. Moreover, in terms of the given draft, favourable conditions are created for the exemption from criminal liability or the conditional suspension of the enforcement of the penalty imposed on some actors involved in the banking fraud. Although it is mentioned in the informative note that the amendments to the draft law are largely elaborated to achieve the goal of „substantial improvement of the investment climate“, we note a

weak, if not even absence of the causal link between the promotion of the investment climate and the substantial reduction of the penalties for the crimes committed intentionally, especially those in the banking domain.

2. **Retroactive effect of the criminal law** – Art. 10 of the Criminal Code provides that *Criminal law that eliminates the criminal nature of an act, that makes the punishment milder, or that in any other way improves the situation of the person who committed the crime shall have retroactive effect, meaning that it shall extend to persons who committed the respective acts prior to the date when this law took effect, including persons who are serving sentences or who served sentences but have criminal records.* Taking into account that the proposed amendments make the punishment for the proposed crimes milder, we find that they will also be applied to persons under investigation or those to be investigated in connection with the banking fraud in 2014. It seems the MJ wants to propose that the exemption from liability should not apply to the crimes committed earlier. Such an approach is hardly possible, since the principle of the application of milder criminal law is a principle of law that does not accept exceptions, and any exceptions introduced in special laws could lead to inconsistent interpretations in practice. Moreover, it is unclear why it is desirable to apply more mild sanctions for economic crimes in the future, if the aim is to ensure a favourable investment climate. De facto, this rule will facilitate those who have committed frauds against good faith investors. Thus, such a draft will rather discourage and will not attract investors to the Republic of Moldova. Given that such an initiative is unjustified, the insistence of the MJ on promoting it implies that the purpose of the draft is in fact other than the one declared.
3. **Obstruction of banking investigations and inconsistency with policies promoted so far** – Offences for which exemption from criminal liability is proposed, even if they are committed once, represent a tremendous danger to the financial and economic security of the state. This is fully exemplified by the situation of banking frauds which brought the Republic of Moldova to the point of a financial collapse with the possibility of exclusion from the international payment systems. Introducing these changes at the moment will seriously hamper the proper investigation of the banking fraud. Moreover, the draft provides for the exemption from criminal liability for the obstruction of banking supervision or fraudulent bank management, crimes introduced in 2014. The sanctions for these were even tightened in autumn of 2016. The exemption from criminal liability for these crimes in 2017 is at least surprising.
4. **Hardly quantifiable damage** – Exemption from criminal liability of people involved in fraudulent lending, poor bank management, etc., means in practical terms that persons guilty of banking fraud will not be sanctioned if they pay to the budget an amount equal to the amount of material damage incurred. However, given the fact that in the case of banking frauds in 2014-2015 complex embezzlement schemes with the use of offshore companies and fictitious persons were applied, the real damage caused by a particular person would be quite difficult to establish. Also, in the chain of embezzlements involving more than one person for the same crime (e.g. the loans committee), it will be quite difficult to assign the link between the really guilty person and the exact amount embezzled from the bank, or the degree of guilt for each individual. Moreover, in addition to the direct financial damage caused, banking fraud also involves a number of collateral damage with long-lasting repercussions which is difficult to assess. The image crisis that happened in the banking sector, the consequences for the national economy, or the opportunity cost of the public money used are just a

few of the situations where the damage will be difficult to assess and virtually impossible to determine the responsible person. Finally, the fact that this damage is to be quantified within the framework of confidential investigations by the criminal investigating authority, that is not a specialist in the quantification of damages caused by economic crimes, creates serious premises for abuses and corruption. In fact, such provisions provide additional leverage to criminal prosecution bodies or control bodies (due to the unclear nature of the draft in this respect) to exercise undue pressure on the persons from the economic sector „in return for the exemption from criminal liability“.

- 5. The global trend is to strengthen the accountability framework for such crimes** – The stability and viability of the financial system is a collective asset which every citizen of the country must take advantage of. The latest banking supervision rules require consistent sanctions to be imposed with the view to prevent and limit the risks associated with fraud. In recent years, taking into account the process of globalization and internationalization of the banking activity, the international community tends to unify the level of sanctions in the domain, way of their application and trigger conditions. Thus, in order to make persons guilty of banking fraud adequately accountable and to discourage recommission of such crimes, the international practice provides for fines making up at least double amount of the damage caused⁷ or the benefit obtained. At the same time, taking into account the importance of a viable financial system, in addition to banking legislation, tough measures against banking and financial crimes are also provided for in the criminal law in case of particularly serious prejudice is produced. For example, for banking fraud of particularly large amounts, the US legislation provides for imprisonment of up to 30 years⁸, while the proposed amendments to the criminal law of the Republic of Moldova only provide for the reparation of the damage and the payment of a double fine under the Criminal Code. Under these circumstances, the financial frauds committed during the period of 2014-2015 in the Moldovan banking sector can not be decriminalized, or the crimes committed are particularly serious taking into account the consequences for both the national financial and economic system and for the Moldovan society as a whole.

Conclusions and recommendations

The draft proposed for public consultation, de facto, offers criminal facilities to defrauders involved in the banking fraud or obstruction of banking supervision. This is unacceptable in a society with a high level of economic fraud and where more than 10% of gross domestic product has been stolen from the banking system recently. The draft does not exclude its application to the persons involved in the banking fraud and the lack of justification of the need for exemption from criminal liability for intentionally committed economic crimes coupled with the insistence with which this initiative is promoted may suggest that the draft pursues a purpose other than that declared.

The domestic banking crisis has revealed the rapidity with which the obscure intentions of some people can spread over the entire financial system, ultimately affecting the taxpayers, economic environment and entire

⁷ The CRD/CRR IV Package (European Directive no. 2013/36/EU and EU Regulation no. 575/2013) is the transposition of Basel III Agreement of the Basel Committee on Banking Supervision. The Republic of Moldova committed itself under Law no. 202 on the activity of banks to transpose the provisions of this Agreement without distorting them.

⁸ Article 18 of the US Code: Fraud of a financial institution or acquisition of any funds, loans, assets, securities or other property held by or under the custody or control of a financial institution through false or fraudulent claims, declarations or promises will be fined by no more than \$ 1,000,000 or imprisonment for not more than 30 years, or both.

society directly and for a long term. Under these circumstances, the ability to influence the banking environment through sanctions is an important feature of the supervisory process, especially when market discipline can not provide sufficient incentives for shareholders and managers to take on the consequences deriving from the risks they run. The lack of adequate immediate intervention tools and inability of the state institutions to act in a coordinated manner have transformed the banking sector into a strong risk factor and instability in terms of state security. The events of 2014-2015 continue to remain a tough spot in the history of the recent years and, at least until the final solution of the case, such kind of crimes can not be decriminalized. Also, any intention or form of avoiding the accountability of persons involved in the banking fraud will be controversial because it suggests absence of willingness of the authorities to find the truth about the banking fraud.

Introduction of some measures of criminal relaxation in the case of deviations which present a threat and an increased social interest can not be applied to the acts committed in the context of fraud in the domestic banking sector. We should reiterate that in this case we are not talking about an act of amnesty, having no effect for the future crimes, but about the amendment of the Criminal Code, and these provisions have a perpetual effect. Anyone can claim the exemption from criminal liability for both already committed crimes and those they will commit in the future, and this initiative should be treated with greater care.

Finally, we note that the adoption of the draft law in the proposed version will further undermine the trust of the population in the governance, the legitimacy of the current composition and de facto interests of the MPs, and will reveal the fundamental deficiencies of the system of the rule of law in the Republic of Moldova. Taking into account the above mentioned, **we strongly recommend excluding crimes related to the financial and banking environment, money laundering and competition domain from the list of crimes to which the exemption from criminal liability or a milder punishment can be applied.**