

OPINION

of the

Promo -LEX Association

on the draft law no. 298 of 06.07.2020 for
the modification of some normative acts
(Tax Code no. 1163/1997 and the Code of
Criminal Procedure of the
Republic of Moldova)

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Sent by email to the

**Committee on Legal Affairs, Appointments and Immunities
Committee on Economy, Budget and Finance
Committee on National Security, Defense and Public Order
Parliament of the Republic of Moldova**
Copy to: Mr. Pavel VOICU, Minister of Internal Affairs
Mr. Sergiu PAIU, Head of the General Inspectorate of Police

**OPINION
of the PROMO -LEX Association
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(Tax Code no. 1163/1997 and the Code of Criminal Procedure of the Republic of Moldova)**

Pursuant to Law no. 239-XVI of November 13, 2008 on transparency in the decision-making process and the Regulation of the Parliament approved by Law no. 7979-XIII of April 2, 1996, **the Promo-LEX Association** expresses its interest in participating in the public consultation of the draft law amending certain acts (the Tax Code and the Code of Criminal Procedure of the RM) (registered in the Parliament under no. 298 of 06.07.2020¹).

Respectively, the Promo-LEX Association, as an interested party, addresses the Committees notified on the merits, namely, the Committee on Economy, Budget and Finance and the Committee on Legal Affairs, Appointments and Immunities, as well as the Committee on National Security, Defense and Public Order requesting to examine the findings, conclusions and recommendations made by the Association with regard to the draft Law no. 298 of 06.07.2020 and outlined in this Opinion.

FINDINGS AND RECOMMENDATIONS:

Having analyzed the draft law, **the Promo-LEX Association presents the following findings and recommendations:**

With regard to the general context of the proposed changes

On 17.12.2019, the President of the Republic of Moldova stated in the “Pro-Business Dialogue” Forum that some normative acts urgently require changes to ensure that the police do not put pressure on business and that specialized and territorial police bodies do not double the functions of the state authorities in charge of fighting against economic crimes².

On 3.01.2020, the Government issued Provision no. 4 on the establishment of a Working Group to ensure the reorganization and efficiency of the body in charge of finding of facts/ investigation into economic crimes³. The provision mandated the working group made up of only four people to assess the regulatory framework of the body in charge of finding of facts / investigation into economic crimes, to prepare a draft action plan for the reorganization and ensuring the efficiency of the body’s activity and advance proposals to amend the regulatory framework. Mention should be made of the fact that the working group did not include any representative of the prosecutor's office, criminal investigating body or any investigating body already existing in the country. Furthermore, neither the results of the study carried out by this working group, nor the actions undertaken by them have been made known to the public.

¹ <https://bit.ly/2ZxCMqY>

² <https://bit.ly/30gGBjG>

³ https://www.legis.md/cautare/getResults?doc_id=119907&lang=ro

The Ministry of Finance has prepared a draft law amending certain legal provisions, by which it proposes granting the State Tax Service powers to carry out particular types of investigation, in accordance with the Law on Special Investigation No. 59/2012, and criminal investigations, in accordance with the Code of Criminal Procedure for the offenses stipulated in art. 241, 241¹, 242, 244, 244¹, 250, 250¹, 251, 252, 253, 335¹ of the Penal Code. To avoid overlapping of competences, the same draft law proposes to review the competence of the prosecutor to exercise criminal prosecution under art. 270 para. (1) pt. 2) let. c) of the Code of Criminal Procedure providing for exclusion of the listed offenses. The draft law also proposes to change art. 276¹ of the Code of Criminal Procedure by which the exclusive competence of the prosecutor to decide on the initiation of criminal proceedings is amended, the competence to exercise criminal investigation being also assigned to the competent criminal investigating body.

According to the informative note, specialized subdivisions are to be established within the State Tax Service, which will carry out investigations into economic crimes mainly with the involvement of criminal investigation officers within the State Tax Service. In addition, according to the informative note, some resources of the Ministry of Internal Affairs (MIA) will be directed to investigate economic crimes to prevent and combat other economic crimes, given that finding and investigation of contraventions related to entrepreneurial activity does not fall within the competence of finding agents within the MIA. The reason invoked for the exclusion of these powers is the involvement of finding agents within the MIA in activities that are less specific to the police and which in fact do not coincide with the competences of the state control bodies or of other finding agents.

On July 3, 2020, by Decision no. 465, the Government approved and presented to the Parliament this draft law.

I. Provisions that raise suspicions of unconstitutionality

Art. 124 of the Constitution of the Republic of Moldova explains the role of the Prosecutor's Office within the judiciary system – it contributes to the administration of justice, protection of rights, freedoms and legitimate interests of the person, society and state through criminal and other legal procedures. Also, according to para. (2) the powers of the prosecutor's office are exercised by prosecutors.

Having considered the above, we conclude that the proposed draft law, especially art. 276¹ of the Code of Criminal Procedure, grants powers, which by themselves, are within the competence of the prosecutor's office and respectively, of the prosecutors, to an administrative authority subordinated to the Ministry of Finance.

The prosecutor's office has an important role in ensuring an independent and impartial functioning of the criminal justice system. The prosecutor's office cannot be excluded from contributing to the administration of justice, and the exclusive powers of the prosecutor's office (especially, to decide on the initiation of criminal proceedings or vice versa) cannot be subject to sharing, assignment or transmission to other authorities.

This amendment distorts the natural construction of the state and is also contrary to the principle of separation of powers. We remind you that the Constitution of the Republic of Moldova, in particular, Chapter IX - Judicial Authority, provides, in this regard, only for courts, the Superior Council of Magistracy and the Prosecutor's Office. Therefore, no administrative authority subordinated to the executive (here: State Tax Service) or any other authority can have the competence to replace the powers of the prosecutor's office or the court, it can only cooperate to exercise their duties.

II. Concentration of the powers of fiscal control and sanctioning, finding of crimes and conducting criminal prosecution

According to art. 13¹ of the Tax Code, the State Tax Service is the administrative authority that carries out its activity and is subordinated to the Ministry of Finance, with the following competences:

- provision of public administrative services to taxpayers,
- tax supervision and control,
- finding infringements in the cases provided by the Code of Criminal Procedure.

The concentration of these types of powers, as well as granting the powers for carrying out criminal investigation to the competence of a single administrative authority, allowed by this draft law, can lead to abuses of taxpayers. Moreover, both the National Anticorruption Center (in the Anticorruption Expert Report on the above draft⁴) and the Ministry of Justice (in its opinion) clearly stated that transferring the powers of investigation and prosecution to the State Tax Service exceeds the jurisdiction and the role of this public entity, whose main mission is to ensure tax administration and management of revenues to the public budget.

III. Lack of broad consensus and a strategic vision about the place, role and powers of the criminal investigation body

The draft law in question proposes the amendment of Law no. 333/2006 on the status of the criminal investigating officer and Law no. 59/2012 on the special investigating activity.

We remind you that the Action Plan for the implementation of the Police Development Strategy for 2016-2020⁵ includes activities for reviewing the status of investigating and prosecuting officers, the deadline being the end of 2018⁶. According to the Report on the Civic Monitoring of the Police Reform⁷, both the **sub-action on establishing the role, place and responsibilities of the criminal investigation subdivisions** within the Police and the sub-action on adapting the legal framework for special investigating activity to Community standards **remain unfulfilled** as of the end of 2019.

It should be noted that state authorities failed to develop and implement a unified strategic and clear vision on the role, place and powers of the criminal investigation bodies. On the other hand, the Ministry of Justice delays the examination of the amendments proposed by the Ministry of Internal Affairs to adapt the legal framework for special investigating activity to community standards. *In this sense, we consider it irresponsible that the Government and the Ministry of Finance promotes and the Parliament approves a draft law that strategically affects and encumbers the processes that have been started at least five years ago to ensure the implementation of the Police Development Strategy.*

At the same time, the National Anticorruption Center stated in the Anticorruption Expert Report that the decision on the creation of additional bodies vested with criminal investigation and prosecution powers would become the object of an ex ante examination to identify the problem and the objective, possible options for solving the problem or achieving the objective and to analyze the effects or consequences of these options prior to the approval of the decision.

⁴ Anticorruption Expert Report no. EL020 / 6623 of 03.07.2020

⁵ <https://bit.ly/3fFINaM>

⁶ 2.2.1. Establishing the role, place and powers of the criminal investigation subdivisions within the Police in the context of the judicial sector reform; 2.2.2 Development of occupational standards for investigation and prosecution officers; 2.2.3. Adaptation of the legal framework for the special investigation activity to the community standards.

⁷ Civic Monitoring of the Police Reform. Report no. 3, 2019, drawn up by the Promo-LEX Association. See pp. 46-47 <https://bit.ly/3fuKE25>

IV. The necessity and expedience of setting up the second body for criminal investigation under the Ministry of Finance

According to the informative note to the draft law, in the period of October 2018 – December 2019, the State Tax Service referred to the Prosecutor's Office 106 cases of economic crimes, under the powers granted to the agency on October 1, 2018. According to the Ministry of Finance, the newly created body responsible for conducting criminal prosecutions and investigations was to provide 70 jobs. Thus, from an economic point of view, we consider that the employment of 70 people to investigate 106 crimes per year is unjustified.

Although the informative note highlights some advantages, the need to transfer the powers of criminal investigation from the Ministry of Internal Affairs to the State Tax Service is not substantiated.

In addition, we mention that a criminal investigation body subordinated to the Ministry of Finance has already been established and operates within the Customs Service. In this sense, *the intention of the Ministry of Finance to set it up a criminal investigation body within the State Tax Service is incomprehensible given the absence of a clear need for it. Moreover, we do not understand the necessity to set up the second criminal investigation body within the same Ministry. An alternative solution could be the reorganization of the prosecution body existing within the Customs Service, which already has a defined structure, including regional agencies (north, center, south).*

Moreover, according to the General Directorate of Criminal Investigation within the GIP, the establishment of a criminal investigation body within the State Tax Service **would generate unjustified expenses for the State**, including for training of experts in the investigation of economic crimes. The argument also applies in the context in which there are sufficient criminal investigation bodies involved in the investigation of economic crimes that can continue, or, if necessary, take over the investigation of these criminal facts. At the same time, based on the experience of the General Inspectorate of Police, even if the prosecution of criminal offenses is the responsibility of prosecutors, GIP criminal investigation officers are included in working groups by the order of the prosecutor and are involved in the investigation of these facts.

The lack of the need to establish an additional criminal investigation body is also substantiated by **the small number of economic crimes**, which are intended to be transferred to the competence of the newly created criminal investigation body. Thus, according to the statistical data of the General Inspectorate of Police, **126 criminal cases were registered in 2019**, of which only 19% have been finalized.

Thus, a subdivision with the capacity of about 70 jobs is created for the investigation of a potential 200 crimes per year, and all of this in the situation, when the mentioned crimes are currently investigated mostly by the Prosecutor's Office and the Police.

Conclusions and recommendations

In conclusion,

Even if the issue of setting up a new criminal investigation body within the State Tax Service is expedient and falls within the competence of the Parliament, in the opinion of Promo-LEX, it is not well-founded or justified for the following reasons:

- *No comprehensive study on criminal prosecution bodies, their place, role and powers has been conducted.*
- *No unified and strategic vision has been developed to establish and clearly define the competence of criminal prosecution bodies, including that of investigation bodies within various institutions defending the rule of law, or the cooperation between them.*

- Consequently, making changes in this segment in the absence of clear and reasoned answers to the questions outlined above, would result in burdening and delaying the implementation of the activities provided by the Police Development Strategy.
- The establishment of a new criminal investigation body generates seemingly unjustified costs for the state, including or perhaps especially for the training of persons to be employed in the new body.
- The time and financial costs for human resources are not justified given the small number of crimes to be investigated by the new criminal investigation body.
- Concentrating the competences of providing public administrative services, control and fiscal sanction, finding crimes and conducting criminal proceedings in a single administrative authority, can generate risks or suspicions of abuses against taxpayers, as well as raise constitutionality concerns.

At the same time, Promo-LEX considers it irresponsible that the Government and the Ministry of Finance promotes, while the Parliamentary Committees and the Plenum of the Parliament approves in the first reading a draft law that strategically affects the processes that have been started for at least five years now. These actions endanger the implementation of the Police Development Strategy, which aims at establishing the role, place and functions of the prosecution subdivisions within the Police in the context of the judiciary reform. At the same time, there is a risk that initiatives to adjust the legal framework for special investigative activity to Community standards may be affected.

In this sense, the Promo-LEX Association recommends to the Parliament of the Republic of Moldova to suspend the voting of the draft law no. 298 of 06.07.2020 in the second reading, until a comprehensive study on the role and place of criminal investigation bodies is carried out, as committed by the authorities through the Police Development Strategy. Moreover, it is necessary to develop a unified strategic vision and to clearly establish the way in which criminal prosecution bodies and investigation bodies will cooperate with other law enforcement agencies.

Nevertheless, if the legislature concludes on the appropriateness and necessity of transferring the investigation and prosecution of economic crimes to the competence of another investigative body, it is recommended to consider the possibility of reorganization and possible extension of the powers of the investigation body within the Customs Service, rather than establish the second investigating authority under the Ministry of Finance.

Respectfully,

Ion Manole / _____ /

Executive Director, Promo-LEX Association