
LEGAL TRENDS

Review of the Draft Laws Elaborated by the Ministry of Justice

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Draft-Laws of Georgia concerning a) A Change to the Criminal Code of Georgia; b) A Change to the Criminal Procedure Code of Georgia; c) Changes to the Law of Georgia on the Rule of Enforcement of Non-Custodial Penalties and Probation; d) A Change to the Law of Georgia on Entrepreneurs; e) A Change to the Law of Georgia on Enforcement Proceedings; f) Changes to the Law of Georgia on Public Law Legal Entity; g) A Change to the Organic Law of Georgia on Termination and Prohibition of Activity of Associations and h) A Change to the Organic Law of Georgia on Political Associations of Individuals

This block of draft-laws introduces criminal liability of a legal person – a new institute in the Georgian criminal legislation, and regulates matters concerning the application of criminal liability to legal persons.

The introduction of criminal liability of legal persons is linked with the need to deploy alternative mechanisms to combat organised crime and especially economic crimes.

The number of legal persons in many countries has significantly increased due to general technical progress, a freer and liberal business environment, the civil activity of the public, the freedom of establishment of entrepreneurial or non-entrepreneurial entities and the growth of trans-national corporations. The increase in legal persons has in its wake increased the level of organised crime. According to the statistics organisations are quite often involved in the commission of grave, organised crimes such as legalisation of illegal proceeds, support of criminal activity of terrorist organisations, drug business, trading in arms, trafficking and prostitution.

Not only natural, but also legal persons acting through them are increasingly appearing as criminals. Moreover, considering the complicated structure of management and control of companies organised in a corporate manner, sometimes it is impossible to identify a particular criminal and apply measures against him. In a situation when the identification of a particular natural person and his punishment is impossible, criminal legislation fails

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to combat crime. This is especially so if a crime is committed by a legal person but punishing only a natural person can not ensure the accomplishment of the purpose of punishment – to prevent a new crime, because the replacement of natural persons does not affect the legal person's activity.

In many countries (USA, UK, France) the mechanisms of criminal liability of legal persons already apply. In other words formal legal mechanisms were introduced against a legal person i.e. a legal fiction, which is based upon the principle of corporate responsibility. This means on the one hand joint liability of natural and legal persons and on the other joint liability of members of a company established on the principle of membership. The introduction of similar mechanisms is a pressing problem in many countries including post-soviet countries (Russia, Ukraine, Kazakhstan).

The importance of criminal liability of legal persons is acknowledged by many international conventions. These include the European Criminal Law Convention on Corruption (27 January 1999), the Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (8 November 1990) and the UN Convention against Trans-National Organised Crime. Pursuant to Article 18.1 of the European Criminal Law Convention on Corruption, "each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences provided for by this Convention, committed for the benefit of the legal person". The same requirement is envisaged by the UN Convention against Trans-National Organised Crime, where Article 10 states that "each state party shall adopt such measures as may be necessary, consistent with its legal principles, to establish liability of legal persons. Subject to the legal principles of the state party, the liability of legal persons may be criminal, civil or administrative. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. Each state party shall ensure that legal persons held liable are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions".

Taking into account the international conventions and sharing the legislative experience of numerous countries, the draft-laws were prepared to introduce the mechanism of criminal liability of a legal person. They specify the conditions under which a legal person may be held criminally liable, prescribe the types of sanctions applicable to legal persons, the rule and terms of their imposition and enforcement, peculiarities of criminal proceedings against legal persons, and the offences for the commission of which legal persons shall be held criminally liable.

In the Criminal Code a new title shall be added that specifies the legal framework for the imposition of criminal liability on legal persons, the types of sanctions, and the rule and terms of their application.

The draft prescribes that a legal person shall be held criminally liable for the offence prescribed by the Criminal Code committed on behalf of or by means of and/or for the benefit of a legal person by a responsible person. "A responsible person" means a person authorised to manage, represent and make decisions on behalf of a legal person and/or a member of a supervisory, controlling, inspection or advisory body of a legal person, as well as any person working for a legal person by election, appointment or on the basis of contract of employment.

Criminal liability shall be imposed on a legal person also in those cases when a criminal activity is committed on behalf, by means and/or for the benefit of a legal person irrespective whether a natural person subject to criminal liability is identified or not. A legal person may be held criminally liable only for a completed crime and also if a responsible person was involved in the commission of an offence as an accomplice.

The following sanctions shall apply to a legal person: fine, prohibition of advertisement of goods, services and works; deprivation of licence; subjecting to judicial review; confiscation of property; and liquidation. However, liquidation and deprivation of an operation licence may be imposed only as a main sanction. A fine may be imposed in the form of a main as well as additional sanction. The prohibition of advertisement of goods, services and works, subjecting to judicial review and confiscation of property may be imposed only as an additional sanction.

A valid judgment of conviction against a legal person shall be made publicly available. The respective legal person shall incur the charges of its publication and dissemination. In addition there are rules and terms of application of each type of sanction and crime prescribed by the Criminal Code for the commission of which a legal person can be held criminally liable.

According to the draft criminal liability applies to legal persons (their legal successors) established in compliance with Georgian or a foreign country's legislation. However, the question of criminal liability of legal persons established in compliance with a foreign country's legislation shall be solved in accordance with the rule prescribed by Georgian legislation and regulations of international law.

The draft Law does not apply legal person's criminal liability to state and local self-government (government) bodies, whereas liquidation and deprivation of a license as a form of a sanction shall not be imposed on a public law legal person established under the law, whose authority delegated by the state shall not be transferred to another person.

These changes and amendments proposed to the Criminal Code leads to the need to change other laws. These are the Criminal Procedure Code; the Law on the Rule of Enforcement of Non-Custodial Penalties and Probation, the Law on Entrepreneurs, the Law on Enforcement Proceedings, the Law on Public Law Legal Entity, the Organic Law on

Termination and Prohibition of Activity of Associations and the Organic Law on Political Associations of Individuals.

The draft of Changes to the Civil Procedure Code regulates the procedural rules of criminal proceedings against a legal person. The grounds for initiation of criminal proceedings for application of criminal liability of a legal person shall be the investigator's or court's (judge's) order to be immediately notified to the founder(s) and/or director(s) of the legal person concerned in order to allow its representative to participate in the proceedings. Criminal proceedings against a legal person are run in accordance with the general rule prescribed by the Criminal Procedure Code as provided for by this draft.

When running proceedings it is necessary to establish: whether a criminal action is committed on behalf of the legal person concerned or by means of him and/or for his benefit; whether the committer of this crime is a person authorised to manage, represent and make decision on behalf of a legal person and/or a member of a supervisory, controlling, inspection or advisory body of a legal person, as well as any person working for a legal person by election, appointment or on the basis of contract of employment, and whether the legal person has acquired property or other benefit from this criminal activity. In addition, it should be established whether the crime is completed or not. However, if the above circumstances fail to be established the order on the initiation of the proceedings on application of a legal person's criminal liability should not be adopted and if adopted should be repealed.

The mechanism of seizure of property provided for by the Criminal Procedure Code may be applied as a criminal procedural compulsory measure against a legal person.

A legal person's representative (advocate) shall be admitted to participate in the case as soon as the order on initiation of the proceedings on application of a legal person's criminal liability. He is entitled to see the case records, appeal against the action and decision of the investigator, prosecutor, judge (court) and present a petition in accordance with the rule prescribed by the Criminal Procedure Code.

The draft envisages that unless the grounds for termination of the case are revealed during the criminal proceedings, the investigator adopts the decision on sending the case to the court. After the parties study the case records and petitions, the investigator adopts the order with regard to a legal person on sending the case to the court. The investigator sends the order together with case records to the prosecutor for approval. The prosecutor after having studied the case records is entitled to adopt one of the following decisions: a) on termination of the proceedings on application of a legal person's criminal liability on grounds provided for by the code; b) on returning the case to conduct additional investigation; c) on approval of the investigator's order and sending the case to court.

The draft specifies the essential elements to be indicated in the court judgement against the legal person. The judgement should indicate: legal person's name, address; identification (first name, last name, ID number, if a partner is a foreigner – his passport number) of founders, directors and those partners who hold more than a ten percent stake in the – person concerned; the Article from the Criminal Code under which the criminal liability was applied against a legal person; type of sanction and measure imposed for the criminal activity; and the body ensuring the enforcement of the sanction; civil action; the question of criminal procedural compulsory measure applied.

The judge (court) ensures publication and dissemination of the valid judgement against the legal person through the official journal or other media at the expense of a legal person. The judgement made against the legal person may be appealed.

Changes and amendments proposed to the Law on the Rule of Enforcement of Non-Custodial Penalties and Probation, the Law on Enforcement Proceedings specify the procedure of enforcement of the judgement made against the legal person. Enforcement of the judgement on the imposition of a fine and confiscation against the legal person shall be ensured by the Enforcement Department of the Ministry of Justice in accordance with the rule prescribed by the Law on Enforcement Proceedings. The judgement imposing deprivation of an operation licence in the form of a sanction is enforced by the Department for Enforcement of Non-Custodial Penalties and Probation of the Ministry of Justice.

If the sanction imposed against the legal person on deprivation of an operation licence concerns prohibition of the activity subject to licensing/permit, the employee of the Department for Enforcement of Non-Custodial Penalties and Probation shall notify the body issuing the respective licence/permit within three days from receipt of the legal act. In addition, the draft provides that the employees of the Department for Enforcement of Non-Custodial Penalties and Probation shall be obliged to periodically control how properly the legal person fulfils the judgement on deprivation of an operation licence.

An amendment proposed to the Law on Entrepreneurs regulates the procedure of liquidation of a legal person on the basis of a valid judgement on liquidation. The legal person concerned shall be liquidated by the liquidator(s) appointed by the court in accordance with the rule prescribed by Article 14 of the Law on Entrepreneurs. However, the director(s) of the company subject to liquidation may not be appointed as liquidator(s).

Changes and amendments proposed to the Law on Public Law Legal Person regulate the rules and procedures of liquidation of a public law legal person on the basis of a valid judgement on liquidation. The public law legal person concerned shall be liquidated on the basis of a court judgement by the liquidator(s) appointed by the court. However, the director(s) of the public law legal person concerned may not be appointed as liquidator(s) by the court. The draft provides that after completion of the procedure of registration of liquidation of public law legal person under the court judgement, the legal act (part of legal

act) on the basis of which the public law legal person was established shall lose its legal force. Liquidation in the form of a sanction shall not apply to a public law legal person whose authority delegated by the state shall not be transferred to other person.

Changes and amendments proposed to the Organic Laws on Termination and Prohibition of Activities of Associations and on Political Associations of Individuals propose additional provisions to the respective laws according to which the activity of legal persons concerned may be terminated and liquidated in the cases of sanction – deprivation of operation licence and liquidation, imposed on the basis of a court judgement on the application of criminal liability against them.