FRENCH MECHANISM OF OVERCOMING CORRUPTION IN PRIVATE SECTOR: EXPERIENCE FOR UKRAINE

Shpakovych O. - Doctor of Jur. Sciences (Dr.hab), Professor, Chair of Comparative & European Law, Institute of International Relations Taras Shevchenko National University of Kyiv;

Penkovska S. - bachelor student (2-nd year), International law, Institute of International Relations, Taras Shevchenko National University of Kyiv

УДК 342+34.04

Статья посвящена анализу эффективного механизма борьбы с коррупцией в частном секторе во Франции. Прежде всего, на основе рассмотрения статистики и доктрины доказано, что коррупция в частной сфере значительно негативно влияет на экономическое развитие в глобальном смысле. Актуальность даного вопроса подчеркивается недостаточным законодательным регулированием борьбы с получением/ предоставлением неправомерной выгоды в частном секторе по сравнению с публичным, в частности в Украине. Осуществлен всесторонний анализ правового регулирования механизма борьбы с коррупционными проявлениями в частной сфере. В частности, установлено, что такой механизм реализуется через введение Законом о прозрачности, борьбе с коррупцией и модернизацию экономической жизни (2015) обязательства компаний с определенным количеством работников/полученными доходами принимать на локальном уровне обязательные антикоррупционные программы («программы соблюдение антикоррупционного законодательства») с определенными элементами. Речь идет о перечне действий работников/руководства, которые должны оцениваться как коррупционные проявления, видов наказания, сообщениях о таких нарушениях и механизме регулярного внутреннего контроля, что может осуществляться, в т.ч. уполномоченным лицом. За непринятие соответствующей программы компании привлекаются Французским агентством по вопросам борьбы с коррупцией к ответственности, в частности, уголовной. Исследовано имплементацию соответствующих законодательных положений и установлено, что она осуществляется посредством принятия компаниями соответствующих программ, подачи отчетов с рассмотрением таких программ и регулярными проверками упомянутым агентством. Определено, что такой механизм является эффективным и позволяет выявить нарушения, что очевидно из судебной практики за последние три года. Для эффективного выполнения таких законодательных положений субъектами частного сектора предоставляется значительное количество разъяснений, других нормативно-правовых актов Французским агентством по вопросам борьбы с коррупцией. Отмечено, что в Украине принятие таких программ является обязательным только для отдельных субъектов публичного сектора, что делает невозможным эффективное осуществление антикоррупционной политики государства. В связи с этим предложено заимствовать французский опыт борьбы с коррупцией в частном секторе.

Ключевые слова: антикоррупционные программы, частный сектор, антикоррупционное законодательство, Кодекс поведения, Французское агентство по борьбе с коррупцией, программы соблюдения антикоррупционной политики.

The article is dedicated to profound analysis of the experience of France in fighting with the corruption in a private sector through the legal means. First of all, attention is drawn to the reasons why corruption in private sphere primarily affects the country's economy adversely and why should it be tackled. Then, French Law on Transparency, Fighting Corruption and Modernizing Economic Life is analyzed, particularly, provisions securing anti-corruption policy in country. Hence, so-called Codes of conduct, that, is anti-corruption compliance programs are considered, taking into account some crucial constituents of them, especially, disciplinary rules, monitoring and penalty system. The system of legal measures in this respect proved to be advantageous for country together with the actions of the French Anti-Corruption Agency analyzed. Therefore, the ways to follow such experience in Ukraine are offered.

Key words. anti-corruption programs, private sector, anti-corruption legislature, Code of conduct, the French Anti-Corruption Agency, compliance programs.

Articolul analizează mecanismul eficient de combatere a corupției în sectorul privat din Franța. În primul rând, pe baza considerației statisticilor și a doctrinei, s-a dovedit că corupția în sfera privată afectează în mod semnificativ dezvoltarea economică în sens global. Relevanța acestei probleme este accentuată de o reglementare legislativă insuficientă a luptei împotriva obținerii / furnizării de beneficii necuvenite în sectorul privat în comparație cu publicul, în special în Ucraina. A fost realizată o analiză cuprinzătoare a reglementării legale a mecanismului de combatere a corupției în sfera privată. În special, s-a stabilit că un astfel de mecanism este implementat prin introducerea Legii cu privire la transparență, anticorupție și modernizarea vieții economice (2015), obligația companiilor cu un anumit număr de angajați / venituri obținute să adopte la nivel local programe obligatorii anticorupție („programe de combatere a corupției") cu anumite elemente. Aceasta este o listă de acțiuni ale angajaților / conducerii, care ar trebui să fie considerate corupție, tipuri de pedepse, rapoarte despre astfel de încălcări și mecanismul controlului intern regulat care poate fi efectuat, inclusiv persoană autorizată Pentru nerespectarea programului adecvat, companiile sunt răspunzătoare de Agenția Franceză Anticorupție, în special, penală. Punerea în aplicare a dispozițiilor legislative relevante a fost examinată și s-a stabilit că aceasta se realizează prin adoptarea de programe adecvate de către companii, transmiterea de rapoarte cu luarea în considerare a acestor programe și analize periodice de către agenția menționată. S-a stabilit că un astfel de mecanism este eficient și permite identificarea încălcărilor, lucru evident din practica judiciară din ultimii trei ani. Pentru implementarea eficientă a acestor dispoziții legislative, entitățile din sectorul privat oferă o cantitate semnificativă de clarificări și alte acte juridice de către Agenția Franceză Anticorupție. Se observă că în Ucraina adoptarea unor astfel de programe este obligatorie numai pentru anumite entități din sectorul public, ceea ce face imposibilă punerea în aplicare eficientă a politicii anticorupție de stat. În acest sens, s-a propus împrumutarea experienței franceze în lupta împotriva corupției în sectorul privat.

Cuvinte cheie: programe anticorupție, sector privat, legislație anticorupție, Codul de conduită, Agenția Franceză Anticorupție, programe de respectare a politicii anticorupție.

Actuality. The fighting with corruption is basically concerned with public sector whereas corruption in a private sector was increasingly recognized as one of the major obstacles to country's economy (Department for International Development of the UK in April 2015). Taking this into consideration, the relevance of the topic is emphasized by the necessity to cope with the problems of non-government spheres in plentiful developing countries, notably, in Ukraine. Hence, valuable experience of France was considered hereinafter.

Objective of research. The most crucial aim of the research is to analyze relevant experience of France in the efficient and ongoing reforms regarding eliminating the corruption in non-government sector in order to adopt corresponding provisions in Ukrainian legislature in the nearest future.

Main material. The case is to realize why corruption in the private sector is of harm and why it should be overcome, particularly, by the means of legislative level. Scholars have concluded that corruption has become one of the world's most pressing challenges, affecting "environmental protection efforts, human rights, national security, access to healthcare and justice services, economic development and the legitimacy of governments around the world" [2, 292 p.]. So that, the corruption in private sector that is the second constituent element together with the corruption in public sector, is widely acknowledged to be ranked among the crucial impediments to the development of every country's economy, and, consequently, to the overall development [4, 1061 p.]. How, particularly, does this work?

First of all, as private sector is undeniable to be less regulated than the public one, there are plentiful legislative loopholes private companies can employ. For instance, they can hide corruption acts behind secret subsidiaries and partners, or, partnership in whole. Others stick to paying bribes or rigging up bids to win tenders or public contracts. Private companies can also exploit tax laws in the way that is illegal and so on [7, p. 282]. Therefore, it can be easily understood there is a wide range of actions private companies can take in order to omit legal frameworks. With such a broad range of opportunities to be employed it is obviously the corruption in private sector assumes increasing temps. That, in turn, harms the country's economy through the taxes to national budget that are not adequate for what they should have been and through different factors of influence these companies are using such as tangible political effects.

The dangerous consequences of corruption in a private sector can be also highlighted while considering the number of actors it encompass. Transparency International in its report on Corruption an d the Private sector' (2009) [11] among such subjects recognizes three major groups: 1) management board, employees and owners (on the company's internal level; 2) suppliers and customers (the company is permanently cooperating with)); and, finally, 3) competitors and market environment. Taking into consideration this range, it can be surely emphasized that almost everyone somehow engaged in market is encompassed by the field of operation of private companies.

Even more crucial is the fact the spheres in which they can exercise corruption schemes are often of the utmost importance – from energy to healthcare. One of the world leading organization in this respect, Transparency International estimated that among the leaders involved in corruption in a private sphere are agriculture, fishery, forestry and banking and finance [11]. So that, the most significant spheres of country's life are undeniable to be affected.

Undoubtedly, the issue of corruption can be tackled on internal level of companies. For instance, internal regulations with null tolerance to the corruption and bribery can be imposed on workers alongside with even fostered measured for governance of the company. There are even several widely-popularized guides provided by varying organizations, for example, Business Principles for Countering (2002 with 2-nd edition published in 2013) [11]. However, as a matter of fact, it is to be mentioned that not all companies will be willing to adopt such internal acts and, moreover, there are no requirements to these documents. Hence, some problems, especially, inability and the lack of means of ensuring the rules can occur. As to another reasonable point, there will be no control and monitoring system in this case as only external, that is to say, conducted by the fully-independent subject can be efficient [6, p. 624]. That is why internal measures cannot prove its ability and corruption in a private sphere tends to increase drastically.

There is no wondering, then, why corruption in a private sector was recognized among two major obstacles in the research conducted by the Department for International Development of the UK in April 2015 [1, p.15]. It is frequently mentioned in the numerous reports of the Organisation for Economic Co-operation and Development ("OECD"). It was also thoroughly researched by scientists who promote struggling with the corruption in private sector. Hence, Hoffmann, D. A., Griffin, M. A. and others admit that 'private sector corruption is often acknowledged' [5, p. 511].

Hence, the necessity to provide measures aimed at fighting with the corruption in a private sector is tangible. Leading European countries try to take this into account and conduct corresponding reforms in their own manner. Such legal actions in the form of national laws on anti-corruption programs in a private sector. One of the most successful and far-reaching reforms to be taken as a sample, notably for Ukraine, is conducted in France.

Initially, France faced with pressure from the Organisation for Economic Co-operation and Development, who has strongly criticised the lack of enforcement for legal bodies in a private sphere that, consequently, lead to the lack of actions (certainly, only 4 cases against individuals were sued with none involving legal entities). To comply with its international commitments and reinforce its own economy, the French government promulgated a new anti-bribery law on 9 December 2017, the 'Loi Sapin II pour la transparence de la vie économique' ('Law on Transparency, Fighting Corruption and Modernising Economic Life') [8].

Notably, this law presupposes, among others, an efficient mechanism for fighting corruption in a private sector through obliging private legal bodies to adopt their own 'anti-corruption compliance programs' (so-called 'Codes of Conduct' or as it is called 'Un code de conduite') and enforce them implementing the provision of the national anti-corruption legislature on a local level. It is to be highlighted that a vast majority of private companies with tangible influence on the country's economic development is embraced by this rule. Article 7, paragraph 1 affixes that among the companies obliged to adopt Code of conduct are: 1) any company based in France employing at least 500 persons in France; 2) any company belonging to a group of companies that employs at least 500 worldwide, but whose parent company is headquartered in France; 3) any company with consolidated or non-consolidated sales of more than 100 million euros etc. Therefore, this obligation concerns more than 1,570 French companies that constitute the most crucial part of the French national economy [12].

The significance of these internal Codes of Conduct can be implicitly understood whilst considering the nature of them and issues they are tackling, so that, the elements they consist of. Foremost, the structure and inevitable components of such Code of Conduct. Essentially, under the provisions of article 7, paragraph 2, this internal act is to be composed of:

· an all-embracing and exhausted list of actions that must be recognized and regarded as the acts of corruption (actions carried out by workers as well as by governance of the company);

· disciplinary rules that constitute the regulatory regime aimed at preventing such actions;

· an envisaged efficient system of internal monitoring the stuff behavior's compliance with these rules including a presupposed 'whistleblowing' system that ensures every worker is able to convey a message about corruption actions observed;

· so-called 'risk-mapping' or 'maps indicating the risks'. Risk mapping is defined as the process of identifying, evaluating, ranking and managing the corruption risks that are inherent to the organization's activities alongside with all the industrial risks that are possible to lead to corruption actions. Thus, all the specialties of the sphere within which company operates and other factors such as geographical location matter to a crucial extent;

· a specifically-designed training course for all workers with accentuation made on most likely to be involved in corruption actions (primarily, senior workers and governance of company)

· a procedure of financial audit carried out within certain intervals determined by Code of Conduct;

· a highly-elaborated system of penalties along with a developed regulatory regime allowing to implement them in practice.

· a mechanism of internal assessment of efficiency of implementation of Code [8].

Apart from securing a detailed structure of these 'anti-corruption compliance programs' that are to be released by the companies, there were benchmark recommendations elaborated simultaneously [3]. For instance, recently, on February 4, 2019, the French Anti-corruption Agency (the AFA) published its new practical Anti-corruption Compliance Guides providing all-embracing guidance in the respect of creating such Codes. It can serve as a relevant sample alongside with added extension to the provisions of law. Such guides concentrate on practical implementation of legal provisions. for instance, they call for the appointment of the duly-authorized Compliance officer in each company or granting such power to one of present workers. The Agency itself, however, stands in favor of the first option as it presumes the Compliance officer to be completely independent. This officer should be in charge of all internal evaluations and investigations conducted and should also possess a free access to the Board of directors in order to make reports and propose new internal standards of anti-corruption policy. This Guide also elucidates the fact the Chief Executive of a company is responsible for its implementation and, consequently, is criminally and administratively liable in the case of failure to do so.

So that, such applicable guides are of the utmost importance and are additional to the legal provisions. Actually, they add a lot of specifications and answer the primary questions issued by the companies who encounter the creation of their anti-corruption compliance programs. As these guides are released by the French Anti-corruption Agency that is the body of state power they have relevant legal force and together with legal acts form comprehensive body of legal rules tackling the issue of corruption in a private sector. Thus, it can be assured this system of rules is extremely detailed and all-embracing.

However, neither the creation of such internal 'anti-corruption compliance programs' nor implementation of them will be resultative without the system of sustainable control. With a regard to this objective the AFA, aforementioned as a body developing some practical guidances for companies, under acticle 17, paragraph 3, the AFA is responsible for auditing companies' compliance with the obligation to release and implement their own Codes of Conduct. This control mechanism work in the following way. Special report must be created by every company, subject to the provisions of 'Law on Transparency, Fighting Corruption and Modernising Economic Life' and, then, these papers are to be transmitted to the AFA. The process in this respect can be considered as a truly effective one. Basically, the AFA is required to evaluate each report of this kind and, then, is to take one of the actions as follows:

– in the case there are no significant deviations from the provisions of Law on transparency, fighting corruption and modernising economic life in internal Code of Conduct of the company and only minor amendments are preferable to be taken, the AFA issues a specific act containing recommendations or amendments that are considered as necessary ones by the Agency, and, consequently, have to be mandatory included in the Code of Conduct of this company. The form of these acts (secured by Paragraphs 3-4 of Article 4) is rather unspecified and is left at the discretion of the Agency. It is to be accentuated that the procedure is to be done regarding any company to the exclusion as the sanctions up to 30 thousand euros that genuinely constitutes a criminal offence are to be imposed on the company that makes some obstructions for the Agency (for instance, forbidding to afford the documents in the response of the request of the Agency), hence, it is impossible to omit the procedure secured;

– in the case there are meaningful deviations from legal standards that matter (for instance, not all of the obligatory components of Code of conduct are included) the Agency is competent to make an application to its Committee on sanctions eligible to impose sanctions on such companies. At first, this Committee can issue a 'warning' or an 'injunction' that encloses the provisions that a company is obliged to make particular amendments within the term determined (however, not exceeding three years). In the case, the company fails to accomplish the requirements of the Agency, the fines are to be mandatory imposed. In our opinion, such sanctions can be regarded as sufficient and imposing (for natural faces – fines not exceeding 200 thousand euros, for legal entities – fines not exceeding 1 million euros). Hence, it appears, that actors of a private sector will be unwilling to infringe on this rule to their own detriment. Obviously, there are means of protection for the subjects as all the decisions made by Committee can be argued by the means of litigation that constitutes the protection from unfair actions on behalf of Committee.

Taking all the actual legal provisions into account, the overall system of legal regulations of anti-corruption policies in private sector alongside with implementation and control can be regarded as rather productive and far-reaching. Crucially, this is reflected in tangible applicable results. To begin with, on October 10, 2017 the French Anticorruption Agency announced wide random inspections to private companies to monitor the existence of their Code of Conduct. These inspections tend to be efficient partially due to absence of criteria of choice of the companies to monitor. Simultaneously, there were more than 15 companies in a private sector prosecuted and, accordingly, four cases were submitted to the French Supreme Court and the Paris Criminal Court under the auspices of the AFA [12]. This result is of significance, especially mentioning the fact there were no cases involving private legal entities at all before 2014. So that, the continuing effect is rather tangible and this process embeds fighting with corruption in private sector. Moreover, there is external impact as by these means France becomes a part of ongoing anti-corruption trend following the policies of European countries [7, p. 282].

This innovative French experience that follows its predecessors in the UK and other states can be of value for countries that are on their first stages in process of overcoming corruption. An exemplifying case is Ukraine envisaging anti-corruption compliance programs only in public sector, particularly, for some bodies of state power possessing supreme authority. Not only the crucial necessity to fight with corruption in private sector is omitted but also 'anti-corruption programs' on a public level are a far cry from be developed. Notably, paragraph 1, article 19, of the Law of Ukraine on Preventing Corruption [9] presupposes the existence of 'anti-corruption programs' that determined bodies of state power (the Office of the President, the Apparatus of the Verkhovna Rada of Ukraine, the Secretariat of the Cabinet of Ministers etc.) are obliged to adopt. However, neither exact provisions to be included in it, nor the procedures of control that is to be exercised by the National Agency on Corruption Prevention are affixed. As for the last one, it has to be highlighted there are no provisions on controlling and monitoring system at all, and, as it has been stated, such reforms cannot be carried out without control. Therefore, observing situation in general, there are no provisions on struggling with the corruption in a private sector. Hence, the experience of France can be used in: 1) launching the national programs aimed at fighting corruption in a private sector; 2) developing the legislative basis for 'anti-corruption programs' in public spheres.

Basically, will it be troublesome to conduct such a reform without all-embracing public talks and taking into consideration public opinion. To be concise, the opinion of private sector leaders need to be listened to as currently they are tackling the problem of the corruption on their own, realize the extent of the issue and have drafts of such internal codes needed to be adopted by the companies. In order to ensure everything will be considered properly, a corresponding official forum has to be conducted by state bodies. This practice appears to be efficient and, for instance, 27 collaborative declarations and joint activities, were released worldwide in 2018 including the China business leaders' integrity forum; the Collective action agreement to promote integrity in the legal profession in Argentina; the Collective action initiative for fighting corruption in Gauteng Province; the Maritime Anti-Corruption Network and the Pact for integrity and transparency in business in Romania.

After this, amendments are to be made to the Law of Ukraine on Preventing Corruption. Initially, additional paragraph should be added to article 19 that secures the private companies are obliged to adopt their own anti-corruption programs. Of course, primarily, the types of companies subject to this provision must be secured. Then, the next provision to be added is the one determining the structure of internal codes with key elements, notably, actions that must be regarded as the corruptive acts from the side of workers or the governance; penalties to be imposed in every potential case; system of internal monitoring, investigating and evaluating; authorized person to provide the development of anti-corruption policies in company. These are the basics constituents, however, other additional elements taken from French experience must be encouraged to use and secured in the legislature in the nearest future.

Ultimately, France tends to be a forward-going state in its anti-corruption policy making tangible efforts to fight with corruption in a private sector. This policy follows current trends of the leaders of anti-corruption struggle and can be taken into account be plentiful states including Ukraine.

Conclusions and recommendations. Corruption in private sector is recognized as a tangible impediment to the development of country's economy and, as a matter of fact, is omitted in the regulations on a legislative level that pertain to the corruption in public sphere to the exclusion. This constituents a significant problem in the developing countries, notably in Ukraine that needs to foster efforts in fighting corruption.

That step can be overcome employing the experience of the states having secured corresponding provisions in their legislatures (the UK, China, Greece etc). However, in our opinion, the most prominent one to be taken is that in France that has created legal rules ensuring private companies with influence to adopt their own anti-corruption compliance programs (Codes of Conduct). The structure of such codes is rather highly-elaborated along with recommendations issued by the authorized bodies, for instance, the French Anti-corruption agency. Such measures secure complete compliance with national anti-corruption legislature.

This experience is to be taken into consideration by Ukrainian legislators. The crucial points to be followed are some structural elements (regulatory regime, penalties, internal whistleblowing system) and control mechanisms. There steps are sure to assist Ukraine with struggling with corruption in private sector.

References

1. Department for International Development. Annual Report and Accounts 2015-2016. Department for International Development Publications, 2016, 156 p.

2. Feathers, B. Bribes without borders: The challenge of fighting corruption in the global context. *American University International Law Review*, *29*(2), 2014, 292 p.

3. Graulle B. French Anticorruption Agency Sets the Pace: *New Anticorruption Compliance Guide Just Published.* Jones day, March 6, 2019. Retrieved October 14, 2019 from https://www.lexology.com/library/detail.aspx?g= 605ceee7-f2f2-407f-a2c9-d4238d2c8635

4. Hodgson, G. M., & Jiang, S. The economics of corruption and the corruption of economics: An institutionalist perspective. *Journal of Economic Issues,* 2007, 41(4), p. 1061.

5. Hoffmann, D. A., Griffin, M. A., & Gavin, M. B. (2000). The application of hierarchical linear modeling to organizational research. In K. J. Klein & S. W. J. Kozlowski (Eds.), San Francisco: Jossey-Bass. *Multilevel theory, research and methods in organizations* 511 p.

6. Javorcik, B. S., & Wei, S.-J. Corruption and cross-border investment in emerging markets: Firm-level evidence. *Journal of International Money and Finance, 28*(4), 2009, p. 624.

7. Karjalainen, K., & Moxham, C. Focus on Fairtrade: Propositions for integrating Fairtrade and supply chain management research. *Journal of Business Ethics,* 116(2), 2013, p. 282.

8. Law on Transperancy, Fighting Corruption and Modernising Economic Life. *Journal officiel de la République Française,* December, 10, 2016, 146 p.

9. Law of Ukraine on the prevention of corruption. Kiev: Verkhovna Rada (BBR) Bulletin, October 14, 2014, No. 49, Art. 2056.

10. Le Frapper, *J. SAPIN 2 Act: a patchwork of reforms but a clear progress (Part 1).* About Governance, Ethics and Critics, August 15, 2019. Retrieved November 1, 2019 from http://iohannle-frapper.com

11. Transparency International. *Global corruption report 2009: corruption and the private sector.* Transparency International Publication, 2009. Retrieved October 15, 2019 from https://www.transparency.org/whatwedo/publication/_global_corruption_report_2009

12. Whistler Br. New French Anti-Corruption Law: France Strengthens its Legislation to Combat Bribery and Corruption and Adopts U.S.-Style Anti-Corruption System. *Global Compliance News, 2*016.