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Support to good governance: Project against corruption in Ukraine – UPAC

Expert opinions
on the Draft Law of Ukraine
on the Principles of Prevention and Counteraction of Corruption

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Table of contents

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I. EXPERT OPINION BY DRAGO KOS

1 INTRODUCTION

Corruption is a phenomenon which affects all states, from those at the beginning of their development to the most developed countries of the world. All of them are fighting corruption – by using different means and with different levels of success. But they all have something in common: they use methods and means which correspond to their economic and social situation. To use modern and very sophisticated methods to fight corruption in a country, where, due to its economic situation, corrupt behaviour is one of the ways to survive, makes no sense. And to use very basic tools of anti-corruption efforts in countries where corrupt behaviour is "only" a crime that helps people to additionally improve their already not-so-bad economic situation is also an already lost battle. But not only that, using improper methods in the fight against corruption also means that the state using such methods is not aware of its problems and, perhaps, that it does not want to fight corruption in the proper way.

Different countries are choosing different ways to fight corruption. The traditional concept to fight corruption only with repressive means has been forgotten years ago, since it has become clear that repression is just one way of fighting corruption, namely that way, which usually does not change anything in the area of conditions and circumstances, which enable the existence and development of corruption. More and more countries reached out for new means and methods to fight corruption, which were and are simply called “prevention”. This fact was slowly but constantly recognised by different international legal documents, including conventions, which among other things also established an obligation for countries to develop and implement different preventive measures. Countries started to enact different pieces of legislation in addition to the existing criminal legislation, very often with the accent on preventive measures. Of course, solutions are varying from country to country, but so do the levels and faces of corruption in those countries.

The Law of Ukraine on the Principles of Prevention and Counteraction of Corruption clearly shows that Ukraine is trying to find an adequate approach. The basic ideas of the law are on par with those of many other European countries, sometimes they are

even more direct. Of course, there are inconsistencies in implementing the basic ideas of the law and turning them into concrete articles and paragraphs, but that does not mean that the law has no value at all. It only means that with some additional help or "fine-tuning" this law will really be a useful tool in the fight against corruption, underlining the efforts of Ukraine to enhance its efforts against corruption and to join older states at the same level of the suppression of this phenomenon.

In this expertise, there are remarks to concrete articles and a summary containing some general suggestions at the end. Of course, the author of the remarks and general suggestions does not expect that they must or will be taken on board completely. It is up to the country to decide which remarks and suggestions will be observed, as it has its own experts with appropriate knowledge and the necessary experience in fighting corruption. The present expertise just attempts to help them both - domestic experts and their country.

The remarks listed below follow the numbering of the articles. Where there is no mention of an article or paragraph, it means that the expert does not have any remark on it.

It might happen that some problems will have been caused by the translation, especially in the cases where English words were used, which are usually not used in international legal documents. The expert would like to apologise in advance for such cases.

2 INTERNATIONAL LEGAL INSTRUMENTS, WHICH SERVED AS A BACKGROUND FOR THE EXPERT OPINION

The present opinion was written against the background of the following international legal instruments:

a) Council of Europe Criminal Law Convention on Corruption (hereafter: ETS 173),
b) Council of Europe Civil Law Convention on Corruption (hereafter: ETS 174),
c) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter: OECD Convention),
d) United Nations Convention against Corruption (hereafter: UNCAC),
e) Council of Europe Resolution (97)24 on the Twenty Guiding Principles for the Fight against Corruption (hereafter: “20 Guiding Principles”),

f) Council of Europe Recommendation No. R (2000)10 of the Committee of Ministers to member States on the codes of conduct for public officials (hereafter: Model Code of Conduct).

3 COMMENTS, REMARKS, PROPOSALS TO THE TEXT OF THE LAW

3.1 SECTION I – GENERAL PROVISIONS

Article 1

Paragraph 1

It would be worth reconsidering if there is a real necessity to add the additional condition for close relatives in a form of "living together with the persons…" and "are allied with such persons through a joint household". The practice of several countries shows that some relatives who do not necessarily live together with persons mentioned in Paragraphs 1 through 3 of Article 2 of this Law, usually serve as those who help to avoid responsibility of the main "targets" of similar laws. However, it has to be mentioned that international legal instruments keep quiet on the problem.

Paragraph 2

Conflict of interests is not only when there is a real contradiction between the individual and the public interests of a person, but also when such a contradiction appears to exist. This is a solution used by the Model Code of Conduct in Article 13 ("appears to influence..."). There are some very valid reasons for that; usually, it is difficult to prove that there was a real contradiction between the individual and public interests of a certain person that has influenced the behaviour of that person. Even a danger of such a contradiction, which appears to exist and which is much easily to prove has to be eliminated.

Paragraph 3

There are not many legislative acts in the world that provide a definition of corruption. This one does. It has some very good points (such as using the term "of authorities and related opportunities"), although there are some problems, too:

- the term "unlawful use" might cause some difficulties: the use of a person's authorities can be completely in compliance with the legal acts dealing with his/her authorities (for example, if s/he has discretionary power to decide) and therefore "legal", yet the person can still use these authorities for personal gain. Of course, s/he has acted against the spirit of the legislation, but this criterion is

too vague to be used in a coherent and consistent manner. There is no international legal act requiring that the behaviour of the official should be "illegal", and it would be advisable to delete this word from Article 1, Paragraph 3, since it is significantly narrowing the scope of the definition.

- The term "illegal" is used twice: "illegal receipt" and "illegal granting". This, again, might represent a narrowing of the scope of the definition. Personal gains achieved by the use of official authorities do not always have to be strictly "illegal". International conventions (i.e. ETS 173 in Article 3, ETS in Article 2,) are usually using the term "undue advantage" and, hopefully, the word "illegal" covers all possible notions of the word "undue".

Paragraph 4

Is it sufficient that only some marks of corruption as defined in Paragraph 2 are fulfilled, or do all of them have to be realised in order to speak of a "corruption offence"? It would be good if this notion ("bearing the marks of corruption") would be made more precise. Another, more theoretical, problem is the fact that there are three possible forms of liability connected with the term corruption "offence", which is usually linked only to criminal responsibility. Such wording might cause some theoretical debates.

Article 2

Definitions of persons responsible for corruption are the most important parts of any anti-corruption law. They are usually given in two different ways – by general description or by listing all possible categories of persons.

In the international conventions, sometimes a reference to national legislations is made (Article 1 of the ETS 173), sometimes, the original definition is given (Article 1 of the OECD Convention), and sometimes a combined approach (Article 2 of the UNCAC) is applied.

In the present draft Law, the principle of listing is used. The expert hopes that no important category is missing. Besides that, the following has to be mentioned:

- What are "other military commands" mentioned in the fifth bullet-point of sub-Paragraph 1? Is there a possibility to make it more precise in the text?
- In the third bullet-point of sub-Paragraph 1, "government employees" are mentioned and in the eighth one "officials of other government bodies" – is there any difference between them?

- In the sixth bullet-point of sub-Paragraph 2, the word “or” is probably missing between “not government employees” and “officials of local self-government bodies”.

There is also a very good solution, which could serve as an example for laws of other countries, too: inclusion of political parties’ leaders (fifth bullet-point of sub-Paragraph 2).

Article 3

Careful reading of this Article shows that it is of a very general and declarative nature. Basically, this Article just provides a list of principles for the prevention and counteraction of corruption. It does not say anything about the implementation of these principles and nothing on the concrete procedures for monitoring of the implementation of those principles. There is no large practical value of such an Article, especially having in mind that not all possible principles for the prevention of corruption are listed here (i.e. political will, continuity, consistency,..). The listed ones are very well chosen, but the word “informational” (used in the second bullet-point) is hardly to be found in the context of anti-corruption measures in any other country.

Article 4

According to this Article, there is no specialised anti-corruption unit in place in Ukraine. It has to be mentioned that UNCAC makes the existence of a preventive anti-corruption body (or bodies) mandatory in Article 6, as well as the existence of a body (or bodies or persons) specialised in combating corruption through law enforcement in Article 36. It seems that the subjects mentioned in Article 6 are not fulfilling the requirements of UNCAC. In order to achieve compliance with UNCAC, it would be useful if this Article (and institutional set-up in Ukraine) would be changed in accordance with the fundamental legal principles of Ukraine’s legal system and specialised institution(s) would be established, at least in the area of prevention. In addition, that would serve as a good model for other countries of the region and Europe as such.

3.2 SECTION II – MEASURES AIMED AT THE PREVENTION AND COUNTERACTION OF CORRUPTION

Article 5

Paragraph 1

In Article 2 of the Law, there is only one Paragraph. Therefore, “sub-Paragraphs” (and not “Paragraphs”) 1 and 2 of Article 2 should be mentioned here.

It is not clear what the meaning and the nature of restrictions given in this Paragraph are. Are they “corruption offences”, or are they only “marks of corruption”? There are also no sanctions provided by this Law for the breach of restrictions from this Paragraph, and it is absolutely not clear what will happen with the person acting in a prohibited way.

Sub-Paragraph 1: concerning the use of the word “illegal” – see comments to Paragraph 3 of Article 1.

Sub-Paragraph 1a: persons mentioned in Article 2 sometimes have the legal obligation to facilitate performing of business activities of other persons. Narrowing the scope of this restriction with the link to “obtain subsidies, grants, loans and privileges” is not the best possible solution, since it still leaves several other possibilities for officials to receive undue benefits of other forms open. It would be much better and much simpler to say: “*illegally facilitate the performing of business activities for physical persons and/or legal entities”.*

Sub-Paragraph 1b: the idea of this sub-Paragraph is an excellent one, since it prevents favouritism to take place. Maybe the wording could be improved by adding the word “formal” before “advantages”, in such way recognising that advantages can be only those which are formally based.

Sub-Paragraph 1c: persons mentioned in Article 2 sometimes have the legal obligation to interfere with the activities of other government bodies and officials. Inserting the word “*illegally*” before “*interfere*” would solve all the problems.

Sub-Paragraph 2: Maybe some other activities could be allowed as well: at least “research” and “sport” can not do any harm.

It is not easy to understand why restrictions from sub-Paragraphs 2 and 3 of Paragraph 1 do not apply to different sorts of deputies. Being a deputy involves large responsibilities and large involvement of time and energy, but also creates large possibilities to (mis)use the influence. Such an exclusion from the general system of restrictions can be understood only if deputies are not professional ones. If they are professional deputies, earning salaries for their deputative activities, than they are the first ones for whom all restrictions have to be put in place. If deputies are employed as such, it is strongly recommended to reconsider the solution given.

Paragraph 3

In sub-Paragraph 1, there is no link to persons mentioned in Article 2. In this manner, a general obligation is created for all citizens of Ukraine. If this is the aim of this sub-Paragraph, then, at least, the word "public" has to be added before the word "aid". Otherwise, even private loans among physical persons would be the subject of this sub-Paragraph and some important rights (right to privacy, at least) and freedoms of citizens would be endangered.

Article 6

Some notions in this Article might cause various human-rights based discussions, especially collecting of information on financial liabilities of the candidates' close relatives (they are not candidates = persons under scrutiny, so why extend special investigation to them, too?), as is the collecting of information on candidates' health (the right to privacy) if this is not part of a general medical examination before the recruitment.

Article 7

It is not clear if gifts received during official events mentioned in Paragraph 2 also count as gifts "allowed by this and other laws of Ukraine" as mentioned in Paragraph 1, or acceptance of gifts during official events is considered to be a general possibility. In both cases, it would be recommendable that the Cabinet of Ministers establishing the procedures mentioned in Paragraph 2 would also introduce a reporting obligation and a form for it for all cases where acceptance of gifts is or will be allowed.

Article 8

This Article appears to be very controversial:

- first, it establishes the obligation of candidates (in Paragraph 4) for certain positions to report on their income, securities, real estate property, valuable (while there is no definition when movable property can be considered "valuable" !) movable property and bank deposits owned by them and their close relatives,
- second, it establishes the obligation of elected or appointed persons from Paragraphs 1 and 2 of Article 2 to report only on their income and financial liabilities,

- third, for every year the persons mentioned in the previous Paragraph and their close relatives have to report on their expenses.

Such a solution does not ensure comprehensive monitoring of financial assets of officials, because the extent (data required) of reporting is a different one, and because persons under obligation are different ones. These loopholes disable any effective monitoring, especially due to the fact that at least two additional legal acts (one mentioned in Paragraph 1, and one mentioned in Paragraph 3) are required.

Reporting on financial assets of an individual represents a step into his/her privacy. Without going into too much detail, it is strongly recommended to redraft this Article to achieve at least the following:

- obligations of all persons concerned should be regulated by this Law,
- categories of persons under reporting obligation at every stage have to be the same,
- extent of data reported at every stage has to be the same and has to include at least the following (Article 8, Paragraph 5 of UNCAC): outside activities, additional employment, investments and assets – in practice, even more information would be absolutely needed,
- responsible institution for the collection of reports has to be appointed,
- the need for inclusion of “close relatives” has to be reconsidered (they are not officials and it might happen that their inclusion would trigger appeals for the breach of their human rights as established by the European Convention on Human Rights – this has happened in some countries already),
- the number of persons under obligation has to be limited to enable effective monitoring,
- all procedures have to be established by this Law.

Article 9

Codes of conduct for officials are mentioned in Article 8 of UNCAC, and there is a question if the general mentioning of a law establishing the liability for violation of the codes of conduct is in compliance with Paragraph 6 of Article 8 of the UNCAC – it mentions only “the grounds” and “the procedure”, but not the sanctions, too.

Generally, this Article is a very soft one – it does not establish an obligation for the adoption of codes of conduct, and it does not establish a firm obligation for the application of sanctions for cases where codes of conduct would be breached.

Article 10

Since Article 2 has only one Paragraph we have to consider that reference is made to sub-Paragraphs 1 and 2 (and not to Paragraphs).

Paragraph 1

The idea of this Article is an excellent one. However, why are persons mentioned in the first and in the third point of sub-Paragraph 1, and persons mentioned in the first point of sub-Paragraph 2 are also not included in the given restriction? Even the most important functions have to follow the principle of absolutely no favouritism and/or nepotism and leaving them aside is destroying the noble idea of this Article and might rightly cause accusations on the privileges of a certain part of officials.

Paragraph 3

In Paragraph 3, it would be useful to include the obligation of officials on informing the collegiate bodies in advance that they will deal with appointments of their close relatives.

Article 11

Paragraphs 2 and 3

There is a question of the relation between Paragraphs 2 and 3: according to the first one, the expertise is mandatory for draft laws submitted by the President of Ukraine and the Cabinet of Ministers, and according to the second one, this expertise is performed on the basis of instructions of the President of Ukraine and the Cabinet of Ministers. It is not clear what the nature of those instructions is – are they mere formality or can they entail substantial guidance as well? It is also not clear which body will carry out the expertise.

Paragraph 6

This Paragraph is not necessarily needed for this Act: everybody mentioned in Paragraph 6 can perform an anti-corruption expertise even without this Act, especially if there are no regulations on how state institutions will take into consideration this

expertise. It would be a great step forward if there would be at least a formal obligation for a state body to study such unofficial expertises, and in cases of reasonable and useful unofficial expert opinions, to include them in the following legislative procedures.

Article 12

This Article is again a very general one. Theoretically, it gives a large list of possibilities for physical persons, associations of citizens and legal entities to participate in the fight against corruption, but those possibilities are purely theoretical. There is no insurance that their activities will influence in any way the work of state organs in the fight against corruption. The list of their possible activities given in Paragraph 2 does not add anything new, since associations of citizens would be entitled to perform these activities without having them specifically regulated by this Law. In addition to these general observations, the following can be added:

Paragraph 2

Point 1: it is not clear what is the real content of information "on the activities on prevention and counteraction of corruption". Further regulation is badly needed in order to achieve compliance with Article 10 of the UNCAC.

Point 2: again, there is no obligation for the government bodies to even read the submitted proposals based on the results of the unofficial anticorruption expertise. There is also no procedure in place to ensure the control of the public on the destiny of their submitted proposals.

Point 3: Are all parliamentary hearings on corruption issues (always) open? If not, what is the real meaning of this activity? How many times will the public be in a position to take part? What does the expression "participate in hearing" mean – just the right to say something, or also to propose conclusions, decisions…?

Article 13 of the UNCAC gives quite an extensive list of possible ways of public participation in corruption prevention measures, and it would be strongly recommended to follow it in the present Law.

Paragraph 4

Does "granting privileges and advantages to certain subjects of economic activities" also include public procurement procedures? If this is the case, they will have to be

excluded, since they fall under other regulations, and the presence of the public is not even required there by Article 9 of the UNCAC.

Again, only very general reference to “Ukrainian laws” is made.

Article 13

Paragraph 1

This Paragraph deals with the obligation of very specific state institutions (specially authorised subjects in the area of prevention and counteraction of corruption, subjects participating in the implementation of measures aimed at prevention and counteraction of corruption) to inform the public on the results of implemented measures on fighting corruption – but it is not regulated where, how often and to which extent. Basically, it is completely up to the institutions to decide on the content, form and regularity of their reports. It would be good if at least these elements would be regulated.

Generally, it has to be mentioned that this Article is a very good one, but it does not reach the scope of Article 10 of UNCAC and Principles No. 9 and No. 16 of the “20 Guiding Principles”. If there is another law regulating these topics, than the expert has no further comments. If not – this Law is an excellent opportunity to include all ideas from the mentioned Article 10 of UNCAC and principles No. 9 and 16 from the “20 Guiding Principles”!

Article 14

The idea of this Article is a solid one, except that there is no definition of “assistance in prevention and counteraction of corruption”. Therefore, it is not clear what the range of protected persons is and what the protective measures at their disposal are.

According to UNCAC, witnesses, experts and victims (Article 32) have to be protected and there is also a list of protective measures given.

Another category of persons, which also has to be protected, is the category of so-called ‘whistleblowers’. They are protected by virtue of Article 33 of UNCAC and Article 9 of ETS 174.

If the Law of Ukraine “On ensuring the Security of Persons, Participating in Criminal Proceedings” covers all mentioned categories of persons and all protective measures listed in the UNCAC, than there is no problem. But already on the basis of the text of

Article 14, it is possible to conclude that this is not the case, and some further improvements will have to follow.

Article 15

It would be much better to give at least some basic ideas on the prevention of conflict of interests in this Law and, possibly, then allow other "laws, regulatory and legal acts" to deal with details of its prevention in different services.

The majority of other countries have enacted one single set of rules and principles in the area of conflict of interests' prevention in order to achieve consistency in their implementation and the same legal position of all of a country's officials.

Article 16

The solution in this Article on limitation of "pantouflage" (or "revolving doors") is an excellent one, except that due to its very general nature, it will need further elaboration in an additional legal (sub-statutory) act.

Article 17

Paragraph 1

What does the term "to provide cash funds and property" mean? How do state institutions provide cash and property? Some additional clarifications are badly needed.

Paragraph 2

Contrary to the previous Paragraph, this one has no time limit for the restriction mentioned in it. It would be good to add it.

3.3 SECTION III – LIABILITY FOR CORRUPTION OFFENCES

Article 19

Paragraph 1

This Paragraph is using the term "initiated". If its content is clear to everyone, than the expert has no further comments.

Paragraph 2

Is there really a law which regulates early termination of authorities of persons mentioned in the first part of this Paragraph?

Paragraph 3

Perhaps it would be good to add a period of time after which the record in the labour book will be deleted. Otherwise, officials might face the consequences of one single corruption deed throughout their entire life.

Paragraph 4

The idea in this paragraph is an excellent one, and should be recommended to all other countries which are in the process of drafting or changing their anti-corruption legislation.

3.4 SECTION IV – ELIMINATION OF CONSEQUENCES OF CORRUPTION OFFENCE

Article 22

Paragraph 2

In accordance to article 5 of the ETS 174, it would be advisable to add regulations according to which persons who have suffered damage as the result of an act of corruption by the state's officials would also be entitled to compensation from the state.

Article 23

"Seizure" is a term which is used for the temporary deprivation of an offender's right. Since measures regulated in this Article are final ones, it is better to use the internationally recognised term of "confiscation".

There are several situations which are not dealt with in this Article:

- if proceeds ("cash funds and property") of corruption have been transformed, can new proceeds be seized (confiscated), too?
- if proceeds ("cash funds and property") of corruption have been intermingled with property acquired from legitimate sources, can they be seized (confiscated), too?
- what happens with the income or other benefits derived from the original proceeds of corruption?
- is it possible to seize the value of the proceeds already spent?

There is plenty of room for improvement, and Article 31 of the UNCAC gives very good directions for such improvement.

3.5 SECTION V – CONTROL AND SUPERVISION IN THE AREA OF PREVENTION AND COUNTERACTION OF CORRUPTION

Article 24

It is referring to other laws. Do they exist?

Article 25

It is referring to other laws. Do they exist?

3.6 SECTION VI – INTERNATIONAL COOPERATION

Article 28

Paragraph 2

What is the nature of guarantees asked from foreign institutions that "the information will be used exclusively for implementing the tasks assigned to the competent body according to the law"? Normally, public bodies are performing their tasks only in accordance with the legislation in force, and foreign public bodies will find themselves in a very strange situation asked by the Ukrainian authorities to guarantee something that is normal and evident in their respective countries.

Beside that, UNCAC has devoted a whole chapter (No. IV) to the regulation of international cooperation in the area of corruption prevention.

4 SUMMARY

Ukraine has to be commended for the development of the idea on prevention and counteraction of corruption with this Law. Some solutions provided really deserve attention, and they could (and should) be used in other countries, too. However, the regulation of some other ideas and principles is not the best possible one, and it would need some serious improvement. Perhaps this Law was drafted as some kind of "umbrella" for all other pieces of anti-corruption legislation, while alone it will hardly bring any improvement of the situation in the area of corruption in Ukraine - if this is a case, then a lot of drafting of those legislative acts will be needed. For the time being and generally, at least the following could be said:

- this law is referring so many times to other laws; sub-statutory acts and regulations that it is far from ensuring comprehensive and consistent prevention and counteraction of corruption. At least in some cases, (mentioned in this

expertise above) the regulations which are now referred to other laws, would have to be provided by this one;

- the definition of the most important term – the one of “corruption” – is a very narrow one, which might lead to problems of misusing this fact in the future;
- although the Act is called “Law of Ukraine on Prevention and Counteraction of Corruption” there is not a lot on prevention in it – although some general principles are mentioned, no special body for the prevention is established, the participation of the public in “prevention” is a mere formality, there are no firm regulations on codes of conduct. Especially in this area, there is major room for the improvement of this Law;
- there are some serious restrictions given in the Law, but there are no sanctions provided for the breach of those restrictions (Article 5);
- some of the highest-level state officials are not included in the restrictions given (Articles 5 and 10), which might already raise a concern on unfair and different treatment of different categories of state functionaries;
- some solutions in the Law (Articles 6 and 8) in their further implementation might cause some problems from the perspective of the European Convention on Human Rights;
- reporting on financial assets as it is provided now (in Article 8) can not function at all without serious amendments in this or in other laws;
- the confiscation regime of the proceeds of corruption (Article 23) represents no serious threat to the perpetrators of corruption.

In conclusion, it has to be acknowledged that Ukraine has started with serious efforts in the fight against corruption; however, there is still a lot of work to be done and many obstacles to be fought.

II. EXPERT OPINION BY IVAR TALLO

The basis of my opinion on the draft Law on the Principles of Prevention and Counteraction of Corruption (PPCC) is the English translation of the draft Law provided by the Council of Europe, as well as the background submitted by the UPAC project team.

5 GENERAL COMMENTS

The PPCC is, to my understanding, still at a very early draft stage.

The drafters should first of all define precisely the tasks or the goals of the proposed law. While the title does give a good idea what the text should aim to do, the content of the draft has much wider aims, which should be the subject matter of other legislation.

6 CLARITY AND SCOPE

My first proposal concerns the clarity of the text. I think that for laws on sensitive issues such as corruption prevention - and in particular in societies without a commonly accepted framework for public sector values - extreme clarity on the subject that is to be regulated is required. For the same reason I would argue that the draft law should clearly be of limited scope, so as not to lose the main messages that it sends to the society.

What does this imply for the draft law under review? As a matter of principle, a definition of terms in the beginning of the law is - depending on the legal tradition – generally a good thing. However, if such definitions exist in other laws, they should be referred to.

I would recommend the explanatory memorandum approach, which has become standard not only in international legal texts, but also in national legislation in transition countries. It would comprise the texts of both the law and the explanation to be developed and submitted to parliament simultaneously; in this way, both parliamentarians and those who have to follow and apply the law later would have a precise idea of what they are going to support, or reject. This kind of approach can be deployed even if there is no official procedure of that type legislated yet: if there is an accompanying document even of an informal nature, implementing the law later will be made significantly easier.

7 COMMENTS BY ARTICLE

Article 1, paragraph 1 is about ’close relatives’”, and clearly, the definition of ‘close relatives’ is also dependent on political culture and social norms in given society. Usually, the term is defined in Family Law, and I have encountered a number of occasions where the definition contradicts the one used in anticorruption legislation simply because it has been drafted be different drafters. So, it is worth checking that the definitions coincide.

Also, with regard to common law marriage – I suspect that there is no such institution in Ukrainian law. But this is clearly a point worth debating and discussing, and the results should be reflected in the explanatory memorandum as suggested above.

Avoidance of “conflict of interest” is one of the key points of any anti-corruption law, but it is especially important in the context of the legal space of the former USSR. I would therefore recommend having a thorough explanation of this concept in the accompanying memorandum, which should show how different provisions of law are tied to the understanding of this concept.

The definition of the concept of corruption is the traditional one, but its exact implications are difficult to judge from the English translation provided. Basically, the more straightforward the definition, the less chances there are for defence lawyers to argue that some component of the deed could have been construed differently, and thus the defendant has not committed a corrupt act, when indeed, everybody informally agrees that that the person has been participating in wrongdoing of such nature. It is good that both activity and inactivity have been included, as well as material and immaterial nature of possible benefits, and that it could be not only the person himself but also other persons.

To illustrate the above: there are cases where it is possible to establish that the act has been committed with the intention to receive an illegal benefit; it is not, however, possible to establish whether the benefit has been received. What would happen in this case?

On Article 2

As the draft is structured now, this article is one of the central building blocks of the law - it stipulates who can actually commit the crime of corruption. The authors have opted for a list of positions from which corruption can be committed, and this is clearly one plausible way forward. However, I have read the article for repeatedly, on different occasions, and I am still not sure to whom it actually applies. When we think that the law has to be clear for the

people to follow it in reality, should we not strive to find a better way of structuring the article so as to ensure maximum clarity on the scope of application to the law? (it may be that in this case it is also a problem of translation).

On Article 3

I would argue that the basic principles of prevention and counteraction would first of all be those the observance of which would prevent a corrupt deed to be done, and only then the basic rights of the person could be reiterated when necessary. I think that the supremacy of constitutional principles is the basic building block of the legal system of Ukraine in any case, so it is not necessary to write them into specific legislations as this one.

So, I would say that the first principle is avoidance of potentially corrupt deeds and situations. The implementation of this principle would be done through certain limitations of office and limitation of deeds that could be enhanced by a special regulation on declaration of material interests. The article in the current form does not reflect the central principles.

To include a prioritization of preventive measures at this point is questionable, because I would think that this is part of strategy and prioritization, not of legislation as such.

On Article 4

This article is clearly meant to give the administration certain authority. A specific law can be doing that as a matter of political expediency. However, it is preferable that such sort of regulation is properly enshrined in the relevant legislation on state authorities. In fact, Article 4, paragraph.2 is clearly referring to such other legislation, and analyzing the current article on its merits would require information on these legal acts that I do not possess at the moment.

On a general level, however, it appears that again, clarity is lacking, because prevention and precaution have been put into one sentence, along with quite different actual objectives of these activities, vested in differing implementers.

What is necessary to reflect in such a paragraph is a clear delegation of tasks between the authority of local self-government bodies and the central government on the one hand and the structure responsible for a specific level of corruption-prosecution on the other hand.

One of the crucial questions is the ability of central government to control the affairs of local government. I assume that is not seen as a problem currently in Ukraine but it will depend on how the local government will be interpreted in the light of the (European) Charter of

Local Governments. We have seen in Estonian case that local governments argued that the central government has no business dictating the anticorruption measures of local governments because that would go against the self-determination rights of local governments. Similar contradictions between central and local control functions arise from time to time in almost every country and that is why it is worth to think and debate the distribution and delegation of authority thoroughly.

Also, when one assigns specific obligations to specific actors as in Article 4, paragraph 6, this makes sense only in case that there is also a list of concrete sanctions applicable in the event of failing to comply with a given obligation.

Section II

On Article 5

Article 5, paragraph 1, subparagraph 1 belongs actually into Article 3. The definition of corruption as the use of public office for private gain is widely established. Paragraph 1, subparagraph 3 is a general requirement emanating from the Public [CIVIL] Procedural Law, and has too much distractive potential in the current draft. Article 5, paragraph 1, subparagraph 4 in its turn should be a clause and principle from the Public Information Act or from similar legislation; it does not have direct relevancy for anti-corruption legislation.

There is also an argument that Article 5, paragraph 2 is part of the regulation of public procedures, and its place in this law risks diluting the purpose of anti-corruption legislation. While it is important to acknowledge that private financing of public activities can be a problem, putting this regulation into this draft could raise unnecessary debates in parliament and could endanger the message this law should carry.

Paragraph 3, subparagraphs 1 through 3 clearly belong to public information regulation, and should again not be reflected in this legal act. In addition, there is an argument that the substance of paragraph 3, sub-paragraph 1 should be part of tax law, while paragraph 3, subparagraph 2 should be in the section on declaration of material interests, and paragraph 3, sub-paragraph 3 should be re-written, because public employment should be transparent in any case, including information on work performance in the public office (however, depending on local tradition personal data protection clauses could be added).

On Article 6

Article 6 is clearly meant to prevent corruption. But as such it is not clear and I would argue opens a Pandora's box of using the issue of corruption for political purposes. First, is there

a necessity for background checks for employment? Yes, but clearly to a degree that is a prudent course of action that should be regulated in the Civil Service Act. Is there something special for specific offices e.g. political ones, or even non-party political top positions. Again, one could argue this point, but then we would need a reference to Article 2 clearly delineating positions of importance, i.e. where people exercise public power and positions where they do not. This is a standard division, and I see no reason why it should be delegated to the President of Ukraine.

Another point worthwhile making is that written in this format, the law makes applicants for government offices "guilty if not proven innocent" even at a stage at which they have not yet started assuming a position of power that they might abuse at some point in the future. Instead of current the approach, one could choose a much cheaper and more intelligent one, by requiring the people to be appointed to deposit certain information about their income, liabilities etc. (listed in current points 2 and 3), and to determine the list of posts for which this information can be public knowledge, or specify which parts of this info can be public knowledge. At the same time, there should be a requirement established that would make knowingly providing false deposition a criminal offence to make sure that this requirement would be honoured. If there is sufficient ground in the future to have concerns about the behaviour of a person, the enforcement agency can go back to the initial deposition (and later ones, if there are any required) and use those in their work.

On Article 7

Here, we should go back to the principle of clarity discussed for the provisions in Article 2. So, it should be clear, after reading this Article, who cannot accept gifts. Yet, in its current reading, understanding exactly this is not easy at all. At the same time, the issue covered by this Article is very important, as it happens all the time, and to a vast number of people. Therefore, the law should be clear on this regulation. As an alternative to the current wording, there should be general categories of persons who cannot accept gifts; the caveat of "except in this law or other laws" should be dropped. There should also be explicit thresholds for absolute (i.e. market value) level of hryvnias under which gifts would not be treated as attempts to buy a favour, for example, accommodating flowers, a box of chocolate, or some small item with a logo, but not from an exclusive brand. These kinds of gifts are made in any case, so banning them without enforcing this ban (and enforcing it is impossible when people think of a regulation as being silly) would compromise the seriousness of the law.

There is also an argument for top people in government to keep gifts that they have received, if they really want to do so, for example through a procedure of estimation of the real market value of a gift and reimbursement. A total ban would again invite breaking the law and thus making it less serious.

That said, I would recommend these procedures for their controversial character to be clearly defined in the draft as opposed to them being left to the Cabinet of Ministers as in the current proposal, because Parliament as an open forum would want control over it.

Parliamentary procedures are by nature more open, so there will be public control factor in the debate. If executive power (read: civil servants) will define these rules, they might try to have rather lax rules in place. At the same time, if anticorruption is, at the time of the establishment of these rules, a hot political topic, government could be forced to institute too restrictive rules, because they are under intensive pressure from opposition. So it is better that these rules be debated in a political forum.

On Article 8

Article 8 should actually be one of the central means to prevent corruption. However, according to the current draft, it leaves the procedure and the scope of declaration of material interests to be defined by other laws and regulatory and legal acts, which is an issue of concern, as clearly, this is the very place to define those.

Article 8, paragraph 3 is extremely interesting, and I would like to see it commented. To control the expenses of a civil servant? Well, maybe there is a case to be made for such a provision, yet my intuitive reaction is clearly against such a provision, as it creates a heavy burden for the person. In case of his/her close relatives, I cannot see it at all happening, because making close relatives liable for specific efforts because their spouse, father, mother-in-law etc. would have taken up a position with government is clearly excessive.

On Article 9

Codes of Conduct are a very good way for positive guidance on civil service behaviour. They are the soft as opposed to hard regulation, specifying the desired behaviour, while not outlawing the undesired one. The current article however has turned the idea of Codes of Conduct into a legal mechanism that it is not. This is a long story, but usually in theory we do make a difference between enforceable behaviour that is regulated by laws and the same thing in more humane language that gives people guidance and is not really in legal language and is called Code of Conduct. Lawyers always argue that the use of such codes

is limited if you cannot directly punish people for violating them; however, there are enforcement mechanisms like annual review of behaviour etc.

Article 9

Article 9, paragraph 3 seems to suggest that what has been meant by the drafters is a kind of description of positions. This is a very good procedure in public management to create order in the chaos of overlapping responsibilities. However, this has relatively little direct application in the anti-corruption fight. This regulation should find its place in either the Public [CIVIL] Procedure Code or Civil Service Law, or some type of law on government.

Par 9.4 can find its way to the anticorruption policy and even there I would argue it should outline that the primary initiative should come from these professions and not from the state.

On Article 10

This article is generally regarded as one of the central corruption prevention measures, trying to outlaw nepotism and conflict of interest occurrences. It does have a description of a mechanism (in paragraph 2), which is quite standard and I would say would depend on the way a given society views the solution to such problems. So, it is up to the parliament to decide on its precise formulation. I would certainly recommend writing it up in simple language in the explanatory memorandum.

On Article 11

Abuse of legal mechanisms is certainly a problem in the situation of establishment of a new regulatory regime for a country. Thus, the attempt to find a way to lessen or minimize this is an interesting attempt worth another look and serious debate. However, in the current formulation I would say that it violates the lawmaking prerogatives of the relevant institutions. If the President would forward a draft law that contains regulations favourable to someone, he would pay the political price for such an action first of all. If you have a separate expertise of draft laws in such a form, who would actually have the lawmaking prerogatives in the country? An anti-corruption analysis centre? The final responsibility is in the hands of parliament, and if parliament would favour one solution over another, then this is what is called representative decision-making process in its purest form and if we do not like the outcome, the citizens can elect a new parliament. But a body composed of officials can only advise, while it is the prerogative of MPs to decide. In my reading, the current

mechanism is proposed to substitute the actual substance of the work done by committees in other parliaments.

On Article 11

In Article 11, paragraph 6 which stipulates the rights of civil society in the process, there is a clear sign of overregulation. It is not the business of government to decide how the expertise in civil society has to develop.

On Article 12

Article 12, paragraph 1 seems to suffer from the same dilemma paragraph 6 of Article 11. With respect to Article 12, paragraph 2, subparagraphs 1 to 3, these regulations belong to the public information act and subparagraphs 4 to 5 could find their rightful place in a legal act that is regulating the participatory democracy approach in the legal system of Ukraine. Paragraph 4 concerns the regulation of the status of NGOs and belongs there as well, whereas from the end of the paragraph, it is clear that it is delegated to no-where in particular, and that in such a form cannot work.

On Article 13

Reading this Article left me wondering what has to be regulated and what not. Certainly, the attempt of paragraph 1 seems to be regulation of the PR of the government, and as such should also find its place in other regulatory acts. The rest of the article clearly bears marks of overregulation as well, since relevancy of statistical material should not be subject of law, but the decision of those who prepare reports and order the collection of statistical data.

On Article 14

This Article concerns people who provide assistance in the fight against corruption and is clearly a means to get data for the hard-to-detect cases that unfortunately corruption cases are quite often. However, as far as I understand it is already regulated in another act, and therefore there is an obvious question as to the necessity of repeating it (and if it is deemed necessary, then assuring that the reference is correct).

On Article 15

Article 15 on conflict of interests should be one of the key articles in this law, since this is one of the central problems civil servants would have to manage in their day-to-day

activities. In this draft, however, it is left in its general form instead of providing mechanisms that would really help to solve these situations.

On Article 16

This Article suffers probably from a translation problem, because it is a normal means of regulating potential conflict of interest situations. However, one can differentiate this and I would not recommend being too strict at this stage in Ukraine precisely for the respect for this legislation to be established by reasonable regulations.

On Article 17

This Article I would think would not start working in reality, because it is a regular procedure in the private sector to found a new legal entity, if the previous one is compromised and the reality shows also that measures directed against the principals of the legal entity committing the unacceptable behaviour tend to be more successful, but not a lot.

For the following sections, it is difficult to make meaningful comments, as they appear to be stating the obvious, this may well reflect legal tradition in Ukraine. Among those Articles were 18, 24, 25, 26.2, 27.

8 CONCLUSION

The articles that I did not comment on raised no objections or thoughts, as they appear to be standard ones often found in different legislations. However, my overall impression is still that in the current form, it is not advisable to submit the draft to parliament, but first to rework and clarify the central message of the draft law and to support it with an explanatory memorandum. Then it could be submitted to parliament with the understanding that some provisions are sensible to be left open for the relevant parliamentary committee to help defining the suitable solutions for Ukraine. These debates could be organized also by an outside agency like the Council of Europe, the World Bank or UNDP, but it is imperative that they would include the very lawmakers responsible for this legislation.