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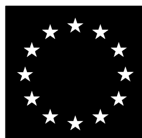

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Support to good governance: Project against corruption in Ukraine – UPAC

Expert opinion on the Draft Law of Ukraine on Amending Certain Legislative Acts Regarding the Liability for Corruption Offences

by Marin Mrčela (Croatia)

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For more information, please contact:

Technical Co-operation Section *Department of Crime problems* *Directorate General I – Legal Affairs* *Council of Europe* *67075 Strasbourg CEDEX* *France*	*Tel: + 33 3 9021 46 46* *Fax: + 33 3 90 21 56 50* *Email:vesna.efendic@coe.int* *Website: www.coe.int*

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I. EXPERT OPINION
BY MARIN MRČELA[1]

1. Executive Summary

After careful consideration of the **draft Law of Ukraine on Amending Certain Legislative Acts Regarding the Liability for Corruption Offences** (hereafter: LUIC), the main findings are as follows:

- The draft LUIC represents a useful starting point on the basis of which further work will need to be done in order to align the draft with international standards, in particular those set by the Council of Europe Criminal Law Convention on Corruption (CLC) and the United Nations Convention against Corruption (UNCAC).
- Some parts of the Draft seem to be in need of <u>substantial</u> reconsideration and possible changes.
- The liability of foreign arbitrators and jurors as foreseen in the scope of the amendment of Article 18 of the Criminal Code seems not to be conclusively resolved by the draft, at least from the point of view of the interpretation of the law.
- With regards to the provisions dealing with 'Abuse of Authority', the inclusion of an 'Omission to Act' as a manner of perpetrating a criminal offence should be considered. From the current description of the offence it cannot be concluded that abuse of authority would not be committed if a perpetrator is acting for the purpose of receiving benefits for any legal person (entity), regardless of who the owner of such a legal person is. Therefore, adding a legal entity as an element to the criminal offence is desirable.
- The current provisions of the criminal offence 'Exceeding of Authority' should be reconsidered; it should be considered whether there is a need for such a criminal offence at all.
- The description of 'Commercial Bribery' needs to be improved in order to fully comply with the Council of Europe Criminal Law Convention against Corruption and the United Nations Convention against Corruption (UNCAC). Further consideration should be given regarding sanctions not only for this criminal offence, but also for active and passive bribery.
- There is an argument for reconsideration and improvement of the current provisions on 'Unlawful Enrichment' and for 'Trading in Influence'.
- Because of the lack of a definition of corruption and a definition (or explanation) of a bribe, there needs to be further discussion for a possible enhancement of the proposal.

2. Amendments regarding Article 18 of the Criminal Code of Ukraine[*]

According to the Council of Europe Criminal Law Convention (hereafter: CLC) and Article 16 of the United Nations Convention against Corruption (hereafter: UNCAC), each party shall adopt such legislative and other measures as may be necessary to establish active and passive bribery as corruptive criminal offences when involving a public official of any other State (Article 5 CLC, foreign public official), members

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1 This expertise is based on the Draft #2112-D, registered by the Verkhovna Rada of Ukraine on 20.11.2006.

[*] Hereafter: CC, and applying the meaning of the term as used in the CC.

of foreign public assemblies (Article 6 CLC), officials of international organisations (Article 9 CLC), members of international parliamentary assemblies (Article 10 CLC), judges and officials of international courts (Article 11 CLC), as well as foreign arbitrators and jurors (Article 4 and 6 of the Additional Protocol to the Criminal Law Convention on Corruption).

The proposal for a new part three of Article 18 of the CC defines the meaning of an official person, and the proposed fourth part refers to "a person […] in any other state or international organisation". One could conclude that CC and LUIC cover most of the CLC and UNCAC provisions regarding types of persons liable for corruptive offences.[2] However, it is not quite clear whether foreign arbitrators and foreign jurors could be deemed official persons, because it is doubtful whether they are performing any of the activities referred to in LUIC proposal for part three of Article 18 of the CC or not. Furthermore, the draft Articles 235^3, 235^5 of the CC make references to the 'lawyer' and 'arbitration trustee'. Whether or not foreign arbitrators and foreign jurors can be deemed as the 'lawyer' and 'arbitration trustee' is a question for the Ukrainian criminal law doctrine and court practice. In order to avoid any uncertainty, it might be useful to specify that foreign arbitrators and jurors are official persons according to the CC.

3. Amendments regarding draft Article 235^1 of the CC ('Abuse of Authority')

This Article could be considered to accommodate the provisions of Article 19 of the UNCAC ('Abuse of Functions'). It should be emphasized that Article 19 expressed no duty to any State Party to adopt legislative (and other) measures to establish abuse of functions by public officials as a criminal offence; the Article reads: "Each State Party **shall consider** adopting…". If the Ukrainian authorities maintain to establish the criminal offence of 'Abuse of Authority' in the proposed way, the following remarks should be taken into consideration:

As a manner of perpetrating 'Abuse of Authority', the proposal stipulates that the criminal offence can be committed by an act. This arises from the term that is used in the proposal: "**The use** of vested authority…" [the emphasis is the expert's]. That means a perpetrator must act in a particular way, he/she must use his/her authority. According to Article 19 of UNCAC, the abuse of functions or position could be the performance of or failure to perform an act. Therefore, it is desirable to consider that an omission to act should also be a manner of perpetrating 'Abuse of Authority'[3]. In this case, the text could read:

The use of vested authority ***or failure to perform such authority*** *by a person […]*

One of the elements of the criminal offence is a perpetrator acting *for the purpose of receiving benefits for oneself or other persons.* From the legal text of the CC, one could conclude that every time when the CC is referring to a person it should be deemed that it is a natural person, except where the CC clearly refers to a legal person (Article 11). If this interpretation is correct, the proposed abuse of authority could not be committed if a perpetrator is acting for the purpose of receiving benefits for any legal person (entity), regardless of who the owner of such a legal person is. According to Article 19 of UNCAC, the abuse of functions or position (or failure to perform) should be performed for the purpose of obtaining an undue

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[2] See the document Expert opinions on the Draft Law on Ukraine on Responsibility of Legal Persons for Corruption Offences, pages 15, 17 and 19.

[3] This would be in line with the existing provision in the CC in Article 11, paragraph 1, which states: 'A criminal offense shall mean a socially dangerous culpable act (action or **omission**) prescribed by this Code and committed by an offender.'

advantage for himself or herself or for another person or entity. Thus, adding a legal entity as an element of the criminal offence would be in line with Article 19 of UNCAC. This part of the proposal could read:

[…] and for the purpose of receiving benefits for oneself or other persons ***or a legal entity*** *[…]*

This is even more important when one keeps in mind that the very same criminal offence could be committed if a criminal act resulted in substantial damage also to the legal entities. According to the proposal, abuse of authority is a criminal offence if there was a purpose of receiving benefits for oneself or other persons and such an action results in substantial damage to the lawful rights and interests of legal entities, but it is very doubtful if the criminal offence exists if the purpose was to receive benefits of the legal entity and such an action results in substantial damage to another legal entity. Therefore, the change as suggested above is desirable.

4. Amendments regarding draft Article 235^2 of the CC ('Exceeding of Authority')

The description of the criminal offence is not quite perspicuous. According to the text, the manner of committing a crime could be exceeding of authority **or** a deliberate action. From the further text one could conclude that both actions must be *beyond the rights or authority vested in such a person.* If this is a correct interpretation of the intention, then it is yet not clear what the difference is between exceeding of authority and deliberate action? Or, is deliberate action just one form of exceeding of authority? This opens another question: what (if any) are the other forms of exceeding of authority (and why are they not in the legal text if there is a deliberate action)?

If this interpretation is not correct, it would mean that deliberate action must be beyond the rights of authority and exceeding the authority would not have such a requirement. And this conclusion seems to be rather inappropriate.

Furthermore, it is not quite clear what the difference between 'Abuse of Authority' and 'Exceeding of Authority' is. Isn't exceeding just one form of abusing of authority? If the action is beyond the rights or beyond authority, doesn't this mean that the action actually represent abuse of authority? Especially when having in mind the description of the 'Abuse of Authority', which is "[Any**]** *use of vested authority*". If the abuse is any use of vested authority, one could conclude that the exceeding of authority is just a form of abuse or at least that the abuse of authority covers also any exceeding of authority, both in a manner which constitute a criminal offence.

For this reason, one may reconsider if there is at all a need for a criminal offence of 'Exceeding of Authority'.

5. Amendments regarding draft Article 235^3 of the CC ('Abuse of Authority by Persons in Exercise of Vested Public Authority')

The description of this offence is very similar to the description of the 'Abuse of Authority'. The remarks regarding draft Article 235^1 (omission to act, legal entities), *mutatis mutandis*, could be taken into consideration also regarding draft Article 235^3.

6. Amendments regarding draft Article 235[4] of the CC ('Commercial Bribery')

Paragraph 1 clearly concerns active (commercial) bribery which may be committed by granting and/or giving benefits. According to the CLC (Articles 2 and 7), as well as UNCAC (Articles 15/a and 16/1), a criminal offence of active bribery could be committed by promising, offering or giving, directly or indirectly, of any undue advantage. It is not quite clear whether the proposal covers promising and/or offering as the manner of committing commercial bribery, because it is not clear what the notion of "granting" in the Ukrainian language implies. If the word "granting", when translated into Ukrainian, implies the meaning of promising and offering, the above remark should be disregarded. If this is not the case, in order to avoid any uncertainty and to be fully in line with the above mentioned provisions of the CLC and UNCAC, the proposal is for this paragraph to read:

Any promising, offering or giving, directly of indirectly, of any benefits to […]

It should be noted that instead of using the word "unlawful", the proposal should use the word "any". The description "Unlawful granting, giving of benefits…" suggests that there are some benefits that could be lawfully given to a person for an action or omission of an action of authority in the interests of the person granting or giving such benefits. It is hard to imagine that someone could give lawful benefits to a person performing management functions in a legal entity so that a person would illegally act or omit to act in the interest of the person who gave the benefit.

Paragraphs 3 and 4 deal with passive (commercial) bribery, which may be committed by receiving of benefits (paragraph 3) or by soliciting of benefits (paragraph 4). According to the CLC (Articles 3 and 8), passive bribery could be committed by request or receipt, directly or indirectly, of any undue advantage. UNCAC (Articles 15/b and 16/2) describes passive bribery as solicitation or acceptance, directly or indirectly, of any undue advantage. Regarding the terms used in the LUIC (receiving or soliciting), the proposal seems to be fully in line with the CLC and UNCAC.

Regarding the use of the term "unlawful", one should take into consideration what is mentioned above. This is all the more relevant having in mind the description of the offence in paragraph 4, which does not contain the term "unlawful" with regards to solicitation.

It should also be noted that according to the draft, solicitation is a graver offence than receiving of benefits, because the penalty for solicitation is harder than for receiving. It is hard to discern why solicitation is socially more dangerous (Article 11, paragraph 1 of the CC) than receiving of benefits, because in the case of solicitation, the benefits are obviously not in the possession of the perpetrator. In any case, the criminal law doctrine in most cases considers soliciting and receiving of a bribe as equally dangerous. Both modes of perpetration of passive bribery should be treated with same sanction, which should be effective, proportionate and dissuasive (Article 19, paragraph 1, CLC). According to the GRECO practice, for passive bribery a maximum imprisonment of up to five years is deemed NOT to be in conformity with CLC, but maximum imprisonment up to eight years is deemed to be in conformity with the CLC.[4]

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[4] The issue of increasing punishments for passive and active bribery has been addressed to the Ukrainian authorities in the OECD Monitoring Report of 12 December 2006, page 16, with an indication that „no action had been taken to increase the punishment for passive and active bribery", and the conclusion that „Ukraine is non-compliant with «recommendation 6 (Amend the incriminations of active and passive bribery in the Criminal Code to correspond to international standards. In particular, clarify elements of bribery through a third person; delineation of offences between

7. Amendments regarding draft Article 235[5] of the CC ('Bribing a Person in Exercise of Vested Public Authority')

The remarks regarding draft Article 235[4], *mutatis mutandis*, could be taken into consideration also regarding draft Article 235[5].

8. Amendments regarding draft Article 368¹ of the CC ('Unlawful Enrichment')

Article 20 of UNCAC defines illicit enrichment as a "significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income". Having in mind this description, it seems that the depiction in the draft Article 368[1] should be reconsidered. Namely, the requirement in the proposal is "acceptance", which could lead to possible problems in practice (if, for instance, the defendant would claim that he/she did not accept anything, and the money on his/her account is merely a mistake). In order to avoid such situations, the description of the criminal offence could start with the objective element of the crime (substantial increase).

Further, the proposal relates to "ownership of benefits" which is probably narrower then the term "assets", which is more general and covers the intention of the criminalization laid down in the UNCAC.

The solution with close relatives seems to be very interesting and justified. In light of the above, the description of the criminal offence could read:

Substantial increase in the assets of an official or his/her close relatives, should the lawfulness of the origin of such assets not be ascertained in accordance with the established procedure[5] (unlawful enrichment) […]

or

Substantial increase in the assets of an official or his/her close relatives that he/she cannot reasonably explain in relation to his/her lawful income (in accordance with the established procedure) […]

9. Amendments regarding draft Article 369¹ of the CC ('Trading in Influence')

The requirement to establish trading in influence as a criminal offence arises from Article 12 of the CLC[6]. There are two forms of this criminal offence. First, promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any (official) person, whether the undue advantage is for himself or herself or for anyone else. Second, request, receipt or the acceptance of the offer or the promise of any undue advantage, in consideration of that influence, whether or not the influence is exerted, or whether or not the supposed influence leads to the intended result.

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an offer/solicitation and extortion, criminalize trading in influence. Consider increasing the punishments for active and passive bribery as well as the statute of limitations for corrupt offences).

See http://www.oecd.org/dataoecd/18/37/37835801.pdf

[5] The suggested change looks even more appropriate when having in mind suggested changes in Administrative Corruptive Offences in the LUIC, where the description of active and passive bribery exists

[6] "Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."

The proposal in paragraph 1 relates to “offering or granting“. Having in mind what has been said about the term “granting“, in order to avoid any uncertainty and to follow Article 12 of the CLC, the text could read:

Any promising, offering or giving of illegitimate benefits to a person […]

In paragraphs 2 and 3, the proposal is making a difference with respect to receiving of benefits. If the person receives benefits, or if the person offers in order to effect the influence in exchange for benefits, this appears to be one type of criminal offence with a prescribed maximum deprivation of liberty[7] of up to five years. If receiving is accompanied by soliciting the benefits, the maximum punishment is eight years. Making this kind of difference is somehow doubtful, because the lesser punishment is for the person who offers to influence in exchange for benefits, and the higher one is for the person who receives benefits as a result of solicitation. To offer influence, and then to receive benefits sounds pretty much the same as to solicit benefits and then to receive benefits for influencing. Therefore, one might want to reconsider the description of this criminal offence in paragraph 3 and 4.

10. Amendments regarding Article 369 of the CC (‘Offering or Giving of a Bribe’)

Introducing offering a bribe as a manner of perpetration of this criminal offence is in line with relevant CLC and UNCAC provisions. However, having in mind what is said in remarks regarding commercial bribery, it might be useful to introduce promises as a way in which active bribery could be committed as well. In this case, these provisions would be fully in conformity with the CLC and UNCAC.

This is regardless of fact that the CC provides for a criminal offence of ‘Provocation of Bribery’ (Article 370 CC), which is a very interesting and valid solution in the field of fight against corruption. Nonetheless, the description in Article 370 does not cover the situation of promising a bribe. Therefore, the suggested amendments would be appropriate and advisable.

The title of the offence is ’Offering or Giving of a Bribe’. The description of the offence in the draft paragraph 1, Article 369 is ‘Offering a Bribe’, and in paragraph 2 is ’Giving of a Bribe’. The CC does not have a definition of what is a bribe, nor a definition of corruption.[8] Although there are no proposals to change the description of passive bribery in Article 368, paragraph 1 and 2 of the CC, and although this might be outside the scope of this expertise, it should be noted that one should consider changing the description of passive bribery, too. Namely, simply saying that giving or taking a bribe is a criminal offence seems to be too vague. The solution should be in line with the CLC, which might improve the clarity of the description. Even more so, if the title of the offence is ‘Taking a Bribe’ (or ’Offering or Giving a Bribe’), one should expect that in the description of the offence, there will be a depiction of what is a bribe. The lack of such a depiction might look as a logical mistake of *idem per idem.*

In light of the above, the description of active bribery could read similar as suggested in the remarks regarding commercial bribery. The description of passive bribery (Article 368 CC)[9] could be:

[7] Regarding consistency of the terminology on sanctions, see footnote 4, paragraph 2.

[8] But the definition is in in the Law of Ukraine on the Fights against Corruption see OECD Monitoring report from December 12 2006, page 15. N.B.: Recommendation 5 requires harmonization and clarification of the relationship between violations of the Criminal Code and the Law on the Fight against Corruption.

[9] The prescribed punishment in paragraph 1 seems not to be effective, proportionate and dissuasive (Article 19, paragraph 1 of the CLC). See footnote 4.

Requesting, receiving, accepting of an offer or a promise of any undue advantage [...]