

Council of Europe
European Commission



Conseil de l'Europe
Commission européenne

Economic Crime Division
Directorate of Co-operation
Directorate General of Human Rights and Legal Affairs
June 2008

Support to Good Governance: Project against Corruption in Ukraine (UPAC)

**TECHNICAL PAPER - EXPERT OPINION ON THE DRAFT LAW OF UKRAINE ON AMENDING
CERTAIN LEGISLATIVE ACTS AS TO LIABILITY FOR CORRUPTION OFFENCES**

*Prepared by:
Drago Kos (Slovenia)
Council of Europe Expert*

Table of Content

1	Introduction	3
2	Comments, remarks, proposals to the text of the draft law	3
	2.1 Criminal Code.....	3
	2.2 Criminal Procedure Code.....	6
	2.3 Code of Administrative Offences.....	6
3	Summary	8

For any additional information please contact:

Corruption and Fraud Unit/Economic Crime Division

Directorate of Co-operation – DG-HL

Council of Europe

F-67075 Strasbourg Cedex FRANCE

Tel +33-3-8841-2354 and/or + 33 3 88 41 29 76 Fax +33-3-9021-5650 ✉: roman.chlapak@coe.int and/or

lado.lalacic@coe.int

<http://www.coe.int/economiccrime>

1 INTRODUCTION

One of international experts, Mr. Marin Mrčela, has already given his opinion on one of the previous versions of this draft law so there is no need to repeat the introduction on the importance of coherent and consistent anti-corruption legislation regulating liability for corruption offences. International legal instruments, which were already mentioned in the opinion of the first expert, were taken as basis for the assessment of the draft law again. Of course, in some cases expert will refer to the expertise of the previous expert in order to underline his own findings.

The methodology used in this opinion is the following one: remarks listed below follow the numbering of articles. Where there is no mention of an article or paragraph, it means that the expert does not have any remark on it and that in principle he agrees with the idea and form of the given legal provision.

2 COMMENTS, REMARKS, PROPOSALS TO THE TEXT OF THE DRAFT LAW

2.1 Criminal Code

Article 18 of the Criminal Code

The question of foreign arbitrators and jurors, which was mentioned in the opinion of Mr. Mrčela is still not explicitly solved. If they are covered, it would be useful to add a “note” to this article listing some categories of officials, including foreign arbitrators and jurors.

Article 235-1 of the Criminal Code

It is still not clear if the term “use of vested authority” covers omissions, too. If this is not a case (in Article 235-4 omissions are explicitly mentioned!) the wording of the Article will have to be changed in order to achieve compliance with Article 19 of the UN Convention against Corruption (UNCAC). If this is a case, an explanatory “note” at the end of a paragraph would be a useful one.

In addition, there is no doubt anymore that the text of Article 235-1 is not covering cases when the perpetrator has the intention to ensure benefits for a legal and not for a natural person. There is no logical explanation for that. Although it is not mandatory for countries to criminalise abuse of authority in the private sector, the expert cannot accept the idea that in the case of criminalisation an important part of the UNCAC requirements is simply forgotten. Therefore, it seems necessary to add the words “or entities” after the wording “oneself or other persons”.

Article 235-3 of the Criminal Code

It is still not clear if the term “use of authority contrary to assignment” covers omissions, too. If this is not the case (in Article 235-4 omissions are explicitly mentioned!), the wording of the Article will have to be changed. If this is the case, an explanatory “note” at the end of a paragraph would be a useful one.

In addition, text of Article 235-3 is also not covering cases when the perpetrator has the intention to ensure benefits for a legal and not for a natural person. There is no logical explanation for that and it seems necessary to add the words “or entities” after the wording “oneself or other persons”.

Article 235-4 of the Criminal Code

Paragraph 1

According to international standards there are three possible forms of active bribery: “promising”, “offering” and “giving”. It is not sure if the words “offering, granting or conveying” have the meaning required by international conventions. If not, they will have to be changed.

Criminal Law Convention on Corruption (hereinafter: CETS 173) and UNCAC are asking for criminalisation of a direct and indirect active bribery in the private sector. The notions of direct/indirect are not explicitly covered by the existing text. If indirect active bribery is covered by general provision of the Criminal Code on aiding or abetting, there is no need to change anything. If this is not the case, the first sentence in Article 235-4 will have to start in the following way: “Direct or indirect offering,”.

Paragraph 3

In accordance with international standards not only receiving of benefits with a criminal intent but also acceptance of promises or offers of such benefits has to be understood as corruption. Therefore, it would be necessary to add words “or their promises or offers” after the words “receiving of benefits”.

Paragraph 5

Special defence described in this paragraph can raise a lot of problems for Ukraine in the framework of GRECO and OECD: both conditions - solicitation and reporting - have to be fulfilled cumulatively. Therefore, the word “or” between the words “solicited,” and “if such person..” has to be replaced by “and”! It would be very difficult to find an explanation for cases in which the offender would first give the initiative (bribe) for bribery himself and then s/he would report it to state authorities and would be relieved of criminal liability.

Article 235-5 of the Criminal Code

Paragraph 1

International legal standards are asking for criminalisation of a direct and indirect active bribery. The notions of direct/indirect are not covered by the existing text explicitly. If indirect active bribery is covered by general provision of the Criminal Code on aiding or abetting, there is no need for any changes. If this is not the case, the first sentence in Article 235-5 will have to start in the following way: “Direct or indirect offering,”.

According to international standards, there are three possible forms of active bribery: “promising”, “offering” and “giving”. It is not sure if the word “granting” has the same meaning as “promising”. If not, it will have to be changed.

Paragraph 3

There must be a typing mistake at the beginning of the sentence - it starts with “offering receiving”. Probably the word “offering” will have to be deleted.

In addition and in accordance with international standards not only receiving of benefits with a criminal intent but also acceptance of promises or offers of such benefits has to be understood as corruption. Therefore, it would be necessary to add words “or their promises or offers” after the words “receiving of benefits”.

Paragraph 5

See comments to Article 235-4, Paragraph 5.

Article 368-1 of the Criminal Code

Paragraph 1

Proposals¹ of Mr. Mrčela for a new text of Article 368-1 are much more logical and simple as the text of the present draft. Obviously, his proposal was not accepted. Still, the word “benefits” in the first sentence will have to be replaced by “assets” – this word is also used in the second part of the sentence (“origin of such assets...”). Wording “should the lawfulness of the origin of such assets not ascertained in accordance with the established procedure” opens the question about the level of the guilt needed for this omission – is it still intent or the negligence is enough (for not ascertaining the lawfulness...)?

Article 369-1 of the Criminal Code

Paragraph 1

According to Article 12 of the CETS 173 there are three possible forms of active trading in influence: “promising”, “offering” and “giving”. It is not sure if the words “offering” and “granting” have the same meaning. If not, something will have to be added. See also other comments to Article 235-5, Paragraph 1.

Paragraphs 2 and 3

See comments to Article 235-4, Paragraph 3.

Article 365 of the Criminal Code

Is the content of the term “special means” mentioned in the first paragraph of the second part known to everybody? If not, an explanatory note will have to be added.

Article 369 of the Criminal Code

Having in mind comments to articles 235-4 (Paragraph 1), 235-5 (Paragraph 1), 369-1 and the requirements of the CETS 173 and UNCAC, a form of a criminal offence consisting of “promising bribe” will have to be added.

Paragraph 6

See comments to Article 235-4, Paragraph 5.

¹ »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 established procedure...« or »Substantial increase in the assets of an official or his/her close relatives that s/he can not reasonably explain in relation to his/her lawful income...«

2.2 Criminal Procedure Code

Article 27-1 of the Criminal Procedure Code

Is there any legal reason (beside the rationale that it is impossible to prove damage if the damaged entity does not want to cooperate) why the harmed legal entity would have to initiate the proceedings in the case of a criminal offences from articles 235-1, 235-2 and 235-3 or give its consent thereof? Who will have to get the consent of the legal entity? How does this fit into the system of mandatory prosecution, presumably in place in Ukraine? Such a solution could offer plenty of possibilities for suspects to avoid being brought to courts for their criminal offences and will (for sure) raise serious criticism by international organisations. If there are no real and very serious grounds for such solution, it would be strongly recommended to avoid (delete) it.

2.3 Code of Administrative Offences

Article 212-21 of the Code of Administrative Offences

Title contains the word “unlawful” (receiving of benefits), which is not repeated in the text of the Article. This has to be changed (starting the Article in the following way: “Unlawful receiving..”), otherwise any acceptance of benefits could be deemed to be an offence. Maybe the drafters wanted to say that any acceptance of benefits not exceeding five untaxed minimal monthly wages is already unlawful by itself?

Article 212-22 of the Code of Administrative Offences

Having in mind previous comments related to Criminal Code (to articles 235-4, para 1, 235-5, para 1 and 369-1), the word “promising” will have to be included.

Also the title of the offence – “bribery” – can cause many problems since it could easily get mixed with the title of Article 369 of the CC (“Offering or giving a bribe”). Also, something substantial is missing to be justified to call simple giving (offering, promising) of benefits “bribery” – there is no intent to influence the decision, which is crucial for bribery! Therefore, it would be strongly recommended to change the title of the offence – maybe into “Unlawful (see comments to Article 212-21 above) giving of benefits”.

Article 212-23 of the Code of Administrative Offences

See comments to Article 212-21 above concerning the use of the word “unlawful”.

Article 212-24 of the Code of Administrative Offences

If “research” and “publicising” are already included in the given exceptions (academic work, artistic work, ...), than there is no problem – if not, it would be good to mention it, at least to guarantee (in the case of publicising) freedom of expression as given in the European Convention on Human Rights.

According to the “Note”, all persons specified in Article 2 of the Law of Ukraine “On Principles of Prevention and Countering of Corruption” are subjects of corruption offences from articles 212-24 and 212-25. This is not in line with the text of Article 4 of the said Law, which correctly prohibits such activities only to persons listed in paragraphs 1, 2 and 3 of Article 2. Therefore, the same solution will have to be applied here, and persons from paragraph 4 of Article 2 of the Law of Ukraine “On Principles of Prevention and Countering of Corruption” will have to be excluded.

Article 212-25 of the Code of Administrative Offences

See comments (concerning the list of persons) to the “Note” of Article 212-24 above.

Article 212-26 of the Code of Administrative Offences

An “illegitimate refusal” can also happen by mistake². Such things will continue to happen and, if such cases would be treated as (administrative) offences, than such solution can give rise to many ill-founded accusations and sanctioning of the officials. There is a very simple solution for that: to insert the word “deliberate” (or “intentional”) before “illegitimate”.

According to the “Note”, persons specified in paragraphs 1 and 2 of Article 2 of the Law of Ukraine “On Principles of Prevention and Countering of Corruption” are subjects of corruption offence from this Article (212-26). This is not in line with the text of Article 4 of the said Law, which correctly prohibits such activities to persons listed in paragraphs 1, 2 and 3 of Article 2. Therefore, the same solution will have to be applied here, and persons from paragraph 3 of Article 2 of the Law of Ukraine “On Principles of Prevention and Countering of Corruption” will have to be included.

Article 212-28 of the Code of Administrative Offences

It is not clear to which legislation this Article is referring – to Article 5 of the Law of Ukraine “On Principles of Prevention and Countering of Corruption”, to Article 10 of the same Law or to both of them? It would be useful to add this information at least in the form of a “Note”.

Article 212-29 of the Code of Administrative Offences

A failure can also happen by mistake³. Such things will continue to happen and, if such cases would be treated as (administrative) offences, than such solution can give rise to many ill-founded accusations and sanctioning of the officials. There is a very simple solution for that: to insert the word “deliberate” (or “intentional”) before “failure”.

Article 212-32 of the Code of Administrative Offences

It seems that there is no real difference between the text of this Article (especially paragraph 1) and the text of Article 212-21. If this is really the case, one of the articles will have to be deleted. If this is not the case, some explanations on the difference between “benefits” and “gifts” will have to be given in the “notes”.

² An official thinks in a good faith that s/he has legitimate grounds to refuse to provide information.

³ An official thinks in a good faith that s/he has legitimate grounds to refuse to provide information.

3 SUMMARY

The expert recognises that many of the observations, comments and remarks of the previous expert concerning changes in the Criminal Code were not followed. They might seem to be minor and/or irrelevant, however, they represent the requirements of international conventions and, if they will not be fulfilled thoroughly, this might lead to new changes of the Criminal Code in the nearest possible future. International conventions, especially CETS 173 and UNCAC are asking for a mandatory criminalisation of the following offences:

- active and passive bribery in the public sector (national, international);
- active and passive bribery in the private sector;
- obstruction of justice;
- money laundering

Establishment of the liability of legal persons is also a mandatory requirement of the mentioned conventions.

Criminalisation of the following offences is not mandatory:

- embezzlement (public and private sector),
- abuse of functions,
- illicit enrichment,
- concealment,
- trading in influence,

but in a regulated legal system these types of behaviour are usually criminalised and, if they are (as is the case in Ukraine), than their incriminations have to follow definitions given in the conventions.

Therefore, the expert recommends to analyse comments made by Mr. Mrčela and by himself again, and to draft necessary changes to the draft text of the amendments to the Criminal Code. If concerns expressed by the experts were met already, some explanations will have to be added when the law will be adopted.

Changes in the Code of Administrative Offences together with the new draft Law of Ukraine "On Principles of Prevention and Countering of Corruption" represent very promising start of a new, harmonised anti-corruption approach of Ukraine. Some minor improvements, as mentioned above, are still needed but such approach can have only positive results.

In general, efforts of the Ukrainian authorities in the area of changes of relevant anti-corruption legislation have to be commended and, if some additional improvements will be made, the final result will be even much better and convincing.