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

### **TECHNICAL PAPER - EXPERT OPINION ON THE DRAFT LAW OF UKRAINE ON THE PRINCIPLES OF PREVENTION AND COUNTERACTION OF CORRUPTION**

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## 1 INTRODUCTION

Expert 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 prevention legislation. In addition, international legal instruments, which were already mentioned in the first opinion, were taken as basis for the assessment of the draft law again. Of course, in some cases expert will refer to his previous expert opinion to underline his new findings.

The methodology also remains the same: the 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 he in principle agrees with the idea and form of the given legal provision.

## 2 GENERAL PROVISIONS

### *Article 1*

#### *Conflict of interest*

Conflict of interests is not only when there is a real contradiction between the individual and the public interest of a person, but also when such 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, which has influenced the behaviour of that person. Even a danger of such contradiction, which appears to exist and is much easily to prove has to be eliminated. Therefore, it would be advisable to add words “Real or apparent” before “collision of....”.

#### *Corruption*

In accordance with international law in the area of corruption not only receiving of unlawful benefits 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 “for the purpose of receiving of unlawful benefits”.

#### *Unlawful benefit and Gift*

Both definitions are basically the same. The expert does not know how to solve the problem but a qualifying element will have to be added either in the first or in the second notion.

In addition, in the definition of “unlawful benefit” the word “promised” will have to be added before “offered”. There is also no need to put the word “received” in the square-brackets. The wording should be following: “promised, offered, granted or received free of...”

### *Article 2*

Despite significant improvements some questions still arise concerning paragraph 1 on the basis of the given list of subjects:

is the term “persons in public service” not covering all other categories of persons employed in the public sector, which are also specifically mentioned ?

is there any definition of “key personnel of internal authorities”... ?

Both problems (if they are problems at all!) are not very important but for the sake of clarity of legislation it would be good to avoid as much as possible the repetitions and duplications of definitions.

In paragraph 3 managers of private companies are mentioned. There is no international obligation to establish special limits or restrictions in the private sector, too. Of course, countries can decide to do it but the expert hopes that there are good reasons in Ukraine to do so.

### *Article 3*

According to this Article there is still no specialised anti-corruption unit in Ukraine. It has to be mentioned that United Nations Convention against Corruption (hereinafter: UNCAC) is asking for a mandatory existence of a preventive anti-corruption body (or bodies) in Article 6 and for a mandatory existence of a body (or bodies or persons) specialised in combating corruption through law enforcement in Article 36. It seems that subjects mentioned in Article 3 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), at least in the area of prevention, would be established. That would also serve as a good model for other countries of the region and Europe as such.

In addition, in para 3 it would be good to establish duty of the Ministry of Justice to cooperate with other state, private and non-governmental institutions when developing the state anti-corruption policy.

Paragraph 6 is explaining the obligations of heads of different services if/when they would find out information on possible corruption. Sometimes they will be the ones acting corrupt and therefore it would be advisable to add another sentence to this paragraph, establishing the right and the duty of all employees of public authorities, legal entities and their structural units to notify a Subject of special authority about their suspicions concerning behaviour of their superiors.

## **2.1 Measures for prevention and countering of corruption**

### *Article 4*

Paragraph 1, sub-paragraph 1

The structure of the introductory sentence to sub-paragraph 1 of paragraph 1 is not very clear. It starts with the wording "to use own official position for unlawful receiving of benefits for themselves or other parties" and then continues "including" + behaviour described in a,b,c,d. A,b,c,d are not forms of misuse of official position for unlawful receiving of benefits, so the word "including" is wrong. Maybe there is not a problem in Ukrainian language but "through" instead of "including" would be much better solution.

In addition and in the light of the observation made to the term of "corruption" in Article 1 after the words "receiving the benefits" the wording " their offers and promises" should be added.

Paragraph 1, sub-paragraph 2

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

Paragraph 1, sub-paragraph 4

It is referring to "paragraphs 2 and 3 of this Article", which is wrong - it should be "sub-paragraphs 2 and 3 of this Paragraph".

In addition, it is still not easy to understand why restrictions from sub-paragraphs 2 and 3 of this paragraph do not apply to different sorts of deputies. Being a deputy involves large responsibilities and large involvement of time and energy but also 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, then they are the first ones for whom all restrictions have to be in place. If deputies are employed as such it is strongly recommended to reconsider the solution given.

### ***Article 6***

There is a very simple question: if an official during an official event receives a gift in the value of under 20% of the subsistence wage (para 3) to whom this gift belongs – to the official or to his organization (para 2)? Some clarification might be needed here. In addition, it still seems almost unavoidable to establish a duty for reporting of all received gifts.

### ***Article 9***

Maybe it would be good to add the obligation for the persons seeking positions to provide all information from para 2 themselves first. This would make the work of Subjects of special authority much easier.

### ***Article 10***

“Officials of foreign states” (Article 2, para 2, sub-para h) and “officials of international organizations” (Article 2, para 2, sub-para i) cannot be legally bound by the obligation to report their assets as is the case now in Article 10. They will have to be excluded in order not to breach international law.

### ***Article 11***

See comments to Article 10.

## **2.2 Public participation in prevention and countering of corruption**

### ***Article 15***

Paragraph 1

There is no introductory sentence or phrase for sub-paragraphs 1 – 9 in this paragraph. In sub-paragraph 1 the wording “to gather the relevant information by their own” can cause very mixed interpretations and feelings since it also might also be understood in the way that citizens are turning into (secret) collaborators of the law enforcement agencies. There would be no harm by deleting it since this is implicitly already covered in the first part of the sentence.

## **2.3 International cooperation**

### ***Article 28***

Paragraph 2, sub-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.

## **3 SUMMARY**

Ukraine has improved the draft further, which was very good already at the beginning. Its adoption will be a very important achievement for Ukraine and for the international community since this draft contains plenty of excellent solutions and not known yet in all countries. Of course, there is a hope that Ukraine will – again – take into consideration comments and proposals of the expert from this expertise and follow at least some of them but already now we are dealing with a very solid piece of legislation. Expert hopes that this draft and all relevant additional legislation will be adopted and implemented soon.