Department of Information Society and Action against Crime
Directorate General of Human Rights and Legal Affairs

Technical Paper: Expert Opinion on Three Draft Laws of Ukraine amending several legislation provisions concerning anti-corruption issues

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I. Introduction

Over the past few year, there has been very vivid legislative activity in the area of anti-corruption in Ukraine. Several draft laws were prepared; some of these –the so-called "anti-corruption package" – were also adopted. Certain solutions planned would mean a significant step forward in the anti-corruption efforts of Ukraine and would enable the authorities of the country to cope with this phenomenon in a more effective way. Unfortunately, still not all of the draft laws have been adopted , while the day of entering into force of the adopted anti-corruption package was postponed to 1st January 2011. This means that effectively, not much has changed in the anti-corruption legislative framework of the country. It should also be mentioned that the adopted anti-corruption package (hereinafter: the AC package) is not without significant flaws and loopholes, but it still presents an important achievement in Ukraine's fight against corruption.

In the most recent step, Ukraine prepared a set of three draft laws amending several other pieces of legislation concerning anti-corruption issues, including laws from the AC package. The present expertise will try to assess whether the proposed changes are improving the existing legislative framework and if so, to what extent. Obviously, both intention and efforts to do something in the area of corruption are still present in the country, and it is worthwhile to explore whether the planned amendments could be taken as an adequate reflection of these efforts. As a general observation it has to be mentioned that several changes of the (newly) adopted legislation do not add much to achieve legal certainty in the country and can sometimes even be understood as an attempt to minimise the influence of existing laws. Having in mind that there was significant room for improvement of the adopted legislation, the expert does not have a general problem with the amendments; but even the best possible intentions can sometimes end up in a completely wrong direction.

The expertise will assess proposed amendments to three draft laws, mainly comparing them with previous (already adopted) texts, international anti-corruption standards and conclusions of international monitoring bodies[1] concerning Ukraine. The three draft laws the expertise will deal with are:

A. The Draft Law of Ukraine on Amendments to Some Laws of Ukraine on Improvement of the Principles of Prevention and Counteraction to Corruption,

B. The Draft Law of Ukraine on Amendments to Some Legislative Acts of Ukraine in Relation with the Adoption of the Law of Ukraine "On the Principles of Prevention and Counteraction of Corruption",

C. The Draft Law of Ukraine on Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving the Procedures for Carrying Out of Confiscation.

In the assessment of each of the above mentioned laws the expert will follow the list of laws, which are planned to be amended. When there is no mentioning of a concrete provision, the expert does not feel the need to

[1] Mainly those made by the Council of Europe Group of States against Corruption – GRECO

comment it – either because the amendment is purely linguistic or technical, or because it does not change anything substantially important in comparison with the previous text.

II. The Draft Law of Ukraine on Amendments to Some Laws of Ukraine on Improvement of the Principles of Prevention and Counteraction of Corruption

This Draft Law brings amendments to 4 legislative acts of Ukraine: the Law on the Principles of Prevention and Counteraction to Corruption, the Law on the Liability of Legal Persons for Committing Corruption Offences, the Code on Administrative Offences and the Criminal Code.

II.1. Amendments to the Law on the Principles of Prevention and Counteraction to Corruption

In the following, a list of amendments and their assessment is presented, with regard to provisions of the Law on the Principles of Prevention and Counteraction of Corruption which are planned to be amended, in order to ensure their recognisability and the relevance of the text.

II.1.1. Amendment to Article 1, Paragraph 1, Subparagraph 2

"Connected persons" are now defined in a much narrower sense than they were defined before: "connected persons" are not longer related to 11 categories of natural and legal[2] persons. Consequences of such shortening of the list will be discussed when the term "connected person" will be applied in the forthcoming text of the adopted law.

II.1.2. Amendment to Article 2, Paragraph 1, Point 2, sub-point f

The reason for changing this provision was obviously the Protocol to the Criminal Law Convention on Corruption (ETS 191) and the introduction of responsibility for jurors and arbitrators. There is only one question arising, given that in this provision, there are four types of bodies mentioned: legislative, executive, administrative and judicial authorities. Usually, states are composed of three branches of power: the legislative, the judicial, and the executive one. There is no "administrative" branch of power since administration is part of the executive branch. If there was no special reason to explicitly expose "administrative bodies", the term should be deleted because it is already covered by the term "executive".

II.1.3. Amendment to Article 2, Paragraph 1, Point 2, sub-point g

This is a very welcome extension of the previous sub-point "g", but with a major problem: linking the responsibility of members of international parliamentary assemblies and international courts to those which Ukraine is a member of, is an unnecessary restriction, which is also running contrary to the text of the Criminal Law Convention on Corruption (ETS 173) and the OECD Convention on Combating Bribery of Foreign Public

[2] It is a question how legal entities can have »connected persons« as defined by the Law

Officials in International Business Transactions. In order to comply with the mentioned conventions, this additional (restrictive) element should be deleted accordingly.

II.1.4. Amendment to Article 3, Paragraph 3, sub-paragraph 2

The wording "special authorised anti-corruption policy entity" was changed into "authorised body". This might imply a significant change inconsistent with Article 6 of the UN Convention against Corruption, which clearly requires specialisation of the body empowered to implement (or to coordinate the implementation of) AC policy . Therefore, stating merely "authorised" body is not sufficient, since it does not ensure specialisation of the AC body.

II.1.5. Amendment to Article 4, Paragraph 1, sub-paragraph 10

It is not very clear now who is not bound by the restrictions of "Items 2 – 3 of Part One of this Article": the ones referred to in Points 2-3 of Paragraph 1 of Article 2 or somebody else. If the limitation of restrictions is now limited only to persons mentioned in Points 2-3 of Paragraph 1 of Article 2 (in the adopted Law reference is made to the whole text of Article 2) this is most welcome. In any case, the amendment is not very clearly defined (what is "point", what "paragraph" and what "sub-paragraph"?).

II.1.6. Amendments to Article 5

There are several very important issues connected with the amendments to this Article:

a) In Paragraph 1, the list of persons which are prohibited to accept gifts is narrowed down from Points 1 and 2 of Paragraph 1 of Article 2 only to Point 1 of Paragraph 1 of Article 2. Despite the fact that it is understandable that foreign and international officials can not be bound by the Ukrainian limitations on gifts there are some other categories, which should be: members of election commissions, assistants to the deputies etc. It would be strongly suggested to redraft this part of the amendment (again, the terms are not clear) – after a thorough examination which categories of persons should be bound by limitations on gifts and which not.

b) In Paragraph 1, there is an absolute ban on accepting gifts if one of the four conditions is fulfilled:

- "If the acceptance of the gift may lead to a conflict of interests": every gift, even the cheapest one, may lead to a conflict of interests or at least to the appearance of it. Therefore, it is not clear at all how the possibility of occurrence of a conflict will be assessed (how to assess something if it always happens?). Paragraph 3 is even confirming this position. Therefore, it is suggested to delete this part of the text.
- "For decisions, actions or omission for the benefit of the latter which were taken or performed by the servant directly so as by other officials and bodies under his/her facilitation": if the translation (especially of tenses used) into English is correct, this is a description of a behaviour which in some countries is incriminated as a criminal offence of bribery despite the fact that there was no agreement on bribery before the official action took place. Some countries do not regulate such

behaviour at all, and the authorities of Ukraine have obviously chosen to regulate it not as a criminal offence, but as a breach of duties related to acceptance of gifts. They can be commended for that.

- Where a gift is given by a subordinated person: a very simple and understandable solution.
- "Where there exist other reasons that would not have arisen if the person who had accepted the gift had not been in service": this text could be explained in too many different ways to be considered clear and appropriate. Therefore, it is strongly recommended to redraft it (or to change its English translation should this have been the cause of the ambiguity).

c) Paragraph 2 is structured more or less in the same way as many similar provisions in other countries. It will be very important to know how many Grivnas/EUR are there in "the subsistence minimum established for the persons of working age as for 1st January of the current year". If this information will not be easily accessible, there will be a series of problems with the implementation of this provision.

d) Paragraph 3 is basically a very good one (see also comments to Paragraph 1), but there might be a problem: if the gift given/accepted was within the limit given in Paragraph 2, should there still be a possibility to repeal a decision of an official in favour of the gift-giver? Obviously, that was not the idea of the authors of the Law, and therefore this provision should be linked to the breach of Paragraph 1 only.

e) Does the term of "official events" in Paragraph 4 have a standardised content? If not, it should be defined somewhere. There is an additional question: do sub-paragraphs in this Paragraph mean that gifts for public authorities (and local self-government bodies) may be accepted only during "official events" or during "business trips"? Most probably this is not the case and the provision could easily be simplified: all gifts for public authorities, local self-government bodies etc. wherever and whenever accepted, are to be considered as their property and not as property of the persons who received them.

Amendments to Article 5 carry some very good ideas, especially in comparison with its previous version (the one adopted). Therefore, it would be worth trying to clarify the text and readjust it following the expert's remarks.

II.1.7. Amendments to Article 6, paragraphs 1 and 3

The amendment is again narrowing the list of persons for whom a prohibition of a direct hierarchical relation to their connected persons applies. It is not understandable why officials of legal entities subjected to public law and members of an election commission should no longer be included in the categories of persons forbidden to have direct hierarchical/subordinate relations with connected persons; why they would not be obliged to notify the leadership of the agency on their connected persons working for the agency, if they themselves are seeking employment with the same agency; why they would not be prohibited to work in the process of consideration of appointment of connected persons etc. It would be strongly suggested to redraft this part of the amendment – after a thorough examination of which categories of persons should be bound by the mentioned limitations and which could be omitted.

II.1.8. Amendment to Article 6, Paragraph 1, sub-paragraph 1

This amendment is opening the possibility for the Cabinet of Ministers to introduce an exception in the 'direct subordination' rule for some categories of persons. There are no reasons stated for such an exception, which will have to remain limited in scope, otherwise this provision will lose its meaning. It is also not very common that the law itself would give the government the chance to limit the application of some of its provisions, especially not without any substantial criteria.

II.1.9. Amendments to Article 7

Amendments to this Article represent significant improvements from the previous, very general text, but there are still some problems which have to be mentioned:

1. The list of persons submitted to the restrictions is (again) narrower than in the adopted law and all previously given comments to this shortening of the list (i.e. concerning articles 1,5,6) should again be taken into consideration;
2. The limit on the period of service in different post for public employment activities has been shortened from 2 years to a one year. There is no standard on the length of this period, but again, it would have to be known what the reasons for such a shortening are.

In addition, it has to be said that there can be cases when there will be no formal contract concluded between the ex-public official and a private enterprise while the official will still represent the enterprise. This should be forbidden, at least with regard to his/her possible appearance before the public authority, where s/he used to work before leaving the public office. This basically represents a typical "revolving door" situation and it should be prohibited.

II.1.10. Amendments to Article 9, Paragraph 2, points 2 and 3

There are countries which are checking also the financial status of connected persons while others do not engage that procedure. Since in the adopted law Ukraine chose the solution of introducing reporting of the financial situation of the connected persons, which is now being changed by omitting this obligation, it would be good to know the reasons for this change.

II.1.11. Amendments to Article 9, Paragraph 3

Again, the list is being shortened – this time of functions for which a special check is mandatory. All previous comments concerning the shortening of the lists (i.e. concerning articles 1, 5, 6, 7) should be taken into consideration here as well.

The idea of the Paragraph is a very good one, but a question appears as to why a candidate's refusal of consent for special check automatically ("shall") means no consideration of his/her candidature and submission of false data only a possibility ("may") for exclusion of his/her candidature.

In some countries, submission of false data even amounts to a criminal offence and for such behaviour at least the same principle as for rejection of consent should apply: candidature of candidates submitting false data shall be rejected!

It is also not clear what is the relation between sub-paragraph 1 and sub-paragraph 4, since both are mentioning the list of positions for which special checks could be introduced.

II.1.12. Article 9, (new) paragraphs 4 – 7

In the new Paragraph 4a, a list of documents for a special check is given. The request for financial data ("data on property, income, liabilities of financial nature,..") is far too general, even though it is completed to a certain extent by the next point ("other documents..."). If there will not be a very precise list of financial information, which will have to be submitted by the candidate, it will be almost impossible to screen the candidate's real financial situation. Therefore, it is strongly recommended to give a more detailed description of information required.

II.1.13. Amendments to Article 10, paragraphs 1 and 2, Article 11, Paragraph 1, Article 12, Paragraph 1 and Article 14, Paragraph 1

Lists of persons submitted to different obligations and restrictions is (again) narrower than in the adopted law and all already given comments to this shortening of the lists (i.e. concerning articles 1,5,6,7,9) should once more be taken into consideration.

II.1. 14. Amendment to Article 1o, Paragraph 1, sub-paragraph 2

This change does not make any sense: "disclosure" is something else than "publication" and the list of persons who have to disclose their information is already given in the first Paragraph. If the intention of the drafters was to regulate the "publication" (as it was the case in the adopted law), then it would be better to substantially resolve the problem here and not to refer to future legislation.

If it is only a problem of translation, this comment should be considered as non-existent.

II.1.15. Amendment to Article 19, Paragraph 1

This amendment is deleting a mandatory suspension of persons for which a report on committing an administrative corruption offence has been issued. It is completely up to the country to decide how to treat persons under different suspicions, but any situation where a person is accused of administrative corruption might sometimes simply ask for his/her suspension. As the previous solution (mandatory suspension) was too hard, the new one is too soft. It would be much better to give the possibility to somebody to decide on the merits of a concrete case whether that person can continue to work. This can be that person's immediate

superior or a body entrusted with such power. In such a way, a flexible, justifiable and effective approach against perpetrators of administrative corruption offences would be ensured from the very beginning.

II.1.16. Amendment to Article 21, Paragraph 1

What used to be a very effective tool against corrupted acts has now partly turned into an uncertain future depending on the adoption of appropriate legislation. It is of the outmost importance to adopt this legislation as soon as possible.

II.1.17 General remarks to amendments to the Law on the Principles of Prevention and Counteraction to Corruption

Amendments bring some improvements to the adopted law (i.e. concerning articles 5, 7, 9) but they are not detailed enough. So, a little bit more work on some details, including comments and remarks of the expert could improve solutions of the amendments even more. There are, however, also some amendments which are changing the situation given in the adopted Law to the worse:

- Shortening of the lists of persons liable for corruption offences and persons submitted to different limitations or obligations (i.e. concerning articles 1, 5, 7, 5, 9): although this shortening partly does make sense (especially concerning foreign and international public officials), it would be indispensable to check all the lists again in order to ensure that all persons that need to be included are indeed covered;
- Adjusting of the text of the adopted Law to the Protocol to the Council of Europe Criminal Law Convention on Corruption and unnecessarily restricting it (see Amendment to Article 2, Point 2, sub-point g);
- Watering down some solutions of the adopted Law by referring to future statutory (i.e. concerning articles 10, 21...) or by-statutory (i.e. concerning Article 6) acts;
- Changing the idea on the "special" authority into the "authorised body" (Article 3) - under the presumption that it is not only a question of translation;
- Deferring from the idea on absolute suspension of persons for which a report on administrative corruption offences was issued (Article 19): there should be a possibility left to introduce such suspension in the most serious cases.

As a final remark, it could be said that the opportunity offered by the planned amendments to the Law on the Principles of Prevention and Counteraction to Corruption was not used to such an extent that could have meant a real significant improvement of the adopted Law.

II.2. Amendments to the Law on the Liability of Legal Persons for Committing Corruption Offences

First of all, it has to be mentioned that a series of very critical opinions had been delivered by different experts on the text of the draft Law before it was adopted. They were not taken into consideration when the text of the Law was finalised. Therefore, it is again very unfortunate that changing of the Law by the planned

amendments does not follow those opinions, with the result that the idea and the text of the Law still remain highly problematic.

II.2.1. Amendment to Article 9, Paragraph 1

This is a highly questionable amendment since it introduces elements of administrative procedure into what was considered to be typical criminal responsibility of legal persons for corruption offences (as stated by Article 2 of the adopted Law). Simple replacement of the Criminal Procedure Code by the Code on Administrative Offences without introducing any additional relevant changes to the text may result in a complete inability of the system to deal with legal persons and their responsibility. Although there is no international legal instrument which would ask for criminal responsibility of legal persons for corruption offences,[3] it has to be observed that a change from criminal to administrative responsibility is somehow surprising[4] and it is obviously based exclusively on the change of attitude of the Ukrainian authorities on the topic of responsibility of legal persons. Although the expert is admitting that such a change is still possible, it has to be mentioned that it would have to be accompanied by a thorough revision of the Law and not by merely technical changes in some of its parts.

II.2.2. Amendment to Article 9, Paragraph 3

This Paragraph has been deleted and thus, no explicit reference is any longer made to the start of a case. Hopefully, it is still clear to the appropriate prosecutor(s) how to initiate a case.

II.2.3. General remarks to amendments to the Law on the Liability of Legal Persons for Committing Corruption Offences

The main amendment is the one referring to Article 9 and changing the nature of the procedures against legal persons in Ukraine. In order not to repeat what was already said in the introduction and in relation to Article 9, it can only to be suggested to reconsider the general idea and the whole text of the Law on the Liability of Legal Persons for Committing Corruption Offences and to draft a new text of the law, which will follow previous remarks of international and domestic experts and the change of the nature of the procedure (from criminal into administrative one) as given in the current amendments.

II.3. Amendments to the Code on Administrative Offences

With regard to the amendments to the Law on the Principles of Prevention and Counteraction to Corruption, some changes are also planned to be introduced in relation to the Code on Administrative Offences.

II.3.1. Amendments to Article 212 (24), the note and to Article 212 (28), the note

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[3] Accordingly, any type of responsibility, including administrative , is in compliance with those instruments.

[4] There are no reasons based on experience given for such a decision since no such reason exists due to the fact that the law has not entered into force yet.

With regard to the changes in the lists of persons responsible for corruption offences in the Law on the Principles of Prevention and Counteraction to Corruption, the amendments are introducing changes to lists in this Law, too. Hence, everything that was already said on such shortening in II.1.17 is also applicable here.

II.4. Amendments to the Criminal Code

Following the amendments to the Law on the Principles of Prevention and Counteraction to Corruption, some changes are also planned to be introduced in relation to the Criminal Code.

II.4.1. Amendments to Article 18, Paragraph 4 and Article 364, Note, point 2

A new definition of a foreign public official is given here following the new definition given in Article 2, Paragraph 1, Point 2, sub-point "g" of the Law on the Principles of Prevention and Counteraction to Corruption. Hence, everything that was already said on such definition in II.1.3 is also applicable here.

II.4.2. Amendment to Article 235(1), Note, point 1

Words "without legal grounds therefore"[5] at the end of the definition of "illegal profit" may cause serious problems in practice: to what extent is a discount based on legal grounds? Usually, discounts follow economical decisions of the services' providers and not explicit legal authorisation. Even if there was such an authorisation there would be a problem to assess which part of the discount represents the "legal" and which the "illegal" profit.[6] Therefore, deletion of the text "without legal grounds therefore" is recommendable, especially due to the fact that other national legislations do not have such explanatory element added to the description of illegal profit.

II.4.3. Amendment to Article 368, Note, point 1

According to this amendment, a bribe is defined as an "illegal profit, which exceeds 5 tax-free allowances". It is not clear how an illegal profit under 5 tax-free allowances is assessed, if it is not considered a bribe? This is unacceptable for a variety of reasons:

- The term of bribe must not be linked to the term of "illegal profit", which by itself has a very complicated definition (see above),
- In international legal instruments and in the majority of the European national legislations, the term "bribe" is given in the form of an "undue advantage",
- Proving criminal offences related to bribery is a very demanding exercise by itself and adding an additional burden to the prosecution to prove all elements of the term of "bribe"[7] would mean that there is a real possibility that almost no offenders in the area of bribery would be convicted;

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[5] Despite the fact that this is not a new part of the text.
[6] In the framework of legal discounts there are plenty of possibilities for misuses.
[7] In addition to proving all other elements of different criminal offences

- In other legislations it is clear that undue advantage can represent a bribe even when it is of a very small value – if this occurs, courts can apply general provisions on mitigating circumstances. This has been the first time that the expert has come across a definition of "bribe" as something above a certain threshold.

At the end, there is only one suggestion possible: to change all relevant articles (368,369,370…) of the Criminal Code – and not only definition of "bribe" as given here - in order to comply fully with the requirements of international conventions on the terms of offering, promising or giving an "undue advantage" or accepting its offer, promise, or the advantage itself.

II.4.4. Amendment to Article 368(1), Paragraph 1

Here the term "benefit" is used and not the term of "illegal advantage" as in the existing text of the Criminal Code in force. A definition of the term is given in the Note to this Article. The problem here is that the "benefit" is linked to an additional requirement – "the legality of which cannot be justified according to the procedure established by law." First, there is a question of procedure: is there any special procedure according to which legality of benefits can be justified or any type of existing procedures would do? In any case, the words "according to the procedure established by law" can cause a lot of problems in practice: if it is the legality (of the benefit) which has to be proven, it is obvious that this can be done only through a lawful procedure. An explicit reference to it can only give the suspects the possibility for complications concerning the procedure.

There is also an important positive element: the wording "the legality of which cannot be justified according to the procedure established by law" can also be understood as to mean that the burden to prove the legality of the benefit lies on the suspect. If this is the case, such reversal of the burden of proof represents a very significant and a modern step forward, which is giving excellent results in the fight against corruption and organised criminality in some European countries.[8]

II.4.5. Amendment to Article 370

One of the most important tools in the fight against corruption world-wide is a method which is sometimes called a "fictitious bribery" or a "false bribery" and represents part of the so-called "special investigative methods" (SIMs). Without them there is almost no possibility to successfully investigate corruption offences. The method of "fictitious bribery" simply means that a law enforcement official gives or accepts a bribe to/from a suspect. Since such action is very close to criminal offences of active or passive bribery, theory and practice have been developed on the so-called "illegal entrapment", which represents a decisive influence that has basically caused a criminal offence: if it is the official whose actions cause the committing of a criminal offence, his/her actions will be considered illegal and different consequences will apply. If the official does not influence the decision of the perpetrator to give/accept a bribe, but only creates conditions in which this could happen, then the entrapment is a legal one and no sanctions will apply.

[8] United Kingdom, Norway, Croatia, Serbia.

In the case of illegal entrapment, legal consequences vary from the exclusion of the evidence, closure of the concrete criminal proceedings, disciplinary sanctions against the official and, finally, criminal procedure against the official for the commitment of the criminal offence of bribery him/herself.

Defining provocation of a bribe as a separate criminal offence simply means that the law officials in Ukraine are forbidden to use the strongest lawful (lawful in other systems) tool against corruption and raises serious doubts about the intentions of the Ukrainian authorities to fight corruption. Normally, in such circumstances law enforcement officials will not apply this method and this will hamper the effectiveness of the anti-corruption fight to a significant extent.

Speaking strictly legally, there is absolutely no reason why a separate offence on illegal entrapment should be established: if it is the official whose role was decisive in the case of bribery, s/he has to be held responsible for a criminal offence of bribery and not for the provocation of it. If his/her role was not a decisive one, other sanctions listed above can apply. This is a solution widely accepted by the majority of European and non-European countries and it is strongly suggested that Ukraine applies it as well. In other words: Article 370 shall be deleted and other form of consequences – material and procedural – for the case of illegal entrapment shall be introduced.

II.4.6. General remarks to amendments to the Criminal Code

Amendments to the Criminal Code bring along not only adjustments to the changes made in the Law on the Principles of Prevention and Counteraction to Corruption but also some other changes. Almost all planned changes are highly problematical and will decrease the possibilities of Ukraine to successfully fight against corruption. The most important deficiencies of the planned amendments concern the following topics:

- The term of an "illegal profit",
- The term of a "bribe",
- Proving the origin of a "benefit",
- Illegal entrapment as a separate criminal offence.

Since these issues are of vital importance for the fight against corruption, all of them will have to be reconsidered. It is strongly recommended to the authorities of Ukraine to adjust the terminology described above to the terminology given in the international legal instruments and to withdraw/delete Article 370 setting out a separate criminal offence on provocation of bribery from the Criminal Code and its replacement with other sanctions.

III. Draft Law of Ukraine on Amendments to Some Legislative Acts of Ukraine in Relation with the Adoption of the Law of Ukraine "On the Principles of Prevention and Counteraction of Corruption"

This draft law brings amendments to the Code of Laws on Labour; the Customs Code; Law on the Militia; Law on the Prosecution Office; Disciplinary Statute of the Prosecution Office; Law on Social and Legal Protection of

Military Servants and Members of Their Families; Law on the Security Service; Law on Associations of Citizens; Law on the Status of Judges; Law on Notariat; Law on the State Service; Law on the State Tax Service; Law on Forensic Examination; Resolution on Approval of the Provisions on the Assistant Advisor of the People's Deputy; Law on the Constitutional Court; Law on the Ombudsman of the Verkhovna Rada; Law on the State Guard of Public Authorities of Ukraine and Officials; Statute of the Internal Service of the Armed Forces; Disciplinary Statute of the Armed Forces; Law on Banks and Banking Activity; Law on Service in Local Self-Government Bodies; Law on the Status of People's Deputy; Law on Evaluation of Property, Property Rights and Professional Evaluation Activity; Law on the Diplomatic Service; Law on the Judicial System; Law on Military Service of Law and Order in the Armed Forces; Law on the Status of Deputies of Local Councils; Law on the State Border Guard; Law on the Principles of National Security; Law on State Special Service of Transport; Law on Elections of the President of Ukraine; Law on the Procedure of Election to the Position and Dismissal from the Position of Professional Judge by the Verkhovna Rada; Law on Elections of People's Deputies; Law on Elections of Deputies of Verkhovna Rada of the Autonomous Republic of Crimea Local Councils and Village, Town and City Mayors; Law on the Central Election Commission; Law on the Legal Basis of Civil Protection; Law on State Criminal and Executive Service, Disciplinary Statute of the Customs Service, Disciplinary Statute of the Bodies of Internal Affairs; Law on Audit Activities; Law on Military Duty and Military Service; Law on State Service of Special Communications and Information Protection; Law on the Cabinet of Ministers; Disciplinary Statute of the State Service of Special Communication and Information; Protection and Disciplinary Statute of the Service of Civil Protection.

Basically, all amendments to all legislative acts are dealing with issues such as dismissal of a person that was found to be in breach of certain duties, restriction of activities, conflicts of interest and special checks. In order not to repeat the same remarks at every act, an analysis of the amendments to the Customs Code will be made at the beginning, which can serve its purpose also in relation to other legislative acts. If there are peculiarities related to specific acts or solutions, they will be discussed separately.

III.1. Amendments to the Customs Code

III.1.1. Amendments to Article 412

The idea of new paragraphs 2 and 4 is a very good one, but the question arises as to why a candidate's refusal of consent for a special check automatically ("shall") means the end of consideration of his/her candidature, while the submission of no or false data is considered merely as a possibility ("may") for exclusion of his/her candidature. In some countries, submission of false data amounts to a criminal offence and for such behaviour at least the same principle as for the rejection of consent should apply: candidatures of candidates submitting false data shall be rejected! This is also a solution which is given for already existing customs officer in new Paragraph 3 of Article 415!

In the new Paragraph 3, the list of documents for a special check is given. Request for asset information (property, incomes, liabilities of financial nature, including those allocated abroad) is far too general. If a very precise list of financial information that the candidate would need to submit is not created, it will be almost

impossible to screen the candidate's real financial situation. Therefore, it is strongly recommended to give a more detailed description of the information required.

III.1.2. Amendments to Article 415

In the new Paragraph 2a, a list of documents in the framework of monitoring customs officials' assets is given. The request for asset information (property, incomes, liabilities of financial nature, including those allocated abroad) is far too general. If there will not be a very precise list of financial information that will have to be submitted by the customs officer it will be almost impossible to screen officer's real financial situation. Therefore, it is strongly recommended to give a more detailed description of the information required.

In Paragraph 3 of Article 415, there will be an addition to general applicability of the Law on the Principles of Prevention and Countering of Corruption. In this amendment, the word "other" (restrictions and requirements) is used, which enables the drafters to avoid duplications, which do exist in some other legislative acts (Law on Militia, etc.).

III.1.3. Amendments to Article 416

This amendment is basically introducing the text, which is already given in Article 6 of the Law on the Principles of Prevention and Countering of Corruption. The expert has no special comments here, but it has to be mentioned that the translation of the original text of Article 6 is better than this one (of Article 416).

III.2. Amendments to other legislative acts

Comments made in relation to the Customs Code also apply in relation to other acts, where only some amendments have to be additionally discussed:

Law on the Militia

In Article 18, there will be an addition on the general applicability of the Law on the Principles of Prevention and Countering of Corruption. No problem with that—but the question arises as to why there is a need to specifically point out some restrictions in Article 17? This causes unnecessary duplication of the text and of the restrictions in force. In the amendments to the Customs Code (Paragraph 4 of article 415), the word "other" (restrictions and requirements) is used, which is a much better solution.

Law on Associations of Citizens

The new Paragraph 2 of Article 20 is very limited in scope, since it is referring only to "powers of subjects" and "main directions of their activity." The expert does not know whether there is a general law on access to public information in place in Ukraine, but such limitations do not add anything to the principles of transparency of public services.

Law on the State Service

The new Paragraph 5 of Article 16 again provides a possibility that the Cabinet of Ministers will introduce some exceptions to the general ban on the direct subordination of state servants. The comments made in II.1.8. also apply here.

Law on Banks and Banking Activity

There is a very important change in Article 60, which prohibits the application of banking secrecy in relation to some financial information concerning connected persons. As much as the expert supports the reasons for this change, it has to be mentioned that such provisions run heavily against the protection of personal data. Therefore, the expert hopes that the question of constitutionality of this amendment will not become an issue.

Law on Elections of the President of Ukraine

In Paragraph 1 of Article 50, a candidate for the position of President is required to submit information not only on his/her personal assets, but also on those of his/her family members. This is a difference in comparison with candidates for other positions, but in view of the importance of the President's function, this difference is an acceptable one. In some countries, only candidates or holders of exposed functions are required to submit such information, and this obligation does not extend to connected persons, since they are not subjects of special limitations and restrictions, and such provisions were already challenged at the constitutional courts. Hopefully, this provision will not cause similar problems in Ukraine.

In the following Paragraph (2) there is a provision according to which "mistakes and inaccuracies" in the candidate's declaration "shall not constitute the ground to refuse the registration". It is strongly suggested to define the terms "mistakes" and "inaccuracies" in order not to allow candidates to intentionally insert false data into their declarations.

Law on Elections of People's Deputies of Ukraine

In Paragraph 2 of Article 60, there is a similar provision to the one in the Law on Elections of the President of Ukraine set out in Paragraph 2 of Article 50, and comments made there also apply here.

Law on Elections of Deputies of Verkhovna Rada of the Autonomous Republic of Crimea,Local Councils and Villages, Towns and City Mayors

In Paragraph 2 of Article 46, there is a similar provision to the one in the Law on Elections of the President of Ukraine set out in Paragraph 2 of Article 50, and comments made there also apply here.

III.3. General remarks to the Draft Law of Ukraine on Amendments to Some Legislative Acts of Ukraine in Relation with the Adoption of the Law of Ukraine "On the Principles of Prevention and Counteraction of Corruption"

Basically, amendments to all legislative acts in this Draft Law establish rules in the areas of special checks of candidates and holders of different positions, their conflicts of interests, reporting of financial assets etc. The provided solutions are very good and only minor adjustments, as stated above, would be needed. Ukraine has to be commended for a decision to submit a variety of its public officials to the restrictions and limitations mentioned. Nevertheless a very logical question appears: would it not be better to simply extend the application of the Law on the Principles of Prevention and Counteraction of Corruption to all those categories of public officials that are now dealt with in this Draft Law? Substantially, nothing would change and such a change would be more simple than changing the whole set of laws. Of course, this is completely up to the Ukrainian authorities as substantially, nothing would change.

IV. Draft Law of Ukraine on Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving the Procedures for Carrying out of Confiscation

This Draft Law brings amendments to two codes in the criminal area in relation to extremely important topics of seizure and confiscation of proceeds of crime. Beyond any doubt, these measures are gaining importance world-wide since they enable states to really effectively fight all forms of criminality. Therefore, the decision of Ukraine's authorities to follow those examples is a very important one as it will extend the possibility for appropriate institutions in the country to seriously harm offenders in their criminal activities.

IV.1. Amendments to Criminal Code

IV.1.1 Article 96

The new Article 96 is introducing confiscation of property acquired through the commitment of a criminal offence in a way which is mainly in line with the international standards and solutions in some other countries. There is very little to be added to the solutions provided.

Paragraph 2

Sometimes it might happen that the perpetrator will no longer be in possession of money, valuables and property referred to in point "a" of Paragraph 1 (hereinafter: original proceeds) but s/he will also have no money that could be confiscated instead. Therefore, it would be useful to add a possibility that other valuables and property in the possession of the perpetrator are confiscated equivalent to the value of the original proceeds of crime.

Paragraph 3

There is a question how (special) confiscation could be applied if the person was discharged from criminal liability because s/he did not commit the criminal offence? If his/her property was not acquired through the commitment of a criminal offence it cannot be confiscated.

Paragraph 4

In order to prevent the state authorities to implement the measure of confiscation, the offenders sometimes transfer not only original proceeds of crime to other persons, but other property, too. It would therefore be recommendable to add a possibility to confiscate not only the original proceeds of crime from other persons but also money (as it is the provision of Paragraph 2 in force for the offender) or other property equivalent to the value of the original proceeds of crime.

IV.1.2. Amendments to other articles

Amendments to other articles are simply excluding all previous separate provisions on confiscation of different property from the text of the Criminal Code, while the confiscation of property is now generally handled by Article 96.

IV.2. Amendments to the Criminal Procedure Code

IV.2.1. Article 81

It would be useful to add a possibility here for the court to issue a decision on confiscation not only of the original proceeds of crime or their monetary value, but also of other property equivalent to the value of the original proceeds of crime (see above in IV.1.1., paragraphs 2 and 4).

IV.3. General Remarks to the Draft Law of Ukraine on Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving the Procedures for Carrying out of Confiscation

Amendments to Criminal Code and Criminal Procedure Code are finally brining Ukraine in line with international standards in the area of seizure and confiscation of proceeds of crime. This will enable Ukraine to fully develop its efforts in the fight against organised crime, money laundering and corruption and might also have some other important consequences. (i.e. benefit for the state budget,...). Solutions provided build a sound system, which can be even slightly improved by taking the expert's opinions and suggestions on board.

V. Conclusions

The set of three new Ukrainian pieces of legislation in the area of anti-corruption and crime without any doubt represents a significant step forward. New solutions are more or less based on international standards and might really improve the situation in the area of crime and corruption in Ukraine. Of course, since many

different laws are being changed, there are differences in the quality of the drafts of different laws. Some of them just need small changes to be even better, while other cause serious concerns.

Solutions provided for the Criminal Code and for the Law on the Liability of Legal Persons for Committing Corruption Offences need serious additional examination. Otherwise, it might happen that investigations, prosecutions and adjudications on corruption criminal offences will be hampered to the extent that they will completely disable the whole criminal justice system in this field. It has to be mentioned that in relation to the Law on the Liability of Legal Persons for Committing Corruption Offences, this is not a consequence of amendments (although adding elements of the administrative procedure will also not have a positive effect!) but of a previously adopted text of the law.

Especially the Draft Law of Ukraine on Amendments to some Legislative Acts of Ukraine in Relation with the Adoption of the Law of Ukraine "On the Principles of Prevention and Counteraction of Corruption" and the Draft Law of Ukraine on Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving the Procedures for Carrying out of Confiscation deserve a very positive opinion. They will hopefully cause some systemic changes in every day's life and also in practice of the state authorities in Ukraine. Of course, all other amendments have the potential to achieve the same, but much more additional work is needed there.

With the exception of the Criminal Code and of the Law on the Liability of Legal Persons for Committing Corruption Offences, all remaining adjustments can be made in a very short period of time, and the Ukrainian authorities are invited to do so. For the rest, some serious efforts will be needed to fully comply with international standards and to ensure the effective fight against corruption and criminality in Ukraine. Nevertheless, the comprehensiveness of the reform of so many different laws proves that Ukraine is quickly developing its arsenal of tools to fight corruption and crime and this can only be most welcomed.