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Technical Paper:
Corruption Proofing in Eastern Partnership countries: overview and lessons for good practice

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1 EXECUTIVE SUMMARY

This Technical Paper provides a descriptive and analytical overview of "corruption proofing" of legal acts in Eastern Partnership (EaP) countries. It provides lessons and recommendations for good practice in the conduct of corruption proofing. The paper draws upon the following:

- Existing literature and documents on corruption proofing, in particular previous papers produced under projects implemented by the Council of Europe (CoE)[1], and a 2014 study on corruption proofing published under the auspices of the Regional Anti-corruption Initiative (RAI).[2]

- A questionnaire developed by the CoE, which was subsequently completed by EaP countries in May 2017.

- Translations of methodology documents and corruption proofing reports provided by the Moldovan National Anticorruption Centre. Examples from Moldova are used frequently: a number of Moldovan practices can be seen as examples of good practice, and more relevant documents (such as methodology, report structure and actual corruption proofing reports) were available in English from Moldova than other countries.

- The outputs of a regional workshop on corruption proofing organised by the CoE/EU Partnership for Good Governance (PGG) Regional Project "Fight against Corruption and Fostering Good Governance/Fight against Money-Laundering" in Kyiv, Ukraine on 22-23 May 2017, including presentations by representatives from the six EaP countries and Lithuania, and discussions on corruption proofing methodologies and their implementation.

The scope of this paper is on official corruption proofing mechanisms, not non-governmental ones, although this should not be seen as a judgment on the relative importance of either.

The paper provides the following as **good practices or recommendations** for corruption proofing:

1. Corruption proofing should be seen as **one aspect of a good governance framework**. In order for corruption proofing to have its intended impact, other key aspects of a good governance and anti-corruption framework – for example adequate regulation of political party/election campaign finance or transparency of the legislative process - need to be implemented.

[1] These are: Project against corruption, money laundering and the financing of terrorism in Moldova (MOLICO), Support to the anti-corruption strategy of Azerbaijan (AZPAC), and Project against corruption in Albania (PACA). Information about the projects is available at: www.coe.int/econcrime

[2] T. Hoppe, *Anti-corruption Assessment of Laws ("Corruption Proofing"): Comparative Study and Methodology*, Regional Cooperation Council/Regional Anti-corruption Initiative, 2014

2. **It is essential that typologies of corruption risks are analytically clear**, with logical groupings of risk factors and a classification of risk factors based on types of risk rather than specific examples from actual policy areas.

3. **Corruption proofing should be seen not as an isolated activity** but as a subset of more general regulatory impact assessment, even if it is a separate activity. Its findings should always be available for use as inputs for broader assessments. Where corruption proofing is conducted by an institution that has wider anti-corruption competencies (such as national anti-corruption agency as in Moldova or Lithuania), corruption proofing should be seen as a natural component of full corruption risk assessment.

4. Corruption proofing may be conducted at **three stages**:

    a. Individual drafting bodies/units should be subject to **clear rules of drafting** in order to avoid corruption risk factors in advance.

    b. Corruption proofing of all **draft** laws (or at least draft laws that regulate areas in which corruption risks are high) and secondary legislation regulating corruption-prone areas should be conducted by an independent institution with sufficient expertise and resources.

    c. **Existing laws** that are of importance should be screened, as well as any laws that are relevant for a corruption/governance risk assessment.

5. Corruption proofing should be conducted using **clear user-friendly templates for reporting**, and **IT tools** that facilitate the generation of statistics that can be used for analytical purposes and presented publicly.

6. **Clear procedures** should be established for the communication of corruption proofing findings to relevant institutions, and for the use of findings. While corruption proofing findings **cannot be formally binding** on the final text of a law, **recipients of findings should be obliged to respond to the findings formally and justify the actions they take as a result**.

7. **Transparency is of fundamental importance**:

    a. All **methodological materials** used for corruption proofing (typology of risk factors, reporting structure) should be available online.

    b. For draft acts, corruption proofing findings and any formal responses to them should be **attached to the draft legal act** for the remainder of the legislative process.

    c. **All corruption proofing findings should be published online, along with responses and steps taken to alter drafts to implement them**.

2 BACKGROUND

2.1 What is corruption proofing?

This paper uses the phrase "corruption proofing" to refer to the **screening of legal acts or draft legal acts to identify corruption risk factors**. Corruption risk factors are legal[3] provisions that increase the risk that corruption or corruption-related conduct will occur. Corruption risk factors may be found in any normative legal act, from higher legal acts to delegated acts (by-laws), instruction and the like.

Typical examples of corruption risk factors contained in legal provisions include:

a) Provisions in a law on business licensing do not define clearly any of the following:
   - conditions or requirements for obtaining a license;
   - procedures for making applications;
   - who is responsible for what within a licensing authority;
   - deadlines by which an institution must process applications;
   - processes by which applicants may appeal against licensing decisions; or
   - requirements to publish a register of licenses.

b) A law designed to fulfil international anti-money laundering obligations relating to the disclosure of "beneficial owners" (real owners/controllers/beneficiaries) of companies contains loopholes allowing persons to continue concealing the ultimate beneficiary of a company.

c) A law on residency conditions for foreigners requires applicants for residency permits to submit a work permit. However, in order to secure a work permit applicants must show they hold a residency permit.

Two examples of actual legal/draft legal acts/provisions that contained corruption risks in EaP countries were the following:

d) **Ukraine**: A draft law on sea ports in Ukraine established conditions for the operation of Port Cooperation Information System (PCIS) "Administration of the seaports of Ukraine". The law provided the monopoly right to develop and implement software (and to determine the size of subscriber payments for its use) to an organisation co-founded by a particular private company.

e) **Moldova**: A draft law on capital liberalisation and fiscal stimulus and related amendments would effectively legalise proceeds of crime in general and assets illicitly acquired by public officials

Corruption proofing emerged in countries of the former Soviet Union over the past decade or so. Most EaP countries have developed significant systems for corruption proofing –

[3] As Section 3.1 elaborates, corruption proofing in practice may also extend beyond the core focus of corruption proofing to also identify violations of legislative procedure, or to identify links between particular interests and risk factors included in a legal act.

Moldova, Ukraine, Azerbaijan, Armenia and to a lesser extent Belarus. Moldova was the first country to develop a comprehensive methodology in 2006. Georgia does not have any specific mechanism for corruption proofing as such, and relies on the legislative process and general legal drafting rules to prevent the inclusion of corruption risk factors into legal acts.

In EaP countries proofing has been conceived primarily as the screening of draft legal acts after they have been drafted – for example before submission to the Government or Parliament. However, corruption proofing may take place at three main stages:

1. During the drafting of legal provisions – in this case, the focus is on drafting in such a way as to avoid including corruption risk factors.

2. Screening legal provisions that have already been drafted.

3. Screening legal provisions that are already in force.

This paper focuses primarily on mechanisms for screening draft legal acts. However, it also underlines the importance of the other two stages, and in particular the importance of "embedding" corruption proofing in legal drafting itself.

2.2 Rationale: why do we need corruption proofing?

The contrast between Georgia and other EaP countries raises the question "Why do we need corruption proofing?" The question is more pertinent given the fact that no EU country has explicitly established corruption proofing of legal acts. It can be argued that a sound legislative process should exclude corruption risk factors from legislation if legal drafters are sufficiently professional and follow well-formulated legal drafting rules, and processes of consultation are well-designed to ensure transparency and well-regulated input.

However, the legislative process consists by nature of two components – **expert** and **political**, which may be characterised as follows:

1. The decision to initiate a legal act, the setting of its objectives and the decision to approve its final form are political. The final text of a legal act is approved by political decision – whether this is a law approved by a representative assembly or a by-law approved by the politically appointed head of a government institution. These decisions are by nature (i.e. because they are made by elected representatives) the result of complex interactions of interests, power relations, compromises etc. The fact that such decisions are democratic also means their content may be "imperfect".

2. The technical process of legal drafting is (or should be) the expert component – carried out by lawyers and experts in the subject matter of the legal act. This includes writing paragraphed legal drafts, but may (and should also) include the implementation of procedures such as internal and external consultation processes.

This distinction yields two key points. First, however perfect the expert component of legal drafting is, experts are not sovereign. Objectives of law may be corrupt, and even if they are not, the final decision to approve a law is not under the control of experts. Second, the expert component of legal drafting itself is rarely perfect. In countries undergoing democratic

and/or administrative consolidation, relying on a generally sound legislative process to prevent corruption risk factors is likely to be too optimistic.

If these points are valid, corruption proofing should be seen as a valuable anti-corruption mechanism in EaP countries. It can lower risks of corruption by improving draft legal acts, contribute in general to a sound culture of legal drafting. The information generated by corruption proofing can also be an important source for identifying areas of vulnerability to corruption.

2.3 What do we mean by "corruption"

The activity of screening legal acts for corruption risk factors automatically raises the question of what is understood as corruption. This paper does not develop this theme in detail, but assumes the following:

a) **In legal terms, corruption means criminal offences of corruption**. However, in the context of corruption proofing, a wider understanding of corruption should be adopted. One reason for this is the fact that corruption may sometimes be legal – indeed, a corruption proofing assessment may reveal provisions that legalise conduct that would normally be regarded as corrupt (the case in Box 1 (section 4.2.1) from Moldova could be seen as such example). More generally, corruption proofing will usually identify provisions that directly facilitate phenomena such as non-transparent decisions, or decisions made without clear criteria, etc., with the assumption being that this in turn facilitates corruption (and/or other poor conduct – see below). **The understanding of corruption used should therefore be flexible** – i.e. that we are concerned with conduct involving conduct in office or a position of public trust in a way that violates norms (if not formal rules) of public office, while benefitting or tending to benefit particular interests, thereby damaging the public interest.

b) Corruption proofers should bear in mind that provisions that are identified as corruption risk factors may increase the probability of **other poor conduct** such as bureaucratic obstructionism, laziness, incompetence, etc. In general, these types of poor conduct should be borne in mind in all types of corruption risk assessment as they may be similarly damaging.[4]

2.4 Key issues

The remainder of this paper attempts to clarify good practices and lessons for corruption proofing, focusing on the following key issues:

a) What risk factors should be included in a corruption proofing typology?

b) How should corruption proofing fit into or relate to other key processes – in particular i) the legislative process and ii) broader anti-corruption/governance risk assessments?

[4] See for example M. Philp and Q. Reed, *Corruption Risk Assessment Methodology Guide*, CoE/EU Project against Corruption in Albania (PACA), 2010. Available at: https://rm.coe.int/16806ec890

c) Who should implement corruption proofing?

d) What are good practices in the implementation of screening and in the recording and reporting of findings?

e) What status should corruption proofing findings have and what should be the procedures for processing/addressing them?

2.5 Context: conditions for corruption proofing to work

It is of great importance to view corruption proofing in context. The screening of draft laws for corruption risk factors is clearly of value in its own right. However, if other aspects of governance are poor, corruption proofing may have little chance of making an impact. Examples include where: regulation of elections and political financing do little to prevent electoral and political corruption; or the legislative process is highly corrupt, does not include formal consultation processes, or is non-transparent. However, it should also be noted that corruption proofing itself can contribute to improvements in other areas of governance – through analysis of the laws regulating those areas, by raising awareness of key corruption risks underpinned by poor legal provisions etc. The experience of EaP countries indicates that even in challenging environments corruption proofing yields significant results and contributes to a better legal drafting culture (see Section 5).

3 CORRUPTION RISK FACTORS: TYPOLOGY

All EaP countries that conduct corruption proofing have developed typologies of corruption risk factors for the purposes of proofing. These are summarised in Table 1 below.

Table 1: Summary of corruption risk factors listed in Eastern Partnership country corruption proofing methodologies[5]

Armenia	Azerbaijan
• Unclear rights and duties • Excessive burdens on citizens to exercise their rights • Excessive discretionary powers • Linguistic ambiguity • Regulatory gaps • Lack of or unclear administrative procedures • Lack of procurement procedures • Lack of sanctions • Lack of oversight • Unclear objectives of the law • Excessive regulatory powers • Delegated law making	• Factors relating to exercise of powers (e.g. wide scope of discretionary powers; overstated requirements for exercise of rights; loopholes facilitating abuse; adoption of legal acts that exceed remit of a government agency; legal gaps resolved via by-laws) • Factors relating to legal gaps (e.g. gaps in regulation, absence of administrative procedures, absence of tender/auction procedures, no bans/restrictions for officials in particular areas, no liability of officials for legal violations, no supervision envisaged, insufficient transparency requirements) • Patterns of systemic corruption (wrong goals/priorities, colliding provisions, provisions that reflect provisions in a higher legal act which already exhibit corruption risk factors) • "Typical manifestations of corruption susceptibility" (e.g. lack of time limits, unbalanced favouritism towards one interest group).
Belarus	**Georgia**
• Unsystematic character and inconsistency of regulation (e.g. inadequacy/incompleteness; conflicting provisions; excessive powers to define sub-legal regulation; unjustified blanket and reference norms) • "Uncertainty of the object-subject and subject contents of legal relations, conditions and grounds for their occurrence, modification and termination" (e.g. lack of competitive procedures; excessive requirements for the exercise of rights; absence or inadequate description of the grounds and conditions for creating/modifying/terminating legal relations)	• **No explicit methodology**, but general legal drafting rules contain obligation to avoid e.g. ambiguity of regulations and conflicting provisions, and to ensure internal and external coherence • Every draft law must include an explanatory letter with: reason for adoption; aim; main principles; financial consequences (including for persons affected by draft law); sources of financing expenses; influence on State Budget income, expenses and financial obligations; accordance with the *standards of International Law, E.U. directives*, obligations of Georgia to International Organizations, bilateral and

[5] Source: Country responses to the questionnaire developed by the CoE, completed by EaP countries in May 2017

• "Uncertainty and imbalance of interests of the subjects of legal relations, their rights and obligations, and the manner in which they are implemented and enforced" (e.g. preferential provisions contrary to stated objectives of regulation; excessive complexity or impossibility to enforce rights/duties; unclear grounds and conditions for decision-making/actions; excessive discretionary powers) • Absence of mechanisms for enforcement or monitoring of implementation (e.g. absence of conditions necessary for implementation, mechanisms for enforcement of norms and protection of infringed rights and interests, or of procedures for exercise of powers to control implementation) • Absence of properly established responsibility (liability, sanctions) for observing legal provisions (e.g. absence of responsibility for breach of legal provisions, contradictory/unclear/ambiguous description of offense, lack of proportionality between severity of offense and responsibilities following from it, unclear grounds for exemption/mitigation from liability, lack of enforcement mechanisms)	multilateral treaties; recommendations received during the drafting process • Government plans introduction of Regulatory Impact Assessment
Moldova	**Ukraine**
• Legal wording (e.g. use of new undefined terms, irregular use of terms, ambiguous wording) • Legal coherence (faulty reference or delegation provisions, conflicting provisions, gaps) • Transparency and Access to Information (lack/insufficiency of access to information on by-laws, transparency in functioning of public entity, or access to information of public interest) • Exercising individual rights and obligations (costs of enforcement excessive compared to benefits, promotion or infringement of interests contrary to public interest, excessive requirements for exercise of rights/duties, unjustified limitation of human rights, discriminatory provisions, excessive/improper duties or duties contrary to status of private person/entity, stimulating unfair competition, unfeasible provisions) • Exercise of public entity's duties (extensive regulatory powers, excessive/improper duties or duties contrary to status of public entity, parallel duties, unspecified public entity/subject provision refers to, duties set up in a manner that allows exceptions and abusive interpretations, establishing a right of public entity instead	• Unclearly defined functions, rights, obligations and responsibilities (competence described using 'can', wide scope of discretionary powers, extreme freedom to establish by-laws, existence of duplicated powers, lack of liability for violations • Collisions and regulatory gaps (absent/insufficient supervision and transparency, absent/insufficient administrative procedures) • Creating undue burdens for users of administrative services (wrongly defined, unjustified or over-burdensome conditions for exercising rights or terms for fulfilling of duties or terms for fulfilling ones' duties) • Absent or incorrect tender procedure • Provision formulated in such a way that its sense cannot be understood • Promoting group or personal interests and benefits (often disguised with falsely declared objectives).

of duty, cumulating competences to establish/control/sanction violation of rules, non-exhaustive/ambiguous/subjective grounds for public entity to refuse to act, lack/ambiguity of administrative proceedings, lack of specific deadlines/unjustified deadlines/unjustified extension of deadlines) • Oversight mechanisms (lack/insufficiency of supervision and control mechanisms (hierarchic, internal, public), lack/insufficiency of mechanisms to challenge decisions and actions of public entities • Liability and sanctioning (confusion/duplication of types of legal liability for the violation, non-exhaustive grounds for liability, lack of clear liability for violations, lack of clear sanctions for violations, mismatch between violation and sanction)	

3.1 Core risk factors

The range of risks appears to be very wide and the classification to vary across countries, but in fact the logic of risk factors is similar across country typologies. Core corruption risk factors in the text of legal or draft legal acts can be grouped logically into the following four categories.

3.1.1 Excessive discretion

Most corruption risk factors are ones that provide officials or institutions with excessive discretion – through excessive powers, unjustifiably broad criteria for exercise of powers, or absent/unclear/conflicting legal provisions that give rise to unregulated discretion. These include (some bullet points contain more than one risk):

a) Unclear, ambiguous or inconsistent use of terms – for example, using a new term that is undefined instead of a different one that already exists, as in the case example from Moldova (see Box 1 – section 4.2.1 below);

b) Absent or unclear criteria for making official decisions – for example, the absence of sufficiently restrictive criteria for allocation of social benefits under a draft law in Belarus (see Table 2 – section 4, below). Examples here might also include unclear criteria for setting sanctions for violations of the relevant obligations by regulated entities (e.g. citizens or legal entities) – which relates to accountability (see Section 3.1.2 below);

c) Conflicting legal provisions – which may allow officials to choose case-by-case which provision to use as it suits them;

d) Faulty reference provisions – meaning provisions that do not make clear enough reference to other provisions within the same law or other law/s, refer to provisions that are not relevant, make general references to "legislation in force" or similar;

e) Delegation of authority to define in secondary legislation rules that should be defined in a primary legal act;

f) Absent/unclear designation of a responsible authority and/or its competencies and obligations, administrative procedures, or deadlines/timelines.

Contrary to the anti-corruption "Klitgaard Formula" of "Corruption = Monopoly + Discretion – Accountability", some discretion is necessary in almost all decision-making processes. The degree of discretion appropriate for a particular position/function will vary – for example, the appropriate degree of discretion is very different for a judge compared to a tax inspector. Formal rules can rarely cover exhaustively all possible situations – for example, even apparently simple processes such as the allocation of welfare benefits may often require decisions based on a careful analysis of situations on a case-by-case basis. In other words, what concerns us is not discretion as such but excessive discretion, and whether a legal act establishes excessive discretion needs to be decided on a case-by-case basis.

3.1.2 Poor accountability

Provisions that fail to establish adequate mechanisms for ensuring the accountability of officials and institutions for their decisions and actions will – other things equal - open or widen possibilities for poor conduct including corruption. Such provisions include:

a) Failure to clearly define relations of hierarchical subordination (i.e. to whom which officials are responsible and how);

b) Insufficient/absent/unclear mechanisms for appeal and redress against official decisions, exemption of certain decisions from such mechanisms, etc. Examples might include the establishment of a procedure under which appeals against decisions are processed by the same administrative unit that issued the original decision or the exemption of appeal decisions from judicial review;

c) Absence of or inadequate complaints procedures;

d) Absence of or insufficient sanctions for failure of officials or institutions to fulfil legal obligations;

e) No/insufficient sanctions on regulated entities (subjects of legal regulation, such as citizens or commercial entities) for failure to fulfil legal obligations.

3.1.3 Insufficient transparency

The third main category of corruption risk factors that may be contained in legal provisions is of factors that establish insufficient transparency in the operation of the relevant authorities and procedures.

In the context of a specific legal act, corruption risk factors may be logically classified as follows:

a) Insufficient/absent requirements to publicise/disseminate information on procedures, rights and obligations established or regulated by the act;

b) Absent/insufficient requirements to inform interested persons of decisions affecting them;

c) Absent/insufficient requirements for publication of decisions/actions regulated by the act.

Lack of transparency is a fundamental factor underpinning corruption. If persons/entities are not informed of relevant procedures, rights and obligations, if authorities do not have to inform them of decisions affecting them, or official decisions/actions do not have to be made public, both incentives to engage in corruption and opportunities to conceal it are greatly increased.

3.1.4 Unjustifiable benefiting of particular interests

The risk factors listed may all be analysed as "formal" risk factors, in the sense that they can be more-or-less identified from the text of a legal act alone. A "formal" risk factor is an instance of poor legal drafting that as a consequence creates or increases the risk that corruption of some kind will occur – for example where the criteria for issuing a business license are not specified in enough detail.

However, a law may be drafted perfectly from a formal point of view (clear procedures, duties, accountability and transparency mechanisms etc.), yet be designed to systematically benefit certain interests at the expense of the public interest. This might be termed a "substance" risk factor (as opposed to purely "formal").

Provisions that unjustifiably benefit particular interests include market/pricing rules that benefit certain interests with no/justification, criteria to qualify for financial benefits (e.g. tenders, subsidies) that are irrelevant to the matter and/or distorted to benefit particular interests without justification, unjustified exemptions from obligations, legalization of a dominant or monopoly position without justification, etc. In terms of typology, such risk factors may be elaborated in detail as above, or bundled together under one corruption risk factor – as in for example Moldova ("**promotion or infringement of interests contrary to public interest**").

A key common denominator of the risks listed above is the term "unjustified". This raises a further general risk factor which should be included in any corruption proofing typology, which is the **absence of (or incomplete) explanatory report**. An explanatory report should set out the reasons why legal regulation (or changes therein) is needed in the subject area of the law, what is the existing legal framework (e.g. the existing law that is to be amended), and why the proposed amendments are the optimum solution. In Lithuania and Moldova, scrutiny of the explanatory report for a draft is a key early stage of corruption proofing. The latter may be seen as a key general risk – and a "red flag" raising doubts over the real objectives of a draft. To the extent that the report provides the objectives of the law, these provide a key benchmark against which to compare the provisions of the draft act – i.e. whether the provisions of the draft are formulated in such a way as to actually achieve the stated objectives.

Examples of provisions benefiting certain interests cited from EaP countries include the inclusion of a tax exemption for one company in an unrelated law on leasing of land (Ukraine), or a proposed amnesty for capital that would benefit criminals and public officials who had failed to declare their assets (Moldova – see Box 1, section 4.2.1). In Lithuania, an analysis of a draft law on public-private partnership in Vilnius metro construction found that it would benefit certain companies directly by enabling them to enter such partnerships without a competition; although the Parliament adopted the legislation, it was vetoed by the President, leading to an agreement with the Parliament not to enact the bill.

Such risk factors are more likely to be deliberate (i.e. the law is drafted with the aim of benefiting them). **However, "formal" and "substance" risk factors are in reality closely intertwined and frequently overlap**. "Formal" risk factors may be included in laws

deliberately, in order to benefit certain interests. In the corruption proofing case from Moldova, risk factors that may look like "formal" drafting mistakes may have major consequences by systematically benefiting a particular group.

3.1.5 Procedural violations

The difficulty of distinguishing between risk factors that are deliberately included in a legal act and ones that result from mistakes in drafting underlines a key point: the primary **focus of corruption proofing is on the content of legal acts, not the intent behind them** (a point stressed in the RAI study[6]). In other words, the core risk factors listed above are equally important whether they are deliberately included to benefit someone or are the result of mistakes in drafting.

However, a corruption proofing exercise may go beyond the provisions of a draft itself to include risk factors arising from violations of procedural requirements of the legislative process. These will vary according to the requirements of the legislative process, but can (and should) typically include:

a) Failure to secure legally required approvals or consent for the passage of a draft;

b) Failure to conduct consultation processes required by law e.g. circulation of draft, provision of draft online for a required period, processing feedback as required, etc.;

c) Failure to observe requirements of parliamentary legislative process (e.g. inclusion of proposed amendments in plenary where they may not be introduced, failure to submit proposed amendments to relevant Committees for opinion, etc.)

The only methodology from EaP countries that addresses such risk factors explicitly is the Moldovan one (see Annex 1). The Moldova case summarised in Box 1 (section 4.2.1) includes specific findings on procedural violations (failure to secure approval from the Government for a draft that has consequences for the state budget, failure to circulate draft).

3.1.6 Other risks

The elaboration of a detailed typology is essential to underpin credible corruption proofing. However, the typology will not be able to predict or cover all possible corruption risk factors. For this reason, in Armenia and Moldova (in its reporting template – see Annex 1) corruption proofers explicitly allow for a general category of "other risks".

3.2 Need for clarity

In general, EaP typologies of risk factors cover the same types of risks, although there is some variation in the degree of comprehensiveness. However, the typologies vary in their degree of clarity, in at least two respects. First, there are cases where corruption risk factors are examples of a corruption risk factor rather than being one themselves. The most obvious

[6] T. Hoppe, *Anti-corruption Assessment of Laws ("Corruption Proofing"): Comparative Study and Methodology*, Regional Cooperation Council/Regional Anti-corruption Initiative, 2014, p. 12.

example of this is the categories of absent or inadequate competitive procedures ("lack of procurement procedures" in Armenia, "absence of tender/auction procedures" in Azerbaijan, "absent or incorrect tender procedure" in Ukraine). These issues refer to a specific area of regulation rather than a formal category of corruption risk factor, and should be covered under more formal categories such as "missing administrative procedures", "legal gaps", or other categories.

Second, the grouping of risks in certain typologies is not entirely logical. For example, in Azerbaijan the titles of main categories of risk factors are perhaps not sufficiently clear – notably "patterns of systemic corruption", "typical manifestations of corruption susceptibility" and risk factors related to formal legal clarity and coherence are mixed together with risk factors related to the objective of a legal act. Overlaps between different groups of corruption risk factors are particularly marked in Belarus.

It is essential that typologies of corruption risks are analytically clear, with logical groupings of risk factors and the inclusion of types of corruption risk factor rather than examples from actual policy areas. The Moldovan typology, which has been in constant development since its first elaboration over a decade ago, is an example of analytical clarity.

4 INSTITUTIONAL SET-UP

The way in which corruption proofing is conducted in practice varies considerably across countries. The specific institutional architecture in place depends on numerous country-specific historical factors, including the extent to which corruption proofing is seen as an isolated screening of legislation vs. a component of wider anti-corruption risk assessment, the overall framework for fighting corruption (from a highly-centralised anti-corruption agency in Moldova to a much more fragmented range of institutions in Ukraine), the extent to and manner in which corruption proofing is integrated in the legislative process or not, the range of risk factors that the country methodology includes, etc. Table 2 provides an overview of the institutional set-up for corruption proofing in EaP countries, data on how many acts are screened and the most important findings.

Table 2: Overview of corruption proofing in Eastern Partnership countries

	Armenia	Azerbaijan	Belarus	Moldova	Ukraine
Regulatory basis	2008 Law on Legal Acts, Government Decree	2010 Constitutional Law on Regulatory Acts	2007/2011 Presidential Decrees, laws on normative acts and on combating corruption	Laws on: National Anti-corruption Centre (NAC), Preventing and Combating Corruption, Legislative Acts, Normative Acts. Parliament decision on circulation of draft acts, Government decision on corruption proofing, NAC decision on methodology	Law on Prevention of Corruption, Rules of Parliament (*Verkhovna Rada – VR*), Ministry of Justice (MoJ) procedure and methodology, National Agency for Corruption Prevention (NACP) procedure
Who conducts	Agency for Legal Expertise (Ministry of Justice)	Ministry of Justice, drafting body, legal unit of bodies whose competencies are affected by draft	Scientific and Practical Centre for strengthening Law and Order (SPC) at General Prosecutor's Office (GPO)	NAC	MoJ (before submission to Cabinet of Ministers) VR Committee on Preventing and Combating Corruption (plus Council for Public Expert Assessment) NACP (not mandatory)
Stand alone or part of legislative process?	Input to Regulatory Impact Assessment conducted by state bodies	Mandatory stage of legislative process	Mandatory stage of legislative process	Separate but drafters obliged to avoid corruption risks during drafting. Draft Integrity Act – public authorities to proof own acts	VR and MoJ – part of legislative process NACP - separate
Acts screened	All draft laws, secondary legislation if foreseen in Government annual plan	All draft legal and regulatory acts	All draft legal and regulatory acts with some exceptions (e.g. international treaties, acts containing state secrets)	All draft legal and regulatory acts with some exceptions	VR: all draft laws MoJ: all draft laws; existing laws selected by annual plan
Status of findings	Non-binding, officially circulated for comment	Drafting institution must take into account "legally	Not distributed but amendments sought during	Officially circulated. Not binding but drafters	VR: Non-binding but declaration of non-

	Armenia	Azerbaijan	Belarus	Moldova	Ukraine
	prior to submission to Government	valid proposals"	corruption proofing. Findings mandatory but may be appealed to GPO.	expected to improve draft or provide explanations; working group discusses disagreements.	conformity has significant effect
Publication of findings	No	No	No	Yes	Not explicitly but VR Committee findings circulated to Committee members. Stakeholders can be invited to meetings to discuss bills.

4.1 Summary of country approaches

- **Armenia**

Corruption proofing is conducted as a separate analysis by the Ministry of Justice Agency for Legal Expertise, and provided as an input to Regulatory Impact Assessment of draft legal acts conducted by line ministries. All draft legal acts must be screened, and secondary legislation if the Government so foresees in its annual legislative plan. The findings of corruption proofing are not binding.

- **Azerbaijan**

Corruption proofing is a mandatory component of the legislative process. Any unit of a state institution preparing a draft legal act must conduct corruption proofing expertise and attach it to the draft legal act, which is sent to the Ministry of Justice and any other institution whose competencies are affected by the act. The body/ies to which the draft was sent provide proposals for amendments in writing. The drafting institution must take into account "legally valid proposals"; if it does not, the head of the institution whose proposals were ignored will not provide his/her visa (signature concurring with the draft). All of these documents accompany the draft on its further passage in the legislative process.

- **Belarus**

Corruption proofing is conducted on all draft laws and regulatory acts (with some exceptions) by the Scientific and Practical Centre for Strengthening Law and Order (SPC), a unit of the General Prosecutor's Office (GPO). Corruption proofing findings are mandatory – draft acts must be amended to address the findings, although findings may be appealed to the GPO, the decision of which is final. Findings are not published.

- **Moldova**

All legal drafters are expected to avoid including corruption risk factors when drafting legal acts. Corruption proofing is conducted by the National Anticorruption Centre on all draft laws and regulatory acts with some exceptions. Findings are officially communicated to drafters, who are expected to amend the draft accordingly. Disagreements over findings are resolved by ad hoc working groups. All findings are published.

- **Ukraine**

Corruption proofing is conducted by three separate bodies – the Ministry of Justice (on drafts prior to submission to the Government), Parliamentary Committee on Preventing and Combating Corruption (on drafts going through Parliamentary legislative procedure) submitted to Parliament), and the National Agency for Corruption Prevention – NACP (on acts/draft acts selected by the NACP). The Parliamentary Committee is the most active of the three, screening all draft acts. A specific characteristic of the Ukrainian system is the reliance of the Committee - through its Council for Public Expert Assessment – on non-governmental expertise. The Committee requests the opinion of Council experts with relevant expertise for

each draft, draws conclusions based on the opinions of all experts engaged, and sometimes invites experts to Committee meetings.

4.2 Boundaries of corruption proofing

The core activities of corruption proofing are based on analysis of legal text. However, the implementation of corruption proofing will tend inevitably to raise issues and questions that go beyond this narrow focus.

4.2.1 Identifying interests behind corruption risk factors

As outlined in Section 3, typologies of corruption risk factors should include the unjustifiable benefiting of particular interests. When a legal act contains such a risk factor, it is natural to ask why this is so – i.e. which interests exactly would benefit, whether and how they influenced the drafting of the law etc. The Moldovan structure for corruption proofing reports includes a section specifically covering this issue (see Annex 1). Specifically, Section 1.4 of the report structure – "Public and private interests advanced by the draft" includes "Scheme of private interests connected to the draft". In its actual corruption proofing reports the NAC has identified and depicted in diagrammatic form connections between politicians/officials and business interests that would benefit from particular drafts.

It should be noted that entering into the territory of identifying "interests behind a draft" carries significant risks, as it will tend to be more dependent on speculation than mere analysis of the legal text. It is advisable only to identify such interests in a corruption proofing report if the institution conducting proofing is very well-established and sufficiently respected not to be vulnerable to accusations of bias.

Box 1 summarizes a corruption proofing expertise by the Moldovan NAC that identified provisions in a draft law on an effective capital amnesty, which identified provisions that would blatantly benefit certain interests at the expense of the public interest.

Box 1: Anticorruption Expertise Report by National Anticorruption Centre, Moldova, January 2017

The Anticorruption Expertise Report concerns Draft Laws on Capital Liberalisation and Fiscal Stimulus and on "Law Amending and Completing Certain Legislative Acts" (Laws on National Integrity Authority, Declaration of Property and Personal Interests, and Tax Code). The draft law on liberalisation would i) allow registration of property/assets for which certain legal provisions were not fulfilled (e.g. tax), are registered in name of another person etc., and ii) cancel penalties for unpaid taxes, social and health insurance on condition that debts are settled by the end of 2016. The box provides sample findings of the NAC expertise.

Category	Corruption risk factor
Drafting Procedure	Failure to ensure approval of Government for the law entailing changes in revenue/loans/expenditure. Failure to observe provisions on circulation for public consultation.
Justification, interests promoted	Objective of draft not stated. No regulatory impact assessment, analysis of volume of illegal capital or of positive

	and negative effects of implementation of the law. Main beneficiaries of the law: public officials who previously failed to declare assets or violated other regulations. Broad and in some respects blanket immunity from prosecution for those who legalise capital.
Language, legislative coherence	Use of terms that are ambiguous and/or contradict other legislation, e.g.: "de facto owner" instead of "effective beneficiary"; "prior, current and subsequent guarantees" to subjects of capital liberalisation. Unclear elaboration of what constitutes "agreement" between *de jure* and *de facto* owners on the transfer of capital from former to latter – creating risk of fraudulent transfers. Unclear provisions on determining value of capital legalised – creating risk of undervaluation to minimize 2% fee.
Activity of Public Officials and Entities	Anti-constitutional negation of the role of Prosecution. Unclear statement of the role of various institutions in liberalisation. Failure to clearly define scope of property that may be legalised - creating risk of private appropriation of public property. Unclear determination of participants/entities related to capital liberalisation process (e.g. including institutions responsible for combating money laundering and crime). No mechanisms/procedures to verify statements provided by applicants for liberalisation, but stiff penalties for violation by officials of liberalisation procedures – creating an unbalanced situation favourable to legalisation of proceeds of crime. Deadlines: the law takes effect from the day of its passage; no time for institutions to establish regulations necessary for implementation.
Human rights	Several factors create risk of undermining rights to, *inter alia*, property, justice, fair trial. E.g. Persons may declare themselves "de facto owners" of capital in order to legalise it - creating risk of fraudulent takeover of assets owned by others.
Conclusion (extract)	The regulations of the draft law on capital liberalisation and fiscal stimulus create the risk of legalising the capital obtained unlawfully; decrease the revenues to the national public budget, allow schemes for fraudulent takeover of others' properties; negatively affect the functioning of the Prosecutor's Office, National Integrity Authority, National Anticorruption Centre, Ministry of Internal Affairs and other authorities with competences in the area of ensuring integrity, preventing and combatting corruption, preventing and combating money-laundering, recovery of illegal proceeds, including in the process of investigating frauds in the financial-banking sector; imply dangers of legalising the assets under sequestration and those in relation to which the court did not order confiscation via a final judgement.
Recommendations	If sufficient arguments are identified in favour of a capital/fiscal amnesty, redraft the law to define more clearly those who may legalise capital, in order to avoid discrimination and undermining of framework for combating corruption, money laundering and asset recovery.

4.2.2 Regulatory Impact Assessment

When seen in the wider context of the creation of legislation, corruption proofing can in principle be seen as a natural component of Regulatory Impact Assessment (RIA) – i.e. of "a process of systematically identifying and assessing the expected effects of regulatory

proposals".[7] Specifically, corruption proofing is in essence the identification of the likely effects of legal provisions on the likelihood of corruption occurring. The **model adopted by Armenia, in which corruption proofing is a separate activity but "feeds in" to RIA of draft legal acts conducted by state institutions, therefore appears a promising one**, although it is beyond the scope of this paper to assess fully the effectiveness of this institutional set-up in practice.

4.2.3 Risk assessment

Corruption risk factors contained in a legal act or draft legal act are one set of risk factors among many. First, corruption proofing risk typologies already contain references to issues that are regulated not only by the legal act in question but also by other acts. For example, a corruption proofing report on a draft licensing law might identify the absence of complaints mechanisms or of sufficient transparency as risk factors. However, these risk factors are likely to result not only from problems in licensing regulation but also other legal regulations. What this means is that when screening particular laws, corruption proofers will inevitably be pulled towards looking at other legal regulations and aspects of the institutional framework that are relevant to the implementation of the legal act under scrutiny. If this point is taken to its logical conclusion, we are pulled towards viewing **corruption proofing as – ideally - one component of an overall corruption risk assessment for a particular sector or area**.

Conversely, any entity conducting an anti-corruption or governance risk assessment of a particular sector or area will unavoidably include an analysis of the legal framework governing the area in question. From this point of view, **corruption/governance risk assessment should always involve corruption proofing of existing legislation**.

It is worth noting that in Lithuania – not an EaP country but a neighbouring former Soviet country that has a developed system of corruption proofing implemented by the Special Investigation Service (an independent agency) – corruption proofing is conceived as an activity with a broader focus. Special Investigation Service (SIS) assessors collect information on existing regulation in the area that is the subject of the legal act being examined, court practice and interpretation, relevant corruption cases, reasons for and causes of preparation of the draft act, societal and media opinion about the act or draft act, relevant research, subjects responsible for implementation of the act or draft act, and legislators and possible conflicts of interest to which they may be subject.

For example, such assessments were conducted on state-owned enterprises, where major problems with nepotism and conflicts of interest were identified; another assessment on the issue of privatisation of lakes identified major issues of transparency (absence of information on which lakes are public property) and insufficient regulation on supervision of decisions on privatising lakes.

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[7] Organisation for Economic Cooperation and Development (OECD), *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, OECD, 1998, p. 3. https://www.oecd.org/gov/regulatory-policy/44789472.pdf

Although corruption proofing can naturally be seen as a component of a broader anti-corruption assessment, this does not mean that every institution or entity that conducts corruption proofing should necessarily expand its focus. For an institution such as the Ukrainian parliamentary committee or a Ministry of Justice legal department, a narrow focus on a draft legal act will be appropriate. However, **corruption proofing should not be an entirely isolated activity and its findings should always be available for use as inputs for broader assessments. Where corruption proofing is conducted by an institution that has wider anti-corruption competencies (such as national anti-corruption agency as in Moldova or Lithuania), it may make sense to conduct corruption proofing as part of a full risk assessment**.

4.3 Stages of proofing and selection of acts to screen

As outlined in Section 2.1, corruption proofing of legislation may take place at three basic stages: (i) during drafting itself; (ii) as a tool for screening completed drafts, or (iii) as a tool for screening acts that are already in force. The answer to the question "Who should conduct corruption proofing" will depend partly on the stage at which proofing is conducted. The main emphasis in EaP countries appears to be on the screening of draft legal acts after their completion, with a variety of actors responsible for conducting such screening. In all EaP countries that have established such mechanisms, corruption proofing is a part of the legislative process, i.e. corruption proofing screens draft acts when they are still in the Executive Branch (e.g. Armenia) and/or in Parliament (the prime focus in Ukraine). In Ukraine and Lithuania, the legislature is obliged to conduct corruption proofing of draft laws, while an independent anti-corruption agency (the National Agency for Corruption Prevention in Ukraine, Special Investigations Service in Lithuania) may also conduct proofing of existing laws and by-laws.

4.3.1 Embedding corruption proofing into legal drafting

A key point that should be highlighted here is that it is better to avoid the inclusion of problematic provisions in draft laws rather than screening for them after drafts have been included. In other words, **a good practice is for legal acts to be drafted according to rules that prevent the inclusion of corruption risk factors**. To some extent this appears to be a requirement in EaP countries – most explicitly in Moldova, although it is difficult to establish how clearly such requirements are outlined in the other countries. A good example of embedding corruption proofing principles into legal drafting itself is provided by the Council of Europe/EU Project against Corruption in Albania, which in 2010-11 assisted with the elaboration of a corruption proofing addendum to the official Law Drafting Manual.[8] There, a comprehensive legal drafting manual was produced with the help of separate technical assistance, and subsequently an addendum on corruption proofing added

[8] C. Cojocaru and Q. Reed, *"Proposed final version of addendum to Albanian Law Drafting Manual: Corruption Proofing - Using Good Law Drafting to Avoid Creating Corruption Risks in Draft Legislation"*, CoE/EU Project against Corruption in Albania, April 2011. Available at: https://rm.coe.int/16806ec88a. *"Law Drafting Manual: A Guide to the Legislative Drafting Process in Albania"* (2010) is available at: http://www.euralius.eu/en/archive-2?download=74:law-drafting-manual.

physically to the manual. The addendum listed corruption risk factors that should be avoided, and where possible highlighted key rules already in the Law Drafting Manual that should be observed in order to avoid such risk factors. The addendum illustrates how sound legal drafting rules will go a long way towards preventing the inclusion of corruption risks.

4.3.2 Draft laws and existing legal acts

Even where corruption proofing is embedded as far as possible in drafting processes, for reasons set out in Section 2.2 this does not guarantee that corruption risk factors will be avoided. Moreover, the extensive evidence of corruption risk factors in draft legal acts provided by corruption proofing findings in all EaP countries show clearly the value of *post hoc* screening. Therefore, **screening of drafts after their completion (or at key stages of the legislative process) is also necessary**.

The third stage of screening is of **already existing legal acts**. This is not the prime focus of this paper, not least because in the EaP countries with corruption proofing systems, all draft laws must be proofed, and in three of the five countries most draft secondary legislation as well. However, in Ukraine the NACP and MoJ may screen already existing legal acts, while in Lithuania screening of existing acts takes place as a component of broader risk assessments (see Section 4.1.3). In general, it may be argued that **good practice is to screen existing laws that are of importance, as well as any laws that are relevant for a corruption/governance risk assessment**.

4.3.3 Selection of acts to screen: coverage *vs*. resources

A key question for the institution or institutions responsible for corruption proofing is how to select acts for screening. On the one hand, as stressed by Ukrainian experts, it can be argued that all draft legal acts should be screened – not least because corruption risks may be deliberately concealed in seemingly unrelated laws, as in the example cited in Section 3.1.4 (a tax exemption for one company inserted in the transitional provisions of an unrelated law on leasing of land). Anecdotal evidence suggests that such "legislative shoehorning" is not an uncommon phenomenon, especially in high-corruption environments.

On the other hand, in order for corruption proofing to be conducted competently, sufficient human resources must be available. According to figures provided by EaP countries, the number of acts screened varies between roughly 500 and 1000 per year, with Azerbaijan an exception with 2500-3000. The figures should be treated with caution – for example in Ukraine they only include acts screened by the *Verkhovna Rada*, not Ministry of Justice or NACP; Armenia was unable to provide statistics on secondary legislation, etc. In any case the number of acts is considerable in all cases. Despite this, even in the Ukraine where the Verkhovna Rada (VR) Committee suffered from a large backlog initially, this was overcome and the committee reported that it is able to manage the workload, partly because many acts exhibit similar problems.

Concerning resources, a particular challenge identified by several countries is the need to have access to expertise on particular areas regulated by acts being screened. In Moldova, the institutional set-up for corruption proofing is defined to ensure the availability of

sufficient in-house expertise. In Ukraine by contrast, the VR Committee has opted to rely on a range of external experts. The Secretariat of the Committee provided the expertise by itself up to September, 2015, consulting non-governmental experts on an *ad hoc* basis. The Committee then established a Council of Public Expertise, consisting of ten paid independent experts selected via open competition; financing was provided by the International Renaissance Foundation. The Council now collects and collates opinions of experts, practitioners and specialised public institutions, who according to the Committee, willingly provide such expertise *pro bono* as an opportunity to have their voice heard.

4.4 Who should conduct proofing?

A key question relating to the implementation of corruption proofing is whether screening should be conducted in a more or less centralised fashion. The centralised variant is illustrated most clearly by Moldova (and also Belarus). Other EaP countries exhibit more fragmented systems: in Armenia corruption proofing itself is centralised but serves as an input for other institutions to use as a component of regulatory impact assessment; in Azerbaijan proofing is conducted by every state body drafting legal acts. In Ukraine proofing is conducted by a range of entities. Answering this question is easier if we distinguish between "proofing during drafting" and "post-draft proofing".

a) Legal drafting is by nature a decentralised activity – for example, relevant line ministries or authorities draft relevant sectoral laws and secondary legislation. Corruption proofing in the sense of **avoiding the inclusion of corruption risk factors during drafting is therefore by definition a decentralised activity**.

b) Concerning (*post-hoc)* proofing of draft acts or of existing legal acts, the evidence from EaP country experience presents strong reasons why there are **advantages in having a centralised process of corruption proofing**. One of the main reasons is the need for corruption proofing to be conducted independently of the body that has drafted the legal act. Tasking a legal drafting unit with corruption proofing its own draft (the system in place in Azerbaijan) does not appear to be an ideal solution - if corruption risk factors have been included in a draft legal act, then this will have been done by the drafter, for example. Other arguments for a degree of centralisation include the need to ensure sufficient expertise and the advantages of seeing corruption proofing as part of a wider anti-corruption assessments (on both of these, see following sections).

Taking these considerations together, **i) individual drafting bodies or units should be subject to clear rules of drafting in order to avoid corruption risk factors in advance, ii) while drafting units may conduct proofing, corruption proofing of at least draft laws and important secondary legislation should be conducted by an independent institution with sufficient expertise and resources.**

4.5 Good practices in the implementation of corruption proofing

The previous sections have underlined the challenges of ensuring sufficient resources and expertise, especially in light of the fact that corruption proofing should ideally be conducted on all or most draft legal acts. This sub-section outlines mechanisms and techniques to maximise the efficiency, quality and credibility of the corruption proofing process itself.

4.6 Methodology and reporting templates

One lesson that this paper draws from existing corruption proofing tools in EaP countries is the importance of clear methodological documentation, meaning:

a) **A clear typology that divides corruption risk factors into logical groups and avoids unnecessary overlaps[9].** EaP country typologies vary in the degree of clarity – and therefore quality.

b) **Clear templates for reporting corruption proofing findings**, which

   i. make reporting as easy to do as possible by providing a clear structure and interface for inputting findings; and

   ii. structure findings so as to provide an optimal balance of formal and statistical information on the one hand, and qualitative description/explanation on the other.

c) The **use of IT tools** (e.g. using an interface for reporting linked to an institutional database) so that findings on corruption risk factors are automatically stored in such a way as to generate statistics that can be easily collated, summarised and presented.

Concerning reporting tools, Moldova again provides a very good model. In addition to the typology of corruption risks, a standardised reporting template is used for every report (see Annex 1). The reporting interface ensures that statistics – for example on the number of each type of corruption risk factor detected – are automatically generated. This makes possible the easy presentation of figures on the breakdown of different corruption risk factors detected in legal acts shown in Table 2.

4.7 Use of findings

The way in which the findings of corruption proofing are used is of vital importance – as with any other oversight activity, a report that is ignored is of little use. From the experience of EaP countries, there are two issues of key importance: the formal procedure for circulating and processing findings, and transparency.

4.7.1 Circulation of findings

There needs to be a **clear procedure** by which the entity that elaborates corruption proofing communicates its findings to other relevant institutions, and under which the findings are used by the latter. For draft legal acts (the main focus of this paper) relevant institutions are obviously the institution that drafted the act and/or the institution that will next receive the act in the legislative procedure.

The appropriate recipient of screening reports will depend on exactly the position of corruption proofing in the legislative procedure. If proofing is designed as feedback for

[9] See section 3.2 for more detailed explanation

drafting institutions to improve drafts at their stage of the procedure, they will naturally be the main recipient. If screening is conceived as an assessment that is then passed with the draft to the next stage of the legislative process, then the next institution in the process would be the natural recipient. This is more or less the situation for Ukraine, where corruption proofing by the Ministry of Justice is conducted on acts already drafted and the findings communicated mainly to the Cabinet (for screening conducted by the Ministry of Justice) and Parliament (for screening conducted by the *Verkhovna Rada* Committee.

4.7.2 Status of findings and obligations of recipient

An important issue is determining the exact status of corruption proofing findings. According to the logic of a democratic legislative process, such findings cannot be formally binding on the content of the law – the final text of which is by definition a democratic and political decision (even in the case of delegated secondary legislation). Moreover, in EaP countries corruption proofers acknowledge openly that there may be (even legitimate) disagreements over findings.

However, procedures should be designed to try and ensure that findings have an impact – i.e. result in corruption risk factors being removed from drafts. **Corruption proofing procedures should be designed so that the recipients of findings are obliged to respond to the findings formally and justify the actions they take** as a result of the findings (particularly if they reject them).

4.7.3 Transparency

A vital component of any good legislative process is transparency. By transparency is meant the following:

a) If the act being proofed is a draft one, **corruption proofing findings should be attached to the draft legal act; the findings and any formal replies to them by recipients should be included as attachments to the draft for the remainder of the legislative process.** Among EaP countries, this is the practice in Azerbaijan and Moldova at least.

b) **All methodological materials used for corruption proofing (typology of risk factors, reporting structure) should be available online**.

c) **All corruption proofing findings should be published online, along with responses and steps taken to alter drafts to implement them.** One negative aspect of corruption proofing in EaP countries is that findings are only made public explicitly in Moldova (in Ukraine, it is claimed that findings are public because they are distributed to *VR* Committee members). In Lithuania, all corruption proofing reports as well as responses are published together with the legal/draft legal act that was screened.

5 IMPACT

The implementation of corruption proofing in EaP countries has yielded significant results, in terms of the impact of individual findings on the content of draft laws, and probably more generally in its effect on the quality and culture of legal drafting. Table 3 presents some

summary information on impact, together with specific examples of findings in EaP countries. According to Ukraine participants, around 400 acts were negatively assessed by the *Verkhovna Rada* Committee, none of which became law. In Belarus a significant number of provisions have been eliminated during drafting. In Moldova, following a corruption proofing expertise on controversial draft laws on capital liberalisation and fiscal stimulus (see Box 1, section 4.2.1), the drafts were withdrawn in Parliament.

More generally, there is a clear sense from EaP participants of the regional workshop that the development of corruption proofing has had an important impact on attitudes to legal drafting and the quality of drafting. Although this is difficult to quantify or document precisely, it can reasonably be concluded that the further development and improvement of corruption proofing methodology and its implementation is an unambiguously positive contribution to governance in EaP countries.

Table 3: Overview of implementation and results of corruption proofing in EaP countries

	Armenia	Azerbaijan	Belarus	Moldova	Ukraine
Statistics – how many acts screened; other data	Draft laws: 5-600/year Secondary legislation: No statistics	Number of expert opinions: 2490 (2013), 2651 (2014), 2671 (2015), 2949 (2016)	2016: 996 draft acts (67 laws, 692 Council of Ministers decisions, 237 Presidential Decrees) 2016: shortcomings in 79 draft acts, eliminated in 64 acts during process	2007-May 2016: 4299 draft acts (1999 laws, 2156 Government decrees, 144 internal rules). Increase from 80 in 2006 to 840 in 2016.	*Verkhovna Rada*: >4700 draft laws since November 2014; 70% positive evaluation, 11% with potential risk factors, 18% with negative evaluation; Up to 400 acts prevented from being passed
Most commonly detected risks	Unclear rights and duties, broad scope of discretionary powers, linguistic ambiguity, regulatory gaps, lack of administrative procedures	Most risks found in by-laws	Unclear criteria/rules for decision-making and on changes in legal relations, excessive discretionary powers, legal gaps, conflicting norms, absence of mechanisms of redress	(Top 6): Excessive, improper duties or duties contrary to status of private person/entity (22%); conflicting provisions (15%); ambiguous wording (14%); duties allowing exceptions and abusive interpretations (7%); irregular use of terms (6%); lack of/unjustified/unjustifiably extended terms (5%)	In the order of prevalence: broad discretionary powers; lacking/ insufficient supervision and transparency; promotion of group/individual interests (disguised behind official aims); lacking or insufficient tender procedures and administrative procedures.
Examples	Draft banking law failing to establish clearly situations in which Central Bank may allow distribution of dividends by banks	Non-conformance with higher law of by-laws regulating legal entities that had been transformed from public authorities into legal entities, *inter alia* involving provisions of exercise of powers by officials	Decree on state assistance allowing excessive discretion in the allocation of one-off social benefits.	Draft laws on the liberalisation of capital and fiscal stimulation, and on amending other acts: failure to provide justification/reasoning, *de facto* legalisation of proceeds of crime and of assets not declared by public officials, etc. (see Box 1)	Area of regulation where risk factors most common: taxation, industrial policy, economy/ business, land issues, construction. Draft law providing subsidies intended for miners' salaries failed to specify the use of the subsidies. Draft law on sea ports providing a monopoly in provisions of IT services to one private company.
Challenges/ difficulties	Findings cannot be definitively objective, may be disputed	Complexity of analysis needed (for holistic analysis of law plus case study)	Scope of examination (wide range of legal relations, specialisation)	Methodology could require conformance of draft provisions with existing provisions containing corruption risk factors. Sensitivities and logic of screening pre-election 'populist' draft laws	Methodology does not explicitly include promotion of group/individual interests; may identify provisions that are not always corruption risk factors

6 ANNEX 1: TYPOLOGY OF CORRUPTION RISK FACTORS, CORRUPTION RISKS, AND STRUCTURE OF CORRUPTION PROOFING EXPERTISE REPORT USED BY THE MOLDOVAN NATIONAL ANTI-CORRUPTION CENTRE

Typology of Risk Factors

Risk factors generated by BAD LANGUAGE OF THE DRAFT:	**I. LEGAL WORDING**	
	1.	Use of new terms which are not defined in the legislation or the draft
	2.	Irregular use of terms
	3.	Ambiguous wording allowing abusive interpretation
	II. LEGAL COHERENCE	
	4.	Faulty reference provisions
	5.	Faulty delegation provisions
	6.	Conflicting provisions
	7.	Gaps (lacunas)
Risk factors generated by LACK IN THE DRAFT OF CORRUPTION PREVENTION MECHANISMS IN THE FOLLOWING DOMAINS:	**III. TRANSPARENCY AND ACCESS TO INFORMATION**	
	8.	Lack/insufficiency of access to information on by-laws
	9.	Lack/insufficiency of transparency in the functioning of a public entity
	10.	Lack/insufficiency of access to information of public interest
	IV. EXERCISING INDIVIDUAL RIGHTS AND OBLIGATIONS	
	11.	Exaggerated costs for provision's enforcement as compared to the public benefit
	12.	Promotion of interests contrary to the public interest
	13.	Infringement of interests contrary to the public interest
	14.	Excessive requirements for exercising rights/duties
	15.	Unjustified exceptions from the exercise of rights/duties
	16.	Unjustified limitation of human rights
	17.	Discriminatory provisions
	18.	Excessive, improper duties or duties contrary to the status of the private person/entity
	19.	Stimulating unfair competition
	20.	Unfeasible provisions
	V. EXERCISING PUBLIC ENTITY'S DUTIES	
	21.	Extensive regulatory powers
	22.	Excessive, improper duties or duties contrary to the status of the public entity
	23.	Parallel duties
	24.	Unspecified responsible public entity/subject the provision refers to
	25.	Duties set up in a manner that allows exceptions and abusive interpretations
	26.	Setting up a right of the public entity instead of a duty
	27.	Cumulating competences to set up, control and sanction failing of the rules
	28.	Non-exhaustive, ambiguous or subjective grounds for a public entity to refuse to act
	29.	Lack/ambiguity of administrative proceedings

30.	Lack of specific terms / unjustified terms / unjustified extension of terms
VI. OVERSIGHT MECHANISMS	
31.	Lack/insufficiency of supervision and control mechanisms (hierarchic, internal, public)
32.	Lack/insufficiency of mechanisms to challenge decisions and actions of public entities
VII. LIABILITY AND SANCTIONING	
33.	Confusion/duplication of types of legal liability for the same violation
34.	Non-exhaustive grounds for liability
35.	Lack of clear liability for violations
36.	Lack of clear sanctions for violations
37.	Mismatch between the violation and sanction

Typology of Corruption Risks

The typical corruption risks which may be determined by the risk factors identified in the regulations are:

Encouraging or facilitating acts of, or legalising acts of:

- active bribery
- giving bribe
- passive bribery
- taking bribe
- trading in influence
- abuse of office
- excess of authority
- conflict of interest and/or favoritism
- illicit enrichment
- misuse of funds and/or patrimony
- embezzlement of funds and/or patrimony
- fraudulently obtaining foreign assistance funds
- undue influence
- breach of gifts' regime
- breach of publicity limitations in public office
- breach of incompatibilities in public office
- breach of hierarchy restrictions in public office
- leaking of limited accessibility information
- money laundering
- tax evasion
- fraud
- falsifying official acts
- other types of violations, according to the Criminal Code, Administrative Offences Code and others (to be exactly mentioned).

General corruption risks are identified when the draft as a whole will encourage, facilitate or legalise the listed acts (if there are norms in the draft generating typical corruption risks), but the analysed provision is too general and no specific typical risk may be associated to it.

In this case, in the cell "Corruption Risks"of the Corruption Proofing Expertise Report, the following shall be indicated: "General".

Corruption Proofing Expertise Report for [title of the draft subject to anti-corruption expertise]

I. Analysis of the risks of corrupting the draft's promotion process

I.1. Relevance of the author and of the proposed category of the act promoted by draft

I.2. Compliance with the requirements of transparency in the decision-making process in promoting the draft

I.3. Declared and real purpose of the draft

I.4. Public and private interests advanced by the draft

- scheme of private interests connected to the draft

I.5. Justification of the draft's solutions

I.5.1. Sufficiency of the reasoning in the draft's supporting note

I.5.2. Economic-financial reasoning

I.5.3. Performing the regulatory impact analysis

I.5.4. Feasibility studies

II. General analysis of the draft's risk factors

II.1. Language of the draft

II.2. legal coherence of the draft

II.3. Activity of public officials and public entities regulated by the draft

II.4. Violations of human rights that may be caused at the implementation of the draft

III. Detailed analysis of the draft's risk factors and corruption risks

<table>
<tr><td rowspan="4">No.</td><td colspan="2">Art. __ para.__ let._)
…</td></tr>
<tr><td colspan="2">Objections:
…</td></tr>
<tr><td>Risk factors:
…</td><td>Corruption risks:
…</td></tr>
<tr><td colspan="2">Recommendations:
…</td></tr>
</table>

IV. Expertise report's conclusions

Date:

Experts of the Legislation and Anti-corruption Expertise Division: *[names of the experts, positions]*

Coordinator of the Corruption Proofing Expertise Report: *[name of the expert, position]*