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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UKRAINE

JOINT URGENT OPINION

OF THE VENICE COMMISSION AND THE DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW (DGI) OF THE COUNCIL OF EUROPE

ON THE DRAFT LAW AMENDING PROVISIONS OF THE CODE OF ADMINISTRATIVE OFFENCES AND THE CRIMINAL CODE REGARDING THE LIABILITY OF PUBLIC OFFICIALS FOR INACCURATE ASSET DECLARATION (NO. 4651 OF 27 JANUARY 2021)

Issued pursuant to Article 14a of the Venice Commission's Rules of Procedure

on the basis of comments by
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I. Introduction

1. By letter of 12 March 2021, the Speaker of the Verkhovna Rada, Mr D. Razumkov, requested an urgent opinion of the Venice Commission on the draft Law amending certain provisions of the Code of Administrative Offences and the Criminal Code of Ukraine regarding the liability of public officials for inaccurate asset declaration (no. 4651, of 27 January 2021) (see CDL-REF(2021)034 for a consolidated version of the draft Law and the legislation currently in force).

2. At its 126th Plenary Session (online, 19-20 March 2021), the Venice Commission authorised the preparation of an urgent opinion on this matter.

3. Mr Nicolae Eşanu and Ms Hanna Suchocka acted as rapporteurs for this urgent opinion on behalf of the Venice Commission. Mr Jure Škrbec analysed the draft law on behalf of the Directorate of Human Rights ("the Directorate") of the Directorate General of Human Rights and Rule of Law (DGI).

4. Due to the COVID-19 crisis, the rapporteurs were not able to travel to Kyiv. Instead, assisted by Mr Dikov from the Secretariat, they held a series of video meetings on 21 April 2021 with the Deputy Head of the Office of the President of Ukraine, the Chair of the Committee on Law Enforcement of the Verkhovna Rada, members of this Committee from various political parties, heads of the National Anti-Corruption Bureau (the NABU) and the National Agency on Corruption Prevention (NACP), representatives of international partners of Ukraine and representative of the civil society working in the field of the fight against corruption. The Venice Commission and the Directorate are grateful to the office of the Council of Europe in Ukraine for the excellent organisation of these virtual meetings.

5. This opinion was prepared in reliance on an unofficial English translation of the draft Law. The translation may not always accurately reflect the original version on all points, therefore certain issues raised may be due to problems of translation.

6. This urgent joint opinion was drafted on the basis of comments by the rapporteurs and the results of the online meetings. It was issued pursuant to the Venice Commission's Protocol on the preparation of urgent opinions (CDL-AD(2018)019) and will be presented to the Venice Commission for endorsement at its 127th
Plenary Session on 2-3 July 2021.

II. Background

7. In the past decades, Ukraine has undertaken several legislative reforms aimed at combatting corruption. Those reforms have intensified since the "revolution of dignity" of 2014. One of the anti-corruption instruments introduced in 2014 was the duty of public officials to submit electronic asset declarations which reflected all property and interests an official may have. This duty became effective after the National Agency for Corruption Prevention (NACP) had been established and had launched the Unified State Register of Declarations (August 2016).

8. The duty to submit an asset declaration is described in much detail in the Law on the Prevention of Corruption (the LPC). In addition, the Code of Administrative Offences (the CAO) and the Criminal Code (the CC) establish liability for the failure to submit a declaration or for making an inaccurate statement therein.[1]

A. Decision no. 13-r/2020 of the Constitutional Court of Ukraine

[1] The CAO defines offences of a minor gravity, whereas the CC defines criminal offences.

9. On 27 October 2020 the Constitutional Court of Ukraine (the CCU) adopted decision no. 13-r/2020 which rendered the mechanism of asset declarations largely ineffective. In particular, the CCU invalidated Article 366-1 of the CC, which established criminal liability for the failure to submit asset declarations/inaccurate declaration of assets.[2] This decision led to the termination of all criminal cases related to inaccurate asset declarations/failure to submit a declaration which were pending at the time. Only the administrative liability related to inaccurate asset declarations/failure to submit them remained.

10. Decision no. 13-r/2020 of 27 October 2020 was criticised by the Venice Commission in its opinion of December 2020.[3] The Venice Commission noted, in particular, that the CCU had not respected its own procedures and that some of the judges of the CCU had been in a possible conflict of interests regarding the outcome of the case, since the accuracy of their own declarations had been challenged by the NACP. As regards Article 366-1 of the CC, the Venice Commission observed that this part of decision no. 13-r/2020 was poorly reasoned and that the CCU interfered, without proper justification, with the powers of the Parliament to define crimes and establish liability for them.

11. On the other hand, despite those flaws, the Venice Commission acknowledged that the legislature must respect the constitutional role of the CCU. As a consequence, in the opinion of the Commission, some legislative amendments had to be made to the CC. The Commission stressed, however, that the legislator, when making such amendments, should give due regard to the international obligations of Ukraine and should not impede the fight against corruption. Most importantly, the Venice Commission emphasised that "the level of monetary fines and other sanctions should be sufficiently high as to act as deterrent and as to ensure a punishment which is proportionate to the importance which the fight against corruption has in Ukraine. The sanction of imprisonment should be maintained for the most serious violations."[4]

B. Law no. 1074-IX

12. On 4 December 2020 the Verkhovna Rada amended the CC. Article 366-1 was removed from the Code and replaced with two new provisions: Article 366-2 and 366-3. The former established liability for the submission of inaccurate declarations and the latter established liability for the intentional failure to submit a declaration. The penalty of imprisonment – which had been previously provided by Article 366-1 as the maximum possible sanction for these types of offences – was removed from the CC. Under the two new provisions, the highest sanction was reduced to "restriction of liberty", which does not entail going to prison.[5] In addition, the lower threshold for criminal liability was raised. Cases of inaccurate asset declarations where the

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[2] Article 366-1 of the CC, which was declared unconstitutional by decision no. 13, reads as follows:

"Submission by the subject of declaration of knowingly false information in the declaration of a person authorized to perform functions of the state or local self-government as provided for by the Law of Ukraine 'On the Prevention of Corruption', or intentional failure by the subject of declaration to submit the aforementioned declaration shall be punishable by a fine of 2,500 to 3,000 non-taxable minimum incomes of citizens, or community service for a term of 150 to 240 hours, or imprisonment for a term of up to two years, with deprivation of the right to occupy certain positions or engage in certain activities for a term of up to three years.

Note. Subjects of declaration shall mean persons, who under paragraphs 1 and 2 of Article 45 of the Law of Ukraine 'On Prevention of Corruption', are obliged to submit a declaration of the person authorized to perform functions of the state or local self-government. The responsibility under this Article for submission by the subject of declaration of knowingly false information in the declaration in respect of property or other declaration object of value shall occur if such information differs from reliable information by an amount that exceeds 250 subsistence wages for able-bodied persons."

[3] CDL-AD(2020)038, Ukraine - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on the Legislative Situation regarding anti-corruption mechanisms, following decision no. 13-R/2020 of the Constitutional Court of Ukraine

[4] *Ibid*, para. 34.

[5] This measure provides that a convict has to work in an "open penitentiary institution" but does not stay there overnight but may live in his/her own place.

undeclared amount fell below the threshold of 500 subsistence minimums (SM)[6] were decriminalised (before the December 2020 amendments, the threshold for criminal liability was 250 SM).

13. These amendments were adopted in a fast-track procedure and received nearly unanimous support of all political factions of the Verkhovna Rada, with no votes against and four abstentions. On 24 December 2020, President Zelenskyy signed this bill in to law – Law no. 1074-IX. Current regulations concerning liability for inaccurate asset declarations which entered into force after the adoption of Law no. 1074-IX, can be summarised as follows.

14. *Failure to submit an asset declaration* constitutes an offence under Article 172-6 (part one) of the CAO and a crime under Article 366-3 of the CC. The difference between an administrative offence and a crime will be discussed in more detail below.

15. The law also establishes liability for the submission of *inaccurate information* in a declaration. Currently, there are three categories of offences related to such inaccurate declarations, depending on the amount which is not declared.

16. Minor inaccuracies in asset declarations are regulated by Article 176-2 part four of the CAO. Where the undeclared amount ("submission of knowingly false information") is between 100 and 500 SM, this is considered an "administrative offence" punishable with a fine ranging from 1,000 to 2,000 tax-free minimum incomes (TFMI).[7]

17. More significant inaccuracies are punishable under the CC. Article 366-2 (1) of the CC establishes liability for the "submission […] of knowingly false information" for undeclared amounts ranging between 500 and 4,000 subsistence minimums (SM).[8] This intermediate level offence is punishable by a fine ranging from 2,500 to 3,000 TFMI,[9] or 150 to 240 hours of community service.

18. Finally, Article 366-3 (2) establishes increased penalties for the most serious instances of knowingly submitted false information. Undeclared amounts of more than 4,000 SM[10] are punishable with a fine ranging between 3,000 and 5,000 TFMI[11] or 150 to 240 hours of community service. The most severe penalty is restriction of liberty for up to two years, which can be associated with the deprivation of the right to hold certain posts or engage in certain activities for up to three years.

C. Draft Law no. 4651

19. The December 2020 amendments to the CC have been criticised by civil society[12] and international partners of Ukraine[13] for establishing unreasonably mild penalties. To address this criticism, on 27 January 2021, President Zelenskyy introduced a draft Law amending the CC and the CAO. These draft amendments are in the focus of the present opinion (draft Law no. 4651). On 15 April 2021 the draft Law was adopted by the Verkhovna Rada in the first reading. The

[6] The subsistence minimum for 2021 was established at the level of UAH 2,189 (approximately EUR 65.3 according to the official exchange rate for 19 April 2021). So, 500 SM equals approximately EUR 33,533.
[7] The tax-free minimum income for working person for 2021 was established at the level of UAH 1,094.5 (approximately EUR 32.65). It means that the maximum administrative penalty for inaccurate asset declaration is around EUR 65,300.
[8] Approximately from EUR 32,650 to EUR 261,200.
[9] Approximately EUR 81,625 to EUR 97,950.
[10] Approximately EUR 261,200.
[11] Approximately EUR 97,950 to 163,250.
[12] See, for example, the analysis by Transparency International Ukraine, available at: https://ti-ukraine.org/en/news/parliament-supports-compromise-law-on-liability-for-false-declarations/
[13] See, for example, the reactions from the EU: https://www.unian.info/politics/legislation-ukraine-s-law-on-asset-declarations-has-several-deficiencies-11248694.html

main thrust of the draft Law is to increase liability for failure of public officials to submit accurate asset declarations, and to lower the threshold for the most serious category of inaccurate asset declarations.

20. Thus, the new version of Article 366-2 lowers the threshold for the most serious cases from 4,000 SM to 2,000 SM.[14] This means that some cases which presently constitute medium level case would be qualified as serious.

21. The draft Law also increases the penalties. The fine for medium level cases (Article 366-2 (1) of the CC) is raised to 3,000 – 4,000 TFMI[15] (against 2,500 - 3,000 in the current version), and a penalty of restriction of liberty for up to two years is added. The fine for serious cases (i.e. where the undeclared assets are worth more than 2,000 SM) is raised to 4,000 – 5,000 TFMI.[16] Most importantly, for the category of most serious cases the penalty *of imprisonment for up to two years* (as opposed to a mere restriction of liberty) is added. The same penalty of imprisonment is also added to Article 366-3.

22. While the draft Law increases sanctions for the failure to submit a declaration and for the submission of an inaccurate declaration, it does not fully restore the level of sanctions which existed prior to the CCU's invalidation of Article 366-1.[17] Thus, criminal liability for inaccurate declaring starts at 500 SM (and not at 250 SM as previously). Imprisonment is possible only if the undeclared amount is higher than 2,000 SM (previously, under Article 366-1, imprisonment was possible to apply for much lower amounts, starting at 250 SM).

III. Analysis

A. Increased liability from the constitutional perspective

23. The Venice Commission reiterates that it is primarily the task of Parliament to define what behaviour constitutes an administrative offence or what constitutes a crime and to establish appropriate sanctions.[18] A body of constitutional jurisdiction should not interfere in this area without weighty reasons.

24. In its controversial decision no. 13-r/2020, the CCU concluded that former Article 366-1 of the CC established disproportionately harsh sanctions. However, Article 366-1 provided for a variety of sanctions, of different types and levels of severity. As previously noted by the Venice Commission, the CCU failed to explain what particular sanction it found disproportionate and, most importantly, on what grounds. Decision no. 13-r/2020 was so imprecise that it gave the legislature a considerable leeway in addressing the issue of proportionality.

25. In December 2020, the Verkhovna Rada reviewed the level of sanctions. The sanction of imprisonment was removed from the CC. The threshold for the criminal liability was raised, and a certain category of cases was decriminalised. However, more serious offences related to asset declarations remained in the CC. The Verkhovna Rada did not consider that the decision of the CCU required a complete decriminalisation of *all* offences related to inaccurate asset declarations, but rather a revision of the types and levels of sanctions. These amendments received cross-party support and were adopted nearly unanimously.

26. Four months later the Verkhovna Rada reverted to this matter and considered increasing sanctions, including reintroducing imprisonment for the most serious violations. The Venice

[14] Approximately EUR 130,600.
[15] Approximately EUR 130,600 as a maximum penalty.
[16] Approximately EUR 163,250 as a maximum penalty.
[17] Article 366-1, which provided for imprisonment as a possible punishment for significantly lower amounts of undeclared assets (starting from 250 SM, i.e. approximately EUR 16,325).
[18] CDL-AD(2020)038, para. 31

Commission emphasises that the penal policy of every State largely depends on the pragmatic assessment of the dangerousness of certain types of behaviour (here, the concealment of assets) and of the deterrent and punitive effect of possible sanctions. It is reasonable that the legislature should regularly review the penal policy in light the changing reality or public perceptions.

27. Even if the draft Law is adopted in its current version, in the opinion of the Venice Commission the Verkhovna Rada would remain within the boundaries set by decision no. 13-r/2020. Thus, a certain category of minor offences would remain decriminalised (in contrast to Article 366-1 declared unconstitutional by the CCU). The sanction of imprisonment for the submission of inaccurate declarations would be possible only if the undeclared amount exceeded 2,000 SM (whereas under the former Article 366-1 the imprisonment could have been applied, at least in theory, to the concealment of much lower amounts, starting from 250 SM).

28. It follows that the proposed draft Law gives due consideration to the concerns expressed by the CCU. One may even argue that the legislature still has a margin of manoeuvre and can increase sanctions further, provided that a category of cases would remain decriminalised or would not be punished with the imprisonment. This scenario will be discussed in the next sub-section.

29. The proposed amendments do not seem to raise any other constitutional issue. As such, the duty of public officials to declare their assets does not seem to interfere with their fundamental rights. The sanctions are now more narrowly tailored to the type and severity of the offence than under the previous Article 366-1.[19] The text of the draft Law is sufficiently clear, and, in addition, the draft Law proposes certain technical amendments (discussed further below) to make the text even more precise. The Venice Commission is therefore of the view that the draft Law in its current form is compliant with decision no. 13-r/2020 of the CCU.

B. Increased liability from the international law perspective

30. The duty of public officials to submit accurate asset declarations exists, in various forms, in many democratic legal orders.[20] In order to be efficient, this legal mechanism has to be accompanied by appropriate sanctions. This follows from the International obligations of Ukraine related to the fight against corruption.[21]

31. In particular, the UN Convention Against Corruption (the UNCAC) provides in Article 8 para. 5 for an obligation of member States to establish measures requiring public officials to make declarations about outside activities, employment, investments, assets and substantial gifts or benefits.[22] Article 52 para. 5 of the UNCAC requires "effective financial disclosure systems for appropriate public officials and […] appropriate sanctions for non-compliance". The Technical Guide to the UNCAC stresses that the duty of public officials to disclose assets and interests should be ensured by the "appropriate" deterrent penalties.[23] Many GRECO reports of the 4th evaluation round emphasise the need to have appropriate sanctions.[24] More specifically on

[19] The CC now distinguishes between the intentional failure to submit a declaration, the knowing submission of an inaccurate declaration, and the qualified offence of submission of an inaccurate declaration concerning particularly high amounts.
[20] For example, amongst other countries, in Belgium, Croatia, Czech Republic, Estonia, France, Latvia, Poland, Moldova, etc.
[21] For example, the UN Convention against Corruption and the Council of Europe's Criminal Law Convention on Corruption.
[22] Available at : https://www.unodc.org/unodc/en/corruption/tools_and_publications/UN-convention-against-corruption.html
[23] Available at: https://www.unodc.org/documents/treaties/UNCAC/Publications/TechnicalGuide/09-84395_Ebook, p. 36
[24] GRECO, 2016, 4th Evaluation Round: Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report for the Czech Republic, p. 24, para. 79, available at

Ukraine, GRECO recommended that "it is critical that the administrative and criminal liability regime applicable to violations of e-declaration rules efficiently reinforce each other, not only in law, but also in practice".[25]

32. What sanctions are "appropriate" depends on a multitude of factors: the category of public officials involved, the amount of undeclared assets, the average income in a country,[26] etc. Such sanctions may be of an administrative, disciplinary or criminal character.[27] For certain categories of public officials (like judges, for example) GRECO recommends that submission of false declarations should be punished by *criminal* sanctions.[28] The OECD Anti-corruption Network for Eastern Europe and Central Asia also recommends criminal sanctions for intentional false or incomplete information about assets of significant value. In many countries submission of false declarations is punished with *imprisonment*.[29]

33. Due to the multitude of situations and legal regimes, it is difficult to arrive at determining a fine or a term of imprisonment that would represent a "European average".[30] An important criterion for establishing an appropriate sanction is the magnitude of the problem of corruption in a given country. According to the Transparency International Corruption Perception Index for 2020, Ukraine occupies an alarmingly high 117th place (out of 180 countries assessed).[31] This may be an argument in favour of increasing the sanctions for corruption-related offences, rather than decreasing them. [32]

34. On the other hand, higher sanctions alone do not solve the problem of corruption. Equally important – and probably more important – is the effective *implementation* of anti-corruption

https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c319b . Additionally, see evaluation reports on 4th evaluation round in regard to Bosnia and Herzegovina (paras 63, 120); Hungary (para 83); Iceland (para 53); Ireland (para 102); Italy (para 159); Malta (para 46); Monaco (para 51); North Macedonia (para 80); Poland (para 163); Portugal (para 66); Russian Federation (para 101); Slovak Republic (para 98); Turkey (para 77).

[25] See https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/168095529a

[26] According to the information provided by the civil society to the rapporteurs, the average salary in Ukraine is about UAH 12,549 (approximately EUR 374), while the salary of a newly appointed judge at the local court is UAH 68,100 (approximately EUR 2,031).

[27] For example, in Poland, if there is no criminal intent to submit false information, a simple failure to submit asset declarations is punishable by a disciplinary sanction (e.g. a warning, a reprimand, a reduction of one's basic salary by no more than 25% for a period not longer than six months and the dismissal or blocking of a promotion for a period of two years).

[28] See GRECO, 2017, Corruption Prevention: Members of Parliament, Judges and Prosecutors. Conclusions and trends, https://rm.coe.int/corruption-prevention-members-of-parliament-judges-and-prosecutors-con/16807638e7 , p. 21.

[29] See the comparative analysis by the Open-ended Intergovernmental Working Group on the Prevention of Corruption, "Asset and interest disclosure systems (article 8, paragraph 5, of the United Nations Convention against Corruption). Background paper prepared by the Secretariat; p. 12-13 (UNODC, 2018): https://bit.ly/3uH3BG1, para. 107.

[30] To give an example (which does not represent a "European average"), the Slovenian Law on Integrity and the Prevention of Corruption provides for a fine of between EUR 400 and EUR 1,200 for the failure to submit a declaration, for the submission of inaccurate information in the declaration, or for the failure to inform the Commission for the Prevention of Corruption about a change in the public officials' assets exceeding EUR 10,000. In France the failure to submit declarations, omitting a substantial part of assets or interests, or providing a false evaluation of assets is punishable by three years of imprisonment and a EUR 45,000 fine (see OECD, 2020, Anti-corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges, 2016-2019; p. 100 https://www.oecd.org/corruption/acn/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2016-2019-ENG.pdf).

[31] The entire ranking is available at: https://www.transparency.org/en/cpi/2020/index/pol

[32] That being said, it is difficult to establish a direct connection between the CPI ranking and the severity of sanctions related to the asset declarations. There are countries with a better CPI ranking which nevertheless retain harsh sanctions for false declarations For example, in Latvia, which is at the more comfortable 42th place in the CPI, false declarations with respect to very high value property or income are punishable by a fine of up to 100 times the minimum monthly wage, community service or up to four years' imprisonment – see GRECO, 2012, Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation report: Latvia, p. 19. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6d36).

legislation. The increase in the level of sanctions will have no effect if corrupt public officials enjoy *de facto* impunity, if appropriate investigative mechanisms are not in place, or bodies prosecuting or adjudicating such cases are not professional, independent, or active enough. The culture of intolerance within the society towards corruption plays an important role as well. So, in parallel with increasing the level of sanctions, the State should keep reinforcing anti-corruption institutions and other mechanism aimed at the eradication of corruption.

35. In its December 2020 opinion, the Venice Commission recommended, in the specific Ukrainian context, that "the sanction of imprisonment should be maintained for the most serious violations" of the duty of public officials to submit asset declarations. According to the draft Law the sanction of imprisonment would be partly reintroduced, even though it would be applicable only if the undeclared amount lies above 2,000 SM (in contrast to 250 SM under former Article 366-1 of the CC).[33] This amendment would be in line with the Venice Commission's earlier recommendation while, at the same time, respecting the judgment of the CCU, in the Commission's view.

36. Indeed, imprisonment, as an isolating punishment, should not be applied automatically. The judge must have a variety of legal tools at his/her disposal and adapt the level of punishment to the gravity of the crime (within the boundaries set in the law). In Poland, for example, courts often apply conditional suspension of a prison sentence in cases related to inaccurate asset declarations. Having the penalty of imprisonment "on the books" may have a useful deterrent effect, even if it is reserved only for the few most serious cases in practice. However, in practice imprisonment may be used as a measure of last resort.

37. In sum, from the international law perspective, national legislatures enjoy considerable discretion in adapting the type and level of sanctions to the local conditions, provided that those sanctions serve as an effective deterrent. In the Ukrainian context, the Venice Commission welcomes that the sanction of imprisonment is reintroduced to the CC for the most serious category of offences related to asset declarations, and that the level of monetary fines is increased.

38. It is regrettable, however, that the proposed increase of sanctions will be applicable only to the next declaration cycle (1st of April 2022). As a result, those officials who failed to submit declarations or included inaccurate information therein would only be liable under the current, milder, provisions, and the positive effect of the increased sanctions may only be felt next year. Due to the principle of non-retroactivity new provisions on criminal liability cannot be applied to the declarations which have already been submitted. At the same time, the principle of non-retroactivity does not prevent the legislator from requiring public officials to submit supplementary asset declarations in line with the new rules later this year (or to confirm the validity of the declaration already submitted). New provisions of the CC could be made applicable to these "supplementary" declarations. An amendment to this end could be made to the LCP together with the amendments to the CC and the COA.

39. Some of the interlocutors argued that the sanctions provided by the draft Law are still insufficient. The Venice Commission acknowledges that a further increase of the level of sanctions for certain categories of most serious offences or for certain categories of offenders (like top officials) cannot be ruled out. However, whether or not a sanction is effective should be determined with reference to the practice, not *in abstracto.* It would therefore seem more appropriate and prudent to adopt the draft Law as proposed and consider taking further steps in this direction once the first results of/feedback on the application of the Law are/is available.

[33] The logic of former Article 366-1 of the CC implied that, in principle, the most severe sanction –imprisonment – would not ordinarily be applied to violations where the undeclared amount was close to the lower threshold for criminal liability. Proposed Article 366-2 excludes even a theoretical possibility of such application of imprisonment unless the undeclared amount reaches the threshold of 2,000 SM.

C. Other aspects of the draft Law

1. Interrelation between administrative and criminal liability

40. The relevant provisions of the CC and the CAO on inaccurate asset declarations are worded almost identically. This creates a risk that an official who failed to submit a declaration or submitted an inaccurate declaration would be punished for the same behaviour twice: once under CAO and again under Article 366-2 or 366-3 of the CC.

41. As regards the offence of submitting a declaration which is "knowingly unreliable" (Article 172-6 part four of the CAO) or "knowingly false" (Article 366-2 of the CC),[34] the distinction between administrative and criminal liability is based on the *amount* which the official has failed to declare. This is a simple and precise criterion, which is unlikely to lead to any controversy concerning the applicable provision. The fact that both codes use the work "knowingly" implies that if the mistake is *bona fide*, no liability arises.

42. It is more difficult to distinguish between criminal and administrative liability as regards *the failure to submit a declaration*. The formulas used by the CC and the CAO are very similar. The CAO speaks of the administrative offence of "untimely submission without good reasons of the declaration" (Article 172-6 part one), whereas the CC speaks of the criminal offence of "intentional failure [to submit] the declaration" (Article 366-3).

43. The Venice Commission understands that to distinguish between those two provisions the circumstances accompanying such behaviour should be taken into account.[35] As explained to the rapporteurs, one-off submission of a declaration after the deadline without good reason can only be punished by an administrative fine, imposed by the NACP. By contrast, a deliberate evasion of this obligation,[36] following a reminder which the NACP sends in cases of belated submission of a declaration[37] may be qualified as a persistent "sabotaging" of the duty to submit an asset declaration, which is a crime investigated by the NABU.[38] The word "intentional" in Article 366-3 of the CC (and absent in Article 172-6 of the CAO) points in this direction. If the CC and the COA are construed in this manner, there is no overlap between them and no risk of double jeopardy.[39]

44. Indeed, there should be circumstances excluding both criminal and administrative liability. For example, a public official should be exempted from liability under Article 172-6 part one of the COA if he or she fails to submit a declaration in time because of a serious illness, or other similar "good reasons" beyond his or her control. Similar circumstances should exempt him/her from criminal liability.

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[34] The Venice Commission understands that those terminological differences are either a problem of translation or immaterial, and that both Codes essentially speak about the same type of action.
[35] See A. Rzepecka Gil, Commentary to the Act on Restrictions on Conduct of Business Activities by Persons Performing Public Functions, Warsaw, 2009.
[36] See: Polish Supreme Court judgment II PK 259/14 of 7 October 2015 (www.sn.pl).
[37] As explained to the rapporteurs, the initial control of the timely submission of declarations in Ukraine is decentralised and conducted by the entities where the declarant works. If an asset declaration was not submitted in time, this entity should inform the NACP which, in turn, notifies the declarant and gives him/her a 10 days' deadline to comply with this obligation.
[38] For instance, the Polish Supreme Court favours the approach of gradation of responsibility, i.e. the appropriate moderation of possible sanctions.
[39] If the administrative sanction can be qualified as criminal in essence, such double punishment may, at least in theory, run contrary to the principle of *non bis in idem*: see the report "From Strasbourg to Luxembourg, a contribution to untangle European case law regarding non bis in idem", https://www.ejtn.eu/PageFiles/18749/TH-2020-01%20PT.pdf

45. The Venice Commission reiterates that while having imprisonment as a sanction under Articles 366-2 and 366-3 may have a useful deterrent effect, in practice the anti-corruption bodies and the courts in Ukraine should apply a gradual approach, in line with the principle of proportionality. Thus, a delay in the submission of a declaration should first be punished under the COA and only if the public official persists in refusing to submit a declaration after a reminder (and there are no "good reasons" justifying a delay) may this behaviour be qualified under Article 366-3. And even in this last case the imprisonment should remain a penalty of last resort, reserved for the most egregious violations.

2. Extension of the prescription period

46. The increase in the level of sanctions, and the re-introduction of imprisonment in Article 366-2 and 366-3 would lead automatically to a slight extension of the prescription period. The new prescription period would be three years from the date of the commission of the offence.[40]

47. From the perspective of the fight against corruption, the extension of the prescription period is in principle a positive development. The rapporteurs heard very different opinions as to whether this new period would be sufficient in practice to obtain a final conviction.[41] Interlocutors from the law enforcement bodies were confident that a three-year period is sufficient to see the culprit convicted, especially given that the cases about false declarations are factually not very complex, once undeclared assets are discovered. Civil society activists argued that even three years may be too short. Undeclared property is often located abroad, and information about this property has to be obtained through the channels of international legal assistance.

48. The Venice Commission observes that the anti-corruption bodies in Ukraine (the NACP and the NABU) are relatively recent and may lack resources and experience. In 2020 their work was perturbed by the pandemic and by the decisions of the CCU. In such circumstances one might argue that a further – exceptional - extension of the prescription period is necessary, in order to help the NACP and the NABU to cope with the influx of cases.[42] However, the Venice Commission prefers not to take a firm stand on this matter. It finds that it might be more prudent to adopt the draft Law as proposed and re-evaluate the length of the prescription period based on practice, in particular, having regard to the possible number of cases which could not reach a final decision due to the prescription period.

3. Categories of officials liable for declaration-related offences

49. The type and the rank of officials subject to the obligation to submit asset declarations varies from country to country, with each model necessarily making a number of compromises in terms of costs and benefits, while the more comprehensive systems cover high-level officials all the

[40] See Article 49 of the CC (unofficial translation): "Exemption from criminal liability due to the expiry of the statute of limitations:

1. A person is exempt from criminal liability if the following terms have passed from the date of committing a criminal offense and until the day the verdict entered into force:

1) two years - in case of criminal misconduct, for which the punishment is less severe than the restriction of liberty;

2) three years - in the case of a criminal offense, for which a penalty in the form of restriction of liberty is provided, or in the case of a serious crime, for which a penalty of imprisonment for a term of not more than two years is provided;

3) five years - in case of committing a serious crime, except in the case provided for in paragraph 2 of this part;

4) ten years - in case of committing a severe crime;

5) fifteen years - in case of committing a particularly severe crime.

[41] In Ukrainian law (see footnote 40) this type of prescription period is calculated until "the day the verdict entered into force", until the entry into force of the decision of the last instance.

[42] This can be done even without increasing the penalties for inaccurate asset declarations, simply by providing in the CC for a special (longer) prescription period for certain types of offences.

way to the lower echelons and their family members.[43] Countries should consider whether the benefits related to broader coverage outweigh the implied costs.[44]

50. The draft Law clarifies the definition of the subjects of administrative offences under Article 172-6 of the CAO.[45] The rapporteurs were explained that those amendments are purely technical and do not redefine the scope of application of this article *ratione personae.*

51. As to the administrative liability for the untimely submission of the declaration (Article 172-6 part one) or for the submission of inaccurate information (Article 172-6 part four), the scope of application *ratione personae* remains largely the same. Administrative liability will be applicable to those officials who are indicated in Article 45 parts one and two of the LPC, part two dealing with former officials who are still under the duty to declare their assets. As explained to the rapporteurs, the reference to Article 3 of the LCP would be removed from the CAO to avoid any ambiguity as to whether former officials can be held liable. The intent of the legislator is to extend this liability to both categories (active and former officials). However, Article 3 of the LCP is still mentioned in the footnote to Article 366-2 and 366-3 of the CC: this should be rectified in order to align the CC with the CAO.

52. Another technical amendment concerns parts two and three of Article 176-2, which establish the offence of failure to notify about foreign bank accounts or about a significant change in property status[46] (part two) and the offence of the repeated failure to submit a declaration in time (part three). The liability under parts two and three will only apply to persons that hold "responsible and especially responsible positions" (middle-level and top officials), as well as persons who hold positions "associated with a high level of corruption risks", as defined by Article 51-3 of the LOP. As explained to the rapporteurs, the duty to declare foreign bank accounts and significant changes in property is regulated in Article 52 of the LCP. Under the LCP, it applies to middle-level and senior officials. Since only a certain category of officials is required to submit such declarations, only they can be held liable under this provision. Thus, this amendment seems to be a technical change which only aligns the COA with the LCP,[47] and is not therefore objectionable.

4. No exception from criminal liability for declaration-related offences

53. The draft Law amends Article 45 of the CC, which provides for the exception from criminal liability for "effective repentance". Articles 366-1 and 366-2 are added to the list of corruption offences which should be prosecuted even in the case of "effective repentance" of the offender.

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[43] Family members of public officials must submit declarations in Albania, Azerbaijan, Georgia, Hungary, Kosovo, Moldova, Russia, Serbia, Slovakia, Turkey, and Ukraine. Some of the States take the obligation even further. For instance, Ukraine requires anti-corruption activists and their contractors to file asset declarations in addition to public officials, whereas Slovenia demands the same from its citizens who hold office in the EU institutions, EU bodies and international institutions to which they have been appointed or elected on the basis of secondments or proposals by the government.

[44] OECD, 2011, Asset Declarations for Public Officials: A Tool to Prevent Corruption, p. 14, https://www.oecd.org/corruption/anti-bribery/47489446.pdf

[45] Currently Article 172-6 provides for the four types of offences:

- "untimely submission without good reasons of the declaration" (Article 172-6 part 1);
- "failure to notify or untimely notification of opening of a foreign currency account in a non-resident bank or of significant changes in property status" (Article 172-6 part 2);
- repeated (within one year) commission of the offence indicated in parts 1 or 2 of this Article (Article 172-6 part 3); and
- "submission of knowingly unreliable information in the declaration" (Article 172-6 part 4).

[46] The duty to declare changes in the property status is distinct from the duty to declare foreign bank accounts.

[47] In addition to the list of middle-level and senior officials described directly in the LCP, the law seems to give the NACP the power to define positions related to a high level of corruption risks (Article 51-3 (1) part two). For the sake of legal certainty, it would be better if the list of those positions was described in the law itself rather than in a bylaw.

This is a positive change since it creates an additional incentive for public officials to submit declarations in time and include accurate information therein.

54. Some of the interlocutors argued that violations related to asset declaration should not be seen as corruption offences, since inaccurate or untimely declaration of assets may have other reasons than corrupt behaviour. This may be true in some cases, but this does not prevent the legislator from associating this category of offences with the phenomenon of corruption and attaching to this offences specific rules regarding "effective repentance", prescription periods, or the competency of the special anti-corruption bodies to investigate, prosecute and adjudicate those crimes.[48]

IV. Conclusion

55. At the request of the Speaker of the Verkhovna Rada, the Venice Commission has examined the draft Law amending certain provisions of the Code of Administrative Offences (the COA) and the Criminal Code (the CC) of Ukraine regarding the liability of public officials for inaccurate asset declaration (no. 4651 of 27 January 2021, the "draft Law").

56. In October 2020 the Constitutional Court of Ukraine adopted the controversial decision no. 13-r/2020. This decision *inter alia* invalidated Article 366-1 of the CC which dealt with inaccurate asset declarations by public officials and the failure to submit such declarations. As a result, all criminal cases relating to asset declarations had to be dropped. In its December 2020 opinion the Venice Commission criticised decision no. 13-r/2020 as poorly reasoned and adopted in breach of the Court's own procedures. Nevertheless, the Venice Commission recognised that despite these flaws the decision had to be implemented.

57. In December 2020 the Verkhovna Rada adopted Law no. 1074-IX, which replaced Article 366-1 with two new provisions: Articles 366-2 and 366-3. Thus, criminal liability for inaccurate asset declarations and failure to declare was restored. However, the new sanctions provided for those offences were widely criticised as being too mild.

58. To remedy it, in January 2021 President Zelenskyy proposed to increase the liability for failure of public officials to submit accurate asset declarations, and to lower the threshold which separates medium level cases from most serious cases. Under the draft Law, monetary fines would be increased, and, most importantly, the penalty of imprisonment for up to two years would be reintroduced to the CC for the category of most serious cases.

59. The Constitutional Court of Ukraine argued that former Article 366-1 of the CC established disproportionate sanctions. However, decision no. 13-r/2020 was so imprecise that it gave the legislature considerable leeway in addressing the issue of proportionality. The draft Law maintains a certain category of offences decriminalised (if compared with former Article 366-1), and reserves imprisonment as a sanction for the most serious cases only. Thus, in the opinion of the Venice Commission the draft Law does not contradict the decision of the Constitutional Court.

60. The draft Law is also in line with the international obligations of Ukraine. International law requires that a system of asset declarations should be in place and that it should be supported by appropriate deterrent penalties. While it is difficult to determine a monetary fine or a term of imprisonment which would represent a "European average" in such cases, re-introducing imprisonment for the most serious offences seems to be a sensible move, especially given the magnitude of the problem of corruption in the country. It is also in compliance with the Venice Commission's previous recommendations to this end.

[48] The Venice Commission understands that cases falling under Articles 366-2 and 366-3 will be investigated by the NABU.

61. Increasing the sanctions may be necessary, but it is not sufficient, if the anti-corruption institutions are not functioning properly. The Venice Commission encourages the Ukrainian authorities to keep reinforcing these institutions and mechanisms.

62. The draft Law makes several other, more technical amendments to the text of the CAO and the CC. In particular, it specifies that a person who committed the offences provided by Articles 366-2 and 366-3 of the CC will not be able to escape criminal liability by invoking "effective repentance". Moreover, after the re-introduction of imprisonment as a sanction for these offences, the prescription period will be extended to three years. The Venice Commission welcomes these proposed changes.

63. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.