

## MEMORANDUM

**Re: Implications of the recently adopted Amendments to the Law “On prevention of Corruption” on NGO anti-corruption activities**

**From:** Pact Inc

**To:** Interested parties

**Date:** April 5, 2017

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### Background

On March 23, the Verkhovna Rada of Ukraine approved in its entirety presidential bill No. 6172 “On Amendments to Article 3 of the Law of Ukraine ‘On Prevention of Corruption.’” On March 27, President Petro Poroshenko signed the bill (1975-VIII), despite the negative resonance it had among civil society and the international donor community.

In the initial version submitted by the president, the core of the draft law was to provide an exemption for contracted military servicemen and mobilized soldiers from obligations to file electronic declarations of assets. The logic was to avoid servicemen’s non-compliance with (and subsequent criminal liability for) the legislation on submitting asset declarations for those who are protecting the country from military aggression. The authors emphasized that, in general, military servicemen would not be able to submit their asset declarations on time (or even at all) due to several barriers, such as the necessity to be present in person for some preparatory steps (e.g., applying for e-signature); the significant amount of time required to comply, which would be better spent on military trainings; the lack of necessary computer equipment in their locations; and the lack of access to secure Internet networks. The justifications seem reasonable, although it is also arguable that the categories of active military personnel should not have been included in the initial version of the e-declaration law, adopted in October 2014.

The Presidential draft law was modified during Parliament session discussion. An additional amendment was proposed by MP Tetyana Chornovil (People’s Front), requiring electronic declarations in the form envisaged for state public officials to be submitted by representatives of anti-corruption non-governmental organizations. Chornovil’s amendment was not supported by the Rada Committee on Prevention and Combating Corruption, but was nonetheless approved by vote of the Parliament. Initially, Ms. Chornovil wanted to expand the law to also include owners and editors-in-chief of mass media, but eventually she withdrew that clause.

The end result was that the Law of Ukraine “On Prevention of Corruption”<sup>1</sup> was expanded to include the following categories:

*Persons who are members of:*

- the supervisory board of a state bank, state enterprise or state organization that aims to profit (even if such persons are not considered officials of legal entities of public law);
- selection commissions established under the Law of Ukraine “On Civil Service” and the Law of Ukraine “On Service in Local Government;”

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<sup>1</sup> <https://nazk.gov.ua/news/do-uvagy-subyektiv-deklaruvannya-shchodo-zu-no-1975-viii-pro-vnesennya-zmin-do-deyakh-zakoniv>

- the Public Council for Integrity established under the Law of Ukraine “On the Judicial System and the Status of Judges;”
- public councils, boards of public control formed in state entities and involved in the decision-making process on staffing, development, monitoring and evaluation of anti-corruption programs.

*Individuals who:*

- receive funds or assets from technical assistance projects or programs implemented in Ukraine which are focused on prevention of and combating corruption; funds/assets can be received directly, through third parties or by any other means provided by the program or project;
- perform work or provide services in the sphere of anti-corruption policy, monitoring of anti-corruption policy, and/or preparation of anti-corruption policy proposals;
- are heads or members of the governing bodies of public associations and other companies, if such:
  - carries out activities related to prevention of or combating corruption; implements standards in anti-corruption policy; monitors anti-corruption policy; prepares proposals on anti-corruption policy; and/or,
  - participates or is involved in activities related to prevention of and combating corruption.

These persons will be required to submit e-declarations in 2018 for the period March 30 – December 31, 2017. All other provisions of the law go into effect immediately, including the requirement to report any bank accounts opened abroad.

### **Local and international reaction**

There was immediate negative reaction from the leading anti-corruption civil society organizations (CSOs), who accused the state of applying undue pressure and attempting to jeopardize the future of anti-corruption reform in the country. Civil society was supported by the EU Delegation and Embassies of the U.S., Great Britain and Canada. Leading CSO leaders appealed to President Poroshenko to not sign the law and to return it to Parliament for revision. Ultimately, Poroshenko signed the law, citing the necessity of protecting thousands of military servicemen from potential administrative and criminal liability for violating the law. At the same time, Poroshenko suggested creating a special working group to develop amendments to mitigate risks for CSOs and the reform agenda.

On April 3, the Reanimation Package of Reforms (RPR), which includes representatives of the most influential CSOs, issued a joint statement<sup>2</sup> of anti-corruption experts with the following main positions:

- The amendments are discriminatory, as they relate only to anti-corruption CSOs or activities, but not other spheres.
- After the president signed the amendments, entrepreneurs all over Ukraine began, under one pretext or another, to refuse to provide spaces for events organized by NGOs, to print booklets, to rent offices or to provide other services to NGOs. This is true not only for organizations whose statutes include the goal of combating corruption.
- Activists who are not public servants are made equal to persons authorized to perform the functions of the state or local self-government.
- No other country in the world has a practice of requiring NGO representatives, in general or working in some specialized category (anti-corruption, human rights, etc.), to submit property declarations mandatory for civil servants.<sup>3</sup>
- RPR experts consider the amendments to be politicians’ revenge against civic activists and an attack by authorities on the third sector.

<sup>2</sup> <http://rpr.org.ua/en/news/rpr-experts-demand-that-discriminatory-amendments-concerning-e-declaration-are-cancelled-and-the-attack-on-the-civil-sector-is-stopped/>

<sup>3</sup> Pact Inc. has not verified the accuracy of this statement.

- Poroshenko's proposal to establish a working group to fix the provisions of the new law is not considered a proper solution by leading anti-corruption CSOs.
- RPR experts demand that the president and MPs immediately initiate cancellation of the discriminatory amendments and stop attacking the civic sector.

### **Similar “bad practices” in Europe and former Soviet countries**

The amendments to the Law of Ukraine “On Prevention of Corruption” fit into the recent global trend of government interference into the activities and administration of NGOs. This has come to be known as “the closing space for civil society.”<sup>4</sup> According to the International Center for Not-For-Profit Law, since 2012 more than 60 countries have passed or drafted laws that curtail the activity of non-governmental and civil society organizations<sup>5</sup>.

Meddling in financial issues of NGO activities is a widespread method by governments to set tighter control over civil society activism. While Ukrainian amendments do not directly impose any restrictions on NGO funding, they produce additional obligations for disclosure of origin and use of money. This practice resembles legislation in some other nations across eastern Europe. In his recently published agenda for 2017, Hungary's prime minister Viktor Orban announced plans for CSO leaders to declare their personal assets, continuing measures to further suppress a sector that has already been restricted under Orban's leadership after a blacklisting of certain domestic organizations in receipt of foreign funding.

In Belarus, access to foreign funding is highly limited. In 2011, changes to legislation were adopted which introduced criminal responsibility for violating the procedure for receiving foreign grants. In Kazakhstan, a law regulating the notification of receipt of foreign funds was adopted in 2016. It requires all entities and individuals receiving assets from foreign sources to inform the local tax authorities about such receipt of foreign assets. They also need to report on the use of such assets. Rules for providing information by NGOs, approved in 2015, imposed vast information requirements upon all civil society organizations, including the submission of sensitive data on employees (these rules were revised after NGOs spoke out strongly against them).

In Russia, “Federal law introducing amendments to certain legislative acts of the Russian Federation regarding the regulation of activities of non-commercial organizations performing the function of foreign agents” was adopted in 2012. This law requires NGOs funded (even in part) by foreign donors to register as an organization “carrying functions of a foreign agent,” if they intend to conduct political activities. In practice, “authorities have defined political activity so broadly as to ensure government control over just about any organized activity relating to public life.”<sup>6</sup>

In 2014, changes to Azerbaijan's legislation were adopted which introduced new rules on receiving and using grants and reporting to the government. In 2015, new rules were introduced requiring foreign donors to obtain approval from the government to provide grants to Azerbaijani NGOs.

Except for direct control of foreign cash inflow to NGOs, legislation in other eastern European nations shares the same broader implication with the recent Ukrainian amendments: they provide additional tools to governments to influence NGOs and to control their activities. These pieces of legislation all contain vague definitions, leaving ample space for interpretation by authorities; are extremely punitive, imposing high fines and criminal penalties for even minor violations; and jeopardize the independence of NGOs and civil associations.

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<sup>4</sup> <http://carnegieendowment.org/2014/02/20/closing-space-democracy-and-human-rights-support-under-fire-pub-54503>

<sup>5</sup> <https://www.cafonline.org/docs/default-source/about-us-policy-and-campaigns/updated-do-as-i-say-not-as-i-do-january-2017>

<sup>6</sup> <https://www.hrw.org/news/2013/06/25/russia-harsh-toll-foreign-agents-law>

## Possible risks and implications

Any law that requires excessive information about NGO activities and extends government audits and checks of CSOs represents control that makes it difficult for groups to advocate for human rights and anti-corruption activities. Restrictive measures may be both formal, in the form of legislation directly prohibiting (or limiting) NGO activities, and informal, including harassment, intimidation, and bureaucratic burdens. As a restrictive measure, the recent amendments to Ukrainian law mostly fit into the second category, as they may create grounds for extensive additional checks. Furthermore, the vague language of the amendments leaves significant room for subjective interpretation, and thus more opportunity for government meddling.

The amendments also contradict provisions by the Council of Europe (CoE) on the legal status of non-governmental organizations, namely those that state all reporting is to be done with respect of the rights of donors, beneficiaries, and staff, as well as the right to protect legitimate business confidentiality. CoE also insist that no external intervention in the running of NGOs should take place unless a serious breach of the legal requirements applicable to NGOs has been established or is reasonably believed to be imminent<sup>7</sup>.

On April 6, the European Parliament voted to approve visa liberalization for Ukraine. Successful implementation of the anti-corruption agenda by Ukraine was one of the criteria set in the EU-Ukraine Visa Liberalization Action Plan (VLAP). According to European Regulation N 539/2001, “the continuous fulfilment by Ukraine of [VLAP] criteria, especially on the fight against organized crime and corruption, will be dully monitored by the Commission.”<sup>8</sup> If the Commission finds that Ukraine is not fulfilling VLAP criteria, visa-free travel could be temporarily suspended<sup>9</sup>. Although regulation of CSO anti-corruption activity is not mentioned in the VLAP, the EU’s strong reaction against the amendments described above could negatively impact the Commission’s future evaluation of Ukraine.

Finally, the amendments to the law coincide with the model described by scholars as “challenge of credibility,” when the authorities try to undermine the credibility of NGOs by arguing that it is the “same corrupted,” and by so doing NGOs’ voices in public policy discourse can be effectively silenced<sup>10</sup>. Challenging credibility may include denying the value of information or denying the relevance of policy advice as released by an NGO. It also suggests that NGOs are motivated by their own aspirations to garner state power or financial betterment. This is so effective, in fact, that no one has openly discussed one more serious issue, but which was expressed off-the-record. Leading Ukrainian anti-corruption CSOs usually receive relatively high salaries, which can be significantly higher than the average salary for peers working in the regions, and which are not comparable at all with the low income of ordinary citizens. Disclosure of such information may lead to loss of trust in anti-corruption activists and significantly harm reform.

The amendments risk creating the situation in which CSOs are demotivated to participate in any anti-corruption activities, including even civic education. While this may be an unintended consequence of measures to restrict civil society advocacy, it is important to acknowledge that creating an environment in which organizations feel silenced is likely to lead to negative outcomes for democratic development of the state.

External actors must continue advocating against these restrictions. Without a concerted and sustained push back, the space for a free and open civil society, and with it democracy’s prospects in Ukraine, is likely to shrink even further.

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<sup>7</sup>[https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2007\)14E\\_Legal%20status%20of%20NGOs.pdf](https://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2007)14E_Legal%20status%20of%20NGOs.pdf)

<sup>8</sup> <http://www.eurointegration.com.ua/files/4/b/4bca8bf-ua.pdf>

<sup>9</sup> <http://www.eurointegration.com.ua/files/2/f/2f976f1-coreper.pdf>

<sup>10</sup> NGO Accountability. Politics, Principles and Innovations. Edited by Lisa Jordan and Peter van Tuijl. London; Sterling, VA, 2006. p7