



EUACI

EUROPEAN UNION
ANTI-CORRUPTION
INITIATIVE

MANAGING CONFLICT OF INTEREST IN UKRAINE AND THE NATIONAL AGENCY ON CORRUPTION PREVENTION (NACP)

SUMMARY AND RECOMMENDATIONS

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MINISTRY OF FOREIGN AFFAIRS
OF DENMARK
Danida

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1. SUMMARY

1.1. MAIN FINDINGS

The conflict-of-interest framework of Ukraine is generally comprehensive and in line with international standards. If implemented well, the Law “On Prevention of Corruption” (LPC) and other related legal acts can become powerful tools for the prevention of inappropriate influence by private interest on the work of the public sector. The main strengths of the framework include:

- strict incompatibilities, which reduce risks of conflicts of interest related to outside activities of public officials;
- detailed default procedures for resolving conflicts of interest with a number of options of solutions that reflect the need to settle the conflicts with due consideration for the circumstances of any given situation;
- rules and guidance for legal persons (companies) that impose the basic standards while allowing them due flexibility in adopting the most appropriate solutions; many of these solutions are suggested in methodological materials developed by the National Agency on Corruption Prevention (NACP).

The LPC is a relatively new law and the adoption of anti-corruption norms often takes place amidst tense political controversies in Ukraine as often also in other countries. Therefore it is understandable why several elements of the framework still require further improvement:

- rules in the law for managers of state-owned enterprises (SOEs) are too relaxed in light of the grave corruption risks that such enterprises often face (by law, they are even allowed to own companies that operate in related sectors, and companies, from which the managers of the SOEs or their families profit, may do business with the same SOEs);
- rules for the resolution of conflicts of interest are too discretionary or permissive for certain categories of public officials, such as for heads of central executive authorities who are not members of the Cabinet of Ministers, or for members of local and regional councils;
- the mechanism of the transfer of the management of enterprises and equity rights has important flaws that nearly eliminate its usefulness for the prevention of conflicts of interest.

Being responsible for the general monitoring and control in the area of the conflict of interest, since the formal inception of its work in August 2016, the NACP has made important efforts for the implementation of the legal framework:

- systematic verifications and monitoring with the use of creative work methods within the boundaries of the law serve as a disciplining factor for public officials who are subject to conflict-of-interest regulation;
- guiding, advisory and educational activities of the NACP aim to turn the conflict-of-interest provisions of the LPC from abstract imperatives into well-understood and practically useful tools that facilitate the work of institutions in the public interest.

Still, in many ways, the implementation efforts should be improved. Some of these improvements are within the powers of the NACP, some are within the powers of other institutions, and for some – efforts of both the NACP and other institutions are needed. Several of these needs could be well served by further international technical assistance:

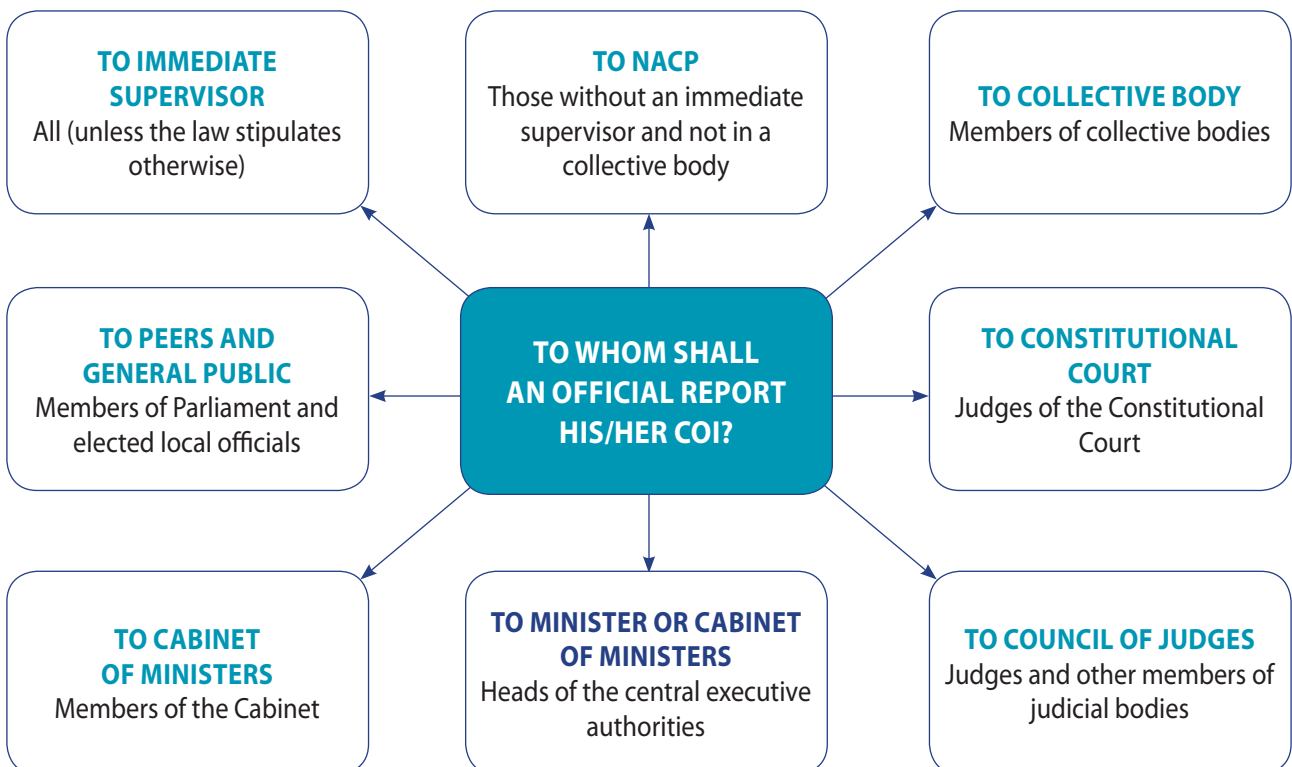
- the NACP should find ways to improve the user-friendliness and didactical appearance of its guidance materials and further develop channels of communication with public officials who want to learn how to better apply the rules;

- the NACP should further improve the internal work organization and in particular introduce an electronic case management system that would reduce practical inefficiencies, strengthen the internal transparency and accountability;
- the NACP and other institutions should, in the most constructive manner, co-operate in order to facilitate access to all databases, registers and official documents necessary for monitoring and verifications since in this area considerable obstacles and inefficiencies remain;
- the court practice in conflict-of-interest cases should be monitored and harmonized to correctly apply relevant legal principles and provisions; while it goes beyond the scope of this Report to assess the share of responsibility of all stakeholders involved, it is nonetheless important to note that courts reject an extremely high rate of NACP administrative cases (nearly all cases are rejected according to interviews);
- the work of anti-corruption focal points (authorized units or persons) should be strengthened by, among other things, providing comprehensive recommendations that specify the methods and routines of their work with regard to the prevention and management of conflicts of interest, and by trainings including exercises, simulated scenarios and similar interactive tools.

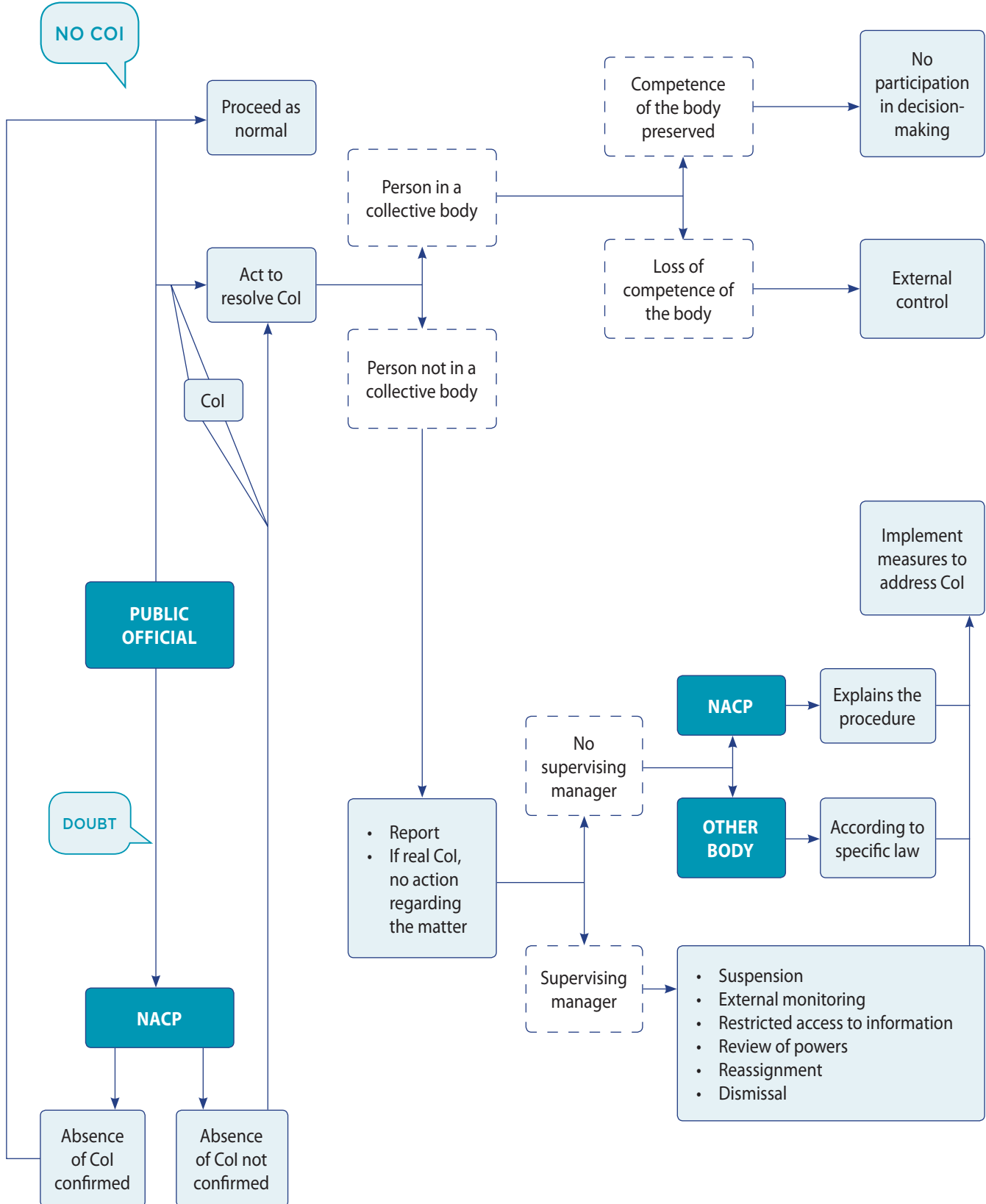
As a general conclusion, it is also important to emphasise that the NACP itself must manage any possible conflicts of interest among its members and employees in a consistent and transparent manner should such conflicts arise.

Specific issues that could be improved are documented in 63 recommendations throughout this Report.

1.2. FLOW-CHARTS



PROCEDURE FOR COI RESOLUTION



1.3. STATISTICS

QUANTITATIVE RESULTS OF THE OVERSIGHT BY THE NACP RELATED TO CONFLICTS OF INTEREST

(ANNUAL REPORT OF THE NACP FOR THE YEAR 2017)

DECLARATIONS	TOTAL
NUMBER OF ADMINISTRATIVE PROTOCOLS	159
Unresolved conflict of interest (Article 172-7 of the CAO)	147
Violations of incompatibilities (Article 172-4)	7
Failure to fulfil the NACP requests (Article 188-46)	4
Violations in accepting gifts (Article 172-5)	1
Protocols on people's deputies	5
Protocols on deputies of local councils	92
Protocols on heads and deputies of local bodies	22
Protocols on officials of legal persons of public law	17
Protocols on civil servants	13
Protocols on judges	3
Protocols on officials of the police and public prosecution	2
Protocol on the former deputy Minister of Justice	1
Protocol on the Head of the National Anti-corruption Bureau of Ukraine	1
Others	Not specified
TOTAL AMOUNT OF FINES (ONLY ACTUALLY APPLIED FINES OF 17 "SUCCESSFUL" ADMINISTRATIVE PROTOCOLS ARE COUNTED HERE)	UAH 35,700 (approx. EUR 1,100)
EXPLANATIONS PROVIDED BY THE NACP (INCLUDING IN RELATION TO THE CONFLICT OF INTEREST)	1,624 (1,081)
PERSONS WHO REGISTERED AND TESTED ON-LINE THEIR KNOWLEDGE OF THE PROVISIONS OF THE LPC	3,111
PARTICIPANTS OF AN ON-LINE COURSE ON COI (AS OF THE END 2017)	12,000
NOTIFICATIONS (SUBMISSIONS, COMPLAINTS) RECEIVED	1,577
The collection of data started and continues	530
No signs of a violation / not the competence of the NACP	657
Facts not established	144
Sent to the National Police	246
PROPORTION OF NOTIFICATIONS BY STATE AUTHORITIES (SOURCE: INTERVIEW)	Approx. 20%
PROPORTION OF ANONYMOUS NOTIFICATIONS (SOURCE: INTERVIEW)	At least 30%
MONITORING ACTIVITIES	1,545
On own initiative	1,153
Upon submissions	392
CONFLICT-OF-INTEREST VERIFICATIONS AS PART OF THE FULL VERIFICATION OF DECLARATIONS (AT THE END OF YEAR COMPLETED/CONTINUING)	360/131
BINDING WARRANTS BY THE NACP TO ELIMINATE VIOLATIONS AND RESPONSES	29
Implemented	12
Under implementation	17

2. RECOMMENDATIONS

2.1. REGULATORY FRAMEWORK (RECOMMENDATIONS 1-28)

Recommendation 1: Consider redefining the real conflict of interest as an influence or possible influence of a private interest on the impartial and objective performance of official duties without contradiction as a necessary element.

Recommendation 2: Consider introducing the concept of an apparent conflict of interest in the LPC along the lines of the Paragraph 12 of the OECD Guidelines for Managing Conflict of Interest in the Public Service.

Recommendation 3: The LPC should be amended to at least make sure that, for the purpose of Art. 36, the status of a person as a family member is not linked to whether he/she lives together with or separately from the official (see also Recommendation 13 regarding the transfer of corporate rights).

Recommendation 4: Provide a time period for how long a public official may not make decisions in favour of a person who has given to the official or to his/her close person a gift. A reasonable period could be two or three years.

Recommendation 5: In guidance materials, emphasise the message that generally permissible additional paid activities can still cause conflicts of interest and in such cases the conflicts must be resolved strictly according to the law.

Recommendation 6: Extend the application of restrictions on other part-time activities (Art. 25 of the LPC) to certain categories of persons who are equated to persons authorized to perform the functions of the state or local self-government, notably, in state and municipal enterprises.

Recommendation 7: Consider introducing restrictions for public officials representing the state in a state-owned company on receiving financial or non-financial benefit from the said business organization or its subsidiary companies, or acquire capital shares, stocks or property of the business organization.

Recommendation 8: Consider possibilities to redefine post-employment restrictions in order to apply them whenever the new activities or employment relates directly to the functions held or supervised by the public official during his/her tenure or otherwise constitute a conflict of interest, including when the official had a specific and decisive role in preparing or adopting regulatory standards that substantially affected specific business interests of the new employer.

Recommendation 9: Introduce an obligation to notify the superior when an official is offered a new employment or business transaction unless he/she immediately declined it. The notification shall not release from compliance with the general post-employment restrictions.

Recommendation 10: At least for a year since the termination of official duties, a public official should be prohibited from entering into contracts directly or indirectly (e.g. through a legal entity) with the public organisation where

the public official held office. This restriction would not apply to new employment contracts between the former official and the same public organisation or to standard transactions where the former official is a regular client of the public organisation.

Recommendation 11: Extend the application of post-employment restrictions (Art. 26 of the LPC) to certain categories of persons who are equated to persons authorized to perform the functions of the state or local self-government, notably, in state and municipal enterprises.

Recommendation 12: Consider extending the scope of persons subject to the restrictions of joint work with close persons.

Recommendation 13: Introduce stricter rules for the prevention of a conflict of interest in the transfer arrangements by prohibiting such transfer to any person who is personally related to the public official. In principle the trustee shall be independent from the trustor.

Recommendation 14: In order to strengthen the transfer arrangements under the current legal framework, the NACP should draft and publish a recommendatory model contract of asset management, which would include provisions against giving instructions to the trustee and guarantees for the independence of the trustee. Consider amending legislation in order to make certain provisions of such model contract mandatory.

Recommendation 15: Prohibit the enterprises and other legal persons, which are fully or partially under the control of the public official or his/her family members (or from which the official or his her family members receive substantial financial benefit) to enter into contracts with the public institution where the public official holds office or held during the last 12 months, which are not related to the office/employment or to standard consumer transactions.

Recommendation 16: The NACP should help persons who are subject to the duty to transfer corporate rights by issuing guidance about what conditions need to be fulfilled in principle in order that an arrangement concluded in a foreign country under its law satisfied the requirements of the LPC.

Recommendation 17: Consider limiting incompatibilities of the authorized persons of legal persons to public positions and those activities that cause real conflicts of interest. Potential conflicts of interest should be managed in order to prevent their turning into actual conflicts of interest.

Recommendation 18: Consider introducing an option to stay in the position of an authorized person if it is possible to terminate the incompatible activity.

Recommendation 19: Clarify in the LPC or the Methodological Recommendations on Col whether the official, after having reported the conflict of interest to the superior, is still expected to take any measures to address the conflict of interest on his/her own.

Recommendation 20: Consider more clearly integrating the standard procedure for the resolution of a conflict of interest with the procedure for seeking a clarification in the LPC.

Recommendation 21: Clarify the compatibility of the default procedure for the resolution of a conflict of interest (starting with a report no later than on the next business day) and the independent resolution, which may take longer time. For example, a public official could notify the manager about his/her intention to resolve the conflict independently, in which case the manager would suspend the final resolution for a set number of days.

Recommendation 22: With due regard to possible risks, consider a separate procedure for the resolution of a potential conflict of interest whose turning into a real conflict of interest is relatively unlikely. Reporting such a conflict and staying alert to the possibility of it turning into a real conflict can be a reasonable and fully legitimate solution in some cases.

Recommendation 23: Consider a possibility to transfer a public official to a different state body upon his/her consent if no other method for the resolution of the conflict of interest is possible.

Recommendation 24: Introduce the concept of a de-minimis conflict of interest and respective criteria, in which case the superior manager of the public official or other competent body may allow him/her to proceed normally with the fulfilment of his/her duties regardless of the conflict of interest.

Recommendation 25: Consider defining the types of private interests that do not give rise to conflicts of interest in parliamentary proceedings, for example, if the matter in question is of general application, affects the Member or the other person as one of a broad class of the public, consists of being a party to a legal action relating to actions of the Member as a Member of Parliament, or concerns the remuneration or benefits of all Members as provided under law (see Art. 19 of the Legislative Toolkit on Conflict of Interest of the Council of Europe).

Recommendation 26: Define the types of private interests that do not give rise to conflicts of interest in the proceedings of the Cabinet of Ministers, for example, if the matter in question is of general application, affects the Member as one of a broad class of the public, consists of being a party to a legal action relating to actions of the Member as a Member of the Cabinet of Ministers, or concerns the remuneration or benefits of all Members as provided under law (see the Legislative Toolkit on Conflict of Interest of the Council of Europe).

Recommendation 27: Adopt a more detailed procedure for the resolution of conflicts of interest of managers of central executive bodies, who are not part of the Cabinet of Ministers. The procedure should list methods for resolving the conflict of interest such as external control of the activity of the manager, transfer of the manager to a different position, etc.

Recommendation 28: With due regard for the need to maintain the decision-making capability of self-governments, consider possibilities to strengthen the conflict-of-interest framework for elected officials of local and regional self-governments in decision-making of local and regional councils. At least non-participation in voting in the councils on decisions that allocate specific targeted benefits to the particular officials could be required.

2.2. OVERSIGHT (RECOMMENDATIONS 29-48)

Recommendation 29: Consider possibilities to extend the scope of the categories of public officials with regard to whose actions the NACP can issue binding requirements (warrants).

Recommendation 30: In order to focus the effort towards officials who have more likely committed violations, in the long term the monitoring activity should be based to a larger degree on a risk-based approach. One risk criterion could be above average informal (including media reports and research) and formal (detected corruption offences, complaints) indications of corruption in particular institutions or by particular senior officials.

Recommendation 31: Consider introducing a requirement to name in the declaration close persons who are not family members.

Recommendation 32: Include the names of the counterparties of transactions in the declaration along with the other data.

Recommendation 33: Amend the procedure for the detailed audit as necessary and develop a component within the detailed audit to verify conflicts of interest in the full sense, including a review of a selection of decision-making processes where the declarant participated.

Recommendation 34: Abolish the absolute deadlines for detailed audit as they not only obstruct auditing of financial data but also cause inefficiency in the area of conflict-of-interest control.

Recommendation 35: The NACP employees who carry out conflict-of-interest verifications should have access to the full version of the declarations and ideally also other confidential data from their workstations, which should be appropriately secured. If it is not possible temporarily, the Col Department at least should have its own “secret data room” for access to confidential data in order to reduce time spent.

Recommendation 36: Ideally the interaction with registers should be made easier by allowing one-click requests regarding all information related to a particular person in the whole register. Since changes in the registers are beyond control of the NACP, the NACP could consider developing software that carries out multiple requests regarding a single person automatically. For this, the NACP should be allowed access with automated software.

Recommendation 37: State stakeholders and courts should consider the legal provisions regarding the rights of the NACP to access information beyond narrow grammatical interpretation and focus, among other things, on the purpose of the law.

Recommendation 38: Consider changing the applicable procedures and require that information retrieved from a state register shall be certified by the institution that holds the register only when the defendant challenges it and claims that the particular information is wrongly represented.

Recommendation 39: The Col Department should be provided with sufficient professional IT support as necessary in order to facilitate the development of new software tools for the monitoring and verification.

Recommendation 40: Join the current process of adopting the international agreement on data exchange, as endorsed by a 2017 European Union summit.

Recommendation 41: The didactical appearance of the Methodological Recommendations should be upgraded with:

- a brief and reader-friendly summary of the most important provisions with flow charts and rules of thumb,
- visually more emphasised structure in long texts with highlighted key messages on each page, boxes and illustrations,
- a table of content with page numbers,
- numbered paragraphs,
- even more examples plus references to relevant case law,
- where possible, less legalistic language, etc.

Recommendation 42: Create, publish and disseminate short videos and/or similar aides that explain the most important provisions, rules of thumb and key messages.

Recommendation 43: Consider developing a checklist, which would help a person in determining specifically the impact of the private interests.

Recommendation 44: Develop an indexed searchable on-line database of the NACP opinions on conflicts of interest (those could be anonymized protocols or extracts thereof) and – possibly in long-term perspective – court case law.

Recommendation 45: Consider creating an on-line based swift consultation service. Even though the answers provided through such a consultation service might not carry legal consequences, for ensuring quick and high-quality responses, it would be important that a few highly-qualified staff members are made available for servicing the requests. A chatbot could be developed to alleviate the workload of providing consultations.

Recommendation 46: Further develop tools that help informants assess whether their information can be used by the NACP and in what form to provide it in order to make it as useful as possible. Easily comprehensible information on what to report and what not to report to the NACP should be a part of future communication campaigns.

Recommendation 47: The didactical appearance of the Guidelines for legal persons should be upgraded with a table of content with page numbers, illustrations, flow charts, examples, key takeaways, etc.

Recommendation 48: Approve recommendations that would specify the methods and routines that authorized units (persons) should use in fulfilling their mandate.

2.3. SANCTIONS AND OTHER CONSEQUENCES (RECOMMENDATIONS 49-58)

Recommendation 49: Increase the maximum level of fines for the violation of requirements for prevention and resolution of a conflict of interest.

Recommendation 50: Consider possibilities to introduce administrative sanctions for a failure to report a potential conflict of interest in a way that would not entail a ban on office for a first-time violation.

Recommendation 51: Introduce administrative sanctions for violations of post-employment restrictions.

Recommendation 52: Statutes of limitations for administrative offences need to be substantially extended, at least in corruption-related cases and particularly regarding the period since detection.

Recommendation 53: The CAO needs to be changed to allow for easier serving of protocols at least in cases where the defendant is a public official. Statutes of limitations should be suspended in case the public official is not receiving mail at work. Refusing to sign receipt of a protocol should be a disciplinary offence. In principle, the NACP should have the obligation to ensure an adequate opportunity for the defendant to acquaint him/herself with the protocol rather than ensure that this opportunity is actually used.

Recommendation 54: It is urgently necessary to further explore reasons why the conviction rate is so low in conflict-of interest cases, which the NACP forwards to courts, and undertake steps to improve the situation.

Recommendation 55: In order to better inform the public about the work of the NACP, consider publishing brief summaries of the subject matter of cases.

Recommendation 56: Statutes of limitations for disciplinary offences need to be substantially expanded.

Recommendation 57: Define as an administrative offence a failure of a manager of a state authority to resolve a conflict of interest of his/her subordinate according to the law.

Recommendation 58: Consider defining criteria when the loss of the right to be in the civil service would not apply. These could be, for example, incompatibilities that did not cause a real or potential conflict of interest and provided the defendant only with income below a set threshold and violations of restrictions with regard to the acceptance of gifts of value below a set threshold.

2.4. INSTITUTIONAL CAPACITY OF THE COI DEPARTMENT (RECOMMENDATIONS 59-63)

Recommendation 59: Set up regional units of the NACP in order to facilitate the full use of the rights of the authorised persons of the NACP such as free entry to the premises of government authorities, authorities of the Autonomous Republic of Crimea, local self-government authorities and access documents or other materials as may be necessary for carrying out inspection.

Recommendation 60: Cases should be assigned to authorised persons based on objective, strict criteria similar to discretion-free case allocation in court.

Recommendation 61: Introduce an electronic case management system in the Col Department.

Recommendation 62: The further efforts to fill vacancies should focus, among other things, on enhancing the capacity to carry out monitoring.

Recommendation 63: Monitor developments in the pay levels and adjust as necessary in order to ensure that the conditions in the NACP remain competitive.

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