RISKS AND THREATS TO CIVIL SOCIETY ORGANIZATIONS FROM THE CONSEQUENCES OF THE ADOPTION OF THE LAW ON LOBBYING

The process of preparing a legislative initiative and criticism from civil society organizations and the expert community

On February 23, 2024, the Verkhovna Rada of Ukraine adopted **the Bill on Fair Lobbying** No. 10337, in its 2nd reading, with 236 votes in favor. Compared to the vote in the 1st reading (309 votes in favor), support for the law had dropped significantly. The Law "On Lobbying" entered into force on 14 March 2024 under No. 3606-IX with a deferred entry into force no later than 1 January 2025 (or two months after the start of the Transparency Register). The process of initiating and finalizing the legislative initiative on the lobbying bill was very short (7 months) and controversial. The state's external political commitments and the narrow timeframe for their implementation significantly affected the process of drafting the law and its content (the bill was drafted and submitted to the Verkhovna Rada in July-November 2023 in preparation for the European Commission's report on opening EU membership negotiations with Ukraine). As a result, the public and expert community had reasonable grounds to criticize the authorities for numerous shortcomings in the legislative initiative, namely its secrecy and non-publicity.

The bill was actually drafted solely by the NACP,

which is supposed to become the main regulatory body in lobbying. This idea provoked warnings and criticism from Ukrainian civil society, which put forward critical reservations to the NACP's legislative projects regarding selective compliance with the principles of the Council of Europe's Recommendations on avoiding conflicts of interest and introducing standards of ethical conduct for lobbyists. Furthermore, the bill did not distinguish between lobbying and public advocacy, therefore not taking into account the important principle of the Council of Europe Recommendations on the involvement of civil society in political life.

Thus, according to the Civil Network OPORA, the proposed Law of Ukraine "On Fair Lobbying and Advocacy in Ukraine" published by the NACP and the accompanying amendments to the Code of Ukraine on Administrative Offenses have become problematic due to the "non-inclusive development process" and "non-compliance with international standards." Both bills were prepared by the NACP without involvement of civil society organizations, and in the course of further revision, without the comments of the Council of Europe being taken into account. In fact, the bills prepared by the NACP treated advocacy as a form of lobbying. During the consultations with NACP, the public insisted on exempting CSOs advocating for social change from the law.

Civil society organizations also noted that the bills, in terms of their content and the process of their discussion, do not meet any of the three recommendations of the European Commission provided on 8 November 2023.

These recommendations stipulate that the law on the regulation of lobbying activities should:

01

comply with European standards;

02

be the result of an open and inclusive discussion with a wide range of stakeholders (including civil society organizations) and broad public consultations;

03

not provide restrictions on the legitimate activities of civil society organizations and not create a disproportionate administrative burden for such organizations.

As a result, by the time the law was adopted, the vast majority of amendments from the public and expert community were taken into account after continued pressure, but the harmonization of legal norms was still at face value and retained many shortcomings in content. The statement of the former Head of the NACP O. Novikov after the public hearings on the bill, that allegedly all of the CSOs' proposals had been taken into account, except for the clause on the complete exclusion of advocacy from regulation, which was not true. Also interesting was his comment that in the EU, about 35% of entities registered under similar laws are CSOs, and this is an international practice.

Risks of the Law of Ukraine "On Lobbying" in terms of international legal standards

According to the OECD and Council of Europe Recommendations, the development of lobbying laws should be based on the constitution and laws of the member state. For example, paragraph 6 of the OECD Recommendation C(2016)16 states that "countries should not directly copy rules and recommendations from one jurisdiction to another. Instead, they should assess the potential and limitations of different policy and regulatory options and apply the implications and lessons learned from other systems to their own context."

As part of the Association Agreement, Ukraine has an obligation to ensure the existence of a transparent dialogue between government agencies and representatives of civil society and business, but the method and forms of such legal regulation are at the discretion of the state.

At the same time, one of the seven recommendations made by the European Commission to Ukraine in its Conclusion on the EU membership application is

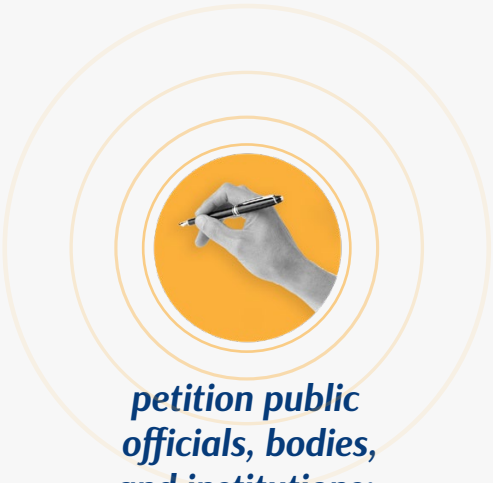
> ***to introduce anti-oligarchic legislation to limit the excessive influence of oligarchs on economic, political, and public life; this should be done in a legally sound manner and should take into account the forthcoming conclusion of the Venice Commission on the relevant legislation" (step 5).***

Furthermore, prior to that, the Venice Commission, in its Conclusion dated 12 June 2023 (para. 33), draws attention to the need to strengthen measures to prevent and combat corruption, including the fight against high-level corruption, which in turn should include further measures in the field of lobbying and transparency of public decision-making.

When comparing the Law of Ukraine "On Lobbying" with the Recommendations CM/Rec(2017)2 of the Committee of Ministers of the Council of Europe, it meets most of them, but with regard to CSOs and public advocacy, it only partially meets the standards of ethical conduct of lobbyists and does not meet the standards of civil society involvement in political decision-making.

The lack of distinction between lobbying and civic advocacy does not comply with Principle 4 of the CoE Recommendation on the involvement of civil society in political life, which stipulates that legal regulation of lobbying activities should not violate the democratic rights of citizens to:

express their opinions;



petition public officials, bodies, and institutions;

campaign for changing laws and political change.

Representatives of civil society in Ukraine emphasize the violation of this principle more than any other. They argue that the creation of the lobbying institution could lead to the formation of a "caste" of lobbyists and limit the advocacy of the interests of different segments of society.

The law may have a negative impact on freedom of expression, the democratic process of advocacy, and civil society. Advocacy is becoming overregulated, causing what is known in constitutional law as a chilling effect: the effects of deterrence and self-restraint. That is aside from the European Commission's recommendation that lobbying regulation should not impede or restrict the legitimate activities of civil society.

Thus, **the main inconsistency of the Law with international practices is the lack of understanding of the difference between lobbying as a legitimate activity and advocacy** as a necessary activity in a democratic society.

The Law also has significant shortcomings in the way the Code of Conduct for lobbyists is regulated.

Given the international practice, a code of conduct (code of ethics) is an internal document of a certain association of people on a professional basis, for example, lobbyists, who have agreed to follow certain rules in their activities. Instead, the Law stipulates that the Code of Conduct will be approved by the NACP, which is an entity external to lobbyists.

The law also does not specify what exactly should be contained in the Code of Conduct, and therefore it may not meet the requirements of subparagraph d) of paragraph 14 of the CoE Recommendation on avoidance of conflicts of interest and the requirement of subparagraph b) of paragraph 17 of the CoE Recommendation on the availability of guidelines (rules) for public officials on their relations with lobbyists.

In other words, **the Law has significant shortcomings in terms of regulating the Code of Conduct from the point of view of international practice:**

01 the Code is planned to be adopted by an external body (the NACP), although such documents are usually internal acts;

02 the Code will be common to all participants in lobbying, which again contradicts the standard logic of adopting this document;

03 the definition of "lobbying participants" is absent and does not allow for unambiguous interpretation;

04 determining the status of an MP (as a lobbyist) through a by-law adopted by the NACP does not comply with the Constitution of Ukraine;

05 even if the Code of Conduct is adopted in accordance with the law, there is no guarantee that it will take international recommendations into account.

The experience of introducing legislative regulation of lobbying, especially in the negative experiences of post-socialist countries, most strikingly Hungary's, is very important and instructive for Ukraine.

The process of implementing regulation in Hungary dragged on from 1994 (introduction of a voluntary register of lobbyists) to 2006 (when the Law on Lobbying came into force). Hungarian lawmakers did not take into account the comments of civil society organizations on the definition of the difference between lobbyists and the public sector. The public and interest groups had a low level of support for the law. Members of the public argued that legalizing lobbying in this way benefited only large commercial organizations that were connected to existing financial and political groups, while weakening public control over the government's actions.

The lobbyists themselves also ultimately criticized the lobbying transparency law, as it did not promote fair competition among lobbyists, while at the same time imposing significant obligations on registered lobbyists. The majority of political decision-makers believed that the law did not take the political and cultural context of Hungary into account, and this negatively affected their implementation of the law. Eventually, in 2011, the law on lobbying was repealed due to its complete ineffectiveness.

Hungary's experience has demonstrated the unsuccessful experience of transferring legislative norms from other countries without taking into account the legal and political context, broad support of all stakeholders, and independent public and international control. In fact, the ill-conceived law on lobbying has become one of the factors weakening civil society and is associated with the strengthening of authoritarian power, restrictions on the opposition's access to the media, elections, and so on.

Potential risks and threats to CSOs from certain provisions of the Law

According to the Main Scientific and Expert Department of the Secretariat of the Verkhovna Rada of Ukraine, the definition of the term "lobbying" and the methods of its implementation proposed in the bill do not fully take into account the recommendations of the Council of Europe, the OECD, and the approach taken by the EU's institutions.

The Verkhovna Rada Committee on Ukraine's Integration into the European Union also warns that the definition of "lobbying" proposed by the bill does not indicate the purpose for which such influence is exercised, thereby not fully taking European standards into account. In other words, the defining feature is the intention to influence, not the fact of influence.

In addition, the Verkhovna Rada Committee on Ukraine's Integration into the European Union specifically draws attention to the provisions of the bill regarding the non-extension of the lobbying institution to advocacy *(while Article 444 of the Association Agreement in the English version contains the term "advocacy," the Ukrainian version is translated as "лобістська діяльність" (lobbying activities))*. However, it remains unclear according to what procedure and under which law advocacy activities will be regulated, which does not ensure compliance with the principle of legal certainty, which requires that legal regulation of social relations be predictable for interested parties.

The need for a clear distinction between lobbying and advocacy is, in particular, stated in **the Recommendations of the Parliamentary Assembly of the Council of Europe**, which explicitly emphasize ***that it is important that lobbying regulations do not impede the legitimate activities of civil society and do not impose a disproportionate administrative burden on such organizations.***

The law does not sufficiently clearly distinguish between lobbying activities and other activities aimed at discussing, defining, defining, or developing state policy or legislation, which are inherent in a democratic state.

Comments on the distinction between lobbying and advocacy are detailed in the Opinion of **the Ukrainian Parliament Commissioner for Human Rights:**

01 **lobbying should be defined not only as the actual influence of the lobbying entity on the lobbying object, but also as the intention to exercise such influence.**

This was also emphasized in the recommendations of the Council of Europe based on the results of the analysis of the bill titled "On Fair Lobbying and Advocacy in Ukraine" in July 2023 at the stage of its development by the National Agency for the Prevention of Corruption;

02 **There is still no clear distinction between these entities,**

which does not ensure compliance with the principle of legal certainty of legislation;

03 **Citizens' associations and civil society organizations are important subjects of the democratic process.**

They should be free to conduct research, raise awareness, and advocate on issues of public interest, as well as to represent their position and protect their rights and interests before public authorities;

04 **Associations have the right to participate in public and political discussions,**

regardless of whether their position is consistent with government policy or whether such a position requires amendments to the law;

05 **It is necessary to consider defining a clear range of entities**

that may be granted the right to conduct separate advocacy and lobbying activities within the legal relations regulated by the bill.

Parliamentary Assembly
Assemblée parlementaire

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

At the same time, the bill does not pay sufficient attention to addressing the issue of inequality of access to decision-making for lobbyists and other public actors.

The new version of the bill, in fact, provides for the same body (the National Agency on Corruption Prevention) to approve the Regulation on the Transparency Register and to apply certain liability measures to offenders, which is inconsistent with one of the fundamental principles of control activities, according to which the regulatory body cannot determine the rules of its activities, i.e., its own rights and obligations.

It is unclear from the provisions of the bill what rules are proposed to be used for public consultations with lobbying entities. In addition, there is a lack of clarity in the legal purpose of introducing such a bylaw as the Rules of Ethical Conduct for Lobbying Entities (which was also drafted by the NACP) into the legislation, as well as the legal mechanisms it should be involved in.

In general, there are significant risks of abuse of office by authorized officials of the National Agency on Corruption Prevention, which the bill gives too broad discretionary powers.

Forms of liability for violation of the Law "On Lobbying."

The Law on Amendments to the Code of Ukraine on Administrative Offenses regarding Violation of Legislation on Lobbying (No. 10373) provides for administrative liability for violation of lobbying regulations, which is consistent with paragraph 15 of the CoE Recommendations.

Administrative liability for failure to comply with the conditions of lobbying is a common international practice, but there are also countries that provide for criminal liability in the form of imprisonment. In other countries, the types of sanctions for violations of lobbying activities can be divided into pecuniary (fines) and physical (imprisonment or restriction of liberty). In addition, the amount of material sanctions (taking into account the average monthly income of citizens of these countries) is large, which ensures the prevention of offenses in this area.

Law 10373 amended the Code of Administrative Offenses with new Articles 188-46-1 and 188-46-2, which will establish administrative liability for illegal lobbying and violation of lobbying legislation. In addition, Article 24 of the Code of Administrative Offenses is supplemented by a new type of administrative penalty in the form of a ban on lobbying.

The bill also proposes to expand the powers of employees of the National Agency on Corruption Prevention (NACP) by empowering them to draw up protocols for administrative offenses under Articles 188-46-1 and 188-46-2 of the Code of Administrative Offenses.

The Law supplements the Code of Administrative Offenses with new provisions establishing administrative liability in the form of a fine:

from 50 to 1000

tax-free minimum incomes (one "tax-free minimum income" being equal to UAH 17)

(amounting to UAH 850-1,700)

FOR LOBBYING WITHOUT REGISTRATION IN THE TRANSPARENCY REGISTER

from 50 to 2000 tax-free minimum income

(amounting to UAH 850-3,400)

with a ban on lobbying for a period of one year, depending on the type of violation

FOR VIOLATION OF THE LOBBYING LEGISLATION BY A LOBBYING ENTITY

from 300 to 1000 tax-free minimum income

(amounting to UAH 5100-17000)

with a ban on lobbying for a period of one year

FOR ACTIONS OR DECISION-MAKING IN CONDITIONS OF CONFLICT OF INTEREST DURING LOBBYING

The impact of legal regulation of lobbying on the level of political corruption.

The adoption of the Law is unlikely to have a significant impact on reducing corruption. The explanatory notes to both alternative bills stated that the main purpose of legalizing lobbying was to fight corruption. However, according to Ukrainian experts, the mere legalization of lobbying in Ukraine will not significantly reduce corruption. Such phenomena as bribing politicians and paying for votes will not be stopped, because this is not about regulating lobbying, rather about ordinary corruption.

Most of the actual rights granted to lobbyists by the bill are already provided for in the current law to a greater or lesser extent and can be exercised by individuals and/or legal entities without obtaining the status of a lobbyist. Under such conditions, it is likely that lobbying entities will not be sufficiently interested in registering as lobbyists and refusing to engage in shadow (corrupt) influences.

Legalization of lobbying is unlikely to stop political corruption. It may facilitate the creation of a separate closed corps of lobbyists, which would require law-abiding citizens, businesses, and CSOs to pay lobbyists to protect their rights and put forward their proposals. Legal experts emphasize that this will have a negative impact on access to political decision-making and justify this position by Article 25(a) of the International Covenant on Civil and Political Rights, which establishes the right of every citizen “to take part in the conduct of public affairs, directly or through freely chosen representatives.” At the same time, this Law will not be able to stop the bribing of politicians to promote certain bills and vote for their adoption. Despite the fact that bribing MPs is already illegal today, this does not change the real situation in the country.

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