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IMPROVEMENT OF ARTICLE 160 OF CRIMINAL CODE
OF UKRAINE AS A WAY TO UNIFY THE CONCEPT OF
«UNDUE ADVANTAGE»

The level and extent of corruption in Ukraine, the effectiveness of combating corruption processes largely depend on the integrity of elected officials, democratic political system in general and the election process in particular. The election process in Ukraine is an integral part of social and political life of society. In turn, legislative provision of voting rights realisation is impossible without adequate means of legal protection. One of such means is criminal liability for the offer, promise or provision of undue advantage for the voter or participant of the referendum by doing or not doing any actions related to the immediate realisation of his/her own suffrage or the right to participate in the referendum provided for in the disposition of Art. 160 «Bribing a voter, participant of the referendum» of the Criminal Code of Ukraine (hereinafter - the Criminal Code of Ukraine). Thus, the key concept, which defines the limits of criminal protection not only in Art. 160 of the Criminal Code of Ukraine but all anti-corruption legislation is «undue advantage».

Legislative understanding of this concept is presented in Articles 160, 354 «Bribing an employee of an enterprise, institution or organization», 364-1 «Abuse of authority by an official of legal entity of private law, regardless of the legal form» (the definition

applies to articles 364, 364-1, 365-2, 368, 368-3, 368-4, 369, 369-2 and 370) of the Criminal Code of Ukraine. The definitions are identical in essence (without the drawbacks of the legislative technique), except the first one, where monetary threshold is set (three per cent of the minimum wage), exceeding which criminal liability for receiving undue advantage is applied.

Thus, money or other property, advantages, benefits, services or intangible assets whose value exceeds three percent of the minimum wage that are offered, promised, given or received without legal justification should be understood like undue advantage in Art. 160 of the Criminal Code of Ukraine.

In our opinion, setting a minimum size of undue advantage is unacceptable because:

- Firstly, with setting a minimum size to obtain undue advantage, it automatically becomes a tangible, which is a direct violation of international regulations concerning the criminalization of any form of undue advantage, including tangible and intangible benefits, regardless of whether it has the market price, which may be determined or not;

- Secondly, there is a possibility of bribing voters or participants of the referendum during the election campaign by providing them with undue advantage in the form of benefits, privileges, services and intangible assets, whose value is practically impossible to determine under the general rule.

Therefore, taking into account the direct object of the offense under Art. 160 of the Criminal Code of Ukraine, we believe that the definition of undue advantage, which is provided in a footnote of the Article, should be read as follows:

«Any cash or other property, advantages, benefits, services, intangibles, and any other benefits of intangible or non-monetary nature that are promised, offered, given or received without legitimate reason should be understood as undue advantage in this article».

Also, Ch. 1 and Ch. 2 of Art. 160 of the Criminal Code of Ukraine after the words «undue advantage» should be supplemented with the following content: «(except for products containing visual depictions, names, symbols, flags of political parties whose value does not exceed the size specified in legislation)».

Thus, there is an opportunity to standardize the definition of undue advantage for the whole Criminal Code of Ukraine (without the drawbacks of the legislative technique).