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URGENT OPINION ON THE DRAFT LAW "ON AMENDMENTS TO THE LAW OF UKRAINE ON PREVENTION AND COUNTERACTION TO LEGALIZATION (LAUNDERING) OF PROCEEDS OF CRIMES, TERRORIST FINANCING AND FINANCING OF PROLIFERATION OF WEAPONS OF MASS DESTRUCTION" IN RELATION TO "POLITICALLY EXPOSED PERSONS"

UKRAINE

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Based on an unofficial English translation of the Draft Law commissioned by the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Draft Law No. 9269-d "On Amendments to the Law of Ukraine on Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crimes, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction" (Draft Law) seeks to enhance the provisions governing the status and due diligence measures applicable to Politically Exposed Persons (PEPs). The main objective of the Draft Law is to implement a risk-based approach in line with the recommendations and guidance of the Financial Action Task Force (FATF), which is also among the structural benchmarks to be met by Ukraine under the International Monetary Fund (IMF) Extended Fund Facility (EFF) for Ukraine.

Given the short timeline to prepare this legal analysis and acknowledging the complexity of the issue at stake, as well as the importance of well-balanced and effective corruption prevention measures, ODIHR decided to prepare an Urgent Interim Opinion. As such, the present legal opinion provides a preliminary analysis of the Draft Law, focusing only on some of the most concerning issues, such as the risks associated with differential treatment, the right to respect for private and family life and personal data protection standards. A more comprehensive and detailed review will follow offering a final assessment of the compliance with international standards and OSCE human dimension commitments of the proposed measures, including proportionality of the life-time status of PEP and their family members.

The introduction of effective corruption prevention measures in accordance with established international standards and recommendations is crucial to mark the progress of Ukraine in implementing EU-mandated reforms. It is however fundamental to ensure that the special measures applicable to PEPs are also in line with international human rights standards and OSCE human dimension commitments.

While avoiding setting particular limits on the time a PEP remains a PEP generally corresponds to the international recommendations on anti-money laundering and countering the financing of terrorism (AML/CFT), the question arises as to whether the enhanced due diligence measures applicable to PEPs, their family members and close associates, potentially for life, are strictly necessary and proportionate to the legitimate aim pursued. Enhanced due diligence measures, which trigger the collection, storage and processing of a larger amount of personal data – compared to "normal" customers – may provide a substantial amount of information about a person's private and family life, which is protected under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the European Convention on Human Rights (ECHR), and should be collected and processed in accordance with applicable personal data protection standards.

While the objective of AML/CFT would be considered as being legitimate, one may question whether it would be proportionate, at least for some public functions that could be considered to constitute a lower risk, to maintain a life-time status of PEP that would trigger an enhanced scrutiny beyond the normal know-your-customer or customer due diligence measures applied by financial institutions (for instance when changing or joining a new financial institution).

It is, therefore, essential that the Draft Law clearly defines the risk assessment methodology with clear and objective criteria to determine the level of risk presented by an individual and the types of data that may be collected for that purpose, which would also reduce the risk of potential discriminatory treatment of PEPs, their family members and close associations, and infringement with their right to respect for private and family life. In this respect, the Draft Law should more clearly circumscribe and limit the situations in which the risks are so substantial that they may justify enhanced due diligence over a longer period of time, and potentially for life, while also including procedural safeguards against abuse.

More specifically, pending the publication of the above-mentioned final assessment, as an interim, it is recommended:

A. To further elaborate in the Draft Law itself clear and objective criteria for the financial institutions to carry out the risk assessment and determine the level of risk, as well as the types of personal data relating to PEPs that may be collected and processed for that purpose and procedural safeguards against abuse, while the secondary legislation may further provide detailed guidance for risk assessment implementation; [para. 36]

B. To clarify in the Draft Law the categories of personal data that may be collected for which type of activities or of due diligence carried out by financial institutions (e.g., normal customer due diligence, enhanced due diligence, PEPs) as well as the conditions and limits for their collection and processing - taking into account the requirements of necessity and proportionality and personal data protection standards; [paras. 38-39]

C. To reconsider the creation of the Unified Register of domestic PEPs, while ensuring that similar modalities for enhanced due diligence are applied to both domestic and foreign PEPs. [paras. 46-47 and 50]

As part of its mandate to assist OSCE participating States in implementing their OSCE human dimension commitments, ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 15 September 2023, the First Deputy Speaker of the Verkhovna Rada (Parliament) of Ukraine requested the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") to review the Draft Law No. 9269-d "On Amendments to the Law of Ukraine on Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crimes, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction" (hereinafter "Draft Law"). On 22 September 2023, a revised version of the Draft Law was adopted by the Parliament of Ukraine in the first reading and this is the version that is the subject of the present legal analysis.

2. On 22 September 2023, ODIHR responded to this request, confirming the Office's readiness to prepare a legal analysis on the compliance of the Draft Law with international standards and OSCE human dimension commitments. Given the short timeline to prepare this legal analysis considering that the Verkhovna Rada of Ukraine aims to consider the Draft Law in the coming days/weeks, ODIHR decided to prepare an urgent legal analysis. Recognizing the complexity of the issue at stake, as well as the importance of well-balanced and effective corruption prevention measures, especially given EU accession efforts of Ukraine, the present Urgent Interim Opinion provides a preliminary analysis of the Draft Law, focusing only on the most concerning issues in terms of their compliance with the right to respect for private and family life, personal data protection standards and non-discrimination. A more comprehensive and detailed analysis will follow, that will offer a final assessment of the compliance of the proposed measures with international human rights standards and OSCE human dimension commitments and will respond to all the questions raised in the request letter.[1] The absence of comments on certain provisions of the Draft Law should not be interpreted as an endorsement of these provisions and the content of this Urgent Interim Opinion is without prejudice to any written analysis and recommendations that ODIHR may provide in the future.

3. This Urgent Interim Opinion was prepared in response to the above request. ODIHR conducted this legal analysis within its general mandate to assist OSCE participating States in the implementation of their OSCE human dimension commitments.[2]

II. SCOPE OF THE URGENT INTERIM OPINION

4. This Urgent Interim Opinion constitutes a preliminary analysis and covers only the most concerning provisions of the Draft Law submitted for review, with a particular focus on the above-mentioned issues. Thus limited, the Urgent Interim Opinion does not constitute a full and comprehensive review of the Draft Law nor of the entire existing legal framework on preventing and countering money-laundering and the financing of terrorism in Ukraine.

[1] These include the question of the retroactive effect of the Draft Law; the compliance of the lifetime status of "Politically Exposed Persons" (hereinafter "PEPs") and their family members with international human rights standards; and the compliance of the financial monitoring measures envisaged by the Draft Law, carried out by financial institutions, with the human rights of PEPs and their family members.

[2] See e.g., specific human dimension commitments relating to the fight against corruption, as underlined most recently in the OSCE Ministerial Council, *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, 7 December 2012, available at <http://www.osce.org/cio/97968?download=true>.

5. The Urgent Interim Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Urgent Interim Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national practices, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards, while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as the country context and political culture.

6. In accordance with the Convention on the Elimination of All Forms of Discrimination against Women[3] (hereinafter "CEDAW") and the 2004 OSCE Action Plan for the Promotion of Gender Equality[4] and commitments to mainstream gender into OSCE activities, programmes and projects, the Urgent Opinion integrates, as appropriate, a gender and diversity perspective.

7. This Urgent Interim Opinion is based on an unofficial English translation of the Draft Law commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. The Urgent Interim Opinion is also available in the Ukrainian language. In case of discrepancies, the English version shall prevail.

8. In view of the above, ODIHR would like to stress that this Urgent Interim Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on the respective subject matters in Ukraine in the future.

III. ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL AND REGIONAL STANDARDS AND OSCE COMMITMENTS

9. The prevention and fight against corruption is an integral part of the commitments undertaken by OSCE participating States, in light of the threat corruption poses to the OSCE's shared values, the enjoyment of human rights and its potential to undermine stability and security within the OSCE.[5]

10. The most prominent anti-corruption standards on a global level derive from the United Nations Convention against Corruption (hereinafter. "UNCAC").[6] Article 52 of the

[3] See the *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine acceded to the Convention on 12 March 1981.

[4] See the *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

[5] See, in particular, OSCE Istanbul 1999 (Charter for European Security: III. Our Common Response), para. 33; OSCE Ministerial Council's Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism (Dublin, 2012)); Decision No. 5/14 on Prevention of Corruption (Basel, 2014); OSCE Ministerial Council Decision No. 4/16 on Strengthening Good Governance and Promoting Connectivity (Hamburg, 2016); OSCE Ministerial Council Decision No. 6/20 on Preventing and Combating Corruption through Digitalization and Increased Transparency (Tirana, 2020) – see <542154.pdf (osce.org)>.

[6] *United Nations Convention against Corruption* (hereinafter "UNCAC"), adopted on 31 October 2003 by UNGA Resolution 58/4. The UNCAC was ratified by Ukraine on 2 December 2009. Ukraine has not ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted on 17 December 1997.

UNCAC defines PEPs as "*individuals who are, or have been, entrusted with prominent public functions and their family members and close associates*", and includes both domestic and foreign PEPs. The Council of Europe's (hereinafter "CoE") Criminal Convention on Corruption,[7] the Civil Law Convention against Corruption[8], the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[9] and CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[10] are standard-setting regional conventions in the field of anti-corruption although not dealing specifically with PEPs.

11. As a candidate for accession to the European Union, Ukraine also needs to align its national legislation with the EU acquis and thus, the relevant EU treaty provisions, Regulations and Directives are also of relevance to this Urgent Interim Opinion. In particular, the Directive 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing[11] (hereinafter "EU Directive 2015/849") has defined PEPs, their "family members" and "persons known to be close associates" of PEPs. Article 22 of the Directive provides that "*where a politically exposed person is no longer entrusted with a prominent public function by a Member State or a third country, or with a prominent public function by an international organisation, obliged entities shall, for at least 12 months, be required to take into account the continuing risk posed by that person and to apply appropriate and risk-sensitive measures until such time as that person is deemed to pose no further risk specific to politically exposed persons*". The EU Directive 2015/849 underlines that while "*certain aspects of the implementation of this Directive involve the collection, analysis, storage and sharing of data*", such processing of personal data should be permitted, while fully respecting fundamental rights, and only for the purposes laid down in the Directive, and for the activities required under the Directive.[12]

12. Anti-corruption standards are also contained, reiterated and expanded in a number of soft-law instruments, including the United Nations Declaration against Corruption and Bribery in International Commercial Transactions,[13] the UN General Assembly Resolution 51/59 on Action against Corruption,[14] the CoE Committee of Ministers Recommendation (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption,[15] as well as Recommendation CM/Rec(2017)2 on the legal regulation of

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7 Council of Europe, *Criminal Law Convention on Corruption*, adopted on 27 January 1999, was ratified by Ukraine on 27 November 2009; see also the *Additional Protocol to the Criminal Law Convention on Corruption*, adopted on 15 May 2003, ratified by Ukraine on 27 November 2009.

8 Council of Europe, *Civil Law Convention Against Corruption*, adopted on 4 November 1999, was ratified by Ukraine on 19 September 2005.

9 Council of Europe, *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, adopted on 8 November 1990, ratified by Ukraine on 26 January 1998.

10 Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), adopted on 16 May 2005, ratified by Ukraine 2 February 2011.

11 Amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC and the EU Directive 2015/849. Directive 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU did not bring any important provision for the issue at stake.

12 Such as carrying out customer due diligence, ongoing monitoring, investigation and reporting of unusual and suspicious transactions, identification of the beneficial owner of a legal person or legal arrangement, identification of a politically exposed person, sharing of information by competent authorities and sharing of information by credit institutions and financial institutions and other obliged entities; see para. 43 of the Preamble and Article 41 of the EU Directive 2015/849.

13 *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, A/RES/51/191, 86th plenary meeting 16 December 1996.

14 *UN General Assembly Resolution 51/59 on Action against Corruption*, A/RES/51/59, adopted on 12 December 1996.

15 Council of Europe Committee of Ministers, *Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption* (hereinafter "Twenty Guiding Principles in the Fight Against Corruption") of 6 November 1997.

lobbying activities in the context of public decision-making.[16] The recommendations and guidance material of the Financial Action Task Force (hereinafter "FATF"), although not legally binding,[17] are of particular relevance to the issue of PEPs and related financial monitoring, especially Recommendations Nos. 12 and 22 on PEPs.[18].

13. According to FATF Recommendation No. 12, financial institutions should be required, in relation to foreign PEPs (whether as customer or beneficial owner), in addition to performing normal customer due diligence measures, to: (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person; (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships; (c) take reasonable measures to establish the source of wealth and source of funds; and (d) conduct enhanced ongoing monitoring of the business relationship. Regarding domestic PEPs and international organization PEPs, financial institutions must take reasonable measures to determine whether a customer or beneficial owner is a domestic/international organization PEP, and then assess the risk of the business relationship. For higher risk business relationships with such PEPs, financial institutions should be required to apply the above-mentioned measures referred to in paragraphs (b), (c) and (d). The requirements for all types of PEPs should also apply to family members or close associates of such PEPs.

14. The FATF Guidance on "Politically Exposed Persons" (2013) underlines that *"[t]hese requirements are preventive (not criminal) in nature, and should not be interpreted as stigmatising PEPs as such being involved in criminal activity. Refusing a business relationship with a PEP simply based on the determination that the client is a PEP is contrary to the letter and spirit of Recommendation 12*". The FATF Guidance further notes that the proper implementation of PEP requirements does not violate anti-discrimination standards, emphasizing that *"[t]he definition of a PEP is not linked in any way to any of the personal characteristics that fall within the prohibited grounds for discrimination by international conventions."* The mandate of the FATF contains no references to international human rights law, nor do the FATF Recommendations explicitly require adhering countries to respect human rights in implementing or applying anti-money laundering and countering the financing of terrorism (AML/CFT) standards. However, as underlined by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, "*human rights implications linked to the development and implementation of those [FATF] standards require sustained and in-depth attention*".[19]

15. At the OSCE level, the Ministerial Council's *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism* (2012) recognizes the need to enhance the implementation of international and national anti-corruption commitments by *inter alia* involving civil society and the business community in the process and acknowledges "the fundamental importance of

[16] Council of Europe Committee of Ministers, *Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making* of 22 March 2017.

[17] Although the recommendations and related guidance material of the FATF are not legally binding, countries strive towards compliance, owing to the benefits linked to membership and the financial and economic disadvantages that non-compliance may trigger.

[18] See FATF, *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation*, updated February 2023, FATF Recommendations No. 12 and 22. See also *FATF Guidance on "Politically Exposed Persons"* (2013). The FATF first issued recommendations covering foreign PEPs, their family members and close associates in June 2003. In February 2012, the FATF expanded the scope of the recommendation to also cover domestic PEPs and PEPs of international organisations.

[19] See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 29 August 2019, para. 33

effectively preventing transfers of proceeds of crime".[20] Furthermore, the Ministerial Council's *Decision No 4/16 on Strengthening Good Governance and Promoting Connectivity* specifically encourages OSCE participating States to implement and adhere to other relevant international standards, such as the FATF "International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation", and to intensify the involvement of all relevant stakeholders, including civil society and the business community in their implementation, as laid out in these international instruments.[21] At the same time, OSCE commitments also underline the importance of upholding the rule of law and protecting human rights in the efforts to prevent and combat corruption.[22] The *OSCE Handbook on Combating Corruption* (2016) may also serve as a useful reference document.

16. Measures aimed at preventing and combatting corruption, money laundering and the financing of terrorism such as the ones concerning PEPs, their family members and close associations, have the potential to interfere with several human rights and fundamental freedoms, including the right to respect for private and family life (Article 17 of the International Covenant on Civil and Political Rights (hereinafter "ICCPR");[23] Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR");[24] and Article 7 of the EU Charter of Fundamental Rights), personal data protection standards,[25] and the right to equality before the law and to be free from discrimination (Article 26 of the ICCPR; Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR).

17. Of note, according to the Court of Justice of the European Union (CJEU), stored data that allow for very precise conclusions to be drawn concerning a person's private life, e.g., everyday habits, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them, constitute far-reaching interference to the right to respect for private and family life.[26] The European Court of Human Rights (hereinafter "ECtHR") has specifically ruled that bank documents, collected for an investigation on among other things, money laundering, undoubtedly constitute personal data that relates to private life, whether or not the information is sensitive.[27] In this respect, Article 8 (2) of the ECHR allows countries to introduce limitations to the right to respect for private and family life in accordance with law and when this "*is necessary in a democratic society in the interests of national security, public safety or the economic well-being of*

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[20] See OSCE, *Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*, 17 December 2012.

[21] OSCE Ministerial Council *Decision No. 4/16 on Strengthening Good Governance and Promoting Connectivity* (Hamburg, 2016), para. 2.

[22] See e.g., OSCE Ministerial Council *Decision No. 6/20 on Prevent and Combating Corruption through Digitalization and Increased Transparency* (Tirana, 2020).

[23] Article 17 of the ICCPR provides that "*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*". Ukraine ratified the ICCPR on 12 November 1973.

[24] Article 8 of the ECHR states: "1. *Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*" Ukraine ratified the ECHR on 11 September 1997.

[25] Including the Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 108), 28 January 1981, ratified by Ukraine on 30 September 2010; Article 8 of the EU Charter for Fundamental Rights; and EU General Data Protection Regulation (GDPR) – Official Legal Text (gdpr-info.eu). See also Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data Convention 108, *Guidelines on Data Protection for the Processing of Personal Data for Anti-money Laundering/Countering Financing of Terrorism Purposes* (16 June 2023).

[26] Court of Justice of the European Union (CJEU) (Grand Chamber) *Tele2 Sverige AB v Post- och telestyrelsen* and *Secretary of State for the Home Department v Tom Watson and Others*, Joined Cases C-203/15 and C-698/15, 21 December 2016, paras. 99–100.

[27] ECtHR, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 4 December 2008, para. 67.

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

18. Finally, regarding the specific role of financial institutions, it is acknowledged at the international level that the role of business enterprises as specialized organs of society performing specialized functions, would require them to comply with all applicable laws and to respect human rights.[28] Recommendations at the international level underline the importance for private businesses to undertake proper human rights due diligence to identify, prevent and mitigate and account for negative human rights impacts of their activities, operations or services.[29] At the same time an important role of the state in this process through effective policies, legislation, and regulations that comply with international human rights standards should not be underestimated. While financial institutions, given their functions, have an important role to play to contribute to the prevention of money-laundering and of the financing of terrorism, when undertaking the necessary monitoring and checks, they also need to ensure that they do not infringe with the individual human rights of their customers in an unjustified or disproportionate manner. And it is the role of the public authorities to make sure that financial institutions are implementing this task adequately by providing clear criteria and guidance.

2. BACKGROUND AND GENERAL COMMENTS

19. According to the current version of the Law of Ukraine "On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crimes, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction" (hereinafter "the Law") initially adopted on 6 December 2019 (as later amended), PEPs are national[30] and foreign[31] public figures, as well as officials of international organizations,[32] who perform or have performed prominent public functions (hold or have held certain managerial positions) in Ukraine, foreign countries, or international organizations, *during the last three years*. This means that the PEP status is limited to a time period of three years after a person has ceased to perform prominent public functions, after which, a person is no longer considered to be a PEP.

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[28] See OHCHR, Guiding Principles on Business and Human Rights (2011), page 3; see also Ten Principles of the UN Global Compact.

[29] *Ibid.* OHCHR, Guiding Principles on Business and Human Rights (2011), Principle 4.

[30] "National politically exposed persons" are defined in Article 1 part 1 para. 37 of the existing Law as "*natural persons who perform or have performed during the last three years in Ukraine prominent public functions, namely: the President of Ukraine, the Prime Minister of Ukraine, members of the Cabinet of Ministers of Ukraine and their deputies; the head of the permanent subsidiary body established by the President of Ukraine, and his deputies; Head and Deputy Heads of the State Administration of Affairs; heads of apparatus (secretariats) of state bodies who are not civil servants, whose positions belong to category "A"; Secretary and Deputy Secretaries of the National Security and Defense Council of Ukraine; People's Deputies of Ukraine; Chairman and members of the Board of the National Bank of Ukraine, members of the Council of the National Bank of Ukraine; the Chairman and Judges of the Constitutional Court of Ukraine, the Supreme Court, and high specialized courts; members of the High Council of Justice, members of the High Qualification Commission of Judges of Ukraine, members of the Qualifications and Disciplinary Commission of Prosecutors; the Prosecutor General and his deputies; Head of the Security Service of Ukraine and his deputies; Director of the National Anti-Corruption Bureau of Ukraine and his deputies; Director of the State Bureau of Investigation and his deputies; Director of the Bureau of Economic Security of Ukraine and his deputies.*"

[31] Article 1 part 1 para. 28 of the existing Law defines "foreign politically exposed persons" as "*individuals who perform or have performed during the last three years prominent public functions in foreign states, namely: head of state, government, ministers (deputies); members of parliament or other bodies exercising the functions of the legislative body of the state; chairmen and members of the boards of central banks or accounting chambers; members of the Supreme Court, the Constitutional Court or other judicial bodies whose decisions are not subject to appeal, except for appeals due to exceptional circumstances; ambassadors extraordinary and plenipotentiary, chargés d'affaires and heads of central military command and control bodies; heads of administrative, managerial or supervisory bodies of state-owned enterprises; members of governing bodies of political parties.*"

[32] Article 1 part 1 para. 20 of the existing Law defines them as "*officials of international organizations who hold or have held during the last three years the position of head (director, chairman of the board or other) or deputy head in such organizations, or perform or have performed during the last three years any other managerial (prominent public) functions at the highest level, including in international interstate organizations, members of international parliamentary assemblies, judges and senior officials of international courts*".

20. The initial version of the Law as adopted in 2019 did not provide any time limit of the PEP status. The existing three-year time limit of the PEP status was introduced as part of the amendments to the Law adopted on 4 November 2022, regarding the protection of the financial system of Ukraine from the actions of a state that carries out armed aggression against Ukraine, and approximation of Ukrainian legislation to certain standards of the FATF and the requirements of the EU Directive 2018/843. It is noted that before the adoption of the Law in 2019, the previous Law of Ukraine "On Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crimes, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction" of 2014, as amended, was referring to a three year period in the definitions of national and foreign public figures and persons performing political functions in international organizations.

21. Article 11 part 14 of the Law requires financial institutions to apply additional financial scrutiny (measures specified in points 2-4 of part 14 of Article 11 of the Law)[33] to PEPs who are currently holding their offices or have held office in the last three years, for at least up to 12 months after the termination of their office, and afterwards, until financial institutions are convinced that increased risks no longer exist with respect to those persons. It is understood from this provision that this enhanced scrutiny would in any case terminate three years after the moment a PEP has ceased exercising his/her prominent public functions. Article 11 part 14 of the Law further specifies that when assessing the risks inherent to a PEP, the financial institutions should take into consideration in particular, the level of influence that the person may still have; the scope of powers with which he/she was endowed; relationships between past and current powers, etc.

22. The stated objective of the draft amendments to the Law is to re-establish enhanced due diligence measures on PEPs consistent with the risk-based approach set in the FATF recommendations, which is among the structural benchmarks that Ukraine had to meet by September 2023 under the International Monetary Fund (IMF) Extended Fund Facility (EFF) for Ukraine.[34] In addition, the National Bank of Ukraine is to amend its regulations to clarify implementation of the risk-based approach regarding PEPs and should conduct a thematic inspection of the financial institutions' compliance system and practice with enhanced customer due diligence on PEPs.[35] The Council of Europe's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) had in the past specifically concluded that the limitation periods of three years of PEP status was inconsistent with the FATF's risk-based approach, noting specifically that FATF guidance does not prescribe time limits regarding PEP status.[36]

23. The Draft Law No. 9269-d initiated by a group of Members of Parliament (MPs), was registered in the Verkhovna Rada of Ukraine on 4 September 2023[37] with the aim to

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[33] The following additional measures are envisaged by part 14 of Article 11 of the Law of Ukraine "On "Amendments to the Law of Ukraine on Prevention and Counteraction to Legalization (Laundering) of Proceeds of Crimes, Terrorist Financing and Financing of Proliferation of Weapons of Mass Destruction": to have a developed a risk management system to identify the fact of the client's or the client's ultimate beneficiary owner to the designated category; to obtain permission from the head of the primary financial monitoring entity to establish (continue) business relations, conduct (without establishing business relations) financial transactions for an amount equal to or exceeding the amount of UAH 400000 (regardless of whether such a financial transaction is carried out once or as several financial transactions that may be interrelated); take sufficient measures to establish the source of wealth and the source of funds with which business relations or transactions with such persons are connected; carry out in-depth monitoring of business relations on an ongoing basis.

[34] See International Monetary Fund (IMF), *First Review under the Extended Arrangement under the Extended Fund Facility*, July 2023, pp. 33 and 42.

[35] *Ibid.* p. 33.

[36] Council of Europe, Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), *Fifth Round Mutual Evaluation Report on Ukraine* (December 2017), Technical Compliance Annex to the Report, paras. 136 and 140.

[37] See <Картка законопроекту - Законотворчість (rada.gov.ua)>.

implement the FATF recommendations and ensure compliance of the Ukrainian legislation with the EU Directive 2015/849.

24. The Draft Law envisages amendments to Articles 1, 11 and 32 of the existing Law, that will lift the three-years limitation of the PEP status and elaborate the requirements for the "subjects of primary financial monitoring" (financial institutions) to apply a risk-based approach when providing services to PEP clients, their family members and close associates. The Draft Law also seeks to introduce sanctions for violation by the financial institutions of the requirements when identifying whether a particular client is a PEP, member of the PEP's family or close associate, as well as for improper application of the risk-based approach, including by defining an unreasonable level of risk of PEP and applying disproportionate financial monitoring measures according to the risk category (see Sub-Section 7 *infra*).

25. On 20 September 2023, some amendments to the Draft Law were introduced, envisaging the establishment of a Unified State Register of national public figures (i.e., of domestic PEPs), which should be run by the government body responsible for financial monitoring. On 22 September 2023 the revised version of the Draft Law was adopted by the Parliament of Ukraine in the first reading.

3. TIME LIMIT OF THE PEP STATUS

26. The changes contemplated by the Draft Law would remove the three year time limit of the PEP status. This means that the qualification of PEP would apply to anyone who has ever performed prominent public functions in Ukraine or other countries or held certain managerial positions in international organizations and not only during the last three years as currently provided by the Law. The removal of three-year time limit would similarly impact the family members of PEPs and their close associates. The draft amendments also propose to add to the Law a provision (new para. 14 of part 14 of Article 11), specifying that after 12 months, a financial institution should no longer apply special financial monitoring measures to PEPs, if in the course of due diligence, it concludes that the person no longer bears the risks inherent in PEPs.

27. FATF Recommendation No. 12 defines a PEP as being someone who is or has been (but may no longer be) entrusted with a prominent public function and does not prescribe particular limits on the length of time an individual, family members, or close associates should continue to be considered to be a PEP. According to the FATF Guidance on Politically Exposed Persons (Recommendations 12 and 22), *"[t]he language of Recommendation 12 is consistent with a possible open-ended approach (i.e., 'once a PEP – could always remain a PEP')."*[38] The FATF Guidance on PEPs further specifies that *"[t]he handling of a client who is no longer entrusted with a prominent public function should be based on an assessment of risk and not on prescribed time limits*". The World bank-UNODC Stolen Assets Recovery (StAR) Initiative Principal Recommendations on PEPs specifically recommend to avoid setting limits on the time a PEP remains a PEP.[39]

28. The power and influence held by persons entrusted with prominent public functions is very dependent upon the country context, and a combination of historical, legal, political and cultural factors. In many cases, the influence held by prominent public officials and

[38] See *FATF Guidance on "Politically Exposed Persons"* (2013), para. 44

[39] See e.g., World Bank, Politically Exposed Persons: Preventive Measures for the Banking Sector (2010), Principal Recommendation 5.

close associates outlasts the term in office by years, even decades, and the risk of potential corruption and undue influence is still present even after the termination of a PEP's functions. Therefore, removing the three-year time limit for PEP status would reflect such a reality and would also be considered to be in line with FATF recommendations,[40] as well as the recommendations made by MONEYVAL and the World Bank (see paras. 22 and 27 *supra*).

29. At the same time, the FATF has also previously accepted certain time limits of PEP status as reasonable, provided that a risk-based approach is continued and that enhanced customer due diligence continued to be carried out on the basis of risk.[41] In the case of a one year time limit of the PEP status, the FATF had also considered that the mere inclusion of a relationship with a former PEP as an indicator of potentially higher risk triggering enhanced due diligence (EDD) measures was not enough, emphasizing that EDD measures should be required to be applied to former PEPs that continue to present even a standard or lower PEP risk – where PEP risk has not yet been fully extinguished.[42] Hence, beyond the considered time limit of PEP status, the determining factor appears to be the continued use of a risk-based approach on a case-by-case basis by financial institutions, and not so much the maintenance of an unlimited PEP status, providing that EDD measures continue to apply even in the case of standard or lower PEP risk.

30. The Law already provides a statutory time-limit (12 months) from the moment the customer ceases to perform prominent public functions during which a financial institution should continue taking into account the risks inherent to the past functions, and after the expiry of 12 months, until it is convinced that such risk no longer exists. The Draft Law also proposes to specify that the main consequences of the PEP status (i.e., additional financial scrutiny of PEPs specified in points 2-4 of part 14 of Article 11 of the Law) could be dropped based on the results of the risk assessment. If the risk inherent in PEPs is considered by the financial institution to no longer exist and the financial transactions carried out by such a person during 12 months following the termination of the prominent public functions were of low risk, the enhanced scrutiny of the said person should no longer apply. This approach is generally in line with Article 22 of the EU Directive 2015/849 (see para. 11 *supra*) and is based on the recognition that the money laundering risk that PEPs present will reduce progressively from the moment they leave office.[43] At the same time, it is not completely clear from the suggested provision of the Draft Law which level of scrutiny or due diligence would continue to apply after 12 months. It is assumed that in case when an assessment identifies no indications of risk at all, a normal customer due diligence would then apply. However, the Draft Law may need to clarify the type of due diligence that would continue to apply, after 12 months, to PEPs that continue to present even a standard or lower PEP risk and until the risk is fully extinguished.

31. Although the FATF Guidance on PEPs underlines that the requirements relating to PEPs are preventive (not criminal) in nature, and should not be interpreted as stigmatizing

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[40] See e.g., World Bank, Politically Exposed Persons: Preventive Measures for the Banking Sector (2010), Principal recommendation 5.

[41] See e.g., *FATF Anti-money laundering and counter-terrorist financing measures – Mutual Evaluation Report for Italy* (2016), p. 157.

[42] See e.g., *FATF Anti-money laundering and counter-terrorist financing measures – Mutual Evaluation Report for Romania* (May 2023), p. 150. See also *FATF Anti-money laundering and counter-terrorist financing measures – Mutual Evaluation Report for France* (May 2022), p. 261, where there is a time limit of one year of PEP status after the termination of prominent public functions, after which financial institutions may implement enhanced due diligence measures if the business relationship presents high risks of ML/TF, but the FATF concluded that these measures were not equivalent to that required under FATF criterion 12.1.

[43] *FATF Guidance on "Politically Exposed Persons"* (2013) allows for a risk-based approach to be taken for individuals who no longer hold a prominent public position. It is noted that any consideration for declassification should not be solely reliant on the length of time a PEP has been out of office but should consider all relevant risk factors. See also Guernsey Financial Services Commission (GFSC), Managing the risk posed by Politically Exposed Persons Thematic Review – 2023, page 13.

PEPs,[44] one cannot exclude a potential stigma associated with the PEP status. The FATF Guidance further notes that refusing a business relationship with a PEP simply based on the determination that the client is a PEP would be contrary to the letter and spirit of Recommendation 12. At the same time, persons classified as PEPs may be exposed to differentiated treatment when it comes to the establishment or continuation of business relations with financial institutions and the carrying out of financial transactions. Certain financial institutions may prefer not to open an account or continue the business or customer relationship with certain categories of clients, such as PEPs, their family members and close associates, owing to the time and resources required to ensure compliance with AML/CFT obligations applicable to PEPs, a practice called "de-risking". This means that in practice, financial institutions are likely to treat differently persons qualified as PEPs (family members and close associates), a status closely interlinked with political exposure and/or political affiliations/connections, potentially leading to discrimination under "other status", provided under Article 1 of Protocol 12 to the ECHR and Article 26 of the ICCPR, if such differential treatment is unjustified or of disproportionate nature.

32. The principle of non-discrimination prohibits both direct and indirect discrimination, requiring that all persons receive equal treatment under the law and should not be discriminated against as a result of the practical application of any measure or act.[45] A differential treatment may be discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the intended aim. Accordingly, differences in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by international human rights standards,[46] would not be considered discriminatory.

33. Ensuring compliance with AML/CFT requirements would generally be considered as a legitimate aim.[47] However, to justify a difference in treatment, there should be a reasonable relationship of proportionality between the means employed and the intended aim. If a proper risk-based approach is required to be applied by financial institutions, with a requirement of enhanced scrutiny for at least one year after the cessation of the prominent public functions and thereafter on the basis of an actual assessment of a continued risk, one may question whether it would be proportionate, at least for some public functions that could be considered to constitute a lower risk, to maintain a life-time status of PEP that would trigger an enhanced scrutiny beyond the normal know-your-customer or customer due diligence (for instance when changing or joining a new financial institution). It is noted that the Draft Law tries to mitigate this risk of potential discriminatory treatment by introducing sanctions that may be imposed on the financial institutions for overly strict application of measures against PEPs (see Sub-Section 7 *infra*). However, imposing obligations on the financial institutions, without offering clear guidance on how to implement such obligations (such as the criteria to consider and the frequency of a risk-based assessment to assess the level of risk that a former PEP still represent, for instance), may fail to prevent or reduce the risk of unjustified and

[44] See *FATF Guidance on "Politically Exposed Persons"* (2013), para. 2.
[45] See Article 26 of the ICCPR; Article 14 of the ECHR and Article 1 of Protocol 12 to the ECHR.
[46] See e.g., ECtHR, *G.M.B. and K.M. v. Switzerland* (dec.), no. 36797/97, 27 September 2001; *Zarb Adami v. Malta*, no. 17209/02, 20 June 2006, para. 73.
[47] See ECtHR, *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018, para. 135; *Fabris v. France* [GC], no. 16574/08, 28 June 2013, para. 56.

disproportionate treatment. Furthermore, this may potentially lead to divergent practices across the financial institutions.

34. It is noted that Article 7 part 5 of the current version of the Law contains quite detailed provisions on implementation of the risk-based approach by financial institutions applicable to all customers, not only PEPs, and with respect to transactions. It requires, among other, financial institutions to establish high risk of relations or financial transactions with certain categories of customers, including, among other, foreign PEPs, members of their families and close associates, but also other groups of customers constituting high risk based on the place of their residence and other factors.

35. These provisions, however, would require further elaboration regarding the specific assessment of the level of risk of former PEPs, family members and close associates. Thus, in particular, it is essential that the Law defines the risk assessment methodology with clear and objective criteria to determine the level of risk presented by an individual and the types of data that may be collected for that purpose, which would also reduce the risk of potential discriminatory treatment of PEPs (see Sub-Section 4 *infra*).

36. The Final Provisions of the Draft Law state that the National Bank of Ukraine and the National Securities and Stock Market Commission shall develop recommendations for financial institutions on the proper application of a risk-based approach when servicing clients who are PEPs, their family members, and persons related to PEPs, within three months from the entry into force of the Draft Law. As already noted above, ODIHR intends to offer a final assessment of the compliance with international standards and OSCE human dimension commitments of the proposed measures, including proportionality of the life-time status of PEPs and their family members. especially with respect to the lower risk PEPs. At minimum, however, the Interim Urgent Opinion recommends to introduce effective safeguards to avoid potentially abusive or disproportionate application of the law. Thus, to enhance legal certainty and given the potential impact on the right to privacy of PEPs and their family members, as well as persons associated to PEPs, **it would be advisable that the basic criteria for assessing risks be defined and clarified in the Law itself and not in secondary legislation**.[48] In this respect, **the Draft Law should more clearly circumscribe and limit the situations in which the risks are so substantial - very high-risk PEPs - that they may justify enhanced due diligence over a longer period of time, and potentially for life, while also including procedural safeguards against abuse**.[49]

RECOMMENDATION A.

To further elaborate in the Law itself clear and objective criteria for the financial institutions to carry out the risk assessment and determine the level of risk, as well as the types of personal data relating to PEPs that may be collected and processed for that purpose and procedural safeguards against abuse, while the secondary legislation may further provide detailed guidance for risk assessment implementation.

[48] See as a comparison, the European Data Protection Supervisor (EDPS) in the *EDPS Opinion on the anti-money laundering and countering the financing of terrorism (AML/CFT) package of legislative proposals* (24 September 2021), paras. 47-49, regarding proposed guidance by the Anti-money-laundering authority (AMLA) on the classification of risk associated with different categories of PEPs.

[49] See e.g., *Opinion of the European Data Protection Supervisor on a proposal for a Directive of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing* (2013).

4. RISK-BASED APPROACH AND PROPORTIONALITY OF FINANCIAL MONITORING MEASURES

37. The consequences of the PEP status involve enhanced due diligence, and hence the collection, storage and processing of a larger amount of personal data – compared to "normal" customers – which may provide a substantial amount of information about a person's private life, which is protected under Article 17 of the ICCPR and Article 8 of the ECHR. They also trigger extensive scrutiny of the business and financial activities of family members or close associates. Article 8(2) of the ECHR specifies that any interference with the right to respect for private and family life shall be in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

38. While the objective of preventing money laundering and the financing of terrorism would be considered as being legitimate, the question arises as to whether the requirements applicable to PEPs, their family members and close associates for life are strictly necessary and proportionate. As indicated above (see para. 27 *supra*), the FATF has accepted time limits for PEP status providing that *enhanced* customer due diligence may continue to be carried out on the basis of risk, until such time when the risk is considered to no longer exist. **The application of a proper risk-based approach would *prima facie* appear less intrusive than the possibility of a life-long PEP status, as it would limit the time-range within which a wider range of personal data would be collected, reduce the risk of potential discrimination, while still achieving the contemplated aim if accompanied by proper risk-based approach.** To limit the risk of potential arbitrary application by financial institutions, **it is also important that the Law itself clarifies the categories of personal data that may be collected for which type of activities or of due diligence carried out by financial institutions** (e.g., customer due diligence, enhanced due diligence, PEPs) **as well as the conditions and limits for their processing – taking into account the requirements of necessity and proportionality**.[50] Data processing by financial institutions should be limited to what is directly relevant for the specific purpose pursued in view of the risks inherent to the customer relationship.[51] **The amount and categories of data to be collected and the number and typologies of sources/databases to be consulted to perform a customer due diligence in relation to normal customers should be more limited than for the due diligence performed for PEPs who represent as a rule, a higher risk of money laundering**.[52]

39. It should be noted that, as underlined by the FATF itself, financial data may include some of the most sensitive data about a wide range of individuals, revealing their financial standing, family interactions, behaviours and habits, the state of their health, etc.[53] In particular, certain data collected in the context of enhanced scrutiny of PEPs may involve particularly sensitive data (e.g., data which could reveal political affiliations or opinion or data on sexual life or sexual orientation in the case, for example, of a same-sex

[50] See the comments made in this respect by the European Data Protection Supervisor (EDPS) in the *EDPS Opinion on the anti-money laundering and countering the financing of terrorism (AML/CFT) package of legislative proposals* (24 September 2021).

[51] See also Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data Convention 108, *Guidelines on Data Protection for the Processing of Personal Data for Anti-money Laundering/Countering Financing of Terrorism Purposes* (16 June 2023), p. 12.

[52] See the comments made in this respect by the European Data Protection Supervisor (EDPS) in the *EDPS Opinion on the anti-money laundering and countering the financing of terrorism (AML/CFT) package of legislative proposals* (24 September 2021), para. 42.

[53] See FATF, *Stocktake on Data Pooling, Collaborative Analytics and Data Protection* (2021), para. 53.

partnership, when scrutinizing PEPs, their family members and close associates).[54] As stated in Article 6 of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), to which Ukraine is a State Party,[55] *"[p]ersonal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards*". Hence, **the processing of such special categories of personal data needs to be accompanied by safeguards appropriate to the risks at stake and of the interests, rights and freedoms protected**.[56] The Protocol (CETS: 223) amending the Convention, though not yet ratified by Ukraine, further specifies that the automatic processing of such sensitive data "*shall only be allowed where appropriate safeguards are enshrined in law, complementing those of [the] Convention*", which shall "*guard against the risks that the processing of sensitive data may present for the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination*" (proposed new Article 6(1) and (2) of the Convention). The Explanatory Report to the Protocol further provides examples of the types of additional safeguards that could be considered alone or in combination regarding the handling of such sensitive data, including the data subject's explicit consent, a law covering the intended purpose and means of the processing or indicating the exceptional cases where processing such data would be permitted, a professional secrecy obligation, measures following a risk analysis;[57] a particular and qualified organisational or technical security measure.[58]

RECOMMENDATION B.

To clarify in the Law the categories of personal data that may be collected for which type of activities or of due diligence carried out by financial institutions (e.g., normal customer due diligence, enhanced due diligence, PEPs) as well as the conditions and limits for their collection and processing – taking into account the requirements of necessity and proportionality, and personal data protection standards.

5. EFFECT OF THE DRAFT LAW

40. If the draft amendments enter into force, the financial monitoring measures envisaged for PEPs would be automatically applicable to all persons irrespective of when they held prominent public functions, until the enhanced due diligence concludes that risks inherent in PEPs no longer exist, after 12 months from the termination of such functions. This

[54] See e.g., ODIHR and Venice Commission, *Joint Opinion on the Draft Law of Ukraine on Political Parties*, CDL-AD(2021)003, para. 77, which states that "*[i]nformation on the membership of a political party is also protected by the right to privacy, as such information provides direct insights into the political opinions of individuals",* and refers in this context to ECtHR, *Catt v. the United Kingdom*, no. 43514/15, 24 January 2019, para. 112, stressing that personal data revealing political opinion falls among the special categories of sensitive data attracting a heightened level of protection.

[55] See Council of Europe, *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 108), 28 January 1981, which entered into force in Ukraine on 1 January 2011. Ukraine has not yet ratified *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* which aims at further enhancing personal data protection mechanisms.

[56] *Ibid.*

[57] Risk assessment prior to processing should assess whether data are protected against unauthorised access, modification and removal/ destruction and should seek to embed high standards of security throughout the processing; such an assessment should be informed by considerations of necessity and proportionality, and the fundamental data protection principles across the range of risks including physical accessibility, networked access to devices and data, and the backup and archiving of data; see Convention 108), *Guidelines on the Protection of Individuals with regard to the Processing of Personal Data by and for Political Campaigns* (2021), para. 4.3.5.

[58] See *Explanatory Report – CETS 223 – Automatic Processing of Personal Data (Amending Protocol)*, 10 October 2018, para. 56.

means that the financial institutions would be allowed and required to collect a broader range of data on the individuals that are considered to be PEPs under the Draft Law in order to initially assess the risk presented by the said persons. Hence, the draft amendments, if adopted, might affect those persons who had ceased to be considered as a PEP under the existing Law, but who will again be considered as PEPs, also their family members and close associates, with the specific legal consequences for the individual rights that PEP status entails, especially in terms of interference with the right to respect for private and family life and personal data protection, as underlined above (see para. 38 *supra*).

41. In order to be compatible with international human rights standards, any interference with the rights of PEPs shall in the first place be prescribed by law, meaning that it should be sufficiently clear and foreseeable. The principle of foreseeability entails that an average person should be able to be aware and foresee, at all times and to a reasonable degree, consequences stemming from their actions to regulate their conduct accordingly.[59]

42. While the need to ensure better compliance with EU regulations in the area of preventing and countering money laundering and terrorist financing, especially given the particular context of Ukraine and its reform-oriented agenda linked to its EU candidate status, could be considered as a legitimate public policy objective, in practice, the adoption of the Draft Law will affect a considerable number of people who have ever performed prominent public functions since the Ukrainian independence or have ever been foreign/international PEPs in their life, as well as members of their families and close associates. All of them would be subject to stricter financial scrutiny in order to assess their level of risk, which may not appear proportional to the declared policy goal.

43. It is true that, as already mentioned above, the Draft Law envisages that enhanced scrutiny shall cease once a financial institution assesses that the risk inherent to PEPs no longer exists (see para. 30 *supra*). Such an approach, if adequately implemented in practice by financial institutions, should limit the practical effect of the amendments, although it is understood that a risk assessment would still need to be carried out. At the same time, given the lack of clarity regarding the criteria to be used by financial institutions for assessing risks and the types of data to be collected as part of the different risk assessment (simplified, normal and enhanced customer due diligence in the case of PEP), as underlined in Sub-Section 4 *supra*, the effect of the Draft Law on all those persons who ceased to hold important offices many years ago (their family members and close associates) would be rather unpredictable and would not appear to be in line with the principle of legal certainty and legitimate expectations. The final assessment that will be prepared by ODIHR will further elaborate on this issue, in particular with respect to the legal consequences for individuals who have ceased to be considered as PEPs under the existing Law, as well as their family members and close associates.

6. UNIFIED STATE REGISTER OF THE NATIONAL PUBLIC FIGURES

44. The revised version of the Draft Law (adopted in first reading on 22 September 2023) provides that the aforementioned additional financial monitoring measures should apply to national public figures in case of their inclusion to a Unified Registry, which should be established and run by the government body under the procedure defined by the Cabinet of Ministers of Ukraine. With this provision, the Draft Law in fact allows

[59] ECtHR, *The Sunday Times v. the United Kingdom* (No. 1), no. 6538/74, 26 April 1979, para. 49. See also Venice Commission, CDL-AD(2016)007, Rule of Law Checklist, para. 58.

financial institutions to decide on the need to apply to national PEPs special financial monitoring measures not on the basis of a risk-based approach and case-by-case assessment, but mainly based on the fact that a particular person is included or not included in the Unified Register.

45. It is noted that creating any kind of register or list of domestic PEPs is not required by the FATF recommendations. As underlined in the FATF Guidance on PEPs, government issued PEP-lists have potential shortcomings and can pose potential challenges for effective implementation.[60] In particular, maintaining and updating lists of *actual names* of PEPs appears challenging as they may be quickly outdated, difficult to manage, costly to maintain, and would not contain family members or close associates, and therefore the FATF does not advocate for this approach.[61] In general, while inclusion on a list can confirm the fact that a person is a PEP, not being featured on a list does not exclude the possibility that a person is nevertheless a PEP. Thus, there is a risk that financial institutions, while relying exclusively on the list, will fail to consider other customers who may be PEPs, and therefore fail to have fully assessed the risk of the business relationship, contrary to the risk-oriented approach.[62]

46. Furthermore, with a list/register of national PEPs, the Draft Law would introduce a distinction between the domestic and foreign PEPs since the application of PEP-related enhanced scrutiny will depend on the mere inclusion of an individual to this list and not a risk-based approach. At the same time, the standards adopted by FATF require similar enhanced due diligence for both foreign and domestic PEPs.[63] The risk-based approach implies that business relationships with domestic/international PEPs may pose an equally high risk as those with foreign PEPs. Therefore, it should not be assumed that the risk is always lower for domestic/international PEPs. Such a distinction, not reasonably justified, might allow some prominent domestic public officials and their families and close associates to avoid proper monitoring, significantly impacting the effectiveness of the measures and omitting an important risk area.

47. Moreover, given that the Unified Register, according to the Draft Law, should be established and managed by the central government body (State Service of Financial Monitoring of Ukraine) according to the procedure defined by the Cabinet of Ministers of Ukraine, there may be a high risk of using the register for political purposes. All the more, the Draft Law does not specify how the Register should be established and managed; what are the criteria for inclusion in the Register; how often it should be reviewed and updated; and what the procedure for this should be. Importantly, the Draft Law does not provide the possibility for a person concerned to challenge a decision of the government on recognizing them as a PEP and including them in the said Register, which is at odds with international standards and good practice.[64] While some of these issues might be further defined by the Cabinet of Ministers of Ukraine in the secondary legislation, the lack of clarity on the aforementioned issues in the Draft Law itself could

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60 See FATF Guidance on Politically Exposed Persons (Recommendations 12 and 22) (2013), para. 64.

61 *Ibid.* para. 65.

62 *Ibid.* paras. 64-65.

63 See e.g., World Bank, Politically Exposed Persons: Preventive Measures for the Banking Sector (2010), Principal Recommendation 1.

64 Article 8, Universal Declaration of Human Rights, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." 1990 OSCE Copenhagen Document, paragraph 5.10 states that "everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity". Paragraph 5.11 notes that "administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available." Under Article 2.3(a) of the *ICCPR* States obligated themselves "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Article 15 of the *Human Rights Committee's General Comment No. 31*. In addition, Article 13 of the *ECHR* guarantees an effective remedy before a national authority to everyone whose rights and freedoms are violated, notwithstanding that the violation has been committed by people acting in an official capacity.

potentially allow the misuse of the Unified Register against political opponents by way of including them in the Register and subjecting them to stricter financial scrutiny.

48. It should also be taken into account that the Law of Ukraine "On Prevention of Corruption" already envisages a Unified State Register of declarations of persons authorized to perform functions of the state or local self-government, which exists in Ukraine since 2016 and is publicly available.[65] The declarations under this register include also family members of the above persons and they must be submitted even a year after leaving the position. The information available in this Register could be used for the purpose of carrying out the due diligence.

49. It is common practice for financial institutions to have their own ("independent") lists of PEP customers. It is generally recommended to have such lists reviewed by senior management or a committee including at least one senior manager using a risk-based approach, at least yearly, and the results of the review should be documented.[66]

50. In light of the above, **it is, therefore, recommended, to reconsider the creation of the Unified Register of domestic PEPs, while ensuring that similar modalities for enhanced due diligence are applied to both domestic and foreign PEPs.**

RECOMMENDATION C.

To reconsider the creation of the Unified Register of domestic PEPs, while ensuring that similar modalities for enhanced due diligence are applied to both domestic and foreign PEPs.

7. LIABILITY OF FINANCIAL INSTITUTIONS

51. The Draft Law envisages liability of financial institutions for violation of the requirements for identifying whether a particular client is a PEP, member of PEP's family or a close associate; improper application of a risk-oriented approach in terms of establishing an unreasonable level of risk for such persons; taking disproportionate measures against them in accordance with the risk category, unreasonable refusal to carry out financial transactions and/or establish (continue) business relations with such person (proposed new paragraph 14^1 of Article 32 part 5). In such case, the financial institution would be subject to a fine in the amount of up to 100 thousand tax-free minimum incomes (around UAH 1,700,000 i.e., EUR 43,925).

52. By introducing this provision, the Draft Law attempts to mitigate the risk of potential discriminatory treatment of PEPs (see Sub-Section 3 *supra*) but also introduces sanctions for financial institutions, who fail to take sufficient measures to identify whether a customer is a PEP, a family member or close associate of a PEP. At the same time, the provision does not explicitly refer to the failure to carry out in-depth monitoring of business relations of PEPs on an ongoing basis. In such cases, the general provision of paragraph 14 of Article 32 (sanctioning for "violation of other requirements of the legislation in the field of prevention and counteraction") would still be applicable.

[65] Electronic declaration has been put on hold by the Verkhovna Rada following the beginning of the war due to the risk of disclosure of personal data and was recently renewed based on the law adopted on 5 September 2023. According to this law, the register will not be publicly available for one more year.

[66] See World Bank, Politically Exposed Persons: Preventive Measures for the Banking Sector (2010), Principal Recommendation 4.

However, it would be recommended to explicitly mention in the provision the other forms of omission by financial institutions when dealing with PEPs.

53. Given the potential risk of discriminatory treatment, for instance on the basis of a person's national or ethnic origin, religion or belief, or political opinion in the collection of additional information and verification materials as part of the enhanced due diligence of PEPs, it is essential to specify that discriminatory practices in this field will be sanctioned in accordance with applicable anti-discrimination legislation by the imposition of proportionate and dissuasive sanctions.

8. RECOMMENDATIONS RELATING TO THE LAWMAKING PROCESS

54. The Draft Law was registered in the Verkhovna Rada on 4 September 2023 and was already voted on in the first reading on 22 September 2023, and it is understood that the second reading is imminent. It is not clear, however, from information available whether consultations or public hearings have taken place.

55. While recognizing that the martial law was introduced in Ukraine in connection with the war caused by the Russian Federation's invasion of Ukraine, which may significantly limit the possibility for wider public consultations, in case when important legislative reforms are initiated, even during states of emergency, public authorities should seek to apply ordinary legislative processes to the extent possible, and to ensure inclusive public hearings and consultations as feasible in the given circumstances, including through the use of online platforms if necessary.[67] While accepting that due to the specific circumstances, it may not be practically possible to organize inclusive and meaningful consultations, the impact of the legislation adopted in this period should be reviewed as soon as the situation so permits,[68] in particular to assess whether it had a disproportionate impact on certain groups of population.

56. OSCE participating States committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 Copenhagen Document, paragraph 5.8).[69] Moreover, these commitments specify that *"[l]egislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (1991 Moscow Document, paragraph 18.1).[70] The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input.[71] As underlined in the OSCE Handbook on Anti-Corruption, it is fundamental to involve and consult civil society organizations, the private sector and those that are likely to be impacted by the measures.[72]

57. Public consultations constitute a means of open and democratic governance as they lead to higher transparency and accountability of public institutions, and help ensure that potential controversies are identified before a law is adopted. Consultations on draft legislation and policies, in order to be effective, need to be inclusive and to provide relevant stakeholders with sufficient time to prepare and submit recommendations on

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67 See, e.g., ODIHR, *OSCE Human Dimension Commitments and State Responses to the Covid-19 Pandemic* (2020), pp. 65-74.
68 See ODIHR, *Guiding Principles of Democratic Lawmaking and Better Laws* (9 October 2023), Principle 11.
69 See *1990 OSCE Copenhagen Document*.
70 See *1991 OSCE Moscow Document*.
71 See Venice Commission, *Rule of Law Checklist*, Part II.A.5.
72 *OSCE Handbook on Combating Corruption* (2016), Chapters 12 and 13.

draft legislation.[73] To guarantee effective participation, consultation mechanisms should allow for input at an early stage and throughout the process, meaning not only when the draft is being prepared by relevant ministries but also when it is discussed before Parliament.[74]

58. In light of the above, taking into account the ongoing martial law, **the authorities are encouraged to ensure that legislative and non-legislative proposals pertaining to AML/CFT continue to be subject to a transparent and inclusive process that involves meaningful consultations with all relevant stakeholders, including with representatives of civil society, financial institutions, political opposition, which should enable equal opportunities for women and men to participate. According to the principles stated above, such consultations should take place in a timely manner, at all stages of the policy- and law-making process, including before Parliament. As an important element of good law-making, a consistent monitoring and evaluation system of the implementation of the Law and its impact should also be put in place that would efficiently evaluate the operation and effectiveness of the draft amendments, once adopted**.[75] **In case it is impossible to organize inclusive and meaningful consultations on such a sensitive matter due to the current martial law, the Draft Law (if adopted), should be revisited later, evaluating its impacts as soon as the situation so permits**.

[END OF TEXT]

[73] OSCE commitments underlined in particular the importance of ensuring full and equal participation of women and men to empower women to actively participate in and contribute to policies and efforts in the field of preventing and combating corruption, money-laundering and the financing of terrorism (see e.g., OSCE Dublin 2012, Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism). According to recommendations issued by international and regional bodies and good practices within the OSCE area, public consultations generally last from a minimum of 15 days to two or three months, although this should be extended as necessary, taking into account, *inter alia*, the nature, complexity and size of the proposed draft act and supporting data/information. See e.g., ODIHR, *Opinion on the Draft Law of Ukraine "On Public Consultations"* (1 September 2016), pars 40-41.

[74] See ODIHR, *Assessment of the Legislative Process in Georgia* (30 January 2015), paras. 33-34. See also ODIHR, *Guidelines on the Protection of Human Rights Defenders (2014)*, Section II, Sub-Section G on the Right to Participate in Public Affairs.

[75] See OECD, *International Practices on Ex Post Evaluation (2010)*.