



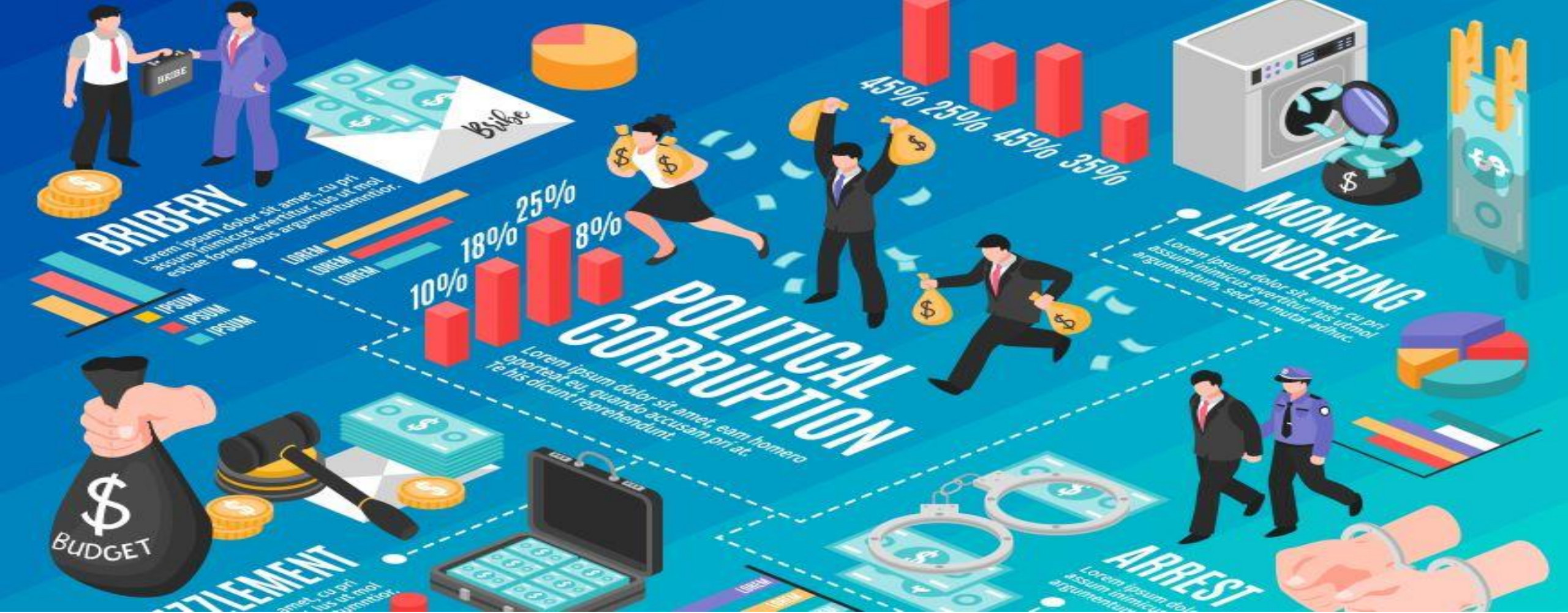
# Corruption Proofing: Tackling Corruption Risks in Legislative and Regulatory Texts

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# Does corruption emerge from a law or through a law?

Preliminary clarifications



# What is corruption?

# Abuse of power for private gain

Shortest definition of corruption by Transparency International

# What does corruption require to manifest?



## Power:

- duties
- competences
- functions
- rights
- duties
- discretions

used for private gain

*determined by laws and regulations!*

# Laws and regulations

while instituting public institutions and positions within, defining official powers, duties and responsibilities are also creating opportunities for interpreting their intended meaning and therefore generating more or less obvious opportunities for future **corruption**



# Where can we find corruption in the legislation?

- Any provision exists to be enforced in one way or another
- Any provision casts certain powers on someone called to enforce it
- Whenever those entrusted a power to enforce a provision are in pursuit for private gain, there will be temptation for abuse
- However, inclination to follow illegal temptations will greatly depend on how clear the boundaries are set, as people are seldomly willing to take higher risks

# How is corruption in the legislation prevented?

- **Corruption proofing (CP) of legislation** is an important tool for preventing corruption, as it implies proofing the legislation in order to improve the legal provisions in such a way as to considerably decrease the likelihood of individuals devoting to corruption.
- **Operates *ex ante***, before corruption has manifested.
- Increases the participants in the drafting process and can lead to the development of a body of expertise which will make existing anticorruption strategies more robust.



# Easy example # 1

documents needed to get a passport:

## CASE A

- Application
- Picture 3x4 cm
- Applicant's birth certificate
- Payment confirmation
- **Any other document required**

## CASE B

- Application
- Picture 3x4 cm
- Applicant's birth certificate
- Payment confirmation
- **Place of residence confirmation**

# Easy example # 2

## After submitting the documents to get the passport

### CASE A

- the passport shall be issued within ten working days.

### CASE B

- the decision on issuing the passport shall be taken within a period of 3 months.

# Easy example # 3

## Police reaction to violation

### CASE A

- In case of establishing the breach of no drunk-driving rule by a car driver, the police **may** stop him/her from further driving and apply a fine

### CASE B

- In case of establishing the breach of no drunk-driving rule by a car driver, the police **must** stop him/her from further driving and apply a fine

# Easy example # 4

## Judge's discretion to impose sanctions:

### CASE A

- Criminal code provides that for state funds embezzlement the judge shall apply **10-15 years of jail time and confiscation.**

### CASE B

- Criminal code provides that for state funds embezzlement the judge shall apply a **fine of 100-150 euro or 10-15 years of jail time and confiscation.**

# Is there intent in the legal drafting process, aiming at enabling corruption?



- **Lack of intent** – in most of the cases, due to mistakes or insufficient quality of the draft laws
- **Existence of intent** – sometimes, but these are usually the most dangerous forms of corruption

# What does corrupt legislation lead to?



- systemic corruption
- human rights violations
- eroding of the rule of law
- **state capture (in case of intent)**

*”State capture is an organized group aimed at influencing decision-making and implementation in a way that favours a particular interest to the detriment of the general interest”*

*(Omelyanchik, 2001)*



## Dr. Joel S. Hellman and Dr Danial Kaufmann

### Experts in the field of state capture

“*While most types of corruption are directed toward changing how existing laws, rules, or regulations are implemented with respect to the bribe payer, **state capture refers to corrupt efforts to influence how those laws, rules and regulations are formed.***” (2001)

“*In weak states **such forms of influence have a strong impact on the speed and direction of reforms, on the creation of economic and political institutions and, finally, on the general quality of governance in transition countries.***” (2003)



# Tailor-made laws, corruption and state capture



- Corruption can enable undue influence on a law, while a tailor-made law can create opportunities for systemic corruption.
- Tailor-made laws seal and legitimise the privatisation of public institutions and resources by making it legal.
- Such laws not only decriminalise the capture but, once legalised, make it harder to fight capture because the effort will be perceived as disobeying the law.
- To determine whether a law is tailor-made, one should consider:
  - *Who benefited from the law (and who was excluded from it)?*
  - *What was the law's impact?*
  - *Where there any anomalies in the making or approval of the law?*

*(TI, Report on State Capture in Western Balkans & Turkey, 2020)*

# Example 1: Turkish Social and General Health Insurance Law No. 5510, in force since May 2019



- The law authorises the Ministry of Health to categorise different types of health-care providers and creates a new category of hospitals, which are defined as “advanced level hospitals”.
- The requirements to be considered an advanced level hospital are to have a 600-bed capacity, 60,000 square metres of indoor facilities, 240 doctors and 480 nurses.
- This type of hospital is supposed to receive better benefits from the Ministry of Health.
- Interestingly, only one hospital meets the requirements and it is formerly owned by the Health Minister Fahrettin Koca.

*(TI, Report on State Capture in Western Balkans & Turkey, 2020)*

# Example 2: Milot-Balldren highway construction



- In 2018, a company (A.N.K.) presented an unsolicited proposal to the government for the construction of the Milot-Balldren highway. In June 2018, the Council of Ministers awarded an 8.5 per cent bonus point to the company.
- In October 2018 the Ministry of Infrastructure announced a 13-year concession for the construction of the 17.2 km road. Law No. 52 was passed in July 2019 for this purpose.
- The company charged **€256 million (€15 million per km)**, more than twice the amount that the government had envisaged for the construction of the road in its Sectorial Transport Strategy 2016-2020. Still, the government allocated **an extra €44 million** to the project in its mid-term budget plan, increasing the **total cost to nearly €300 million**.
- **The State Supreme Audit Institution of Albania (ALSAI) revealed an artificial increase in the costs of the project created by qualifying the project as a “highway” instead of an “interurban road” with a consequent increase in the price from €61.5 million to €140 million in the feasibility study.**



# Key concepts

on corruption proofing

# Who is in charge of corruption proofing (CP)



- **Approach 1:** CP conducted by a CP Agency or CSO, at a particular stage in the legal drafting process, preparing a special CP opinion, based on a separate CP methodology, making it's findings and recommendations public
- **Approach 2:** CP is the responsibility of the draft's author or being the joint responsibility of all the participants in this process, not having any separate dedicated stage in the legal drafting process

# What is the scope of CP? How to choose the drafts?

- **Approach 1:** all the draft normative acts, with clear exceptions
- **Approach 2:** all draft normative acts, as well as local acts
- **Approach 3:** all the enacted normative acts
- **Approach 4:** a selection of draft normative acts
- **Approach 5:** a selection of enacted normative acts

# Selectivity approaches

- **Discretion of the CP Agency** (Lithuania)
- **Discretion of the drafter to request CP** (Moldova, for local acts; Serbia)
- **Predefined vulnerable areas** (i.e. in Serbian Methodology: Political activities, Public finance, Privatization and public-private partnership, Judiciary, Police, Spatial planning and construction, Health care system, Education and sport, Media.)



# Roles of institutions in the CP



- **Drafter** – to be aware and avoid corruption risks while writing the draft. If the case – remedying the corruption risks identified by the CP agency/CSO.
- **Designated CP agency/CSO** – to prepare an CP opinion and to make it public. If the case – cooperate with the draft's author to remedy the risks. At a later stage – monitoring the enacted normative acts for corruption risks that were not remedied.
- **Adopting agency** (Parliament of Cabinet of Ministers) – making sure the draft the pass is free from corruption risks, as identified in the CP opinion.

# Goals of CP



- Corruption prevention by removing corruption risks from the drafts
- Making the public aware of the corruption risks from the drafts
- Providing additional safeguards to the people that the legislative process is carried out in the interests of the citizens and the public interest



# Corruption Proofing Opinion

structure

# Detailed CP opinion structure (Moldova)



## I. Assessment of the corruption risks associated to the legislative process

1. Observance of transparency and public consultations standards
2. Declared and real goals. Identification of hidden, unstated goals
3. Public and private interests
4. Identification of risks of illegal lobbying
5. Relevance of the rationale to support the solutions of the draft law

## II. Detailed analysis of corruption risks and risk factors in the provisions

## III. Conclusions

# Detailed analysis of corruption risks and corruption risk factors in the provisions



№	Article __ paragraph__ entry_)	
	...	
	Objection: ...	
	Recommendation: ...	
	Risk factors: ● ...	Corruption risks: ● ...

***corruption risk*** – possible occurrence of a corruption act

***corruption risk factor*** – the provision of a legal act (draft law, proposed law or enacted regulation) the application of which may generate corruption risks

When corruption risk factors are spotted, the expert has to determine **how this provision generates corruption risks:**

- through legalizing a corruption-related offence
- through favoring a corruption-related offence



# Corruption Risks

Favouring and legalizing corruption



# Favouring corruption

- A corruption crime is *favored* if the implementation of the provision will generate conditions for corruption to appear easily.
- These provisions are pushing the implementer to an understanding that in such conditions giving/taking bribes (or other form of corruption) becomes very easy.
- Concrete provisions favoring occurrence of corruption offences do not make such offences legal, do not exclude criminal liability and do not remove chances for their investigation. Such legal provisions are more like an “invitation” to commit corruption.

# Legalizing corruption



- A corruption offence is *legalized* if the implementation of the provision will lead to making this behavior legal, exclude the possibility of holding the perpetrator liable for it and exclude the chances to investigate it.
- A corruption offence shall be deemed as legalized through a certain provision if in its absence such a behavior would be considered an offence, would entail liability and trigger an investigation.

# Corruption risks found in drafts



## Facilitating the crimes of:

- Bribe taking
- Bribe giving
- Abuse of duties
- Excess of duties
- Illicit enrichment
- Money laundering
- Tax evasion etc.

## Legalizing the crimes of:

- Abuse of duties
- Excess of duties
- Illicit enrichment
- Money laundering
- Tax evasion etc.

# Draft law on capital liberalization and fiscal stimulation of Moldova:



## Article 5. Duties of participants of the capital liberalization and fiscal stimulation

- (1) The State Tax Service, Customs Service, National Health Insurance House, cadaster bodies, Ministry of Information Technology and Communications, National Integrity Agency, other institutions and organizations shall be recognized as persons indirectly related to the process of liberalization.
- (2) Besides the subjects of capital liberalization and their representatives, the participants of capital liberalization shall be the Ministry of Internal Affairs, National Anticorruption Center, General Prosecutor's Office, other public authorities from abroad, which perform their activity and exercise their duties in the process of capital liberalization according to the provisions of the present law.

# Objections



- The provision sets improper roles, contrary to the statute of the public authorities and contradict the legal framework in force. These public authorities cannot participate in capital liberalization process, as they should guarantee fighting against criminal activity, especially in the part related to corruption and money laundering. As the draft sets no verifications of the capital origins, these authorities will be forced to observe helplessly the legalization of criminal assets, without having the possibility to prosecute.
- Regarding the “other public authorities form abroad” concerned, the only valid reason why the authorities of other states seem to be included is of hampering potential trans-border investigations from other jurisdictions in which illegal proceeds originate and were liberalized in the Republic of Moldova. In this case, other national authorities mentioned as participants of liberalization (NAC, MIA, GPO) should refuse the collaboration with similar authorities from abroad, because the draft has assigned them the status of participant in capital liberalization.

# Recommendations and identification of risk factors and of corruption risks



## Recommendations: To exclude art.5

### Risk factors:

- Ambiguous wordings allowing for abusive interpretations
- Conflicting legal provisions
- Excessive and improper duties to the status of public authority

### Corruption risks:

#### *Legalization of the crimes of:*

- illicit enrichment
- money laundering
- embezzlement

#### *Facilitation of the crimes of:*

- abuse / excess of duties
- negligence

# Visibility of recommendations



- CP agency's recommendations (and, if applicable, the explanations for why they were disregarded) are circulated as an annex to the draft law being debated in the legislature and are also published online, thus providing both lawmakers and citizens with more information about the potential corruptogenic factors associated with the law.



# Corruption Risk Factors

Typology and identification



# Typology of risk factors:

**I. Legal wording and coherence**

arisinng from ambiguity

**II. Transparency and access to information**

**III. Competences, procedures, rights and obligations**

**IV. Control mechanisms**

**V. Liability and sanctions**

arisig due to lack of  
corruption prevention  
mechanisms

# Category I. Legal wording and coherence



1. Use of undefined terms
2. Irregular use of terms
3. Ambiguous wording
4. Faulty reference provisions
5. Conflicting provisions
6. Gaps (lacunas)
7. Unfeasible provisions

# Category II. Transparency and access to information



- 8. Lacking or insufficient transparency of a public institution
- 9. Lacking or insufficient access to information of public interest

# Category III. Competences, procedures, rights and obligations



- 10. Unspecified subject the provision refers to
- 11. Parallel duties
- 12. Improper duties for the status of the public/private entity
- 13. Duties set up in a manner that allows exceptions and abusive interpretations
- 14. Setting up a right of the public authority instead of a duty
- 15. Unjustified exceptions from the exercise of rights/duties
- 16. Non-exhaustive, ambiguous or subjective grounds for decision-taking
- 17. Cumulating competences which are better to be exercised separately to avoid potential abuse

18. Unclear administrative procedures
19. Lack of specific terms / unjustified terms / unjustified extension of terms
20. Unjustified limitation of human rights
21. Discriminatory provisions
22. Stimulating unfair competition
23. Exaggerated costs for provisions' enforcement as compared to the public benefit
24. Promotion of interests which are contrary to the public interest
25. Infringement of interests which are contrary to the public interest
26. Excessive requirements for exercising rights/duties

# Category IV. Oversight mechanisms



27. Lack/insufficiency of supervision and control mechanisms (hierarchical, internal, public)

28. Lack/insufficiency of mechanisms to challenge decisions and actions of public institutions

# Category V. Liability and sanctioning



- 29. Confusion/duplication of types of legal liability for the same violation
- 30. Non-exhaustive grounds for liability
- 31. Lack of clear liability for violations
- 32. Lack of clear sanctions for violations
- 33. Mismatch between the violation and sanction



# Preparation for corruption proofing

Identifying public and private interests



# Steps for preparing a CP opinion



**Step 1:** legislation related to the draft law

**Step 2:** explanatory note of the draft law

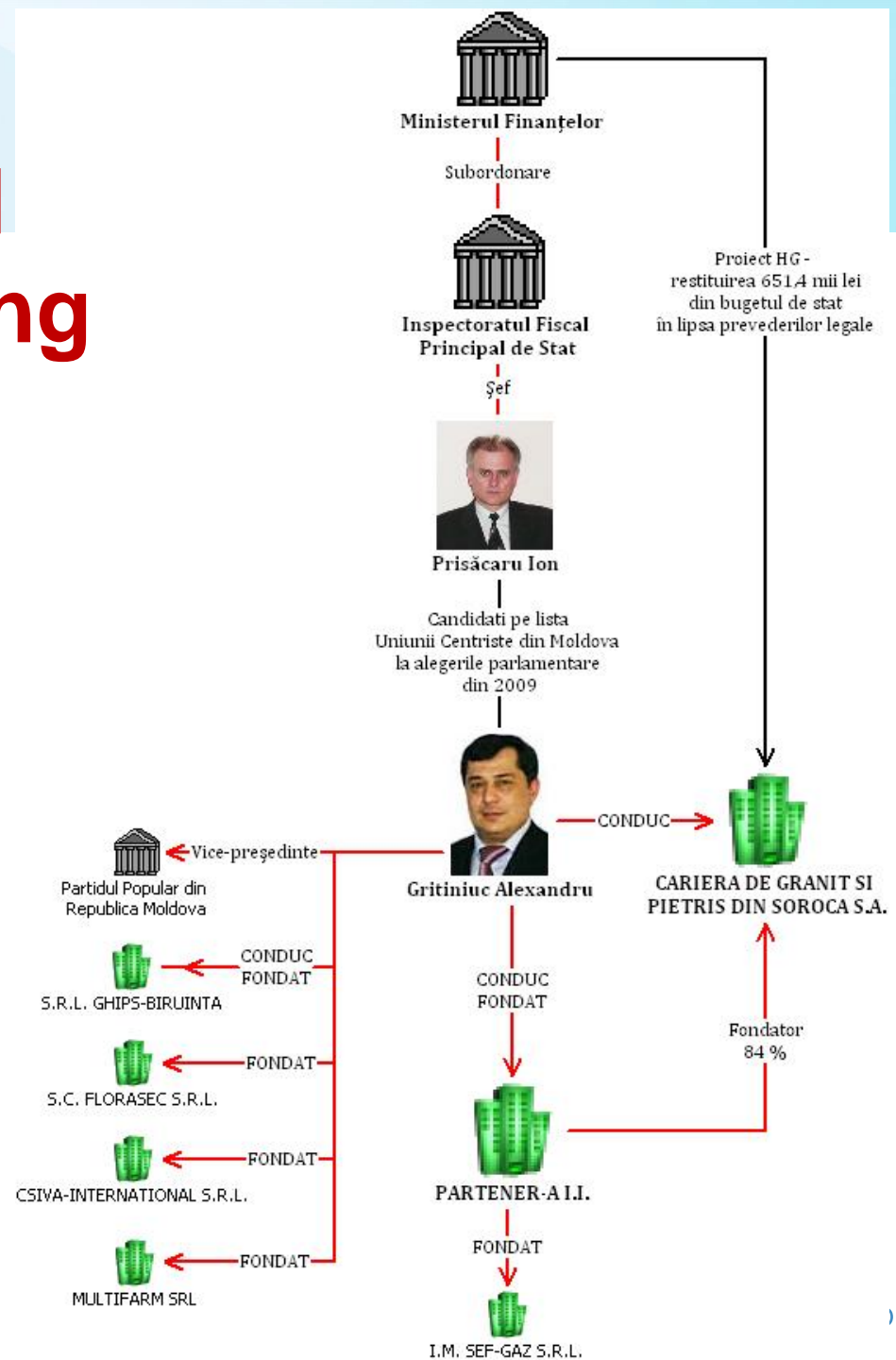
**Step 3:** text of the draft law

**Step 4:** information regarding the private interests in promoting the draft law, including lobbying

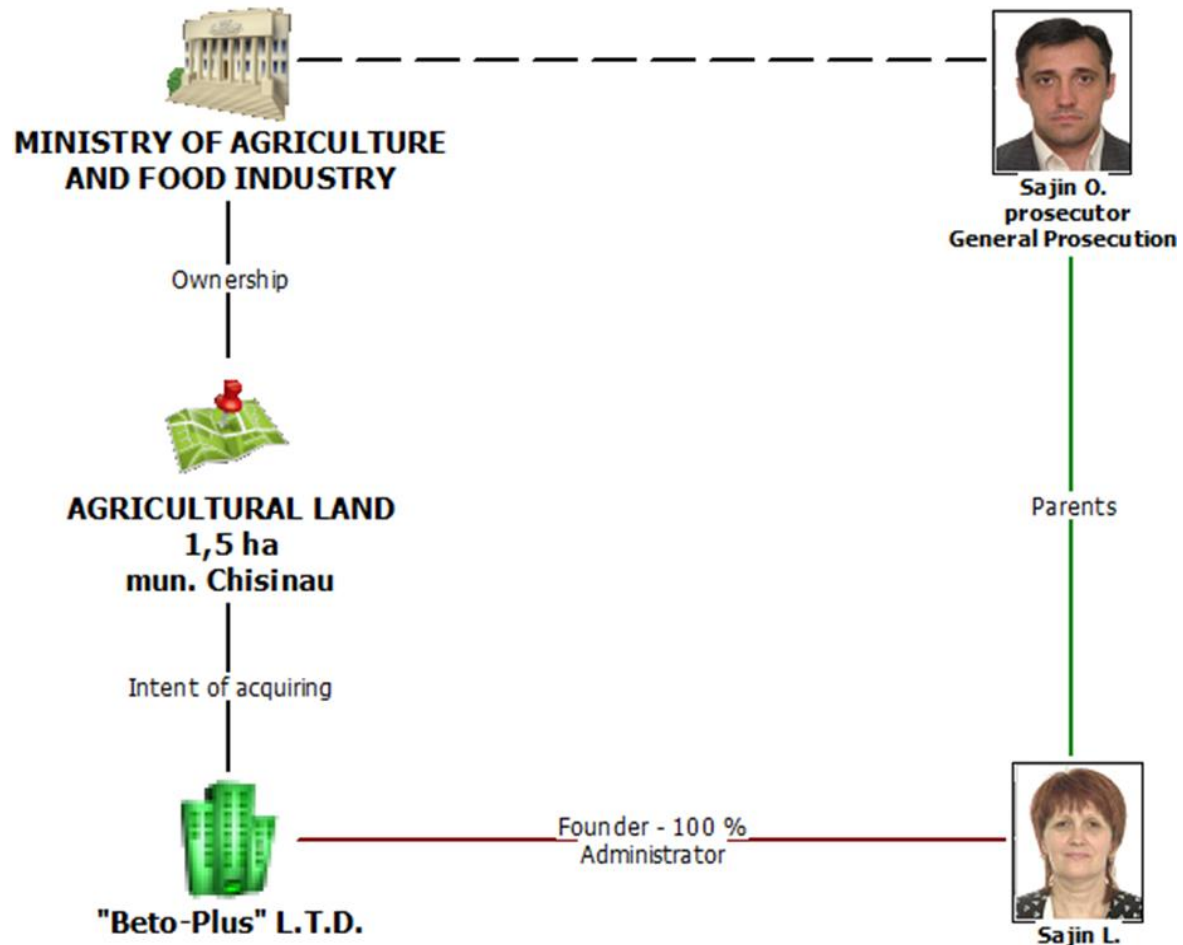
**Step 5:** damages which might be caused by the draft law

**Step 6:** other relevant information

# Granite and gravel mining



# Excluding 1,5 hectares of agricultural land from the public domain



# Boosting the impact of CP



- Quality of CP opinions
- Transparency of CP opinions
- Getting the interest of the media
- Use of simple and plain language

# Principles of conducting CP

1. Transparency of corruption proofing opinions;
2. Striking of the right balance between public interest and legitimate private interests;
3. Independence of experts in the process of preparing the corruption proofing opinions;
4. Avoiding unsolicited interference from the authorities and from the interested groups.

**THANK YOU!**

