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**PROJECT ON "STRENGTHENING SPECIALISED SERVICES FOR COMBATING
CORRUPTION IN UKRAINE"**

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Law Enforcement Affairs office in Ukraine*

EXPERT OPINION

**On draft Law of Ukraine "On the Anti-Corruption Bureau of Ukraine"
(registered on 18.01.2008 under №1378, submitted by Member of
Parliament Mr. Gennadiy Moskal)**

*Developed on the basis of the commentaries prepared by Mr. Goran
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INTRODUCTION

In March of 2008, during the meeting with the Member of Parliament of Ukraine, First Deputy Head of the Committee of Verkhovna Rada of Ukraine On Combating Organized Crime and Corruption, Mr. Gennadiy Moskal, it was requested from the Project on “Strengthening Specialized Services for Combating Corruption in Ukraine”¹ that an expert opinion on the draft Law “On the Anti-Corruption Bureau of Ukraine” (hereinafter: the draft Law)² be developed. Two experts have been retained for development of the expert opinion – Mr. Goran KLEMENČIČ, Slovenia (University of Maribora, Advisor to the Service on Prevention of Corruption) and Ms. Violeta GRIGALIENE, Lithuania (Special Investigation Service) – who prepared their commentaries on the basis of which the Secretariat of the Project has developed this expert opinion.

Commentaries of the experts have been prepared on the basis of the English translation of the Draft Law and of the selected pieces of Ukrainian legislation. There is a possibility that some arguments in the review are based on possible weaknesses in the translation or on misunderstanding of original legislative text. Results of different monitoring and review papers on Ukraine (e.g. OECD’s Istanbul Action Plan, Council of Europe’s projects; GRECO’s Evaluation Report of 2006) as well as personal experience with past in-field technical assistance and monitoring missions to Ukraine of the experts were also taken into account. Some arguments and concerns underlined below, however, might be based on the lack of in-depth knowledge of the overall legal and institutional framework of Ukraine given the limited focus of the analysis and at the same time the nature of the subject-matter which cuts deep into the existing institutional and legal framework in Ukraine.

Parts of this opinion build strongly on the contents of the **OECD’s publication “Specialised Anticorruption Institutions: Review of Models”** published in 2007 within the framework of the Anti-Corruption Network for Eastern Europe and Central Asia. Other references used: *Esser, Albin & Kubiciel Michael (2004): Institutions against*

¹ Project is funded by the U.S. Department of State’s Bureau for International Narcotics and Law Enforcement Affairs office in Ukraine.

² Draft Law “On the Anti-Corruption Bureau of Ukraine” (№ 1378) was submitted for consideration of Verkhovna Rada of Ukraine by the Member of Parliament of Ukraine G. G. Moskal on 18.01.2008. On February 21 2008 draft law was withdrawn by its initiator with the view of further improvement.

Corruption: A Comparative Study of the National Anticorruption Strategies reflected by GRECO's First Evaluation Round; Meagher, Patrick (2004), Anticorruption Services - A Review of Experience, IRIS; UNDP (2005): Institutional Arrangements to Combat Corruption: A Comparative Study, UNDP Regional Center in Bangkok; UNDP (2005): The draft Legislative Guide to Promote the Implementation of the United Nations Convention against Corruption; Doig, Alan (2004). "A Good Idea Gone Wrong? Anti-Corruption Commissions in the Twenty First Century", EGPA 2004 Annual Conference, Ljubljana; Council of Europe (2004), Anticorruption Services – Good Practices in Europe, Council of Europe Publishing, Strasbourg.

Views and opinions expressed in this document are authors' own, and do not necessarily reflect official views or positions of the institutions they are affiliated with, nor official positions of the OECD and State Department of the United States.

PART I

GENERAL COMMENTS

1. The draft Law on the Anti-Corruption Bureau of Ukraine represents a valuable (and concrete) step towards consolidation and strengthening of anti-corruption efforts in Ukraine. A step, which in the view of the experts, is indeed needed as well as somewhat overdue. The draft law could possibly serve as a starting point for further elaboration, discussion and preparation of the concept of establishing a focal anti-corruption body of Ukraine.

2. On the positive side, the draft Law:

- makes an important and far-reaching policy, institutional and legal decision to establish a strong focal anti-corruption institution with law enforcement functions (hereinafter: the Bureau) and by this consolidating (currently fragmented) tasks of detection and investigation of corruption and corruption related offences of high level officials at state and local self-government levels;
- recognises the need for a certain level of formal, institutional and fiscal autonomy and independence of the Bureau;
- recognises the importance of safeguarding appointment and removal procedures for the Bureau's Director from political pressure and bias;
- recognises the need for special qualifications, appointment procedures for the Bureau's staff as well as the need for legal and social protection of the staff and family from undue influence, pressures, threats etc.;
- obliges (selected) other state institutions to cooperate with the Bureau and specifically grants the Bureau powers to access relevant operative, systemic and analytical information, data and documents collected and kept by other public institutions;
- recognises the importance of a delicate checks and balances through control, oversight and accountability of the (powerfull) Bureau towards other state institutions (Parliament, President, Courts, Prosecutor's Office, etc.);
- in addition to the above highlighted positive orientations, various provisions of the draft law underline the need to respect legality and human rights in the process of exercising relatively broad powers of the Bureau.

3. **All the above mandates a general conclusion that the proposed legal framework is well intended and in principle aims to follow (some) international and European standards and OECD's and GRECO's recommendations in relation to specialized anti-corruption and seeks to address obvious persistent institutional**

and legal gaps and problems of the Ukrainian efforts to make efficient and sustainable progress in controlling corruption.

4. Nonetheless, in spite of various positive solutions and general principles embodied in the proposed law, a closer review transpires various significant general (structural) and specific deficiencies. Below follows a non-exhaustive list of some concerns with the draft law (they will be further elaborated in the next section):

- the mandate and task of the Bureau - while predominately law enforcement oriented - remain somewhat confusing, are in need for more precise definitions and a possible extension of the list of currently proposed task;
- the jurisdiction (personal, but in particular subject-matter) is at best vaguely defined and possibly overwhelming - as a result it can lead to arbitrary and politically motivated initiations or stopping of investigations on one hand and to jurisdictional conflicts with other law enforcement institutions on the other hand;
- arguments can be raised against the institutional placement of the Bureau within the MoI but even more strongly against an overly complicated system of internal and external “checks and balances” which grants various legal, reporting and fiscal powers of different institutions - the President, the Parliament, the Parliamentary Committee on the Fight Against Organised Crime and Corruption, Minister of Interior, Cabinet of Ministers, Prosecutor General, etc.;
- given the size of Ukraine and the personal and subject-matter jurisdiction a single centralised body without regional / detached departments or offices (not envisaged by the draft Law) seems insufficient;
- it seems the draft Law falls short of good integration with existing legislation on pre-trial investigative and operative measures as governed by the Code of Criminal Procedure, Law on Operational Activity, legislation in the area of Money Laundering Prevention; similarly the draft law misses a chance to give added value to the laws mentioned by identifying and rectifying some of their important gaps concerning tools and instruments against corruption;
- along the lines of the preceding comment, one can note that the law enforcement powers regulated by the draft Law urgently call for further elaboration; on one hand the draft Law introduces - not in a sufficiently defined manner - some important powers currently not regulated by Ukrainian legislation (e.g. enabling the use of provocation of bribe without adequate safeguard against abuse as required by European/ECHR standards) while at the same time it omits other important strategies, tactics and tools deemed necessary by international standards and foreign practice to

efficiently counter corruption (e.g. witness protection and encouragement of persons to report corruption, integrated financial and criminal investigations, assets recovery and confiscation of proceeds from crime; etc.);

- the draft Law fails to address a crucial link with Prosecutor's Office, its mandate jurisdiction, cooperation and specialisation in the field of the Bureau's jurisdiction;
- provisions safeguarding fiscal autonomy and in particular financial sustainability of the Bureau could be further streamlined and expanded;
- given the powers of the Bureau and its expected prominence within the Ukrainian law enforcement community there exists a danger to become overly exclusive and secretive; the experts, thus, find a possible need for more permanent and well defined external oversight mechanisms (apart from already political ones, judicial ones which depend on complaint and a very vague prosecutorial one); in the same light openness to civil society and private sector should be encouraged (despite - or because of - the typically closed law enforcement culture);
- apart from some half-defined measures ("moral and financial encouragement") the draft Law is silent on measures encouraging people to report cases of corruption; along the same lines protection of people involved in the proceedings (witness protection) is only referred to and relies on (rather insufficient) existing provisions of the Criminal Procedure Code.;
- the draft Law seems to provide for a rather ad hoc and overly automatic "transition process" in establishment of the new Bureau (transfer to the Bureau of existing human, material and financial resources from existing departments in the Ministry of Interior and Security Service) which gives rise to a valid argument that not only will people and resources be transferred from the existing structures but also the current problems and deficiencies, etc..

5. A number of concerns with the draft law and its structure does not enable me to give an article by article comments for possible improvement and consideration. Neither is at this stage appropriate to try to identify all concerns. In the next section I'll touch upon specific areas of concerns and suggest possible solutions.

6. The sources of international standards³, although different in scope, depth and aim, define a clear international obligation for the countries to ensure institutional specialisation in the field of corruption. At the same time, neither international standards nor an overview of comparative legal and institutional solutions in Europe and worldwide offer a definite blueprint for setting-up and administering a specialised anti-corruption institution. There is simply not a single best model or a universal type of anticorruption agency which can be copied and transplanted. Even a brief inventory of different anti-corruption institutions in existence today worldwide illustrates that anticorruption institutions worldwide are numerous and that their ranks are growing. At the same time, it is safe to say that among them there are more failures than successes and most of all - very few if any, present a “magic stick” for solving endemic or serious corruption problem in a given country.

There is always a danger that a new institution could create just another layer of ineffective “anti-corruption bureaucracy”; or a new centre of state repressive power which will trigger political fights for its domination and control; its establishment could divert resources, attention and responsibilities from existing control institutions; it could divert donor resources from priority areas of reform; it can invoke jurisdictional conflicts and turf-battles with other institutions; it could be abused as a tool against political opponents, etc. Hence the responsibility (and burden) on national authorities to find and institutionalise a model tailored to specific country needs. What can be identified from international standards and past and current experience from other countries is the number of caveats and mistakes that can be avoided and some good practices to be followed.

7. Stakes are even higher in a country as Ukraine, with a documented corruption problem, which is considering setting up a strong, central, anti-corruption body with significant powers. As was the case in many other (if not most) countries in transition in Europe and beyond where corruption ranked high in the concerns of citizens, as well as in the eyes of international community, donors and investors, there will be high public and political expectations linked with the establishment of such an anticorruption body. Willingly or not, such specialised anti-corruption institutions become very visible and their image in the public as well as in international community becomes closely linked to the perception of the public and even state institutions of the strengths and weaknesses of the fight against corruption in the whole country. While such expectations might be highly legitimate, good results are not imminent and no anti-corruption institution, notwithstanding its mandate, functions, powers and management will succeed alone to eradicate corruption. It can and should, however,

³ Articles 6 and 36 of the UN Convention Against Corruption, Article 20 of the CoE Criminal Law Convention on Corruption, Principle 7 of the Twenty Guiding Principles For the Fight Against Corruption, adopted by the Resolution №97(24) of the Committee of Ministers, etc..

play a leading role in reduction and control of corruption, and - importantly create and "islands" of integrity and competence. Showing results will be a crucial factor for any such body to gain and/or retain public, international and (good minded) political support and resist undue pressure and ill-motivated political or criminal attacks.

8. An anti-corruption body bears few chances to deliver on its promises if at its design and inception the following issues are not thoroughly assessed and regulated: institutional placement of the institution, its mandate and functions; forms of specialisation; independence, autonomy and accountability; adequate material resources, specialized and trained staff; adequate powers; cooperation with the civil society and the private sector; and inter-agency cooperation. To put it bluntly: if this one fails in Ukraine, the damage will be long-lasting and any subsequent efforts to make new or further structural and institutional anti-corruption reforms will be harder and tainted with lack of credibility and higher popular cynicism.

9. The introduction provided in the preceding paragraphs was deemed necessary as it is the opinion of the experts that some of the mentioned arguments apply to the existing Ukrainian situation and bear direct relevance for the future of the idea behind the draft Law. This, of course, should not be taken as a general criticism - as was already stated above, the draft Law is generally on good track. The intention is to merely underline, that various anticorruption bodies, agencies, commissions and committees have mushroomed throughout the last decade worldwide, more often than not established in an ad-hoc manner without comprehensive strategies, adequate resources or sufficient personnel; sometimes they are aimed primarily at appeasing the electorate and the donor community. Not surprisingly, today most transition and developing countries have one or many such institutions - many with questionable records of performance.

10. The creation of specialised anti-corruption bodies should not be an ad hoc one step project. As elaborated in the OECD's (2007) "Specialised Anti-corruption Institutions: Review of Models" and the Council of Europe's (2004) "Anti-corruption Services - Good Practices in Europe" **steps to be taken towards the creation of an anti-corruption body comprise of:**

- development of an anti-corruption strategy;
- decisions regarding the type and institutional placement of the anti-corruption institution;
- decisions on the mandate, functions and tasks of the institution;
- a definition of the relationships with other state institutions and clear rules on inter-agency cooperation;

- elaboration and adoption of a sound legal basis governing the institutional, financial, personnel, procedural and operational issues relating to the agency;
- the allocation of adequate budgetary resources;
- the appointment of a politically independent head of the institution through a transparent process seeking broad political and public consensus;
- the preparation of internal organisational structures and internal regulations including the internal code of conduct;
- an initiation of the process of recruitment of staff;
- a working out of internal administrative, operating and reporting procedures;
- the establishment of manageable work plans and benchmarks, and;
- the training of staff.

Accordingly, comparative experience shows that **an anti-corruption institution has more chances to succeed if:**

- its establishment is embedded in a comprehensive anti-corruption strategy, careful planning and performance measurement, realistic expectations, sufficiently strong political backing (across class/party) to make it effective despite (political and personal) consequences;
- if its jurisdiction (personal and subject-matter) is based on clear standards leaving as little room as possible for arbitrary or politically motivated initiations and/or terminating of investigations;
- if it is adequately accountable towards other state institutions and public through clear legal standards, judicial review, public complaints and oversight, answers to all branches of government and the public;
- if its size (in relation to staff) is not overloaded with “automatically” transferred officials from other services;
- if it is structurally independent and its independence is ensured through proper appointment/removal procedures for top officials;
- if it has fiscal/budgetary autonomy and sustainability;
- if its powers include strong research and prevention capabilities, access to documents and witnesses, freezing of assets, protection of informants, monitoring of income and assets;

- if it has access and powers to propose strategies and legislative reforms;
- if its staff is well-trained, highly specialised and in sufficient, well-compensated, subject to integrity reviews and quick removal, strong ethic of professionalism and integrity and high morale;
- if it possesses sufficient budget, adequate facilities and assets, and has a direct possibility of high-level information sharing and coordination with other government bodies, private sector and civil society.

PART II

SELECTED SPECIFIC COMMENTS AND RECOMMENDATIONS

(a) Mandate / tasks of the Bureau, its personal and subject-matter jurisdiction

11. The mandate / tasks of the Bureau (Art. 12 of the draft law) seem to invoke some confusion (it might also be a matter of translation or misunderstanding of the Ukrainian legal system). It is understood by the experts that the policy decision that the Bureau will be primarily a law enforcement (and not a multipurpose body) has already been made and is also in line with GRECO's recommendations. Nonetheless, some of the tasks listed in Art. 12 step in the area of prevention (a term "prevention" is used, in the text, enforcement of the rules of the conflict of interest for high level officials is used in a vague sense in point 5 of Art. 12; "analyse practice of state authorities" in point 5 or "research of public opinions" in point 10 is similarly vague; etc). On the other hand some areas that could be important from a purely law enforcement perspective are missing or are inadequately addressed (e.g. preventive and coordinative tasks within law enforcement community, internal investigation within law enforcement and security sector; criminal liability of legal persons, etc.).

12. A specialised anti-corruption institution is needed in contexts where structural or operational deficiencies of existing institutional framework do not allow for effective preventive and repressive actions against corruption. A more specific underlying rationale for establishing a new anti-corruption institution is centralize and consolidate all necessary information and intelligence about corruption and to assert leadership in the anti-corruption efforts, to resolve coordination problems among multiple agencies through vertical integration; and to address those important anti-corruption functions that are currently not implemented (at all or highly deficiently) by existing state institutions. In this light, establishing a centralised body with investigative functions seems proper in Ukrainian circumstance - which has been in various reports criticized for fragmented approach to investigation corruption among various agencies, low cooperation between them and a

rather modest role played by traditional law enforcement institutions such as Police and Prosecution (contrary to that of the Security Service).

However, this goes only half-way: reported current shortcoming such as weak coordination among law enforcement bodies, weak and fragmented analytical capabilities are not solved by simply centralising multiple agencies into one (especially since some important analytical functions and data necessarily remains with other institution such as Tax and Custom Administration, Office for the Prevention of Money Laundering etc.). Hence it is the view of the experts that tasks related to coordination, information and intelligence sharing and analysing should be further elaborated.

13. It is not the purpose of this paper to elaborate on the indisputable need to counter corruption also, or primarily, through prevention, not only repression. It can only be attested that success of countries that have build their anti-corruption policies and specialised institutions solely on detection and investigation is less then desired. **At the same time, mindful of the existing risks linked to the creation and effective functioning of a new institution it is acceptable that the new agency starts operating with mainly law enforcement functions while preventive and coordination capability is strengthened by additional institutional arrangements. In the future, should the Bureau prove to be effectively coping with the investigation of corruption offences it could be vested with additional responsibilities to reinforce its leading role in the anti-corruption efforts.**

14. What should also be taken into account is that the selection of tasks of any institution conditions its institutional placement and institutional culture. Law enforcement types of institutions are by definition closed and less transparent - characteristics that are neither valued nor desired for handling complex phenomena as corruption is – and which requires broad public consensus, open integrity and involvement of private sector and civil society. This seems especially worth noting, since Art. 12 of the draft law (Duties of the Bureau) provides a long list of tasks and duties, some of which are also preventive in nature, but fails to elaborate further on their implementation. Art. 12 seems to be partially inspired by the tasks given to the Lithuania's and Latvia's specialised a-c bodies (which are a different - multipurpose - type of institutions with - admittedly - a strong law enforcement bias).

15. The preventive tasks listed in Art. 12 should be revisited, further elaborated, in particular with regard to the verification of assets declarations and enforcement of rules on financing of political parties and election camapigns.

16. It is also important that the internal organisational structure (now only briefly addressed in Art. 7) should be streamlined and further defined (here again see the OECD's publication on Specialised Institutions which provides examples of internal structures).

17. The main challenge of institutions mandated to fight corruption through law enforcement, is to precise their personal and subject-matter (substantive) jurisdiction (offences falling under their competence), to avoid the conflict of jurisdictions with other law enforcement agencies and to ensure efficient cooperation and exchange of information with other law enforcement and control bodies. This is even more crucial as corruption related offences are often committed in concurrence with other financial and economic crimes as well as in the course of organised criminal activity; and in Ukraine the investigation and prosecution of the former will remain a responsibility of other law enforcement departments.

18. Current draft Law limits personal jurisdiction to high level officials from Art. 3/1 of the Law on Countering Corruption, in short: high level officials of the Executive, Legislative and Judiciary as well as local self-government. This approach has its own merits. there are, however, a number of caveats.

First, since the experts are not familiar with the grading system of civil servants in Ukraine (the draft includes civil servants up to 2nd grade) they trust this also covers most posts on “lower” level in corruption vulnerable areas (procurement, subsidies, financial transfers, etc.). Second, personal jurisdiction is limited to high-level officials only in regard to “corruption and corruption related offences”, while there is no personal jurisdiction limitations in regard to political party financing or in regard to abuse of foreign and international assistance (for the latter it would be advisable at least to limit jurisdiction with a certain amount of damage caused). Third, literal reading of the law implies that the Bureau will only have jurisdiction over passive bribery. Fourth, by limiting jurisdiction only ex persona rather than ex rem (e.g. by the amount of damage caused) a number of highly important and complex cases (which by chance will be perpetrated by lower officials) will fall on other law enforcement bodies (which due to the fact that most a-c efforts, training and “investments” will go to the Bureau will be even worse “equipped” to deal with such cases as they are currently). Fifth, it could be suggested to consider expanding the jurisdiction also over some specific and corruption vulnerable sectors (in particular the military, security and law enforcement services, tax and custom, etc.) not limiting it by “grade of the official” but rather by complexity of the case and estimated damages/proceeds of crime. Along this line, the Bureau should also have jurisdiction over cases involving bribery of foreign and international public officials and possibly over investigating cases of criminal liability of legal persons (when both issues will be properly legislated in the near future).

19. Furthermore, the draft Law prescribes substantive jurisdiction simply as “corruption and corruption related offences”. It seems that there are still some problems in Ukraine with the clarification and the relationship between violations of the Criminal Code and the Law on the Fight against Corruption and its lack of an uniform system to sanction

corruption (overlapping of through criminal and administrative approach). In relation to the offences falling within the competence of the Bureau the draft Law makes reference to the latter. By this it threatens to overburden the Bureau with a flood of cases.

It is of utmost importance that the substantive mandatory (exclusive) jurisdiction of the Bureau is properly defined in the draft Law. Experience shows that mandatory jurisdiction results in an overburdening of the institution with cases. One of the solutions is to limit the jurisdiction of the service to important and high-level corruption cases; if this is an adopted approach it is crucial that the law prescribes precisely the factors for determining such jurisdiction to avoid abuse of discretion and conflicts of jurisdiction with other bodies. If, however, a system of discretionary approach (choose and pick) is adopted an elaborate system for preventing arbitrary and politically motivated selection of cases needs to be adopted.

Experience also shows that the focus of new a-c institutions should be perspective rather than retrospective (as much as possible, the jurisdiction should be prospective and future-oriented with a limited retrospective remit that focuses only on the most severe and explicit cases).

20. Finally, **the lack of clear standards concerning the personal and substantive jurisdiction gives room to arbitrary or politically motivated initiations and/or terminating of investigations and in particular room for jurisdictional battles among different agencies** (either in the form that more of them are claiming jurisdiction, or all of them are refusing it saying it falls under the responsibility of another agency).

(b) Institutional structure

21. The draft Law places the Bureau within the Ministry of Interior. At the same time the draft Law goes a long way to secure its distinction and institutional autonomy from the Ministry. It obviously seeks to create a sui generis independent body. Why then positioning it in the Ministry of Interior at all if the draft law cuts most institutional and hierarchical links with the Minister? There is a fear that this might - despite, or exactly because of, all other provisions in the draft Law providing for its special status - create internal, administrative jurisdictional, competence-hierarchical turf battles, institutional deadlocks, obstructions, in-fights and external undue influence.

22. It is clear that creating a sui generis executive agency fully outside any ministry or within the prosecution service might be problematic from a constitutional point of view. But on the other hand **placement of an a-c agency within existing "police" structures unavoidably influences (in a negative way) independence and in particular the**

institutional culture of such new agency (law enforcement culture, especially a former Soviet one - as experience indicate in other countries that followed such model - does not present a fertile ground for seeing and approaching corruption as a broad social problem going beyond mere detection and investigation).

23. As stated above, the draft Law in Art. 7 provides only an outline of internal structures. Lastly, but importantly, the draft Law does not speak about how the Bureau will be organized on regional and/or local level. It only speaks about one centralised Office. Surely it will need some regional / detached departments. While this could be left to later executive regulation, the law should provide at least some guidance on territorial / jurisdictional issues.

(c) *Appointment and removal of the Director*

24. It is noteworthy that the draft Law recognises the importance and symbolic role of the Director. Appointments of heads of central a-c bodies should follow a system where the selection process for the Director is transparent and facilitate the appointment of a person of integrity on the basis of a high-level consensus among different powerholders. The draft Law to a large extent follows this rule. I found it appropriate that the President, the government, and the Parliaments are involved. The text of the draft Law, however, requires further streamlining and clarification. As experience shows such appointments and removals can become prominent - and embarrassing – political battlefields, so one needs to be as consistent and detailed as possible.

25. In the opinion of the experts, the Government (the Cabinet of Ministers), rather than the Minister of Interior as proposed in the draft Law should play a role in the process of appointment and possible dismissal. Not having been very familiar with the structure and functioning of the Parliament's Committee against Organised Crime and Corruption; perhaps it is worth considering that the Parliament, rather the Committee is involved in the process.

26. The draft Law sets out a long list of specific qualifications for the post of Director and limits causes or his/her dismissal. This is good. However, it might be that the list is not at least to some extent a duplication from existing requirements in civil service.

27. Provisions of Art. 8 of the draft law under which the Director bears personal responsibility for the “accomplishment” of the Bureau's tasks seems strange (perhaps its a matter of translation).

28. Deputy Director: his/her role is not defined in the draft law and should be revisited (regarding qualifications, obligations and duties - apart from substituting the Director when he/she is absent); it is not clear if there is only one or there can be more of them (Art. 9. uses plural when referring to this position); also while the solution that Deputy Director is appointed by the President on the submission by the Minister of Interior has its own merits it might be worth involving the Director in the process (enabling him/ her to influence the composition of his closer own team).

(d) Collegium of the Bureau

29. It seems that the idea of the Board a good one; it however needs further streamlining and perhaps a change of focus. It is suggested that its regular composition is to be fixed in the draft Law (e.g. Director, Deputy Director and Heads of departments), and not open-worded ("other high officials of the Bureau").

(e) Employees / their protection, privileges and immunities

30. The draft Law affords a lot of attention / provisions to qualification of the staff of the Bureau and to their protection, privileges and immunities. In principle this is a good approach. However, with no intention of making an uneducated conclusion, the experts have found some of the immunities overreaching (e.g. in relation to the immunity from prosecution) and other a duplication with existing laws (e.g. some of the same provisions exist in the Law on operation activities). The draft Law also goes a long way to limit possibilities of prosecuting and investigating a member while at the same time leaves doors wide open for civil actions against the employees (perhaps also here there should be jurisdiction linked to Kyiv Court of Appeals).

31. Given the broad immunities and powers of the employees of the Bureau it would seem necessary to consider including in the draft Law a special independent complaint procedure for persons whose rights might been violated by the staff of the Bureau (I'm of the opinion that the current system which requires a leave of the Prosecutor General and a special jurisdiction of the Kyiv Court falls short of the European Court of Human Rights clear standards on investigation of allegations of violation of Art. 2 and 3. of the ECHR).

32. One important issue that is not addressed adequately in the draft Law concerning the Bureau's staff is their specialisation and training.

33. Furthermore, selection and appointment of personnel should be based on a system of objectivity, transparency and merit; what I miss from the draft Law is a procedure for

background security checks that could be integrated into recruitment procedures as well as regular periodic and ad hoc security inspections and inspections of the staff's assets.

34. It can be concluded that one of the prerequisites for employment in the Bureau is 5 years of working experience. In most cases this is a valid norm, but for some tasks, and in particular in the a-c area, young, determined people with good education, integrity and will might be a better choice than people with long career in the bureaucracy. In addition - and more importantly - the draft Law should at least note that not all people will be investigators, an a-c agency must employ for example, forensic specialists, financial experts, auditors, IT specialists, etc..

35. Often, such services need to utilise specialists from other governmental or state agencies (Court of Audit, Tax & Custom, Ministry of Finance; it is recommended that the law provides for a possibility of time-limited "secondment" of personnel to the Bureau from other positions in the public sector.

(f) Powers

36. Art. 13 and 14 which prescribe powers of the Bureau and its employees overly vague and under-regulated. Further attention should be given to more concise regulation of adequate powers of the Bureau - both from the perspective of efficiency of investigation of criminal and administrative cases as well as from the perspective of respecting established European Human Rights Standards.

37. Comparing the powers in the draft Law with existing investigative powers in the Code of Criminal Procedure, Law on Operational Activity, and the legislation in the area of Money Laundering Prevention leaves me confused (it might very well be the misunderstanding of the Ukrainian legal system): it seems as some existing investigative powers are not mentioned; some rather intrusive new powers are introduced with little or no safeguards; other important a-c powers are not mentioned.

Only this topic would require a separate review, so highlighting of some of the examples is provided: the draft Law introduces the use of provocation in bribery which is to my knowledge currently not regulated in the CPC or the Law on operational activities while not providing adequate (any) safeguard against abuse as proscribed by established European standards; it introduces the power of a warrantless entry and search of private institutions without even a requirement of a prior reasonable suspicion or ex-post judicial review; it enables freezing of financial transactions for up to 3 days without any safeguards and conditions; it speaks about "pecuniary" encouragement to citizens for assistance without any regulation against abuse prevention; etc..

38. On the other hand the draft Law makes no mentioning of important tools and instruments for countering corruption such as running integrated financial and criminal investigations, forming joint investigative teams, assets recovery and confiscation of proceeds from crime; raising the incentives for persons to report corruption and cooperate with the authorities (ranging from whistleblowers protection to the possibility of granting limited immunities and reduction of punishment to collaborators of justice).

39. The Bureau will be given vast access to information, but the draft Law makes no provision on securing personal data; on the other hand provisions could be also added that secure the confidentiality of information and ongoing inquires (provided that they don't exist in other laws).

40. Given the fact that Ukrainian legislation relating to regular investigative and criminal proceedings (e.g. Code of Criminal Procedure) is currently also under reform and some tools and instruments deemed necessary for efficient suppression of serious crime (not only corruption) are not yet in place, it is advisable that the draft law in the a-c Bureau addresses some of those gaps.

41. Similar services in other Eastern European countries have often been subject to criticisms (or observations) to rely predominately on special investigative means, proactive covert methods of detection and investigation of corruption, sometimes resulting in provocations and entrapment. While corruption, a concealed criminal act between two consenting parties, a victimless crime, is notoriously hard to detect without special investigative techniques, it is also true that the usage of such measures will be higher when legislative gaps exists as elaborated in the previous section – absence of legally regulated protection of incentives for persons involved in corruption to report it and benefit from the collaboration with justice. It would therefore seem advisable to conduct a review based on the review of the case-law of the European Court of Human Rights and European and good constitutional and legislative practices of European countries and based on this subsequently provide in the law on the operation activities or in the CPC for a clear test for undercover activities, special investigative means, provocation / entrapment, giving clearer guidance on permissible and non-permissible practices in the usage of such methods.

42. To preserve the confidentiality and integrity of investigation some countries opted for a system where court orders (not trials) for different special investigative measures are ordered by a court (or courts) of special jurisdiction, by judges that undergo specific background checks. This might again be something to consider.

43. Strong and functioning inter-agency cooperation and exchange of information among different state law enforcement bodies and control institutions (e.g. financial control

institutions, tax and custom administration, regular police forces, security services, financial intelligence units, etc.) is an important feature that is to some extent addressed in the draft law. Problems in this area are plentiful in practice and range from overlapping jurisdictions and conflicts of competencies to the lack of competencies (where institutions are refusing jurisdiction in sensitive cases and shifting responsibilities to other institutions). If this feature is overlooked (as it often is) in the process of designing the legal basis of the new institution it will likely seriously hinder the performance of the institution and taint its relations with other State institutions in the future.

The draft Law currently obliges other state institutions to cooperate with the Bureau and gives the Bureau the powers to gain access to their data and information. The draft Law should, however take into consideration that this is a two-way street and that also the Bureau should provide others with relevant information (e.g. institutions responsible for tackling organised crime, money laundering, tax evasion, etc.); and importantly: the law lacks provisions obliging automatic information sharing (as opposed to sending information on request) in situations when one institution comes across a case which might fall in the jurisdiction of another institution.

44. With the establishment of the new institution, especially with removal of the a-c investigative function from the Security Service there will inevitably come new problems with cooperation and possible conflicting competencies in cases of concurrence of corruption, financial and organised crime offences. In many countries absence of very specific regulations in different laws and the signed agreement on cooperation the exchange of information and cooperation often remain subject to good-will of particular heads of services and personal relationships. This could be worrisome, since complex corruption cases are seldom only corruption cases, but involve elements of other financial crimes, money laundering and organised crime. Hence, in addition to the existing provisions in the draft law, the law could provide for additional operational memorandums for the exchange of information.

(g) *Relation with the Prosecution service*

45. Absence of almost any reference to the Prosecution Service (except in some instances to the Prosecutor General) in the draft law is striking. Internal difficulties and on-going discussions about the role of different institutions in the chain of justice in Ukraine are understandable; it can also be acknowledged that sometimes difficult institutional relationships between security services and the prosecution in many transitional countries exist. However, it is a fact, that corruption, as any other crime, must not only be detected and investigated, but must also be prosecuted and adjudicated.

46. It is of little effect if only one institution (e.g. the police) is consolidated, specialised, free of undue political or other influence, properly equipped and trained; if the carefully

prepared and investigated case falls apart, is compromised or stopped at the level of prosecution, backlogs in the judicial system, ... While some countries have specialised anti-corruption investigative agencies only the level of police and their cases are processed by regular prosecutors, in transition economies that has not proven as a good solution.

47. It is therefore strongly recommended that a question of some kind of specialisation of the prosecutor's office which would mirror substantive-jurisdiction of the Bureau is considered (one does not need to follow e.g. Romanian or Spanish example where the Bureau is be organised within the Prosecution Service; one could look at examples of Lithuania, Croatia, Slovenia, Serbia, where detection, investigation and prosecution remain institutionally separated but with strong cooperation and complementary jurisdiction).

(h) Accountability, involvement of civil society and private sector

48. Independence, should not amount to a lack of accountability; specialised anticorruption services should in the discharge of its duties and powers strictly adhere to the principles of the rule of law and internationally recognised human rights. The draft Law includes a number of provisions to that effect. While the Bureau is envisaged by draft Law to regularly report to the Parliament to the President and is subject to prosecutorial (this one is defined rather vaguely in the draft) and court supervision it does not have an external oversight body as utilized in many strong centralized multipurpose anti-corruption agencies (Hong Kong, Singapore, Latvia, etc.); e.g. in forms of committees (which can comprise of representatives of different state bodies and civil society).

Working with the media, civil society and private sector proved an important factor in countries with a decent success rate of their specialised a-c agencies. The draft Law is silent on this. It is recommended for this issue to be revisited. Accountability and independence reinforces each other. Practice in many countries attest that the support of the public (which in turn is conditioned by the integrity of the anti-corruption institution) is crucial in times when the body comes under politically motivated attacks.

49. In addition, there is room and need to further streamline reporting (e.g. some reports of its functioning should by law be made public and available on the internet); Parliament, President and the Government should be able to require ad hoc reports on specific issues etc..

(i) Other comments/proposals

50. There is a need for clarification and further detailed elaboration of the principles based on which the Bureau will be functioning Art. 4 of the draft Law (for example, the

meaning of the principle of “centralization”, “collegiality in the preparation of the important decisions”, “social justice”, etc.).

51. Taking into consideration that Art. 6 of the draft Law provides for international cooperation, it is proposed to amend the text of the Art. 3 with provisions, according to which the Bureau shall be additionally guided in its activities by international treaties to which Ukraine is a party.

52. It seems controversial that Art. 7 (General structure and number of personnel of the Anti-Corruption Bureau) shall contain provisions regarding temporary isolation wards.