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Anti-Corruption Network  
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**PROJECT "STRENGTHENING THE CAPACITY FOR INVESTIGATION AND  
PROSECUTION OF CORRUPTION IN UKRAINE"**

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**EXPERT COMMENTS**

**to the Draft Law of Ukraine  
"On the National Bureau of  
Anti-Corruption Investigations of Ukraine"  
(Draft Law No. 5031, registered in the parliament of Ukraine on  
29 July 2009)**

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*Views and opinions expressed in this document are author's own, and do not necessarily reflect official views or positions of the institutions he is affiliated with, nor official positions of the OECD or the US Government.*

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## **I. Introduction**

So much has been said about corruption recently that there can be no doubt about the enormous damage it causes, and the threat it poses to the rule of law and to the development of democracy. It does not attack the state, its institutions and the basic principles of democracy from the outside, but corrodes them from within. It is an integral part of every public administration. The knowledge about how far-reaching corruption is and how much damage it can cause the private sector, civil society and every individual is growing every day.

Although corruption does damage to individual countries the driving force in combating corruption are not individual states, but the international community. The reason for this is the realisation that the best way to fight the damage caused by corruption internationally is to fight it within individual countries. The Organisation for economic co-operation and development (OECD), the Council of Europe and recently the UN have devoted a lot of attention to this issue. Many countries have accepted the leading role of these international organisations with relief because, despite a growing awareness of the necessity for action in this field, many recognise the delicacy of these issues. The prevention, detection and suppression of corruption are made difficult by powerful individuals and/or groups obstructing progress in individual countries. No single country or institution is immune to corruption and any individual could find himself or herself in a situation of a conflict of totally irreconcilable interests. It is because this is the case that it is vital to set effective standards that are accepted by the majority of, if not all, the countries of the international community.

The international community is taking on a vital co-ordinating role, which is necessary for all the countries in the face of increasing globalization and the (at least minimal) universality of solutions. But it is also adopting fundamental positions that importantly affect the formulation of the concept of corruption and its attributes, the strategies for its reduction and the measurement of its consequences. One of the measures, lately almost fixed as an international standard is also the establishment and functioning of the national specialised anti-corruption institutions.

## **II. International standards in the area of anti-corruption institutions**

Almost all international legal instruments devote some attention to the position and powers of institutions fighting corruption:

UN Convention against Corruption stipulates in Article 6:

*“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:*

- Implementing the policies referred to in Article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies,*
- Increasing and disseminating knowledge about the prevention of corruption.*

*Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from undue influence. The necessary material resources and specialized staff, as well as training that such staff may require to carry out their functions, should be provided.*

*Each State Party shall inform the Secretary General of the United Nations of the name and address of the authority or authorities that may assist other State Parties in developing and implementing specific measures for the prevention of corruption”.*

Furthermore, UN Convention against Corruption stipulates in Article 36:

*“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks”.*

The Council of Europe Criminal Law Convention on Corruption (ETS 173) stipulates in Article 20 that *“each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Part, in order for them to be*

*able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks”.*

The Council of Europe Resolution (97) 24 on the Twenty Guiding Principles for the Fight against Corruption stipulates that countries have the duty:

*- to ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations (Guiding Principle No.3);*

*- to promote the specialisation of persons or bodies in charge of fighting corruption and to provide them with appropriate means and training to perform their tasks (Guiding Principle No. 7).*

It is very easy to summarise essential mandatory international requirements for the bodies for the effective fight against corruption:

- necessary independence,
- specialisation,
- resources and powers.

According to already existing texts<sup>1</sup> these terms have the following meaning:

**Independence** primarily means that the anti-corruption bodies should be shielded from undue political interference. To this end, genuine political will to fight corruption is the key prerequisite. Such political will must be embedded in a comprehensive anti-corruption strategy. The level of independence can vary according to specific needs and conditions. Experience suggests that it is the structural and operational autonomy that is important, along with a clear legal basis and mandate for a special body, department or unit. This is particularly important for law enforcement bodies. Transparent procedures for appointment and removal of the director together with proper human resources management and internal controls are important elements to prevent undue interference. Independence should not amount to a lack of accountability; specialised services should adhere to the principles of the rule of law and human rights, submit regular performance reports to executive and legislative bodies, and enable public access to information on their work. No single body can fight corruption

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<sup>1</sup> The OECD Review of Models of Specialised Anti-Corruption Institutions, <http://www.oecd.org/dataoecd/7/4/39971975.pdf>

alone; inter-agency co-operation, co-operation with civil society and business are important factors to ensure their effective operations.

**Specialisation** of anti-corruption bodies implies the availability of specialised staff with special skills and a specific mandate for fighting corruption. Forms of specialisation may differ from country to country; there is no one successful solution that fits all. For instance, the Council of Europe Criminal Law Convention on Corruption clarifies the standard for law enforcement bodies, which can be fulfilled by the creation of a special body or by the designation of a number of specialised persons within existing institutions. The study of international trends indicates that in OECD countries specialisation is often ensured at the level of existing public agencies and regular law enforcement bodies. Transition, emerging and developing countries often establish separate specialised anti-corruption bodies due to high level of corruption in existing agencies. In addition, in these countries, creation of separate specialised bodies is often in response to pressure by donor and international organisations.

**Resources and powers** should be provided to the specialised staff in order to make their operations effective. Training and budget are the most important requirements. Another important element required to properly focus the work of specialised anti-corruption bodies is the delineation of substantive jurisdictions among various institutions. Sometimes, it is useful to limit jurisdiction to important and high-level cases as well. In addition to specialised skills and a clear mandate, specialised anti-corruption bodies must have sufficient power, such as investigative capacities and means for gathering evidence; for instance they must be given legal powers to carry out covert surveillance, intercept communications, conduct undercover investigations, access financial data and information systems, monitor financial transactions, freeze bank accounts, and protect witnesses. The power to carry out all these functions should be subject to proper checks and balances.

When considering the establishment of anti-corruption bodies, countries need to take into consideration the full range of anti-corruption functions, including<sup>2</sup>:

- a) **Policy development, research, monitoring and co-ordination.** These functions encompass research of trends and levels of corruption, and assessment of effectiveness of anti-corruption measures. They further include policy development and co-ordination, including elaboration of anti-corruption strategies and action plans and monitoring and co-ordination of implementation measures. Another important function is serving as a focal point for international co-operation.

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<sup>2</sup> See above, Footnote No.1

- b) **Prevention of corruption in power structures.** These functions focus at promoting ethics inside public institutions and include elaboration and implementation of special measures concerning public service rules and restrictions, and administering disciplinary punishment for non-compliance with them. More specifically, these functions may include prevention of conflict of interest; assets declaration by public officials, verification of submitted information and public access to declarations. Besides, these function aim to prevent corruption through state financial control, anti-money laundering measures, measures in public procurement and licensing/permits/certificates systems. Finally, preventive functions aim to promote transparency of public service and public access to information and ensure effective control of political party financing.
- c) **Education and awareness-raising.** This area includes developing and implementing educational programmes for public, academic institutions and civil servants; organising public awareness campaigns; and working with the media, NGOs, businesses and the public at large.
- d) **Investigation and prosecution.** Firstly, these functions aim to ensure a legal framework for effective prosecution of corruption, including dissuasive sanctions for all forms of corruption. Secondly, they aim to ensure effective enforcement of anti-corruption legislation throughout all the stages of criminal proceedings, including identification, investigation, prosecution and adjudication of corruption offences. In doing so, it is also important to ensure transition between criminal and administrative proceedings. Thirdly, these functions include overseeing interagency co-operation and exchange of information on specific cases and outside such cases (among law enforcement bodies and with auditors, tax and customs authorities, the banking sector and the financial intelligence unit (FIU), public procurement officials, state security, and others). Fourthly, these functions include acting as a focal point for mutual legal assistance and extradition requests. The responsibility for the above anti-corruption functions must be clearly assigned to specific existing or newly created institutions.

### **III. Practical problems connected with the decision on the establishment of a specialised anti-corruption body**

Not very often countries decide to establish a new budgetary consumer in a form of a new public institution – they usually do it because they are forced so, either by the population or by their international commitments. The area of corruption is a field, where lately both push factors are very intensive and therefore more and more countries establish different anti-corruption institutions. Since fighting corruption can be a very unpleasant exercise for the main policy makers of the country they might be tempted to establish such body with a legal act, which can easily be changed or even abolished. Therefore, one of the most important pre-requisites for an effective anti-corruption body is a proper legal document, which serves the purposes of the establishment and functioning of this body. Without any doubt the best possible way to establish such a body and ensure its relatively unhindered operation is a form of a law, adopted in a (normal) legislative procedure, providing for institution's independence, resources and methods by which it is to be accountable to the public.

The very first decision, which has to be made in such law, is the decision on the main character of the anti-corruption institution and its position in the existing institutional set-up of the country. There are different forms of anti-corruption institutions, dealing with the following ways of fighting corruption: prevention, repression and education. It is understandable that prevention and education go together hand by hand, but what about the repression?

Independent repressive anti-corruption bodies are usually created when corruption is so pervasive and law enforcement agencies so corrupt or ineffective that corruption offences are either not investigated or not prosecuted. It is basically very simple – if the population still trust the “ordinary” law enforcement services risks of establishing an additional one would be too unforeseeable: division of work between the existing and new institution, division of powers and cases among them, information-flow, the level of co-operation, fragmentation of the fight against corruption, etc. are simply too problematic to be tackled without any serious need.

When the decision on the character of a body is made, the decision on its position in the country's institutional set-up has to be made and its powers have to be defined and regulated. Of course, powers of the body with investigative authorities are completely different than powers of the body, which deals exclusively with prevention (and education). Investigative powers are very close to possible breaches of basic human rights, much more than the powers of pure preventive bodies. Therefore, legislators have to be very careful in defining

those powers and they have to follow at least the same standards as they are used for the powers of traditional law enforcement agencies.

The powers, which an anti-corruption institution has and the range of its duties in respect of targeted professions already give the first hint on its formal position: if this is a body established to fight corruption in all three branches of power and it really wants to be independent, the best possible position for it is completely (of course, bound by the basic constitutional principles of the country) independent position, without interference with any branch of power. Said that, it has to be clear that such institution is also completely accountable for its deeds and actions and a proper reporting mechanism to a superior state body has also to be established. In theory, accountability to the country's legislative body is considered to be the best form of accountability of an independent anti-corruption body.

When the body is established and its powers are regulated the most difficult task starts: the anti-corruption institution has to be given sufficient resources to hire and educate employees, to purchase necessary premises and technical equipment and to pay at least decent salary to the employees. Independence in drafting and expenditure of its budget is again a basic pre-condition for its effective work and a clear signal on the real intentions of the country establishing such a body. The successes of countries' anti-corruption institutions depend on such trivial matter as money but – money is a proof of a real political will. The best legal arrangements on the establishment even ideally positioned anti-corruption institution will undoubtedly fail if there is not an appropriate part of the budget devoted to this institution.

When the body starts to operate it strictly has to follow some principles, which are unconditionally linked to its work: objectivity, professionalism, impartiality, integrity, honesty, effectiveness and efficiency. If these principles are not followed the enemies of the institution have a very easy job in discrediting its efforts and in demanding its re-structuring or even its abolishment.

Based on the international legal and other<sup>3</sup> texts and practice it is also apparent that to succeed an anti-corruption agency in addition to fulfilling the requirements mentioned in Chapter II of this opinion needs the following:

- to be an element within a wider national anti-corruption policy,
- government commitment and political will,
- co-ordinated action with other stakeholders,
- adequate legislation with clearly defined powers,
- transparency and accountability mechanisms,
- credibility and public trust,

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<sup>3</sup> OSCE: Best practises in combating corruption.



- co-operation with civil society,
- high level of ethics.

#### **IV. Draft Law of Ukraine on the National Bureau of Anti-Corruption Investigations of Ukraine<sup>4</sup> and amendments to related legislation of Ukraine - analysis and opinion**

##### ***IV.1. General remarks***

There have been several international recommendations already made to Ukraine to enhance its anti-corruption efforts through (a) specialised anti-corruption institution(s).

According to the 2004 review of the situation in Ukraine carried out within the OECD/ACN Istanbul Anti-Corruption Action Plan, Ukraine was recommended to: *“Concentrate law enforcement capacities in the area of the fight against corruption, which are currently fragmented, and develop operational specialized anti-corruption prosecution units, consider establishing a national Specialized Anti-corruption Unit, specialized and empowered to detect, investigate and prosecute corruption offences. Such a Unit could be an integrated, but structurally independent, or separate unit of an existing law-enforcement agency and/or the Prosecution Service. Apart from working on actual important corruption cases, one of the main tasks of such a Unit would be to enhance inter-agency cooperation between a number of law enforcement, security and financial control bodies in corruption investigations.”*<sup>5</sup>

In its Evaluation Report on Ukraine as a result of the joint first and second evaluation rounds GRECO noted that *“a clear distinction needed to be made between the implementation of overall preventive reforms as enshrined in the Concept Paper [for Eradication of Corruption in Ukraine “On the Road to Integrity”] on the one hand, and improving the law enforcement on the other. These two functions are separate and ought not to be mixed up.”* GRECO thus recommended *“to establish a body, distinct from the law enforcement functions, with the responsibility of overseeing the implementation of the national anti-corruption strategies and related action plans [...]”*

The Draft Law of Ukraine on the National Bureau of Anti-Corruption Investigations of Ukraine clearly shows that Ukraine is trying to find an adequate institutional approach for the fight against corruption. The basic concepts of the law are on a par with those of many other European countries

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<sup>4</sup> Draft Law No. 5031, submitted to the Verkhovna Rada (Parliament) of Ukraine on 29 July 2009.

<sup>5</sup> Fighting Corruption in Transition Economies: Ukraine, OECD, 2005; Recommendations are available at [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn).

and sometimes they even exceed them (*i.e.* articles 8, 9, 12, 17, 18, 31). Of course, (few) inconsistencies occurred in the transformation of the concepts into concrete articles and paragraphs, but that does not mean that the value of the draft law has in any way diminished. It merely suggests that with some additional assistance or "precise tuning" this law will truly become a useful tool in the fight against corruption, underlining Ukraine's efforts in this field, placing the country, along with some other states, at a higher level of suppression of this phenomenon.

In the expertise comments are made to concrete articles and a summary containing some general suggestions is added at the end. It is up to the country to decide, which comments and suggestions will be taken into account, as it has its own experts with excellent knowledge and the necessary experience in fighting corruption. The present expertise is thus merely an attempt to lend some assistance to both – the domestic experts and their country.

Comments listed below follow the numbering of the articles. Where there is no mentioning of an article or a paragraph that indicates that the expert does not have any specific remark on it.

#### ***IV. 2. Comments, remarks, proposals to the text of the law***

### **Chapter I. – General Provisions**

#### **Article 2**

The list of legal instruments is not structured in the best possible way: “international treaties of Ukraine” should probably be placed immediately after the Constitution of Ukraine. This way the conclusion of the sentence “as well as other legal normative acts in accordance with them” would also make sense.

#### **Article 3**

##### **Paragraph 1**

“Centralisation and single commandment” is a purely technical principle and it should be placed at the end of all principles.

Despite the fact that the “independence” is extensively dealt with in Article 4, it is, however, one of the core principles (if not the most important one) and should, therefore, be mentioned also here.

##### **Paragraph 2**

Is the inclusion of prohibition in this Paragraph really needed? All state institutions in all other countries are usually implicitly forbidden to exercise

activities listed here, thus explicitly mentioning the latter in connection with the National Bureau might cause some difficulties in its future work, when its opponents will state that, to say the least, (completely legal, professional and non-partisan) activities of the Bureau “intend to obstruct their work”.

#### **Article 4**

##### Paragraph 1

Usually, the independence of an institution is ensured also by its status, accountability (as given in Article 1 and in Chapter VII) and proper resources (as provided in Articles 26 and 27). Since this applies – without a doubt – also to the Bureau, it would make sense to include “status”, “accountability” and “proper financing” as guarantees for its independence also in this paragraph.

##### Paragraph 2

The second sentence could be much more precise and broader: not only activities with political purposes within the National Bureau should be forbidden, there has to be a general prohibition for the Bureau’s director and Bureau's employees to take part in the activities of political parties and other associations with political purposes, regardless of the "on- or off-duty" status of the staff.

### **Chapter II. – General structure, leadership and staff of the National Bureau**

#### **Article 6**

##### Paragraph 4

One of the basic elements of an independent functioning of an institution is its organisation. There are two possibilities: either the organisational structure is stipulated by the law (as it is the case with the regional offices in Paragraph 1 or the structure of the Bureau in Paragraph 5) or it is decided by the Director of the Bureau him/herself. When somebody else – in this case the Cabinet of Ministers – is deciding about the organisation of the institution, the independence of the latter is seriously harmed. To avoid excessive budgetary decisions of the Director there is a possibility to insert a later endorsement (and not approval!) of the Cabinet of Ministers (like the one by the Verkhovna Rada’s Committee) but the final word has to be the one from the Director.

In view of the following Paragraph, Paragraph 4 is in effect not needed.

##### Paragraph 5

This Paragraph solves the problem of the previous one: basic organisational units of the Bureau are set out here. It would be good to add the wording

“according to the decision of the National Bureau’s Director” at the end. This way the independence of the Bureau is ensured, but the Director carries full responsibility for his/her decision-making.

#### Paragraph 6

It goes without saying that fulfilment of all the posts at the Bureau will take a significant amount of time. In order to shorten the time needed, it is suggested to prepare a special plan for the fulfilment of the vacancies. Of course, this can be done by the Director only and by a separate document, not by this Law.

### **Article 7**

#### Paragraph 2

Having in mind explanations to Article 6, Paragraph 4, it would be much better to amend the system also here; thus not to ask for approval of the Cabinet of Ministers and the endorsement of the Verkhovna Rada Committee, but rather for the endorsement of the Cabinet of Ministers or of the Verkhovna Rada Committee. It might be a quite complicated and lengthy procedure to acquire endorsements from two different institutions, which can effectively block all Bureau's efforts.

#### Paragraph 3

Is it not an overdoing to give a legal personality and separate accounts to the regional and local offices? Having in mind responsibilities of the Director as given in sub-paragraphs 1, 2, 3, 6, 7, 8, 10, 11, 13 and 14 of Paragraph 5 of Article 8 such a solution can cause a lot of problems in exercising Director’s powers<sup>6</sup>.

### **Article 8**

#### Paragraph 2

It would be good if some clarifications on the meaning of the condition “...is capable to perform relevant duties according to his business and moral quantities, educational and professional level, state of health...” is given somewhere, not necessarily in this law.

Concerning reference to Article 13, please see comments to Article 13.

#### Paragraph 3

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<sup>6</sup> Having in mind the lack of deeper knowledge of the expert of the system and main features of legal persons in Ukraine there is a possibility that according to the Ukrainian legal system remark of the expert is an obsolete one.

This is a very good solution, since it limits the possibility that the incumbent Director is susceptible to any kind of influence due to his/her wish to be reappointed.

Paragraph 4

The list of reasons for dismissal presented here is a closed one. It is the expert's perception that this ensures an exclusion of the Director's dismissal on any political grounds (*e.g.* vote of confidence of any kind upon being acquainted with the Director's report), which may prove to be a crucial solution ensuring the real independence of the Director. With minor remarks (as listed in the following text) the list of grounds for dismissal seems to be clearly defined.

*Sub-paragraph 3:*

There is no need to set a special medical commission to establish any medical health impairment of the Director. Certainly, there are regular medical authorities (individuals and commissions) in Ukraine, which assess health status of individuals. In order to avoid any misunderstanding it would be advisable that they (and no special commission) are assigned to perform the medical assessment of the Director.

*Sub-paragraph 4:*

This reason for dismissal seems to be too broad: even the mildest sentencing for any criminal offence, including the least dangerous one, can provide grounds for dismissal of the Director. Of course, this can also be a solution, but it would be much better to add a qualitative element, such as a type of an offence or seriousness of a sentence.

Concerning references to Article 13, please, see comments to Article 13.

Paragraph 5

*Sub-paragraph 7*

It would be advisable to replace the word “approves” (the report) with “adopts” (it). Without any doubt the Director will be the one who will be reporting on the use of financial resources of the Bureau and will be responsible for it.

**Article 9**

This Article introduces extremely well balanced and well thought-out procedure for the appointment of the National Bureau’s Director. Such a solution can be found in some of the most developed countries in the world, which – by establishing new anti-corruption bodies - have real and sincere intention to fight corruption through a non-politicised professional body. The appointment of the Head of the anti-corruption agency is always a crucial test,

which shows the real intentions of the government. A transparent and open procedure, as described in this Paragraph, is important due to several reasons:

- it ensures that the appointment procedure is almost entirely non-political,
- it ensures the autonomy of the Director and the Bureau,
- it enables the citizens of Ukraine to follow the realization of practical implementation of this Law,
- it provides the Director with the necessary level of the citizens' trust and (also) the confidence of the country's decision-makers.

Nevertheless, the expert has some minor comments to this Paragraph:

*Paragraphs 3 and 4*

The composition of the Selection Committee is an interesting one. It is obvious that political representatives (ministers, MPs and the representative of the President) have the majority in the Committee. With regard to the specific situation in Ukraine such a composition is understandable, but in the future it would be worth considering the idea to either increase the number of representatives of non-political bodies (prosecution service, judiciary) in the Committee or to change the system of voting in order to increase the weight of the votes of the representatives of these bodies.

*Paragraph 5*

*Sub-paragraph 3*

Three candidates will be invited for an interview but the draft law does not say anything about the criteria according to which this will happen. It would be normal that the three candidates with the best results according to the criteria mentioned in Article 8, Paragraph 2 are invited. In order to avoid any criticism this should also be mentioned here. Otherwise it might happen that the worst candidates will be invited for an interview and then (according to the next Sub-Paragraph) the best one from the worst ones will be chosen.

*Sub-Paragraph 5*

The idea is good but it has to be made sure that it is fully in compliance with the legislation on personal data protection – for example, the candidates can be asked to sign a permission for the publication of information on their candidatures. It has to be noted here that by the implementation of this provision the selection process will be exposed to public control; citizens of Ukraine will thus be in position to closely follow the appointment of the new Director. Without any doubt, this will again raise the level of trust of the population in the government's intentions, the procedure as such and in the non-political and non-partisan nature of the Director's work.

### Paragraph 6

This Paragraph as such is not problematic, but there is a question of whether the Cabinet of Ministers can reject (or not follow) the proposal of the Committee? If the Cabinet is not bound by the selection of the Committee (where it is evident that by not accepting the Committee's proposal, the Cabinet will have to assume full political responsibility), a solution for such a situation will have to be added. If it is bound by the Committee's decision, this also has to be mentioned.

## **Article 10**

### Paragraph 1

With regard to the powers of the Director described in Article 8, Paragraph 5, Sub-Paragraph 6 and the need for his/her independence, there is absolutely no need for an additional condition of approval of the Verkhovna Rada Committee for the appointments of directors of regional and local offices. Therefore, it is strongly suggested to delete the wording "upon approval of the Verkhovna Rada Committee".

## **Article 11**

### Paragraph 3

In addition to the regular periodic in-service training it might also be good to introduce a mandatory introductory training at the beginning of the National Bureau's employees' career in the Bureau.

## **Article 12**

Again, open competition will be applied to fill in the vacancies in the Bureau. This is the most welcome solution, since it will enable the Bureau to employ the best, the most honest and the most professional staff, which is of an utmost importance for the Bureau's work. Of course, these employment procedures will be slightly longer, but will give a much better final outcome. Since the Bureau is a new institution, all efforts have to be taken to prove to the citizens of Ukraine that it has no connection with the already existing institutions, which are apparently not so effective in the fight against corruption. Similar to the procedures mentioned in Article 9, open competition in staff employment will present one of the cornerstones also in the establishment of the Bureau.

## **Article 13**

### Paragraph 1

#### *Sub-Paragraph 2*

Even the mildest sentencing for any criminal offence, including the least dangerous one, can eliminate candidates for a post in the Bureau. Of course, this can also be a solution, but it would be much better to add a qualitative element, such as type of an offence or seriousness of a sentence. Otherwise, good candidates with previous minor mistakes in their life will not be able to run for the post in the Bureau.

#### *Sub-Paragraph 3*

Usually, the term “corruption offence” is similar to the term “crime”. Since this is not the case in Ukraine, it would be advisable to make the distinction clearer (also for external readers) and furthermore to use such wording that shows that the term “brought to responsibility” means the final decision on a sentencing for a corruption offence (and not any earlier stage of the proceedings).

### Paragraph 2

#### *Sub-Paragraph 1*

Expert just wonders whether the prohibition of participating in strikes is in compliance with the Ukrainian labour legislation.

#### *Sub-Paragraph 2*

Usually, the list of exceptions covers not only “academic work”, “lecturing”, etc. Some countries allow also other remunerated activities (*i.e.* research, scientific work, sport, etc.).

The meaning of the term “creative work” is not clear enough (or it may just be a problem of translation).

#### *Sub-Paragraph 4*

It would be a much more understandable and simpler way to say that employees of the Bureau are not allowed to “take part in any political activity”. The text, which is used now (“take part in creation or activity of organisational ...”) is a very complicated one and not comprehensive enough since it prohibits political activities of the employees within the Bureau only – see comments to Article 4, Paragraph 2: all political activities of Bureau’s staff (inside or outside of it!!) have to be prohibited.



## **Article 15**

Since the Bureau will need various types of specialists, it is common that they are seconded to the Bureau also from the already existing institutions. This way the necessary level of knowledge is ensured in the shortest time possible. It is therefore important that the Draft Law provides a legal basis for such an arrangement. This is especially the case with secondment of the prosecutors, since they will have the opportunity to work hand-in-hand with the Bureau's investigators and thus specialise and acquaint with the Bureau's operation. Generally, this Article is a very reasonable one with a minor comment:

### Paragraph 2

There is no reason for Verkhovna Rada Committee to endorse decisions on secondment of prosecutors to the National Bureau! This is a matter of the Bureau's and prosecutors' management. Therefore, it is suggested to delete the second sentence of this Paragraph.

## **Chapter III – Powers of the National Bureau**

### **Article 16**

#### Paragraph

##### *Sub-Paragraph 5*

In order to fulfil requirements of international conventions whistleblowers will also have to be explicitly protected. Therefore, it is suggested that the words “whistleblowers and” are added after the words “protection of”.

### **Article 17**

This Article gives extensive authority to the Bureau and its employees in a very broad manner. Nevertheless it also includes safeguards against possible abuse. It is obvious that this Article gives a sound, well-balanced and useful basis for the work of the Bureau.

Fighting corruption is not possible, when the designated institutions do not have legally clear and understandable powers – with regard to this, it should be mentioned that in the Draft Law one of the most important powers is not regulated enough. In the new Sub-Paragraph 7 of Paragraph 1 of Article 8 of the Law of Ukraine on Operative-Investigative Activity (hereinafter - LOIA) the so-called “controlled commission” is mentioned. This method is known in other legal systems as “fictitious” or “simulated” bribery, which gives excellent results in the fight against corruption and it is also seen as proof of a true will to fight corruption. Due to its use in many different countries, it has also been confirmed by the European Court on Human Rights, stating that upon fulfilling

certain conditions, this method of fighting corruption is not in breach of the European Convention on Human Rights. Among others the mentioned conditions refer to the following: that the method has to be stipulated in the effective legislation, that there has to be a clear separation made from the provocation or so-called “entrapment” (which is not allowed), there have to be safeguards in place, including judicial control, etc. Just making a reference to this method in LOIA is therefore not enough. In order to give the members of the new Bureau an important, entirely legal tool in their hands and to protect future subjects of investigation from potential mistreatment, it is strongly suggested to additionally elaborate on the method of “controlled commission” in Article 8 of LOIA or in this Draft Law in order to achieve the level of clarity and legality required by the case-law of the European Court on Human Rights (see, among others, *Miliniene v. Lithuania*, *Ramanauskas v. Lithuania*, *Volokhy v. Ukraine*).

#### *Sub-Paragraph 2*

Is the “established procedure” really and already established? In the table of amendments to the current legislation such a procedure cannot be found – not even in the new Paragraph 6 of Article 112 of the CPC. If the procedure is not established yet, this should be done as soon as possible – in this draft law or somewhere else (since it is a technical procedure, this can be done in a form of by-laws, too).

#### *Sub-Paragraph 3*

With regard to the “established procedure” – see comments to the previous sub-paragraph.

#### *Sub-Paragraph 6*

The powers given here are usually the powers of the so-called FIUs (financial intelligence units). It is not incorrect to assign such powers to the Bureau, but it has to be clear that the power of the Bureau to freeze bank operations is limited to the Bureau's mandate as stipulated in Article 112 of the CPC. See also comments to the new Paragraph 5 of Article 112 of the CPC (in sub-chapter IV.3.1 of this review).

#### *Sub-Paragraph 10*

The “official ID” is mentioned here for the first time. It would be perhaps be beneficial to define it somewhere in the Draft Law or to make a reference to the legal document, where the notion will be defined.

With regard to the second part of the sub-paragraph (exceptional entrance into premises): it is hard to believe that such power does not already exist for all agencies dealing with operative-investigative activities. If it does, there is no need to repeat it here.

### *Sub-Paragraph 12*

Following the example of this Sub-Paragraph, perhaps a similar solution on the use of communication means can also be included in this Article.

### *Sub-Paragraph 14*

In the least, the financial rewards for the persons assisting the Bureau require special rules on the scope of such rewards, conditions for granting them, etc. It would therefore be good to refer to those rules here and to define a body or a person (most probably the Director), responsible for the preparation of such rules.

### *Sub-Paragraph 15*

At least the first part of this Sub-Paragraph (creation of the informational systems) is covered by Sub-Paragraph 17 of Article 8 of the LOIA and it makes no sense to repeat it here.

### *Sub-Paragraphs 16, 17*

Hopefully, the meaning of the term “special means” is known in the Ukrainian legislation.

## ***Article 18***

The solution given in this Article, which enables anonymous reports on corruption, is a very important and useful one. Usually, people have different reasons why not to report corruption; being known as a whistleblower is one of the strongest reasons against reporting (fear from retaliation, mobbing, etc.). If anonymous reports will contain at least a minimum of credible factual information, they will enhance reporting on corruption, including corruption at the highest levels. Of course, there is always a danger that the possibility to remain unknown will trigger other types of reports (*e.g.* aimed exclusively at ruining somebody’s credibility), but highly qualified staff of the Bureau will have to be trained to deal properly also with these.

## **Chapter IV – Interaction of the National Bureau with other state authorities**

### **Article 20**

#### **Paragraph 2**

In its current form, the paragraph can also be understood as requiring a written order for the exchange of every single piece of information. It would be better to draft the Paragraph in a way that would allow for a more flexible

exchange of information (*i.e.* by a written order allowing the exchange of all information in joint cases dealt with by different authorities).

Paragraph 5

It would be a useful addition to insert a timeframe in which the authorities would have to transfer relevant information and other materials to the Bureau, starting from the moment the authorities would acquire the information.

**Article 21**

Paragraph 2

*Sub-Paragraph 1*

Also completely legal acts can indicate corrupt activity or create conditions for it. Therefore, the word “illegal” can be deleted.

*Sub-Paragraph 2*

Again, it would be useful to insert a timeframe in which the authorities would have to transfer the relevant information to the Bureau, starting at the moment they acquire it.

According to this Sub-Paragraph, two conditions would have to be fulfilled in order to establish an obligation for a state authority to transfer information to the Bureau:

- information can indicate corrupt activity and
- information can be used to prevent, detect, suppress and investigate crimes in the area of corruption.

Such a solution in a form of two cumulative (especially the second one!) conditions might hinder the transfer of information, since it enables the state authorities to find excuses for not sharing the information. It would be entirely acceptable to include only the first condition.

**Chapter V – Legal and social protection of the National Bureau’s employees and other persons**

**Article 22**

Paragraph 4

With regard to the importance of the National Bureau’s employees’ work, the level of consent is set too high here. From practical reasons it would also be advisable not to leave it only to the Prosecutor General of Ukraine him/her-self to decide on criminal cases against the National Bureau’s employees (*e.g.* if s/he is not available). It is logical that consent of a prosecutor is needed but perhaps it

would be sensible that some other prosecutor(s) are also authorised to take decisions on these cases rather than merely the Prosecutor General.

#### Paragraph 5

It would be useful to elaborate a little bit more on the forms of protection of collaborators of the Bureau: it is not enough only to prohibit violations against them, they have the right to know whether they are entitled to any damage compensation (such as the employees of the Bureau according to Paragraph 14 of Article 23) or even to means of physical protection.

The notion of a term “close relatives” is without a doubt set out in some other legislative act. Making a reference to it would be a useful addition.

#### **Article 23**

This article ensures the employees of the National Bureau extremely favourable social rights. The expert does not know how much this position defers from the position of other state employees in Ukraine. It is normal that employees working in such a demanding service (as the National Bureau will be) deserve increased level of social protection, but this level must not be increased too much otherwise it might become a source of criticism or even a source of corruption itself. Therefore, it would be advisable to examine ones again whether the rights provided by this article are reasonable (especially in comparison with the general level of social rights in Ukraine).

This article refers several times to other legislative acts. When a final decision on the scope of the National Bureau’s employees’ social rights will be made, those pieces of legislation and this draft act will have to build a comprehensive legal structure, which will enable the employees of the Bureau to exercise those social rights in practice. Even a slightest doubt in the real intention of the Ukrainian state in this area could have devastating consequences for the Bureau's staff.

Paragraphs 12 and 13 are missing in the text available to the expert.

#### **Article 24**

This article is missing in the text available to the expert.

#### **Article 25**

Technically, it would be better if the first Paragraph is split into two paragraphs: its second sentence (starting with “Remuneration ..... shall ensure sufficient...”) should become the new first Paragraph and its first sentence

should become the new second Paragraph. Existing second Paragraph should then become the new third Paragraph.

Warnings given in the first paragraph of comments to Article 23 are applicable here, too.

## **Chapter VI – Financial, material and technical provision of the National Bureau**

### **Article 26**

#### **Paragraph 1**

For budgetary reasons, it would be useful to allow also financing from other sources, or at least not to prohibit it. For example, there is no valid reason why the Bureau would not be allowed to take part in funded international projects performed jointly with similar institutions from other countries. A similar exception is already provided in Paragraph 2 of Article 27! With regard to the sensitivity of the Bureau's work it would be beneficial, if such funding was allowed, while in these cases a special procedure would apply.

### **Article 27**

#### **Paragraph 1**

If the “material and technical provision of the National Bureau” in the second sentence refers to something else than the general and common rules of the Ukrainian government on the acquisition of material and technical means, this might give rise to doubts with regard to the independence of the Bureau. It is the Bureau which – in the limits of its budget – is solely responsible for the acquisition and the use of its material and technical means.

## **Chapter VII – Control and oversight over activity of the National Bureau**

### **Article 28**

#### **Paragraph 2**

##### ***Sub-Paragraph 2***

The content of the report could be stipulated here – perhaps following the list of topics given in Paragraph 2 of Article 31.

## **Article 29**

This Article deals with an important issue of the Bureau's internal control. Having in mind the rather extensive powers of its members, the type of suspects the members will be dealing with and the need to win and keep the trust of the population, it is absolutely necessary that internal control bodies within the National Bureau are established and regulated by the law. Duties of the future internal control units are set out in a comprehensive and well-balanced manner, there are thus only some minor comments presented to the text of this Article:

### Paragraph 1

Again, there is no need to include Verkhovna Rada Committee into the Director's decisions on staffing. S/he should be completely free in those decisions but bearing full responsibility for them. Therefore, a deletion of the words "upon approval of the Verkhovna Rada Committee" in the second sentence is suggested.

### Paragraph 2

In order to avoid being seen as the "enemy" of the National Bureau's employees and to add an additional layer to corruption prevention in the Bureau, it would be useful to give the internal control units an additional task: consultancy to the employees! In this respect an additional Sub-Paragraph (No. 8) can be added: "provide the National Bureau staff advice on the areas of integrity, conflict of interest, prevention of corruption and limitation of corruption exposure".

### Paragraph 4

In some countries serious constitutional problems would emerge, if reporting and publishing of financial assets of the Bureau's employees' family members was required. Therefore prior to the provision's final adoption, it would be advisable to check the provision's compliance with the Ukraine's Constitution.

The third Sub-Paragraph is giving the Cabinet of Ministers the right to decide on a matter that should be regulated by the law – at least in the cases of the list of employees and the extent of information to be published. It is therefore suggested that the current Sub-Paragraph 3 is replaced by a detailed provision on the list of employees and the scope and detail of information to be published.

### Paragraph 6

Again, there is no need to include Verkhovna Rada Committee into organisational or staffing decisions of the Director. S/he should be completely free in those decisions, but bearing full responsibility for them. Therefore,

deletion of the words “upon approval of the Verkhovna Rada Committee” is suggested.

## **Article 31**

### Paragraph 2

If the content of the report (for the Cabinet of Ministers, President, etc.) was defined in Article 28, it would be much simpler when Paragraph 2 of Article 31 would merely contain a reference to Article 28.

Otherwise, the list of topics provided by this Paragraph as a content of the report for the media is a very good one – with only few remarks:

#### *Sub-Paragraph 1*

People might (falsely) interpret that – despite the limitation set out in Paragraph 4 – the information about “sources” will contain concrete data on concrete whistleblowers. Since this might discourage persons from blowing the whistle, it is suggested that the words “, their sources” are deleted or rephrased.

#### *Sub-Paragraph 3*

Information on “persons suspected of their commission” must not contain personal data. Having in mind the presumption of innocence (until the final decision of the Court), it would be better to report on “categories of persons suspected of their commission” enabling the public to see, which are the main categories of persons dealt with by the Bureau.

### Paragraph 3

There are no consequences provided for the cases of attempted restrictions on the publication of the Bureau’s information. Such *lex imperfecta* might cause several problems to the Bureau, since temptations to interfere with its work will undoubtedly be very high.

## **Chapter VIII – Final Provisions**

### Paragraph 2

Comments to the amendments to the legislation of Ukraine are given in Sub-Chapter IV.3.of this review.

### Paragraph 3

It is not very clear what does the term “set up on the basis of ...” mean. Some clarification would be needed here.

### Paragraph 5



Expert does not have any specific comment to this Paragraph as a legal norm but it has to be pointed out that practical implementation of this provision will cause a lot of turbulence, at least in the Ministry of Interior, Security Service and public prosecution bodies. Giving away the premises, material means and databases is always a very painful process, which – at least at the beginning – might cause some tensions between the Bureau and other state bodies. In order to minimise those tensions and to enable the National Bureau a proper start of its activities, it would be good if the Cabinet of Ministers would devote special attention to this question and perhaps form a working group with mandatory participation of the representatives of the Ministry of Interior, the Security Service and the public prosecution bodies. This working group would have the task to prepare all practical details for the implementation of this Paragraph, particularly to decide on division of obligations (“who will provide what”) among the bodies involved.

### ***IV.3. Comments, remarks, proposals to amendments to related legislation of Ukraine<sup>7</sup>***

#### **IV.3.1. Criminal Procedure Code**

##### **Article 112**

##### **New Paragraph 5**

This Paragraph establishes a very reasonable threshold for the activation of the National Bureau. It combines all internationally recognized principles for the establishment of competences of specialised anti-corruption bodies: a selected number of offences, status of the suspects, value of the objects of crime and amount of the harm inflicted. This way, competences of the National Bureau will be limited to the most important cases of corruption, avoiding the unnecessary and problematic task of dealing with all cases, including the least important ones (*i.e.* administrative offences), that would only represent an unnecessary burden for the highly qualified staff of the Bureau. Following the solutions provided by this Paragraph, members of the Bureau will effectively be in a position to deal with the most dangerous forms of corruption in Ukraine, which is obviously also the ultimate reason for the establishment of this Bureau. Nevertheless, in considering the excellent solution in this Paragraph, the expert has two minor comments:

Among other provisions, this Paragraph refers to Article 209 of the Criminal Code, which is a typical money laundering offence, not limited only to laundering of the proceeds of corruption offences. To a certain extent (at least in

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<sup>7</sup> Given according to the document - "Table of amendments to the current legislation".

cases where the value of the object of crime or amount of the harm inflicted ... exceeds 48 000 EUR) this provision turns the National Bureau into a Financial Intelligence Unit. This is not necessarily unacceptable, but special attention will have to be paid to relations with the existing Ukrainian FIU<sup>8</sup> in order to avoid the duplication of efforts of the two bodies.

This Paragraph sets out the list of offences that fall under the responsibility of the Bureau. It should perhaps be considered to extend this list, in order to cover some additional offences that are usually linked to the high level corruption. In the Criminal Code of Ukraine, there are three offences, which could be of a significant importance for the fight against corruption in Ukraine: they are set out in articles 159-1, 210 and 211. It would be advisable to consider inclusion of those three articles in the list of offences in this Paragraph.

### **IV.3.2. Law on the Procuracy**

#### **New Article 17-1**

##### *Paragraph 2*

There is no reason and no need to include Verkhovna Rada Committee - a political body - into secondment of prosecutors to the National Bureau. This is a simple working procedure where politicians should not have any influence or powers. It is therefore suggested that this Paragraph is deleted.

### **IV.3.3. Law on Operative-Investigative Activity**

#### **Article 8**

##### *Paragraph 1*

##### *(New) Sub-Paragraph 7-1*

See comments to Article 17 of the Draft Law on “controlled commission”.

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<sup>8</sup> State Committee on Financial Monitoring of Ukraine.

## V. Conclusion

In comparing the text of the Draft Law of Ukraine “On the National Bureau of Anti-Corruption Investigations in Ukraine” with requirements of the international legal instruments (as given in Chapter II of this review) and with practical problems that usually occur during the establishment of a new anti-corruption body (as given in Chapter III of this review), it can be concluded that to the extent possible<sup>9</sup> the Draft Law fulfils almost all requirements and gives very satisfactory responses to almost all common problems:

- The decision on the establishment of a new anti-corruption body in Ukraine will be enforced by a legislative act, which is the best possible solution.
- According to all classifications it is obvious that the new highly specialised body will have a repressive character, thus complementing the new Ukrainian anti-corruption preventive body<sup>10</sup>.
- The decision on the body's position has been made, relations with other bodies have been defined and its satisfactory powers have been clearly defined and regulated.
- Bureau's transparency and accountability as provided by the Draft Law are exemplary.
- The body is an important element of a wider national anti-corruption policy.
- If the Draft Law will be adopted it will clearly show the government's commitment and political will for the fight against corruption through enhanced repression of corruption in Ukraine.

Unfortunately, there is a very important requirement of the international legal instruments, which the Draft Law failed to address in even better manner: the independence of the Bureau, understood also as structural and operational autonomy, shielding the Bureau from undue political interference. Solutions as provided in Articles 6/paragraph 4, 7/2, 10/1, 15/2, 29/1, 4 and 6 of the Draft Law can – in practice – seriously limit the Bureau's autonomy and independence. Therefore, it is again strongly suggested to thoroughly follow the expert's comments and proposals concerning the mentioned articles and paragraphs stipulated in Chapter IV of this review.

As already stated in Chapter IV.1 of this review, some other inconsistencies also occurred in the transformation of otherwise extremely well-thought-out

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<sup>9</sup> Answers to some problems can be given after the start of operations of the Bureau only.

<sup>10</sup> The Government Anti-Corruption Agent.

concepts into concrete articles and paragraphs of this Draft Law. Comments and suggestions were thus made also there, just to offer a possibility for further improvement.

Normally, some of the responses to the international legal requirements and practical challenges can be given only after the operational start of the Bureau: it remains to be seen what level of ethics<sup>11</sup> the Bureau's Director and employees will hold, what level of credibility and public trust the Bureau will gain and will there be sufficient resources available for the Bureau.

Here sufficient resources for the practical work of the Bureau will be of particular importance in order to enable the implementation of the well-drafted legal norms and to prove that adoption of the Law of Ukraine “On the National Bureau of Anti-Corruption Investigations in Ukraine” is intended to be just the first, yet a very important step in the country’s investigation and suppression of corruption procedures. Existence and functioning of the specialised anti-corruption institution(s) in the country is the most visible and easily accessible indication of its actual readiness to fight corruption and of the existence of a genuine political will to suppress this phenomenon. However, if anti-corruption institutions do not receive the resources needed, it becomes obvious that their establishment was just another failure in the development of anti-corruption measures throughout the world. Therefore, Ukrainian authorities are strongly invited to ensure not just the adoption of the present Draft Law but also its practical implementation.

*Drago Kos*

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<sup>11</sup> Understood as full compliance with principles of objectivity, professionalism, impartiality, integrity, honesty, effectiveness and efficiency.

Sources:

1. Council of Europe: *Anti-Corruption Strategies and Action Plans in South-Eastern Europe*, Project PACO Impact, Strasbourg, July 2006.
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