

EXPLANATORY NOTE
to the Draft Law of Ukraine
“On the National Bureau of Anti-Corruption Investigations of Ukraine”

1. Reasons for adoption of the Draft Law

The necessity to adopt the Draft Law is explained by the widely spread corruption in Ukraine that poses a threat to its democracy, realisation of the rule of law principle, respect for human rights and freedoms, national security, economic and social development. The systemic nature of corruption in Ukraine was recognised by the national state authorities, international organisations and is confirmed by the popular perception of the level of corruption.

This points out in particular the ineffectiveness of the existing institutional mechanism for counteracting corruption in Ukraine. As mentioned in the National Security Strategy of Ukraine, the law enforcement authorities of Ukraine in their current state are incapable of ensuring a sound protection of human rights and freedoms, effective fight against crime, in particular organised crime, criminalisation of the economy and corruption.

This is corroborated by the attitude of citizens towards the law enforcement bodies. According to the nationwide study of corruption conducted in 2007 by the project “Promoting Active Citizen Engagement (Action) in Combating Corruption in Ukraine”, citizens believe the main reasons for rampant corruption in Ukraine are that officials see their posts as a way to obtain personal benefits and that control over them by law enforcement bodies is insufficient.¹

Besides, the police, courts and public prosecution are perceived as the most corrupt institutions among public authorities. According to another survey, conducted in 2009 by the Council of Europe/European Commission Project “Support to Good Governance: Project against Corruption in Ukraine”, almost 50% of respondents to the survey who had contact with judicial and law enforcement agencies experienced solicitation of bribes.²

Hence one of the avenues for raising effectiveness of the anti-corruption law enforcement measures should be an institutional reform of the bodies that carry out pre-trial investigation and prosecution of corruption crimes.

This could be achieved by improving specialisation of the law enforcement agencies. The current system of bodies combating corruption in Ukraine includes a number of units in various law enforcement agencies

¹ State of Corruption in Ukraine, May 2007,
http://www.pace.org.ua/images/survey/full_report_ukr_final.pdf.

² Survey by the MAConsulting, <http://www.minjust.gov.ua/0/20990>.

(interior, Security Service, procuracy and tax service), which often duplicate each other, focus their attention on petty criminal cases or cases of administrative offences, and do not have necessary powers and resources to effectively prevent, detect, suppress and investigate corruption offences. Especially fruitless is the fight against the so called high-level corruption, *i.e.* offences committed by the highest officials of the state authorities or local self-government.

That is why it is urgently required to solve the issue of the ineffective institutional model and existing specialisation in the area of anti-corruption. According to the Concept Paper [Strategy] on the Criminal Justice Reform in Ukraine, adopted by the President of Ukraine's decree No. 311 of 8 April 2008, implementation of an effective state policy of combating corruption requires functioning in the criminal justice system of a specialised anti-corruption agency with powers to conduct pre-trial investigation and co-ordination in this area. The Concept Paper also provides for introduction of the specialisation of prosecutors in corruption offences.

The importance of effective specialisation of law enforcement authorities in combating corruption and the standards for functioning of such specialised institutions are mentioned also by international treaties (Article 36 of the UN Convention against Corruption, Article 20 of the Council of Europe Criminal Law Convention on Corruption) and recommendations to Ukraine made by international organisations (OECD Istanbul Action Plan and GRECO).

2. Goals and objectives of the Draft Law

The goal of the Draft Law is to curb corruption by ensuring effective fight against corruption offences committed by the highest public officials and offences that pose an especial threat to society.

The objective of the Draft Law is to create an effective institutional basis for prevention, detection, suppression and investigation of corruption crimes.

3. Main provisions of the Draft Law

The Draft Law defines legal framework for organisation and activity of the National Bureau of Anti-Corruption Investigations of Ukraine (hereinafter – NBAI or National Bureau) – a specialised law enforcement agency for combating corruption in Ukraine.

Model of the agency. International standards require introduction of anti-corruption law enforcement specialisation by setting up new specialised institutions, creating specialised units within existing law enforcement agencies or ensuring specialisation of persons who combat corruption. At the same time,

the choice of the specific model of such specialisation remains within discretion of the national authorities.³

Taking into account the best international practice, as well as national factors (in particular, the ineffectiveness of the existing law enforcement agencies, the fact that they are corrupted) it is advisable to set up a new autonomous agency (outside of the system of existing law enforcement bodies) with the main function of detection and investigation of corruption crimes posing especial threat to society. Such an agency should comply with international standards described below.

On the basis of analysis of the practice of creation and functioning of specialised anti-corruption bodies in the world, as well as provisions of international treaties, the following main standards on the specialised anti-corruption institutions can be mentioned:

- a) Independence from political and other illegal influence (structural and operational autonomy, procedure for appointment/dismissal of the head of the institution, etc.).
- b) Accountability of the institution (regular reporting, informing of the public).
- c) High professional level of the staff (competitive selection of employees, their training).
- d) Sufficient powers for effective activity (special operative, detective and investigatory measures, access to financial information, etc.).
- e) Sufficient financial and material resources.

The Draft Law suggests creating a new state body – a central body of the executive power with law enforcement functions and special status.

The special status of the National Bureau is translated into a special way of its creation (on the basis of a law), uncommon procedure for selection of the head and certain employees of the agency (based on an open competitive selection), special mechanisms for control over and accountability of the National Bureau, etc.

Advantages of creating a new autonomous anti-corruption body with law enforcement functions are the following:

- creation of such institution is a political signal that political forces and public authorities who supported its establishment are willing to actively combat the most dangerous acts of corruption;

- creation of such institution creates a chance for departing from the previous practice of ineffective counteraction to corruption and for attaining new quality results;

³ For more details about various models of specialised anti-corruption institutions see relevant OECD publication, <http://www.oecd.org/dataoecd/7/51/39972270.pdf>.

- the new institution will not be burdened with public perception of being corrupt and ineffective as is the case with the existing law enforcement bodies; this will allow, if effective functioning is achieved, to create a public trust and support for the new institution;

- it creates necessary conditions for the autonomy of the institution and its independence from political or corrupt influence;

- a separate institution is independent from those state authorities that will become its target of attention when detecting and investigating corruption offences (*e.g.* in the existing law enforcement bodies);

- creation of such institution with a special status on the basis of a specific law will allow to guarantee at the legislative level mechanisms of its independence and accountability;

- a high level of specialisation and professionalism are achieved; the newly established institution will have a narrow specialisation and will focus on the corruption among senior officials and corruption inflicting gross damages; this will allow not to disperse the new institution's efforts and resources on the less important cases.

Main provisions of the Draft Law are described and justified below.

Principal functions of the to-be-created NBAI are proposed to be pre-trial investigation in criminal cases referred to its competence and operative-detective measures.

The proposed investigatory jurisdiction (competence) of the NBAI takes into account the need to limit the number of cases the new institution will deal with and to concentrate its attention on the corruption of high-level officials and offences that inflict gross harm to interests protected by law. This means that less serious cases of corruption will be excluded from its competence.

Therefore, according to the proposed changes to the Criminal Procedure Code of Ukraine the investigatory jurisdiction of the NBAI will consist of:

(1) cases of the following corruption and other crimes⁴ –

- Misappropriation, embezzlement or conversion of property by abuse of official post (Article 191 of the Criminal Code [CC]);
- Legalising (laundering) proceeds from crime (Article 209 CC);
- Interference with activity of law enforcement officers (Article 343 CC);
- Abuse of authority or office (Article 364 CC);
- Excess of authority or official powers (Article 365 CC);
- Forgery in office (Article 366 CC);
- Taking a bribe (Article 368 CC);
- Illicit enrichment (Article 368-1 CC);

⁴ Crimes mentioned here are listed in line with amendments in the Criminal Code of Ukraine introduced by the Law of Ukraine No. 1508-VI of 11 June 2009.

- Proposing or giving a bribe (Article 369 CC);
- Trading in influence (Article 369-1 CC);
- Prosecution of a knowingly innocent person (Article 372 CC);
- Delivery of a knowingly unfair sentence, judgment, ruling or order by a judge (or judges) (Article 375 CC);
- Interference with activity of judicial authorities (Article 376 CC);
- Stealing, appropriation, extortion or fraudulent obtaining of weapons, ammunitions, explosive or other warfare substances, vehicles, military or special engineering, or abuse of office, by a military serviceman (Article 410);
- Abuse of authority or official position by a military official (Article 423 CC);
- Excess of authority or official powers by a military official (Article 424 CC);
- Omissions of military authorities (Article 426 CC);

(2) for the cases of the above crimes to fall under the NBAI's competence they also need to have one of following characteristics:

– crime was committed by a senior public official (the list of such officials is included in the amendments to the Criminal Procedure Code – see Final Provisions of the Draft Law); *or*

– value of the object of crime (*e.g.* bribe) or the damage inflicted by the crime exceeds the margin determined by law (this margin is proposed to be that of three times of the bribe of especially gross size according to the Criminal Code or approximately UAH 558,000 as of 1 January 2010); *or*

– proposing or giving of a bribe was committed concerning an official of a foreign state or an international organisation.

Investigation of all other corruption cases, which do not fall under the above criteria, will be carried out by the existing law enforcement bodies according to the established procedure and current division of competence. The National Bureau will not deal with cases of administrative offences.

Investigation of corruption cases concerning employees of the NBAI will be carried out by the bodies of the interior.

The system of the NBAI will consist of the Central Office and 11 regional offices (including separate offices for the City of Kyiv and the Kyiv oblast), as well as a training facility for in-service training of the NBAI's staff. Besides the Cabinet of Ministers of Ukraine can establish additional local offices (*e.g.* in large cities) within the maximum number of the National Bureau's staff.

The structure of the NBAI will include operative-detective, investigative units, units of technical support of the operative activity, special forces unit, units for protection of criminal proceedings' participants and ensuring safety of the NBAI staff, units of internal control, divisions for information and analysis,

public relations and public information, human resources, forensic expert unit, etc. (*see draft Organisational Chart in Appendix to this Note*).

Maximum number of the NBAI staff is proposed to be 1,300 persons. This will include 420-450 staff members in the Central Office (including 210 investigators, operative officers, officers of technical support of the operative-detective activity and forensic experts) and 65-70 staff members in each regional office of the NBAI (including 50 investigators, operative officers, officers of technical support of the operative-detective activity). *See also draft Organisational Chart in Appendix*.

When determining the staff number of the NBAI the authors of the Draft Law in particular took into account the number of potential crime subjects (perpetrators) that fall under the NBAI's competence (about 2,600 persons for one oblast or 5,200-7,800 persons for one regional office), as well as staff number of the existing special units combating corruption (overall number of staff of the Main Department for Combating Organised Crime in the Ministry of the Interior is about 4,800 employees, Main Department for Combating Corruption and Organised Crime in the Security Service - about 1,800 employees).

The Director of the NBAI is appointed by the Cabinet of Ministers based on the results of an open and transparent competitive selection. Competition will be conducted by Selection Commission comprising 9 members (Prime Minister – Chair of the Commission; 3 members of the Parliament's Anti-Corruption Committee determined by the Committee; Minister of Justice; Prosecutor General or his Deputy; a representative of the President; two persons designated by the Congress of Legal Higher Educational Institutions and Legal Academic Institutions).

To ensure transparent selection of the head of the NBAI based on the criteria of professionalism, knowledge and experience the Draft Law provides for mandatory publication of detailed information about all candidates who applied to the competition and three short-listed best candidates who were interviewed by the Selection Commission. This will ensure public control over the selection procedure.

Director of the NBAI is appointed by the Cabinet of Ministers upon submission of the Prime Minister of Ukraine based on the selection by the Selection Commission of the best, in its opinion, candidate after the open competition.

Director of the NBAI will be appointed for a 5-year term of office; the same person cannot be appointed to this post for two consecutive terms. Such a restriction will allow reducing the possibility of undue influence on the head of the NBAI and, together with complicated procedure for early dismissal of the Director, will support independence of the NBAI and its head.

Investigators and operative officers, heads of operative and investigative units of the NBAI, directors and deputy directors of its regional and local offices will be appointed only on the basis of an open competition.

Creation of the new specialised agency to combat corruption will make sense only if it is able to recruit highly professional and uncorrupted employees. That is why the Draft Law excludes the possibility of an automatic transfer of staff from the existing law enforcement bodies and introduces mandatory competitive selection to the posts with the investigatory, operative or administrative powers.

Persons without prior experience of the law enforcement work will undertake an internship in the NBAI after having passed the competition. Upon results of the internship they can be dismissed from the NBAI.

The Draft Law suggests that the status of the NBAI employees will be that of civil servants. The Draft Law provides for guarantees of their adequate remuneration, which will include a basic salary, an additional payment for the work experience and an additional payment for special conditions of work that cannot be less than the amount of the basic salary. This will allow creating decent job conditions taking into account the intensity and danger of work and compensate the transfer to the civil service of the military servicemen who worked in other law enforcement agencies before recruitment to the NBAI.

An important provision of the Draft Law is the secondment of prosecutors to the NBAI with such prosecutors remaining in the service of the prosecution bodies. This will allow strengthening the guarantees of independence of the NBAI, ensuring its effective functioning by specialising prosecutors in corruption cases. To reduce the possibility of influence on the prosecutors who will work in the NBAI they will be subordinated directly to the Prosecutor General and their secondment and withdrawal will be endorsed by the relevant parliament's committee.

The Draft Law provides for establishment in the NBAI and its offices of internal control units which will prevent and detect office-related offences by the NBAI employees, conduct administrative and disciplinary investigations, vet candidates for the posts in the NBAI, etc. Internal control units will have the right to carry out operative and detective measures.

According to the Draft Law the NBAI will publish twice a year a detailed activity report and submit reports to the Verkhovna Rada, Cabinet of Ministers and President of Ukraine. The Draft Law states minimum requirements to the contents of the NBAI's reports.

The Draft Law also provides for a number of control powers of the Verkhovna Rada Committee dealing with the issues of anti-corruption.

This control function of the respective parliamentary committee will include: endorsement of the organisational structure of the NBAI; endorsement of the regulations on the Central Office and regional offices of the NBAI; endorsement of the early dismissal of the NBAI's Director according to certain

grounds; designation of the Committee's members to the Selection Commission for selection of the NBAI's Director; endorsement of secondment and withdrawal of prosecutors to/from the NBAI; conducting committee hearings on the issues of the NBAI activity; endorsement of appointment of the head of the internal control unit of the NBAI Central Office; endorsement of regulations on the internal control units of the NBAI.

Mentioned control powers are in line with provisions of the Constitution of Ukraine regarding functions of the parliament's committees and provisions of the Law of Ukraine on the Verkhovna Rada of Ukraine's Committees in the light of amendments introduced by the Law of Ukraine No. 1692-VI of 23 October 2009.

4. Active legislation in the area of the Draft Law

Ukrainian legislation in the area of regulation of the Draft Law includes the following legal acts: Constitution of Ukraine, Code of Administrative Offences, Criminal and Criminal Procedure Codes, Civil and Civil Procedure Codes, laws of Ukraine "On Civil Service", "On the Police", "On the Organisational and Legal Framework for Combating Organised Crime", "On Operative-Investigative Activity", "On the Procuracy", "On the State Tax Service in Ukraine", "On the Security Service of Ukraine", etc.

In order to implement provisions of the Draft Law it is proposed to amend the following legal acts: Criminal Procedure Code, Civil Code, laws of Ukraine "On the Procuracy", "On the Pre-Trial Detention", "On Operative-Detective Activity", "On the Protection of Participants of Criminal Trial", "On the State Protection of the Staff of Courts and Law Enforcement Agencies", "On the Procedure for Compensation of Damage Caused to Citizen by Illegal Actions of Pre-trial Investigation Bodies, Bodies of Procuracy and Courts", "On Banks and Banking Activity", "On Committees of the Verkhovna Rada of Ukraine", "On the Framework for Prevention and Counteraction to Corruption" (the law adopted by the parliament on 11 June 2009).

5. Financial justification

Adoption of the Draft Law will require additional expenditures from the State Budget of Ukraine. To this end the Cabinet of Ministers of Ukraine is instructed to to prepare relevant amendments in the Law of Ukraine on the State Budget of Ukraine for the current year. The Draft Law also postpones its enactment for one year since its validation.

6. Forecast of social, economic and other consequences of adoption of the Draft Law

Adoption of the Draft Law, provided its practical implementation is ensured, will result in the increased effectiveness of the fight against corruption, reduction of the level of corruption and raised integrity of the public service. Reduced corruption level will entail improvement of the investment attractiveness of the country, elimination of barriers for entrepreneurship and, therefore, foster social and economic development. Creation of the new specialised institution will also have a general deterrent effect, since functioning of an anti-corruption agency that targets high-level public sector corruption will contain corrupt activity.

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Draft Organisational Chart of the National Bureau of Anti-Corruption Investigations

