

**SUPPORT TO CRIMINAL JUSTICE REFORM
IN UKRAINE**



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**COMMENTS OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULE OF
LAW (DIRECTORATE OF HUMAN RIGHTS) OF THE COUNCIL OF EUROPE
ON THE DRAFT LAW OF UKRAINE ON THE STATE BUREAU OF INVESTIGATION**

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A. Introduction

1. These comments are concerned with the draft Law of Ukraine N2114 "*On the State Bureau of Investigation*" ('the Draft Law' or SBIDL and SBI, respectively), which was submitted to the Verkhovna Rada by a group of People's Deputies (A Kozhemyakin and others).
2. The comments have been prepared by the Council of Europe consultants Mr Erik Svanidze¹ and Prof. Dr. Lorena Bachmaier Winter.² The comments review the compliance of the proposed draft vis-à-vis the requirements of the European Convention on Human Rights ('the European Convention' or 'ECHR') as interpreted and applied by the European Court of Human Rights ('ECtHR'). They have been designed to assess the extent to which the draft law to create the SBI provides for an adequate body for dealing with serious crime, and also if the structure and regulation of the SBI meets the requirements of an effective independent investigatory body for investigating complaints with regard to serious human rights violations.
3. The comments first address the conceptual dimension of the Draft Law and its coherence with the reform of the Ukrainian criminal procedure and justice sector in general. There is then a provision-by-provision analysis of the articles and amendments to other legislative acts envisaged by the Draft Law. The comments also highlight the improvements introduced in the present Draft Law in comparison with the previous draft assessed by the Council of Europe consultants in 2014, and thus in how far the earlier recommendations of the Experts' Opinion on the Draft Law on the SBI ('the Experts' Opinion')³ have been followed. The comments do not concern those provisions that are not questionable, deemed compatible with the ECHR and ECtHR case law, as well as with the concept and specific provisions of the current Criminal Procedure Code (CPC), Laws on the Public Prosecution Service, National Anti-Corruption Bureau of Ukraine (NABU) and overall principles maintained in the related domestic legal framework.
4. These comments have been prepared using the unofficial English translation of the Ukrainian text of the Draft Law and comparative table of the amendments to the relevant provisions of other legislative acts provided by the Council of Europe to the

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³ Council of Europe Experts' Opinion on the Draft Law on the SBI (2014 DGI (2014) 32), prepared on the basis of contributions by Ms Bachmaier-Winter, Ms Dyrman and Mr Wadham, upon the request of the Ministry of Justice of Ukraine.

consultants. The comments have been prepared under the auspices of the Council of Europe Project “Support to Criminal Justice Reform in Ukraine”, financed by the Danish Government.

B. General (conceptual) considerations⁴

5. The content of the Draft Law clearly indicates an intention to ensure that: the SBI is established within the time-frame envisaged by the CPC; the institutional layout of the investigative agencies responsible for conducting pre-trial procedures is adjusted to its general concept, including in terms of stripping the Public Prosecution Service of the function in issue; the concept and SBI-related framework is furthered and fine-tuned in line with the recent reforms and developments that have taken place in the sector concerned, including in terms of creation of the NABU; and that the SBI meets the obligation to conduct an independent and effective investigation into alleged serious human rights violations. Indeed, delays in advancing the relevant legal framework and creation of the SBI may considerably undermine the pace and spirit of the reform of the criminal procedure in Ukraine.
6. This kind of reforms should be carried out with due regard to the rule of law and other principles and values that are necessary conditions for the successful fight against organised and other most dangerous crimes. These include, in particular, the need for clarity (predictability) in the legal framework, which is also a non-negotiable requirement of the European Convention. Although the latter affords a considerable margin of appreciation in the application of rights - such as the enjoyment of property and respect for private and family life - where measures to tackle criminality are required, it does not leave states an unfettered discretion. Moreover, it is axiomatic that the consistency of counter-crime measures with criminal procedure as a whole and the general legal framework is a pre-condition for their efficient application.
7. The scope of jurisdiction of the SBI goes far beyond what was initially foreseen in the 2012 CPC (Art. 216 CPC). The initial idea was to create a special investigation body for handling investigations against mainly high ranked officials, as well as the law enforcement officials. Such unit would follow the principles set out in the ECtHR case law, the 14th General Report [CPT/Inf (2004) 28, the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations and other relevant recommendations.
8. However the present Draft Law, besides the function of investigation against law enforcement officials (although limited), also envisages the SBI as a specialised unit for preventing, detecting and investigating certain forms of serious crimes (organised

⁴ For the relevant case law on Articles 2, 3 and 5 ECHR applicable to the comments on the effective investigation of violations of serious human rights by law enforcement officials, see the Council of Europe Experts’ Opinion on the Draft Law on the SBI (2014 DGI (2014) 32).

crime, terrorism, those sanctioned with life imprisonment and war crimes, Art. 5 SBIDL). Therefore these comments will deal with the two set of competences attributed to the SBI.

SBI as a specialised unit to prevent and investigate certain forms of grave crimes

9. The Draft Law supposedly seeks to reinforce the role of the SBI and expand its format beyond a concept of a specialised purely investigative agency, which was supposed to rely on the operative support of the MIA (Ministry of Internal Affairs), SSS (State Security Service) and other relevant bodies. The proposed furnishing of the SBI with its own operative staff could be considered as an option for overcoming institutional barriers and increasing the efficiency of the primarily investigative function that targets special categories of crimes and/or perpetrators.⁵
10. At the same time, the Draft Law suggests furnishing the SBI with functions and powers, which, in fact, are similar to the general supervision authority of the Soviet Procuratura that has been eliminated by the new law on the Public Prosecution Service of Ukraine. Thus, sub-paragraph 1.9 of Article 6 provides for submitting proposals to respective government authorities or officials to cancel regulatory acts and/or decisions issued/made as a result of a crime. Sub-paragraph 1.5 of Article 7 envisages the power to engage specialists of central and local executive authorities (subject to consent of their heads), national and international scientists, experts and specialists (subject to their consent) to address issues within the competence of the State Bureau of Investigation.⁶
11. In addition, the Draft Law proposes that the SBI is enabled to petition the court to hold invalid the regulatory acts and/or decisions issued/made as a result of a crime (sub-paragraph 1.9 of Article 6); file motions with a court to cancel registration and terminate activities of entrepreneurs as well as motions to hold transactions invalid as prescribed by laws of Ukraine (sub-paragraph 1.8 of Article 6); take measures to reimburse losses and damage suffered by the government, ensure forfeiture of criminally obtained funds and other property (sub-paragraph 1.11 of Article 6); take measures to return to Ukraine funds and other property obtained as a result of criminal offences falling under its jurisdiction (sub-paragraph 1.12 of Article 6). Although these functions and powers are related to the criminal procedure, and should be based on judgments in criminal cases, they primarily presuppose use of civil remedies and administrative tools that in principle fall outside the investigative framework and criminal procedure proper. Moreover, unless fine-tuned and narrowly applied in the practice, there are some potentially excessive elements in the broad formulation of sub-paragraph 1.2 of Article 6 that provides for collecting reports on criminal offences,

⁵ This was the assumed rationale of the SBI-related amendments to Article 41 of the CPC introduced under the NABU legislative package.

⁶ See para 39 below.

identifying systemic causes and conditions giving rise to crime and taking measures to eliminate them. All of the above are conceptually problematic due to the reasons that have been specified by the Venice Commission with regard to the need of stripping the Public Prosecution Service in Ukraine of functions falling outside the criminal justice field.⁷ They are fully applicable to the SBI. ***It would be a serious drawback for the reform of the criminal procedure and justice in Ukraine to reinstate elements of the Soviet Procuratura under the SBI cover.***

12. Besides, such an extended scope of powers and functions would require creation and maintaining relevant sizeable non-investigative structures within the SBI and spending considerable human and financial resources in the circumstances, where there are Ministry of Justice, Ministry of Foreign Affairs, Public Prosecution Service and other state agencies and bodies that are better placed, equipped, and specialist in handling relevant matters and should take over and pursue all the relevant functions that stem out of the criminal procedure. Thus, the resultant spending of considerable financial, human and other resources inherent in ***the proposed model with the expanded (extra-investigative) scope of the SBI functions should be carefully weighed against efficiency of coordination and other forms of inter-ministerial cooperation and re-considered.***
13. In addition, the provisions entrusting the SBI with overseeing enforcement of penalties and other correctional measures imposed on individuals held criminally liable for committing offences that fall under the jurisdiction of the Bureau (sub-paragraph 1.7 of Article 6) run counter the well-established principle of distancing and separation of law-enforcement from execution of criminal sanctions, including their involvement in running penitentiary systems. Accordingly, the SBI ***should not be entrusted with any power to oversee or otherwise*** ex-officio/upon its own initiative and in absence of any information, allegation or complaint falling under its investigative jurisdiction, ***interfere in execution of criminal sanctions.***
14. The Draft Law evidently also proposes an extension of the SBI functions up to fully fledged ‘prevention, detection, stopping and solving’ crimes with parallel expansion of its jurisdiction over criminal organisations and terrorism-related, as well as extremely grievous violent crimes. This would lead to boosting its law-enforcement, operative functions, amount to creation of one more super-powerful state institution and considerably depart from the model of an efficient, compact investigation-oriented agency. It is indicative that Article 1 of the draft does not at all refer to its investigative function.⁸

⁷ Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine by the Directorate of Human Rights and the Venice Commission, adopted at the plenary session of the Venice Commission, 11-12 October 2013 (CDL(2013) 039), paras. 16-29, 75-105.

⁸ It is spelled out further in the text of the Draft Law.

15. Even if the Draft Law pursues an idea of stripping the two other super-powerful law enforcement agencies, namely the MIA and SSS, of some of their competences and re-distributing them accordingly, it leaves many overlapping functions and areas that may result in considerable parallelism in terms of preventive and operative activities. In particular, the distribution of the investigative jurisdiction proposed in amendments to Article 216 of the CPC⁹ is not reinforced by corresponding strict distribution of jurisdiction between them in terms of prevention and detection of crimes, as well as related operative search activities. It is to be noted in this respect that when defining the scope of powers and authority of the SBI, Article 6 of the Draft Law contains a limiting clause ‘offences falling under its jurisdiction’ only in paragraph 1.4 that concerns detective operations and pre-trial investigations.
16. Other, even partially overlapping paragraphs, including sub-paragraph 1.3 envisaging the power to prevent, detect, stop, solve and investigate crimes and sub-paragraph 1.5 providing for the authority to search for people fleeing from justice for criminal offences do not expressly specify their limits. Although the scope of the SBI competence is specified under Article 1.1 and further in paragraph 1.1 of Article 7, the very nature of the activities that are carried out outside the CPC framework (unrelated to specific pre-trial procedure/ criminal case) often are not and normally could not be classified with sufficient clarity in terms of attributing them to a specific Article of the CC. Therefore, *the proposed (extended) scope of the Bureau’s law-enforcement tasks and powers (beyond the model of an efficient, compact investigation-oriented agency with some supporting operative staff) may result in duplication of functions, uncertainty in terms of responsibilities of other relevant institutions and waste of resources.*

SBI as a special unit for investigating ill-treatment and other serious violations of human rights committed by law enforcement officers

17. The Draft Law, in the paragraph 1.3 of Article 5 and proposed amendments to Article 216 of the CPC, limits this function of the SBI only to handling cases of torture and other forms of ill-treatment attributable only to investigators (detectives) of the National Anti-Corruption Bureau of Ukraine, the Security Service of Ukraine, bodies of internal affairs and prosecutors and not all their officers or employees.
18. What is more, by specifying ‘the purpose of ensuring fair trial and preventing cases when innocent persons are brought to criminal liability’ it excludes from the SBI competence ill-treatment that occurs in the context of protection of public order, detention and other domains that are not immediately related to the criminal procedure. Thus, the proposed wording is not fully compatible with the scope of obligation to

⁹ As to the shortcomings in delineation of jurisdictions in the body of the Draft Law, see comments to its Articles 6 and 8 below.

investigate violations of Article 3 of the ECHR. Moreover, it omits to tackle relevant component of procedural obligations under Articles 2 (the right to life), 4 (the prohibition of slavery and forced labour), 5 (the right to liberty and security) and 8 (the right to respect for private and family life), which fall under the category of ‘serious human rights violations’.¹⁰ ***It would be necessary to introduce relevant arrangements for ensuring institutional independence of pre-trial investigation of all serious human rights violations (not only ill-treatment-related) attributable to all law-enforcement officers and employees (not only investigators and detectives).***

19. The proposed amendments omit to address the need of ensuring institutionally independent investigation of serious human rights violations attributable to the SBI officers or employees. In the country-specific context the internal control unit of the SBI would not meet the requirement of independence. Thus, ***it would be necessary to introduce relevant arrangements for ensuring institutional independence of pre-trial investigation of all serious human rights violations attributable to the SBI officers and employees.***
20. In this connection, it should be noted that the proposed SBI-based model of conducting pre-trial procedures on ill-treatment-related cases (serious human rights violations) is supposed to address the institutional independence requirement of such investigations, which however is not the only aspect of the independence standard. For securing full compliance with the standard it is necessary to take into account the functional, actual and other aspects of independence.¹¹ However, conferring the investigation of human rights abuses by law enforcement officials, to an agency specialised in prevention, detection, and investigation of serious crimes, and thus accumulating these two different functions into a single body would entail risks. On the one hand, the investigations on violations committed by law enforcement agents can be neglected in favour of allocating resources and efforts in the fight against organised crime, terrorism, war crimes and other serious crimes. On the other hand, the scope and nature of the functions would undermine its appearances in terms of impartiality and, possibly, independence.¹²
21. Thus, in addition to the discussed issues concerning the scope of the SBI functions, its powers, accordingly its structure and place in the framework of law-enforcement and executive authorities, the Draft Law is to be ***reconsidered in terms of serving the***

¹⁰ See Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, adopted on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies.

¹¹ See E. Svanidze, Effective Investigation of Ill-treatment, Guidelines on European Standards, 2nd Edition, 2013, Council of Europe, p.p. 43-46.

¹² See *Najafliv. Azerbaijan*, no. 2594/07, 2 October 2012. In para. 52 the ECtHR has stated: “What is important is that the investigation of alleged misconduct potentially engaging the responsibility of a public authority and its officers was carried out by those agents’ colleagues, employed by the same public authority. In the Court’s view, in such circumstances an investigation by the police force of an allegation of misconduct by its own officers could not be independent in the present case” (para. 52). See also recently *Cestaro v. Italy* no. 6884/11, 7 April 2015.

purpose of creating a body for handling pre-trial criminal procedures that would take into account the condition of institutional independence required by procedural limbs of a number of Articles of the ECHR.

C. Provision by provision analysis

Article 1. State Bureau of Investigation

22. As discussed,¹³ the setting up of a specialised unit with competences in detection, prevention and investigation causes problems of overlapping and lack of precise delimitation of the functions of this body. Although an SBI covering both investigation and fully-fledged prevention of certain crimes is in principle not against ECHR principles, insufficient clarity as to the scope of the function and the risk of overlaps may cause a lack of efficiency.
23. Article 1.1 should specify that the SBI is an investigative authority conducting pre-trial procedures with regard to crimes attributed to its jurisdiction by the CPC. The expression “solving” crimes used in the English text does not have a clear meaning. However, in the Ukrainian context, it appears to refer only to the detection and identification of suspects, and not precisely to pre-trial investigative acts. Therefore, Article 1.1 should make express reference to the “investigation” activities of the SBI, to clarify its primary role.
24. With regard to the previous draft law, it is positive that the former paragraph 2, which provided for the Cabinet of Ministers to regulate and coordinate operations of the SBI has been deleted.
25. As stated in the comments on the previous draft law, it should be considered if Article 1.2 is the appropriate place for regulating the representative role of the Director of the SBI, taking into account that this is generally regulated under Article 12 of the Law.

Article 2. Legal Principles of SBI operations

26. This provision corrects the wording of Article 2 of the previous draft law, by including the reference to the CPC as applicable law.

Article 3. Basic principles of SBI organisation and operations

27. The adding of this provision merits a positive assessment, underlying what are the principles that shall govern the SBI, following the rule of law principles, legality, neutrality, transparency. Last subparagraph of the Article may need some clarification

¹³ See para. 14 above.

as it is not fully clear what is meant by “one-man management” compatible with “procedural autonomy of an investigator”. As long as the SBI Director and the Directors of Regional Offices can give orders and instructions within their powers, it is unclear what the internal structure of the SBI is and what is meant by “procedural autonomy” of each investigator.

28. When mentioning the principle of transparency, a reference to the data protection laws should be included.

Article 4 Independence of the SBI

29. The measures provided under this Article to safeguard the independence of the SBI may be considered as adequate. It is positive that the prohibition on mass media to “interfere” has been deleted, as this provision could be interpreted broadly in a way that is restrictive of the right to freedom of press and freedom of expression.
30. The inclusion of a “collective decision making” process for the adoption of most crucial decisions, a consideration that was made in the Experts’ Opinion on the previous draft law, is a positive improvement.

Article 5. SBI Tasks

31. The considerations with regard to this Article are addressed in the general comments.¹⁴
32. It is positive that the Draft Law already mentions what is the scope of jurisdiction of the SBI, as the previous draft did not specify it, not even in a general manner, although the scope of jurisdiction may not be the most appropriate, as expressed above under the general comments.

Article 6. Powers and authority of the SBI

33. In addition to the general comments with respect to the scope of powers and authority of the SBI, in particular the relevant provisions of Article 6 of the Draft Law it is to be noted that its sub-paragraph 1.6 concerns the power to use staff and contract covert officers subject to their voluntary involvement and confidentiality. This may incentivise, both financially and psychologically, individuals assisting in prevention, detection, termination and investigation of criminal offences under the jurisdiction of the State Bureau of Investigation and may be interpreted as introducing special framework for confidential cooperation distinct from the CPC norms (its Article 275). Accordingly, ***sub-paragraph 1.6 of Article 6 should include a reference to the relevant provisions of the CPC (Article 275).***

¹⁴ See paras 9-21 above.

34. In spite of the limiting clause ‘only for the purpose of exercising its powers’, sub-paragraph 1.13 providing for the power of obtaining user-level access to information systems of government authorities specified by the Cabinet of Ministers of Ukraine, creating information systems and keeping real-time records according to its functions, could be interpreted or include a right of unfettered access to and handling personal data held by public bodies. In view of the possible issues affecting the right to respect for private life under Article 8 of the European Convention that could arise, **sub-paragraph 1.13 of Article 6 should include a reference to the personal data protection framework, relevant provisions of the CPC and specify the requirement for obtaining a judicial authorisation for obtaining such information.**
35. Notwithstanding the limiting clause ‘acting within its competence’, sub-paragraphs 1.16 - 1.18 of the Article providing for the authority to meet requests for legal aid from respective foreign agencies and ensure compliance with, and performance of obligations under Ukraine's international treaties, as well as cooperate with foreign police and other respective agencies in line with its competence could be interpreted as introducing exceptions to the international legal assistance framework established by the CPC. Accordingly, **sub-paragraphs 1.16-1.18 of Article 6 should include a reference to relevant provisions of the CPC (Article 545 etc.).**
36. A mere formatting issue is noted in the structure of this Article: the numbering of a paragraph 1 is not necessary as it is the only one.

Article 7. Exercising powers of the SBI

37. As was pointed out in the Experts’ Opinion on the previous draft, stating the obligation of the ICT companies to cooperate with the SBI without court warrant, may violate the fundamental right to privacy, and as a rule it should not be allowed. On the other hand this provision is contrary to the rules on covert and detective investigations, regulated under Art. 246.2 CPC where the authorisation of the investigating judge is required and circumstances that provide grounds for suspicion of committing a crime are to be presented to the investigating judge for him/her to grant such a measure (Art. 248.2 5) CPC). Therefore the considerations offered with regard to sub-paragraph 1.13 of Article 6¹⁵ are valid for sub-paragraph 1.2 of Article 7. Accordingly, in addition to the clause on personal data protection framework, **sub-paragraph 1.2 of Article 7 should refer to the CPC or specify the requirement for obtaining a judicial authorisation for obtaining information protected by the right to respect private life.**

¹⁵ See para 34 above.

38. The deletion of the possibility of the SBI to confiscate objects and documents and seal premises, included in the previous draft law, merits a positive assessment. The same applies to night searches.
39. The discussed power to engage specialists, envisaged by sub-paragraph 1.5 of the Article is questionable due to the indefinite character of the clause that lacks a reference to the CPC norms and, therefore, could be interpreted as introducing an exception to them.¹⁶ Accordingly, ***sub-paragraph 1.5 of Article 7 should include a reference to relevant provisions of the CPC.***
40. Sub-paragraph 1.6 provides an entitlement ‘to use transport vehicles of individuals or legal entities (except transport vehicles of diplomatic, consular and other representative offices of foreign countries, organisations and special-purpose transport vehicles) to get to the scene, stop a crime, chase and detain individuals suspected of committing thereof, and deliver people in need of emergency medical care to hospitals’ is devoid of an indication to an condition for meeting the proportionality requirement. In view of the possible issues affecting the right to protection of property under Article 1 of Protocol 1 to the ECHR that could arise in case of permanent seizure or destroying the transport vehicles,¹⁷ ***sub-paragraph 1.6 of Article 7 should include a clause specifying that such use is only permitted in urgent circumstances or any other wording introducing the proportionality requirement.***¹⁸
41. The considerations suggested with regard to sub-paragraphs 1.16-1.18 of Article 6 that concern international legal assistance and relations of the SBI are valid for sub-paragraph 1.11 of Article 7. ***Sub-paragraph 1.11 of Article 6 should include a reference to relevant provisions of the CPC (Article 545 etc.).***

Article 8. Procedures for receiving reports on criminal offences under the jurisdiction of the SBI

42. The provisions of the Article are confusingly worded, since they do not refer to the CPC and, in particular its Article 214, which should have precedence. The suggested provision could be interpreted as introducing special format (only through dedicated telephone line and website) and rules for receiving and registration of notification of crimes falling under the SBI jurisdiction. Accordingly, ***Article 8 should be amended so that it fully corresponds to the CPC provisions on notification of crimes (Article 214).***

¹⁶ See para 10 above.

¹⁷ See *Gakayeva and Others v. Russia*, ECtHR Judgment of 10 October 2013, paras. 383-384.

¹⁸ Reimbursement of damages envisaged by the provision in issue does not exhaust the conditions for permitted interference within the right in issue.

43. Paragraph 3 of this Article has followed the recommendation with regard to the previous draft, establishing that the other agencies, when receiving information or a report on the offences under the SBI jurisdiction should send them to this agency. This merits a positive assessment.

Article 9. The structure and headcount of the SBI

44. This Article includes a positive amendment with regard to the previous draft: stating that the overall structure, functions and headcount of the SBI shall be determined according to the law. And in the fourth paragraph it regulates the main structure of the SBI. This may not have been necessary, but provides for more certainty. Moreover it limits the powers of the SBI Director, because according to the previous draft law, it was the Director of the SBI who decided on the structure.

45. Paragraph 6 of this Article refers to the procedure of Article 11.2, but this provision deals with the selection of SBI Director and the Deputies. This reference should be reviewed, as it does seem to be mistaken.

Article 10. The SBI Director and his/her deputies

46. One of the criticism expressed with regard to the previous draft law, was the absolute powers accorded to the SBI Director. The present Draft Law has established that the SBI director shall exercise “part of his/her powers” together with the first deputy and the deputy, establishing so a certain collegial decision-making procedure, which is viewed as positive. This is reflected in the new paragraph 1 of this Article.

47. The present Draft Law has also addressed the previous concerns regarding Article 10, which restricted the persons eligible for the position of the SBI Director in a too wide manner. The provisions that members of political parties or persons employed by them could not be appointed as SBI Director have been deleted.

Article 11. Procedures for Appointment of the SBI Director and his/her deputies

48. This provision has been amended so that the procedure for appointing the SBI Director also applies to the deputies. It is positive that the present Article underlines that the persons appointed to the selection panel shall have an impeccable reputation etc. and includes a list of persons that are not eligible to be members of the selection panel.

Article 12. Powers and authority of the SBI Director

49. The Draft Law has addressed the concern that the powers of the SBI Director should be counterbalanced by a collegial body. A new paragraph 2 has been added to this Article, providing that several decisions of the SBI Director shall be taken together with the deputies.

50. A new paragraph 3 has been added to the Draft Law providing for the elaboration of a strategic action programme of the SBI by its Director. It is surprising that the roles of the deputies are strengthened in order to counterbalance the too powerful hierarchical power of the SBI Director, but that the deputies have no role in the elaboration and/or approval of the strategic action plan. Furthermore, it is not said who shall approve this strategic plan.

Article 13 Directors of SBI's Regional Offices and heads of SBI's Central Office Units and their deputies

51. The same comment made to Article 12 would apply here: the directors of Regional SBI Offices shall prepare an action programme. This programme is subject to approval by the SBI Director, with no intervention of the deputies.

Article 14 Staff members of the SBI

52. In the comments to the previous draft law, with regard to this provision it was said:

“It is not clear from this provision where exactly the investigatory staff for the SBI will be recruited from. Although those with most experience of criminal or misconduct investigations will already be working for law enforcement agencies or within the prosecution office, compliance with the Convention and the development of confidence in the new proposals will not be enhanced by having the SBI populated by current police and law enforcement officers and prosecutors. Having officials who have recently worked alongside the colleagues that they now have to investigate will be very problematic. It is important to ensure the SBI recruits from outside the current law enforcement field, especially for those in leadership positions - the managers and team leaders of investigations.”

53. Following this comment, the present draft law, clarifies in the Final Provision 3 how the staff of the SBI will be recruited, stating that there shall be a majority of persons with other work experience and not directly transferred from the prosecution or law enforcement units. This seems to be adequate, although the system of quotas may not be strictly necessary or appropriate.¹⁹

54. What is clearly positive is the adding in paragraph 6 of Article 14 the need for special training for those agents who will be dealing with investigations of ill-treatment, terrorism, war crimes and corruption, including training abroad. What is more doubtful is the need for these investigators to be also trained in military higher education institutions.

¹⁹ See the comments on the final provisions accordingly.

Article 15. Restrictions applied to SBI staff members

55. The flaws pointed out in this provision have been addressed in the present Draft Law, eliminating excessive restrictions such as having another citizenship and having taken part in strikes.

Article 20. Monetary compensations and remuneration of SBI staff

56. For insuring independence, the Draft Law under Article 4.1 provides for “good remuneration”. It is not for an international expert to assess what should be considered as good remuneration in this context. But it should be pointed out that the previous draft established a 100% of increase of their base salary for officers serving in the SBI, and the present Draft Law has changed such provision, establishing a more detailed regulation, providing for basic salaries according rank and dividing the parts of the salary in different concepts. Without assessing the adequacy of the provision, this detailed regulation ensures more certainty.

Article 22. Cooperation of SBI with other government authorities

57. In the fight against organised crime, terrorism, and other serious forms of crime, cooperation and coordination with other authorities and with administrative institutions is of foremost importance. This Article provides for this exchange of information, which shall, nevertheless ensure that data protection rights are adequately safeguarded. The provision which might raise concern is paragraph 6.3: “upon request of the SBI, inspect, check, and take actions within their competence to oversee compliance with the laws of Ukraine by individuals and legal entities.” This power of the SBI to instruct to carry out general oversight functions, appears to be too broadly drafted, taking into account that it does refer generally to “compliance with the laws of Ukraine”. The wording of this provision should be redrafted in order to clarify that such instructions may only given with regard to the prevention or investigation of crimes that fall within the competence of the SBI.

Article 24. SBI Internal Control Units

58. As already stated above in the general comments, for the purpose of preventing and detecting offences committed by SBI staff, a Central Internal Control Unit and Regional Internal Control Units, which will be directly accountable to the Director of the SBI, will conduct investigations (*Article 24. 2. 6*). This does not meet the European standards requirement that alleged serious human rights violations by law enforcement officials must be investigated by a body that is institutionally independent from the agency of those implicated and where there is no hierarchical connection.

Article 25. SBI Disciplinary Commission

59. The wording of this Article has improved, as the previous text gave much more powers to the SBI Director, which was considered to increase the risk of a too hierarchical structure without balances. In the present text, it is not the Director of the SBI who will regulate the disciplinary proceedings, decide on the composition of the commission and take the final decision on sanctions, but it is the Disciplinary Commission who shall take the final decision on disciplining a member of the SBI.
60. Another improvement consists in stating that the regulation of the disciplinary proceedings by the SBI director shall follow the Standard Regulations approved by the Cabinet of Ministers, thus limiting the discretionary powers of the SBI director in this regard. All these measures are positive to counterbalance the very powerful figure of the SBI Director.

Article 27. Ensuring transparency of SBI's operations

61. The comments made in the Experts' Opinion on the previous draft concerning the publication of information on investigations of high profile cases, have been addressed in this provision.

Article 28. SBI Public Control Council

62. It is still unclear who will appoint the members of this Council, apart from the fact that it is the Cabinet of Ministers who will approve its regulations and the procedure of its formation. It appears that the right place to regulate these issues should be in this law. This was already pointed out in the Experts' Opinion on the previous draft, but no amendment has been introduced in this respect.
63. A positive change to be found in this Article is the change in Article 28.3.3: the Public Control Council shall select three representatives from amongst its members to be members of the Disciplinary Commission. In the previous draft law, the number was only two, being thus a minority within the five-member Disciplinary Commission (Article 25.1). According to the new provision, the powers of the SBI Director are also counterbalanced, as for disciplining a member of the SBI, the support of at least one member of the Public Control Council is needed.

Section 6. Final and Transitional Provisions²⁰

64. The proposed institutional quotas for the initial composition of the investigative units of SBI most probably reflect the current ratio of their investigators and pursue an idea

²⁰ The comments accordingly concern the table of amendments to other legal acts attached to the Draft Law.

of securing work opportunities. As to the 60 to 40 % proportion of detectives to be employed in accordance with the work experience criterion, it seems too artificial. The specifics of the Bureau and the momentum of introducing a new agency would require application of demanding, but not formalistic and purely individual professional profiling and selection criteria. For these reasons, it would be advisable *to remove the provisions as to institutional and work experience-related quotas and ratio suggested in paragraph 3 of Section 6 of the Draft Law.*

65. The investigative jurisdiction amendments to Article 216 of the CPC proposed in *sub-paragraph 5.1 of Section 6 of the Draft Law* and the corresponding boxes of the table are addressed in the general comments.
66. The amendments to Article 8 of the Law on Operative Search Activity concerns crimes that do not fall under the SBI jurisdiction. What is more, it provides for ‘evidentiary operation’,²¹ which, most probably concerns control of the commission of a crime (envisaged by Article 271 of the CPC). Thus, it is to be considered as an attempt to smuggle in a possibility for carrying out such a covert activity under the loose framework of operative search framework. Taking into account the intrusive character and complexity of any activity concerning a control of commission a crime, including in terms of its procedural rules, potential for abuse and consequences, they should be carried out only upon initiation of pre-trial procedures, exclusively under the CPC framework. Accordingly, *the amendment in sub-paragraph 5.2 of Section 6 of the Draft Law concerning introduction of paragraph 7¹ to Article 8 of the Law on Operative Search Activity concerning control of the commission of a crime is to be excluded.*
67. The amendment proposed in sub-paragraph 5.9 of Section 6 of the Draft Law concerning the inclusion of ‘State Bureau of Investigations’ in the list of bodies entitled to obtain ‘information concerning natural and legal persons that contains bank secret shall be provided by banks’ envisaged by Article 62 of the Law on Banks and Banking Activity should not be problematic, provided the whole norm is consistent with the relevant principles and requirements, including those concerning the right to respect for private life.²²

Summary of Recommendations

General

²¹ The Ukrainian text operates with the wording ‘операцію з контрольованого вчинення відповідних діянь’.

²² The table does not display the full text of the norm.

68. The proposed (extended) scope of the Bureau’s law-enforcement tasks and powers (beyond the model of an efficient, compact investigation-oriented agency with some supporting operative staff) may result in duplication of functions, uncertainty in terms of responsibilities of other relevant institutions and waste of resources.
69. As to the powers conferred to the SBI, it would be a serious drawback for the reform of the criminal procedure and justice in Ukraine to reinstate elements of the Soviet Procuratura under the SBI. Furthermore, the SBI should not be entrusted with any power to oversee or otherwise ex-officio/upon its own initiative and in absence of any information, allegation or complaint falling under its investigative jurisdiction, interfere in execution of criminal sanctions.
70. Moreover, the proposed format does not fully secure an effective and independent system for investigation of serious human rights violations. Due to the suggested scope of the SBI functions as well as in view of other deficiencies undermining its institutional independence and impartiality, it would be necessary to make additional arrangements for putting-in place a full-fledged system of investigation of cases of ill-treatment and other serious violations of human rights by law enforcement officials.

With regard to particular Articles

71. Article 1: the scope of activities of the SBI should be reviewed by introducing “carrying out pre-trial investigations”.

Article 3: there is a need to clarify the procedural autonomy of an investigator, within the concept of “one-man management”.

Article 3: data protection rights should be mentioned among the principles.

Article 5: should be reviewed in the light of the considerations expressed in general comments.

Article 6: should be reviewed in the light of the considerations expressed in general comments.

Article 6.1.6: should include a reference to the relevant provisions of the CPC (Article 275).

Article 6.1.13: should include a reference to data protection rights.

Article 6.1 16-18: should include references to the relevant provisions of the CPC.

Article 7.1.2: should refer to the CPC or specify the requirement for obtaining a judicial authorisation for obtaining information protected by the right to respect private life.

Article 7.1.5: there is a need to include a reference to the relevant provisions of the CPC.

Article 8: should be amended so that it fully corresponds to the CPC provisions on notification of crimes (Article 214).

Article 9.6: the reference to article 11.2 should be reviewed.

Article 12: the involvement of deputies in the elaboration of the strategic programme should be considered.

Article 13: the involvement of deputies should be considered.

Article 22.6.3: the power of the SBI to instruct to carry out general oversight functions should be redrafted.

Article 24: there is a need to provide for an independent arrangement to carry out efficient investigations against SBI agents in line with the considerations expressed in the general comments.

Article 28: clarification of the purpose and remit of the Public Control Council is required. Appointment of members of the Public Control Council should be further regulated under this law and not referred to future approval by Cabinet of Ministers.

Final provision 3: the provisions as to institutional and work experience-related quotas and ratio suggested in paragraph 3 of Section 6 of the Draft Law should be reconsidered.

Final provision 5.2: the amendment concerning introduction of paragraph 7 to Article 8 of the Law on Operative Search Activity concerning control of the commission of a crime is to be excluded.

Conclusions

72. The present Draft Law includes significant improvements in comparison with the previous draft law on SBI reviewed by the Council of Europe consultants in December 2014. The scope of the SBI jurisdiction has been clarified and particular shortcomings in relevant provisions have been addressed. The over powerful role of the SBI Director has been reduced providing for more intervention of the deputies in adopting certain decisions. The disciplinary proceedings also show improvement in this regard, and increase the involvement of the members of the Control Council.
73. However, there are concerns with regard to the structure and functions of the SBI in order to provide both an efficient response against serious crimes and to address the needs of effective investigation of ill-treatment and other serious human rights violations by law enforcement agents. Therefore, additional arrangements for addressing the mentioned concerns and/or creating a body meeting the relevant standards are required.