

**SUPPORT TO CRIMINAL JUSTICE REFORM  
IN UKRAINE**



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**DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW**

**DIRECTORATE OF HUMAN RIGHTS**

**OF THE COUNCIL OF EUROPE**

**OPINION**

**ON THE ADVANCED DRAFT LAW OF UKRAINE**

**"ON THE STATE BUREAU OF INVESTIGATION" (REG. NO. 2114)**

**AND THE DRAFT AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF  
UKRAINE ON ADJUSTMENT OF THE JURISDICTION OF PRE-TRIAL  
INVESTIGATION BODIES (REG. NO. 2542a)**

**Prepared on the basis of a contribution by:**

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## A. Introduction

1. This Opinion is concerned with the version of the draft Law of Ukraine "*On the State Bureau of Investigation*", No. 2114 ('the advanced Draft Law' and SBI, respectively), which has been advanced in the course of its review during the second reading at the Committee on Legislative Support of Law Enforcement of the Verkhovna Rada of Ukraine.
2. The comments are developed on the basis of a contribution by the CoE consultant Mr. Erik Svanidze<sup>1</sup> mainly with the view of assessing the extent to which the recommendations made in the earlier comments (DGI (2015) 11 of 8 June 2015 - 'the Preceding Comments') on the previous version of the draft Law of Ukraine on SBI have been taken into account.
3. After suggesting an overall assessment of the recent amendments to the advanced Draft Law, the comments deal with specific changes made. At the same time, they reflect some of definite statements made by the Ukrainian delegation in the course of the High-level Consultations on the draft legislation on SBI, held between the Ukrainian authorities and the representatives of the Council of Europe on 8 September 2015. However, the document does not take into account the amendments additionally prepared to the advanced Draft law in view of its preparation to the repeated consideration by the Verkhovna Rada of Ukraine in the 2<sup>nd</sup> reading in the nearest future. The comments also partially touch upon the draft Law of Ukraine "*On Amending the Criminal Procedure Code of Ukraine in view of complying with the recommendations of the European Union on fulfilment by Ukraine of the Visa Liberalisation Action Plan, concerning adjustment of the jurisdiction of pre-trial investigation bodies*", No. 2542a, dated 31 August 2015 ('draft law No. 2542a '). The comments to the draft law No. 2542a address exclusively the provisions related to the investigative jurisdiction of the SBI.
4. The comments have been prepared under the auspices of the Council of Europe Project "Support to the criminal justice reform in Ukraine", financed by the Danish Government (hereinafter - Project) and are based on the English translation of the Ukrainian texts of the advanced Draft Law and the draft law No. 2542a provided by the Project to the consultant.

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<sup>1</sup> Mr Erik Svanidze is a former prosecutor in Georgia, deputy minister of justice, member/expert of the European Committee for the Prevention of Torture, member of the Council of Europe group of consultants providing expert advice on the new Criminal Procedure Code, Law on the Public Prosecution Service (including the relevant joint opinion of the Directorate of Human Rights and the Venice Commission (2013 (CDL(2013)039)) and other related legislative acts of Ukraine.

## B. General considerations

5. The analysis of recent amendments suggests that a number of changes introduced into the advanced Draft Law strive taking into account the CoE experts' considerations, opinions and recommendations. They have improved and advanced it accordingly.
6. Thus, by skipping and narrowing some powers exceeding the mainstream tasks of the SBI, the advanced Draft Law partially addresses the concerns that an extension of the SBI functions up to fully fledged 'prevention, detection, stopping and solving' crimes, boosting its law-enforcement, operative functions, would amount to creation of one more super-powerful state institution and full departure from the model of an efficient, compact investigation-oriented agency.
7. In particular, it has removed the prerogative to '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' (former s/paragraph 8.1 of Article 7).
8. It omits clauses on overall prevention of and combating crime (in the introductory sentence), as well as the relevant standalone task in its Article 5 (former s/paragraph 1.1) and unspecified prevention component tasks related to specific categories of crime.
9. It now specifies that its key powers, as well as one of tracing fugitives, is limited to crimes falling within its investigative jurisdiction (s/paragraphs 3 and 5.1 of Article 6). As discussed in the Preceding Comments, the proposed furnishing of the SBI with its own operative staff could be considered as an option for overcoming institutional barriers and increasing efficiency of the primarily investigative function that targets special categories of crimes and/or perpetrators. However, this would require careful delineation of operative jurisdiction and activities, effective arrangements for coordination of between different law enforcement bodies in practice.
10. At the same time, the advanced Draft Law (in Articles 6 and 7) has retained provisions on unspecified 'preventive' component alongside its key powers to detect, solve and investigate relevant crimes.<sup>2</sup> As a result, the advanced Draft Law provides the SBI with the powers in issue without attributing relevant tasks to be performed. Law enforcement activities, including detection and investigation of crimes do involve and contribute to their prevention. If it is the scope of

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<sup>2</sup> This does not concern the replacement of the term 'combating crimes' with 'crime prevention' with regard to development and implementation of public policy instruments envisaged by s/paragraph 1.1 of Article 6.

preventive effects expected to be ensured by the SBI activities, this should be spelled out accordingly. Taking into account that the powers to contribute to crime prevention in general are envisaged in s/paragraphs 1.1 and 1.3 of Article 6 it would be advisable to use a different term instead of ‘preventing’, which could be an equivalent to ‘averting a specific crime’.

11. Moreover, the lack of further provisions that would specify the scope of preventive components of the powers attributed to the SBI combined with the retained functions and powers, which, in fact, are similar to the general supervision authority have retained serious risks of abuses, interference and overlap with competencies of other law enforcement and state institutions. This applies to s/paragraphs 1.9 and 1.11 of Article 6, which in the absence of a minimum condition of being predetermined by a final court verdict still provide for the powers to submit proposals to government authorities or officials to cancel regulatory acts and/or decisions issued/made as a result of a crime and take measures to reimburse losses and damage suffered by the government, ensure forfeiture of criminally obtained funds and other property.<sup>3</sup>
12. Furthermore, the advanced Draft Law maintains 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 (s/paragraph 1.7 of Article 6). As advised, they run counter the well-established principle of distancing and separation of law-enforcement from execution of criminal sanctions, including their involvement in operating penitentiary systems.<sup>4</sup>
13. In terms of distributing investigative jurisdiction, the advanced Draft Law gets rid of terrorism-related crimes, which could be seen as a move towards the model of efficient, more compact investigation-oriented agency.
14. This move is even stronger in the draft law No. 2542a, which suggests that the crimes related to the activities of organized crime groups and criminal organizations, as well as extremely grievous violent crimes which are punished by life imprisonment should not be included in the scope of the SBI jurisdiction.

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<sup>3</sup> The inclusion of the clause ‘the procedure provided by the law’ in paragraph 1.10 does not fully meet the concern. In the course of the high level consultations the Ukrainian counterparts expressed their readiness to exclude these provisions from the draft.

<sup>4</sup> The advanced Draft Law has incorporated new s/paragraph 6.4 in Article 22 providing for ‘information exchange’ with the State Penitentiary Service concerning ‘persons having been brought to responsibility for criminal offences falling under jurisdiction of the SBI’. It would be sufficient for meeting the implied considerations.

15. The Preceding Comments highlighted major conceptual concerns related to handling investigations of serious human rights violations attributable to the state. In the previous version of the Draft Law (s/paragraphs 1.3 and 4 of its Article 5, and amendments to Article 216 of the CPC under the respective Draft Law), the SBI jurisdiction was limited only to handling cases of torture and other forms of ill-treatment committed for specific purposes by law enforcement officers; by investigators (detectives) of the National Anti-Corruption Bureau, Security Service of Ukraine, bodies of internal affairs and prosecutors and not all their officers or employees respectively. By removing the reference to ‘the purpose of ensuring a fair trial and preventing cases when innocent persons are brought to criminal liability’; extending the jurisdiction with respect to ill-treatment related cases to all ‘staff members of other law enforcement agencies’; providing for the jurisdiction over all crimes committed by the ‘officials occupying especially responsible positions’, the advanced Draft Law has just partially addressed the recommendations in question.

16. The remaining gaps and inconsistencies in the advanced Draft Law include the following points:

- The jurisdiction should involve all serious human rights violations (not only ill-treatment-related). As discussed, this category comprises cases concerning violations of 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).<sup>5</sup> Listing in the amendments to Article 216 of the CPC envisaged by the advanced Draft Law of Articles 115, 120 etc. of the Criminal Code covering deaths of victims, illegal placement in mental institutions and so on does not exhaust the scope of crimes in issue. It is because of the complexity of the crimes comprising serious human rights violations, which could include rape, illegal phone tapping and many other *corpus delicti*. Moreover even the torture-related *corpus delicti* envisaged by the Criminal Code (including Article 365 of the Criminal Code, which is inexplicably omitted from the list suggested in the related norm of Article 216 of the CPC) do not comply with Article 1 of the UN Convention against Torture and related international standards. Thus, it might be necessary to introduce more comprehensive list and elaborated provisions and, possibly, additionally incorporate a definition of serious human rights violations that could refer to ‘crimes comprising violations of the rights to life, prohibition of ill-treatment, slavery and forced labour, liberty and security of person, respect for private and family life as understood under the European Convention on Human Rights.’

- It remains dubious (due to the inconsistency of the construction of the norm and inconsistency between Article 5 and the amendments to Article 216 of the CPC, proposed by Final and Transitional Provisions of the advanced Draft Law) whether

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<sup>5</sup> 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.

the words ‘staff members’ and ‘the law enforcement authorities’ added to the discussed s/paragraph of Article 216 of the CPC apply to the National Anti-Corruption Bureau of Ukraine, the Security Service of Ukraine, bodies of internal affairs. Moreover, Article 5 operates with the wording ‘staff members of other law enforcement agencies’ and amendments to Article 216 of the CPC: “Other staff members of law enforcement agencies’. This paragraph could be still interpreted as extending the SBI jurisdiction only to investigators (detectives) of these agencies, as well as prosecutors, and not any employee of the state institutions concerned. Thus, the draft should include a clear provision extending its jurisdiction over crimes concerning serious human rights violations attributable to a staff member of any law enforcement or other state institution or body executing similar coercive functions, including penitentiary service.

- The advanced Draft Law skipped to provide for institutionally independent investigation arrangements concerning serious human rights violations attributable to the SBI officers or employees. As discussed, in the country-specific context the internal control unit of the SBI would not meet the requirement of independence. Thus, a cross jurisdiction as to investigation of this category of crimes (serious human rights violations attributable to the SBI staff) could be doled out to other institutionally separate investigative agency.

17. As regards the amendments to Article 216 of the CPC suggested by the draft law No. 2542a (its paragraph 1 of Part 4), they extend the SBI jurisdiction to [all] crimes committed ‘by judges, prosecutors and staff members of law enforcement bodies’, i.e. including those falling under the category of serious human rights violations. Although the SBI would have jurisdiction over some special categories of crimes (IT crimes, public services, against authority), they are more neutral and their nature makes it more acceptable in terms of ‘appearances’ expected from institutions supposed to meet the ECHR standards on effective investigation. Thus, these amendments actually address one of the key gaps highlighted in the Preceding Comments.

18. It remains to be seen whether the SBI functions, its powers, jurisdiction and accordingly its structure and place in the framework of law-enforcement and executive authorities, actual operation and practice will comply with independence requirements and other standards for handling cases of serious human rights violations, eliminate impunity and gain sufficient public trust. This will require reinforcement of public scrutiny arrangements, complementing the SBI-based system for investigating serious human rights violations with avenues and bodies for addressing disciplinary related issues. Moreover, certain additional arrangements for securing internal (hierarchical) and procedural autonomy, as well as in terms of being attached to special prosecutors, could be envisaged for specialised SBI units or investigators handling investigation of serious human rights violations.

### **C. Provision by provision analysis of the advanced Draft Law**

19. The deletion of words concerning prevention and combating crime is in line with the CoE experts' recommendations.<sup>6</sup>

#### *Article 1. State Bureau of Investigation*

20. Part 1 still omits to make express reference to the "investigation" activities of the SBI, to clarify its primary role.<sup>7</sup>

21. The deletion of Part 2 is appropriate and in line with the comment that it is not the 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*

22. The inclusion of 'the international treaties' is welcome as putting emphasis on the relevant elements of the legal framework

#### *Article 3. Basic principles of SBI organization and operations*

23. The inclusion of 'society' rightly extends the concept of transparency of the SBI operation.

24. Although the Preceding Comments suggested to mention the data protection laws, the use of a reference to the requirement of complying with human right requirements could be considered as sufficient for meeting the point.

25. The change of 'investigator' to 'investigating authority' makes the last s/paragraph obscure (since strict hierarchical arrangements normally reinforce autonomy or independence of an institution and not an independence of individual investigators).

#### *Article 4 Independence of the State Bureau of Investigation*

26. The inclusion of "other individuals and legal entities" is a positive improvement with regard to a previous draft.

27. At the same time, the deletion of 'and its staff members' can be interpreted as removing them from the ambit of the provision.

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<sup>6</sup> See para.8 above.

<sup>7</sup> As to the 'preventive' component, see paras. 8-11 above.

*Article 5. SBI Tasks*

28. The comments to this Article are provided in the preceding part of the current comments.<sup>8</sup>

*Article 6. Powers and authority of the State Bureau of Investigation*

29. 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 the advanced Draft Law failed to address the recommendation suggesting that s/paragraphs 1.6, 1.10, 1.15-1.17 (former 1.13, 1.16-18) should include a reference to the CPC provisions.
30. S/paragraphs 1.9 should specify that the methodologies should comply with the requirements applicable to normative acts, including in terms of their publicity.

*Article 7. Exercising powers of the State Bureau of Investigation*

31. The change ‘measures’ to ‘actions’ and inclusion of ‘investigate’ streamlines the norm by specifying the CPC-based and accordingly investigative functions of the SBI.
32. S/paragraph 1.2 omitted to refer to the CPC or specify the requirement for obtaining a judicial authorisation for obtaining information protected by the right to respect private life.
33. The amendments to s/paragraph 1.3 attempt to address the relevant expert comment, but could be further improved by specifying that the measures to be taken are those envisaged by law.
34. The extension of the scope of data collected by the SBI with respect to suspects is balanced by the reference to Article 8 of the ECHR.
35. The inclusion of ‘contractual basis’ for engaging specialists, envisaged by s/paragraph 1.5, addresses the recommendation.
36. The advanced Draft Law skips to amend s/paragraph 1.6 of Article 7 with a clause specifying that use vehicles is only permitted in urgent circumstances or any other wording introducing the proportionality requirement.
37. The amendments to s/paragraphs 9 and 10 are of technical nature and not problematic.

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<sup>8</sup> See paras. 5-18.



38. New s/paragraph 1.11 has changed its focus and does not provide for direct representation of Ukraine in international cooperation and is not problematic.

39. The considerations suggested with regard to the power to obtain access and information envisaged by s/paragraph 1.2 are equally valid for new s/paragraph 1.12 of Article 7. Moreover, it is unclear what kind of ‘responsibility’ is envisaged for non compliance with the requests in issue and where it is established.

40. The deletion of Part 3 is not problematic.

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

41. The amendments introduced to Part 8 concerning the operation of the Selection Panel make it more consistent and are not problematic.

*Article 12. Powers and authority of the SBI Director*

42. Part 3 (in particular in view of its last sentence) still does not specify who shall approve a strategic plan developed by the Director.

*Article 13. Directors of SBI’s regional offices and heads of SBI’s central office units and their deputies*

43. The same comment made to Article 12 would apply here.

*Article 14. Staff members of the SBI*

44. The amendment to Part 4 limiting the regulatory arrangements for establishing the procedures for awarding ranks to senior officials of the SBI aimed at increasing its autonomy is not problematic.

45. Amendments to Part 6 are of technical nature and reflect relevant changes introduced to earlier provisions.

*Article 18. Legal protection of SBI staff*

46. The replacement in Part 4 of ‘offence’ by ‘unlawful acts or failure to act of another SBI staff member’ rightly extends and specifies the norm in terms of whistleblowers’ protection.

*Article 20. Monetary compensations and remuneration of SBI staff*

47. The amendments specify (for the first time) that the SBI staffing list is to include detectives. This move supposedly mirrors the development under the NABU framework, which has skipped (on the legislative level) more clear definition of their role, functions, powers and responsibilities. There is need to mind and fill this gap in terms of consistency with the basic principle of making a strict distinction between the investigative and operative activities, ensuring necessary qualifications of those performing them.

*Article 22. Cooperation of SBI with other government authorities*

48. The advanced Draft Law omits to redraft s/paragraph 6.3 in order to clarify that instructions may only be given within criminal procedures carried out by the SBI.

49. Newly introduced s/paragraph 6.4 does not raise any concerns.<sup>9</sup>

*Article 23. Control of the SBI's operations*

50. The deletion of s/paragraph 3.4 regarding an item on cooperation with civil society institutions and media to be tackled by the SBI report is unfortunate. It should be re-instated.

*Article 24. SBI Internal control units*

51. See the general comments suggested in paragraph 15.

*Article 27. Ensuring transparency of SBI's operations*

52. The introduction of an obligation to publish information on staff appointments and dismissals is a welcome development.

*Article 28. SBI Public Control Council*

53. 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. Indeed, this would reinforce the importance and advance the status of the Council and should be regulated in this law.

*Article 30. Official ID of the SBI staff member*

54. The new article is not problematic.

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<sup>9</sup> See above para. 12 and footnote 3 accordingly.

## *Section 6. Final and Transitional Provisions*

55. Alongside the removal of the provision as to the role of the Cabinet of Ministers in establishing the SBI and its mandatory composition, the advanced Draft Law retained debatable institutional quotas for its initial composition. It should be reiterated that 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.
56. The investigative jurisdiction amendments to Article 216 of the CPC are addressed in the General Comments.<sup>10</sup>
57. As to the investigative competence of the SBI detectives see comments to *Article 20 of the Draft Law*.<sup>11</sup>
58. The change of ‘the court in the relevant proceeding decisions’ by ‘the court’s verdict of guilty that came into legal force’ introduced to Part 7 of Article 216 of the CPC is appropriate.
59. Besides the technical adjustments, the amendments to Article 8 of the Law on Operative Search Activity incorporate reference to the CPC just partially address the concerns expressed in the Preceding Comments, since the CPC does not provide for a ‘controlled corruption action’, proposed to be incorporated into the text of the Law on Operative Search Activity.
60. The technical amendments of other provisions also do not raise any concerns.

## **Conclusion**

61. The advanced Draft Law in the edition prepared for the 2<sup>nd</sup> reading includes significant improvements with respect to its previous version examined by the CoE. Moreover, the draft amendments to Article 216 of the CPC suggested by the draft law No. 2542a are further adjusting the remit of the SBI and approximating it to the model of efficient, more compact investigation agency. Provided that these two drafts are effectively consolidated and the advanced Draft Law is further enhanced to meet the concerns with regard to the non-investigative powers of the SBI, as well as in terms of fine tuning its jurisdictions and meeting the demanding standards on combating impunity for serious human rights violations by law enforcement agents, its adoption would contribute to advancing the on-going

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<sup>10</sup> See paras 13-18 above.

<sup>11</sup> See para. 47 above.

reforms in the criminal justice area in Ukraine. Taking into account the five year deadline envisaged by the CPC for the establishment of the SBI, the complexity of the institutional, organisational and other implications of implementation of this Law in view of setting-up a new institution, it would be advisable to ensure the adoption of the respective draft law in the nearest future.