Funded by the European Union and the Council of Europe
EUROPEAN UNION
COUNCIL OF EUROPE
CONSEIL DE L'EUROPE
Implemented by the Council of Europe
SUPPORT TO CRIMINAL JUSTICE REFORM IN UKRAINE
COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

CoE/EU PCF "Fight against Corruption and Fostering Good Governance/ Fight against Money-Laundering" (EaP- 2)

DGI/09-15

ECCU-PCF-2/2015

29 May 2015

JOINT COMMENTS OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULEOF LAW ON THE LAW OF UKRAINE "*ON AMENDING SOME REGULATORY ACTS OF UKRAINE AS TO THE ACTIVITYOF THE NATIONAL ANTI-CORRUPTION BUREAU OF UKRAINE*"

A. Introduction

1. These comments are concerned with the Law of Ukraine № 198-VIII *"On Amending Some Regulatory Acts of Ukraine as to the activity of the National Anti-Corruption Bureau of Ukraine"* ('the Law'), which was adopted on 12 February 2015.

2. The present comments focus only on those provisions of the Law ('the amendments') that would entail changes to provisions in the Criminal Procedure Code and the Law of Ukraine *"On the Public Prosecutor's Office"* that was adopted on 14 October 2014 ('the 2014 Prosecution Law'), as well as in the 1991 Law of Ukraine *"On the Public Prosecutor's Office"* ('the 1991 Prosecution Law'; certain parts of which remain in force until the 2014 Prosecution Law enters fully into force). It reviews the compliance of the amendments vis-à-vis the requirements of the European Convention on Human Rights ('the European Convention') as interpreted and applied by the European Court of Human Rights ('the European Court') and in the light of international anti-corruption standards and best practices in investigating and prosecuting corruption offences, both at a procedural and an organizational level.

3. The comments first address the conceptual dimension of the amendments and their coherence with the reform of Ukrainian criminal procedure. There is then a provision by provision analysis of the amendments to the Criminal Procedure Code and the two Laws *"On the Public Prosecutor's Office"*. The comments conclude with an overall assessment of the compatibility of the amendments with European standards.

4. These comments have been based on an English translation of the Ukrainian text of comparative tables of the amendments and relevant provisions of the Criminal Procedure Code and the two Laws *"On the Public Prosecutor's Office"*. The original text of the amendments in Ukrainian was consulted where the language of the English translation seemed uncertain or required some further clarification[1]. The comments have been prepared under the auspices of the Council of Europe's Project "Support to criminal justice reform in Ukraine", financed by the Danish Government, on the basis of contributions provided by two of its Mr Jeremy McBride, Barrister, Monckton Chambers, former Chair of the Scientific Committee of the European Union's Agency for Fundamental Rights, United Kingdom, and Mr Eric Svanidze, former prosecutor, Deputy Minister of Justice, and member of the European Committee for the Prevention of Torture, Georgia, and with additional input from Mr Alan Bacarese, former prosecutor, United Kingdom, and Tilman Hoppe, former judge, Germany, - the Council of Europe's consultants under the CoE/EU Eastern Partnership Programmatic Co-operation Framework (PCF) "Fight against Corruption and Fostering Good Governance/Fight against Money-Laundering".

[1]The comments do not include any analysis of the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"* but it has been reviewed as background material.

5. The explanatory note for the Law was not provided to the experts but the content of the amendments clearly indicate an intention to take further steps to ensure that the provisions of the Criminal Procedure Code are adapted to take account of the mandate of the establishment of the National Anti-Corruption Bureau of Ukraine ('the Bureau') pursuant to the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"*[2], as well as to adapt the Laws *"On the Public Prosecutor's Office"* to the establishment of the Bureau.

6. The Bureau has been

> vested with prevention, detection, suppression, investigation and solving of corruption offenses under its competence, as well as prevention of committing the new ones[3].

In particular, its objective is to

> counter criminal corruption offenses committed by senior officials authorized to perform the functions of the state or local self-government and which threaten national security[4].

The amendments thus seek to reinforce the role of the Bureau in a profound fight against corruption in general. There is full appreciation in the present comments of the challenges, special needs, contemporary methods and tools required to combating corruption both in general and in Ukraine, in particular, where, reportedly, it is of pervasive character and has gained a global scale.

7. At the same time, the comments have also been developed with due regard to the rule of law and other principles and values that are necessary conditions for the successful and final defeat of corruption. These include, in particular, the need for clarity (predictability) and legal certainty in the legal framework, which is also a non-negotiable requirement of the European Convention. Although the latter affords a State a considerable 'margin of appreciation' in the interpretation and application of rights - such as the enjoyment of property and respect for private and family life - where measures to tackle corruption are required, it does not leave states an unfettered discretion. Moreover, it is axiomatic that the consistency of anti-corruption measures with criminal procedure as a whole and the general legal framework is a pre-condition for their efficient application.

[2] There were already some amendments to the Criminal Procedure Code in the Final Provisions of this Law.
[3] Part 1 of Article 1 of the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"*
[4] *Ibid.*

Provision by provision analysis

B. The Criminal Procedure Code

8. The Law has 26 amendments relating to the Criminal Procedure Code. They are concerned with the following sections: General Provisions; (Articles 3, 31, 38, 41, 52 and 100) Measures to Ensure Criminal Proceedings (Articles 159, 170 and 208-2); Pre-trial investigation (Articles 216-2, 246, 269-1 and 271); Special Procedures for Criminal Proceedings (Articles 468, 469, 472, 480 and 481); and International Cooperation in Criminal Proceedings (Article 545).

Article 3. Definitions of the Code's principal terms

9. There are two amendments for Part 1 of this provision which would modify the definition of the 'head of a pre-trial investigation agency' and of 'an investigator' in paragraphs 8 and 17 respectively. Both would insert into these definitions the phrase

> a division of detectives, a unit of internal control of the National Anti-Corruption Bureau of Ukraine.

These insertions reflect the functions of investigation and solving corruption offences given to the Bureau by Article 1 of the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"*.

10. In this regard[5], it should be noted that the amendments with respect to Parts 8 and 17 of Article 3, Part 2 of Article 38 and Part 5 of Article 216-2 of the Criminal Procedure Code appear to introduce new participants into the criminal procedure - detectives and members of an internal control unit of the Bureau - without clearly defining their role, functions, powers and responsibilities. This issue should be carefully assessed in terms of consistency with the basic principle of making a strict distinction between the investigative and operative activities in terms of the qualifications of those performing them, as well as with all the relevant structures introduced by the Criminal Procedure Code. It should be recalled that a similar blurriness was a significant factor in the widespread abuse seen under the previous system of criminal procedure.

11. As has already been noted above, there is no specific definition of the role, functions, powers and responsibilities of these entities. However, it is understood that the term

[5] It should be noted that there are also some provisions in the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"* that do not correlate with ones in the Criminal Procedure Code or with arrangements already appropriately regulated by other laws. Thus, paragraph 2 of Part 1 of Article 17 provides for obtaining [by means of a prosecutor] materials of criminal proceedings concerning criminal offenses referred by law to the investigative jurisdiction of the Bureau. Furthermore, paragraph 3 of Part 1 of the same article can be interpreted as suggesting that, albeit under the general and vague mention of the personal data protection legislation, the head of the Bureau is entitled to regulate access to information and data available in other institutions and bodies.

'detective' in the Law is actually being used with a view to denoting persons who are actually investigators at the Bureau, but who are also supposed to carry out operative activities. Therefore, the presumed intention is that the persons concerned should meet the requirements for investigators, even though they may also carry out operative activities.

12. *In order to ensure that there is no future deviation from the present intention, there should be a specific requirement that detectives and members of an internal control unit working for the Bureau must fulfil the requirements for appointment as an investigator*.

Article 31. Composition of court

13. This provision has been amended by adding a President whose powers have been terminated and members of the Bureau to those to be tried by a court whose composition is governed by this provision. This is not problematic and indeed it ensures that the persons concerned are treated in a similar manner to others holding senior public positions.

Article 38. Pre-trial investigation agency

14. This amendment would entail inserting the heading 'investigation units' before the bodies listed in Part 1 and adding a Part 2 providing that pre-trial investigation agencies shall be "a division of detectives, a unit of internal control of the National Anti-Corruption Bureau of Ukraine".

15. *For the reasons already discussed above, these additions need to be subjected to a specific requirement that detectives and members of an internal control unit working for the Bureau must fulfil the requirements for appointment as an investigator.* This would also help eliminate potential legislative loopholes created by an insertion of wording on new sub species of investigation units and new division of detectives, for what one assumes are investigators.

Article 41. Operational units

16. The amendments to this provision would affect both Parts 1 and 2.

17. The first change makes it possible for investigative (search) actions and covert investigative (search) actions to be conducted by

> a division of detectives, an operational and technical unit and a unit of internal control of the National Anti-Corruption Bureau of Ukraine

in addition to the other operational units given these functions. However, whereas the latter can only do so upon the written assignment of the investigator, public prosecutor, those connected to the Bureau are able to do so upon their own initiative or upon the written assignment of a public prosecutor seconded to the Bureau.

18. There is a possible inconsistency with the framework established in the Criminal Procedure Code in the potential exception to the ban established in Article Part 2 of 41 for operative and technical structures (officers) to exceed the written assignments of investigators and to carry out investigative activities on their own initiative.

19. Furthermore, the amendments concerning the Bureau's detectives and internal control units that has been introduced into Article 41 seem to be in conflict with paragraph 'b' of Part 1 of Article 38 of the Criminal Procedure Code since the latter classifies them as pre-trial investigative agencies but the former treats them as operational units. This comment goes back to the general lack of clarity about the precise nature of the investigations to be conducted by the Bureau since, given their mandate, it is assumed that they will conduct both operative activities and full investigations into suspects of corruption. Clarification on this point in the Law would, however, be more appropriate.

19. However, as noted above[6] it is understood that the term 'detective' in the Law is actually being used with a view to denoting persons who are actually investigators at the Bureau, but who are also supposed to carry out operative activities. This arrangement is being made with a view optimising the resources at its disposal.

20. The main thing is, of course, not by whom particular activities are carried out but that this is done in accordance with the framework established in the Criminal Procedure Code. Thus, it does not matter how a particular officer is described so long as he or she satisfies certain minimum requirements in terms of proficiency, knowledge and skills necessary for applying the relevant powers conferred under the Criminal Procedure Code, thereby ensuring that the safeguards that it embodies are maintained. It is, therefore, important to recall that investigators - as understood for the purpose of the Criminal Procedure Code - should have higher legal education and meet other advanced requirements that are more exacting than those required for persons occupying operative positions.

21. Thus, if the Bureau does ensure that all those who hold the position of detective and member of an internal control unit fulfil all the requirements to be an investigator for the purpose of the Criminal Procedure Code, there would be no objection to classifying all the officers concerned as 'investigators', even if they are also undertaking operative functions. Nonetheless, for the sake of upholding the basic principle in issue, it would be preferable for the reversed approach to have been followed, namely, to have left the Criminal Procedure Code provision unchanged and to have adjusted the term used, as well as the Bureau's structure, through designating

[6] Para 11.

the relevant officers as 'investigators' and expanding their powers and functions over operative activities accordingly. There is a solid argument to be advanced, as the authors have done, that to create legal clarity and certainty around the definition of the 'investigators' and/or 'detectives' too many attempts to define terminology that already exists in the CPC does not make immediate sense. Defence counsel will always try to challenge the process of investigations into corruption for powerful clients and one obvious area of challenge is the legal authority of those investigating to prosecuting the cases. If there is any confusion created in terms of definitions – and so de facto legal powers - then these will be exploited by defence counsel.

22. Furthermore, although the consistent implementation of the present intention as to who will fulfil the position of detective and member of an internal control unit should certainly ensure that in practice the conceptual principles introduced to secure the discontinuance of abusive practices are not undermined, there is no guarantee that this intention will always be adhered to as it is certainly not required by the amendments.

23. *Thus, in order to ensure that there is no future deviation from this intention, there should be inserted a specific requirement that all detectives and members of an internal control unit working for the Bureau must fulfil the requirements for appointment as an investigator as defined within the laws of Ukraine.*

Article 52. Mandatory participation of a defence counsel

24. The amendment to this provision establishes a mandatory requirement for the participation of a defence counsel at the initiation of the conclusion of a plea agreement in criminal proceedings. This is a potentially important safeguard against undue pressure for those concluding such an agreement. This amendment is thus entirely appropriate.

Article 100. Storage of material evidence and documents and making a decision on special attachment

25. The provisions in Part 9 that deal, at the making of a decision ending criminal proceedings, with the treatment of physical evidence and documents which have been produced before the court have been amended by adding a provision relating to the confiscation of certain property unless legitimate grounds for title to such property are duly confirmed by court. The property involved covers the money or any other property, (including related income) of both a person convicted of a corruption crime or money laundering or of any legal entity which, due to such person's contribution, obtained the said property or title thereto (a 'related person'). Such confiscation is to occur where the court

> resolves that there are no legitimate grounds for acquisition of title to any portion of the property, such portion of the convicted person's property (...) or the value thereof if such portion cannot be separated. If it is not possible to confiscate the property the legitimacy of

title to which has not been acknowledged, the convicted person shall be bound to pay the value of such property.

26. Although confiscation is an interference with the right to peaceful enjoyment of possessions, it is unlikely that the use of this provision will entail a violation of Article 1 of Protocol No. 1 given that such a measure is taken by a court following a conviction and can be regarded as being taken to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. Although the burden of proving legitimacy of title is on those that would otherwise be subject to confiscation, this is not objectionable in the eyes of the European Court so long as the decision is not based on mere suspicion and is subject to an effective judicial guarantee[7]. Both requirements are respected in this amendment and it cannot, therefore, be regarded as problematic.

27. That said, as far as anti-corruption standards are concerned, Ukraine has still not implemented the recommendations made by MONEYVAL[8] or the OECD[9] on introducing extended confiscation (at least, within the scope of amendments analysed in the present paper). In this connection, the amendments to Article 100 relating to the confiscation of property do rather than does seem problematic since it is not clear if the two initial categories - persons convicted and related persons - are inclusive or exclusive of each other as regards the need for a criminal conviction to take place before any confiscation occurs. Certainly, if such a conviction were required, it would not extend sufficient power to pursue assets of those who have enriched themselves beyond the levels of legitimate income that they enjoy, which is what the second part of the amendment appears to elude to[10].

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[7] See *Arcuri and Others v. Italy* (dec.), no. 52024/99, 5 July 2001, in which it was stated that "the proceedings for the application of preventive measures were conducted in the presence of both parties in three successive courts – the District Court, the Court of Appeal and the Court of Cassation. In particular, the applicants, instructing the lawyer of their choice, were able to raise the objections and adduce the evidence which they considered necessary to protect their interests, which shows that the rights of the defence were respected. In addition, the Court observes that the Italian courts were debarred from basing their decisions on mere suspicions. They had to establish and assess objectively the facts submitted by the parties and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily. On the contrary, the Italian courts based their decision on the evidence adduced against the first applicant, which showed that he was in regular contact with members of criminal organisations and that there was a considerable discrepancy between his financial resources and his income. The domestic courts also carefully analysed the financial situation of the other applicants and the nature of their relationship with the first applicant and concluded that all the confiscated assets could only have been purchased by virtue of the reinvestment of Mr Rocco Acuri's unlawful profits and were de facto managed by him, with the official attribution of legal title to the last three applicants being merely a legal dodge designed to circumvent the application of the law to the assets in question (see, mutatis mutandis, Autorino v. Italy, application no. 39704/98, Commission decision of 21 May 1998, unreported).

[8] Progress Report MONEYVAL(2012)31, page 73.

[9] OECD ACN, Anti-Corruption Reforms in UKRAINE, Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan, March 2015, page 61.

[10] See the EU Directive, 2014/42/EU, on extended confiscation - http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.127.01.0039.01.ENG.

The language of the amendment is also unclear as to why property restricted to just money 'or any other property' (what about services, payments towards a child's education, which is never given directly to a suspect), and why related persons' are just restricted to legal entities, as well as to the meaning of 'related income'. Furthermore, it is also unclear as to why the income obtained only relates to money laundering in addition to corruption offences; this restriction could curtail the ability of investigators and prosecutors to consider a broader list of potential suspects.

In short, the amendment is far too restrictive and does not follow increased international efforts to improve the performance of states in the confiscation of the proceeds of crime[11].

Article 159. General provisions for provisional access to objects and documents

28. The amendment to this provision involves the deletion of the phrase

> upon adoption of the appropriate ruling by investigating judge, court

from Part 1[12]. This deletion is not, however, problematic since Part 2 remains with its stipulation that

> Provisional access to objects and documents shall be executed based on a ruling of investigating judge, court.

Thus, this is not a case of removing a requirement that provisional access to objects and documents must be judicially authorised - which would potentially result in a violation of Article 1 of the Protocol No. 1[13] - but it is simply one involving the deletion of the first of the two iterations in this provision of such a requirement. Part 1 remains a simple explanation of what provisional access means and its exercise continues to be subject to the requirement of judicial authorisation in Part 2.

Article 170. Grounds for attachment of property

29. The amendment creates an exception to the general requirement for prior judicial authorisation of property, allowing this to occur on the basis of the decision of the Director or Deputy Director of the Bureau, approved by a public prosecutor, in respect of property or money on the accounts of physical or legal entities opened with financial institutions

[11] I*bid.*

[12] The full text of the unamended provision states: "Provisional access to objects and documents consists in providing a party in criminal proceedings by the person who owns such objects and documents, with the opportunity to examine such objects and documents, make copies thereof and, upon adoption of the appropriate ruling by investigating judge, court, seize them (execute seizure)".

[13] See, e.g., *G, S and M v. Austria* (dec.), no. 9614/81, 12 October 1983.

> In urgent cases and exclusively in order to preserve evidence or ensure possible confiscation or special confiscation of property in criminal proceedings in connection with regard to a grave or especially grave criminal offence.

30. This attachment is to apply only for a period up to 48 hours and a public prosecutor must apply to an investigative judge with the petition to order the property's attachment within 24 hours from the moment of making the decision. In view of the provision of subsequent judicial control and the making it clear that the effect of failing to make such an application within the timeline envisaged is to cancel what is a provisional attachment and to require the return of the attached property or money, the seizure for the reasons given in the amendment is thus not likely to be considered disproportionate by the European Court[14]. This amendment is thus not problematic from a human rights perspective. Nonetheless, the proposed period of 48 hours might prove too short for a prosecution to gather sufficient evidence to make a convincing case to the judge in corruption and economic crime cases, on account of the complexity of the financial arrangements typically associated with them. Addressing this concern would, however, need to be accompanied by judicial control over any prolonged attachment of the property or money concerned.

Article 208-2. Apprehension by a competent official

31. Under the amendment to Part 1, a third situation would be introduced in which a person could be apprehended without the necessity of obtaining a ruling by an investigating judge, court. This would be where "there are valid grounds to escape investigation".

> if there are reasonable grounds to believe that the person suspected of a grave or especially grave corruption crime that under law is within the jurisdiction of the National Anti-Corruption Bureau of Ukraine may escape aiming at evading criminal responsibility.

32. This amendment does not appear to be intended to affect the special aspects of apprehension of certain categories of person found in Chapter 37 of the Criminal Procedure Code.

33. Moreover, such an addition to the powers of apprehension without prior judicial authorisation may not be inconsistent with the limited authorisation for apprehension under Article 5(1)(c) of the European Convention where there is reasonable suspicion that a person has committed an offence. This is because the existence of a risk of flight is made a condition for dispensing with the need for judicial authorisation and thus is only dealing with a limitation in the power under the Criminal Procedure Code, which is more restrictive in this regard than the European Convention under which reasonable suspicion of having committed an offence is not time limited (unlike 'fleeing after having done so' at the end of Article 5(1)(c)). The limitation on this power to grave or especially grave corruption offences is not objectionable.

[14]See, e.g., *Grifhorst v. France*, no. 28336/02, 26 February 2009.

34. However, it should be noted that in the text there is no stipulation of a requirement of reasonable suspicion of an offence but only a need for the person concerned to be 'suspected' of one. The condition of reasonableness seems only to be attached to the belief that the person concerned "may escape aiming at evading criminal responsibility". Thus, the amendment is introducing a lower standard for apprehension than is permitted under Article 5(1)(c) of the European Convention.

35. Furthermore, there appears to be a potential clash between the power of apprehension that has been created and the restriction in the Constitution on arresting someone without a substantiated court decision in that the latter permits this to be dispensed with only in the case of urgent necessity to prevent or stop a crime[15]. This is much more restrictive than the approach permitted, in principle, under Article 5(1)(c) but any incompatibility of the power with the Constitution would necessarily mean that the power could not be 'lawful' for the purpose of the Convention[16].

36. *The amendment should be modified so as to require a reasonable suspicion of an offence in addition to reasonable belief about flight. In addition, the potential clash with the Constitution needs to be addressed and, in the event of it proving real, appropriately resolved by an amendment either to the present provision or the constitutional guarantee.*

Article 216. Investigative jurisdiction (competence)

37. The amendments to this provision concern Parts 4, 5 and 6, as well as the addition of two new Parts (8 and 9).

38. Thus, there is firstly a slight reformulation of the first paragraph of Part 4 regarding the competence of investigators of the State Bureau of Investigations of Ukraine with respect to pre-trial investigation which is not problematic[17].

[15] Article 29 provides: "No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law. In the event of an urgent necessity to prevent or stop a crime, bodies authorised by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within seventy-two hours. The detained person shall be released immediately, if he or she has not been provided, within seventy-two hours from the moment of detention, with a substantiated court decision in regard to the holding in custody"..

[16] Such a possibility was raised *Korneykova v. Ukraine*, no. 39884/05, 19 January 2012, at para. 34. but did not need to be resolved in the particular circumstances of that case.

[17] It now provides that "Investigators from units of the State Bureau of Investigations of Ukraine shall, save for the cases specified by Part Five of this Article, engage in pre-trial investigation of the crimes committed by officials holding a particularly responsible status pursuant to Part One of Article 9 of the Law of Ukraine *On Public Service* and the persons whose posts **in the public service** refer to categories **one-three**, judges and law enforcement personnel" instead of "Investigators from units of the State Bureau of Investigations of Ukraine shall engage in pre-trial investigation of the crimes committed by officials holding a particularly responsible status pursuant to Part One of Article 9 of the Law of Ukraine *On Civil Service* and the persons whose positions refer to categories 1-3, judges and law enforcement personnel, save for the cases specified by Part Five of this Article"

39. In addition, there are modifications to the addition of a second paragraph to Part 4 that was made by the Final Provisions of the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"*, namely, the giving of competence to the investigators of the State Bureau of Investigations of Ukraine over offences committed by officials of the National Anti-Corruption Bureau of Ukraine. This competence now also extends to the offences committed by public prosecutors of the Specialised Anti-Corruption Prosecutor's Office. However, this competence is also limited in that it does not extend to the matters that fall within the competence of the National Anti-Corruption Bureau's internal control unit.

40. Insofar as these modifications relate solely to an intra-institutional allocation of competence over pre-trial investigation of offences, they are not problematic as there are no strict standards concerning an overall distribution of investigative jurisdiction on the domestic level. However, the giving of the internal control unit of the National Anti-Corruption Bureau (instead of the State Bureau of Investigations) jurisdiction over certain crimes committed by its own officials (with the exception of its Director and his or her First Deputy or Deputy) potentially disregards the well-established requirement of independence of investigation of serious human rights violations by public officials. Indeed, in its recent judgments, the European Court has consolidated the standard and suggested that it amounts to violation of the procedural limb of the relevant articles of the European Convention when an

> 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[18].

41. Although the relevant offences mainly relate to aspects of corruption[19], there is a possibility that they might be combined with or could involve (e.g. in the context of excess of authority or official powers by an employee of a law enforcement agency, through the forgery of detention registers etc.) serious human rights violations[20] and it is questionable whether the internal control unit would satisfy the foregoing requirement[21] for independence of investigation in such cases. This is especially important requirement for handling of cases where the allegations are of a serious

[18] *Najafli* v. *Azerbaijan*, no. 2594/07, 2 October 2012, para. 51. See also *Taraburca* v. *Moldova*, no. 18919/10, 6 December 2011, para. 54.

[19] Namely, the receiving of illegal benefits by an employee of a state enterprise, institution or organisation, forgery in office, taking a bribe, giving a bribe and provocation of bribery.

[20] Namely, abuse of authority or office, excess of authority or official powers and neglect of official duty.

[21] Thus, the European Court stated in *Najafli* v. *Azerbaijan*, no. 2594/07, 2 October 2012 that it found " it of no real significance that, while the alleged perpetrators were officers of the Riot Police Regiment of the Baku Police Department, it was another police department which was requested to carry out the investigation. 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).

nature, where there is a greater need for independence and objectivity in the investigation and decisions making[22].

42. *The overall hierarchical and institutional criteria and relevant appearances thus require that these aspects of the amendments to Parts 4 and 5 be modified so that the investigative jurisdiction over relevant pre-trial procedures (concerning, as minimum, serious human rights violations[23] attributable to the officials of the National Anti-Corruption Bureau and the Specialised Anti-Corruption Prosecutor's Office[24]) are always assigned to a different authority regardless of other (including corruption-related) charges pressed.*

43. Apart from this, the amendments made to Part 5 giving the responsibility for pre-trial investigation of corruption-related offences to the Bureau's detectives subject to all the existing conditions relating to the standing of the persons committing the offence and the amount involved[25] and authorising the Bureau's detectives to investigate criminal offences which belong to the jurisdiction of investigators of other agencies in order to prevent, detect, terminate and solve criminal offences belonging to its jurisdiction under the law upon the decision of the Bureau are unproblematic.

44. The new Part 8 is concerned with determining which investigator is to conduct the pre-trial investigation of offences relating to money-laundering and terrorist financing, as well as limiting the circumstances in which such an investigation is not to be undertaken with a view to bringing the person concerned to criminal liability, namely, the offence providing the proceeds was committed outside Ukraine and the laundering committed there and the fact of committing that offence has already been established by a court elsewhere. This is not problematic.

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[22] E.g., the UK's Independent Police Complaints Commission ('IPCC') (https://www.ipcc.gov.uk/) oversees the police complaints system in England and Wales and sets the standards by which the police should handle complaints. It is independent, making its decisions entirely independently of the police and government. Its primary statutory purpose is to secure and maintain public confidence in the police complaints system in England and Wales. Police forces deal with the majority of complaints against police officers and police staff. The IPCC considers some appeals from people who are dissatisfied with the way a police force has dealt with their complaint. Since November 2012, the responsibility for determining appeals is shared with local police forces. In addition, police forces must refer the most serious cases – whether or not someone has made a complaint – to the IPCC.

[23] As to the scope of serious human rights violations 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.

[24] On account of their close functional interrelationship, these two bodies cannot be regarded as being independent from each other in terms of the standards on investigation of serious human rights violations; see. *Barbu Anghelescu* v. *Romania*, 5 October 2004, no. 46430/99, para. 67.

[25] Introduced by the Final Provisions to the Law of Ukraine *"On the National Anti-Corruption Bureau of Ukraine"*.

45. The new Part 9 is simply the placing the second paragraph of Part 6 dealing with certain organisational arrangements for investigating offences[26] - into a discrete Part and is not problematic.

46. *However, for the reasons already discussed above, these amendments need to be subjected to a specific requirement that detectives and members of an internal control unit working for the Bureau must fulfil the requirements for appointment as an investigator.*

Article 246. Grounds for covert investigative (detective) actions

47. The addition to Part 2 of a reference to the new Article 269-1 that deals with the monitoring of bank accounts is merely consequential upon this addition to the different forms of covert investigative (detective) actions under the Criminal Procedure Code and, as such, is not problematic.

Article 269-1. Monitoring of bank accounts

48. The amendment in question entails the introduction into the Criminal Procedure Code of an entirely new Article that would authorise the monitoring of bank accounts in certain circumstances. However, such monitoring would be compatible with the right to respect for private life if based upon reasonable suspicion of the commission of an offence, it is judicially authorised, the categories of persons affected are defined, limits are set on the discretion as to the use and storage of material gathered, there is appropriate control over its disclosure, a temporal limit for the monitoring is set by the judge authorising the order and there is provision for the eventual destruction/erasure of the product of the monitoring in the event that it is not used as evidence in future proceedings[27]. These requirements are met by the explicit requirement of reasonable suspicion and the need for judicial authorisation, as well as the making applicable to such monitoring of the requirements in Articles 246, 248 and 249 of the Criminal Procedure Code, namely, as regards applying for and granting authorisation and its duration. This amendment is thus not problematic but its use should be reviewed in accordance with Ukrainian law to ensure that it is not being abused.

Article 469. Initiation and conclusion of an agreement

49. The amendments to this provision concern Part 4, providing for the possibility of a plea agreement being concluded additionally in respect of especially grave corruption crimes if the investigation is under the Bureau and if the suspect or accused disclosed another person who committed a crime being investigated by the Bureau and this

[26] Thus, it provides that the agency conducting a pre-trial investigation is to have responsibility for a pre-trial investigation into other crimes - whether committed by the suspect or someone else - where it is not possible to separate the proceedings, notwithstanding that the agency concerned would not normally have jurisdiction to undertake a pre-trial investigation into those crimes.

[27] See, e.g., *Kennedy v. United Kingdom*, no. 26839/05, 18 May 2010.

information is supported by evidence. Furthermore, it is now provided that a plea agreement can be reached in respect of criminal misdemeanours and crimes that cause damage only to state or public interests. These amendments are not problematic.

Article 472. Content of a Plea Agreement

50. The amendment would add the

> conditions of partial release of liability of the suspect, the accused in the form of reimbursement of damages to the state caused as a result of committing a criminal offence

to what must be indicated in the plea agreement. This can only contribute to ensuring that, as required by the European Court[28], a plea agreement is a consequence of a conscious and voluntary decision by the suspect, the accused and has not resulted from any duress or false promises made by the prosecution. This addition is not problematic. Nonetheless, in the context of such serious offences as corruption, this would require some careful monitoring by the courts[29]. In particular, the decision-making as to when the offer is made to, or accepted on behalf of, the suspect should be made explicit within a carefully drafted legal framework to avoid inconsistencies and to ensure that whenever a plea bargain is accepted it is in accordance with law. By way of example, in the Netherlands, prosecutors openly treat with defence lawyers in heavy cases of white-collar or organized crime because they acknowledge that they are opposed by well-resourced adversaries. Similarly, in England, the Serious Fraud Office resorts to such a practice in cases of serious or complex fraud[30]. Indeed, the SFO has been compelled to go further and adopt a model[31] similar to that used in the USA to moderate the cost of prosecuting huge multi-national companies.

Article 480. Individuals subject to special procedure of criminal proceedings

51. The amendment adds prosecutors of the Specialised Anti-Corruption Office to the list of office-holders for whom a special procedure for criminal proceedings is applicable[32] and is certainly not inappropriate.

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[28] See *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014, at para. 97.

[29] In this connection, it is worth noting that the European Court in the *Natsvlishvili and Togonidze* case also considered that "a further guarantee of the adequacy of the judicial review of the plea bargain ... [was] the fact that the Kutaisi City Court was not, according to applicable domestic law, bound by the agreement reached between the first applicant and the prosecutor. On the contrary, the City Court was entitled to reject that agreement depending upon its own assessment of the fairness of the terms contained in it and the process by which it had been entered into. Not only did the court have the right to assess the appropriateness of the sentence recommended by the prosecutor in relation to the offences charged, it had the power to lessen it" (para 95.)

[30] Attorney General's Guidelines, See: http://www.sfo.gov.uk/media/111905/ag_s_guidelines_on_plea_discussions_in_cases_of_serious_or_complex_fraud.pdf

[31] Deferred Prosecution Agreements, See: http://www.sfo.gov.uk/about-us/our-policies-and-publications/deferred-prosecution-agreements-code-of-practice-and-consultation-response.aspx

[32] Those already on the list are people's deputies of Ukraine; judges of the Constitutional Court of Ukraine, professional judges, as well as jurors, and people's assessors at the time when they administer justice; candidates for the office of the President of Ukraine; the Commissioner of the Verkhovna Rada of Ukraine for human rights; the Head of the Chamber of Accounts, his first deputy, deputy, Chief Comptroller and secretary

Article 481. Notification of suspicion

52. The amendment adds prosecutors of the Specialised Anti-Corruption Office and the Director and other employees of the Bureau to certain categories of person to whom a written notice of suspicion must be sent by the Prosecutor General[33] and again is certainly not inappropriate.

Article 545. Central authority of Ukraine

53. The amendment inserts a new Part 3 - the existing one has become Part 4 - whereby a deadline of 3 days is set for the transmission to the Bureau by the Prosecutor General's Office and the Ministry of Justice of materials received within the framework of international legal assistance that relate to "financial and corruption offences".

54. This is not, in principle, problematic but it is recalled that the Bureau's mandate does not extend to all financial and corruption offences.

55. *There is a need, therefore, to ensure that any transmission pursuant to the amendment does not result in the processing of offences not within the Bureau's mandate being unduly delayed.*

C. The Laws *"On the Public Prosecutor's Office"*

56. The amendments made to the two Laws *"On the Public Prosecutor's Office"* are essentially designed to integrate the newly-established Specialised anti-corruption public prosecutor's office into the framework which they embody.

The 1991 Prosecution Law

57. An amendment to the 1991 Prosecution Law was required because certain parts of it remain in force until the 2014 Prosecution Law fully enters into force. The amendment - inserting an entirely new Article 17-1 - simply provides for the appointment of prosecutors who will work in the Bureau following their competitive selection and is not problematic. Although, the implementation of these provisions needs to be under the scrutinised public monitoring to ensure that the important caveats to any perceived influence of the Prosecutor General over the selection process (not least, the approval of the Director of NABS with regard to procedure for selection),

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of the Chamber of Accounts; deputies of local councils; defence attorneys; the Prosecutor-General of Ukraine and his or her deputy; and the Director and officials of the Bureau.

[33] These are: members of the Parliament of Ukraine; candidates for the President of Ukraine; the Human Rights Commissioner of the Verkhovna Rada; the Chairman of the Accounting Chamber of Ukraine; the First Deputy Chairman; the Deputy Chairman, Inspector General, the Secretary of the Accounting Chamber; and deputies of the Prosecutor General of Ukraine.

which are reflected in the Law, are truly safeguarding the transparency and fairness of the selection process.

The 2014 Prosecution Law

58. The amendments to the 2014 Prosecution Law are somewhat more extensive but generally are also unproblematic.

59. Thus, Article 7 has been amended to include the Specialised anti-corruption public prosecutor's office into the system of the Public Prosecution Service and to provide for its establishment and the determination of its structure and staff by the Prosecutor General upon the approval of the Bureau's Director. The observation as to the need of scrutinised public control, expressed under comment above also applicable with regard to the respective provisions under the 2014 Prosecution Law.

60. An entirely new Part 5 has been introduced into Article 8 which sets out the functions of the Specialised anti-corruption public prosecutor's office, namely, supervision of the observance of laws during the pre-trial investigation conducted by the Bureau, performing public prosecution in relevant proceedings, representation of citizen's or the state's interests in a court in cases stipulated by this Law and connected with corruption or corruption related offenses and performing international cooperation within the implementation of its functions. Only the third of these is subject to any reservation and that is only as regards the desirability of stripping the Public Prosecution Service as a whole of all functions beyond the criminal justice field[34].

61. However, bearing in mind the existing models of international cooperation in this field and a number of entities being entrusted with certain tasks in the overall action against corruption, it would be paramount to clearly delineate authority regarding international cooperation between new and old structures. In countries where there are a number of entities assigned with the same task can often create confusion in international circles as to who takes the lead and where should incoming requests, in particular concerning intelligence and other operational activities be made. This may not be an issue for Ukraine under the CPC and this new model but it is one worth clarifying at the outset.

62. Detailed provision relating to the peculiarities of the organization and activities of the Specialised anti-corruption public prosecutor's office are made through the insertion of an entirely new Article 8-1. Its provisions deal with the appointment of the office's prosecutors, the subordination of its Head - who is also to be a Deputy Prosecutor General - to the Prosecutor General, the appointment by the latter of the former and his or her deputies pursuant to an open competition, the housing of the office, the

[34] See Comments of the Directorate General Human Rights and Rule of Law (Directorate of Human Rights) of the Council of Europe on the Law of Ukraine on the Public Prosecution Service of 14 October 2014 (DGI(2014)30), paras. 25-30 and 76-92.

autonomy of the prosecutors in the office with respect to Prosecutor General and his or her deputies as regards the exercise of their powers, the supervision of a pre-trial investigation of corruption crimes by the Prosecutor General from amongst his or her deputies or heads of department and the specific responsibilities of the Head of the office. These are all appropriate matters to be included and the only slight reservation concerns the possibility of the exercise of the power of appointment by the Prosecutor General with respect to any pre-trial investigation into offences of corruption allegedly committed by prosecutors from the office and /or as regards politically sensitive cases, as this could have the potential to exercise influence over them and thus undermine their autonomy.

63. *However, any such risk should be addressed through monitoring of any exercise (or failure to exercise) this power rather than by any further amendment*.

64. Article 15 has been amended to include the Head of the Specialised anti-corruption public prosecutor's office within the list of public prosecutors, which is appropriate.

65. Part 5 of Article 24 has been amended to specify that the right to file an appeal, a cassation complaint, an application for revision of a court judgment under new circumstances, applications for revision of a judgment by the Supreme Court against judgments passed in criminal proceedings where the investigation was carried out by the Bureau shall belong to the public prosecutor who participated in the trial, regardless of participation in the proceedings, the Head of the Specialised anti-corruption prosecutor's office and his or her first deputy and deputy rather than the Prosecutor General, his or her First Deputy and Deputies, the heads of regional public prosecutor's offices and their first deputies and deputies, as is generally the case. This amendment is not, as such problematic.

66. The Head of the Specialised anti-corruption public prosecutor's office has been introduced into the list in Article 39 of administrative positions in public prosecutor's offices and this provision has also been amended to provide for the appointment of a prosecutor to that administrative position for a period of 5 years. Both amendments are appropriate.

67. The arrangements for dismissal from administrative position in Article 41 have been amended to accommodate the position of Head of the Specialised anti-corruption public prosecutor's office, while excluding this administrative position from the grounds for dismissal on account of a transfer to a position in another public prosecutor's office. Neither amendment is inappropriate.

68. The provisions on salaries of public prosecutors in Article 81 have been amended to provide that the basic salary of a prosecutor of the Specialised anti-corruption prosecutor's office cannot be less than the basic salary of the head of a department of the central office of the Bureau which carries out a pre-trial investigation. This is

entirely appropriate given the responsibilities of such a prosecutor regarding the conduct of pre-trial investigations involving corruption offences.

69. A new Part 3-1 has been introduced into the transitional provisions in Section XIII which has the effect of barring admission to service at the Specialised anti-corruption prosecutor's office of persons who, within five years before the date of the Law's enactment

> worked (served), regardless of length, in a specially authorized units to combat corruption in the prosecution authorities, the Ministry of Internal Affairs of Ukraine, the Tax Police, the Security Service of Ukraine, the Military Service of Law and Order of the Armed Forces of Ukraine and customs authorities may not be admitted to service.

Such a bar is undoubtedly designed to ensure a fresh start in efforts to tackle corruption and, given past difficulties in this regard, does not seem to be disproportionate, notwithstanding that not everyone who had so worked in such units may be the legitimate object of suspicion.

D. Conclusion

70. The amendments that would be made by the Law are not generally problematic but there are certain points that require attention.

71. Thus, the appearance of an exception to the basic principle of strict distinction between the investigative and operative activities and relevant structures in the Bureau - which is not intended to be followed in practice - should be corrected by the introduction of a specific requirement that all detectives and members of an internal control unit working for it must fulfil the requirements for appointment as an investigator.

72. Secondly, the text of Article 208-2 should be modified so as to require a reasonable suspicion of an offence for apprehension in addition to reasonable belief about flight. Moreover there is a need to clarify whether the new power is incompatible with Article 29 of the Constitution. An affirmative answer would require either it or the constitutional guarantee to be appropriately amended.

73. Thirdly, account should be taken of the need for there to be independent investigation of alleged serious human rights violations attributable to the officials of the Bureau's and the Specialised Anti-Corruption Prosecutor's Office.

74. Fourthly, there is a need to monitor the actual operation of two provisions; the amended Article 545 of the Criminal Procedure Code (to ensure that any transmission of materials received within the framework of international legal assistance is not unduly delayed) and Article 8-1 of the 2014 Prosecution Law (to ensure that the

exercise of the power of appointment by the Prosecutor General with respect to any pre-trial investigation into offences of corruption allegedly committed by prosecutors from the Specialised anti-corruption public prosecutor's office does not result in their autonomy being undermined). Furthermore, there will be a need to keep under review the extent of the Prosecutor General's role in relation to the new Specialised anti-corruption public prosecutor's office with a view to ensuring the true independence of this new institution.

75. Fifth, Article 100 would need to be reworded in order to eliminate the vagueness relating to the mechanism at the disposal of prosecutors and the types of income and expenditure covered by the provision, as well as to address current shortcomings which pertain to the offences to which it applies and the concept of related persons.