Strasbourg, 26 October 2015

CDL-AD(2015)031
Or. Engl.

Opinion no. 819/2015

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

INTERIM OPINION

ON THE DRAFT LAW ON INTEGRITY CHECKING

OF UKRAINE

Adopted by the Venice Commission
at its 104th Plenary Session
(Venice, 23-24 October 2015)

on the basis of comments by:

Mr Sergio BARTOLE (Substitute Member, Italy)
Ms Veronika BÍLKOVÁ (Member, Czech Republic)
Mr George PAPUASHVILI (Member, Georgia)

TABLE OF CONTENTS

I. Introduction

1. By a letter of 13 August 2015, Ambassador Mykola Tochytskyi, Permanent Representative of Ukraine to the Council of Europe, requested the opinion of the Venice Commission on the compatibility of the Draft Law of Ukraine on Integrity Checking[1] ("the Draft Law") "with applicable international norms and European standards".

2. The Draft Law on Integrity Checking was prepared by the Ministry of Justice, pursuant to subparagraph 2 of paragraph 4, Section II "Final Provisions" of the Law on the National Anti-Corruption Bureau of Ukraine.[2] The provision tasks the Cabinet of Ministers to *"submit to the Verkhovna Rada of Ukraine proposals for the regulation of the organisation of integrity checking with respect to persons occupying public posts in state of local administration".* Integrity checking is also foreseen by the Law of Ukraine on the Principles of State Anti-Corruption Policy in Ukraine (the Anti-Corruption Strategy) for 2014 – 2017.[3]

3. The Venice Commission appointed Mr Sergio Bartole, Ms Veronika Bílková, and Mr George Papuashvili to act as rapporteurs.

4. On 1 October 2015, a joint delegation of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe visited Kyiv and held meetings with the Ministry of Justice, representatives of the National Anti-Corruption Bureau and of the Security Service of Ukraine, as well as NGO representatives. The Venice Commission is grateful to the Ukrainian authorities and to other stakeholders, in particular to the Council of Europe Office in Kyiv, for their excellent co-operation during the visit.

5. During the visit to Kyiv, the delegation was informed by the Ministry of Justice that the Draft submitted to the Venice Commission was a preliminary version and that the authorities intended to amend this preliminary version on the basis of recommendations by the Venice Commission. It was thus decided to prepare as a first step, an interim opinion on this preliminary version of the Draft Law. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance in the matter.

6. The present interim opinion is based on the English translation of the Draft Law of Ukraine on Integrity Checking provided for by the Ukrainian authorities. It was prepared on the basis of the comments submitted by the experts above and adopted by the Venice Commission at its 104th Plenary Session, in Venice (23-24 October 2015).

---

[1] CDL-REF(2015)033 Draft Law of Ukraine on Integrity Checking**.**

[2] Закон України № 1698-VII *Про Національне антикорупційне бюро України,* Відомості Верховної Ради (ВВР), 2014, № 47, ст. 2051. The Law was adopted on 14 October 2014 and entered into force on 25 February 2015.

[3] Закон України № 1699-VII *Про засади державної антикорупційної політики в Україні (Антикорупційна стратегія) на 2014 - 2017 роки,* Відомості Верховної Ради (ВВР), 2014, № 46, ст.2047. The Law was adopted on 14 October 2014 and entered into force on 26 October 2014.

II. Applicable Legal Framework

A. National Legal Framework

7. Over the past two years, Ukraine has sought to build up a comprehensive legal framework aimed at ensuring good governance, fighting corruption, and cleansing the administration from public officials lacking personal integrity or impartiality.

8. As a country bound by several international human rights instruments, including the European Convention on Human Rights (hereinafter, "ECHR"), Ukraine has also sought to ensure that this framework is compatible with international human rights standards, in accordance with Article 3 of the Constitution of Ukraine[4].

9. A package of anti-corruption legislative acts was adopted by the Verkhovna Rada of Ukraine on 14 October 2014. This package includes the Law on the National Anti-Corruption Bureau of Ukraine, the Law of Ukraine on the Principles of State Anti-Corruption Policy in Ukraine, and the Law on the Prevention of Corruption.[5] These Laws set the principles of the state´s anti-corruption policy, define the basic terms, identify means to combat corruption and foresee sanctions for those engaged in corruption. The Laws also establish two new bodies: a) National Anti-Corruption Bureau of Ukraine (hereinafter, "NABU"), which is tasked to investigate corruption in Ukraine and to prepare cases for prosecution. It replaces the National Anti-Corruption Committee, which had been established originally in 2009 but never became truly operational. b) National Agency for the Prevention of Corruption (NAPC), a central executive body with special status, which ensures shaping and implementing the state anticorruption policy.

10. The adoption of the anti-corruption package came as a response to the pressure exercised both by the Ukrainian public and by international actors such as the International Monetary Fund or the World Bank. According to the 2014 Corruption Perception Index of the Transparency International, in the last two decades, Ukraine has repeatedly and steadily featured among the most corrupted states in Europe.[6] In its 2014 report, Transparency International concluded that *"corruption in Ukraine continues to be a systemic problem existing across all levels of public administration".*[7] There can thus be no doubts that the adoption of anti-corruption package is highly urgent and pursues a legitimate goal.

11. The Venice Commission had not been so far requested to give its opinion on the anti-corruption legislation of Ukraine. This legislation has however been assessed by other international bodies, most prominently by the OSCE[8] and, indirectly, by the GRECO[9] and the OECD.[10] The assessments appear to suggest that although corruption continues to be a challenge in Ukraine, the country is on the right track to combat it.

12. In parallel with the anti-corruption legislation, Ukraine has enacted a set of laws aimed at *cleansing the state administration* from individuals who have either been considered politically unreliable due to their ties to the pre-1991 communist regime or the pre-2013 Yanukovych governments, or have been engaged in acts of corruption. The

---

[4] *"Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. (…)To affirm and ensure human rights and freedoms is the main duty of the State".*

[5] Закон України № 1698-VII *Про запобігання корупції,* Відомості Верховної Ради (ВВР), 2014, № 49, ст. 2056. The Law was adopted on 14 October 2014 and entered into force on 26 April 2015.

[6] Ukraine remains most corrupt country in Europe - Transparency International*, Interfax,* 3 December 2014.

[7] Transparency International, *National Integrity System Assessment, Ukraine 2014,* Kyiv, 2014, p. 12.

[8] OSCE, *Opinion on Two Draft Anti-Corruption Laws of Ukraine,* GEN -UKR/254/2014, 18 July 2014.

[9] GRECO, *Fifth Addendum to the Compliance Report on Ukraine,* Greco RC-I/II (2009)1E 5th Addendum, 19 June 2015.

[10] OECD, *Anti-Corruption Reforms in Ukraine,* Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan, Paris, 24 March 2015.

cleansing package encompasses the Law on Government Cleansing (so called Lustration Law)[11] and the Law on the Restoration of Trust in the Judiciary of Ukraine.[12] The former Law has been assessed by the Venice Commission in an interim opinion adopted in December 2014 and a final opinion in June 2015.[13]

B. International Legal Framework

13. The Venice Commission has been asked by Ukraine to assess the Draft Law on Integrity Checking in light of *"applicable international norms and European standards".* Such norms and standards encompass various hard and soft law instruments adopted at the universal or European level.

14. Ukraine is a state party to the United Nations Convention against Corruption (UNCAC) (ratification in 2009) which explicitly sets the task *"to promote integrity, accountability and proper management of public affairs and public property"* (Article 1(c)) as one of its purposes. It calls on Member States "*to facilitate the reporting by public officials of acts of corruption*" (Article 8 subsection 4) and to take "*disciplinary or other measures against public officials who violate the codes or standards*" (Article 8 subsection 6).

15. The Technical Guide to the United Nations Convention against Corruption prepared by the United Nations Office on Drugs and Crime (UNODC) together with the United Nations Interregional Crime and Justice Research institute (UNICRI), in its Chapter 50 lists integrity testing as one of the available tools in the fight against corruption and describes it as "*a method that enhances both the prevention and prosecution of corruption and has proved to be an extremely effective and efficient deterrent to corruption*"[14].

16. The OECD manual on "Managing Conflict of Interest in the Public Sector" states that *"[T]he Integrity Test can be a powerful specialised corruption detection tool".*[15] The OSCE "Best practices in combating corruption" note that: *"Integrity testing has now emerged as a particularly useful tool for cleaning up corrupt police forces – and for keeping them clean."*[16] Further, the World Bank "Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity" guidelines refer to integrity testing as "*a powerful corruption detection tool"*[17]*.*

17. Ukraine is also a state party to both the Civil Law[18] and the Criminal Law[19] Conventions on Corruption adopted within the Council of Europe.

18. In 2006 Ukraine joined the Group of States against Corruption (GRECO). In its 2014 report on Ukraine, GRECO noted that *"considerable progress has been achieved in respect of criminalising corruption activities under the Criminal Code (as opposed to dealing with such matters as administrative offences), liability of legal persons for corruption, regimes for confiscation and seizure, public procurement procedures and in respect of the protection of*

---

[11] Закон України № 1682-VII *Про очищення влади,* Відомості Верховної Ради (ВВР), 2014, № 44, ст. 2041. The Law was adopted on 16 September 2014 and entered into force on 16 October 2014.

[12] Закон України № 1188-VII *Про відновлення довіри до судової влади в Україні*, Відомості Верховної Ради (ВВР), 2014, № 23, ст. 870. The Law was adopted on 8 April 2014 and entered into force on 11 April 2014.

[13] Venice Commission, Opinion No. 788/2014, Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, CDL-AD(2014)044-e, 16 December 2014; and Adopted Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine as would result from the amendments submitted to the Verkhavna Rada on 21 April 2015, CDL-AD(2015)012-e, 19 June 2015.

[14] UNODC (2009), *Technical Guide to the UNCAC,* Article 50 II.4.5., p. 186.

[15] OECD (2005), *Managing Conflict of Interest in the Public Sector*, p. 68 ("Integrity Testing Policy").

[16] OSCE (2004), *Best practices in combating corruption*, (English and Russian), Chapter 12, page 141 ("Integrity testing").

[17] Gramckow H. (2011), *Preventing Corruption in Prosecution Offices: Understanding and Managing for Integrity*, Justice&Development Working Paper Series, No. 15/2011, page 11.

[18] Ratified by Ukraine on 19 September 2005.

[19] Ratified by Ukraine on 27 November 2009.

whistle-blowers. Yet important reforms concerning areas such as administrative procedures and justice as well as regulating the civil/public service are still to be carried out".[20]

19. In 1997, the Committee of Ministers of the Council of Europe adopted the Resolution 97(24) on the Twenty Guiding Principles for the Fight Against Corruption. The Resolution, among other things, encourages states *"to ensure that the rules relating to the rights and duties of public officials take into account the requirements of the fight against corruption and provide for appropriate and effective disciplinary measures"* (para. 10.)

20. In 2000, the Committee of Ministers of the Council of Europe adopted the Recommendation No. R (2000) 10 on Codes of Conduct for Public Officials. The Model Code of Conduct for Public Officials, attached to the Recommendation, seeks to *"specify the standards of integrity and conduct to be observed by public officials, to help them meet those standards and to inform the public of the conduct it is entitled to expect of public officials"* (Article 3). Under Article 9 of the Code, *"the public official has a duty always to conduct himself or herself in a way that the public's confidence and trust in the integrity, impartiality and effectiveness of the public service are preserved and enhanced".*

21. Article 24 of the Recommendation addresses the issue of integrity checks. It stipulates that *"the public official who has responsibilities for recruitment, promotion or posting should ensure that appropriate checks on the integrity of the candidate are carried out as lawfully required"* (par. 1), adding that *"if the result of any such check makes him or her uncertain as to how to proceed, he or she should seek appropriate advice"* (par. 2). Article 25 declares that *"the public official who supervises or manages other public officials should take reasonable steps to prevent corruption by his or her staff in relation to his or her office"* (par. 2).

22. The Explanatory Memorandum to the Recommendation stresses that *"public service requires integrity from public officials"* and explicitly declares that *"experience shows the importance of carrying out integrity checks or acting on them in order to avoid long-term integrity problems in the public service".*

23. The International Code of Conduct for Public Officials,[21] adopted in 1997 by the UN General Assembly, also emphasises that *"public officials shall ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies"* (par. I(2)), but it does not address integrity checks specifically. The Report of the UN Secretary General on the Implementation of the International Code submitted in 2002 shows that corruption is seen as one of the major threats to the integrity of the public officials and that states adopt a variety of measures to combat it[22] (integrity checks are not explicitly addressed by the report).

24. In 2005, the Committee of Ministers of the Council of Europe adopted the Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism. Special investigation techniques are defined as *"techniques applied by the competent authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons"* (Chapter I). Undercover operations, including the use of the agent provocateur, fall under special investigation techniques. The Recommendation however is meant to apply solely in criminal investigation. *"The use of SIT in a different contexts*", as the Explanatory Report states explicitly, *"does not fall within the scope of the recommendation"* (par. 26).

[20] GRECO, *Fifth Addendum to the Compliance Report on Ukraine,* 19 June 2015, par. 57.
[21] UN Doc. A/RES/51/59, *Action against Corruption,* 28 January 1997.
[22] UN Doc. E/CN. 15/2002/6/Add.1/, *Implementation of the International Code of Conduct for Public Officials.* Report of the Secretary General, 12 February 2002.

25. Issues relating to integrity checks, sometimes in the context of the fight against corruption, have arisen in several cases adjudicated by the European Court of Human Rights ("ECtHR") (*Teixeira de Castro v. Portugal*[23]*, Vanyan v. Russia*[24], *Khudobin v. Russia*[25], *Ramanauskas v. Lithuania*[26], *Bulfinsky v. Romania*[27], *Sandu v. the Republic of Moldova*[28], *Yeremtsov and Others v. Russia*[29], etc.). Virtually all these cases deal with checks carried out by the police and resulting in criminal prosecution of the individuals.

26. The Venice Commission has considered integrity checks in its 2014 *Amicus Curiae* Brief on Moldova.[30] This opinion was primarily focused on checks within the judiciary, yet it contains principles applicable to integrity checks used outside the criminal law framework.

27. At the national level, regulation of integrity checks by means of undercover operations has had a long tradition in common law countries such as the United Kingdom, the United States or Australia in criminal law context. [31] In these countries, rich case-law has been developed in their respect by ordinary and high courts.[32] More recently, the technique has started to be used in civil law countries, for instance the Czech Republic, Hungary, or Romania. Its introduction has given rise to doctrinal debates[33] and has also been occasionally challenged in ordinary or constitutional courts.[34] Again, the checks mostly serve criminal law purposes. In common law countries, checks, including random ones, have also been used within the police forces to test their moral integrity.

28. Over the past few years, integrity checks have been introduced as part of anti-corruption legislation in Romania (for the Ministry of Internal Affairs personnel)[35] and the Republic of Moldova (for public agents in general).[36] The legislation of the latter country has been one of the main sources of inspiration for the Draft Law of Ukraine on the Integrity Checking.

---

[23] ECHR, *Teixeira de Castro v. Portugal,* Application No. 25829/94, 9 June 1998.
[24] ECHR, *Vanyan v. Russia*, Application No. 53203/99, 15 December 2005.
[25] ECHR, *Khudobin v. Russia,* Application No. 59696/00, 26 October 2006.
[26] ECHR, *Ramanauskas v. Lithuania,* Application No. 74420/01, 5 February 2008.
[27] ECHR, *Bulfinsky v. Romania,* Application No. 28823/04, 1 June 2010.
[28] ECHR, *Sandu v. the Republic of Moldova,* Application No. 16463/08, 11 February 2014.
[29] ECHR, *Yeremtsov and Others v. Russia*, Applications Nos 20696/06, 22504/06, 41167/06, 6193/07 and 18589/07, 27 November 2014.
[30] Venice Commission, Opinion No. 789/2014, *Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing,* CDL-AD(2014)039-e, 15 December 2014.
[31] For more details, see Marcus, Paul: *The Entrapment Defence,* 4th edition, Michie, 1992; Chernok, Adam V.: Entrapment under controlled operations legislation: A Victorian perspective, *Criminal Law Journal,* Vol. 35, 2011, pp. 361-375; Spencer, J. R.: Entrapment and the European Convention on Human Rights, *Cambridge Law Journal,* 2001, pp. 30-33.
[32] See, for instance, UK House of Lords, *Regina v Loosely,* 25 October 2001; US Court of Appeals, District of Columbia Circuit, *United States v. Kelly,* 748 F.2d 691 (1984); *Jacobson v. United States,* 503 U.S. 540, 548 (1992); *Mathews v. United States,* 485 U.S. 58, 63 (1988).
[33] See, for instance, Roibu, Magdalena: Entrapment in Case of Corruption Offenses – Breach of the Right to a Fair Trial, *Journal of Eastern European Criminal Law*, No. 2, 2014, pp. 93-100; Pușcașu, Volcu: Agenţi sub acoperire. Provocarea ilegală a infracţiunii. Consideraţii (I), *Caiete de Drept Penal,* No. 2, 2010, pp. 29-74; Pușcașu, Volcu: Agenţi sub acoperire. Provocarea ilegală a infracţiunii. Consideraţii (II), *Caiete de Drept Penal,* No. 3, 2010, pp. 75-98.
[34] See, for instance, the decisions of the Constitutional Court of the Czech Republic No. 597/99 of 22 June 2000 and No. 407/07 of 29 October 2009.
[35] See Romania, Law 38/2011 on modifying the Emergency Government Ordinance No. 30/2007 on the organization and functioning of the Ministry of internal Affairs (Article 17) and the Ministry of Internal Affairs Order No. 256/2011 on the procedure for testing the professional integrity of the Ministry of Internal Affairs staff.
[36] See Republic of Moldova, Law No. 325 of 23 December 2013 on Professional Integrity Testing. CDL-REF(2014)041.

III. Analysis

29. According to the Explanatory Note, the Draft Law on Integrity Checking is part of a package of initiatives aimed at *"improving the system of preventing and combating corruption and its comprehensive reform in accordance with international standards and good practices of foreign countries".* It seeks to achieve this goal by introducing into the Ukrainian legal order the institution of integrity checks (also called checks for virtue in the explanatory note). Such checks should *"be carried out to ensure the professional incorruptibility and the prevention of corruption of public officials, verification of compliance with their duties, ethical standards of behaviour, detect, assess and elimination of factors that lead to corruption"* (explanatory note).

30. The Draft Law has five sections (General Provisions, Procedure of Integrity Checks, Results and Legal Consequences of Integrity Checks, Financing of Integrity Checks, and Final and Transitional Provisions). The first three sections will be examined separately. Section IV which provides that the cost of the integrity checks will be borne by the State Budgets, does not give rise to any legal difficulties.

31. Section V (Final and Transitional Provisions) indicates that the introduction of the institution of integrity checking into the Ukrainian legal order requires amendments to certain existing legislative acts: the Labour Code, the Code of Administrative Offences, the Criminal Code, the Law on the Security Service of Ukraine and the Law on the Prevention of Corruption. The amendments relate to the procedure or consequences of the integrity checking and will therefore be assessed together with the Sections dealing with them.

32. Article 5 of Section V[37] of the Draft Law stipulates that *"the laws and other regulatory acts adopted before the effect of this Law apply where not inconsistent with this Law".* By virtue of Article 6 of Section V, the Cabinet of Ministers is invited *"to submit to the Verkhovna Rada of Ukraine its proposals on bringing the legislative acts of Ukraine into conformity with this Law"* (par. 1). This requirement seems to contradict the Explanatory Note, which asserts that *"the Draft Law complies with the Constitution of Ukraine and the European Convention on Human Rights and is consistent with other acts of the same legal force".*

A. General Provisions (Articles 1-8)

33. Section I defines the crucial terms used in the Draft Law, indicates the purpose of integrity checks and the principles applicable to them, enumerates the categories of persons subject to integrity checks and enlists the rights and duties of those carrying out integrity checks as well as those subject to them.

34. Although the legal technique of providing the definitions of a number of terms referred to in the Law (Article 1 of Section I) is rather a question related to the legal culture of the country, these definitions should not add confusion to the interpretation of the Law in the future: the terms should not be used outside the meaning provided in the definitions (for example, the term "integrity" is used in a different sense in Article 2, than the one defined in Article 1), the definitions should not be vague, unnecessary (for example, the term "conflict of interest" defined in Article 1 is not used even once in the Draft Law) and the Draft Law should not create parallels which confuse legal standards by providing definitions for terms already defined in other Laws.

[37] The English translation of the Final and Transitional Provisions seems incomplete, as section 3 is followed by section 5 (with section 4 missing).

35. Under Article 1, integrity is defined as *"performance of official duties (…) on the basis of compliance with the rules of ethical conduct and with prevention of corruption or corruption related offences"* (par. 1). The terms "corruption", "corruption offences" and "corruption-related offences" are defined in the Law on the Prevention of Corruption and the Criminal Code. The term "rules of ethical conduct" on the contrary is not completely clear.

36. The term could refer to Section VI of the Law on the Prevention of Corruption, entitled Rules of Ethical Conduct.[38] This Section enumerates certain general principles that public officials are expected to abide by, such as political neutrality, impartiality, competence and efficiency or non-disclosure of information. Under Articles 11(10) and 37(2) of the Law on the Prevention of Corruption, a set of more specific *"rules of ethical conduct for civil servants and local self-government officials"* should be elaborated and approved by the National Agency for the Prevention of Corruption ("NAPC"). To the best knowledge of the Venice Commission, the NAPC has not so far approved any such rules and there is a high risk that these rules will not be available by 1 January 2016 when the Draft Law shall enter into force.

37. The term "rules of ethical conduct" thus remain rather unclear and vague, relating only to the general requirements of Section VI of the Law on the Prevention of Corruption.[39] Since a violation of such rules may have serious consequences for the person, possibly leading to his/her dismissal and the prohibition to occupy public positions for three years, the rules have to be not only accessible but also *"formulated with sufficient precision to enable the citizen to regulate his conduct".*[40] This is not currently the case with "rules of ethical conduct". The Venice Commission therefore recommends that the provisions of the Draft Law related to these rules do not become operational, until the approval by the NAPC of such rules.

38. The rules to be approved by the NAPC are to apply solely to civil servants and local self-government officials, representing only one category of persons falling under the Draft Law. It is not clear whether the adoption of similar rules is envisaged with respect to the other categories of persons. If this is not the case, then the objection of vagueness raised above would remain applicable to the other categories even after the approval of these rules. Moreover, the Draft Law could result in double standards with civil servants and local self-government officials subject to more detailed (and probably stricter) rules of ethical conduct than the other categories of persons. Since these other categories include the highest representatives of the state as well as military officers, such double standards could hardly be justified by the respective position of the persons subject to them.

39. The wording of Article 2 seems somewhat imprecise and the very concept of integrity in this Article is not completely clear either. "Compliance with the legislation on prevention of corruption" (Article 2(1)1) is an extremely large field. The Law on the Prevention of Corruption is a comprehensive legal instrument, introducing a variety of obligations (some of them merely formal or procedural) including political neutrality (Article 40 of the Law on the Prevention of Corruption), anti-corruption expertise [checking whether draft laws are "corruption-proof"] (Article 55), anti-corruption programme of a legal entity (Article 62). The Draft Law fails to specify whether any failure to abide by any of these obligations amounts to the non-performance of official duties. Obviously, it is not easy to imagine an integrity test related to any of the above-mentioned obligations. Taking into account the consequences of the negative result of an integrity check on the person subject to the check, the concept of integrity should be defined in clearer terms and should be spelled out in the Draft Law which

[38] If this is the case, it is not clear why Article 1(2) enumerating terms which are defined in the Law on the Prevention of Corruption, fails to include "rules of ethical conduct".

[39] The public organs might also be tempted to interpret the term in light of more general ethical standards, such as those contained in the 1993 Law on Civil Service (to lose force on 1 January 2016) or in the General Rules of Civil Servant's Conduct adopted by the National Civil Service Agency in 2010 (and repeatedly updated). Yet, these standards have a general nature and are not meant to be used in the specific anti-corruption framework to which the Draft Law belongs.

[40] ECHR, *The Sunday Times v. the United Kingdom,* Application No. 6538/74, 26 April 1979, par. 49.

compliance risks the tests concretely aim to tackle. Obligations mentioned in the Law on the Prevention of Corruption directly related to an illegal benefit would appear to be the most relevant.

40. Article 4 enumerates the categories of persons who may be subject to integrity checks. Those are *"persons authorised to perform the functions of state or local government, as defined in the Law (…) on the Prevention of Corruption, and who by law fall under disciplinary liability procedures, except judges of the Constitutional Court of Ukraine and other judges"* (par. 1).

41. This provision relates to Article 3(1) of the Law on the Prevention of Corruption, which contains a list of persons authorised to perform the functions of the state or local self-government who are subject to the Law. It is more difficult to say whether the Draft Law should also apply to *"persons who (…) are equated to persons authorized to perform the functions of the state or local self-government"* (Article 3(2) of the Law on the Prevention of Corruption) and to *"persons permanently or temporarily holding positions related to the implementation of organizational-administrative or administrative-economic duties or specially authorized to perform such duties in the legal entity of private law"* (Article 3(3) of the Law on the Prevention of Corruption). Whereas the Law on the Prevention of Corruption applies to these categories as well, the wording of Article 4 of the Draft Law, if interpreted literally, suggests that they do not fall under the scope of application of this law.

42. Article 4 of the Draft Law only applies to persons *"who by law fall under disciplinary liability procedures".* This provision seems to exclude from the scope of the application of the Draft Law those individuals who cannot be subject to disciplinary liability procedures due to their special position. This would most probably be the case of the President of the Republic and of the deputies of the Verkhovna Rada as well as of other elected persons. If the circle of such persons is not extremely broad, it might be better to list the categories of persons covered in order to avoid confusion. In any case the provision would benefit from further clarification as during the meetings in Kyiv, the interlocutors had different legal interpretations on the categories of persons subject to integrity checks.

43. The Venice Commission commends that judges – both of the Constitutional Court and of ordinary courts – are explicitly excluded from the scope of the application of the Law. As the Venice Commission stated in its *Amicus Curiae* Brief on Moldova, the special place of the judiciary within the system of the separation of powers and the emphasis placed upon the judicial independence and impartiality require that *"laws regulating the assessment or evaluation of the professional duties of judges must be worded and applied with great care and the role of the executive or legislative branches of government in this process should be limited to the extent absolutely necessary".*[41] The exclusion of judges from the scope of application of a general law on integrity checking and the introduction of special legal acts focussing specifically on the judiciary (such as the Law on the Restoration of Trust in the Judiciary of Ukraine) fully comply with this requirement.

44. The Explanatory Note notes that *"the Draft Law shall not apply to the development of administrative and territorial units".* It is not clear what is meant by this remark.

45. Despite its title, Article 4 identifies not only the subjects of integrity checks but also the entities responsible for these checks. As a rule, this is the National Anti-Corruption Bureau of Ukraine (NABU). There are two exceptions: one for the employees of the NABU, with regard to whom the integrity checks are carried out by the internal control unit of the NABU; and other for the employees of this internal control unit, who are checked by the Security Service of Ukraine.

[41] Venice Commission, Opinion No. 789/2014, *op. cit.,* par. 14.

46. This gapless chain of control as defined in subsection 2 of Article 4 is a necessary feature. Integrity testing does not work if the testers themselves lack integrity since an integrity tester has precious information as to the time, object and subject of the next integrity testing. It is thus necessary to put the testers and their controllers under the risk of being tested as well. Subsection 2 serves this objective.

47. The NABU was established by the 2014 Law on the National Anti-Corruption Bureau of Ukraine and is to become fully operational by the end of 2015. The OECD commended the establishment of the NABU noting that it *"is modelled on the best international practice and complies with the OECD/IAP recommendations".*[42] It should operate as an independent body,[43] with headquarters in Kyiv and territorial units in the regions and with the head appointed by the President of the Republic. As of October 2015, the head of the NABU has already been appointed and the process of recruitment of the staff has started, but the body has not become fully operational yet.

48. The NABU is primarily tasked 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"*.[44] The maximum number of its employees is set at *"700 people, including not more than 200 of ranked persons".*[45] The Law on the NABU does not include conducting integrity checks among the duties of the NABU enlisted in its Article 16. Integrity checks are solely mentioned in this Law with respect to the employees of the NABU itself (Articles 13 and 27).

49. During the meetings in Kyiv, several representatives of state organs and of civil society organisations expressed serious doubts as to the capacity of the NABU to effectively carry out integrity checks. Limited human and financial resources of the NABU, potential lack of political will and concerns that integrity checks (which have a preventive purpose) might interfere with the criminal law agenda of the NABU (mainly a law enforcement agency), were given as the main reasons for these doubts. The Venice Commission is not in a position of assessing these factual concerns. It would however like to draw the attention of the Ukrainian authorities to those issues.

50. Article 6 provides for the rights and duties of the heads of state bodies and local authorities in connection with integrity checks. The Moldovan Law on Professional Integrity Testing No. 325[46] examined by the Venice Commission in an Amicus Curiae Opinion[47] requires in its Article 7(2)a that the public entities inform public agents on the possibility of being subject to the professional integrity test. This requirement is missing from the wording of Article 6 of the Draft Law. It is advisable to ensure that all public officials falling under the scope of integrity testing are explicitly warned upfront of the possibility of the test, which would better serve the preventive purpose of such test.

51. According to Article 7(1)4 t persons conducting integrity checks have the right to make use of "undercover documents for individuals, units, agencies, facilities and vehicles" in the course of integrity checks which, according to Article 11(3), "may also involve other persons, with their prior consent and guarantees regarding non-disclosure of their activities". In its efforts to create such undercover identities, the NABU should have a statutory right to ask for assistance by other authorities. In Moldova, for instance, the National Anti-Corruption Center faced problems in creating such identities when it needed the support of other

[42] OECD, *Anti-Corruption Reforms in Ukraine,* Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan, Paris, 24 March 2015, p. 6.
[43] Despite its independence, the NABU is clearly not a judicial body and its decisions should be considered as administrative acts and should be subject to the judicial review.
[44] Article 1(1) of the Law on NABU.
[45] Article 5(5) of the Law on NABU.
[46] CDL-REF(2014)041.
[47] CDL-AD(2014)039 Amicus Curiae Brief for the Constitutional Court of Moldova on certain provisions of the law on professional integrity testing, adopted by the Venice Commission at its 101st plenary session (Venice, 12-13 December 2014).

authorities, as they would refer to the lack of a statutory authority for such assistance. A well backed-up undercover identity is important and measures should be taken in order to prevent the person undergoing an integrity test to discover the real identity of the tester by checking the police or civil registry database.

52. Article 8 establishes the principles applicable to integrity checks. Those include the non-disclosure of the data collected during integrity checks and the protection of secrecy and of data of private nature. The Venice Commission welcomes the explicit inclusion of such principles. However, as a matter of legislative technique, this provision, instead of formulating new data protection or state secrecy rules, could refer to the already existing legislation on data protection for the protection of data obtained during the integrity checks.

53. Article 8(3) declares that *"the results and materials of integrity checks may not be used as evidence in criminal proceedings or in administrative offence proceedings against a person authorised to perform the functions of state or local government who underwent an integrity check".* This provision seeks to prevent the possibility that integrity checks could result in administrative or criminal prosecution of the public official subject to the check. This exclusion is correct since under the Draft Law the carrying out of integrity checks does not require judicial authorisation and since it may not be possible to use the results of integrity checks in criminal proceedings in line with the case-law of the ECtHR on agents provocateurs (see para. 62 et seq.).

54. Article 8(3) *prima facie* collides with Article 8(5) which notes that *"if an integrity check establishes any facts that evidence a crime or offence of the checked individual or third party the person conducting the check accordingly notifies the coordinator of the check for further notification of the competent authorities and their appropriate action".* It is hard to envisage how an appropriate action could be taken against the relevant person, if the evidence gained during the check were not to be used in the criminal or administrative proceedings against the person.

55. Article 8(5) is most probably inspired by Article 9(6) of the Moldavian Law on Professional Integrity Testing, which refers to *"other illegal activities of the tested public agents or of third persons"* that are established accidentally within the integrity check. If this is the case, as confirmed during the meetings in Kyiv, then Articles 8(3) and 8(5) refer to different illegal activities – one carried out within the integrity check, the other outside it – and are compatible. However, the use of special investigative techniques in criminal proceedings is as a rule reserved for serious crimes and subject to appropriate safeguards. Article 8(5) would benefit from clearer wording.

B. Procedure of Integrity Checks (Articles 9-12)

56. The integrity checks are conducted *"by simulation of a situation with artificial conditions where a person authorised to perform the functions of state or local government is given a possibility to break the rules of ethical behaviour or to commit a corruption or corruption-related offence"* (Article 11(1)). The Draft Law has thus a narrow scope. It only deals with one special investigative technique, that of "undercover operations". It could be advisable providing for alternative modalities of checking the integrity of public officials which do not require a simulation.

57. The use of *special investigative techniques*, including undercover operations, in the fight against corruption is generally seen as lawful.

58. The UN Convention against Corruption recognises that *"in order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and*

undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom" (Article 50(1)).

59. Similarly, the CoE Criminal Law Convention encourages states to *"adopt such legislative and other measures as may be necessary, including those permitting the use of special investigative techniques, in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences"* (Article 23(1)).

60. The ECtHR has repeatedly held that for a successful fight against corruption, the use of special investigative techniques, such as undercover agents, *"may be necessary to gather evidence".*[48] This use however *"must be kept within clear limits"*[49] set by the ECHR and other human rights instruments.

61. In its *amicus curiae brief* on the Moldovan Law on Professional Integrity Testing, the Venice Commission noted that *"there is plenty of case law by the European Court of Human Rights on the involvement of undercover agents and more specifically on their use as* agents provocateurs*".*[50] So far, this case-law refers solely to checks carried out in criminal proceedings. Yet, when, as a result of integrity checks, strict disciplinary measures analogous to criminal law sanctions (dismissal combined with a 3-year ban to hold public positions) are imposed on a person, it seems necessary to subject such checks to the same legal guarantees as are offered within the criminal proceedings[51].

62. The relevant case-law of the ECtHR has been summarised by the Venice Commission as follows: [52]

- an undercover agent's involvement requires prior reasonable grounds to suspect that the targeted person is involved in a similar criminal activity or has committed a similar criminal act before;
- as to the scope of the undercover agent's involvement, s/he is (only) allowed to join an ongoing criminal act and must abstain from inciting the targeted person to commit a criminal act (*agent provocateur*), for example by 'intensively' offering a sum of money for the commission of a criminal offence; and
- the authorisation of an undercover agent's activity must be formally legal, an administrative decision that does not contain full information regarding the purpose and reason for applying such a method is not sufficient.

If these conditions are not met, the Court constantly finds violation of Article 6(1) of the ECHR.

63. Under the Draft Law, the conduct of integrity checks is initiated on the basis of corruption risks identified in the performance of the state body or local authority, available information and petitions that evidence possible lack of integrity, and grounded requests from heads of state bodies or local authorities (Article 9(1)). The grounds are stated in very general terms. The ECtHR has repeatedly drawn attention to the problems involved in cases, where *"no objective suspicions that the applicant had been involved in any criminal activity"*[53] exist. In the criminal procedure, to which the ECHR refers, the requirement of the objective suspicion needs to be construed very strictly, as relating to the concrete person. In the disciplinary procedures, it is possible that the requirement may be interpreted more broadly, as relating to the public institution rather than the concrete person. The amount of corruption in Ukraine also argues for such a broad approach. But in this case the sanction should be limited to dismissal.

---

[48] ECHR, *Ramanauskas v. Lithuania,* Application No. 74420/01, 5 February 2008, par. 50.
[49] ECHR, *Ramanauskas v. Lithuania,* par. 51.
[50] Venice Commission, Opinion No. 789/2014, *op. cit.,* par. 81.
[51] See for instance, *Matyjek v. Poland*, admissibility decision, Application No. 38184/03, 30 May 2006 (concerning disqualification from holding public office).
[52] Venice Commission, Opinion No. 789/2014, *op. cit.,* par. 82.
[53] ECHR, *Ramanauskas v. Lithuania,* par. 56.

64. The ECHR has repeatedly criticised the cases of entrapment in which *"officers (…)do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed".*[54] Article 11 of the Draft Law seems to leave space for both legitimate undercover operations and for entrapment. This is largely due to the way in which the provision is drafted: the person to undergo the integrity test "*is given a possibility to break the rules of ethical behaviour or to commit a corruption or corruption related offence".* A more appropriate wording, which would prevent an interpretation allowing entrapment, would be that the person to undergo the integrity test is "*called upon to perform its functions without knowing the situation is simulated*".

65. The decision on the conduct is made by the coordinator of the check (Article 9(2)). The coordinator is appointed, for each check, by the Director of the NABU, the head of the internal unit of the NABU or the head of the Security Service (Article 10(2)). Since the coordinator is appointed for a specific check but this check has to be initiated by the coordinator, it is not clear how the procedure operates in practice and who is to take the first initiative (the director of the body, the (future) coordinator?). The coordinator approves the plan of the integrity check which is then carried out by persons conducting the check. The Draft Law does not specify how/by whom/from whom these persons are selected.

66. Article 10 of the Draft Law, on management and coordination of integrity checks, in its paragraph 3 (information that should be contained by the integrity check plan) ensures sufficient guidance for the integrity tester. On the other hand, point 6 of paragraph 3 of Article 10 suggests that the plan for integrity check should also contain information "on actions prompted [during the integrity check] by considerations of reasonable risk". Point 6, which concerns the participation of the tester in corruption offence, should be revised so that the integrity check plan also contains detailed instructions concerning the conditions under which the tester can participate in a corruption offence in line with the case-law of the ECtHR on the use of agent provocateur.

67. Under Article 7, the person conducting the integrity check has the right *"to identify, jointly with the coordinator (…), persons (…)who are subject to integrity checks, and to establish the frequency of such checks"* (par. 1). This identification should probably take place prior to the setting of the plan of the check by the coordinator and should serve as the basis for such a plan. The person conducting the integrity check and the coordinator seem to be granted vast discretion in choosing the persons for the integrity check and determining the frequency of the checks.

68. The European Court held that *"in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".*[55] Article 7 of the Draft Law might contradict this requirement, because it does not set any limits to the discretion of the person carrying out the check and the coordinator to determine the subject and frequency of the check, thus providing no guarantees against the abuse of the power.

69. The integrity checks do not require *judicial authorisation*. This is problematic in that the integrity checks which also involve audio/video recording, may encroach upon the person´s right to privacy granted by Article 8 ECHR. The collection of information or recording by a state official of an individual without his or her consent, as a rule, falls within the scope of private life. The ECtHR went as far as to hold that *"an individual may, under certain conditions, claim to be the victim of a violation occasioned by mere existence of*

[54] ECHR, *Ramanauskas v. Lithuania,* par. 55.
[55] ECHR, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan,* Application No. 37083/03, 8 October 2009, par. 57.

secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him".[56]

70. The Court also stated that *"the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests"*.[57] This applies *a fortiori* to the use of modern techniques outside the criminal-justice system.

71. The protection of privacy is less intensive in the workplace than outside it, especially with respect to public officials. Yet, according to the European Court´s case law, telephone calls or e-mail sent from work are covered by the notions of "private life" for the purposes of Article 8 of the European Convention.[58] The right to privacy therefore ma y extend to the workplace[59]. It is true that the Draft Law mainly addresses the activities done in the performance of official duties. Yet, it cannot be excluded that the audio/video recording would also relate to actions covered by the right to privacy. The requirements set in Article 8(2) thus must be respected.

72. The European Court has left a space for undercover operations to take place without judicial pre-authorisation. In such cases, however, *"a clear and foreseeable procedure for authorising investigative measures, as well as their proper supervision, should be put into place in order to ensure the authorities' good faith and compliance with the proper law-enforcement objectives"*.[60] Provided the vague terms in which the grounds for the integrity checks are defined and the discretion granted to the coordinator and the person conducting the checks, the Venice Commission have doubts whether these requirements are fulfilled by the Draft Law.

73. Under Article 12(3) of the Draft Law, the audio/video recordings shall be attached to the report made by the persons conducting the integrity check and stored for a period indicated in Section III of the Draft Law. The storing of the data – without any distinction as to what type of data might have been recorded – could conflict with Article 8 ECHR, granting protection to the personal data. The ECtHR has repeatedly held that *"the storing by a public authority of information relating to an individual's private life amounts to an interference within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding".*[61] Such interference can be justified, but only on the condition that sufficient guarantees against the abuse of the data exist under the Ukrainian legal order.

C. Results and Legal Consequences of Integrity Checks (Articles 13-17)

74. The integrity check could have a positive or negative result. The positive result (Article 13) means that the person who underwent the check demonstrated integrity in the course of the check. As already noted above (par. 39), the "demonstration of integrity" is quite a general and vague term which should be further specified in the Draft Law.

75. The positive result is notified to the head of the state body or local authority six months after the approval of the report, in full confidentiality. The 6-month term is rather long and no explanation is given in the Explanatory note, why this period is needed. Provided that under Article 17(1), all the audio/video recordings are stored till the notification to the head (that is for the whole period of 6 months), the term increases the risk of misuse of the data. The Venice Commission recommends that the positive result of the integrity check be

[56] ECHR, *Klass v. Germany,* Application No. 5029/71, 6 September 1978, par. 34. See also, ECHR, *Bykov v. Russia* (Grand Chamber), Application No. 4378/02, 10 March 2009.
[57] ECHR, *S. and Marper v. the United Kingdom*, Applications Nos 30562/04 and 30566/04, 4 December 2008.
[58] ECHR, *Copland v. the United Kingdom,* Application No. 62617/00, 3 April 2007, par. 41-42.
[59] See *Niemietz v. Germany*, Application no.13710/88, 16 December 1992, para. 29 et seq.
[60] ECHR, *Khudobin v. Russia,* Application No. 59696/00, 26 October 2006, par. 135.
[61] ECHR, *Amman v. Switzerland,* Application No. 27798/95, 16 February 2000, par. 69. See also ECHR, *Leander v. Sweden,* Application No. 9248/81, 23 March 1987.

communicated to the head as soon as possible (with the 6-month term as the maximum period).[62]

76. Under Article 13(3), the head informs other employees of the body about the positive result within 10 working days. It would seem more logical to inform the person who underwent the check, not other employees, in the first place, as the exclusion of the checked employee from knowing that he/she was being tested might be questionable under the ECtHR case-law concerning the control of undercover measures. It is however important that the employee cannot draw conclusions as to the identity of the testers. Therefore, the notification of the employee should rather indicate a time-frame during which the test has been conducted and could come after a minimum time has passed. The notification could also be made subject to request.

77. The negative result (Article 14) means that the person who underwent the check failed to demonstrate the integrity in the course of the check. Here, particularly, the vagueness of the term "demonstrate integrity" is highly problematic and should be addressed. Further, it appears that Article 14(1) does not define the negative result as a mirror-image of the positive result as defined in Article 13(1) since the standards set out in Article 13(1) [demonstration of integrity] and Article 14(1) [failure of demonstration of integrity and to perform the duty of prevention of corruption crimes in the performance of official duties] are not the same. Also, the definition "failed to perform the duty of prevention of corruption crimes in the performance of official duties" is rather confusing: does this include the failure to prevent crimes of colleagues or subordinates and if so, what concrete obligations would this entail?

78. The negative result is notified to the head of the state body or local authority within ten working days from the date of its approval. The head has the right to familiarise him/herself with the audio/video recordings and any other relevant materials. For the sake of effective defence and the right to "adequate facilities to prepare his/her defence" as required under Article 6 ECHR, the right to familiarize with the audio/video recordings should be extended to the person subject to the integrity testing as well. Further, he/she should have the possibility to be heard during the disciplinary proceedings.

79. Within 15 days after the notification, the head has to inform the NABU (its internal unit or the Security Service) about the measures taken and penalties imposed on the relevant person.

80. The negative result of the integrity check entails disciplinary liability. Article 15, subsections 1 to 7, are provisions of purely disciplinary function. There is no reason to include those provisions in the law on Integrity testing as all those provisions should apply in general to all public officials found guilty of corruption regardless of whether the guilt has been established as a consequence of the integrity testing.

81. The head of the state body or the local authority is left with some discretion to consider the gravity of the act and the behaviour of the person. Yet, the penalty of dismissal is obligatory *"if the results of the check established lack of a person´s integrity manifested in failure to perform the duty of prevention of corruption in the performance of official duties"* (Article 15(3)). As already noted (par. 39), the Draft Law fails to specify, whether the failure to perform the duty of prevention of corruption only occurs when the person engages in corruption or corrupted-related offences or whether it relates to any instance of non-compliance with the obligations stemming from the Law on the Prevention of Corruption. In the latter case, the obligatory dismissal could clearly be disproportional in case of minor omissions.

[62] The Moldavian Law on Professional Integrity Testing speaks about the notification *"within 6 months from the testing date".* Since the Draft Law is largely inspired by the Moldavian Law, it might be that its text also refers to "within 6 months" and the expression "6 months after the approval" is just an incorrect translation.

82. The automatic dismissal has to take place within three days after the notification. This term is extremely short and does not give to the concerned person the chance and the time of preparing and submitting even personally or in a written form his/her defence, given in particular that a lawyer might be involved in the procedure.

83. The dismissal based on the negative result of the integrity check entails the prohibition for the person to occupy positions related to performance of the functions of state or local government for three years from the date of dismissal (Article 15(5)). This is a serious consequence and strict legal guarantees may therefore have to apply here.

84. Under Article 15(6), the negative result of the integrity check based on other grounds than the failure to perform the duty of prevention of corruption crimes or corruption related offences entail *"penalties other than dismissal".* These other grounds are: the failure to prevent violations of the rules of ethical behaviour, the failure to immediately notify the competent body about corruption-involving initiatives, and the failure to inform the supervisor about any fact of undue influence. The reference in Article 15(6) to subparagraphs three to six of Article 2(1) (2) of the Draft Law is made in a confusing way since Article 2(1)2 has only five subparagraphs. Article 15(6) limits the discretion of the head of the state body or local authority and seems to deprive him/her of the possibility of dismissing a person who, for instance, engaged in serious unethical behaviour. Here, again, proportionality of the sanction could be at stake. Moreover, the Draft Law fails to specify what the *"penalties other than dismissal"* could be.

85. The decision on the imposition of penalty in connection with the negative result of an integrity check may be appealed by the person subject to the penalty (Article 16). The Draft Law refers to the procedure established by law. This reference most probably relate to the Code of Administrative Procedure.[63] Article 6 of the Code recognizes the right of everyone *"to defence of his/her rights, freedoms and interests by an independent and impartial court"* (par. 1). Given the peculiarities of the matter, it would be advisable to introduce in the Draft specific rules on the appeal of the relevant decision, the procedural follow-up and the powers of the judicial authority to examine the case on appeal. It is not clear whether the appeal may relate only to the penalty as such or whether the course of the integrity check and its result could also be challenged in court. It is important that this Article confirms the right to a judicial hearing whenever a tested subject feels his/her rights are violated. A more appropriate title for Article 16 would then be "Right to judicial hearing" or "Legal recourse". Finally, the Draft Law also fails to specify whether the appeal has a suspensive effect and whether it can result in the re-instalment of the dismissed person.

86. Article 17 regulates the storage of recordings made during integrity checks and provides, in its second paragraph, that those recordings are destroyed upon the expiry of the terms specified in the first paragraph (in case of a positive result, until the notification of the head of state body about the conducted check; in case of a negative result, until the expiry of the time-limit for appeal). However, the NABU might want to store some selected recordings for training or public awareness purposes. Thus, if the identity of all persons on a recording is obliterated, or the voices are distorted, the modified version could be kept longer.

[63] *Кодекс адміністративного судочинства України*, Відомості Верховної Ради України (ВВР), 2005, № 35-36, № 37, ст. 446. The Code was adopted on 6 July 2005 and entered into force on 1 September 2005.

IV. Conclusion

87. The Draft Law aims at improving the system of preventing and combating corruption in accordance with international standards and good practices of foreign countries. This is a legitimate and, indeed, laudable, aim. As the Venice Commission noted earlier: *"Corruption undermines, among others, the rule of law, poses significant risks to the protection of human rights and endangers the stability of democratic institutions and the moral foundation of society. Efforts made by States to fight this are to be welcomed, but should ensure not to jeopardise the stability of democratic institutions nor weaken the independence and impartiality of the judiciary."*[64]

88. Integrity testing is *"a tool by which public officials are deliberately placed in potentially compromising positions without their knowledge, and tested, so that their resulting actions can be scrutinised and evaluated by the relevant authorities".*[65] Testing can be random or targeted to officials already suspected of corruption. If the integrity checks entail disciplinary sanctions, random testing will collide with human rights guarantees.

89. Integrity checks are an exceptional tool helping to verify, and strengthen, the professional and moral integrity of public officials. They should never serve as a replacement for criminal investigations or for lustration measures.

90. The Draft Law seeks to comply with international standards. Yet, to meet these standards fully, the following main improvements would be recommended in particular:

- The concepts of "rules of ethical behaviour" and the "failure to perform the duty of prevention of corruption" should be defined more precisely. The *"rules of ethical conduct for civil servants and local self-government officials"* should be approved by the National Agency for the Prevention of Corruption ("NAPC") before the Draft Law enters into force. Similar rules should be elaborated with respect to other categories of persons falling under the scope of the application of the Draft Law.

- The initiation of the integrity check should require prior reasonable grounds to suspect that the targeted person, or possibly the public institution, is involved in corruption or unethical behaviour or has committed acts of corruption or unethical behaviour before. The authorisation of the conducting of an integrity check should be specific enough and the person conducting the check should not engage in active entrapment.

- Discretionary powers of the person conducting the check and the coordinator to decide on the subject of the check and its frequency should be limited. In case where the checks might interfere with the fundamental human rights of the person subject to them, judicial pre-authorisation should be sought.

- The person who underwent the integrity check should have the right to challenge the decision, as well as the course and the result of the integrity check, in courts. The possibility for an appeal should not be limited to the "decision on imposition of a penalty".

91. The Venice Commission remains at the disposal of the Ukrainian authorities for any further assistance in the matter.

[64] Venice Commission, Opinion No. 789/2014, *op. cit.,* par. 85.
[65] OECD, *Managing Conflict of Interest in the Public Sector: A Toolkit,* OECD, Paris, 2005, p. 68.