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## MODELS OF SPECIALIZED ANTI-CORRUPTION BODIES AND PROSPECTS OF ITS FORMATION IN ARMENIA

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Policy paper

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## Introduction

The requirement to create an independent anti-corruption body is a subject of international obligations of the Republic of Armenia (RA). On May 19, 2005, RA signed UN Convention against Corruption (UNCAC), which for Armenia entered into force on April 7, 2007. It is the requirement of article 6 of the UNCAC to create such body (or bodies) which are engaged in preventing corruption.<sup>1</sup>

Besides in contemporary Constitutional Law there is a tendency to consider the existence of independent body, tasked to fight corruption and prevention of corruption in general, as an element of human rights protection system, as well a component of rule of law notion. Thereby, 2 justices of the Constitutional Court of the South Africa, in the case of *Glenister vs. President of SAR and others*, in their separate opinion of March 17, 2011, noted that failure on the part of the state to create a sufficiently independent anti-corruption entity infringes a number of rights. These include the rights to equality, human dignity, freedom, security of the person, administrative justice and socio-economic rights, including the rights to education, housing, and health care.<sup>2</sup>

Slovenia's Constitutional Court, in case on constitutionality of the law which was regulating the operation of Slovenia's Corruption prevention commission, in its March 29,

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<sup>1</sup> Article 6. Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
  - (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
  - (b) Increasing and disseminating knowledge about the prevention of corruption
2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

<sup>2</sup> *Glenister vs. The President of the South African Republic and et alii*. (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC). Para. 198. The whole judicial act is accessible via the following link: <http://www.saflii.org/za/cases/ZACC/2011/6.pdf>

2007 decision noted, that from the principle of a state governed by the rule of law ensues the duty to prevent corruption too.<sup>3</sup>

Prevention, investigation of corruption, as well number of other activities which relate to the fight against corruption, are divided between different representatives of the state system of Armenia. Nevertheless, theoretically the leading role among those bodies is granted to the Anti-corruption Council (hereafter Council) and adjunct to it Monitoring Commission on Implementation of the Anti-corruption Strategy (hereafter Monitoring Commission). Together with these two, Ethics Commission for High-Level Public Officials is the 3rd most important body involved in anti-corruption fight in Armenia. OECD in its second monitoring report on Armenia, conducted within the framework of Istanbul Anti-corruption Action Plan, in view of the lack of human resources, had not provided positive feedback both on the effectiveness of Council and Monitoring Commission.<sup>4</sup>

Taking into consideration the abovementioned, here it is tried to present the imperative for establishing independent anti-corruption body, as well to present the main elements of RA's international duties and the best practice, in this regard. Besides, here we tried to suggest the institutional structure of an independent anti-corruption body, by taking into consideration RA's Constitutional regulations.

### **Quick remark on the bodies involved in the anti-corruption fight in Armenia**

Armenia takes diversified approach on tackling corruption: fighting corruption through different state institutions. In the spectrum of Armenian state institutions, a unique role is granted to the Anti-corruption Council and Monitoring Commission, as well to Ethics Commission. Those bodies, with some exceptions, are both preventive and educational ones. Such bodies as Chamber of Control, State Commission on the Protection of Economic Competition and others, have some elements which are peculiar to preventive anti-corruption institutions. In regard of investigating bodies (law enforcement) a specific

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<sup>3</sup> See A group of MPs and others. Official Gazette RS, No. 100/2005, Official Gazette RS, No. 46/2006, Official Gazette RS, No. 33/2007 and OdUS XVI, 22. Paragraph 20. The whole decision is accessible via the following link: <http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/903DCFE39960ECA6C12573220042F2F9>

<sup>4</sup> For more please see the report at: <http://www.oecd.org/corruption/acn/48964985.pdf>

role is granted to the Special Investigative Service, which according to RA Criminal procedure code is preliminary investigative body for such cases in which suspects are high level public officials. So, there is a lack of unified and centralized body, which would have large and comprehensive powers to fight corruption.

### **Remarks on the classification of anti-corruption agencies**

The professional literature divides anti-corruption bodies into 3 models: multi-functional, law enforcement type and preventive.

In *Multifunctional model* there is a body which encompasses 3 main anti-corruption elements: detection, prevention and public relations and education. The best examples of this model, which also are successful ones, are Singapore and Hong-Kong.

*Law enforcement model* usually is being created in detection, investigative or prosecutorial bodies. In this model the functions of detection, investigation and prosecution are concentrated in one body. In rare cases, this model can also have elements peculiar to prevention, coordination and research functions. One of the best examples of this model is Norway's agency-Okokrim.

The most widespread model is the *Preventive* one, which is being divided into 3 groups: *coordination councils*; *central bodies* for the prevention of corruption; *public bodies* which are not specifically mentioned as ones which are devoted to fight corruption but contribute to the prevention of it.

*Coordination councils* as a rule are being created for the development of anti-corruption national strategies, implementation and monitoring of it, and they have collegial nature. In this model, alongside with ministers and heads of state institutions, in the activities of the council civil society's representatives also are participating.

*Central bodies* as a rule have little advantage over the councils. Usually they have such functions as corruption risk assessments, development of guidelines on tackling corruption, oversight over the conflict of interests and declaration of assets and income, as well oversight over financing of political parties and lobbying.

It must be also noted, that there is no mandatory legal requirement ordering to give a preference to one of the observed models. For this reason states are free to show innovative approach and to tailor legal architecture of the anti-corruption to the specific needs of the states. Nevertheless, international legal documents stipulate main elements peculiar for anti-corruption bodies. That elements are: specialization; independence and autonomy; responsibility and transparency; having enough resources; trainings; inclusion of society in its activities, as well interagency and international cooperation.

Specialization assumes existence of knowledge and experience in different fields (Law, finances and etc.). This requirement is being considered satisfied even in the case of hiring or in any other way involving specialists in the work of the anti-corruption body. The most important element is the independence and autonomy of the body. This assumes effectively and freely implement own functions, without undue influence by other actors or without bearing a duty to report and without having prior permission from any state body.

The level of anti-corruption body's independence is being measured by several criteria: by the legal basis by which it was created; place and role within the framework of other institutions; transparency and objectivity of appointment of its leadership; and by financial independence.

The criteria of legal basis assumes creation of anti-corruption body based on the sustainable and predictable legal act (for example by law and not by the Governmental decree which can be easily changed). Institutional positioning means that the body can be considered as more independent if it is out from the patronage or jurisdiction of other state institutions. The manner of appointment is one of the essential elements, because appointment of the leadership of the body, if being conducted in an open, transparent manner and with participation of diverse actors, it has potential to secure more independence and consequently to secure more legitimacy and public trust. Financial independence assumes that anti-corruption body receives from state budget necessary amount of money, without prejudice to its functions, and uses that resources independently.

Responsibility and transparency is a system which don't allow anti-corruption

body to acquire absolute freedom and don't result in absence of any responsibility. The anti-corruption body must regularly present reports to the public and to the most representative entity in democracies-Legislature.

Public involvement in its activities is a key element, which is one of the most important basis for securing effective anti-corruption fight. International experience comes to prove that those bodies which don't enjoy public support had failed in anti-corruption fight or that fight didn't bring enough positive results. As about international cooperation, it is essential component because there is always need to be updated on the best practices of anti-corruption fight.

### **Vision and Recommendations**

Taking into consideration past efforts of Armenia in tackling corruption, registered failures, current state structure and constitutional-legal regulations, it can be claimed that the most optimal way for Armenia would be creation of preventive type anti-corruption body.

In the recommended model, the composition, structure and powers of Anti-corruption Council must be altered. The Council will be composed from 3 persons, who will be appointed by the RA President. Those 3 persons must satisfy the following requirements: they must be Armenian citizens and at least 27 years old; they need to have higher education and be apolitical (during the last 5 years were not members of any political party or alliance of political parties); previously not convicted for gross crimes; and all members must know at least 2 foreign languages, one of which must be English or French. During the operation of the Council, if contrary facts will appear, then the appointment of that members will considered as void, by the force of law. In this case, will be conducted new elections for filling the emerged vacancy.

The elections of the 3 will be conducted by the Temporary Qualification Commission, which will be also composed from 3 members. The members of this Commission will be appointed in the following manner: 1 member will be appointed by the National Assembly (Parliament) whose candidacy must be mandatory agreed by the political party representing majority in the Parliament and the biggest opposition political party in the Parliament; 1 member will be appointed by the Chairman of the Constitutional Court and

that member must be professional lawyer and enjoy trust and respect of lawyer's community; 1 member will be appointed by the Ombudsman and that member must be representative of a civil society who will enjoy trust of those organizations which are engaged in anti-corruption fight in Armenia.

Temporary Qualification Commission will operate only for 2 months, during which period it will have to elect 3 members of the Anti-corruption Council. During that 2 months, all 3 members will be remunerated in the amount of 90% from the salary of the Chairman of the Chamber of Control. During that period they will be considered as high-level public officials in accordance with the Law on Public Service, with entailing consequences. After formation of the Anti-corruption Council, during 3 years period, the members of the Temporary Qualification Commission, together with inter-connected persons (close relatives as the definition is provide under the Law on Public Service), will continue to bear duty to declare their assets and income to the Ethics Commission for High-level Public Officials. All 3 members must be apolitical i.e. during the last 5 years had not been member of any political party.

The Temporary Commission will receive necessary logistical and administrative support from the staff of the National Assembly: at least 2 administrative assistant for the period of 2 months. Financial resources will be allocated from the Reserve Fund of the National Assembly.

The Temporary Commission, after seven days of its formation, will develop verbal test for the examination of the candidates. The test will be composed from the following components: basics of the state structure of the Rep. of Armenia; domestic legal acts concerning corruption and the fight against it; international tools for the fight against corruption; international best practice on the fight against corruption; questions on integrity and ethics necessary for the person who is involved in the fight against corruption. On the 7<sup>th</sup> day the announcement on invitation to submit applications will be announced and will be posted on the website [www.azdarar.am](http://www.azdarar.am) , official websites of the RA President, Government, National Assembly, Constitutional Court, Prosecutor General's office, Police, Special Investigative Service, Ethics Commission for High-Level Public Officials, Chamber of Control, State Commission on the Protection of Economic

Competition (Anti-monopoly commission), as well will be published in the newspaper Republic of Armenia and will be advertised on Saturdays in the air of Public TV in the range of 22:00-23:00. This advertisement will be available during 3 weeks period since the 8<sup>th</sup> day of the formation of the Commission. The deadline for the application will be 21<sup>st</sup> day after the formation of the Commission. The applications will be handed over exclusively by post or in person, by addressing the Temporary Commission located in the National Assembly. Temporary Commission each Monday, until the end of the advertisement period, will present to public the number of received applications on the moment of previous Friday, 18:00. The process of informing public on the number of received applications will be open for the public and will be conducted in the premises of the National Assembly, with the participation of journalists.

On the next working day after the deadline, at 12:00, the Commission will invite sitting and again will announce the total number of received applications. Thereafter, during the open session will be conducted checking of the applications with the official requirements stipulated for the applications. After this procedure, the remaining applicants will receive public invitation, during the same sitting, to participate for the verbal test, and the list of remaining applicants will be posted at the abovementioned websites. The verbal examination will be held on 35<sup>th</sup> day after the formation of the Commission, in the premises of the National Assembly, which will be aired online by the website of the National Assembly and will be open for journalists.

The examination will be lasting 30 minutes for each applicant. If the number of the applicants are such which make impossible to examine all of them in one day, then the next 3 working days can be utilized for the same purposes. At the end of examination, during the open session aired by the internet channel of the National Assembly, the Temporary Commission will chose the 3 candidates and a statement on this will be posted at the abovementioned websites. The results may be challenged to the same Temporary Commission, before the 42<sup>nd</sup> day after the formation of the Temporary Commission. The complaints will be examined and solved in the same manner as examination of applicants. On the 60<sup>th</sup> day after formation of the Temporary Commission, the President of Armenia will appoint the chosen 3 candidates. The Chairmanship of the Council will be operating



on the rotation principle (4 months for each member). On the 60<sup>th</sup> day the Temporary Commission will terminate its operation. All sittings of the Temporary Commission will be chaired by the member who is oldest among members.

The newly appointed Council will start its operation 3 days after appointment of its members. The members of the Council will be appointed for 7 year period. The Council will form its separate staff and will have separate residence out of any premises of any other state institutions.

The Council will form 3 departments in its staff: Department on the formulation of anti-corruption policy and implementation; Department on Advocacy on anti-corruption fight and relations with public; Department on Research and International Relations. The Council, quarterly will present report and also will present annual reports which will be posted at the website of the Council.

The Council will be accountable only toward the public. The powers of the 3 members of the Council may be terminated only in cases and in manner prescribed by law for the members of the Ethics Commission on High-level Public Officials.

The Council each year will hire 5 independent experts to evaluate its efficiency for the previous year, in terms of conducted anti-corruption activities.

The Council will coordinate anti-corruption fight in Armenia and its decisions will have mandatory force and will be mandatory for application. The Council will have right to conduct inspections over any state body for determining whether it properly conducts activities prescribed for it under relevant anti-corruption policy documents. The Council, during 6 months after its formation, will develop policies of cooperation with Ethics Commission for High-Level Public Officials, Police, Prosecutor's office, Special Investigative Service, Ombudsman, and State Commission on the Protection of Economic Competition. The policies will be posted in the form of Memorandums of Understanding at the website of the Council, and the abovementioned bodies will be invited to sign them.

The Council will be empowered with the tools for exercising administrative liabilities.

**Recommendations which requires constitutional changes**

As it can be seen from the above, the immunity of the members of the Council is not properly guaranteed. To guarantee full immunity for the members there is need to make Constitutional changes. The immunity of the members is essential for securing effective anti-corruption fight. Therefore, it is necessary to secure the immunity of the members at the Constitutional level.

Besides, the selection and appointment of the Council will have more legitimacy and sustainability if it will be laid down under the Constitution. Similar to Bhutan, it will be also advisable to have a specific provision in Constitution which declares each citizen's right as well duty to fight corruption.