

ARMENIAN LAWYERS' ASSOCIATION AND  
CSO ANTI-CORRUPTION COALITION OF ARMENIA

**Expert Opinion and Recommendations on the RA Draft Law on Anti-Corruption Committee**

On 24 January, 2020, the Ministry of Justice of the Republic of Armenia submitted draft laws on amendments and supplements to the Draft Law of the Republic of Armenia “On Anti-Corruption Committee” and the related laws on the Unified Website for Publication of Legal Acts’ Drafts [www.e-draft.am](http://www.e-draft.am).

According to the justification of the Draft Law of the Republic of Armenia “On Anti-Corruption Committee” (hereinafter in the text: *the Draft*), it is proposed to establish a new, specialized, anti-corruption investigative body, the Anti-Corruption Committee (hereinafter in the text: the Committee), which will carry out investigations and will have the necessary toolset for detecting corruption crimes.

It should be noted that the development of the Draft was provided for in Annex N 2 (event 2) to Decision No 1332-N of the Government of the Republic of Armenia dated 3 October, 2019 on "Approving the Anti-Corruption Strategy of the Republic of Armenia and its Implementation Action Plan for 2019-2022" (hereinafter: Strategy). In this connection, we would like to inform that on 2 September, 2019, the Armenian Lawyers’ Association NGO and the CSO Anti-Corruption Coalition of Armenia presented their Opinion and Recommendations on the Draft of the “RA Anti-Corruption Strategy and Its Implementation Action Plan 2019-2022”<sup>1</sup>, referring to the anti-corruption institutional system, including the regulations related to the Anti-Corruption Committee **introduced common standards that were more appropriate to apply when establishing the necessary legal bases and preconditions for bodies that are part of the anti-corruption institutional system, including the Anti-Corruption Committee.**

Therefore, before referring to the particular regulations of the Draft, it is important to note that the following from the general criteria presented by us were not included in the Draft that was submitted for public discussion:

1. The draft does not guarantee **the actual independence of the Committee**. The effectiveness of the institutional fight against corruption requires that this fight be carried out in **the context of the rule of law and provided with a stable constitutional and legal basis**. According to the Draft, the Committee is not classified as **an independent body** provided for by the Constitution, that is to say, in the context of constitutional and legal regulation, the independence of those bodies is not

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<sup>1</sup> ALA’s Opinion and Recommendations on the Draft of the “RA Anti-Corruption Strategy and Its Implementation Action Plan 2019-2022” is available at: <https://armla.am/44519.html>

guaranteed, nor is it classified as an **autonomous body** provided by the Constitution. The Committee will be regarded as **an investigative body established by law**, with guarantees of independence **provided only at the level of legislative regulations**. That is to say, the decision on the independence of the anti-corruption body is directly left to the discretion of the current political authority, as here we have a simpler and easier procedure for limiting the range of independence of that body. Moreover, **independence** in the Project is provided for only as a **principle of activity**, whereas it should be borne in mind that the combination of a number of the regulations in the Draft indicates that the provided guarantees of independence are insufficient to enable the Committee to operate independently. And these regulations contain risks of potential risks of political influencing and interfering with the Committee's activities.

2. According to the Draft, the Committee, as an anti-corruption body, **is not integrated into the system of restraint and counterbalance** to ensure democratic governance. That is, the Draft does not fully comply with the internal and external accountability, public communication and engagement provided for in Jakarta Statement. For example, according to the Draft the Committee does not have a realistic mechanism for oversight by specialized civil society organizations - **the Public Oversight Council**. It is necessary to create **a council consisting of NGOs** with professional experience in the field of anti-corruption and human rights protection, which will oversee the activities of the Committee. It is necessary to establish a 4-level control at the legislative level: parliamentary, public, prosecutorial, "judicial" (The term "judicial control" is conditional, and we mean that criminal cases sent to the Court by the Committee will be heard by the Anti-Corruption Court, and the verdict will serve as a "control" tool to assess the implementation of the law enforcement function of the body). By "parliamentary oversight" we mean reporting and answering questions in the parliament, which actually will give an opportunity to have a true picture of the activities of the Committee, including the main issues that may arise.

*Below considerations on separate regulations of the Draft are presented:*

3. Article 5 of the draft lists the basic principles of the Committee's activities, which, among other principles, states that the Committee's activities are based **on the principle of humanity**, which we believe should be excluded from the range of principles, taking into account the tendencies of the development of law. First of all, it should be emphasized that this principle is of a very abstract nature. It has been incorporated into the current legislation from the model codes of the soviet era, and the new laws regulating the field of criminal law currently in circulation refuse

that principle, as specific manifestations of humanity are expressed in a variety norms of incentives provided by lawmakers in specific criminal law regulations. At the same time, it should be noted that Article 6 of the Draft, which includes, among other things, **humanitarianism, does not contain the conceptual form of its manifestation**, aimed at preserving it in the exercise of powers by a Committee officer. In addition, considering the provisions of Articles 3, 5 and 6 of the Constitution, it is not necessary to establish the provisions of Article 6 of the Draft.

4. According to Article 5 (1) of the Draft, **independence and political neutrality** are one of the principles of the Committee's activities; according to Article 6 (1), a staff member of the Committee **shall be subject only to the law** in the exercise of his powers; According to Article 7 (1), **the Committee shall be independent in its exercise of its powers, as well as in its structure, decisions on the procedure for organizing the work, and shall be subject only to the law;** accordance with paragraph 2 of the same Article, the staff member of the Committee shall exercise his powers **independently on the basis of laws and inner convictions**. The above arrangements appear to be the basic and sufficient guarantees of independence provided to the Committee, which will exclude any interference with the activities of the Committee and guarantee the independence of its activity. But the provisions of Article 20 of the Draft prove the contrary. Thus, according to Article 21 of the Draft, a Competition Board shall be formed for the election of candidates to the Chairman of the Committee, having the power to elect a candidate for Chairman of the Committee, who, according to Article 20 (1) shall be appointed by **the Prime Minister of the Republic of Armenia**. That is to say, the Prime Minister of the Republic of Armenia is empowered **to elect one of the candidates selected on a competitive basis to the position of the Chairman of the Committee**. The existence of such regulations contradict to Jakarta principles according to which ACA heads shall be appointed through a process that ensures his or her **apolitical stance, impartiality, neutrality, integrity and competence**. The RA Prime Minister is given opportunity to nominate in the position of the Chairman of the Committee a candidate that is desirable for the authorities instead of politically neutral candidates, thus **increasing the risks of political influence on the Committee's activities**. In addition, the Draft did not address the question of what will happen if the RA Prime Minister does not consistently appoint the candidates nominated by the Competition Board. In this respect, on the one hand, having regard to the fact that the Chairman of the Committee cannot be elected by the National Assembly, as the Committee is not considered an independent constitutional body, and according to the submitted Draft it is not considered to be an

autonomous body, and on the other hand, given the fact that the appointment of the Chairman of the Committee by the Prime Minister of Armenia includes risks of political influence, which is not in line with international principles, including Jakarta principles, we consider that **candidate who receives the maximum number of votes by the decision of the Competition Board shall be appointed Chairman of the Committee.**

5. According to Article 8 (1) of the Draft, the Committee shall inform the public of its activities, ensuring the confidentiality of the preliminary investigation, as well as the protection of state and other secrets protected by law; and according to paragraph 2 of the same article, the Chairman of the Committee **shall submit to the Government and the National Assembly a written report on the activities of the previous year until 31 January**, and within the same period **shall publish information on its activities.** In connection with this regulation, we find that if the Committee annually submits a report to the National Assembly and that report is debated in the National Assembly in accordance with the procedure provided in Article 126 (3) of the Constitutional Law of the Republic of Armenia “Rules of Procedure of the National Assembly”, in other words, during the discussion of this program **the MPs will be able to ask questions to the presenter**, consequently, **Members of the Government** should also be reserved the right to ask their questions to the presenter of the Committee's Annual report at the Government meeting. In addition, in order to ensure internal and external accountability, public communication, and engagement of the Committee in accordance with the Jakarta Principles, we recommend that the Committee also report to a **Board of Non-Governmental Organizations and that members of the Board also be reserved the right to ask questions.**
6. Article 9 of the Draft concerns the financial independence of the Committee, according to which the financing of the Committee shall be carried out at the expense of the funds provided by the State budget. For the purpose of financing unforeseen expenses for the maintenance of the normal operation of the Committee, **a reserve fund** equal to two per cent of the unified salary fund of the staff of the Committee and the employees of the Committee's Department, the allocations from which are made **by the decision of the Chairman of the Anti-Corruption Committee.** Considering that the staff of the Committee will receive relatively high salaries according to the regulations of the Draft, which implies that the amount of the reserve fund of the Committee will not be small, we believe that the Chairman of the Committee should not be able to allocate funds from the reserve fund by his sole decision; and we propose that the Draft shall provide that, **before making an allocation, the size of the allocations from the Reserve fund should be agreed with the members of the Board of Non-Governmental Organizations.**

7. According to Article 12 (2) Paragraph 9 of the Draft, the Chairman of the Committee shall be entitled to periodically **carry out an examination of the virtues of the staff of the Committee** through the appropriate subdivision, **including by means of provocation**. This provision has been foreseen in the Draft based on the international experience. However, we believe that for its effective implementation in Armenia it was first necessary to conduct an in-depth analysis and study of the practice of Armenian law enforcement agencies. Such regulation may not be acceptable in both institutional and functional terms and may seriously jeopardise the independence of the Committee staff: the procedural autonomy of the trial participant as an investigator, which is guaranteed by Article 55 of the RA Criminal Procedure Code. It is necessary to define appropriate organizational mechanisms and procedures in the Draft, otherwise exercising this authority by the Chairman of the Committee may become a "tool" for the dismissal of "undesirable" employees. In addition, the question arises as to who will carry out the examination of the virtue of the Chairman of the Committee in such a way and how will this process be overseen?
8. According to Article 13, (1), the Chairman of the Committee shall have **two deputies**: on anti-corruption and operative-intelligence issues, who **shall be appointed by the Prime Minister at the recommendation of the Chairman of the Committee** in accordance with Article 22, Part 1. First of all, referring to the appointment of the Deputy Chairmen of the Committee on his recommendation by the Prime Minister of the Republic of Armenia, it is worth noting that, according to the Jakarta Principles, anti-corruption bodies shall have the power to recruit and dismiss their own staff according to internal clear and transparent procedures. Therefore, the appointment of the Deputy Chairmen of the Committee by the Prime Minister of the Republic of Armenia may itself include risks of political influence. We therefore recommend that the Deputy Chairmen of the Committee are appointed and dismissed by the Chairman of the Committee. In addition, taking into account the powers of the Committee referred to in Article 4 of the Draft, we suggest replacing the wording of "**Deputy on Anti-Corruption Issues**" under Article 13 (1) of the Draft with wording "**Deputy on Investigation and Pre-Investigation of Corruption Crimes Issues**".
9. According to Article 15 (2) of the Draft, the Disciplinary Committee shall be composed of 7 members, including **one of the Deputy Chairmen of the Anti-Corruption Committee, by decision of the Chairman of the Committee; 3 employees of the Anti-Corruption Committee by the draw; and three legal scholars by decision of the Chairman of the Committee**. We recommend to include one of the Deputy Chairmen of the Anti-Corruption Committee in the Disciplinary

Committee by the decision of the Committee Chairman; **2 employees of the Anti-Corruption Committee, selected by draw, 2 legal scholars and two lawyers-representatives of specialized NGOs selected by the competition.**

10. At the same time, we recommend that similar regulations as provided in Proposal 9 be introduced in Article 19 (2) of the Draft, so that there may be two legal scholars, 2 lawyers representatives of specialized NGOs and 3 civil servants in the 7-member Competition Commission established to supplement the list of candidates for the Committee employees. The legal scholars and the representatives of specialized NGOs should be included in the commission by competition.
11. In addition, considering that Part 3 of the same Article states that a member of the Disciplinary Committee may not be a member of the **Qualification Committee** at the same time, and Article 36 (14) of the Draft refers to **the powers of the Qualification Committee**, while there are no regulations for the formation of a qualification committee, we therefore recommend to define in the Draft similar regulations for the Qualification Committee.
12. According to Article 17 (4) of the Draft, **the age limit for holding a position in the Committee shall be 60 years; upon expiry of which the Chairman of the Committee may extend the term of service by up to 5 years.** At the same time, **the age limit for the post of the Chairman and Deputy Chairman of the Committee is considered 65 years.** In this context, the question as to what justification and what criteria have been taken into account in considering the age limit 60 years for holding the position in the Committee has not been clarified<sup>2</sup>, and to the Chairman of the Committee has been granted the discretionary power to extend or not to extend the mentioned term. We propose to establish the same standards for both the Chairman of the Committee and those holding the position in the Committee and to refrain from providing the Chairman of the Committee unnecessary discretion.
13. The conditions for appointment to the position in the Committee provided for in Article 18 of the Draft are not the same. In particular, subject to the conditions provided **for the position of the Chairman and the Deputy Chairman of the Committee**, inter alia **the experience of the judge of criminal specialization, body conducting financial-banking activities, an attorney carrying out representation in criminal case, or policy-making in the field of anti-corruption** are considered as well. However, in the case of other posts, such as **department head of the Anti-Corruption**

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<sup>2</sup> By the way, such age limit is also provided for in Article 6 (5) of the “RA Law on Special Investigation Service” and In Paragraphs 4 and 5 of Article 17 of the “Law on Investigative Committee” which we find to be subject to review as well.

**Committee, deputy head of department, head of division these professional experiences are not taken into account.**

14. Article 19 of the Draft provides the regulations governing the competition for the post in the Committee. Accordingly, it is provided that the competition commission will conduct the competition by the stages of **review of the documents, interview, integrity check and results verification**; but **no written (test) stage of knowledge examination during the competition is provided**. In this respect, considering the fact that the staff of the Committee are public servants and are subject to a number of provisions of the Law on Public Service, as well as the fact that relations in the Department of the Committee shall be governed by the Law on Civil Service, which provides **for a written (test) stage**, we therefore recommend to make the written (test) stage of the competition for service in the Committee mandatory as well. **To provide similar provisions for the competition for the post of the Chairman of the Committee.**
15. According to Article 20, (1), the Chairman of the Committee shall be appointed **by the Prime Minister for a term of eight years**. The justification attached to the Draft does not provide any argument explaining what constitutes selecting the eight-year term of office of the Chairman of the Committee. At the same time, considering that the Draft has a number of similar provisions with the Laws on “the Special Investigation Service” and “the Investigative Committee”, therefore there is a question ‘on what justification is the differentiated approach to the term of office adopted?’ and ‘why no preference was given to a shorter six-year terms of office in case of heads of other investigative bodies?’ Moreover, it should be noted that even at the level of constitutional regulations, a preference for the six-year terms of the tenure of office has been provided in case of the heads of independent constitutional bodies, including the RA Prosecutor General, the Human Rights Defender.
16. According to Article 21 (2) of the Draft, the composition of the Competition Board for the election of the Chairman of the Committee shall be formed **from the candidates nominated by the Government, the National Assembly, the Supreme Judicial Council, the Human Rights Defender and civil society (one nominee from each)**, and according to Part 3 of the same article **the procedure for involving a civil society representative shall be approved by the Government**. In this connection, we propose to make it clear that the election of a civil society representative is conducted **on a competitive basis**, the procedure of which is approved by the Government. In addition, we recommend that **only specialized civil society organizations** shall have the right to nominate candidates for the Competition Board.

17. According to Article 21 (5) of the Draft, the Competition Board shall be deemed to have been formed **after the involvement of at least three members**. We propose that among the minimum of the three members required for the formation of the Competition Board, there should be a representative of the Human Rights Defender and specialized civil society organization, and only after this it will only be considered formed.
18. According to Article 21 (11) Paragraph 6 of the Draft, the Competition Board shall, after the end of the interview stage, **at least within one day upon receipt of an advisory opinion from the Corruption Prevention Commission, as a result of open voting, selects at least two winners of the competition that best meets the requirements**, except for the cases where only one candidate has applied to participate in the competition. Considering that in the foregoing we have touched upon the risks regulations related to the appointment of the Chairman of the Committee provided in the Draft, and have proposed that the candidate with the highest number of votes by the decision of the Competition Board be immediately appointed Chairman of the Committee, we therefore recommend that the Competition Board determine the winner of the Competition the candidate who has scored the maximum points and, in case of equal scores organize the next round of the Competition.
19. According to Article 21 (11) Paragraph 6 of the Draft, the Competition Board shall, after the end of the interview stage, **at least within one day upon receipt of an advisory opinion from the Corruption Prevention Commission, as a result of open voting, selects at least two winners of the competition that best meets the requirements**, except for the cases where only one candidate has applied to participate in the competition. There are also some reservations regarding the above regulation, in particular how the members of the Corruption Prevention Commission will conduct an Integrity Test of the Committee officials, in the case where the **first composition of the Commission has been appointed without passing an Integrity test**.