

**The Problematic
Anti-Corruption Reform:
Assessment of the Venice
Commission and the European
Integration Process**



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Introduction

On December 18, 2023, the Venice Commission published its opinion on the Anti-Corruption Bureau of Georgia.¹ The opinion reveals that the process of creating the Anti-Corruption Bureau in Georgia was flawed, and incorrect decisions were made regarding the procedure for the creation of the Anti-Corruption Bureau, as well as its powers, accountability, and independence.

The purpose of this analysis is to review the opinion of the Venice Commission and analyze it in the context of the measures taken and to be taken for strengthening the institutional framework of anti-corruption capacities of Georgia, as well as in the context of past opportunities.

1. Regarding the Creation of the Anti-Corruption Bureau in General

Strengthening Georgia's anti-corruption efforts was one of the priorities given by the European Commission for Georgia to fulfill.² Although this priority identified by the European Union was quite clearly formulated and, in our opinion, the minimum requirement-content³ of the IV Priority was evident to the conscientious/unbiased reader, it still became a subject of discussion and disagreement.

From this point of view, special emphasis should be placed on the differing visions of the ruling party and civil society organizations. In particular, from the beginning of the implementation of the priority, the ruling party's intention to ignore the key issues identified in the conclusion of the European Commission of June 17, 2022, was obvious.⁴ The main subject of disagreement was equipping the anti-corruption agency with real powers, including investigative authority, the procedure for electing the head of the Anti-Corruption Bureau, and the independence of the institution.

In the end, the Anti-Corruption Bureau was given three functions: monitoring of officials' asset declarations, powers related to whistleblower protection, and monitoring of political party

¹ European Commission for Democracy through Law (Venice Commission) On the Provisions of the Law on the Fight Against Corruption Concerning the Anti-Corruption Bureau, December 18, 2023, [available at: <https://shorturl.at/gSNO5> date of access: 21.12.2023].

² European Commission Opinion "On Georgia's application for membership of the European Union", June 17, 2022, p. 17 [available at: <https://shorturl.at/efilV> date of access: 19.22.2023].

³ Ibid. p. 8 (part: 1.3.B).

⁴ The Institute for Development of Freedom of Information (IDFI), Analysis, "The Draft Law Initiated on Anti-Corruption Issues Does not Respond to the 4th Priority of the European Union", November 1, 2022, part 3, 4. [available at: <https://bitly.ws/378y8>, date of access 19.22.2023].

finances.⁵ This was done in such a way that the legal framework regulating the relevant functions was not amended at all, only the body implementing these powers was changed (the State Audit Office and the Civil Service Bureau were replaced by the Anti-Corruption Bureau).⁶ The Parliament of Georgia did not take into consideration any other recommendations from the civil sector.

2. The "Chaotic" Process of Creating an Anti-Corruption Bureau

Based on the opinion of the Venice Commission, an objective observer may be left with the impression that an in-depth discussion regarding the creation of an Anti-Corruption Bureau was not conducted at the national level. In this regard, we would like to discuss the circumstances that accompanied the creation of the Bureau and which, in our opinion, significantly undermined the ongoing discussion on its independence and accountability, which led to the critical opinion of the Venice Commission.

2.1. Strengthening the Fight against Corruption: Key Visions for the EU's 4th Priority

On July 1, 2022, the ruling party presented a plan⁷ for the implementation of the 12 priorities defined by the European Commission's conclusion of June 17, 2022. The provisions regarding anti-corruption measures outlined in this plan did not allow any conclusions to be drawn. According to the ruling party's plan of July 1, 2022, "a working group will be created within the framework of the Legal Issues Committee of the Parliament of Georgia, which will prepare the concept of consolidation of anti-corruption functions".⁸

On July 3, 2022, the Action Plan developed by non-governmental organizations regarding the implementation of 12 priorities was published.⁹ According to the Action Plan, an anti-corruption agency should be created in Georgia, which would unite "three anti-corruption departments, which [at that time] were scattered in different institutions (Anti-Corruption Agency - a

⁵ Law of Georgia "On amendments to the law of Georgia on conflict of interest and corruption in public institutions", November 30, 2022, website December 15, 2022, document #2204-IX06-X03. [available at: <https://shorturl.at/pvFI4>, date of access: 19.22.2023].

⁶ See the legislative package on amendments to 9 different legislative acts, November 22, 2022, #07-3/270/10 [available at: <https://shorturl.at/nwKV9>, date of access: 19.22.2023].

⁷ The ruling party's – "the Georgian Dream—Democratic Georgia" website, news, "Chairman of the ruling party, Irakli Kobakhidze, presented a specific plan for the implementation of the 12 points established by the European Union", July 1, 2022, [available at: <https://shorturl.at/giwEP>, date of access: 19.22.2023].

⁸ Ibid. point 4.

⁹ 12 Steps Towards EU Candidacy, Action Plan signed by 22 civil organizations, July 3, 2022, [available at: <https://bitly.ws/378MB> date of access: 20.22.2023].

department of the State Security Service; Political Party Finance Monitoring Department of the State Audit Office; and Asset Declaration Monitoring Department of the Civil Service Bureau)".¹⁰ The vision of the civil sector was clear from the beginning, based on the strategy of consolidation of anti-corruption efforts, which, in our opinion, was explicitly derived from the gaps and requirements identified by the European Union in the anti-corruption direction.¹¹

2.2. Anti-Corruption Reforms Working Group

August 18, 2022: The Legal Issues Committee of the Parliament of Georgia created a working group, the purpose of which was "preparation of the concept of consolidation of anti-corruption functions/preparation of legislative amendments for the purpose of institutional strengthening of anti-corruption activities." December 1, 2022, was set as the deadline for the work of the working group.¹² IDFI was a member of the mentioned working group and presented its opinion and views regarding the Anti-Corruption Bureau to the members.

According to IDFI's vision, "in order to promote an effective and coordinated fight against corruption and prevent corruption in public service, an **independent** state body - the National Anti-Corruption Agency - should be created, the chairman of which will be elected by the Parliament of Georgia for a 5-year term with a high quorum.

The main activities of the agency should be:

- **Prevention of corruption in public service;**
- **Controlling the compliance by officials with the norms established by the law of Georgia "On Conflict of Interest and Corruption in Public Service";**
- **Impartial and effective investigation of corruption crimes;**
- **Controlling the financial activities of political parties."**

¹⁰ Ibid. point 4.

¹¹ European Commission Opinion "On Georgia's application for membership of the European Union", June 17, 2022, p. 8 [available at: <https://shorturl.at/efilV>, date of access: 19.22.2023].

¹² Decision of the Legal Issues Committee of the Parliament of Georgia, August 18, 2022. #2-12266/22;

Unfortunately, IDFI's views were not taken into account by the Legal Issues Committee, on the basis of which the relevant working group was created. This was clearly seen from the draft law prepared by the members of the Legal Issues Committee initiated on October 26, 2022.¹³

2.3. Anti-Corruption Bureau "Without Functions"

On October 26, 2022, the members of the Parliament of Georgia initiated a package of legislative amendments,¹⁴ which provided for the creation of an Anti-Corruption Bureau for the first time, although only one function was assigned to the Anti-Corruption Bureau - participation in the development of anti-corruption policies.¹⁵

The Bureau had neither the powers to monitor asset declarations nor to protect whistleblowers or to control political finances. The Bureau did not have the capacity to implement and/or provide effective administrative (procedural or substantive) oversight to effectively enforce the requirements of the anti-corruption legislation. It did not have the authority to influence the implementation of preventive or punitive anti-corruption measures in practice.

The representative of the Institute for the Development of Freedom of Information paid special attention to the exact mentioned issue at a sitting of the Legal Issues Committee, within the framework of which the extremely problematic draft law was approved in the second reading.¹⁶ In particular, IDFI, based on its analysis¹⁷ of November 1, 2022, argued that the draft law did not respond to the challenges clearly identified by the European Union in the fourth priority task:

- Did not concern those members of the families of officials who to this day are not required to declare their property;
- Did not increase whistleblower protection guarantees, did not regulate legal relations with whistleblowers;

¹³ See part 2.3.

¹⁴ Legislative package on the amendment of 27 different legislative acts, including in law of Georgian "On Conflict of Interest and Corruption in Public Institutions", October 26, 2022. #07-3/259/10. [available at: <https://shorturl.at/cjxzA>, date of access: 19.22.2023].

¹⁵ Ibid. See the powers listed in the first paragraph of Article 20¹⁵ provided by the draft Law "On amendments to the law of Georgia on conflict of interest and corruption in public institutions", as well as the version approved by the first reading.

¹⁶ The representative of the Institute for Development of Freedom of Information, the head of the rule of law direction, presented the opinion of the institute at the meeting of the Legal Issues Committee. [available at: <https://shorturl.at/svCGQ>, date of access: 19.22.2023].

¹⁷ The Institute for Development of Freedom of Information (IDFI), Analysis, "The Draft Law Initiated on Anti-Corruption Issues Does not Respond to the 4th Priority of the European Union", November 1, 2022, [available at: <https://bitly.ws/378y8>, date of access 19.22.2023].

- Did not strengthen the monitoring system of officials' asset declarations;
- Did not strengthen the administrative capacity/mechanisms for supervising the finances of political parties;
- Did not provide for the creation of a specialized investigative body. The investigation of such crimes still remains within the competence of the State Security Service;
- Did not include the establishment of a single body that will handle all key anti-corruption functions and at the same time have a high degree of independence.

Although the draft law provided for the creation of an Anti-Corruption Bureau, none of the functions envisioned by the European Union recommendation were assigned to the body. The legislative package did not concern not only the steps to be taken derived from the spirit of the European Commission's Opinion but also the challenges mentioned in the text of the document.¹⁸

2.4. The Chaotic Process of Granting Real Powers to the Anti-Corruption Bureau and the Safeguards of the Bureau's Independence and Impartiality Beyond Consideration

The creation of a non-functioning Anti-Corruption Bureau pushed the issues related to its independence, accountability, and the election of its head to the side, since the Bureau, left without key functions, did not need guarantees of independence. For example, our first written analysis prepared after the publication of this version of the draft law was published with the following note: " The rules for creating the Anti-Corruption Bureau contain several gaps, but we will not discuss these shortcomings in the presented analysis, since the Bureau is not assigned any authority, such that its implementation would require high guarantees of independence".¹⁹

As a matter of fact, the guarantees of independence, the architecture of accountability, and the manner of election or appointment to the position are selected in accordance with the functions/powers to be exercised by the relevant agency/official. Namely, first of all, the functions to be implemented should be established, and then the importance and legal nature of the independent execution of these functions can be determined. Only then can the guarantees of independence and systems of accountability be selected.

¹⁸ Ibid. Summary

¹⁹ The Institute for Development of Freedom of Information (IDFI), Analysis, "The Draft Law Initiated on Anti-Corruption Issues Does not Respond to the 4th Priority of the European Union", November 1, 2022, [available at: <https://bitly.ws/378y8>, date of access: 19.22.2023].

On November 15, 2022, the Parliament of Georgia adopted the initially submitted version of the draft law in two readings. At that stage, the Anti-Corruption Bureau had not yet been assigned any key functions.²⁰

The assignment of these functions was verbally announced by the Chairman of the Legal Issues Committee at the plenary session of the Parliament on November 15, but the draft law was not available. On November 28, a sitting of the Legal Issues Committee was held where the amended bill was voted on.²¹ Two days later, the law was adopted in the third reading.²² After granting additional functions to the Anti-Corruption Bureau, there was no more space left in the Parliament of Georgia to discuss the independence of the Anti-Corruption Bureau.

3. Venice Commission regarding the Authorities and Independence of the Anti-Corruption Bureau

The Venice Commission mentions in its opinion that a fundamental requirement is the independence of specialized anti-corruption bodies, “with an adequate level of structural and operational autonomy involving legal and institutional arrangements to prevent political or other influence”.²³ Apart from that, when determining the independence of the Anti-Corruption Body, the Venice Commission evaluates various factors, including “its legal basis, institutional placement, appointment and removal of the director, selection and recruitment of staff, budget and fiscal autonomy, and accountability and transparency”.²⁴

3.1. Institutional Independence: The Majority in the Competition Commission is Formed by the Parliamentary Majority

Although the pre-selection of the candidates for the position of Head of the Bureau is done by the Competition Commission, the Venice Commission draws attention to the fact that “four out of the seven members of this commission representing the political majority or being appointed by this majority”.²⁵ Consequently, according to the opinion, the composition of the Competition

²⁰ See #07-3/259/10 the version of the legislative package approved by the second reading, [available at: <https://shorturl.at/cjxzA>, date of access: 19.22.2023].

²¹ Ibid. Minutes of the sitting of the Legal Issues Committee.

²² Ibid. Minutes of the third hearing at a parliamentary plenary session.

²³ European Commission for Democracy through Law (Venice Commission) On the Provisions of the Law on the Fight Against Corruption Concerning the Anti-Corruption Bureau, December 18, 2023, par. 17, [available at: <https://shorturl.at/g5N05> date of access: 21.12.2023].

²⁴ Ibid, par. 18.

²⁵ Ibid, par. 20.

Commission is not considered "sufficiently pluralistic,"²⁶ considering also that the final choice of a candidate is to be made by the Prime Minister, who additionally has the option of a reasoned refusal and the possibility of prolonging the mandate of the incumbent head by not appointing a new head".²⁷

3.2. Arranging the System of Accountability

The Venice Commission states that, as specified by the law, the Anti-Corruption Bureau is accountable to the Parliament and to the Inter-Agency Anti-Corruption Council, and in this context, the appointment and early termination of the tenure of its head by the Prime Minister are "casting a shadow"²⁸ on the Bureau's independence and political neutrality.²⁹ "There is effectively a triple accountability, which is unfortunate and should be reconsidered".³⁰

According to the recommendation of the Commission, the role of the Inter-Agency Anti-Corruption Council should be defined "with greater clarity and precision" so that the functions of the Council and the Bureau do not overlap.³¹ Apart from this, the Bureau being accountable to the Inter-Agency Anti-Corruption Council should be removed.³²

In this context, the Commission focuses on the overlapping functions³³ of the Anti-Corruption Bureau and the Inter-Agency Anti-Corruption Council and states that "it is hard to see the usefulness of the Inter-Agency Anti-Corruption Council" when there is a specialized Anti-Corruption Body.³⁴

3.3. Selection of the Head of the Bureau by the Parliament

While discussing the benefits of granting the power of appointing and dismissing the Head of the Anti-Corruption Bureau to the Parliament, the Venice Commission notes that "increased involvement of Parliament furthers the democratic principle".³⁵

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid, par. 23.

²⁹ Ibid.

³⁰ Ibid, 25.

³¹ Ibid, par. 37 and 43.

³² Ibid, par. 43.

³³ Ibid, par. 37.

³⁴ Ibid, par. 38.

³⁵ Ibid, par. 25.

While referring to the previous opinions, the Venice Commission notes that “the need to ensure independence and neutrality of anti-corruption bodies may require cross-party support of appointments of key officeholders, which may be ensured by a qualified majority, as well as a suitable anti-deadlock mechanism”.³⁶

Accordingly, the Venice Commission recommends that “the Law be amended to oblige the head of the ACB to be appointed by a qualified majority in Parliament, coupled with a suitable anti-deadlock mechanism (requiring more than an ordinary majority), or an appropriate alternative, reflecting broad, cross-party agreement in Parliament (for example, in the form of a double majority, entailing a majority among members of parliament both from the majority and the opposition)”.³⁷ Furthermore, the Venice Commission suggests that the “decision on early termination of his/her term in office be made by the Parliament, not the Prime Minister”.³⁸

The Venice Commission points to the need for a “wide consensus” regarding institutions that require “strong public trust” and which, given the nature of their functions, “need to be perceived as politically neutral”.³⁹

3.4. Granting Investigative Powers

The Venice Commission welcomes combating corruption in the long-term, but “it notes that the ACB has no investigative powers and no legal tools to address” high level corruption.⁴⁰ The Venice Commission points out that, in order to achieve the goal of consolidating key anti-corruption functions and fighting high-level corruption, the Anti-Corruption Bureau lacks investigative powers.⁴¹

3.5. Summary

The Venice Commission pays attention to the fact that it was not asked to fully assess the activities of the Anti-Corruption Bureau, as the request for the evaluation of the relevant legislation was not made by the Parliament of Georgia. In this sense, the Venice Commission refers to the authority of monitoring the financial activities of political parties. The opinion

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid, par.16.

⁴¹ Ibid.

mentions that it would be better to have a “holistic assessment of reforms“, although such a request was not made before the Venice Commission.⁴²

The Venice Commission points out that it is not for the Commission to assess whether amendments are in compliance with the EU recommendations. However, it concludes that “bringing various preventive anti-corruption functions together in the ACB falls short of the stated aim of rigorously addressing high-level corruption”.⁴³

According to the Venice Commission, “the current institutional design does not provide for a sufficient degree of independence of the ACB and considers that its competences to oversee the financing of political parties and monitor asset and interest declarations of high-level officials require additional safeguards to be included in the Law. In this connection, the fact that the appointment and dismissal of the head of the ACB is to a large extent in the hands of the Prime Minister is particularly problematic”.⁴⁴ As recommended by the Commission, the head of the Bureau should have cross-party support and should be elected by a qualified majority in the Parliament. Apart from that, the opinion states that “given that the ACB is accountable to Parliament – any decision on early termination of his/her term in office be made by the Parliament, not the Prime Minister”.⁴⁵

Conclusion

The conclusion of the Venice Commission made it clear that the process of creating the Anti-Corruption Bureau in Georgia was flawed and inappropriate decisions were made regarding the procedure for creating the Anti-Corruption Bureau, as well as establishing its powers, accountability, and independence.

If the Parliament of Georgia had taken into account the recommendations of the civil society and selected the Head of the Anti-Corruption Bureau by itself, with a high majority, equipped it with investigative powers, and reduced the influence of the government on its activities, the anti-corruption reform would not have started with such systemic flaws and Georgia would have fulfilled the 4th priority of the European Union and taken one step forward on the path of European integration.

Therefore, we once again call on the Parliament of Georgia to prepare a draft law that takes into account the requirements of the Venice Commission and the recommendations of the civil sector. It is important that the drafted law, which would reconsider the architecture of the Anti-

⁴² Ibid, par. 39.

⁴³ Ibid, par. 40.

⁴⁴ Ibid, par. 41.

⁴⁵ Ibid, par. 42.

Corruption Bureau's operational and institutional strengthening and independence, be submitted to the Venice Commission for a holistic assessment.

It should be emphasized that implementing the recommendations of the Venice Commission is essential for the advancement of the process of Georgia's integration with the European Union.

In particular, the anti-corruption reform was a part of 12 priorities that the European Union considered to be partially fulfilled, and for the moment, the recommendations of the Venice Commission related to ensuring the effectiveness, institutional independence, and impartiality of the Anti-Corruption Bureau represent part of the so-called nine reservations⁴⁶ of the European Union that Georgia currently has to implement.

⁴⁶ European Commission, Communication on EU Enlargement Policy, November 8, 2023, p. 25, [available at: <https://shorturl.at/amJOZ>, date of access: 19.12.2023].