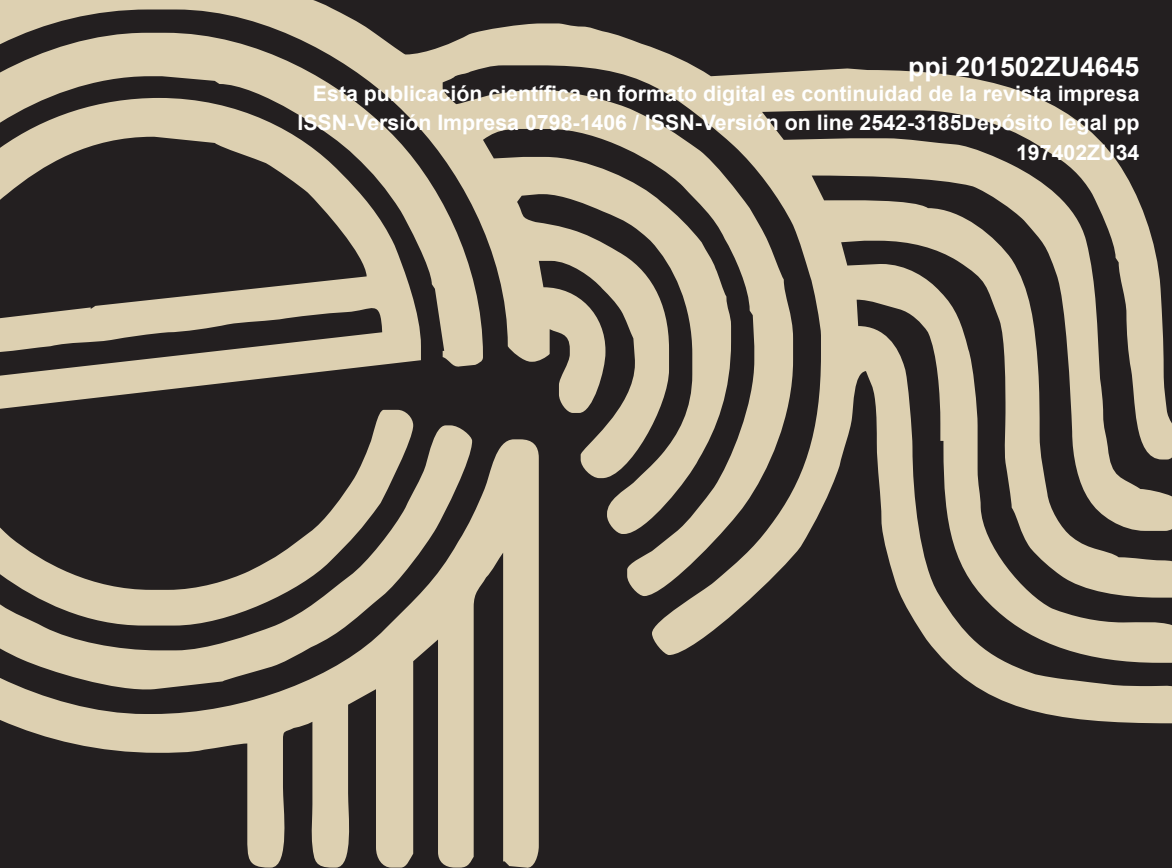


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# Public control over the activities of the State Bureau of Investigation: A comparative analysis

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## Abstract

The purpose of this work was to analyze the adequate level of legal support for the implementation of public control over the activities of the State Investigation Bureau through the activities of the Public Control Council. To achieve the objective, general scientific and special scientific methods of cognition were used simultaneously, in particular dialectical, logical-formal, analysis and synthesis, systemic-structural, legal-comparative, legal-formal and prognostic. On the basis of a comparative analysis of the legal regulation of the issues of formation and activity of the Public Control Councils in a number of newly created law enforcement bodies, a system of blocks was highlighted, which were the subject of analysis, namely: 1) control over the activity of the body; 2) powers of the Public Control Council; 3) the name of the main area of activity of the Public Council; 4) the object of approval of the Regulations of the Public Council. Everything allowed to conclude which are the «bad» normative constructions, the contradictory norms in the related normative acts and to locate the need for unification of approaches according to the identified structural blocks, which were the object of analysis. In addition, attention is focused on those directions that require further scientific analysis and regulatory optimization.

**Keywords:** law and policy; public control; law enforcement agencies; state research office; comparative law.

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## El control público de las actividades de la Oficina Estatal de Investigación: Un análisis comparativo

### Resumen

El propósito de este trabajo fue analizar el nivel adecuado de respaldo legal para la implementación del control público, sobre las actividades del Negociado Estatal de Investigación a través de las actividades del Consejo de Control Público. Para lograr el objetivo, se utilizaron simultáneamente métodos científicos generales y científicos especiales de cognición, en particular dialéctico, lógico-formal, análisis y síntesis, sistémico-estructural, legal-comparativo, legal-formal y pronóstico. Sobre la base de un análisis comparativo de la regulación legal de las cuestiones de formación y actividad de los Consejos de Control Público en una serie de cuerpos de seguridad de nueva creación, se destacó un sistema de bloques, que fueron objeto de análisis, a saber: 1) control sobre la actividad del cuerpo; 2) facultades del Consejo de Control Público; 3) el nombre del área principal de actividad del Consejo Público; 4) el objeto de aprobación del Reglamento del Consejo Público. Todo permitió concluir cuáles son las construcciones normativas «malas», las normas contradictorias en los actos normativos relacionados y ubicar la necesidad de unificación de enfoques según los bloques estructurales que sean identificado, que fueron objeto de análisis. Además, se centra la atención en aquellas direcciones que requieren mayor análisis científico y optimización regulatoria.

**Palabras clave:** derecho y política; control público; organismos encargados de hacer cumplir la ley; oficina estatal de investigación; derecho comparado.

### Introduction

The role of the public and normatively regulated public organizations is currently considered extremely important. In addition, precisely those that have the maximum legitimacy and are mandatory in the activity of the system of new law enforcement agencies of Ukraine received quite powerful powers from the lawmaker. However, it is important to clearly enshrine them in domestic legislation, because, as the research shows, sometimes such powers are not clearly specified at the regulatory level.

Thus, it is the controlling role of the public over the activities, in particular, of bodies that currently perform both preventive and countermeasure functions in the field of offenses committed primarily by officials with significant public powers and civil servants, is quite significant and largely depends on the level of its implementation and the level of efficiency of such state law enforcement institutions depends.

At a time when the state of Ukraine was subjected to large-scale military aggression from a neighboring country, during the year Ukrainians courageously defended their land precisely thanks to the self-organization of civil society in its various manifestations, which, in fact, is what most experts emphasize. And it was the public that became the driving force that caused the cohesion and stability of public institutions in the “face” of the military threat.

At the same time, the legal status of Public Councils/Public Control Councils over the activities of newly created state institutions is not clearly defined. In particular, at the beginning of January 2023, the new composition of the High Council of Justice, when approving the Project of the State Anti-corruption Program for 2023-2025 (for the implementation of the Anti-Corruption Strategy for 2022-2025 adopted at the level of the Law of Ukraine).

Regarding the expansion of the powers of the Public Council of Integrity (permanently operating an independent body in the judicial system of Ukraine, appointed to assist the Higher Qualification Commission of Judges of Ukraine in establishing the compliance of a judge/candidate for the position of judge with the criteria of professional ethics and integrity for the purposes of qualification assessment), it was stated that “current legislation does not clearly define the status of the Public Council of Integrity - it is a subject of authority or an institution of civil society,” and “the scope of responsibility of the Public Council of Integrity” is not defined at all. Also, the High Council of Justice once again reminded that “decisions of the Public Integrity Council should have a recommendatory nature” (Judicial and legal newspaper, 2023).

The State Bureau of Investigation (hereinafter referred to as the SBI) is a state law enforcement agency of Ukraine tasked with the prevention, detection, termination, disclosure, and investigation of criminal offenses primarily against high-ranking officials, heads of anti-corruption agencies, the judicial corps, law enforcement officers, and against the established order of wearing a military uniform. service, which, in fact, concentrates in itself perhaps the most significant powers in terms of the system of currently operating domestic law enforcement agencies as a whole.

The changes introduced in accordance with Laws of Ukraine No. 305-IX dated 03.12.2019 and No. 720-IX dated 17.06.2020 add special importance and update the status of the body, according to which the SDB from the status of “central body of executive power carrying out law enforcement activities” was transformed into a “state law enforcement body”, which is entrusted with the above-mentioned tasks, which, in fact, strengthened the independence of this body and gave it considerable governmental weight.

In this context, the control function of the public over the activity of the body as a whole and its observance of the principles of objectivity, the maximum possible (within the regulatory field) transparency, compliance with anti-corruption norms and generally accepted principles of the activity of an independent law enforcement body, whose activities are primarily aimed at ensuring rights and human and citizen freedoms, is considered extremely important. In addition, the Council of Public Control under the SBI, whose members undergo a transparent and rather strict competitive selection, is called to implement such functions.

### **1. Objectives**

The purpose of this work is to analyze the appropriate level of legal support for the implementation of public control over the activities of the State Bureau of Investigation through the activities of the Council of Public Control.

### **2. Materials and methods**

To achieve the goal, general scientific and special scientific methods of cognition were used, in particular dialectical, formal-logical, analysis and synthesis, systemic-structural, comparative-legal, formal-legal and prognostic.

The theoretical basis for conducting the research was the scientific output of scientists who dealt with issues of the controlling role of the public over the activities of, in particular, the system of newly created law enforcement bodies, as well as the legal basis of the formation and operation of these bodies as a system, and separately the problems of the functioning of each of them.

Among these, it is worth noting the research of Yara O., Artemenko O. and Lytyvn O. regarding the analysis of legal principles of activities of public administration entities, which carry out measures in the field of prevention and control of domestic violence (Yara *et al.*, 2021); Ladychenko V., Bryhinets O. and Uliutina O., who carried out an analysis of the features of the regulatory regulation of state financing of the maintenance of a public institute in Ukraine, as a jury trial (Ladychenko *et al.*, 2022); Oleksenko R., Malchev B., Venger O., who studied in more detail the peculiarities of the Ukrainian public using the example of a modern Ukrainian voter (Oleksenko *et al.*, 2021); Ladychenko V., Danyliuk Yu., who studied public participation in ensuring security and law and order at the level of local self-government bodies (Ladychenko *et al.*, 2021); certain aspects of the

legal basis for the implementation of public control over state institutions both in Ukraine and abroad are studied in the works of Mudrolubova N. (Mudrolubova *et al.*, 2022), Kutsevych M. (Kutsevych *et al.*, 2020), Kidalov S. (Kidalov *et al.*, 2020), Golovko L. (Golovko *et al.*, 2022); the problems of the functioning and activity of the system of new law enforcement agencies, whose activities are aimed primarily at combating and preventing corruption, were investigated in the work of Gulak O., Kurylo V., Dubchak L., Golovko L., Holovii L. (Gulak *et al.*, 2015; Gulak *et al.*, 2021; Dubchak and Gulak, 2021; Gulak *et al.*, 2022).

A comparative analysis of the legal support for the formation and activity of both these bodies and public organizations, which are called to implement the control function, became important in the scope of the research. A number of by-laws, reports, online meetings and speeches in the mass media, the specialized committee of the Verkhovna Rada of Ukraine were examined, and a critical look was made at the personal participation of the co-authors of the study in the election of the Council of Public Control at the SBI of the new term.

### 3. Results and discussion

Currently, in accordance with the requirements of paragraph 3 of the Procedure for the formation of the Public Control Council at the State Bureau of Investigation, approved by the Decree of the President of Ukraine No. 42 of February 5, 2020 and in accordance with Articles 12, 23 and 28 of the Law of Ukraine “On the State Bureau of Investigation”, the head of the SBI issued an Order No. 508 of October 5, 2022 on approval of the personal composition of the competition commission specifically for the selection of members of this Council.

In fact, it is her who is called upon to monitor the gaps in the regulatory support for the activities of the SBI itself and to develop appropriate proposals aimed at optimizing the organizational and legal foundations of the body’s activities, preventing any corrupt elements.

At the same time, it is worth paying attention to certain conflicting or debatable issues that are fixed in the domestic legal field in relation to the legal regulation of the formation and activity of the Council of Public Control under the SBI.

Among them is the very name of this public body. In particular, the legal correctness of its definition can be formulated by analyzing similar bodies in terms of normative legal acts on the consolidation of such in the system of new law enforcement bodies, which have primarily / including an anti-corruption function.

The National Agency for the Prevention of Corruption (hereinafter referred to as the National Agency for the Prevention of Corruption) should be included among a number of such; National Anti-Corruption Bureau (hereinafter - NABU); Economic Security Bureau of Ukraine (hereinafter - ESBU).

Thus, in the profile laws that regulate the activities of these bodies, the structure of the system of the blocks we have identified is presented in a slightly different way:

1. control over the body's activities;
2. powers of the Council of Public Control;
3. the actual name of the main area of activity of the Civic Council;
4. the subject of approval of the Regulations on the Public Council.

**Table 1. Differences in the legislative regulation of public control councils in newly created law enforcement and anti-corruption bodies**

Blocks highlighted by us	Profile Laws of Ukraine			
	On prevention of corruption/ NAZK	About the National Anti-Corruption Bureau/NABU	About the Bureau of Economic Security/BEB	About the State Bureau of Investigation/ SBI
<b>Control over the activity of the body</b>	<p><b>Article 14.</b> Control over the activities of the National Agency</p> <p>4 types of control are distinguished, including public control</p>	<p><b>Article 26.</b> Control over the activities of the National Bureau and its accountability</p> <p>Public control as such is not singled out</p>	<p><b>Article 35.</b> Control over the activities of the Bureau of Economic Security of Ukraine and its accountability</p> <p>Public control as such is not highlighted</p>	<p><b>Article 23.</b> Control over the activities of the State Bureau of Investigation</p> <p>Public control as such is not singled out</p>

<p><b>Powers of the Council of Public Control</b></p>	<p><b>There is no separate article</b></p> <p>7 clearly delineated powers at the level of the Law of Ukraine (Part 2 of Article 14) are singled out, including:</p> <ul style="list-style-type: none"> <li>● membership of competitive and disciplinary commissions;</li> <li>● expert work;</li> <li>● legislative activity</li> </ul>	<p><b>Article 31.</b>                  Council of Public Control under the National Bureau</p> <p>There are 3 clearly defined powers at the level of the Law of Ukraine (Part 3 of Article 31), which have a rather limited nature</p>	<p>Стаття <b>34.</b> Article 34. Council of Public Control under the Bureau of Economic Security of Ukraine</p> <p>5 clearly delineated powers at the level of the Law of Ukraine are singled out (Part 2 of Article 34), including:</p> <p>1) membership of competitive and disciplinary commissions</p>	<p><b>Article 28.</b>                  Council of Public Control under the State Bureau of Investigation</p> <p>There are 4 clearly defined powers at the level of the Law of Ukraine (Part 2 of Article 34), which are of a rather limited nature, providing, unlike other Public Councils, a requirement for the development and approval of the Rules of Professional Ethics of the State Bureau of Investigation</p>
<p><b>The name of the main area of activity of the Civic Council</b></p>	<p>Part 2 of Art. 14. Public control over the activities of the NACP</p>	<p>Part 1 of Art. 31. Civilian control over NABU activities</p>	<p>Part 1 of Art. 34. Public control over the activities of the ESBU</p>	<p>Part 1 of Art. 28. Civilian control over the activities of the SBI</p>
<p><b>Subject of approval of the Regulation on the Public Council</b></p>	<p>Part 2 of Art. 14. Regulations on the Public Council under the National Agency are approved by the <b>Cabinet of Ministers of Ukraine.</b></p>	<p>Part 1 of Art. 31. Regulations on the Council of Public Control under the National Bureau and on the order of its formation are approved by the <b>Cabinet of Ministers of Ukraine.</b></p>	<p>Part 1 of Art. 34. Regulations on the Council of Public Control under the Bureau of Economic Security of Ukraine and the procedure for its formation are approved by the <b>Cabinet of Ministers of Ukraine.</b></p>	<p>Part 2 of Art. 28. Regulations on the Council of Public Control and the procedure for its formation are approved by the <b>President of Ukraine</b> upon submission of the Director of the State Bureau of Investigation.</p>

Source: authors.

Based on the comparative table developed and presented within the scope of this study regarding the discrepancies in the legislative regulation of the formation and activity of the Councils of Public Control in the newly created law enforcement and anti-corruption bodies, we can state a number of significant discrepancies.

1. In particular, Article 14 “Control over the activities of the National Agency” of the Law of Ukraine “On Prevention of Corruption” (Law of Ukraine, 2014a) defines four types of such control, and the public one - which is actually implemented by the “Public Council under the



NACP” - is one of them. Neither this Law of Ukraine, nor its Chapter II “National Agency for the Prevention of Corruption” contains a separate article regarding the normalization of the function, structure and tasks of the Public Council under the NACP.

Actually, Part 2 of Art. 14 of this Law clearly regulates the name of the main activity of the Public Council, namely: “Public control over the activities of the National Agency is ensured through the Public Council under the National Agency...”. At the same time, the Laws of Ukraine: “On the National Anti-Corruption Bureau” (Law of Ukraine, 2014b), “On the Bureau of Economic Security” (Law of Ukraine, 2021) and “On the State Bureau of Investigation” (Law of Ukraine, 2016) to define the main direction the term “public” and “civilian control” are used for the activities of the Councils of Public Control, which, of course, requires unification in the domestic legal field.

It should be emphasized that the current Article 26 of the Law of Ukraine “On the National Anti-Corruption Bureau” entitled: “Control over the activities of the National Bureau and its accountability” quite illegally contains 2 significant regulatory gaps:

2. an incorrect reference to the committee of the Verkhovna Rada of Ukraine “... the subject of which is the fight against corruption and organized crime”, because among the 23 currently active committees of the Verkhovna Rada of Ukraine there is only “the committee of the Verkhovna Rada of Ukraine on anti-corruption policy” (Word and Deed, Analytical portal, 2023), and the function of “fighting organized crime” is not inherent in any of these;
3. among the legal bases for ensuring control over the activities of the National Anti-Corruption Bureau, in addition to the Constitution of Ukraine, the Law of Ukraine “On Democratic Civilian Control over the Military Organization and Law Enforcement Bodies of the State”, which is invalid as of 07/08/2018, based on the adoption of the Law of Ukraine “On National Security of Ukraine” dated June 21, 2018 under No 2469 (Law of Ukraine, 2018).

Actually, this Law of Ukraine (clause 5, article 1) defines the term “democratic civil control”, by which the legislator understands: “a set of legal, organizational, informational, personnel and other measures implemented in accordance with the Constitution and laws of Ukraine to ensure the rule of law, legality, accountability, transparency of the bodies of the security and defense sector and other bodies whose activities are related to the restriction of human rights and freedoms in cases defined by law, promotion of their effective activity and performance of the functions entrusted to them, strengthening of the national security of Ukraine”.

However, none of the bodies analyzed by us is directly defined in the Law of Ukraine “On National Security of Ukraine” as being included in the security and defense sector, which also raises the issue of conflicting regulatory regulation regarding the issues outlined by us.

Moreover, and what is most important in the essential understanding of the issues we are investigating, this Law of Ukraine in Section III “Democratic Civil Control” presents its structure, where actually, by making changes to the same Law of Ukraine, “public control” was replaced by an absolutely unacceptable the legal construction “public supervision” (Law of Ukraine, 2020), but it is only the last, namely, the tenth element in the structure of democratic civil control, which includes: “control carried out by the President of Ukraine; control carried out by the Verkhovna Rada of Ukraine; control carried out by the National Security and Defense Council of Ukraine; control carried out by the Cabinet of Ministers of Ukraine, executive authorities and local self-government bodies; judicial control and public supervision” (Part 1, Article 4 of the Law of Ukraine “On National Security of Ukraine”) (Law of Ukraine, 2018).

In addition, the analysis of the content of Article 10 of the Law of Ukraine “On the National Security of Ukraine” under the title: “Public supervision” allows us to assert the granting of such powers to all citizens of Ukraine who “participate in the implementation of civil control through public associations.”

That is, the lawmaker defined “public supervision” as one of the components of civil control, giving such authority significant legal opportunities, which we actually interpret as “legal ignorance”, which causes legal and regulatory uncertainty and leads to both theoretical and law-enforcement conflicts, which definitely need streamlining and clarity in general.

In addition, the blocks we singled out and analyzed: “powers of the Council of Public Control” and “subject of approval of the Regulations on the Public Council”, based on the structure of the presented table, are also conflicting from a legal point of view, requiring regulatory arrangement and certain unification.

In addition, the President of Ukraine, according to the exhaustive order of norms defined for him by the Constitution of Ukraine, does not have such powers in relation to the newly created body - the State Bureau of Investigation. Therefore, the norm established in Part 2 of Art. 28 of the Law of Ukraine “On the State Bureau of Investigations”, regarding the fact that the Regulations on the Council of Public Control and the procedure for its formation are approved by the President of Ukraine at the request of the Director of the State Bureau of Investigations, do not correspond, in our opinion, to the main Law of our state.

## Conclusions

Our analysis of the legal foundations of the formation and activity of the Council of Public Control at the newly created state law enforcement body - the State Bureau of Investigation, which, according to its status, is currently, in our opinion, the law enforcement body with the most powerful powers, showed a number of conflicting norms and contradictions.

In particular, on the basis of a comparative analysis of the legal regulation of issues of formation and activity of Public Control Councils at a number of newly created law enforcement bodies, a system of blocks was singled out, which were subjected to analysis, namely: 1) control over the body's activity; 2) powers of the Council of Public Control; 3) the name of the main area of activity of the Public Council; 4) the subject of approval of the Regulations on the Public Council.

Within the scope of the study, it is pointed out the "inappropriate" regulatory constructions, contradictory norms in related regulatory acts, the need for unification of approaches according to the structural blocks we have identified, which were subjected to analysis, and attention is focused on those directions that require further scientific analysis and regulatory optimization.

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