INDEPENDENT ANTI-CORRUPTION COURTS IN UKRAINE: THE MISSING LINK IN ANTI-CORRUPTION CHAIN

POLICY BRIEF

EXECUTIVE SUMMARY

The inability of the judiciary in Ukraine to deliver fair and impartial judicial decisions regarding cases of high-level corruption necessitates the establishment of specialized Anti-corruption Courts to consider high-profile corruption cases that will be as autonomous and independent from the old system as possible. Involvement of the international community in establishing these courts and selecting anti-corruption judges is crucial for the efficiency of the reform.

This policy brief analyzes the necessity to establish specialized Anti-corruption Courts in Ukraine as part of the country's reform agenda after the 2014 Revolution of Dignity, as well as sets out recommendations for further actions and provides relevant policy-making suggestions.

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INTRODUCTION

In the last two years since the 2013-2014 Revolution of Dignity, Ukraine adopted a number of extraordinary anti-corruption measures, among which is the establishment of new bodies of pre-trial investigation and prosecution of high profile corruption crimes — the National Anti-corruption Bureau of Ukraine (NABU) and the Specialized Anti-corruption Prosecutor's Office (SAP). Nonetheless, this did not lead to any drastic change in the level of convictions and the perception of corruption, since there was no shift in these issues obvious to the general public. The level of impunity is still very high: out of 41 criminal proceedings and 63 indictments forwarded to the court only 9 ended up with verdicts[1], out of which 5 were the result of a plea bargain. The rest of the cases are stalled[2]. At the same time, courts have the ability to block pre-trial investigations by refusing to give necessary warrants for investigative activities, leaking information on such warrants, releasing suspects on low bails, or preserving positions of power for such suspects. This indicates that high-profile corruption still gets 'special treatment' in Ukrainian courts and therefore thrives.

This is no wonder – in 2015, 94%[3] of the population was convinced that Ukrainian court system itself is corrupt and it is therefore impossible to fight corruption, especially high-profile, with the existing judiciary. In 2016, the situation did not change much in terms of level of trust of the judiciary, which did not exceed 10%[4]. Despite the fact that comprehensive judicial reform has already started, with the adoption of Constitutional Amendments regarding judiciary and the new version of the Law "On Judiciary and Status of Judges" in June 2016, it would require several years before the full-scale change is complete. In the best-case scenario, 3 years are needed for appeal courts to be reorganized, and additional time is required to reform first instance courts, which are currently responsible for blocking consideration of high-profile corruption cases. This allows for more than enough time to discredit the NABU and the SAP and completely undermine Ukraine's struggle with top-level corruption.

GROUNDS FOR THE REFORM

Having 34 out of 40 cases stalled in the first instance courts waiting for hearings to start is a blatant example of judges' unwillingness to consider and ensure fair punishment for high-profile corruption. In such a situation new anti-corruption institutions are failing to deliver results expected by society - imprisoning corrupt officials and recovering stolen assets. If expectations of the society are not met, the NABU and the SAP risk being attacked by political leaders from the "old system" who are waiting for a pretext to intervene. Therefore, corrupt courts not only explain the lack of punishments of corrupt public officials but also lead to general backsliding in anti-corruption policies in Ukraine. Since the judicial reform is largely under-communicated[5] it will be easy to blame the new anti-corruption institutions, and not the old courts, for its lack of success.

There have been a number of discussions regarding the mechanisms of ensuring justice in high-profile corruption cases – should there be specialized anti-corruption courts created or specialized chambers in existing courts? Or maybe there is no need for separate institutions, but rather for specialized anti-corruption judges in ordinary courts? The ordinary court proceedings should be appropriate for all cases[6], however, there is no working alternative to the establishment of the Anti-corruption Courts (AC) taking into account present-day reality in Ukraine. Although abovementioned alternatives might seem more attractive financially, as they would require lower budgetary expenditure compared to the establishment of a new court, the experience of the NABU and the SAP shows that maximum detachment of new institutions from non-reformed systems has to be ensured. Moreover, appointing anti-corruption judges to existing local courts will not prevent informational leaks from the courts' administrative staff, that block NABU's pre-trial investigations now; while establishing separate anti-corruption chambers within local courts and resourcing them with special judges and special staff requires considerable expenses that are not justified by the number of cases that these chambers will consider per year.

New framework law "On Judiciary and status of Judges"[7], adopted in June 2016, mentions the establishment of the High Anti-corruption Court, but stipulates that a separate specialized law has to be first developed and adopted. Although the framework law envisions a 12-month period to form the AC from the moment the specialized law is adopted, it fails to set any deadlines for its adoption. Thus, in the absence of political will, this process may be postponed indefinitely, which can again lead to blooming impunity and serious setbacks in anti-corruption reforms.

Drafting and adopting the specialized draft law on the AC together with bylaws and respective amendments to the Procedural Codes can be accomplished in six months, while selecting, appointing and training the first 20-30 judges of the new court can be completed in another six months. Thus, high-profile corruption cases may be considered by more competent, unbiased and integral judges in one year.

Furthermore, establishing the Anti-corruption Courts through a transparent and independent process, supported by proper advocacy and communication campaigns, will also contribute to increasing public trust and confidence in the courts' further activity and fight against corruption. This can greatly benefit the general level of trust in governmental institutions and increase public support for reforms.

To sum up, in a long transitional period of full-scale justice reform, the establishment of the AC may be achieved relatively quickly and can lead to better results in fighting corruption and increasing trust in the judiciary system.

GENERAL MODEL OF THE ANTI-CORRUPTION COURTS

When drafting a general model for the Anti-corruption Courts legislators should consider several key issues: place of the AC in the national judicial system, selection process of the AC judges, requirements to candidates and guarantees for judges of the AC, etc. The key requirement in addressing these questions is political impartiality in both selecting anti-corruption judges and preventing any administrative influence on anti-corruption judicial institutions.

[1] The first year of the NABU`s investigations. Available in English at: https://nabu.gov.ua/en/novyny/first-year-nabus-investigations-580-million-uah-embezzlement-prevented-100-million-uah

[2] AntAC concept note «Why Ukraine needs anti-corruption courts». Available in English at: https://antac.org.ua/en/publications/why-ukraine-needs-anti-corruption-courts/.

[3] 2015 polls by Democratic Initiatives Foundation and Razumkov Center. Available in Ukrainian at: http://dif.org.ua/article/sudova-reforma-opituvannya-gromadskoi-dumki-suddiv-ekspertiv.

[4] 2016 polls by Democratic Initiatives Foundation. Available in Ukrainian at: http://dif.org.ua/uploads/pdf/13816462815863c78c6b27d3.47743328.pdf.

[5] 2016 GfK and USAID poll indicates that 64% of Ukrainians are not aware of the implementation of judicial reform. Available in English at: http://www.fair.org.ua/content/library_doc/fair_gfk_eng.pdf.

[6] Mentioned by the President of Venice Commission Gianni Buquicchio in his interview to "Evropeiska pravda". Available in Ukrainian at: http://www.eurointegration.com.ua/interview/2016/10/13/7055823/.

[7] Full text of the Law is available in Ukrainian at: http://zakon4.rada.gov.ua/laws/show/2453-17.

In their discussions, experts from both governmental and non-governmental spheres have frequently referred to the Special Court in Slovak Republic. The Slovak Special Court hears not only high-profile corruption cases, but also considers cases of economic and organized crimes, offenses committed by high-level officials etc., while the Ukrainian framework law on judiciary limits AC's competence only to high-profile corruption. The AC of Ukraine should also have national jurisdiction — centralization will increase the court's independence from regional elites. It is worth stressing that the framework law envisions the establishment of the first instance anti-corruption court and does not provide for a special anti-corruption court of appeal. Thus, appeal procedure is another important issue that needs to be solved - the dominant view is that an anti-corruption panel should be formed in the new Supreme Court of Ukraine as the court of second instance for high-profile corruption cases. Involvement of the Supreme Court is necessary due its Constitutional status as the highest Court. In this case cassation will not be available — such two-tier system is efficient and corresponds with international standards.

SELECTION OF ANTI-CORRUPTION JUDGES

Judges' selection procedure was proposed by Ukrainian CSO Anti-Corruption Action Center (AntAC) and endorsed by the civil society coalition «Reanimation Package of Reforms», as well as a number of other Ukrainian think-tanks, experts, business associations and top religious and opinion leaders who passed the demands to create such courts to the President of Ukraine[8]. The proposal[9] suggests establishing a special selection panel to select and appoint judges of the AC. The President, the Parliament and the Ministry of Justice should delegate three members each to the abovementioned panel, allowing both Ukrainians and foreigners to participate. However, the Ministry of Justice should choose their delegates from candidates recommended by major donor counties and international organizations because of the virtual inability of current Ukrainian political bodies to form a politically unbiased and publicly credible selection panel. Candidates recommended by the international community shall have a blocking minority of voices within the panel, as the concept requires a minimum of 7 out of 9 votes to make any decision. The Selection panel's decisions should be binding and mandatory on every step of the selection process.

The procedure that would oblige the Ministry of Justice to file requests for recommendations from donors became a necessity due to past failures of Ukrainian authorities to form independent selection panels.
The current bodies for selection of judges – the High Qualification Commission of Judges and the High Council of Justice - have already proved their political subordination by securing positions for judges who unlawfully ruled against participants of the Revolution of Dignity as well as to those who showed signs of illicit enrichment. This cannot be allowed in the selection of anti-corruption judges.

Moreover, success stories of the NABU[10] and the SAP establishment refute the claim of threat to sovereignty. Furthermore, donors' involvement will also draw the attention of media that will monitor the selection process, thereby increasing transparency.

[8] "For independent anti-corruption courts" ("ZaNAS") initiative. Available in Ukrainian at: http://zanas.org.ua/.

[9] See AntAC concept note «Why Ukraine needs anti-corruption courts».

It is critical that all judges who will preside over high-profile corruption cases in both instances are selected by the special selection panel under the abovementioned procedure. Otherwise, the independence of these judges will not be guaranteed, and the level of trust to them will be the same as to the whole judiciary.

REQUIREMENTS FOR CANDIDATES

Although a minimum of 10 years of legal experience should be required from the candidates, this experience should not be limited to only judiciary — candidates from outside the judicial system should be eligible to apply for positions of an AC judge. The selection procedure should be based on 3 main criteria:
1) Integrity. Candidates should undergo special scrutiny on whether they have unjustified assets and whether their lifestyles correspond with their declared incomes, which can be carried out by the National Agency for Corruption Prevention (NACP), the NABU, and the Public Integrity Council (PIC)[11]. The obtained information should be submitted for evaluation to the selection panel.
2) Proficiency. Candidates shall pass a special proficiency test to confirm their in-depth knowledge of Criminal and Anti-corruption law and procedure. If a candidate performed duties of a judge in the past, his/her previous rulings should be examined by the panel. It should be checked whether such candidate made politically-motivated decisions/ rulings, and whether, and on what grounds, his/her previous decisions were canceled by courts of higher instances or the European Court of Human Rights. Proficiency test and previous decisions review should be conducted by the High Qualification Commission of Judges, but the final evaluation of results should be performed by the independent selection panel.
3) Motivation. Candidates' motivation should be checked during interviews with the selection panel or using value motivation tests.

SPECIAL GUARANTEES FOR ANTI-CORRUPTION JUDGES

It is clear that efficient work of the AC judges cannot be guaranteed without appropriate wages and security guarantees. Higher wages should encourage highly qualified lawyers outside of the system to apply for the position, guarantee their independence and integrity. Thus, remuneration should be carefully considered.

In addition, around-the-clock security for a judge, his/her family members and their residence might seem too radical, but it should be provided on first request without any approval. The possibility of moving abroad in case if a judge or the family members are threatened should also be available.

Separate premises for both instances of the Anti-corruption Courts should be provided to guarantee safety of the judges and witnesses. The amount of funding for both the court and the chamber should be determined annually directly by the law on the state budget. Both institutions should have administrative staff, with heads of administrative units being appointed by the same selection panel as the anti-corruption

[10] More information on international cooperation of the NABU is available in Ukrainian at: https://nabu.gov.ua/en/novyny/mizhnarodne-spivrobitnyctvo.

[11] Public Integrity Council is another new institution established by the Law "On Judiciary and Status of Judges" to assist the High Qualification Commission of Judges in checking compliance of a judge with the criteria of professional ethics and integrity for the purposes of qualification evaluation. The PIC is formed of representatives of NGOs who are recognized experts in their fields (attorneys, scholars, journalists) and possess a high professional reputation, political neutrality and integrity.

judges. Anti-corruption appeal chamber within the Supreme Court should have its own documentation system and must not be subordinated to the head of either Cassation Criminal Court or the Supreme Court.

RISKS

Old political elites will not only try to block the process of adoption of the law, but will be eager to slow down the process of court establishment and to discredit selected judges. In this regard, pressure from the international donors and institutions is crucial – almost 3 years of reforms have shown that reforms are moving much faster if foreign donors make their support conditional. The IMF has already included the adoption of the Law "On the Anti-corruption Court" in its requirements[12]. In his speech in September 2016, the EU Commissioner for Neighborhood Policy and Negotiations on Enlargement Johannes Hahn mentioned the necessity of creating the AC with the involvement of international partners[13].

If second instance Anti-corruption Court is not created as a special chamber of the Supreme Court, and high-profile corruption cases are to be heard by regular judges of the Supreme Court, then the risks of annulling decisions made by the first instance court will increase. Despite the fact that the new framework law on judiciary allows for the formation of a new Supreme Court from scratch, there is still no guarantee that this composition will be completely free of any political influence. In Slovak Republic, for example, the establishment of the Special Court was not followed by Supreme Court reforms, and cases adjudicated by the new court were appealed in the old court with old-style judges. As a result, around 30% of decisions of the first instance court were set aside.

If anti-corruption court is not created or fails to give fair justice in cases of high-profile corruption, efforts put into launching of the NABU and the SAP will also remain fruitless. A successful system of anti-corruption institutions must include both independent pre-trail investigation and fair justice. Investigations alone cannot bring results in combating high political corruption if it continues prevailing in unreformed courts.

[12] Ukraine and the IMF: Letter of Intent, Memorandum of Economic and Financial Policies, and Technical Memorandum of Understanding. Available in English at: http://www.imf.org/External/NP/LOI/2016/UKR/090116.pdf.

CONCLUSIONS

Establishment of the Anti-corruption Courts in Ukraine is necessary due to the inability of the present judicial system to ensure convictions of corrupt officials. High-profile corruption cases should be heard in two, not three instances with the High Anti-corruption Court as the only first instance court for cases of high-profile political corruption: this system will be much faster to build and easier to control publicly. Anti-corruption panel in the Supreme Court of Ukraine may be established to hear appeals. Anti-corruption judges of both instances should be selected through a special procedure, involving international donors. Both anti-corruption judicial institutions should be as detached from the rest of the judiciary as possible. Involvement of the international community is crucial in selecting judges to the Anti-corruption Courts. Stricter eligibility criteria, as well as guarantees, should be established for anti-corruption judges to ensure their independence and impartiality.

[13] Remarks by the European Commissioner for European Neighborhood Policy and Enlargement Negotiations, Johannes Hahn, on the occasion of meeting with Ukrainian anti-corruption institutions at the Verkhovna Rada in Kyiv, September 16, 2016. Available in English at: https://ec.europa.eu/commission/2014-2019/hahn/announcements/remarks-johannes-hahn-occasion-meeting-ukrainian-anti-corruption-institutions-verkhovna-rada-kyiv_en.

RECOMMENDATIONS

The following recommendations can be given to the stakeholders of the anti-corruption and judicial reforms in Ukraine.

The Ukrainian authorities:

• adopt a new Law "On Anti-corruption Courts" which will provide the necessary regulatory framework including the recommendations of the civil society and international community regarding the institutional design of the AC and the selection procedure;
• set special rules for selecting the AC judges where political forces and acting judges do not have decisive influence and respected international experts delegated by international community have at least blocking minority;
• ensure guarantees (appropriate wages and social security; additional guarantees of independence and non-disclosure; personal and family security) for all judges who hear cases on high profile corruption.
• introduce maximum autonomy for the Anti-corruption courts: both instances should have separate funding, separate buildings, equipment and security services, and separate court staff which is subordinate only to the AC judges;
• ensure newly appointed judges receive enough training;
• strengthen evaluation of the AC judges' performance and ensure they are not a subject to an undue influence form the disciplinary bodies comprised of "old" judges.

The European Union:

• support the establishment of the Anti-corruption Courts as a condition for international assistance and demand very concrete policy-making steps defined in this brief;
• engage in a more rigorous dialogue with the Ukrainian government, closely observe implementation, and involve civil society in the assessment of the reform;
• take the 'sovereignty' argument by Ukrainian politicians with caution when Ukrainian authorities try to refuse international participation in the judges' selection process: most likely, it is dictated by their corrupt interest;
• provide best experts to the AC judges selection panel and training capacity for the selected AC judges;
• monitor the selection of the AC judges and the first results of their work closely, react properly if the objectives of the reform are not met.