

President's draft law on anticorruption court neglects Venice Commission recommendations

26.12.2017

On December 22 the President submitted to the Parliament the draft law No7440 on anticorruption court. This draft law does not meet key recommendations of the Venice Commission.

Though some recommendations of the Venice Commission were taken into account (establishment of a separate High Anticorruption Court (HACC) with national jurisdiction and an independent appeal instance as a chamber within the HACC) the threats of the draft law significantly take over.

Key recommendations of the Venice Commission that are fully neglected by the draft law No7440:

- nominees of international donors are given an advisory role, instead of a crucial one, in the selection of judges;
- jurisdiction of the court does not fully cover cases investigated by NABU and on the contrary – covers cases which are not related to (*high profile*) corruption as such (drug dealing and arms trafficking, which involve officials);
- discriminative eligibility requirements towards international donors who can nominate advisory experts for the selection of anticorruption judges: only international organizations with which Ukraine cooperates in the field of combating corruption can nominate experts, while foreign aid agencies that provide technical support and funding for anticorruption efforts are not eligible.

In addition, draft law offers unrealistic eligibility requirements towards candidates for anticorruption judges: besides experience as judge, lawyer or scientist each candidate must possess extensive experience of legal aid in the field of anticorruption in international organizations or international judicial institutions. In addition, the High Qualification Commission of Judges is given a full discretion to decide whether experience of a given candidate is extensive enough. The draft law also does not establish the number of HACC judges, giving this decision to State Judicial Administration and thus making court dependant from this body.

Submission of such a draft law contradicts President's own recent [promises and commitments](#) to “*submit his version of the draft law on the creation of the Anticorruption Court taking into account the recommendations of the Venice Commission.*”

The draft law was neither presented nor discussed publicly.

According to official web-site of the President, his draft law has been developed by a group of experts that included founder of the Fund for Innovations and Development Georgiy Vashadze, director of the same Fund Roman Yakovlev, and scientists and OCSE experts Anatoliy Zayets and Valentyn Serdiuk. However, today Oleksandr Vodyannikov, OSCE representative and a member of the Council for Judicial Reform [informed](#), that the OSCE was not involved in development of the draft law and that experts referred to as OSCE experts were only contracted by the organization some time ago and are not representing it now.

Should the draft law be adopted in the form, submitted by the President, it will not solve existing problem of courts delaying consideration of NABU cases. Instead of setting up a really independent anticorruption court, a fake institution vulnerable to external pressure will be established.

Detailed analysis

Creation of the anticorruption court is a prior action for Ukraine to receive the next tranche of the IMF loan, while implementation of current program with the IMF is also a precondition for Ukraine to get the next macro-financial assistance program from the EU. In October 2017 the Venice Commission of the Council of Europe gave a comprehensive opinion on advisable model of the anticorruption court for Ukraine.

In addition, the European Commission in its first report under the Visa Suspension Mechanisms stated that it is critically important to ensure the independence, effectiveness and sustainability of the anticorruption institutional framework, in particular by setting up an independent and specialised high anti-corruption court in accordance with the Venice Commission opinion and Ukrainian legislation.

Number of key recommendations of the Venice Commission that were neglected by the draft law No7440:

- **International experts are given only an advisory role in selection of judges, instead of a decisive.**

*Article 47 of the Venice Commission opinion states that “the Venice Commission would have a clear preference for more substantial amendments, namely for assigning the task of nominating Commission members to a non-political body such as the HQC – in its capacity as judicial self-governance body which is already involved in the appointment procedure – subject to the role of international donors as discussed below. Another option would be not to create an additional body such as the proposed Competition Commission but, as a temporary measure pending completion of the judicial evaluation, to include experts proposed by international donors as supernumerary members of the HQC to participate in the selection procedure for judges in the anti-corruption courts and to **give them a crucial role in that procedure** similar to that envisaged for them in the Competition Commission by draft law No. 6011”.*

In the President's draft law international experts are envisaged only as members of the Public Council of International Experts with the role analogical to that of the Public Integrity Council. Opinion of international experts is seen as not binding for the High Qualification Commission of Judges and can be overruled by $\frac{2}{3}$ of votes of the Commission members.

As a result of using similar model, in selection of the Supreme Court judges 60% of advisory opinions of the Public Integrity Council were overruled; and in the end around 25% of the new Supreme Court judges [don't meet integrity criteria](#). Likewise, international experts will most likely be used to legitimize selection procedure they will have no real influence on.

In addition, it is worth stressing that members of public councils are obliged to submit e-declarations.

- **Discriminative eligibility requirements towards international donors who can nominate advisory experts for the selection of anticorruption judges**

Article 51 of the Venice Commission opinion: “Further legal clarifications are also required to ensure legitimacy of the approach chosen, in particular regarding the question of how to determine which foreign donors will be involved, how to ensure that those donors are representative of the international donor community”

Draft law N07440 narrows the scope to international organizations only, with which Ukraine cooperates in the sphere of corruption prevention and counteraction according to the international agreements. Countries acting as donors through their foreign aid agencies, including the U.S., the U.K., Denmark and others, are not seen as eligible to participate in the nominations process. All international donors, both international organizations and countries working through their foreign aid agencies, should be given equal right to nominate experts for the selection of anticorruption judges.

- **Jurisdiction of HACC does not fully cover cases investigated by NABU and simultaneously covers cases not related to corruption.**

Article 73 of the Venice Commission opinion: “the jurisdiction of the HACC and of the appeal instance should correspond to that of the National Anti-Corruption Bureau (NABU) and of the Special Anti-Corruption Prosecutor’s Office (SAPO).”

Draft law N07440 omits crimes related to money laundering, submitting false information in e-declarations and adopting legal acts and bylaws that unlawfully decrease budget revenues: these cases, although under jurisdiction capacity of NABU, are not seen as covered by the HACC

On the other hand, the court will be hearing cases of drug dealing and arms trading that involve public officials (and investigated by the Police and the State Bureau of Investigations). Since there are thousands of such cases per year and the draft law sees them all as concentrated in one court, this provision may block the court from consideration of high profile corruption crimes.

All cases investigated by NABU and prosecuted by SAPO should be covered by the jurisdiction of the HACC. The court’s jurisdiction should be limited strictly to NABU cases without extension to any other crimes.

Other threats:

- **Draft law envisages unrealistic and discriminative eligibility requirements for candidates for judicial positions**

Besides experience as judge, lawyer or scientist each candidate must possess extensive experience of legal aid in the field of anticorruption in international organizations or international judicial institutions. This requirement limits number of potential candidates for judicial positions to a dozen of people. In addition, the High Qualification Commission of Judges is given a full discretion to decide whether experience of a given candidate is extensive enough. This provision runs against Common Understanding on anticorruption court for Ukraine, presented by the international donors and referred to in the Venice Commission opinion. Thus, *article 3.4. of the Common Understanding says that: “Formal qualifications requirements for candidates should be developed in a way to allow the participation of the widest range of judges, lawyers and academics in the competition.”*

Eligibility criteria for candidates for position of anticorruption judges should be broad enough to attract professional lawyers and judges.

- **Number of anticorruption judges in the HACC is not defined by the law**

Draft law does not establish even minimal number of judges for the HACC, providing that this number should be established by the State Judicial Administration. Such provision, especially considering extended jurisdiction of the court, provides for another leverage on performance of the court and an opportunity to block its operation.

It is advisable to have at least 40 first instance judges and at least 30 appellate anticorruption judges, which makes a total of 70 judges for the High Anticorruption Court. This number of judges is relevant only with due regards to limiting jurisdiction of the court to cases investigated by NABU.