

The Constitutional Court deprived NABU of powers to invalidate civil agreements in courts

07.06.2019

On June 5, 2019, the Constitutional Court of Ukraine made the [decision](#) which satisfied the constitutional appeal of Kolomoisky's Zaporizhzhya Ferroalloy Plant. It declared the norm of the Law of Ukraine "On the National Anti-Corruption Bureau" unconstitutional. According to it, the NABU was granted the following right – "in case of the grounds provided by the Law, send the appeal to the court regarding the invalidation of agreements in accordance with the procedure established by the Law of Ukraine (article 17, paragraph 13)."

What are these provisions?

Since the creation of the NABU, the legislator provided the newly created body with the right to send the appeal to the court and invalidate agreements. Since the NABU was authorized to investigate top corruption cases, they are all connected with the conclusion of various types of agreements anyway.

These obviously illegal agreements often cause insane losses to the state. And since difficult criminal investigations are often long-playing, this mechanism was intended to allow the Bureau to stop such schemes even before the completion of the investigation.

It should be noted that the NABU used this mechanism very effectively. Thus, during four years of its work, the NABU sent over forty appeals to the court. Court decisions were made regarding them on the recognition of invalid [94 agreements for the amount of 4.77 billion UAH](#). And the state can count on the return of this money.

The parties of such appeals were well-known enterprises of the state sector of economics, namely: Ukrnafta PJSC, Zaporizhzhyaoblenergo PJSC, Ukrzaliznytsya PJSC, Wog Aero Jet LLC, SE Administration of seaports and many others. The vivid example of success is, for instance, [five appeals from the NABU](#) for the total amount of more than 346.2 million UAH. The court satisfied requirements of the Bureau on the invalidation of agreements between Zaporizhzhyaoblenergo JSC, where 60% of shares belonged to the state, and the private company HC Energomerezha regarding the requirement of the debt for the electricity consumed by large industrial enterprises of Zaporizhzhya region.

Moreover, the President Volodymyr Zelenskyi in his draft law on illicit enrichment and civil forfeiture has even suggested to extend this authority for the NABU and provide the opportunity to send appeals to the court not only regarding agreements, but also appeals on charging the unjustified assets from officials to the state income. Today, this suggestion can not be realized.

What will happen to these agreements and money now?

Firstly, yesterday the norm of NABU law became invalid. And as of today, the NABU has no longer the right to send such appeals to the court and demand the cancellation of even the most absurd and harmful agreements, as well as to be the party in existing cases.

Secondly, this does not mean automatic return of funds to “subjects of schemes”. In order to return money, they need to send appeals to courts against decisions that came into force already in exceptional circumstances. But according to the Law, this is possible only in cases when decisions are not implemented yet. The executed decisions can not be appealed in this way. But it is possible that in practice the insulted parties will send appeals against executed decisions, and will also demand the state to compensate material and non-pecuniary damage. And in these cases, everything will depend on “the reformed Ukrainian courts”.

Thirdly, existing cases could be saved by involving the SAPO prosecutors as the party in the case. Whether courts would involve prosecutors is far from being the fact. And in practice it may not be in the state’s favor, although there are legal grounds for doing so.

Why the Constitutional Court made such decision?

The main argument was the opinion that the Verkhovna Rada of Ukraine, as the legislative body, **unjustifiably granted the NABU authorities that, according to the Constitution of Ukraine, could only be conducted by the Prosecutor’s Office.**

According to the Court, there is the Specialized Anti-Corruption Prosecutor’s Office in Ukraine which should send regarding appeals to courts in cases foreseen by the Law. Instead, the Verkhovna Rada of Ukraine actually duplicated authorities of the Prosecutor’s Office and transferred them to another body without changing the regarding norms in the Constitution of Ukraine, which are the norms of direct action, and which provide Prosecutor’s Office authority to represent interests of the state in some cases.

How justified is the position of the Constitutional Court?

The position of the Constitutional Court is more than questionable. Namely:

Firstly, according to the Constitution, the Prosecutor’s Office really represents the state interest in courts in exceptional cases. But the Prosecutor’s Office is not the only body that could represent interests of the state. The state may be represented by Ministries and other specialized state bodies in cases determined by the Law.

Secondly, the NABU was not delegated the function of representing interests of the state. It was granted only the right to send appeals on the invalidation of agreements, and only in cases determined by the Law. That means that this is about the very narrow and specific amount of appeals that absolutely do not deprive the Prosecutor’s Office of its constitutional right to represent interests of the state in the court. And they do not duplicate authorities of the Prosecutor’s Office, as the Court stated.

Thirdly, the Constitutional Court actually acted as the cassation instance in the private dispute. After all, the assessment of circumstances of the particular case, as well as verification of the correct application of norms of Ukrainian law does not fall within the competence of the Constitutional Court of Ukraine. And before the Constitutional Court has repeatedly denied the complainants due to actual appeal of decisions of other courts.

Thus, the First Senate of the Constitutional Court of Ukraine in February 2019 refused to open the constitutional proceeding in the case regarding nearly similar constitutional appeal of Ukrnafta PJSC, since the applicant actually disagreed with the court’s decisions, which is not the ground for recognizing the

unconstitutionality of the provision of the appealed norm.

Fourth, the mechanism was really effective and worked in favor of the state. Agreements with total amount of millions were declared invalid not by the NABU unilaterally, but by courts after numerous considerations in various instances. And courts themselves have already confirmed the illegality of almost hundred of agreements.

As the result, this is already the second decision of the Constitutional Court, which very sharply and unjustifiably cuts authorities and capabilities of the Bureau – the only law enforcement agency in the history of independence of the country, which managed to investigate the corruption schemes and bring cases of existing top officials to the court.

The number of cases is still considered by the Constitutional Court. The NABU can be completely destroyed with their help. For instance, this is the appeal regarding the constitutionality of authorities to detain corrupt officials, or the appeal that spreads the notorious “amendment of Lozovyi” on cases started before its adoption. The latter might ruin most part of the NABU’s cases. The electronic declaration system is also under the threat. It is appealed by 59 Members of Parliament.

We should recall that:

The complainant in the case was Zaporizhzhya Ferroalloy Plant controlled by Pryvat group of Genadiy Bogolyubov and Ihor Kolomoiskyi.

The ground for the appeal to the Constitutional Court was the appeal filed by the NABU against Zaporizhzhyaoblenergo JSC, Zaporizhzhya Ferroalloy Plant and HC Energomerezha.

*We should recall that grounds for the [appeal](#) were two agreements on the transfer of debt and the agreement on the admission of countervailing homogeneous requirements, on the ground of which the Plant unreasonably transferred its debt to HC Energomerezha which arose for the consumed electricity to Zaporizhzhyaoblenergo for **the amount of about 165 million UAH**. According to results of the consideration of the case, [Kyiv Economic Court of Appeal](#) in November 2017, and later [Economic Court of Cassation of the Supreme Court](#), invalidated the above-mentioned agreements. Therefore, Zaporizhzhya Ferroalloy Plant should return the debt to Zaporizhzhyaoblenergo.*

*In particular, the Ferroalloy Plant in its [appeal](#) stated that the appealed norm **violates the principle of legal certainty** due to the lack of clear legislative mechanism for the implementation of such authorities by the NABU, and, therefore, it does not comply with the Constitution of Ukraine.*