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Combating corruption in Ukraine – awaiting the results

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Systemic corruption has been the dominant problem of an independent Ukraine for more than two decades. The takeover of the state by a political-business group led by Viktor Yanukovich had been one of the principal causes for large-scale street protests during the Revolution of Dignity. Following the 2014 power shift, slogans calling for combating corruption and cleaning up the elites have featured among the most important priorities announced by President Petro Poroshenko and two consecutive prime ministers – Arseniy Yatsenyuk and Volodymyr Groysman. Moreover, the fight against corruption remains the West's main condition to support Ukraine.

It is difficult to make an unambiguous assessment of the achievements of the past three years. The frequently expressed view that the anti-corruption reform has failed cannot be accepted. Complex socio-political processes should not be measured in the short-term perspective. In a legal and institutional sense, much more has been done in the field of combating corruption than over the whole period of Ukraine's independence. On the other hand, the actual results of anti-corruption activities are few in number. The Ukrainian leadership has lost its initial zeal for reform and the parliamentary majority frequently adopts legislation that hampers the fight against corruption. Resistance of a major portion of the political elite and of various interest groups has been increasingly evident. They fear that the anti-corruption reform will disable them from doing business according to former methods. The principal success involves the establishment of two independent institutions: the National Anti-Corruption Bureau of Ukraine (NABU) and the Special Anti-Corruption Prosecutor's Office (SAP). This is accompanied by the systemic involvement of civil society in the fight against corruption. In both 2015 and 2016, drastically low number of court rulings regarding corruption-related crimes did not increase. However, in recent months, for the first time in history, several prominent politicians and officials have been arrested. This has triggered serious concern in influential political and business groups which, in response, have stepped up their efforts to fight independent anti-corruption institutions. Ukraine has neared a critical moment when the first high-ranking officials may be convicted of crimes. However, this is a very uneven fight since it is being waged only by those employees of the anti-corruption institutions, who are ready to break the 'old ties' with support from the international community and non-governmental organisations.

The level of corruption and the first serious investigations

There are various levels of corruption: low-level corruption (related to the everyday life of citizens), corruption at the middle level of govern-

ment, and large-scale political corruption. As far as the latter is concerned, two phenomena are typical of contemporary Ukraine: politicians' dependence on big business, and the sponsoring of political parties by oligarchic groups. It cannot be objectively stated whether corruption

at the middle level of government and large-scale corruption have decreased after the collapse of the Yanukovich regime. The reason behind this is the lack of instruments to measure the phenomenon. The most credible method involves comparing relevant statistics compiled by public order institutions and courts over many years. However, in Ukraine, where the judiciary is inefficient, this makes no sense. The popular Transparency International ranking offers a subjective view on corruption, i.e. how society perceives it. Ukraine is ranked very low on these lists (in 2014 it was ranked 142nd, in 2015 – 133rd and in 2016 – 131st out of 176 countries surveyed), which indicates that corruption remains a paramount social problem.

The Ukrainian leadership has lost its initial zeal for reform and the parliamentary majority frequently adopts legislation that hampers the fight against corruption.

Due to the high level of corruption involving close ties between politics and business, the actual and systemic involvement of the prosecution bodies and the judiciary in the fight against corruption is of fundamental importance for Ukraine. After years of stagnation, the first positive changes are being felt. In recent months, NABU brought serious corruption charges against two active politicians: Roman Nasirov, head of the State Fiscal Service and member of the Petro Poroshenko Bloc was accused of unlawful restructuring of tax arrears, which caused major losses for the state treasury¹. Mykola Martynenko, a prominent activist of the People's Front party was accused of illegally transferring funds from state-controlled mining companies².

¹ For more see T. Iwański, 'Nasirov arrested – a blow against corruption in Ukraine', *OSW Analyses*, 8 March 2017, <https://www.osw.waw.pl/en/publikacje/analyses/2017-03-08/nasirov-arrested-a-blow-against-corruption-ukraine>

² Interfax Ukraina, Суд перенес на 12 мая рассмотрение апелляции прокуратуры на отказ в аресте Мартыненко, 5 May 2017.

It is difficult to assess how grave the evidence gathered by NABU and SAP is or how long the judicial proceedings will take since the case is multilayered and requires comprehensive international assistance. In contrast to earlier investigations by NABU, the two cases involve rather large sums – in the so-called 'Martynenko case' the allegedly stolen sum stands at US\$ 17 million, and in the 'Nasirov case' it was around US\$ 75 million³. NABU has also requested the public prosecutor's office strip three MPs of their immunity. These MPs, Oles Dovgiy, Maksim Polyakov and Boryslav Rozenblat, are suspected of bribing other MPs when adopting laws on amber mining⁴. Two important investigations are still to be closed. Despite the efforts made by anti-corruption bodies, the court refused to strip Mykola Zlochevsky, the former ecology minister, of the gas extraction licences which he had acquired in an illegal manner⁵. The SAP has also failed to collect evidence that would enable it to formulate an indictment against Mikhail Okhendovsky, head of the Central Electoral Committee, suspected of accepting a bribe from the so-called 'black accounts' kept by the Party of Regions⁶.

The National Anti-Corruption Bureau

It was possible to launch investigations targeting high-ranking officials due to the fact that two new independent institutions – the anti-corruption bureau and the anti-corruption prosecutor's office – were finally established at the end of 2015. The process of establishing these institutions took longer than had initially been planned. The reluctance on the part of other law enforcement institutions, system inertia, poor organisation, and budgetary and personnel problems all delayed the reform. The major cause for the delay was pushback from representatives of the political elite and

³ *Ibid.*

⁴ <http://www.pravda.com.ua/news/2017/06/20/7147434/>

⁵ <http://www.epravda.com.ua/news/2017/06/16/626102/>

⁶ https://dt.ua/UKRAINE/sap-pripinila-rozsliduvannya-u-spravi-proti-ohendovskogo-245012_.html

various interest groups uninterested in boosting the independence and the investigative potential of these institutions. This resistance is difficult to analyse precisely. Specific parliamentary caucuses, groups of MPs or even individual MPs have repeatedly attempted to adopt legislation to limit NABU's mandate, for example by introducing the principle that NABU would not be allowed to launch an investigation into a case which the public prosecutor's office has dismissed or closed. Interestingly, these attempts are not being made by MPs from a single caucus, but by MPs representing both the Opposition Bloc (which is the successor of Viktor Yanukovich's Party of Regions) and the ruling parties: the Petro Poroshenko Bloc and People's Front. Amendments to the law on operation and reconnaissance actions, intended to make NABU independent from other state security bodies, are being blocked in parliament. The procedure of selecting the members of NABU's audit committee (which, in line with the adopted legislation, has been authorised to assess NABU's activities and request the president to retain or dismiss the bureau's head) has become fully politicised⁷.

Representatives of the political elite and various interest groups are not interested in boosting the independence and the investigative potential of anti-corruption institutions.

The results of NABU's activities to date (that is, to April 2017) include 319 launched investigations, 178 notifications on suspicion of committing a crime, 91 indictments prepared on the basis of materials compiled by the bureau. The anti-corruption prosecutor's office submitted 57 cases to the courts. According to statistics compiled by NABU, the suspects are: central and local administration officials (25%), managers of state-controlled companies (23%),

judges (14%), high-ranking state officials (9%). Aside from the cases that happened after the Revolution of Dignity, the proceedings also cover corruption-related crimes committed under Yanukovich (they include, for example, the prosecution of individuals involved in the practice of bribing politicians representing specific political parties and those involved in corruption related to parliamentary election fraud). To April 2017, NABU had submitted requests to the Ukrainian courts to seize funds amounting to 2 billion hryvnias (around 70 million euros)⁸.

The great unknowns and the failures

• The public prosecutor's office

Since Yuri Lutsenko, former head of the presidential party's parliamentary caucus, was appointed Attorney General, the public prosecutor's office has been involved in an increasingly heated dispute with NABU over the division of competences. Regardless of the planned reduction of the influence the prosecutor's office has on how NABU proceeds with its investigations and of the fact that the State Investigative Bureau is currently being established, the present Attorney General claims that NABU "should not be monopolising the fight against corruption". He argues that the public prosecutor's office should remain the main investigative body in this field. In August 2016, the investigations carried out by these two institutions against each other culminated in a physical fight between the respective officers, which resulted in them being detained for a short time⁹. In May 2017, the public prosecutor's office launched an investigation targeting Gizo Uglava, deputy head of NABU, a native of Georgia. He was charged with holding dual citizenship when taking his post at NABU, among other offences. NABU rejects these charges and views them

⁷ <http://www.pravda.com.ua/articles/2017/03/17/7138444/>

⁸ http://news.liga.net/interview/politics/14737953artem_sytnik_v_dele_martynenko_nabu_uverenno_idet_k_rezultatu.htm

⁹ For more see P. Żochowski, R. Sadowski, Korupcyjny węzeł gordyjski na Ukrainie, *Analizy OSW*, 24 August 2016, <https://www.osw.waw.pl/pl/publikacje/analizy/2016-08-24/korupcyjny-wezel-gordyjski-na-ukrainie>

as an attempt to discredit Uglava in connection with his actions in the Martynenko case¹⁰. According to Lutsenko, in 2016 the public prosecutor's office submitted more corruption-related cases to the courts than all the authorised bodies¹¹. However, the efficiency of the public prosecutor's office in combating corruption should be assessed as low. Due to the fact that neither the courts nor the public prosecutor's office regularly publish information on the number of opened and closed anti-corruption cases, it is necessary to refer to estimates by independent investigative journalists. According to the Nashi Groshi website, in 2016 nearly 8,000 corruption-related cases were opened. They resulted in a mere 362 individuals receiving final sentences, including five individuals who received prison sentences. In around 40 cases, prison sentences were handed down, albeit not final. It should be noted that the investigations carried out by the public prosecutor's office concerned minor corruption-related crimes and in more serious cases lenient sentences were pronounced¹².

Ukraine's system of combating corruption is beset by negligence in introducing mechanisms for preventing corruption.

After two years of delay, the public prosecutor's office began to investigate cases involving the so-called 'large-scale corruption' from the Yanukovich era. So far, the investigations have not been particularly successful – none of Yanukovich's aides was taken to court over corruption charges. Several major investigations were dismissed due to insufficient evidence or because they had fallen under the statute of limitations. As a consequence, the European Union and Interpol have removed the names of

the individuals involved from the list of people covered by sanctions or the list of wanted individuals. In late February 2017, Ukraine's Supreme Court dismissed the case against Yuri Ivanyushchenko, one of Yanukovich's closest business partners who is considered by society to be a symbol of the corrupt practices of those years. The reason behind this dismissal was the lengthy prosecution process¹³. The final seizure of US\$ 1.4 billion belonging to Yanukovich, frozen on accounts in Oschadbank since 2014, carried out by a court in late April 2017, should be viewed as a success¹⁴. What is astonishing, though, is the legal basis for this seizure and the pace at which it was implemented (it took a mere two weeks).

Assets declarations

Ukraine's system of combating corruption is also beset by negligence in introducing mechanisms for preventing corruption, promoting ethical behaviour and preventing corruption-prone practices (including conflicts of interests). The systemic gathering, verification and public disclosure of the assets declarations of state and local government officials (more than one million individuals) was intended to facilitate these activities. The National Agency for the Prevention of Corruption was the institution responsible for gathering and verifying these declarations. The deadline for submitting the first portion of the declarations by the highest-ranking officials had been repeatedly postponed but was passed in October 2016. There were endless technical problems with the system accepting the declarations. Parliamentarians repeatedly attempted to change the regulations in force and limit the number of categories of individuals obliged to submit their declarations. Finally, in the first round 103,000

¹⁰ <http://www.pravda.com.ua/news/2017/05/24/7144889/>

¹¹ <http://korrespondent.net/ukraine/3760938-lutsenko-o-borbe-s-korruptsyeyi-obschestvo-ne-oschuschaet>

¹² <http://nashigroshi.org/2017/02/23/habari-2016-koho-posadyly-i-za-scho/>

¹³ For more see material by the Anti-Corruption Centre (ANTAC): <https://antac.org.ua/publications/cherez-znyattya-sanktsij-es-z-poplichnyka-yanukovicha-yury-enakijevskoho-ukrajina-vtraty/>

¹⁴ Турчинов объяснил, почему деньги Януковича возвращали через суд, *Ukrainska Pravda*, 28 April 2016.

electronic declarations were submitted and the total value of assets they covered stood at around US\$ 1 billion, the lion's share of which belonged to the president, members of parliament and members of the government¹⁵. The impressive sums stated in the declarations do not necessarily signify corruption. However, they clearly indicate that most Ukrainian politicians and state officials come from business circles. This, in turn, requires the Ukrainian state to apply strict legal and ethical standards to eliminate the risk of conflict of interest when adopting regulations pertaining to the economy.

The courts frequently decide to release corruption suspects from custody, they reduce the required amounts of bail, and the court proceedings are very lengthy.

The deadline in the second round of submitting e-declarations, this time covering middle- and low-level officials, passed on 1 April 2017. Again there were frequent technical failures which disabled the process of submitting the declarations. This time, however, it was not the content of the declarations that attracted the public's attention but the fact that, as a result of competence disputes and the poor efficiency of its work, the National Agency for the Prevention of Corruption was unable to launch the automatic declaration verification system. As a consequence, the agency opened the verification procedure for only 100 declarations out of the 1.1 million which were submitted. Moreover, the agency's conflicted executives are unable to agree on the further course for checking the declarations. Prime minister Groysman even called on the agency's executives to resign¹⁶.

¹⁵ 17 кроків до прозорості: хто заважав, а хто допомагав запровадити е-декларування в Україні Хто і як заважав електронному декларуванню?, *Vox Ukraine*, 2 November 2016, <https://voxukraine.org/2016/11/02/17-steps-for-transparency/>

¹⁶ Корчак спростовує звинувачення у блокуванні перевірки декларацій, *Ukrainska Pravda*, 11 May 2017, <http://www.pravda.com.ua/news/2017/05/11/7143612/>.

The judiciary

The small number of sentences in cases involving corruption charges has been the chief problem which Ukraine has been unable to resolve. Moreover, the courts frequently decide to release corruption suspects from custody, they reduce the required amounts of bail, and the court proceedings are very lengthy. According to data compiled by the Anti-Corruption Centre ANTAC in November 2016, out of 33 cases which NABU submitted to common courts in 2015–2016 a mere six have been opened; in the remaining 27 cases the court has not even set the date of the first hearing¹⁷. This trend illustrates the judges' reluctance to adjudicate in corruption-related cases, especially when the suspects are high-ranking officials.

In September 2016, constitutional amendments came into effect regarding the reform of the judiciary, alongside the law on the judiciary and on the status of judges. These new provisions change the rules of choosing and appointing judges, and introduce a number of anti-corruption instruments. The changes have also increased the independence of judges and strengthened the powers of the main bodies of the judges' self-governing. The changes have impacted the process of eliminating corrupt judges only to a certain extent¹⁸. This means that in the worst case scenario the judiciary will not be rid of individuals who are dependent on political ties or those who have had corruption charges brought against them, and the fact that the judges are practically impossible to remove from their posts will prevent a personnel change and preserve the former mentality.

In this situation, civil society, supported by the international community, has voiced the need

¹⁷ Why Ukraine needs anti-corruption courts?, Anticorruption Centre (ANTAC), November 2016, <https://antac.org.ua/en/publications/why-ukraine-needs-anti-corruption-courts>

¹⁸ The changes mainly covered the bodies of the judges' self-governing council and judges directly involved in trying the participants of Euromaidan. Around 1,000 judges resigned from their posts voluntarily, most probably in connection with the requirement to submit open assets declarations.

to establish a special anti-corruption court of first instance with a very strict procedure of recruiting judges, increased guarantees of independence from external factors, and security guarantees for judges adjudicating in these courts. A special anti-corruption chamber at the Supreme Court could serve as the second instance¹⁹. Theoretically, the new law on the judiciary and on the status of judges provides for such a solution; however, in practice both the Ukrainian leadership and the judges' community are not favourably inclined towards this proposal²⁰. In May 2017, the Judiciary Committee of the Verkhovna Rada stated that according to the latest constitutional amendments the bill on establishing the anti-corruption court may be submitted to parliament only by the president.

The promoters of changes

Civil society's contribution to building the new anti-corruption system is enormous. Representatives of social organisations were able to set the tone of the public debate regarding corruption. Numerous institutional and legal proposals regarding, for example, the anti-corruption court or the introduction of an open system of publishing assets declarations have been inspired by this group²¹. Media and non-governmental activists are also involved in direct actions intended to put pressure on public institutions. For example, a rally was organised by social activists in front of the courthouse in which the judges debated whether to place Roman Nasirov, the head of the State Fiscal Service, under arrest; this was done in order to prevent him from leaving the building. In other

countries this type of pressure on the judiciary would most probably be considered unacceptable. In Ukraine, though, it was welcomed.

Anti-corruption requirements are among the most important conditions of loans and macroeconomic assistance offered to Ukraine.

Actions of this type are treated as the only way to prevent the decisions by judges who yield to political pressure or by corrupt judges, who allow suspects to flee abroad.

The international community is another source of pressure on the Ukrainian leadership. This includes: the European Union, the International Monetary Fund (IMF), the USA, and the governments of specific EU states. Anti-corruption requirements are among the most important conditions of loans and macroeconomic assistance offered to Ukraine. The visa liberalisation plan Ukraine implemented in late 2015 was another instrument to facilitate the changes.

In total, Ukraine has received aid from the EU worth EUR 2.8 billion²². In February 2017, the EU launched a special assistance project intended to support the implementation of an anti-corruption system in Ukraine²³. To date, the IMF has paid out four loan instalments to Ukraine (totalling US\$ 8.4 billion) out of US\$ 17.5 billion agreed in March 2015. In its March 2017 memorandum regarding the payment of the most recent instalment, the IMF pointed to delays in the implementation of anti-corruption obligations. In reaction to this, Ukraine committed itself to appointing an audit committee at NABU by the end of June 2017. NABU was expected to have been granted the right to freely use wire-

¹⁹ For more see Why Ukraine needs..., op. cit.; M. Zhernakov, Independent Anti-corruption Courts in Ukraine: the Missing Link in Anti-Corruption Chain, *International Renaissance Foundation Policy Brief*, February 2017, http://rpr.org.ua/wp-content/uploads/2017/02/Renaissance_A4_3ANTI-CORRUPTION-COURTS-.pdf

²⁰ *Ibid.*

²¹ S. Kudelia, Corruption in Ukraine: Perpetuum Mobile or Endplay of Post-Soviet elites, [in]: H.E. Hale, R. W. Orttung (eds.), *Beyond the Euromaidan. Comparative Perspectives on Advancing Reforms in Ukraine*, Stanford University Press 2016. p. 63; T. de Waal, Fighting the culture of corruption in Ukraine, *Carnegie Europe*, April 2016.

²² EU Commission approves disbursement of €600 million in assistance to Ukraine, *European Commission Press Release*, 16 March 2017.

²³ The EU and Denmark launch Euro 16 million EU Anti-Corruption Initiative in Ukraine, *External Action Service Press Release*, 1 February 2017, https://eeas.europa.eu/19719/eu-and-denmark-launch-euro-16-million-eu-anti-corruption-initiative-ukraine_en

tapping equipment in its actions²⁴ by the end of May 2017, and by mid-June 2017 the Verkhovna Rada was expected to have adopted a law on anti-corruption courts which should begin their work at the end of March 2018 at the latest²⁵. So far, neither of these tasks has been fulfilled.

The future of the fight against corruption in Ukraine

Ukraine has been recording increasing legislative delays in adopting anti-corruption laws. Parliamentarians are in no hurry to adopt a law expanding NABU's operating competences. The cases opened against the former head of the State Fiscal Service and a People's Front activist, alongside the most recent political corruption charges brought against several MPs, have resulted in increased political attacks on the National Anti-Corruption Bureau and accusations involving its alleged abuse of powers. The National Agency for the Prevention of Corruption has been in an organisational deadlock; several members of its collective executive body resigned from their posts in protest against irregularities. In comparison with the previous year, the involvement of President Poroshenko and his administration in supporting the anti-corruption reform has diminished. Poroshenko announced that he would not abandon the

introduced changes regarding the requirement for non-governmental activists to submit open assets declarations. Despite the fact that the legislative initiative regarding the establishment of anti-corruption courts is in his hands, he failed to submit a request to parliament for a quick adoption of the relevant law. Corruption-related accusations are being formulated towards politicians from the Petro Poroshenko Bloc politicians with greater frequency and this has placed the president in a difficult situation. On the one hand, against the backdrop of a dwindling approval rating, he should take a tough stance and support the fight against corruption. On the other hand, strict measures to combat corruption may weaken the consolidation of his party.

The fight against corruption in Ukraine is entering a new phase. For the first time in history anti-corruption investigations have been launched against active politicians and the public has been granted access to information about the assets owned by high-ranking officials. NABU and SAP are improving their operational and investigational skills and may soon be ready to carry out investigations into the most serious corruption cases. The establishment of anti-corruption courts will be of fundamental importance because these courts will be able not only to open proceedings, but also to examine the cases in an independent, substantive and non-lengthy manner. The stakes are very high and therefore further serious attacks on anti-corruption institutions in the immediate future are likely.

²⁴ The former deadline, end of November 2016, has not been kept by Ukraine.

²⁵ Ukraine. Memorandum of Economic and Financial Policies. Attachment to the letter of intent sent to the Managing Director of the IMF on March 2, 2017.

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