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ESTABLISHING THE ANTI-CORRUPTION COURT IN UKRAINE

KEY ISSUES TO SOLVE AND RECOMMENDATIONS BASED ON SLOVAK EXPERIENCE

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INTRODUCTION

The purpose of this paper is to review the concept papers and draft a law on the establishment of the anti-corruption court in Ukraine in light of the international standards and best practices, with special emphasis on the reflection of Slovak experience with the Specialized Criminal Court.

The paper evaluates three concept papers provided by USAID-New Justice Project¹. It also summarizes the main lessons learned during the expert round table held in Kyiv on March 3, 2017, as well as the outcomes of a series of group meetings with the Government of Ukraine and NGO experts.

When appropriate, the paper provides a reference to the Slovak experience with its Special Court and Specialized Criminal Court².

KEY ISSUES TO SOLVE

There are several issues that appear to be crucial in establishing a well functioning anti-corruption court in any transition country, such as the main institutional design of the court, its jurisdiction, structure and size, selection procedures for judges, their qualification requirements and remuneration.

In addition, certain specific issues are being discussed in Ukraine: the role of international experts in the selection of judges, the role of the Public Integrity Council in the process, as well as the appellate framework/cassation system.

JURISDICTION

With regard to the subject-matter jurisdiction, the OSCE concept paper deals sufficiently with the pros and cons of the most probable jurisdiction layout: Entrusting the High Anti-Corruption Court (HAC) with the power to deal with all crimes that fall within the investigative jurisdiction of the National Anti-Corruption Bureau of Ukraine (NABU). This model means that the HAC will also deal with any other offenses committed by high public officials.

In Slovakia, the jurisdiction of the Slovak Specialized Criminal Court (SCC) is defined by the respective offences, which can be divided into following groups:

- Corruption-related offences - active bribery, passive bribery, abuse of power by a public official, deceitful practices in public procurement and public auction
- Organized crime and terrorism - Establishing, masterminding and supporting a criminal or a terrorist group, particularly serious crimes committed by a criminal group or a terrorist group

¹ ANTAC/RPR paper “Specialized Anti-corruption Courts”, the OSCE Concept paper “Draft Law on the High Anti-Corruption Court” and the Draft document titled “Concept on the Creation of the New High Anti-Corruption Court”

² The Special Court was established in 2004, abolished by the Constitutional Court in 2009, and re-established by the Parliament in the same year as the Specialized Criminal Court. For a comprehensive overview of the Slovak court see <http://www.u4.no/publications/specialised-anti-corruption-courts-slovakia/>.

- Economic offenses – when a damage caused reaches at least EUR 6,6 mil. EUR;
- Criminal offenses against financial interests of the European Communities
- Pre-meditated murder
- Other offences - forgery, fraudulent alteration and illicit manufacturing of money and securities and crimes of extremism³.

The jurisdiction of the SCC evolved significantly since its creation in 2004. The original design only covered corruption-related offences and crimes committed by the organized criminal groups. Following the Constitutional Court verdict in 2009 abolishing the Special Court, the jurisdiction of the new SCC was broadened to also include economic criminality and pre-meditated murder. Crimes of extremism were added to SCC portfolio in 2017.

Originally, the Special Court also had personal jurisdiction over all crimes committed by high public officials⁴. This competence was, however, removed after the above mentioned Constitutional Court ruling⁵. The reasoning of the Constitutional Court when dealing with personal competence of the Special Court is not particularly convincing. A vague reference to „personal competence being used in feudal systems“ as an „extraordinary feature of the Special Court“ had a peripheral importance in the verdict, and was quite strongly condemned by the dissenting judges⁶.

The possibility that the personal competence of HAC will be challenged on similar grounds is not particularly high, but cannot be excluded. A thorough comparative constitutional analysis of other courts in the European Union with personal jurisdiction should help to sustain possible pressure⁷.

ORGANIZATIONAL MODEL, SIZE OF THE COURT AND RELATIONS WITH OTHER AUTHORITIES

The OSCE concept paper provides a balanced overview of two organizational models as basis for the HAC. The first one envisioned a number of territorial judicial chambers and the Chamber of Appeals located in Kiev (the maximum number of judges in this model is proposed to be 120 judges). The second model, in which the HAC Court shall consist of the Chamber of Judicial Supervision, chambers (a chamber) serving as a trial court, the Chamber of Appeals as a court of appeal (with the exception of the Chamber of Judicial Supervision all based in Kyiv - the maximum number of judges of the High Anti-Corruption Court shall be 75 judges).

When it comes to size of the court, although the value of the comparison with the Slovak model is limited because of the size of the country and a different jurisdiction of the court, at

³ Such as supporting and promoting groups aimed at suppression of fundamental rights and freedoms; incitement, defamation and threatening to persons because of their affiliation to race, nation, nationality, ethnic group or family origin; manufacturing, dissemination and possession of extremist materials, etc.

⁴ MPs, cabinet ministers, state secretaries, constitutional court justices, judges, prosecutors, president of the Supreme Audit Office, head of the Slovak Intelligence Service, head of the National Security Bureau, etc.

⁵ Although the personal competence of the Special Court had not been the corner stone of the Constitutional Court verdict abolishing the Court, it was mentioned as an „element of an extraordinary court“ which is not consistent with European rule of law standards.

⁶ See the dissenting opinion against the Constitutional Court decision No. PL. ÚS 17/08. The verdict was perceived as extremely controversial and passed by the majority of 7 against 6 Constitutional Court judges.

⁷ Personal competence can be found in jurisdiction of the High Court of Impeachment (Valtakunnanoikeus) in Finland; the Court of Impeachment of the Realm (Rigsretten) in Denmark; the State Tribunal in Poland; etc.

least some interesting numbers can be inferred from the 10 years of the operation of the Slovak SCC and the Special Prosecutor's office:

- The number of judges of the SCC increased gradually, now there are 14 judges dealing with 160-180 charges per year. Between 2005 and 2015, the Special Court/SCC convicted 1107 persons. The judges approved 476 plea bargain agreements and 92 persons were acquitted⁸.
- There are 25 special prosecutors working in the Special Prosecutor's office. In 2015, they dealt with 343 new cases (in 2014 the total number of new cases was 401 and in 2013 it was even more - 442)⁹.
- Comparing the average number of convictions before and after the establishment of the court provides an interesting perspective. Between 1999 and 2003 there were about 23 convictions for corruption offences per year, between 2010 and 2014 the total number of these offences reached 123¹⁰.

We can see that the number of corruption convictions raised significantly over the past decade. On a less positive side, about 48 percent of half of bribery convictions by the SCC after 2012 have involved bribes of EUR 20 or less. The anti-corruption institutions in Slovakia are severely criticized for lack of convictions of high level officials.

The number of cases decreases at the Special Prosecutor's office. The Special Prosecutor is being heavily criticized for not being active enough in prosecuting corruption by the Prosecutor General as well as by the media which claim that the Special Prosecutor himself did not file any charge out of 61 cases he has been personally supervising during the last eight years in the office¹¹. He blames the police for insufficient job at securing evidence during the investigation process¹².

The conclusion is clear – even if one link in the law enforcement chain functions properly, the other may significantly undermine its effectiveness.

APPEALS AND CASSATION

If the police and prosecutor's office are to be blamed for the lack of charges brought before the SCC, another bottleneck lies above the SCC. The appellate body against the SCC verdicts is the Supreme court. As oppose to the judges of the SCC, who were carefully selected from the very beginning as the first-instance judges, the appellate judges served with the Supreme Court for years and the reputation of some of them is sometimes questioned internationally¹³. Therefore, it is important to ensure that judges deciding on all stages will be selected by procedures securing a high level of integrity.

⁸ Email communication from Katarina Kudjakova, spoke person of the SCC, March 28, 2017

⁹ Part part "Special Prosecutor's office" in the "Annual report of the Prosecutor General of the Slovak Republic on the activity of the Prosecutors in 2015", <https://www.genpro.gov.sk/spravy-o-cinnosti/sprava-generalneho-prokuratora-slovenskej-republiky-o-cinnosti-prokuratury-v-roku-2015-a-po-3979.html>

¹⁰ Statistics of the Slovak Ministry of Justice, <https://www.justice.gov.sk/Stranky/Sudy/Statistika-sudy.aspx>, part „Korupčné trestné činy“.

¹¹ <https://spectator.sme.sk/c/20477049/top-scandals-vanish-in-dusan-kovaciks-office.html>

¹² Part "Special Prosecutor's office" in the "Annual report of the Prosecutor General of the Slovak Republic on the activity of the Prosecutors in 2015" <https://www.genpro.gov.sk/spravy-o-cinnosti/sprava-generalneho-prokuratora-slovenskej-republiky-o-cinnosti-prokuratury-v-roku-2015-a-po-3979.html>

¹³ See notes about Stefan Harabin, criminal judge of the Supreme Court and former Supreme Court President in http://www.inpris.pl/fileadmin/user_upload/slovak_judiciary_state_challenges.pdf

However, there is one component in the Slovak criminal system worth to be considered in the Ukrainian criminal procedure system as well. A brief comparison shows that while Slovakia, has 14 strictly defined grounds for a cassation appeal against the second-instance verdict¹⁴, the right to file a cassation appeal in Ukraine is very broad. The OSCE concept paper deals with the possibility of narrowing down the grounds for cassation. The amendments to the procedural codes have been submitted to the Ukrainian Parliament in March 2017 so the cassation in civil, commercial and administrative cases will be less frequent. It is worth to consider similar action in the criminal cases as well.

SELECTION PROCEDURE AND EVALUATION OF PERSONAL REQUIREMENTS

The OSCE concept paper summarizes the main qualification criteria and organization of the selection process for judges in general. High Qualifications Commission of Judges (HQCJ) and the High Council of Justice are in charge of selecting the best candidates for judgeship based on their legal competency level; moral qualities, including the professional ethics; and integrity. The High Qualifications Commission of Judges manages the whole selection, the High Council of Justice shall conduct their final approval and submit proposals on the judicial appointment.

At the same time, the paper refers to an idea of introducing new, specialized bodies for conducting the selection procedure of judges of the High Anti-Corruption Court. The OSCE concept paper rightly points out a question of compliance with the Constitution of Ukraine such model may raise: a special procedure of formation of the HAC may provide grounds to claims challenging the selection, and consequently the court itself, as breaching the unified status of judges in Ukraine.

Also the idea of participation of the representatives of the international community in the selection process, which was proposed in one of the concept papers, needs to be carefully evaluated during the preparatory process. The paper proposes that three members of the selection commission should be nominated by „the Cabinet of Ministers upon positive recommendations from the delegation of countries and organizations who provide international financial assistance to Ukraine“. The Cabinet may not nominate people who did not receive positive recommendations through the above mentioned procedure. Diplomatic institutions nominate either foreigners or Ukrainians. Commission shall need 7 voices for each its decision to be adopted. People backed by international community shall have blocking voices within commission“.

In my opinion, the stronger the foreign involvement, the higher is the risk that the selection procedures or the court itself will be challenged on the basis of breaching the principle of country’s sovereignty. Courts are one of the three state powers. Court’s power to make decisions about citizens originates from the people of that respective polity – the sovereigns. Therefore, a strong foreign involvement in establishing the judicial power may be seen as problematic.

It is clear that the recent experience with foreign participation in selection of individuals for important positions (like the establishment of the NABU or some political nominations) speaks in favor of repeating such model in other selections. However, the situation is different when it involves the courts as the separate, independent state power, and more importantly the judges of the anti-corruption court who are supposed to issue a verdict “In the name of Ukraine” against the country’s elected representatives and high officials.

¹⁴ Slovak Criminal Procedure Code, Law No. 301/2005, Art. 371 par. 1 a) to n)

The motivation for participation of foreigners in the selection process of the HAC judges is obvious: a distrust towards current domestic elites who may fill the new institution with old minds. The international should have a word in designing the process, and may use its diplomacy tools and consultative powers to help to achieve the best possible result. But providing the international community with direct roles in the process of selecting judges (even when it is only candidate's rejection) may end up with a fragile or short-term solution.

Another important component of the selection process is the role of the Public Integrity Council (PIC) - determining compliance of the candidates with the criteria of legal competency, moral qualities and integrity. Involving PIC in the selection process is a very innovative model and some of its features may serve as an inspiration for other transition countries as well. Due its novelty, it is advisable to review the whole mechanism after some time and adjust it as required. In addition, considering serious tasks the members of the PIC are to deal with (including review of candidates publications, analytical materials, speeches, judgments, contacts, etc.) it is advisable that the functioning of the PIC gets appropriate attention in terms of financial compensation of the members (by state). It is hardly imaginable that such work can be conducted pro bono on a long term basis.

With regard to qualitative characteristics of the HAC candidates, the OSCE concept rightly stresses that the main focus should be put on assessment of their competencies and integrity and the importance of the formal requirements should be brought down to a necessary minimum.

Question concerning non-lawyers functioning as judges at the HAC (mainly because of the need of special knowledge about the economic, finances, etc.) should be considered with caution. The court may benefit from the specific knowledge of experts without legal education in another form (court assistants, clerks, experts) instead of appointing lay persons as the HAC judges.

OVERAL CONSTITUTIONAL COMPLIANCE

Article 125 of the Ukrainian constitution stipulates quite precisely which courts are to be established and which are not permitted: "The judiciary system in Ukraine is based on the principles of territoriality and specialization and is defined by the law. Court is established, reorganized and dissolved by law, which draft shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultation with the High Council of Justice. The Supreme Court is the highest court in the system of judiciary in Ukraine. Higher specialized courts may function in accordance with the law. Administrative courts function to protect human rights, freedoms, and interests of a person in the sphere of public law. Establishment of extraordinary and special courts is not permitted."

Various countries designed their judicial systems differently. In the Czech Republic the system of courts is designed as "closed" - all courts are enumerated in the constitution and no other courts can be established. There is no reference to extraordinary and special courts in the Czech Constitution. The system of courts in Slovakia is more open, similarly to Ukraine it gives the establishment of courts into the hands of the legislator and enables creation of other courts. It does not deal with extraordinary or special courts.

The determination of the system of courts and question of extraordinary courts was a decisive argument during the Constitutional Court dispute about the existence of the Slovak Special Court in 2009. Although the Slovak Constitution allows establishing new courts, and there is no reference to extraordinary courts, the Constitutional Court abolished the Special Court because it found certain "hybrid elements" in the court's design, resembling the extraordinary courts.

The main problem was the requirement for every candidate to receive a security clearance certificate issued by the National Security Bureau (NSB). In the original design, a negative conclusion from NSB meant not only a red light for the judge-candidate, but also for sitting judges, because the certificate was to be renewed every five years. Such position of the NSB, as a part of the executive branch, was evaluated as breaching the balance of powers and the independence of the judiciary by the Constitutional Court. Consequently, the security clearances were removed from the process in the new law on the Specialized Criminal Court¹⁵.

RENUMERATION / DISCRIMINATION

One of the issues in the Constitutional Court dispute in Slovakia was the salary of anti-corruption court judges. To attract a sufficient number of qualified candidates for the difficult position, extra bonuses were offered to judges of the Special Court: At the time of the dispute, the judge received his/her salary plus a bonus payment equivalent to 6-times average salary in Slovakia. The Constitutional Court found this difference to be excessive, and the bonus was decreased to the equivalent of 2-times average salary. The Constitutional Court also pronounced that the salary difference between the Special Court's judges and judges of the general courts is discriminatory¹⁶.

The solution designed in the OSCE concept paper to bring the level of HAC judges' remuneration "as close to the level of salaries of judges of the Supreme Court as possible" seems proportionate.

CONCLUSIONS AND RECOMMENDATIONS

The Slovak experience shows two major lessons learned:

Firstly, a potential risk of legal attacks against the Slovak Special Court weren't properly evaluated at the initial stage. A few organizational adjustments would, with a high level of probability, help the Special Court to sustain its operation without its legitimacy being questioned by the Constitutional Court.

Secondly, it is of utmost importance that proper operation is secured throughout the entire law enforcement chain. While the Specialized Criminal Court operates efficiently and its integrity is not questioned, the other authorities involved in prosecuting corruption do not deserve a positive assessment in any aspect. Within the police, loyalty towards the political expectations is valued the most. Therefore, this job is not attractive for people who want to

¹⁵ Another change was implemented by the Constitutional Amendment in 2014. A modified version of the security clearances was re-introduced, a narrower scope of information is collected on the sitting judges as well as judge-candidates, and the power of the NSB was modified as well: The NSB only provides a review of the candidate but the final decision is made by the Judicial Council. The law determining details of the new clearance procedure was immediately challenged and the Constitutional Court now evaluates its constitutional compliance. The Constitutional Court also suspended temporarily the clearances for sitting judges, the review of the judge-candidates remained in place.

¹⁶ The discrimination argument was later used by more than 700 judges (out of 1300) which sued the state and demanded EUR 100 000 as a compensation of non-material damages caused by the bonus awarded to the Special Court judges. Although a few judges were successful, the vast majority of the complaints were withdrawn or rejected. The fact that judges, who filed discrimination claims themselves were deciding identical cases of their colleagues, was perceived as extremely controversial and further decreased the level of public trust in the judiciary.

work independently and several senior investigators responsible for high level cases left the police corps, pointing out serious obstacles created by their superiors or the Special Prosecutor's office ¹⁷. Lack of leadership at the Special Prosecutor's office is notoriously known. On the appellate level, many unpredictable and poorly reasoned decisions of the Supreme Court led to perpetrators being acquitted regardless of the strong evidence. The final result – a widely perceived culture of impunity - has a devastating effect on the whole state, and further discourages the citizens from reporting corruption in the future.

The situation seems to be different in Ukraine in certain aspects, particularly on the level of the police. To complete the entire chain, the establishment of HAC seems a logical and suitable step. For it to work properly, it is important to:

- Importance of good preparation cannot be stressed enough
- Identify major risks of potential legal challenges during the design phase
- Make appropriate adjustment during the preparation to minimize these risks. When a legitimate issue is raised, questioning the constitutionality of the proposed measure, it makes sense to choose a safer solution.
- Constantly evaluate the operation of the whole chain (Police-Prosecution-Courts). Make all measures possible to prevent information leaks from the investigation authorities, prosecutors and judges (especially, but not only, with regard to wire-tapping).
- Ensure integrity of people in all crucial positions through an open, transparent, and merit-based selection process. The role of the international experts should be balanced with the principle of sovereignty.
- Build a wide public and expert support for functioning of the anti-corruption institutions. Their success or failure depends not only on their design and integrity, but also on the people who will either report corruption cases and undergo the painful role of whistleblowers or witnesses, or will decide to spare themselves the troubles and resign.

¹⁷ See <https://spectator.sme.sk/c/20487727/ex-policeman-raids-at-basternak-were-suspicious.html> or <https://spectator.sme.sk/c/20369734/interior-minister-ignored-investigator-who-left-gorilla-case.html>