

## Specialized Anti-corruption Courts

### Purpose and general idea

Following the conditionalities of international aid, including that from IMF, Ukraine established new institutional framework for prevention and investigation of top corruption. National Anti-Corruption Bureau already filed several cases to courts and finalizes more complicated cases. Now effectiveness of new anti-corruption institutions depends from courts.

Unfortunately, presently courts not only fail to punish top officials following NABU investigations, but also block NABU's investigations. Since February 2016 more than 30 cases were filed to courts. As of beginning of September 2016 only 6 NABU cases were considered (of which 5 are those where suspects recognized themselves guilty), while remaining cases are still waiting for hearings to start.

Courts use every opportunity to block NABU investigations. Since NABU is legally obliged to receive court warrants on number of investigative activities to collect evidences, courts have powerful tools to undermine cases of NABU even before they are submitted to courts. Below are just few examples.

On July 13th Appeal court of Ukraine restored on position K. Kylik, military prosecutor of Prosecutor's general office, suspected by NABU in illicit enrichment. Earlier before Solomiansky district court followed NABU request and removed Kylik from his position in order to prevent him from influencing the investigation against him. However, Appeal Court of Kyiv restored Kylik on his position, disregarding NABU's evidences that Kylik have continuously attempted to influence the investigation (NABU presented results of intersection of Kylik's communications, which included his requests to help him "solve the issue").

On February 23 Solomiansky district court refused NABU in access to files from the cell phone of assistant to the influential MP Granovsky. NABU took this phone during search in the case regarding embezzlement of funds in Odessa portside plant. Despite NABU's claims that information from that phone may help to investigate further transactions with money embezzled through the plant, the court prohibited NABU to receive information from the phone.

Courts create opportunities for NABU suspects to escape from prosecution. When NABU files requests for detention of well-connected suspects, courts frequently establish small bails that are incompatible with gain the suspect achieved through corruption. Therefore, suspect receives an opportunity to pay an easy pledge and leave the county.

In such a situation new anticorruption institutions will fail to deliver results in the form of putting corrupt officials into jail and recovering assets that were stolen from the state. If new anticorruption institutions are thus left fruitless, political leadership will receive much wanted pretext to intervene or even close down NABU and SAP.

Therefore, corrupt courts will not only account for failed punishments for corrupt public officials, but also may bring about general backsliding in anti-corruption policies in Ukraine.

To prevent this scenario, it is necessary to create special anticorruption courts to consider cases of top corruption. Judges for these courts should be selected transparently, apart from existing system of selection of judges and with participation of representatives of international partners of Ukraine.

### Relation to judicial reform

Upcoming judicial reform in Ukraine will take another three to five years. On the first stage only the Supreme Court of Ukraine is rebooted. First instance courts, where cases of NABU are stuck, are not yet rebooted.

New judges are going to be selected by judges of regime of Yanykovych, who are used to implementing political requests. Bodies that are now in charge of selection of judges did not undergo any significant renewal in membership.

In last two years these bodies continuously failed to perform effective filtering of judicial system.

For example, the High Qualification Commission of Judges secured positions for 8 out of 10 judges, on who National Anticorruption Bureau of Ukraine gave information on signs of illicit enrichment or fraud in asset declarations.

The Highest Council of Justice have numerously secured positions for judges, who unlawfully ruled against participants of the Revolution of Dignity. As of beginning of 2017, the Council the Council ignored 70% of disciplinary claims against such judges, and 35-40% of opened disciplinary cases did not lead to any disciplinary measures against judges involved.

Recently the Highest Council of Justice failed to filter even itself by refusing to temporary remove from office its member P. Hrechivskiy, who is suspected in receiving bribes for influencing judicial decisions.

Therefore, past decisions of these bodies create grounds for doubts in their capacity to select new judges in politically impartial manner.

### Jurisdiction of anti-corruption courts

Cases under investigative jurisdiction of National Anti-Corruption Bureau.

### Anti-corruption court chambers within judicial system of Ukraine

Anti-corruption investigative judges (sanction investigative activities that need special legal permits)	First instance	Highest Anticorruption Court
	Second instance (appeals)	Anticorruption Chamber within Criminal Court within the Supreme Court of Ukraine
Hearings on cases of corruption	First instance	Highest Anticorruption Court
	Second instance (appeals)	Anticorruption Chamber within Criminal Court within the Supreme Court of Ukraine

*NB: One judge must not act as an investigative judge and a judge regarding the same case.*



## Legal framework

Establishment of anti-corruption court chambers is possible within the framework of effective Constitution of Ukraine. The concept shall be implemented through special law on anticorruption courts without amendment of either the Constitution or the Law on Judicial System.

## Selection of anti-corruption judges: general provisions and criteria

Anticorruption judges of all instances should be selected by a special selection commission that shall act as additional filter in existing procedure of selection of judges.

The President and the Parliament shall delegate three members of the commission each. Three members should be nominated by the Cabinet of Ministers upon positive recommendations from the delegation countries and organizations who provide international financial assistance to Ukraine. Requests for such recommendations shall be filed by the Ministry of Justice and the Ministry shall also file list of proposed candidates for consideration of the Cabinet. The Cabinet may not nominate people who did not receive positive recommendations through the above mentioned procedure. Diplomatic institutions either 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.

People with or without previous experience as a judge shall be eligible to apply for positions of anticorruption judges.

Selection criteria:

- Righteousness – candidates should pass special scrutiny on whether they have unjustified assets and whether their way of living corresponds their declared incomes. Information shall be collected by National Agency for Prevention of Corruption, National Anti-Corruption Bureau and ARO-AMO. This information should be provided to and evaluated by the selection commission.
- Proficiency – candidates shall pass special test on criminal legislation, anti-corruption legislation and general skills. Quality of previous rulings of judges should be checked (whether the judges made politically-motivated rulings, whether and how many of his previous rulings were cancelled by higher courts or European Court of Human Rights). Both test and assessment of previous rulings should be organized by existing qualification commission of judges, but final consideration of this information should be within mandate of the commission.
- Motivation - candidates should pass value motivation test and interview with selection commission.

Based on the information listed above contest commission preselects judges as well as decides on exact position (High Anticorruption Court or the Anticorruption Appeal Chamber) for each of selected judges.

**High Qualification Commission of Judges adopts list of candidates for anticorruption judges based on decision of the selection commission. Qualification commission of judges can veto, but no add candidates to the list.**

**Qualification commission of Judges then passes its decision on candidates for anticorruption judges to High Council of Justice, which also can veto some candidates. High Council of Judges submits list candidates to the President for appointment.**



### Special guarantees for anti-corruption judges

Wages and social security guarantees	<ul style="list-style-type: none"> <li>Wages equal to that of the judges of the Supreme Court of Ukraine (for all anticorruption judges)</li> </ul>
Additional guarantees of independence and non-disclosure	<ul style="list-style-type: none"> <li>Separate premises for both High Anticorruption court and anticorruption chamber within Criminal Court within Supreme Court of Ukraine</li> <li>Amount of funding for both the court and the chamber are to be established directly in the law on state budget</li> <li>Anti-corruption court and chamber should be resources with their own administrative staff. Head of administrative units of both the court and the chamber are to be selected by the same selection commission as anticorruption judges. Staff members should be appointed with participation of anticorruption judges.</li> </ul>
Personal and family security	<ul style="list-style-type: none"> <li>24/7 guards for a judge and his family members as well as for his residence;</li> <li>Possibility for moving abroad in case if a judge of his family members are under threat.</li> </ul>

### Relevant international practices

In terms of the structure of anticorruption judicial institutions offered concept relies on the best international practices. In most countries where anticorruption judicial institutions are established, there function single anticorruption first instance courts with appeals going directly to the supreme courts and with no casation provided. This model is applied in Slovakia, Croatia, as well as in Burundi, Cameroon, Nepal, Pakistan, Senegal.

The notion of special selection procedure for anticorruption judges relies on the experience from Indonesia. There anticorruption judges are selected by special selection panel with representatives of the civil society, not by bodies that select regular judges.