

Ukraine: attempted attack on anti-corruption bodies?

Piotr Żochowski, Sławomir Matuszak, Tadeusz Iwański

The high susceptibility of Ukrainian officials to corruption has been one factor affecting the condition of the Ukrainian state. Since 2014, the government has managed to create several anti-corruption institutions whose independence from the executive is one of the main conditions for Ukraine to continue receiving financial assistance from the West. Over the past year, this system has become more robust, and the first sentences were issued in cases involving state officials caught up in corruption schemes. However, despite President Volodymyr Zelensky's declared determination to combat corruption among state officials, recent months have seen measures that may weaken the key institutions established to combat corruption; this would be tantamount to reversing reforms in this field. These actions have been initiated by politicians and oligarchs intending to make the fight against corruption less effective. This has triggered major concern from Western donors (who are responding to this by threatening to halt financial support and to suspend the visa-free regime) and from Ukrainian civil society.

The Ukrainian "anti-corruption trio"

In Ukraine, efforts to build a system of institutions to combat corruption among state officials lasted five years. In May 2019, President Zelensky's administration 'inherited' the system of bodies tasked with combating corruption among state officials. It had been created during Petro Poroshenko's presidency in response to pressure from Western lenders and Ukrainian activists. Back in April 2015, the National Anti-Corruption Bureau of Ukraine (NABU) was established as a special service to combat this type of crime within the state administration. In order to boost the effectiveness of this institution, in December 2015 the Special Anti-Corruption Prosecutor's Office (SAP)

was established to draw up indictments on the basis of evidence compiled and provided by NABU, and to bring them before court.

To ensure the independence of anti-corruption institutions, a special procedure for selecting their heads was adopted (by an open competition in which only individuals with an untarnished reputation can participate) and a provision was enacted to prevent them from being quickly dismissed on political grounds. For four years, the effectiveness of NABU and SAP was minor because their indictments were filed with unreformed and corrupt common courts. To improve the situation, the High Anti-Corruption Court of Ukraine (HACC) was created. Although the law came into effect



in June 2018, until autumn 2019 the operation of this body was disrupted due to the fact that all corruption indictments, regardless of their substance, were filed with this court and this prevented it from examining the most important cases in an efficient manner.

Streamlining the anti-corruption system

Streamlining the operation of HACC was an unquestioned success for President Zelensky, which he achieved at the beginning of his term. He did this by issuing a decision that NABU and SAP should only file indictments regarding corruption among senior state officials with this court. The remaining cases were to be examined by the relevant departments of the public prosecutor's office. Another presidential initiative intended to streamline the system built to combat corruption involved enacting the law in autumn 2019 to regulate the legal status of individuals who report information on corruption-related crimes. In this law, these individuals are referred to as "exposers" (whistle-blowers). Whenever they are involved in the practice they intend to report, they are absolved of criminal responsibility. Individuals who report a corruption-related crime in which they were not personally involved will receive 10% of the value of funds recovered by the state. In addition, the law authorised NABU to independently use surveillance techniques (wire-tapping, visual surveillance) without having to apply to the Security Service of Ukraine (SBU) for permission. President Poroshenko's administration had successfully blocked the introduction of these measures for several years.

However, resistance from numerous political groups, officials at various echelons and business circles continues to be an obstacle to the smooth operation of anti-corruption institutions. These groups are accustomed to creating and using mechanisms that help them obtain favourable administrative decisions. Oligarchs and the representatives of the political elite associated with them are particularly interested in undermining the effectiveness of the bodies established to

combat abuse. They fear that, once the anti-corruption system becomes more robust, it will make it difficult for them to continue their corrupt practices at the interface of big business and the state administration.

Anti-corruption bodies under fire

In September 2020, one event that triggered a critical reaction from the Western countries and civil society organisations which monitor the course of reforms in Ukraine involved the Ukrainian parliament electing seven out of the eleven members of the selection committee formed to nominate a candidate for the head of SAP. This post has remained vacant since August 2020, when Nazar Holodnitsky resigned due to his conflict with the Prosecutor General. The line-up of the committee has raised concerns from anti-corruption activists, a portion of the opposition, and of the West. These groups of critics argue that committee members were recruited taking into account their party membership and that they failed to fully meet the criteria of professionalism and integrity. This in turn offers no guarantee that their attitude during the selection committee's work will not be biased, which may result in an individual susceptible to pressure from politicians being selected as the head of SAP.

” Oligarchs and the representatives of the political elite associated with them are particularly interested in undermining the effectiveness of the bodies established to combat corruption.

In addition, on 16 September the Constitutional Court of Ukraine ruled that some provisions of the law on NABU are unconstitutional. The ruling stated that the president's powers authorising him to establish NABU and to appoint and dismiss its head have not been defined in the Basic Law. This was another ruling by the Constitutional Court in which the court requested the Verkhovna Rada to prepare and enact a new law on the National Anti-Corruption Bureau. In the previous ruling, issued on 28 August, the court considered that

Artyom Sytnik had been unconstitutionally appointed (by President Poroshenko) to his position as head of NABU. There is a risk that the new wording of the law will contain provisions which will make the National Anti-Corruption Bureau and its head more vulnerable to political pressure. The Constitutional Court has obligated the MPs to enact this new law within three months.

” Attempts to undermine the constitutionality of anti-corruption bodies result from mistakes made during the legislative process.

The initiators of the most recent motion to the Constitutional Court included fifty MPs from the Servant of the People parliamentary group¹. This group has been associated with oligarch Ihor Kolomoysky, and representatives of the pro-Russian Opposition Platform – For Life (whose leaders include Viktor Medvedchuk, a politician with close political and business ties with Russia). It seems that this tactical alliance of MPs representing the two parliamentary groupings is based on the similar intentions of both sides. Medvedchuk is mainly interested in supporting activities that could potentially trigger a political crisis in Ukraine and in Ukraine’s relations with the West, and in undermining the president’s position. In recent months, Kolomoysky (who is the subject of an FBI investigation into money laundering in the US) has publicly expressed *de facto* pro-Russian views by calling for Ukraine to break off its cooperation with the IMF and to declare insolvency. The MPs associated with Kolomoysky support the activities intended to reduce the effectiveness of the anti-corruption system. It seems that their main goal is to pressurise the Servant of the People (which is at present ruling the country independently) into establishing a formal coalition with the For the Future parliamentary group (which Kolomoysky controls) and to install its representatives in the government.

¹ The parliamentary representation of the Servant of the People is highly diverse. It includes MPs representing various interest groups, including oligarchic interest groups. This results, for example, from the fact that, ahead of the 2019 parliamentary elections, the electoral lists were compiled in an ad hoc manner.

Another development suggesting that a coordinated attack on the system of anti-corruption institutions has been launched to disrupt their operation involved an attempt to challenge the constitutionality of the operation of HACC. On 22 July 2020, 49 MPs (representing Medvedchuk’s grouping and the For the Future grouping) filed a motion regarding this claim. The arguments presented in the motion suggest that HACC was established in a manner which seriously violates the principles of the judicial system defined in the Ukrainian constitution.

The anti-corruption system in a legal trap

The practice of bringing motions to the Constitutional Court in an attempt to disrupt the operation of the system of anti-corruption institutions is a consequence of mistakes made back when the subsequent versions of the wording of the laws were being debated in parliament. Back then, insufficient effort was made to ensure that the new provisions were consistent with the constitution. This is why the rulings of the Constitutional Court in the NABU case do not give rise to legal doubts, and the problematic issue of the constitutional empowerment of the president to appoint and dismiss the head of this institution had already been raised. In autumn 2019, President Zelensky himself made an attempt to amend the provisions of the constitution to clarify his powers regarding NABU. However, his proposal failed to garner the required parliamentary majority (300 MPs), and it was rejected by almost the entire opposition due to MPs’ fear that the presidential centre of power intends to take over supervision of this institution.

Alongside this, the ruling of the Constitutional Court, which paves the way for enacting a new law on NABU, triggers the risk that this independent institution may become a body subordinate to the executive, and that the Verkhovna Rada may gain greater control of its operation. At present, it is difficult to quickly dismiss the head of NABU for political grounds. This can happen at the request of a third of MPs – for example following a legally valid judgement stating that the head

of NABU has committed a crime or in the wake of a negative assessment of his work arising from an independent audit to evaluate NABU's operation. However, the provisions of the new law may weaken the position of the head of NABU, for example by expanding the list of instances in which the institution's head could be dismissed. This in turn would make this person more susceptible to influence exerted by politicians.

The last year has seen an increase in the effectiveness of the anti-corruption system. This is evident in the rulings issued by HACC. They concerned 16 crimes committed, for example by judges (accepting a bribe in exchange for issuing a specific ruling), former MPs (tax fraud) and managers of large industrial plants (money laundering and the theft of company property). Only one acquittal was pronounced. In addition, lawsuits against the incumbent mayor of Odessa, Gennadiy Trukhanov, and Mykola Martynenko (a senior figure of the National Front party and who had been a member of the ruling coalition back in 2014–2019) are pending. Possible convictions of such prominent representatives of the Ukrainian elite would be unprecedented. Thus far, several important politicians have been detained. However, they have always ultimately managed to avoid a prison sentence.

The activity of NABU and SAP has triggered concern on the part of several Ukrainian oligarchs who argue, not without reason, that investigations carried out by these bodies pose a threat to their interests. These investigations concern, for example, an attempt by Hryhory and Ihor Surkis to receive unjustified compensation for lost assets in PrivatBank, and their alleged attempts to bribe the judges.² The case questioning the legality of Ukraine adopting the so-called Rotterdam+ formula in 2016 has a similar context. This formula involved a plan to increase the price of coal used to produce energy by tying it to the API-2 index (its price at the Port of Rotterdam). Beneficiaries

of the application of this formula included the oligarch Rinat Akhmetov and, according to media reports,³ the then President Petro Poroshenko. NABU estimated the losses suffered by the state treasury at 39 billion hryvnias (around US\$ 1.4 billion).⁴ Actions carried out by NABU regarding these cases are being hampered by the General Public Prosecutor's Office and by the SBU, which are using procedural pretexts to postpone taking them to court.

An ambivalent reaction from the president...

In official statements, President Zelensky assures the public that he is ready to continue the fight against corruption and to maintain the conditions that guarantee the stable operation of the institutions established to counteract such practices. Although there is no direct evidence that the president or his collaborators are behind the attempts to undermine the anti-corruption system, there are certain indications that this may be the case. The president's insignificant support for the independence of anti-corruption institutions, alongside his failure to offer a critical response to recent measures by MPs, are noteworthy. In addition, he has failed to take a clear stance regarding the direction of legislative changes intended to guarantee transparent rules for the selection of candidates for senior positions.

” The president's rhetoric is characterised by insignificant support for the independence of anti-corruption institutions and by the absence of criticism regarding actions carried out by MPs.

This may suggest that the President's Office intends to use the attack launched by Medvedchuk's and Kolomoysky's groupings to replace the heads of these institutions, with ones loyal to the pres-

² 'Суркисы vs Приватбанк: НАБУ открыло дело из-за попыток завладеть имуществом банка', *Экономическая правда*, 8 September 2020, www.epravda.com.ua.

³ И. Верстюк, 'Формула успеха: Зачем Ахметов и Порошенко придумали Роттердам плюс — расследование', *НВ*, 2 June 2017, www.nv.ua.

⁴ С. Головнюк, 'Чи будуть засуджені організатори «Роттердам плюс»', *Бизнес Цензор*, 3 August 2020, biz.censor.net.

ident. In order to achieve this, it cites the need to amend the legislation regarding NABU and to ensure the rotation of officials holding the office of head of SAP. The president's motivation was similar in March 2020, when Prosecutor General Ruslan Riaboshapka was dismissed. He openly objected to pressure from the President's Office requesting him to launch criminal proceedings against Petro Poroshenko, arguing that there was insufficient evidence to do so. He was replaced with Iryna Venediktova who is more loyal to President Zelensky.

...and unambivalent reactions from the international community

The possibility of introducing unfavourable changes to the system of institutions established to combat corruption has exposed the Ukrainian leadership to criticism from the West. Ambassadors of the G7 countries issued a statement⁵ underscoring the need to maintain the independence of the structure of anti-corruption bodies and pointed out that this is a necessary condition for Ukraine to continue to receive financial support. Alongside this, following his visit to Ukraine, on 22 September the EU's High Representative for Foreign Affairs and Security Policy, Josep Borrell, emphasised the importance of transparent and politically neutral procedures for the selection of new heads of anti-corruption institutions in the context of continued cooperation between Kyiv and Brussels. On 5 October, an open letter from a group of MEPs to Davyd Arakhamia, the head of the Servant of the People parliamentary group, was published. In their letter, the MEPs warned that the EU may view the issue of the selection of the head of SAP and the situation around NABU as grounds for suspending its financial support to Ukraine. In addition, they announced that the visa-free regime may be suspended for selected oligarchs and policy makers.⁶

The crisis around NABU and SAP is one of several reasons for the IMF to withhold its financial assistance to Ukraine. The stand-by loan programme agreed in June 2020 envisaged a credit line worth a total of US\$ 5 billion spread over 18 months.⁷ Having received the first loan instalment worth US\$ 2.1 billion, in June 2020 the government in Kyiv brought about a change in the line-up of the executive body of the National Bank of Ukraine, whose independence is among the most fundamental issues for the IMF. Another fact that raised the IMF's concern involved the court ruling in favour of the Surkis brothers in the case concerning PrivatBank compensation. Although the Supreme Court invalidated this ruling, a number of similar cases are still pending in Ukraine's common courts. The *de facto* suspension (albeit not breaking off) of Ukraine's cooperation with the IMF is tantamount to freezing the payments by other donors, in particular the EU (an instalment of macro-financial assistance worth 600 million euros), and the loans from the World Bank (US\$ 1 billion). Although the situation in Ukraine is not as difficult as it was back in 2014–2015, the crisis caused by the COVID-19 pandemic has triggered a recession in the first half of 2020 (-6.5% of GDP) and an increased demand for external funding.

” For Ukraine, halting its cooperation with the IMF is tantamount to freezing the payments from other donors, including the EU, and the loans from the World Bank.

For the time being, the announced possible suspension of the visa-free regime should be viewed as a warning. Borrell's statements suggest that Brussels may decide to launch this procedure only if it is convinced that the Ukrainian authorities are deliberately dismantling the anti-corruption system.⁸ A joint statement issued by the EU and Ukraine following the 6 October summit in Brus-

⁵ 'Посли G7 оприлюднили заяву щодо ситуації довкола обрання нового керівника САП', *Європейська правда*, 3 September 2020, www.eurointegration.com.ua.

⁶ V. von Cramon, M. Gahler, R. Juknevičienė, 'Open Letter to Arakhamia – Head of Sluha Narodu', 5 October 2020, www.violavoncramon.eu.

⁷ S. Matuszak, 'Nowe porozumienie Ukrainy z Międzynarodowym Funduszem Walutowym', *OSW*, 10 June 2020, www.osw.waw.pl.

⁸ С. Сидоренко, 'Візит із натяком на безвіз: що сказав і про що промовчав у Києві шеф дипломатії ЄС', *Європейська правда*, 23 September 2020, www.eurointegration.com.ua.

sels is similar in tone.⁹ The open letter from MEPs, for its part, only mentions oligarchs and policy makers who hamper the effective fight against corruption. The possible suspension of the visa-free regime would have highly negative social consequences because most economic migrants from Ukraine travel to the EU (to Poland in particular), thus taking advantage of visa-free movement. It would also have a major negative impact on the government's approval rating and would be tantamount to eliminating one of Ukraine's greatest achievements on its way to European integration. In addition, a decline in remittances sent from abroad would pose a serious problem to Ukraine's balance of payments (in 2019 the value of these remittances stood at US\$ 12 billion).

President Zelensky's anti-corruption dilemmas

The fight against corruption is among the most important tests for Zelensky's presidency. On the one hand, his major involvement in this fight could help to reverse or at least to slow down a trend spelling a decline in his approval rating. In public opinion polls, the respondents point to corruption as the problem which has the strongest impact on Ukraine's unfavourable domestic situation.¹⁰ On the other hand, the fight against

corruption will undoubtedly aggravate the conflict with oligarchs, a portion of the political elite and officials at various echelons, which may trigger a serious crisis of state.

The present attempt to weaken NABU and SAP is proof of the effectiveness of these institution's operations which pose a direct threat to the interests of oligarchs and senior state officials. However, the role of the president in this process is unclear. Unlike his predecessor, President Zelensky has not been accused of reaping benefits from corruption. However, his failure – whether deliberate or not – to carry out decisive actions is making the risk that anti-corruption bodies may lose their independence all the more likely. The shift in the president's attitude towards anti-corruption bodies which has been evident over the last year is also symptomatic. While in the first months after taking office he gave these institutions a free hand and only demanded that they should be effective, since spring 2020 he has distanced himself from them, in particular from actions carried out by NABU.

At present, it is difficult to determine whether the current status of NABU and SAP will be undermined. The main factors preventing this are the tough stance of the West and Kyiv's dependence on external financial support. Although at present Ukraine has large currency reserves (US\$ 29 billion), it also faces the need to repay its previous loans,¹¹ and it will only be able to avoid insolvency if it continues its financial cooperation with the West.

⁹ Joint statement following the 22nd EU-Ukraine Summit, 6 October 2020, The European Council, 6 October 2020, www.consilium.europa.eu.

¹⁰ In a poll conducted by the Sociological Group "Rating" published on 7 September 2020, 48% of the respondents said that corruption is Ukraine's most serious problem. It was followed by the war in the east of the country (43%). Since 2015, the results of most polls conducted in Ukraine have been similar. 'Опитування IRI: Суспільно-політичні погляди в Україні', Рейтинг, 7 September 2020, www.ratinggroup.ua.

¹¹ According to information provided by the Ministry of Finance, by the end of 2020 Ukraine is obliged to pay 87 billion hryvnias (US\$ 3.1 billion), and in 2021 421 billion hryvnias (US\$ 15 billion).