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## High Anti-Corruption Court of Ukraine: the peculiarities of establishment and the first results

### Антикорупційний суд в Україні: особливості становлення та перші результати діяльності

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Written by:

**Oleksii Drozd**<sup>84</sup>

ORCID ID: 0000-0002-4514-6594

**Yaroslav Nykytiuk**<sup>85</sup>

ORCID ID: 0000-0001-6187-2302

**Liliia Dorofeieva**<sup>86</sup>

ORCID ID: 0000-0002-0585-5927

**Olha Andriiko**<sup>87</sup>

ORCID ID 0000-0002-7507-3090

**Serhii Sabluk**<sup>88</sup>

ORCID ID: 0000-0001-5055-9169

#### Abstract

The purpose of the article is to analyze the peculiarities of establishment of the High Anti-Corruption Court of Ukraine (НАСС) and to consider the first results of its work. Methodology. Thus, the analysis and synthesis method as well as the logical method were used to formulate a holistic view on corruption and its features, as well as the ways, in which it can be manifested. The logical-semantic method was used to establish the meaning of the term "corruption". The historical method was useful in studying the history of the establishment of the НАСС. The comparative method was used when analyzing Ukrainian legal acts, which regulate the issue under consideration, as well as scientific views on the topic. The system and structural method was applied to determine the institutional features of the НАСС. The method of systematic analysis made it possible to identify the operational characteristics of this agency. The legal modeling method was helpful in drawing conclusions of the research. The results of the study. The high level of corruption of Ukraine has led to the need to find the ways to

#### Анотація

Метою статті є аналіз особливостей становлення та перші результати роботи Вищого антикорупційного суду України (ВАКС). Методологія. Методи дослідження були обрані виходячи з об'єкта, предмета та мети дослідження. У дослідженні використовувалися загальнонаукові та спеціальні методи юридичної науки. Так, метод аналізу та синтезу, а також логічний метод застосовані для формування цілісного погляду на корупцію та її особливості, а також способи її прояву. Логіко-семантичний метод був використаний для встановлення значення терміна «корупція». Історичний метод допоміг вивчити історію створення ВАКС. Порівняльний метод застосовувався при аналізі нормативно-правових актів України, які регулюють питання, що розглядаються, а також при аналізі наукових поглядів на цю проблему. Системно-структурний метод використовувався для встановлення організаційних особливостей ВАКС. Метод систематичного аналізу дозволив вивчити функціональні характеристики цього

<sup>84</sup> Doctor of Law, Associate Professor, Head of the Department of Doctorate and Post-graduate Studies of the National Academy of Internal Affairs, Ukraine.

<sup>85</sup> Postgraduate Student of Police Law Department of the National Academy of Internal Affairs, Ukraine.

<sup>86</sup> Doctor of Law, Associate Professor, Professor of the Department of Administrative, Financial and Information Law of Uzhhorod National University, Ukraine.

<sup>87</sup> Doctor of Law, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine, Head of the Department of Public Administration and Administrative Law of the Institute of State and Law of National Academy of Sciences of Ukraine, Ukraine.

<sup>88</sup> PhD in Law, Chief Scientific Officer of the Scientific Institute of Public Law, Ukraine.

counteract it. To that end, the system of bodies of pre-trial investigation and prosecution of high-ranking officials for corruption offenses has been created over the last three years. The establishment of the HACC was the final stage of this reform. Practical implications. Since the international experience in establishing anti-corruption courts is quite controversial, it was found that many scholars are skeptical about the ability of the HACC to reduce corruption in Ukraine. So, the list of arguments for and against the operation of HACC in Ukraine was comprehensively reviewed. Value / originality. As a result of the research, the authors identified both the shortcomings and the benefits of the work of Ukrainian anti-corruption court.

**Keywords:** corruption, High Anti-Corruption Court of Ukraine, establishment, results of the work, international experience.

## Introduction

Corruption is an offense that involves the use by officials of their position and their official powers for personal enrichment. This phenomenon is one of the major threats to the national security, as it undermines the financial system, has negative effects on the State's credibility and the ability of public servants to protect national interests because of the taking advantage of public office for personal gain.

However, corruption is not a phenomenon inherent only in the present; it emerged with the establishment of the first States and their social relations. The first mention of corruption, as a negative form of civil service, is contained in the oldest historical monuments known to mankind: in the archive of ancient Babylon, dating from the 2<sup>nd</sup> of the 14 century B.C. E. In the Sumerian and Semitic era, King Lagash (an ancient city-state in Sumer on the territory of modern Iraq) reformed government to stop abuses of officials and judges, as well as to reduce illegal remuneration of temple staff by royal administration, to reduce and streamline the payments for rituals (Beliauskii et al., 1956).

відомства. Метод правового моделювання допоміг сформулювати основні висновки дослідження. Результати дослідження. Високий рівень корупції в Україні зумовив необхідність пошуку шляхів протидії цьому явищу. Із цією метою протягом останніх трьох років була створена система органів досудового розслідування та притягнення до відповідальності високопоставлених посадових осіб за вчинені корупційні правопорушення. Становлення ВАКС стало завершальним етапом проведення цієї реформи. Практичні наслідки. Оскільки міжнародний досвід створення антикорупційних судів є доволі суперечливим, було встановлено, що багато вчених скептично ставляться до здатності ВАКС знизити рівень корупції в Україні. Отже, авторами статті було проаналізовано перелік аргументів «за» та «проти» створення ВАКС в Україні. Співвідношення / оригінальність. У результаті дослідження автори визначили як недоліки, так і переваги роботи антикорупційного суду в Україні.

**Ключові слова:** корупція, Вищий антикорупційний суд України, становлення, результати роботи, міжнародний досвід.

Corruption existed both in antiquity and in the Roman Empire, where the term “*corrumpere*” meant “breaking, spoiling, damaging, falsifying testimony, as well as bribing a judge (*praetor*)” (Bartoshek, 1989).

The fight against corruption is performed not only in one particular area of public life – it requires systemic institutional changes. The global nature of this problem has led to the need to find the ways to solve it internationally. Thus, international organizations such as the UN, the European Parliament, the Organization for Security and Community in Europe, etc. are working on this problem.

The rapid increase in the level of corruption in Ukraine also requires fundamental changes in the organization of counteraction to this phenomenon. To that end, the system of bodies of pre-trial investigation and prosecution of high-ranking officials for corruption offenses has been created over the last three years – the National Anti-Corruption Bureau of Ukraine (NABU) with relevant territorial departments and the Specialized Anti-Corruption Prosecutor's Office (SAP). The final stage of the reform is the

creation of an anti-corruption court, which would try corruption cases of top officials of the State (Drozd et al., 2020).

The international experience in establishing anti-corruption courts is quite controversial: in some countries it has become a sufficiently powerful tool for combating this phenomenon, in some countries it hadn't happened. So, in this article we tried to figure out, whether the work of the Anti-Corruption Court will be effective in Ukraine.

### Literature Review

The issue of anti-corruption courts is of interest to the researchers and legal practitioners worldwide. For example, the **comperative analysis** of specialised anti-corruption courts of some countries throughout the world was made by Matthew C. Stephenson and Sofie Arjon Schütte (2016); O. Drozd (2020).

The examination of the features of anti-corruption courts of the individual countries was conducted by: T. Lindsey and S. Butt (2018); S. Schütte (2016) – **Indonesia**; R. Pangalangan (2010); Stephenson, M. (2016) – **Philippines**; K. Staroňová (2008) – **Slovakia**; N. Gallina (2013) – **Slovakia and the Czech Republic**, etc.

The problem of creation and functioning of the anti-corruption court in Ukraine has received little attention in the scientific literature. For example, A. Sliusar (2017) points out that the formation of a single specialized anti-corruption court is not seen as a systematic solution to the problem of combating corruption at the stage of criminal proceedings. It may be rather a decision for the transitional period, at the end of which anticorruption courts of the first instance, whose jurisdiction will extend to all corruption offenses without exception, should be created under the principle of speciality of the judicial system.

This point of view is also shared by N. Mysnyk (2019), who thinks it is naive to hope that the work of the anti-corruption judiciary can eradicate corruption. Finally, there are no such courts at all in the countries with low levels of corruption. This clearly shows that the existence of specialized courts is not a sign of the absence of corruption. The State's economic development is more likely to have an impact on its presence and level.

This view is supported by O. Yevsieiev (2017), who states that the issue of the creation of separate anticorruption courts has nothing to do

with the problem of the effectiveness of justice in corruption cases, the fight against which requires the use of completely other forms of influence, many of which are outside the legal field. Indeed, such courts may play a positive role at some stages of their functioning, but their establishment, as international practice shows, cannot eradicate corruption by itself.

A. Osadcha (2017), for her part, points out that a low level of public confidence in the objectivity, impartiality and legitimacy of court decisions is one of the reasons for the creation of a separate specialized court.

I. Lishchyshyn (2017) argues that a High Anti-Corruption Court may become the basis for intensifying the anti-corruption fight in the State; however, its establishment requires the political will of the senior management of the State.

### Methodology

Research methods are the ways to achieve the goal of scientific work. All methods of scientific research are divided into several levels: philosophical methods (dialectical, metaphysical, dogmatic, etc.); general scientific methods, which can be applied in any branch of science (analysis, synthesis, abstraction, generalization, induction, deduction); specific scientific (special) methods, which are used in a particular branch of science. The most common methods for jurisprudence are historical and legal, comparative and legal, sociological methods, etc.

Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science. Thus, the analysis and synthesis method as well as the logical method were used to formulate a holistic view on corruption and its features, as well as the ways in which it can be manifested.

The logical-semantic method was used to establish the meaning of the terms "corruption" and "anti-corruption court".

The historical method was useful in studying the success of the activities of anti-corruption courts in the world. It was also applied in exploring the history of the establishment of anti-corruption court in Ukraine.

The comparative and legal method was used when analyzing Ukrainian legal acts, which regulate the issue under consideration. This

method was also useful when reviewing scientific works of Ukrainian and foreign scholars and legal practitioners, who have studied this topic.

The system and structural method was applied to determine the institutional features of Ukrainian anti-corruption court. For example, with his help, it was determined that the HACC dispenses justice as a court of the first and appellate instance in criminal proceedings concerning the crimes within its jurisdiction.

The method of systematic analysis made it possible to identify the operational characteristics of this agency, i. e., to clarify the jurisdiction of the High Anti-Corruption Court and to determine, which offences are referred to its jurisdiction.

The legal modeling method was helpful in drawing conclusions to the research.

## Results and Discussion

The introduction of a specialized anti-corruption court in Ukraine was one of the recommendations of the Organization for Economic Co-operation and Development (2015) in the context of analyzing anti-corruption reforms in the country. In particular, when analyzing the state of fight against corruption in Ukraine, it was noted, in particular, that “the whole system of anti-corruption repression should be safeguarded against illegal interference – it is therefore recommended to ensure operational and institutional autonomy of specialized anti-corruption prosecutor’s office and to come up with a solution to eliminate existing bottlenecks in the judicial system (e.g. through specialized anti-corruption courts or judges).

The process of establishing a High Anti-Corruption Court of Ukraine (hereinafter – HACC) was lengthy and difficult. According to the authors of the Draft law on HACC, the HACC should have considered only the cases against high-ranking officials investigated by National Anti-Corruption Bureau of Ukraine (NABU). The opponents of the Draft Law insisted that the small number of cases, investigated by the NABU, did not require the creation of a separate judicial unit.

In assessing this Draft Law, the Venice Commission (2017) in its Opinion no. 896/2017 of October 09, 2017 supported the position of the latter and stated that the HACC would be competent not only for corruption offenses

strictly sensu but also for connected crimes such as abuse of power or official position, illegal enrichment and money-laundering.

The legislator agreed with this remark of the Venice Commission and decided to amend the original Draft Law accordingly, since the previous approach to determining the jurisdiction of a High Anti-Corruption Court not only gave him the characteristics of a special court, which is expressly forbidden under Art. 125 of the Constitution of Ukraine (Law of Ukraine, 1996), but also violated the constitutional principle of equality before the law (Art. 24). Besides, linking the jurisdiction of a HACC to the investigative jurisdiction of the NABU created the risks of turning this court into a “pocket” court, which, given the purpose of its creation, is obviously unacceptable.

The problem of determining the status of the anti-corruption court in Ukraine was also explored by the Venice Commission. As it is stated in par. 22 of the Opinion no. 896/2017 “...as neither the legal framework of Ukraine nor the CCJE Opinion or other Council of Europe texts define the concepts of specialized, special and extraordinary courts, it is difficult to draw the exact line between them”. Therefore, to solve this problem, the Commission has thoroughly examined its previous opinions on this issues provided for other countries, the legislative acts of Ukraine and foreign countries that already have experience in this matter and the ECHR’s practice. As a result, it concluded that “the HACC can in principle be regarded as a specialised court”.

In view of the above, a new Draft Law no. 7740 was adopted in 2018, under which the High Anti-Corruption Court is competent to hear all corruption cases, regardless the body, which completed the investigation. In the same year, the Verkhovna Rada of Ukraine adopted the relevant Law on the basis of this Draft Law. The newly formed judicial body started its work on September 05, 2019.

According to the Law of Ukraine of June 07, 2019 “On the High Anti-Corruption Court” (hereinafter – the Law) (Law of Ukraine, 2019) the HACC is a permanent supreme specialized court in the judicial system of Ukraine. Its task is to dispense justice in accordance with the legal principles and procedures of the judiciary in order to protect an individual, society and State from corruption and related crimes and to exercise judicial control over the pre-trial investigation of these crimes, to monitor the

observance of human rights, freedoms and interests of persons in criminal proceedings, as well as to resolve the issue of in cases of the recognition of unjustified assets and their recovery to the State in civil proceedings.

The HACC dispenses justice as a court of the first and appellate instance in criminal proceedings concerning the crimes within its jurisdiction, determined by procedural law, as well as monitors the observance of human rights, freedoms and interests in such criminal proceedings in the cases and in the manner prescribed by the procedural law, dispenses justice as a court of the first and appellate jurisdiction in cases of the recognition of unjustified assets and their recovery to the State in civil proceedings.

In order to accomplish such important tasks, the judge of the anti-corruption court must be a highly qualified professional, a standard of ethics and an example of law-abidingness, independent from any unlawful influence both on the part the State and public pressure. The Venice Commission also stressed this point in the relevant provision of the Opinion no. 896/2017 “judges of HACC need to be specialised and experienced, adequately protected and, in line with the spirit of the on-going judicial reform, selected in a way which provides strong safeguards for their integrity and independence. Bearing in mind the urgency of the matter, there is no time to wait for completion of the current judicial reform – which includes vetting of all ordinary judges and is clearly a promising process towards a more healthy judicial body” (§ 28).

That is why the judges of the HACC are subject to additional special requirements related to the material jurisdiction of the Court and its specialization in dealing with criminal proceedings on corruption offenses. Thus, according to the Law, in order to be appointed as the judge of the HACC a citizen of Ukraine should be:

- not younger than 35;
- have at least 5 years of judicial experience;
- or have a law degree, five years of judicial or at least 7 years of legal experience;
- or have professional experience as a lawyer, including providing representations in the courts and/or defending against a criminal charge for at least 7 years;
- or have combined experience of at least 7 years.

At the same time, the Law restricts the appointment of certain categories of persons to the position of the judge of the HACC in connection with occupying certain positions in State agencies or practicing certain professions. Such restrictions are due to the fact that occupying certain positions or practicing certain professions may adversely affect the impartiality of the decisions, made by the judge of the HACC. In this context, we should note that Art. 127 of the Constitution foresees the establishment of additional requirements for certain categories of judges in terms of experience, age and professional level. The Venice Commission in its Opinion expressed the position that “it seems appropriate to include certain particularities in the general procedure for the appointment of judges. At the same time, care should be taken to ensure that the procedure for the appointment of anti-corruption judges does not deviate more than necessary from the general appointment procedure in order to dispel any possible doubts about the constitutionality of the law (see further below). In this connection, it is noted that the Constitution foresees the possibility to introduce specific qualification requirements on judges for specialized courts, but that it does not explicitly allow for the establishment of a special appointment procedure for such judges” (§ 29).

Thus, the peculiarities the procedure for the selection of judges to the HACC are conditioned precisely by the establishment of special requirements for education and the length of professional experience. The legislator refrained from introducing a separate, special, different from the general procedure for the selection of judges to the HACC, since this posed the risk of giving the HACC the features of a special court. At the same time, the Law takes into account another position of the Venice Commission regarding the involvement of persons proposed by international organizations in the selection of judges.

For this purpose, the Public Council of International Experts was formed at the High Qualification Commission of judges of Ukraine (hereinafter – HQC), whose members are appointed by the HQC solely on the basis of proposals from international organizations, with which Ukraine cooperates in the area of preventing and combating corruption in accordance with international treaties of Ukraine. The main task of the aforementioned Public Council is to assist the HQC in determining whether or not the candidates for the posts of judges to the HACC meet the criteria of integrity (morality, honesty, incorruptibility), namely,



check the legality of the sources of origin of the property, conformity of the level of income of the candidate or members of his (her) family with the declared income, consistency of the candidate's lifestyle with his (her) status, proven knowledge and practical skills to deal with the cases, assigned to the jurisdiction of the HACC. In other words, the main task of the Public Council is to identify dishonest judges and prevent them from being appointed to the HACC.

To ensure the accomplishment of this task, international experts are actually entitled to veto any candidate, which is possible to overcome by 2/3 of the total composition of the HQC.

The HQC together with the Public Council of the International Experts had been choosing the most experienced judges with unblemished record for six months. On March 06, 2019, the HQC summed up the results of the qualification assessment and approved the candidates' ratings for the positions of judges of the HACC and the Court of Appeal of the HACC; almost 40% of dubious applicants were cut out. Currently, the High Anticorruption Court is composed of 38 judges – 27 are the judges of the first instance, 9 are investigative judges and 11 are the judges of the Appellate Chamber.

Each stage of the competition was constructed to ensure maximum publicity of the procedures, which was also noted by the international experts. For example, the Head of the Public Council Sir Antoni Khuper stated: "I don't know of any country in the world that could achieve this level of transparency in the appointment procedures. Ukraine can be congratulated on the tremendous achievements in creating a fundamentally new and unique system of judicial appointments for the world experience" (High Qualification Commission of Judges of Ukraine, 2019).

Once the HACC started its work, the criminal proceedings, over which it has jurisdiction, were transferred to it on the basis of the decisions of the courts, in which these criminal proceedings were pending.

It should be reminded that a specialized anti-corruption court should consider criminal proceedings related to committing offenses containing a corruption component based on the stated tasks. According to Art. 33-1 of the Law a High Anti-Corruption Court has jurisdiction in criminal proceedings concerning corruption offenses provided for in Article 45 of the Criminal Code of Ukraine (Law of Ukraine,

2001): Art. 191 "Misappropriation, embezzlement or conversion or property by malversation"; 262 "Stealing, appropriation or extortion of firearms, ammunition, explosives or radioactive material, or obtaining them by fraud of abuse of office"; 308 "Stealing, appropriation, extortion of narcotics, psychotropic substances or their analogues, or acquisition of same by fraud or abuse of office"; 312 "Stealing, appropriation, extortion of precursors, or acquisition of precursors by fraud or abuse of office"; 313 "Stealing, appropriation, extortion of equipment devised for making of narcotic or psychotropic substances, or their analogues, or acquisition of such equipment by fraud or abuse of office, and other unlawful actions involving such equipment"; 320 "Violation of rules related to circulation of narcotics, psychotropic substances, their analogues or precursors"; 357 "Stealing, appropriation, or extortion of documents, stamps and seals, or acquiring them by fraud or abuse of office, or endamage thereof"; 410 "Stealing, appropriation, extortion or fraudulent obtaining of weapons, ammunitions, explosive or other warfare substances, vehicles, military or special enginery, or other munitions, or abuse of office, by a military serviceman", as well as the crimes provided for in Article 210 Misuse of budgetary resources, execution of budget expenditures or granting of budgetary appropriations without exceeding budgetary allocations or exceeding them ", 354 "Bribing employee of an enterprise, institution or organization"; 364 "Abuse of authority or office"; 364-1 "Abuse of authority by an official of a legal entity of private law regardless of the legal form"; 365-2 "Misuse of powers by public service providers"; 368 "Acceptance of an offer, promise or receipt of an improper benefit by an official", 368-2 "Illicit enrichment"; 368-3 "Bribing official of a legal entity of private law irrespective of the legal form", 368-4 "Bribing public service provider"; 369 "Offering, promise or giving illegal benefit to an official"; 369-2 "Abuse of influence". These are also the Articles 206-2 "Unlawful seizure of property of an enterprise, institution, organization"; 209 "Legalization (laundering) of criminally obtained money and other property", 211 "Making of regulations or directives that modify budget revenues and expenses contrary to the procedures prescribed by law"; 366-1 "Declaring false information", if there is at least one of the conditions provided for in paragraphs 1-3, Part 5, Article 216 of the Criminal Procedure Code of Ukraine (Law of Ukraine, 2012). Such conditions are:

- 1) committing a crime by a special subject (the President of Ukraine, whose powers have been terminated, the People's Deputy of Ukraine, the Prime Minister of Ukraine, a member of the Cabinet of Ministers of Ukraine, etc.);
- 2) the amount of the subject matter of the crime or the damage caused to it;
- 3) the crime under Part 1, Art. 369 and Art. 369-2 of the Criminal Code, committed in respect of the official specified in Part 4, Art. 18 of the Criminal Code of Ukraine or paragraph 1, Part 5, Art. 216 of the Criminal Procedural Code of Ukraine.

There were fears that the court would not cope with the considerable amount of materials transmitted before the beginning of the work of this body, because according to the State Judicial Administration, the HACC was supposed to get more than 3 500 criminal cases. Only 5 % of these cases were investigated by NABU and belong to the category of high-level corruption cases (Rzheutska, 2019).

However, it seems that this anti-corruption body is showing quite good results. Thus, 191 criminal proceedings were submitted to the first instance of the HACC, of which 45 were returned back to the general courts, 4 proceedings were refused returned to the prosecutors, 2 sentences were passed for 100 days of the work of the HAAC, that is, from September 05 to December 05, 2019.

2142 motions, 720 complaints, 65 applications were submitted to investigative judges. 2457 proceedings have been completed.

In total, 444 criminal proceedings were received by the judges of the HACC Appeal Chamber, 343 of which had already been decided.

During this time, the HACC has already passed two sentences. The first sentence was passed against a retired judge, who did not file electronic declaration. The panel of judges found her guilty and sentenced her to a fine of UAH 51,000 with the deprivation of the right to hold public office (except the elected ones) for a year.

The second sentence was passed against the Deputy Director of Pharmaplant Ukraine LLC under Part 3, Article 209 of the Criminal Code of Ukraine (legalization of income in particularly large amounts).

The verdict in this case was reached on the basis of a plea agreement. The defendant was

sentenced to 4 years' imprisonment without deprivation of the right to occupy certain positions or be engaged in certain activities and without confiscation of property (Valko, 2019).

However, studying these decisions of the HACC, N. Mysnyk (2019) comes to a disappointing conclusion. Thus, in the first case, the judge was fined UAH 51 000, and was forbidden to hold public office for a year. However, such a sentence can hardly be considered harsh, given that the defendant herself filed her resignation long before the HACC was created and she was retired on May 24, 2018.

In the second case, the punishment was also insignificant, according to the researcher. In particular, the defendant was imprisoned for a term of 4 years without deprivation of the right to occupy certain positions or be engaged in certain activities and without confiscation of property for financial transactions totaling \$ 6,015,751. However, the accused was not imprisoned, as under Article 75 of the Criminal Code of Ukraine he was released from serving the sentence with a probation period of 2 years.

Obviously, it is too early to evaluate the results of the work of the HACC. This should be done no later than the end of 2020, when the judges will resolve most of the cases. However, it can be noted now that the flow of disposal of cases is much faster than it was in general courts.

## Conclusions

Ukraine scored 30 points out of 100 and ranked 126 out of 180 countries in the 2019 Corruption Perceptions Index (Transparency International, 2019). So, conducting anti-corruption reforms is a top priority for our country under such conditions. These reforms began in 2014 and have been going on for over five years, but their results are rather ambiguous. The system of anti-corruption agencies (National Anti-Corruption Bureau of Ukraine, Specialized Anti-Corruption Prosecutor's Office, National Agency for Prevention of Corruption) was created, the National Police, the Security Service of Ukraine, the Prosecutor General's Office were reformed, e-declarations and Public Procurement system ProZorro were introduced, but corruption remains on the same level.

The HACC, whose creation became the final stage of establishing the anti-corruption system of Ukraine, has been operating since September 2019. The relevant Law provides that the High Anti-Corruption Court dispense justice as a court

of first and appellate instance in criminal proceedings concerning crimes within its jurisdiction, that is, those containing a corruption component. It currently consists of 38 judges.

It is too early to talk about the results of the HACC: this judicial body had begun its work several months ago. However, the first sentences against senior officials had already been passed, despite being criticized for excessive loyalty by some practitioners.

Many scholars are skeptical about the ability of the HACC to reduce corruption in Ukraine. International practice shows that anticorruption courts at some stages of their functioning may play a positive role, primarily through specialization of judges in this category of cases, increasing criminal liability for committing criminal offenses, etc. However, the introduction of anti-corruption courts cannot eradicate corruption in itself.

However, there are many, who are positive towards the establishment of the specialized court. To support the latter, I would like to cite the words of Mark Vulf, a senior U.S. District Judge, who helped Ukraine to create the HACC and is one of the ideologues of the International Anti-Corruption Court: "Unlike all other top corruption countries, Ukraine has everything to become a corruption-free country: support from international partners, independent journalism, an active public sector and political opposition. If this is not possible in Ukraine, it cannot be done at all" (Ulianovska, 2018).

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