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Ukrainian MPs endanger independence of key anti-corruption body

– With 239 votes, Ukrainian MPs appointed scandalous and much-criticized members to the commission that will select the head of the Specialized Anti-Corruption Prosecutor’s Office, a key anti-corruption institution.

Article by: Olena Makarenko

Euromaidan Press (18.09.2020) – <https://bit.ly/2ElIGE0> – On 17 September, Ukrainian MPs voted for a decision that puts international financial support for the country under risk and threatens the independence of a key anti-corruption institution.

In particular, the Parliament voted for the members of the commission which selects the head of the Specialized Anti-Corruption Prosecutor's Office. Previously, NGOs fighting against corruption, Ukraine's international partners, as well as pro-democratic politicians pointed at the lack of qualification and integrity among the candidates to the commission suggested by the corresponding parliamentary committee. Still, the majority of the MPs ignored these issues and supported the candidates. European representatives responded by hinting that Ukraine's visa-free regime with the EU and a EUR 1.5 bn tranche now be up in the air.

Why is the Specialized Anti-Corruption Office so important?

The Specialized Anti-Corruption Prosecutor's Office (SAPO) is a new institution created in 2015 to fight top corruption, together with the National Anti-Corruption Bureau (NABU). While the NABU investigates cases on top-corruption, the SAPO provides procedural supervision for such cases. Afterward, the two direct such cases to the High Anti-Corruption Court, created in 2019. Previously, the top-corruption cases were directed to ordinary courts.

Over the five years of their work, NABU and SAPO directed over 260 cases to courts.

Previously in Ukraine, government top-officials, MPs, and other influencers were considered untouchable. Therefore, before the NABU and the SAPO existence, Ukrainians have never seen investigations on top corruption.

The procedure for selecting the head of the SAPO

The head of the SAPO is selected for five years. The terms of powers of the previous one, Nazar Kholodnytskyi, would have expired in November 2020. However, he resigned two months earlier.

In the process of creation of the SAPO, Ukrainian civil society and politicians together with Ukraine's international

partners focused on how to make the procedure of selection of its head transparent and fair. Otherwise, there was a high chance that those potential corrupts investigated by the NABU and the SAPO would influence the institution through its head.

They arrived at a solution when the head of the SAPO is selected by a Commission consisting of 11 persons. Four out of them are nominated by the Prosecutor's Council. Seven are nominated by the Parliament.

What is the scandal around the members of the Commission about?

Earlier this year already, the prosecutors nominated their representatives. Society had no questions regarding them – unlike the candidates suggested by the Parliament's Committee on Law Enforcement.

Previously, the candidates supported by the committee did not find the needed support in the Parliament.

On 17 September, from the third attempt, the MPs finally supported them with 239 votes, despite all the criticisms.

In particular,

- President Volodymyr Zelenskyy's Servant of the People party gave 172 votes,
- pro-Russian Opposition Platform for Life – 30,
- For the Future (associated with oligarch Ihor Kolomoyskyi) – 18,
- the group Dovira – 11,
- and independent candidates – 8.

Petro Poroshenko's European Solidarity, Yuliya Tymoshenko's Batkivshchyna, and Voice did not give a single voice.

The core of the scandal around the candidates voted in by the parliament concerns their inconsistencies with provisions of the Ukrainian legislation. In particular, the Law on the Prosecutor's Office says that the members of the commission

which select the head of the SAPO have to have “significant experience of activities in the field of preventing and or combating corruption.” Instead, the majority of the members elected from the Parliament don’t have such experience at all. Neither do the members have an impeccable business reputation, high professional and moral qualities, and public credibility, as prescribed by the law.

Also, among the members supported by the Parliament, nobody corresponds to the requirements of being appointed as the head of the commission. According to the law, the commission should be headed by a person from the Parliament’s quota.

Due to all of these inconsistencies with the Ukrainian legislation, Ukraine’s western partners started warning Ukraine on the consequences of the support of the Parliament’s candidates before and after the voting.

What was the reaction of Ukraine’s international partners?

A transparent procedure corresponding to the necessary criteria for selection of the new head of SAPO was one of the conditions for providing a new EUR 600 mn of EU macro-financial support. As well, its violation can launch the process of suspending and canceling the EU visa-free regime.

And the reaction was swift. (See <https://bit.ly/2ElIGE0>)

Earlier this month, Ambassadors of the G7 published a statement underscoring the importance of merit-based selection processes for heads of anti-corruption institutions:

Also, Gerry Rice, the director of the IMF Communications Department, informed that the development of the IMF’s programs on the financial support of Ukraine will depend on whether the anti-corruption bodies (the NABU, the SAPO, and the Anti-Corruption Court) will manage to preserve their independence.

What did the Servant of the People, the party which gave most of the votes, say?

David Arakhmama, the head of the Servant of the People faction, told journalists he is not going to react to Viola von Cramon-Taubadel's statement regarding the possible cancellation of Ukraine's visa-free regime with the EU and the EUR 1.5 bn tranche.

He said that the EU Association Agreement documents do not mention the SAPO, and that the MEP's words were rumors: "[The Association Agreement] does not mention the SAPO; it mentions the independence of the anti-corruption structures. This we support and will follow," Arakhama said.

Previously, Dmytro Kuleba, the Minister of Foreign Affairs of Ukraine stated that there are no threats to visa-free travel between Ukraine and the EU.

What did the President's Office answer?

Following the voting for the Commission members, the President's Office also reacted, saying that it took the Parliament's decision, as well as societal criticism which followed it, into consideration. In a statement, it said that even a strict competition process does not automatically guarantee the independence of the future head of the institution.

"Therefore, we urge all participants of the public debate on the activities of the anti-corruption infrastructure of the state to refrain from excessive emotions, as well as from speculative assessments of the work of specific individuals in administrative positions in anti-corruption bodies. The path on overcoming corruption is also a mandatory component for the European and Euro-Atlantic integration of our country."

But actually, there are no legal instruments for the President's Office to influence the Parliament's decision.

How can this influence the SAPO?

The members of the commission which will select the SAPO head from the Parliament's quota can promote candidates loyal to some particular political forces.

The head of the SAPO can sabotage cases which means their chances to be considered properly in the court decrease.

SAPO's previous head, Nazar Kholodnytskyi, was noticed sabotaging cases himself.

Still, in general, the very existence and the work of the SAPO is evaluated positively by Ukrainian anti-corruption NGOs.

"Still, Kholodnytskyi himself is not the SAPO; prosecutors make up the SAPO. I think the majority of prosecutors are ethical," Vadym Valko, Automaidan NGO lawyer and Secretariat of the National Anti-Corruption Bureau's Public Control Council analyst says, pointing at the particular investigations into the most corrupt, including MPs, being directed to courts.

Therefore, even in the worst-case scenario, the SAPO will be able to independently work on the cases no matter who is the head for some time.

The competition for the position of the head of the SAPO should be completed by 30 November.

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