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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

UKRAINE

OPINION

ON THE DRAFT LAW ON ANTI-CORRUPTION COURTS

AND ON THE DRAFT LAW ON AMENDMENTS TO THE LAW ON THE JUDICIAL SYSTEM AND THE STATUS OF JUDGES (CONCERNING THE INTRODUCTION OF MANDATORY SPECIALISATION OF JUDGES ON THE CONSIDERATION OF CORRUPTION AND CORRUPTION-RELATED OFFENCES)

Adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017)

On the basis of comments by

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I. Introduction

1. By letter of 30 June 2017, the Speaker of the *Verkhovna Rada* of Ukraine requested the Venice Commission to prepare an opinion on compliance with the Council of Europe standards of the draft law on anti-corruption courts (draft law No. 6011 of 11 February 2017) and of the draft law on amendments to the Law of Ukraine 'On the Judicial System and the Status of Judges' (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences) (draft law No. 6529 of 31 May 2017) (CDL-REF(2017)035 and CDL-REF(2017)036).

2. The Commission invited Mrs Aurela Anastas (Albania), Mr James Hamilton (Ireland), Mr George Papuashvili (Georgia), Mr Jørgen Steen Sørensen (Denmark) and Mrs Hanna Suchocka (Poland) to act as rapporteurs for this opinion. In addition, the Commission invited the Council of Europe's Group of States against Corruption (GRECO) to appoint an expert to contribute to this opinion. The expert appointed was Mr Rainer Hornung (Germany).

3. On 6-7 September 2017, a delegation of the Commission, composed of Mrs Aurela Anastas, Mr James Hamilton (Ireland) and Mr George Papuashvili (Georgia), accompanied by the Secretary of the Commission, Mr Thomas Markert, and by Mr Michael Janssen from the Secretariat, visited Kyiv and met with representatives of a large number of relevant authorities, civil society, international organisations and foreign donors.

4. The present opinion was prepared on the basis of contributions by the rapporteurs and on the basis of English translations of draft law No. 6011 and of draft law No. 6529. Inaccuracies may occur in this opinion as a result of incorrect translations.

5. Following its discussion at the Sub-Commission on the Judiciary (Venice, 5 October 2017) and an exchange of views with Mr Oleksyi Filatov, Deputy Head of the Presidential Administration of Ukraine and with Mr Pavlo Pynzenyk, First Deputy Chair of the Rules of Procedure and *Verkhovna Rada* Work Organisation Committee, this opinion was adopted by the Venice Commission at its 112th Plenary Session (Venice, 6 October 2017).

II. General remarks

6. Ukraine has launched a comprehensive reform of the judiciary which includes constitutional amendments approved by the *Verkhovna Rada* on 2 June 2016 as well as adoption of the Law "On Ensuring the Right to a Fair Trial" (February 2015), the Law "On the Judicial System and the Status of Judges" (June 2016), the Law "On the High Council of Judges" (December 2016), the Law "On the Constitutional Court" (July 2017) and new procedural legislation (pending approval). The High Council of Judges (HCJ) and the High Qualifications Commission of Judges (HQC) were reformed on the basis of the new legislation (new members were elected in 2015-2016), the Supreme Court is being restaffed on the basis of a transparent competition procedure and all sitting judges will have to undergo an evaluation procedure with regard to competence, professional ethics and integrity criteria; according to the current legislation, judges, legal practitioners and legal academics meeting certain criteria can be candidates for the position of judge. Those efforts were undertaken i.a. with the aim to implement the standards of the Council of Europe and recommendations by the Venice Commission and are welcome.

7. The 2016 Law "On the Judicial System and the Status of Judges" (LJSJ) provided for the establishment of a High Anti-Corruption Court (HACC) as one of the two Higher Specialised Courts.[1] Neither of these two courts has been set up to date. Following the adoption of the LJSJ, draft law No. 6011 was submitted to the *Verkhovna Rada* by several MPs on 1 February

[1] The other Higher Specialised Court is the High Court for Intellectual Property Matters.

2017. According to the explanations given by the authors of the draft law, its main idea is that adjudication of high-profile corruption offences should be entrusted to experienced legal professionals, including from outside the existing body of judges, who are selected in a specific procedure and enjoy a high degree of independence. Key components of the draft are participation of the international community in the process and establishment of a specialised court (and of a specialised appeal instance)[2] which is clearly distinct from general courts. Appeals against the procedural decisions of the HACC are examined by an Appeals Chamber within the Court.

8. Given that corruption is one of Ukraine's major problems,[3] that parts of the judiciary itself have for many years been considered as weak, politicised and corrupt,[4] that the on-going reform of the judiciary which includes vetting of all judges is a long-term process and will according to estimates not be completed before four or five years, given the high expectations by civil society after the "Revolution of Dignity" (Euromaidan), following the establishment in 2016 of specialised law-enforcement bodies competent for grand corruption cases (NABU, SAPO),[5] and noting the complete absence of convictions in such cases,[6] international organisations including the EU and foreign donors have repeatedly called on Ukraine to set up a HACC. This has also been formalised as a commitment in the Memorandum of Understanding between Ukraine and the IMF in March 2017.[7]

9. International donors support the basic principles for establishing the HACC, as evidenced in a paper of 15 May 2017 ("common understanding"). Similarly as the authors of the draft, they call for the setting-up of a special panel responsible for the selection of HACC judges with significant involvement of international donors active in providing support for anti-corruption programmes in Ukraine.

10. While there seems to be broad agreement in Ukraine that anti-corruption reforms are not yet complete and that further, rapid action is needed, the question of how best to move forward remains highly controversial in the country. For example, the High Council of Justice in its consultative opinion of 9 March 2017 recommended not adopting draft law No. 6011, as it saw contradictions with the Constitution and inconsistencies with the LJSJ and with the Law "On the High Council of Justice".

11. On 31 May 2017, an alternative bill – draft law No. 6529 – was submitted to the *Verkhovna Rada* by a group of MPs. It follows a completely different approach from draft law No. 6011 and proposes to introduce specialisation of judges on corruption offences in all local general courts and courts of appeal, while the Supreme Court is to provide a separate chamber of criminal court of cassation for corruption cases.

12. The Council of Europe has been and remains actively engaged in the judiciary and anti-corruption reforms which have been initiated since the "Revolution of Dignity". *Inter alia*, the 2016 constitutional reform as to justice has largely benefited from the expertise of the Venice

[2] In draft law No. 6011, the appeal instance takes the form of an Anti-Corruption Chamber at the Supreme Court. HACC and Anti-Corruption Chamber are referred to as "Anti-Corruption Courts".
[3] See e.g. GRECO's most recent evaluation report on Ukraine, GrecoEval4Rep(2016)9.
[4] See also the statements made in CDL-AD(2015)007, Joint Opinion by the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and the Rule of Law on the Law on the Judiciary and the Status of Judges and amendments to the Law on the High Council of Justice of Ukraine, paragraphs 72 ff.
[5] National Anti-Corruption Bureau, Special Anti-Corruption Prosecutor's Office.
[6] According to information submitted by NABU, no final court decisions have been taken on cases investigated and prosecuted by NABU/SAPO to date, except for friendly settlements.
[7] According to that MoU, the necessary legislation should have been adopted by June 2017 and the court should be established by spring 2018.

Commission.[8] As for the establishment of the HACC, the Council of Europe has contributed to the discussions to some extent. The Council of Europe Office in Ukraine has been involved in the development of the international donors' common understanding on basic principles for establishing the HACC. On 25 January 2017, the Parliamentary Assembly of the Council of Europe "encouraged the authorities to establish a specialised anti-corruption court, and to fight the widespread corruption in the judiciary, which is essential for the success of the fight against overall corruption".[9]

13. In its evaluation report of 23 June 2017, GRECO identified "a clear need to entrust the handling of high-profile corruption cases – which often imply complex financial transactions or elaborate schemes – to specialised judges", which "might possibly be accompanied by the establishment, at least for a transitional period, of a specialised court as foreseen by the LJSJ". This should be linked, however, to certain conditions, including guarantees for the unity of the judicial system, ensuring that the same court is also competent to try criminal offences connected to corruption such as money-laundering, selection of specialised judges in a transparent process based on objective criteria, as well as adequate protection of such judges from undue external – e.g. political – influence and from any possible attack on their independence and safety.[10]

14. On 7 September 2017, in the course of his annual address to the *Verkhovna Rada*, the President of Ukraine noted that the most painful and difficult question of reforms is the fight against corruption. He emphasised, in particular, the urgency of resolving the issue of creating an efficient "special anti-corruption judicial body", which should be formed on a competitive basis from judges with impeccable reputation, should be dependent only on the law and free of all extraneous influences and "must meet the standards of the Council of Europe and the Venice Commission".[11]

15. As requested, the present opinion analyses compliance of the two draft laws with relevant Council of Europe standards. While such an assessment cannot be isolated from the constitutional and legal framework of Ukraine, this opinion does not attempt to provide an exhaustive analysis of the draft laws' consistency with the existing domestic legislation.

III. Analysis

A. Draft law on anti-corruption courts (No. 6011)

16. During the meetings in Kyiv, some interlocutors including officials from the Presidential Administration, the Ministry of Justice and the judicial self-governing bodies raised concerns about the very concept of the HACC as designed by draft law No. 6011, and about its conformity with constitutional requirements. The present analysis will focus on those overarching concerns, before examining more in detail some specific provisions of the draft. It must be stressed, however, that ultimately it will be up to the Constitutional Court, in a given case, to decide on the constitutionality of the law, if adopted.

1. The status of the HACC – specialised or special court

17. During the meetings with various stakeholders, the rapporteurs took note of controversial discussions on whether the HACC as foreseen by draft law No. 6011 is indeed to be regarded a specialised court as foreseen in the LJSJ or rather a special court. The question is important

[8] See e.g. CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary, as well as the previous opinions on that matter.
[9] See PACE Resolution 2145 (2017) "The functioning of democratic institutions in Ukraine".
[10] See GrecoEval4Rep(2016)9, paragraphs 118 to 121.
[11] The statements by the President were published on his official website.

since Article 125 of the Constitution explicitly allows "Higher Specialised Courts" but prohibits "extraordinary and special courts"; similarly, the Consultative Council of European Judges (CCJE) stressed in its Opinion No. 15 that "providing specialist judges to meet the complexity or particular requirements in specific legal fields is a separate matter from setting up special, *ad hoc* or extraordinary courts as dictated by individual or specific circumstances. There is a potential danger of these latter courts failing to provide all the safeguards enshrined in Article 6 of the Convention."[12]

18. At the same time, it is to be noted that the European Court of Human Rights (ECtHR) stated in the case of *Fruni v. Slovakia* that Article 6§1 of the European Convention on Human Rights (ECHR) on the right to a fair hearing by an independent and impartial tribunal established by law cannot be read as prohibiting the establishment of special/specialised criminal courts if they have a basis in law.[13] The Court did not enter into discussions about the differentiation between specialised and special courts, but it had no objections against the concept of the Slovak court in question which had at the time criminal jurisdiction *ratione personae* over certain public officials and *ratione materiae* over corruption, organised crime and other serious offences.[14] It acknowledged that "fighting corruption and organised crime may well require measures, procedures and institutions of a specialised character."

19. Those who argue that the HACC might be a special or extraordinary court primarily refer to the jurisdiction of the HACC which is, at least partly, defined by reference to certain categories of officials, to the fact that the HACC would be separate from general courts and subject to a number of specific provisions, and to the deviation of the procedure for the appointment of HACC judges from the ordinary procedure.

20. Under draft law No. 6011, the HACC is mainly competent to conduct justice as a court of first instance for cases under investigation by the NABU.[15] The latter is tasked with pre-trial investigation of specified corruption-related crimes[16] (including bribery, abuse of power or official position, illegal enrichment, money-laundering, etc.) committed by specified high-ranking officials (e.g. the Prime Minister and ministers, specified senior civil servants, judges, senior prosecutors) – or by other officials if the subject of crime or the damage caused by it equals or exceeds the amount of 500 times the minimum wage set for the relevant year.[17]

21. Under draft law No. 6011, anti-corruption courts and judges are subject to a set of specific regulations which differ from those applicable to other judges. Those regulations envisage the creation of a specific Competition Commission – with international involvement – for the appointment procedure of judges,[18] a special regime of self-governance,[19] remuneration[20] and

[12] See the Opinion No.15(2012) of the CCJE on the specialisation of Judges.
[13] See ECtHR, *Fruni v. Slovakia*, application no. 8014/07, 21 June 2011, paragraph 142; see also Erdem v. Germany (dec.), application no. 38321/97, 9 December 1999.
[14] The Constitutional Court abolished that court in 2009 for several reasons including its competence to decide on all crimes committed by high public officials. Parliament re-established the court in the same year with some amendments, including with respect to its jurisdiction.
[15] See draft article 3.1(1).
[16] I.e. crimes punishable under Articles 191, 206-2, 209, 210, 211, 354 (concerning employees of legal entities of public law), 364, 368, 368-2, 369, 369-2, 410 of the Criminal Code.
[17] See Article 216 part 5 of the Criminal Procedure Code. The minimum wage in Ukraine in 2017 amounts to 3 200 UAH net/month (approximately 103 €).
[18] See draft articles 14 ff.
[19] Draft articles 10 and 11 foresee the establishment of a separate assembly of HACC judges, an assembly of judges of the Anti-Corruption Chamber of the Supreme Court and a joint assembly of both.
[20] According to draft article 36, the official salary of HACC judges is the same as that Supreme Court judges (75 minimal salaries) and higher for judges of the Anti-Corruption Chamber of the Supreme Court (94 minimal salaries).

other benefits, disciplinary proceedings,[21] advanced security measures for anti-corruption courts and judges,[22] separate court premises and a separate budget.[23]

22. As neither the legal framework of Ukraine nor the CCJE Opinion or other Council of Europe texts define the concepts of specialised, special and extraordinary courts, it is difficult to draw the exact line between them. That said, the Venice Commission wishes to draw attention to several indicia from which it may be concluded that the HACC can in principle be regarded as a specialised court.

23. Firstly, the HACC would not be set up for handling one single or a limited number of specific cases, which might be presupposed by the terms "extraordinary or special courts" in Article 125 of the Constitution. On the contrary, it would be competent for all corruption-related offences which are characterised by a certain gravity, either in terms of the official functions of the perpetrator or the value of the subject of crime or the damage caused by it. In other words, the HACC would be competent for a generally and abstractly defined range of criminal offences and perpetrators. Those criteria have been applied, for example, by the German Constitutional Court in its decision that German Courts of honour for attorneys are not extraordinary or special courts prohibited by the German Constitution.[24] Similarly, in its recent Opinion on the constitutional amendments on the judiciary in Albania, the Venice Commission accepted the creation within the High Court of Albania of a Specialised Qualification Chamber with competences in the judiciary vetting procedure and qualified it as being "evidently a sort of a specialised court which is not an *Ad hoc* extraordinary judge – because it is not created in view of a single specific case – and it is supposed to stay in activity during the whole duration of the vetting procedure."[25]

24. Moreover, under draft law No. 6011 the HACC would not have jurisdiction over all legal matters or all crimes committed by a certain group of officials – contrary to the above-mentioned Slovak court[26] before its reform –, it would only be tasked to adjudicate corruption offences involving such officials.[27] The HACC would thus be specialised on certain types of criminal offences, which are typically linked to the officials' functions. It should be noted that corruption offences are, to a large extent, by their very nature related to a specific category of persons, i.e. to public officials; and the Ukrainian Criminal Code contains some corruption provisions – e.g. the aggravated offences of passive bribery under Articles 368, paragraphs 2 and 3 – which are only applicable to certain high-ranking officials. It thus appears logical that a specialised anti-corruption court is only competent for a limited number of persons.

25. It is also noteworthy that the HACC has not been endowed with any special powers and that it does not follow any specific procedures different to those applied in the existing criminal courts – which, if they existed, would be indicia of a special court. Nor are the rules of evidence changed in respect of the HACC.

26. The Venice Commission again refers to its above-mentioned Opinion on constitutional amendments in Albania where it had the opportunity to examine a situation similar to the present case. The constitutional amendments provided i.a. that the law may create a

[21] Draft article 13 states that the High Council of Judges may open disciplinary cases against anti-corruption judges only after obtaining the approval of the relevant self-governance body.
[22] Cf. draft articles 33(3) and 35.
[23] Cf. draft articles 32 and 33.
[24] See the decision by the German Constitutional Court BVerfGE 26, 186.
[25] See CDL-AD(2016)009, Final Opinion on the revised draft constitutional amendments on the judiciary (15 January 2016) of Albania, paragraph 63.
[26] See again ECtHR, *Fruni v. Slovakia*, application no. 8014/07.
[27] By way of comparison, see again the decision BVerfGE 26, 186, in which the German Constitutional Court stressed that the Courts of honour for attorneys in question were only competent to decide on matters relating to the law governing the profession of attorneys.

specialised first instance court and court of appeal to adjudicate corruption and organised crime, and criminal charges against high-level officials (cf. Article 135(3) of the Constitution of Albania). In its opinion, the Commission stated that "as an extraordinary matter, specialised courts may be established to deal with corruption and organised crime", on the condition that the notion of "high-level officials" whose cases are to be adjudicated by such courts is clearly defined by law.[28] In the particular context of Ukraine described above, the Commission sees no reason to deviate from that position and to put in question the possible creation of such an anti-corruption court.

27. It also needs to be borne in mind that the concept of a HACC was included in the LJSJ simultaneously with the constitutional reforms which prohibited extraordinary and special courts but provided for the possibility of Higher Specialised Courts; the lawmakers themselves apparently did not qualify such a new anti-corruption court as special or extraordinary. It must be stressed that from the outset, the plan to set up an anti-corruption court had a very specific purpose, i.e. to address the ineffective handling of high-profile corruption cases – which fall under the jurisdiction of NABU and SAPO – by the existing courts. During the interviews held in Kyiv, it was convincingly explained to the rapporteurs by a variety of interlocutors that under the current system, first instance judges at local courts were not prepared and able to deal with high-level corruption cases: They lacked the specialisation necessary to handle the often very complex cases, and in addition they felt under high external pressure and were actually intimidated in a number of situations. As a result, no final court decisions have been taken on cases investigated and prosecuted by NABU/SAPO to date (except for friendly settlements).

28. Given the above reasons for establishing the HACC, it appears logical and necessary to introduce some special regulations for its functioning; in particular, its judges 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[29] and is clearly a promising process towards a more healthy judicial body.

29. In this context, it must be emphasised that the HACC will also have to decide on corruption cases against judges. It therefore 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 specialised courts (see Article 127) but that it does not explicitly allow for the establishment of a special appointment procedure for such judges. To conclude, in the view of the Venice Commission certain specific features in the formation and functioning of the HACC are necessary for it to work effectively and do not make it *per se* special or extraordinary; significantly, the LJSJ itself already foresees particularities in the procedure for the appointment of judges of Higher Specialised Courts (however, without an extra filter such as the Competition Commission).[30] That said, special regulations under draft law No. 6011 which are not necessary should be removed or amended (see further below) to reduce the risk of the Court being regarded as "special" or "extraordinary". While it is up to the Constitutional Court of Ukraine to decide on the constitutionality of the draft law, the Venice Commission therefore considers that there are good arguments to consider the establishment of an anti-corruption

[28] See CDL-AD(2016)009, paragraph 50.
[29] That process has only just started. Judges of local and appellate courts have not yet been evaluated.
[30] See Article 81 LJSJ.

court as a Higher Specialised Court permissible under the Constitution of Ukraine. That said, attention should be paid to compliance of particular regulations with the Constitution.

2. The unity of the judiciary and the uniform status of judges

30. Given the above-mentioned set of specific regulations which differ from those applicable to general judges, the further – but related – question has been raised whether the draft undermines the principle of unity of the judiciary. That principle is not explicitly mentioned in the Constitution of Ukraine but only in Article 17(4) LJSJ. During the visit it was indicated to the rapporteurs that the Constitutional Court in its court practice nevertheless referred to that principle, but there were no decisions directly relevant to the matter at hand.

31. Article 17(4) LJSJ gives some general indications as to what the principle of unity of the judiciary implies, such as uniform status of judges, mandatory nature of judgments on the territory of Ukraine, financing of courts exclusively from the State budget, existence of judicial self-governing bodies, etc. Most of those principles seem to be unproblematic in the present context, but the element "uniform status of judges" warrants closer attention. While the LJSJ does not define that concept any further, it does not seem to require identical regulations for all judges. For example, the LJSJ includes specific eligibility criteria, particularities in the appointment procedures and employment conditions for Supreme Court judges. Moreover, the LJSJ already foresees some special regulations on Higher Specialised Courts and their judges.[31]

32. As far as Council of Europe standards are concerned, there is no "hard law" which would set forth and define the principles of unity of the judiciary and uniform status of judges. That said, the above-mentioned CCJE Opinion No. 15 on the specialisation of judges[32] is relevant in this context, and GRECO has extensively referred to it in its comments on the planned establishment of anti-corruption courts.[33] According to the CCJE Opinion, specialist judges (and courts) "should always remain a part of a single judicial body as a whole" and "in principle, generalist and specialist judges should be of equal status" (e.g. with respect to rules of ethics and liability).

33. On the one hand, it could be argued that the provisions of draft law No. 6011 deviate from those principles; they seek to establish courts/chambers which are separated from general courts and whose judges enjoy a special status in terms of remuneration, security measures and liability. On the other hand, the draft attempts to ensure that anti-corruption courts "are part of a unified system of courts in Ukraine", as stipulated in article 2 of the draft. Its special provisions are built on the general regulations on courts and judges as contained in the LJSJ, the Criminal Procedure Code, the Law on the HCJ etc.;[34] the Grand Chamber of the Supreme Court reviews under cassation procedure the decisions of the Anti-Corruption Chamber (in cases determined by procedural law) in order to ensure the uniform application of the law by cassation courts; the criteria for the selection of anti-corruption judges are almost identical with those applicable to Supreme Court judges; the remuneration of HACC judges is identical with that of Supreme Court judges; the general rules of ethics and liability are applicable, except that the launch of disciplinary proceedings requires approval by the relevant self-governance body.

34. As explained before, the situation in Ukraine justifies and requires exceptional measures.[35] Certain deviations from the general rules on courts and judges therefore appear acceptable.

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[31] Cf. Articles 31 ff. and 81 LJSJ.
[32] See the Opinion No.15(2012) of the CCJE on the specialisation of Judges.
[33] See GrecoEval4Rep(2016)9, paragraphs 118 to 121.
[34] Those general regulations remain applicable to the extent to which they are not superseded by the special provisions of draft law No. 6011
[35] See also CDL-AD(2015)007, paragraph 73.

The Venice Commission takes the view that in principle, the establishment of a specialised anti-corruption court – adapted to the specific challenges of Ukraine in the fight against high-level corruption – is reconcilable with the general principles underlying CCJE Opinion No. 15 and with GRECO's evaluation report. That said, several amendments to the draft law are recommended (see below). Deviations from the general rules should be limited to what is necessary for the anti-corruption courts to work effectively, and care must be taken to avoid the possible impression that anti-corruption judges are a different or privileged class of judges or that they are appointed in a procedure that is not justified by the specificities of those courts.

3. Specific questions

a. Jurisdiction of anti-corruption courts

35. The Venice Commission welcomes that under draft law No. 6011, the HACC would be competent not only for corruption offences *stricto sensu* but also for connected crimes such as abuse of power or official position, illegal enrichment and money-laundering.[36] This is in line with the requirements set by GRECO in its 2017 evaluation report. At the same time, the question arises how cases involving both offences which fall under the HACC jurisdiction and connected offences which do not would be dealt with. There seem to be no clear legal provisions which would allow determining the competent court and the procedure to be followed in such cases. This needs to be remedied. As for the matter of cases which are pending at the moment when the HACC starts to function, this is closely regulated by paragraphs 20-5 ff. of Section V (Final and transitional provisions) of draft law No. 6011; in short, such cases are continued to be considered by the courts before which they are pending at that moment.

b. System of anti-corruption courts and appeal channels

36. Under article 2.2 of draft law No. 6011, the system of anti-corruption courts consists of the HACC and the Anti-Corruption Chamber of the Criminal Cassation Court of the Supreme Court (hereafter Anti-Corruption Chamber). Under draft article 3.3, an Appeals Chamber shall be established within the HACC by decision of the assembly of HACC judges. The judges of this chamber are competent to review the HACC decisions which can be appealed in accordance with the procedural law except those by which the consideration on the merits of the case has been completed (draft article 3.5). Review of the latter falls into the competence of the Anti-Corruption Chamber (draft article 5.1). In cases determined by procedural law, the Grand Chamber of the Supreme Court – which is tasked to ensure the uniform application of the law by cassation courts[37] – reviews under cassation procedure the decisions of the Anti-Corruption Chamber (draft article 5.5).

37. According to the explanations given to the rapporteurs by the Ministry of Justice, the common understanding at the time when the concept of Higher Specialised Courts had been introduced in the LJSJ was that the system should be built on the HACC as first instance and the Supreme Court as appeal instance. Draft law No. 6011 follows that approach and adds the specialised Anti-Corruption Chamber at the Supreme Court as an extra element. The Venice Commission recognises the logic behind this concept, namely to ensure adjudication of high profile corruption cases by specialised, independent and well protected judges both at the first and second instances, which appears consistent. That said, the administrative autonomy of the Anti-Corruption Chamber as envisaged by draft article 7 does not appear necessary and should therefore be removed from the text.

[36] See draft article 3.1(1) and Article 216 part 5 of the Criminal Procedure Code. For more details, see also paragraph 20 above.
[37] See Article 45 part 1(1) LJSJ.

38. With respect to European standards, the Venice Commission notes that pursuant to Article 2 of Protocol No. 7 to the ECHR "everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal."[38] This is ensured by draft law No. 6011 as HACC decisions on the merits of the case can be appealed to the Anti-Corruption Chamber of the Supreme Court. Regarding other HACC decisions, which can be appealed to an appellate chamber within the same court, the Venice Commission refers to its previous opinions according to which "the possibility of appealing judgments made by different sections within the same Court to a different division of that Court, if it is in effect separate from the rest of the Court should in itself not be a problem."[39] If the above-mentioned court structure were kept in the draft law, it would have to be made clearer though that the Appeals Chamber is in effect separate from the rest of the HACC, i.a. in terms of administration, budget and staff exchange.

39. As far as Article 6§1 ECHR is concerned, it requires that if a possibility of appeal exists, the law must guarantee a fair hearing by an independent and impartial tribunal established by law in the meaning of that Article.[40] Apparently draft law No. 6011 seeks to provide for such guarantees. In particular, draft article 3.5 states that "judges of the Appeals Chamber do not participate in criminal proceedings as a court of first instance", and that "the judges of the Appeals Chamber, who previously participated in adopting the court decision, do not participate in its review on appeal". Those rules are clearly to be welcomed.

40. Some interlocutors shared with the rapporteurs their concerns that the limited right to review (by the Grand Chamber of the Supreme Court) might conflict with the constitutional principle of equality before the law,[41] although the Constitution also states that the right to cassation is guaranteed only "in cases prescribed by law".[42] In this context it should be pointed out that the LJSJ is not clear regarding appeals against decisions of Higher Specialised Courts. It seems compatible with the approach of the LJSJ to provide that appeals from the Higher Specialised Courts go directly to the Supreme Court, bypassing the courts of appeal.

41. However, the Venice Commission has some reservations about the draft regulations relating to the Grand Chamber of the Supreme Court. Namely, draft paragraph 7(1) i) of the Final and Transitional Provisions stipulates that revision of decisions by the anti-corruption courts is carried out by the Grand Chamber solely on the basis of the establishment by an international judicial body – whose jurisdiction is recognised by Ukraine – of violation by Ukraine of international obligations in the process of resolving a case by an anti-corruption court. Such a very restricted role of the Grand Chamber is difficult to justify. Concerns that judges might lack specialisation or be unduly influenced appear much less relevant at that level than at the level of first and second instance judges (who have to decide on factual questions). The uniform application of the law by cassation courts should be ensured by the Grand Chamber of the Supreme Court in accordance with the general rules. Paragraph 7(1) i) of the Final and Transitional Provisions should therefore be removed from draft law No. 6011.

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[38] See also Article 14.5 of the ICCPR.

[39] See CDL-AD(2012)014, Opinion on legal certainty and the independence of the judiciary in Bosnia and Herzegovina, paragraph 62. See also CDL-AD(2013)015-e, Opinion on the Draft Law on the Courts of Bosnia and Herzegovina, paragraph 10.
On the other hand, see CDL-AD(2017)004-e, Opinion on the duties, competences and functioning of the criminal peace judgeships in Turkey, where the lack of an appeal to a superior court had been seen as problematic as the system of horizontal reviews could not ensure uniformity of interpretation and application of the legislation. The situation in Ukraine differs from that, however, as draft law No. 6011 only foresees one single Appeals Chamber (within the HACC).

[40] Cf. ECtHR, *Andrejeva v. Latvia*, 18 February 2009, application no. 55707/00, which contains further references.

[41] Cf. Articles 21 and 24(1) of the Constitution.

[42] Cf. Article 129 of the Constitution.

c. Selection of HACC judges

42. Articles 21 ff. of draft law No. 6011 provide for a complex procedure for the selection and appointment of judges of the HACC and of the Supreme Court Anti-Corruption Chamber. Eligibility requirements for judges of anti-corruption courts are identical with those for Supreme Court judges, with the only exception that candidates with ten years' professional experience as a prosecutor are also eligible (in addition to those with ten years' professional experience as a judge, criminal lawyer or legal academic).[43] The appointment procedure follows the same pattern as that provided for in respect of Supreme Court judges and includes a qualification assessment administered by the HQC – adjusted to the requirements on anti-corruption judges –,[44] a special verification procedure including integrity checks, vetting by the Public Integrity Council, interviews and nomination by the HQC and the HCJ, appointment by the President of Ukraine.[45] However, one significant difference lies in the involvement of a specific Competition Commission in the process.

43. The above arrangements seem to be in line with the requirements of Article 128 of the Constitution, according to which judges shall be appointed by the President of Ukraine on submission of the HCJ due to the procedure prescribed by law, on the basis of a competition. As explained above, the introduction of extra elements appears justified and necessary, given that anti-corruption judges will have to decide on highly sensitive cases including against judges. This is also stressed in the above-mentioned "common understanding" of international donors. That said, the draft provisions on the formation of the Competition Commission deserve closer examination.

44. According to draft article 15, the Competition Commission consists of three persons appointed by the President of Ukraine, three persons elected by the *Verkhovna Rada* and three persons appointed by the Minister of Justice.[46] Commission members must fulfil certain eligibility criteria, e.g. they must have high professional and moral qualities and significant experience in the field of corruption prevention and counteraction. The appointment of members by the Minister of Justice must be based on the recommendations of at least two governments of foreign States or international organisations (labelled in the draft as "agencies"). The Minister may not appoint a member not recommended by any of the agencies and may refuse to appoint members recommended by the agencies only if they do not comply with the criteria laid down in draft article 15. According to draft law No. 6011, the Competition Commission is actively involved in the entire recruitment process and its decisions on the ability and rating of candidates and appointment proposals are binding on the HQC, the HCJ and ultimately the President of Ukraine. Decisions by the Competition Commission require consent of at least seven members,[47] thus including consent of at least one member recommended by foreign "agencies".

45. In this context, it must be noted that the Venice Commission has repeatedly supported measures taken by Ukraine to reduce risks of political influence on judges.[48] Thus, in the course of the 2016 constitutional reforms, the election of judges by the *Verkhovna Rada* had

[43] See article 8 of draft law No. 6011 and Article 38 LJSJ.
[44] See article 27(2) of draft law No. 6011: the examination is aimed at identifying "the level of knowledge, practical skills and abilities in the application of Anti-Corruption legislation of Ukraine, including criminal and criminal procedural law, international legal acts on the corruption prevention, the practice of European Court of Human Rights, as well as conducting hearing of the court."
[45] See articles 21 ff. of draft law No. 6011 and Article 81 LJSJ.
[46] At least one person appointed by the President of Ukraine and one person elected by the *Verkhovna Rada* must have ten years' professional experience as a judge.
[47] Cf. draft article 20(3).
[48] See e.g. CDL-AD(2015)027, Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary, as well as the previous opinions.

been replaced by presidential appointment on the binding recommendation of the reformed HCJ.

46. Under draft law No. 6011, the HCJ would only be formally involved in the appointment of anti-corruption judges, as it would be bound by the assessment of candidates by the Competition Commission. The Venice Commission takes note of the fact that concerns have been raised as to the compliance of such a limitation of the HCJ's discretion with the Constitution, as the HCJ would *de facto* be deprived of its constitutional decision-making powers. As for the HQC, it would be actively involved in the qualification assessment of candidates but it would also be bound by the decisions of the Competition Commission. The composition of that Commission therefore needs to be designed with much care. The fact that the Commission members are designated by political figures/institutions (i.e. the President of the Republic, the *Verkhovna Rada* – and the Minister of Justice, though with limited discretion) gives rise to concerns. Namely, it may undermine the process of depolitisation of the judiciary; the recent amendments to the Constitution and the LJSJ excluded the legislative and executive powers (Minister of Justice) from the appointment procedure which is now led by the judicial self-governance bodies (HCJ and HQC).

47. It therefore seems necessary to introduce additional safeguards to ensure that the procedure for the appointment of judges is independent of the executive and legislative powers. In this regard, inspiration could be drawn from the Venice Commission's recommendations concerning the designation of HCJ members.[49] That being said, the Venice Commission would have a clear preference for more substantial amendments, namely for assigning the task of nominating Commission members to a non-political body such as the HQC – in its capacity as judicial self-governance body which is already involved in the appointment procedure[50] – subject to the role of international donors as discussed below. Another option would be not to create an additional body such as the proposed Competition Commission but, as a temporary measure pending completion of the judicial evaluation, to include experts proposed by international donors as supernumerary members of the HQC to participate in the selection procedure for judges in the anti-corruption courts and to give them a crucial role in that procedure similar to that envisaged for them in the Competition Commission by draft law No. 6011.[51] It is of utmost importance that the anti-corruption courts and their judges are, and are seen to be, independent – not least with regard to the requirements of Article 6§1 ECHR.[52]

48. As far as the three Commission members appointed by the Minister of Justice are concerned, the involvement of foreign "agencies" is, understandably, controversial in Ukraine. Bearing in mind that the agencies' proposals for Commission members are binding on the Minister of Justice (see above) and that the members proposed by the agencies would have a blocking minority of voices in the Competition Commission, the question has been raised whether this concept infringes the principle of Ukraine's sovereignty.[53] While this is ultimately a matter of internal constitutional law, the Venice Commission notes that the issue concerns only three out of nine members of one of a number of institutions involved in the appointment process. Furthermore, foreign involvement in anti-corruption institutions – with the agreement of

[49] Such as requiring that members of the Competition Commission chosen by the *Verkhovna Rada* be elected by qualified majority, which would favour candidates with cross-party support, and introducing a requirement of political neutrality. See e.g. CDL-AD(2015)027, paragraphs 19 and 20.
[50] The HQC is a permanent State judicial self-governance body. Eight of its 16 members are elected by the Congress of Judges from among the judges who have experience as a judge for at least ten years, or retired judges, two members each are elected by the Congress of Advocates and by the Congress of law schools and scientific institutions, and two members each are appointed from among persons who are not judges by the Parliament Commissioner for Human Rights and by the Head of the State Court Administration. See Articles 92 LJSJ ff.
[51] The involvement of the Public Integrity Council in the procedure might then not be necessary.
[52] See e.g. the previously mentioned ECtHR ruling *Fruni v. Slovakia*, application no. 8014/07.
[53] Cf. Article 1 of the Constitution.

the authorities – is not a new phenomenon in Ukraine; it has been practiced, in particular, during the selection of the NABU Director and of the Head of the Special Anti-Corruption Prosecutor's Office (SAPO).

49. In international comparison, it is not unusual that anti-corruption institutions are established with considerable support and input from international donors, and it is not unheard of that foreign nationals play some part in the judiciary; for example, in certain very small countries, even judges may be foreign nationals. The international involvement seems to be justified in the specific situation in Ukraine, with due regard to the principle of Ukraine's sovereignty.

50. During the interviews conducted in Kyiv, several interlocutors emphasised that only international involvement would ensure citizens' trust in the impartiality of the process. This could not even be replaced by entrusting a stronger role to civil society, e.g. by giving the Public Integrity Council (PIC) a veto right against candidates proposed. Such a scenario was opposed by various interlocutors, for different reasons: as part of the domestic society, PIC members could come under pressure as well; the future composition of the PIC is unpredictable; concerns have in the past been expressed about the unsatisfactory regulation of the PIC (e.g. regarding conflicts of interest of its members).[54] The Venice Commission understands that more detailed public regulation could undermine the independent non-governmental character of civil society, but for that reason it is not subject to legal safeguards which might be considered necessary in relation to appointments to public bodies such as conflict of interest rules.

51. To conclude, the Venice Commission underscores that the involvement of international/foreign donors is an exceptional measure and should therefore naturally be limited in time. Moreover, 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 (e.g. when it comes to the qualifications evaluation of candidates[55]). Further legal clarifications are also required to ensure legitimacy of the approach chosen, in particular regarding the question of how to determine which foreign donors will be involved, how to ensure that those donors are representative of the international donor community and how – and according to which criteria – foreign donors nominate candidates. In the view of the Venice Commission, donors should invite applications from suitable candidates to be nominated by them and should conduct a competitive process to find the most suitable nominees according to criteria to be specified in advance. It is essential to ensure high transparency at all stages of the appointment procedure. Finally, political involvement in the appointment procedure should be avoided.

d. Self-governance

52. The Venice Commission cannot see the need for a special regime of self-governance as provided for by draft articles 10 and 11.[56] Such unnecessary regulations may give the false impression that anti-corruption judges are a different class of judges. The Commission has particular misgivings about draft article 12 part 1 which states – rather vaguely – that the joint assembly of judges of the HACC and the Anti-Corruption Chamber "discuss common practice of considering certain categories of cases". Such provisions might jeopardise the strict separation of the two court instances and the principle of internal judicial independence. In sum,

[54] Cf. GrecoEval4Rep(2016)9, paragraph 141.
[55] Namely, under Article 85 LJSJ the examination of candidates includes a written anonymous test as well as performance of a practical task, whereas article 27 of draft law No. 6011 only mentions an anonymous written practical assignment.
[56] Those draft articles foresee the establishment of a separate assembly of HACC judges, an assembly of judges of the Anti-Corruption Chamber of the Supreme Court and a joint assembly of both.

any reference in the draft to special self-governing bodies for anti-corruption judges should be deleted.

e. Status of anti-corruption judges

53. The provision of advanced security measures for anti-corruption courts and judges under draft law No. 6011 is to be welcomed and appears necessary, given that those judges will have to decide on high-profile corruption cases. While it is not up to the Venice Commission to decide which of the specific measures foreseen in draft articles 33(3) and 35 are necessary, advanced security measures can in principle not be seen as an unjustified special regime. At the same time, the rapporteurs noted that according to several interlocutors, the protection of other judges also needs to be enhanced, as recommended by GRECO.[57]

54. The special remuneration schemes[58] for anti-corruption judges under draft law No. 6011 should be reconsidered. On the one hand, it is clear that those judges should be entitled to higher salaries than generalist judges of first instance courts, and it should also be taken into account that they work on important corruption cases and may come under significant external pressure; the CCJE recognises the possibility of special remuneration "where specific grounds can be identified which permit the conclusion that either the specifics of the profession of the specialist judge or the burden of his/her responsibilities (including a personal burden that may come with an assignment in a specialist function) demand such compensation".[59] On the other hand, care should be taken not to deviate too much from the general rules. Article 135 LJSJ already provides for regulations in that area, which might be more adequate when compared to the remuneration of generalist judges;[60] in any case, that Article makes it clear that judges' remuneration can only be regulated by the LJSJ itself.

55. Finally, the Venice Commission notes that according to the draft law, anti-corruption judges would in principle be subject to the same rules on disciplinary liability as generalist judges. The only difference lies in the fact that the launch of disciplinary proceedings against anti-corruption judges would require approval by the relevant self-governance body (draft article 13). That provision lacks the necessary precision; in particular, it fails to define the criteria for granting or refusing such approval. In any case, if the draft provisions on special self-governing bodies were deleted as recommended above, article 13 would be redundant and should be removed from the draft.

f. Conformity with the LJSJ

56. In accordance with Article 4(2) LJSJ, changes to that law may only be made by "laws on amending the LJSJ". While draft law No. 6011 does not foresee such amendments, they may be necessary in several areas, e.g. in relation to the appointment process of judges,[61] the establishment of the Anti-Corruption Chamber of the Supreme Court[62] and, possibly, the remuneration of judges.[63] This needs to be clarified by the Ukrainian authorities.

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[57] See GrecoEval4Rep(2016)9, paragraph 116.
[58] According to draft article 36, the official salary of HACC judges is the same as that Supreme Court judges (75 minimal salaries) and higher for judges of the Anti-Corruption Chamber of the Supreme Court (94 minimal salaries).
[59] Cf. CCJE Opinion No. 15, paragraph 57.
[60] According to Article 135 part 2 LJSJ, judges of Higher Specialised Courts are entitled to the same official salary as Appeal Court judges (50 minimal salaries).
[61] Article 81 LJSJ provides for a special procedure for the appointment of judges to Higher Specialised Courts.
[62] Pursuant to Article 37 part 4 LJSJ, the number and specialisation of cassation court chambers at the Supreme Court are decided by the meeting of judges of the relevant cassation court.
[63] Pursuant to Article 135 part 1 LJSJ, the remuneration of judges can only be regulated by the LJSJ.

4. Legislative procedure

57. According to Article 125 of the Constitution,[64] courts are established, reorganised and dissolved by law, and the draft law on those matters must be submitted to the *Verkhovna Rada* by the President of Ukraine after consultation with the HCJ. Some observers argue that this provision has been infringed since draft law No. 6011 was submitted to Parliament by MPs and not by the President of Ukraine. In response to such concerns, the authors of the draft bring forward that the HACC is already instituted by the LJSJ, and draft law No. 6011 only defines the details of its organisation and the appointment and status of its judges, as stated in draft article 1.

58. Nevertheless, the Venice Commission sees a risk that the draft law might be challenged before the Constitutional Court for violation of Article 125 of the Constitution – bearing also in mind that the creation of an Anti-Corruption Chamber at the Supreme Court could possibly be considered as reorganisation of a court. During the interviews, the rapporteurs noted with interest that the authors of draft law No. 6011 would be ready to withdraw it from Parliament[65] if the President submits his own draft based on the same principles, in particular, creation of an independent anti-corruption court and international involvement in the recruitment of its judges. In order to dispel any doubts about the validity of the process, the Venice Commission strongly recommends that draft law No. 6011 be withdrawn and that a new draft law, based on the recommendations contained in the present opinion, be introduced by the President of Ukraine in the *Verkhovna Rada*. Reference is made here to the recent statements made by the President of Ukraine in the course of his annual address to the *Verkhovna Rada* that there is an urgent need for creating an independent and "efficient special anti-corruption judicial body".

B. Draft law On Amendments to the Law of Ukraine 'On Judicial System and Status of Judges' (concerning the introduction of mandatory specialisation of judges on the consideration of corruption and corruption-related offences) (No. 6529)

1. General remarks

59. Draft law No. 6529 follows a fundamentally different path than draft law No. 6011 and the LJSJ in its current form. As mentioned above, it proposes to eliminate the LJSJ provisions on the HACC and to include provisions on specialisation of judges in local general courts and courts of appeal, while the Supreme Court is to provide a separate chamber of criminal court of cassation for administration of justice in corruption cases. Furthermore, it does not foresee the involvement of a new body in the selection of anti-corruption judges. Consequently, several questions discussed with respect to draft law No. 6011 (e.g. specialised court v. special court, involvement of foreign agencies in the selection of judges) are not relevant for the assessment of draft law No. 6529.

60. The approach of draft law No. 6529 deviates from the international obligations of Ukraine to set up a specialised anti-corruption court,[66] and from the original idea to give a response to the inefficient adjudication of cases investigated and prosecuted by NABU and SAPO, i.e. of high-level corruption cases. Instead, it proposes specialisation of judges at all court levels for all corruption offences, including both criminal and administrative offences, independently from the gravity of the offence committed and from the perpetrator. While such an approach may have the benefit of favouring consistent adjudication of different types of corruption offences, it faces several concerns.

[64] See also Article 19 LJSJ.
[65] This would be necessary under the Rules of Procedure of the *Verkhovna Rada*.
[66] See e.g. the Memorandum of Understanding between Ukraine and the IMF of March 2017.

2. Need for specialised judges and practical questions

61. First, the rationale and justification for such a far-reaching measure, i.e. the appointment of specialised judges at all general courts for all corruption offences, remains unclear. While it is commonly agreed that corruption is a significant problem in Ukraine, this does not necessarily mean that all corruption crimes are particularly complex and need to be handled by specialised judges. In this connection, it is interesting to note that Ukraine decided to create specific anti-corruption investigative and prosecution bodies only for high-level corruption (NABU, SAPO).

62. The question is important, not the least with regard to Council of Europe standards. The CCJE stressed in its Opinion No. 15 that "specialist judges and courts should only be introduced when necessary because of the complexity or specificity of the law or facts and thus for the proper administration of justice."[67] Based on that principle, and in the specific context of Ukraine, GRECO identified a specific need to entrust "the handling of high-profile corruption cases – which often imply complex financial transactions or elaborate schemes – to specialised judges".[68] Bearing in mind the inherent risks in the concept of specialised courts and judges, e.g. the risk of compartmentalisation of legal thinking, it appears highly doubtful whether the measures foreseen in draft law No. 6529 – which go far beyond those mentioned by GRECO – can be justified. Moreover, several interlocutors interviewed by the rapporteurs expressed their concerns that if specialised judges were competent for all corruption cases, they might again be tempted to decide on minor cases as a priority (as has been the case until now) instead of dealing with the sensitive high-profile cases.

63. Second, if the authors of draft law No. 6529 see a need for specialised anti-corruption judges, the question arises how such specialisation is secured. The draft does not foresee any specific eligibility requirements other than a certain professional experience in the field of law (which is very similar to the general requirement on judicial candidates),[69] nor does it foresee any specific training for anti-corruption judges or similar measures. It is also to be noted that the appointment of "not less than three" anti-corruption judges at each local general court and "not less than five" at each appeal court, plus the creation of a separate chamber at the Supreme Court (see draft articles I)1c) and I)2.7), represents a significant challenge for the judicial system in Ukraine. According to estimates by civil society, at least 1 800 specialised judges would be needed. At the same time, the rapporteurs were informed during the visit in Kyiv that around half of judge posts in Ukraine are currently vacant. Against this background, many interlocutors clearly stated that the appointment of specialised anti-corruption judges at all courts is unrealistic.

3. Scope of competences of specialised judges

64. The competences of specialised judges under draft law No. 6529 are not quite clear. The draft refers to "corruption crimes" and "administrative offences related to corruption". It seems necessary to spell out more clearly which offences would fall under those concepts. For example, the term "corruption crimes" might refer to the criminal offences in office under Chapter XVII of the Criminal Code, which include offences such as public sector bribery, abuse of office, etc. – but it might also cover e.g. private sector bribery (which is regulated in the

[67] See the Opinion No.15(2012) of the CCJE on the specialisation of Judges.
[68] See GrecoEval4Rep(2016)9, paragraph 120.
[69] Under Article 69 part 1 LJSJ, judicial candidates must have at least five years' professional experience in the field of law. Under article I)4) of draft law No. 6529, specialised judges must either have at least three years of experience as a judge, a scientific degree in law and experience in law science for at least five years, experience of professional activity as a lawyer or prosecutorial and investigative activity for at least five years, or accumulated experience in those areas for at least five years.

Chapter XVIII) or, on the other hand, exclude offences such as abuse of office which are not directly related to bribery.

65. In this connection, the Venice Commission also recalls that according to GRECO, the same court (to be read in the present context as "the same category of – specialised – judges")[70] should be "competent to also deal with criminal offences connected to corruption, e.g. money-laundering if the proceeds of corruption have been laundered.[71] This is apparently not provided for by draft law No. 6529.

66. Similarly as draft law No. 6011, draft law No. 6529 lacks clear legal provisions which would allow determining the competent court and the procedure to be followed in cases involving both offences which fall under the jurisdiction of specialised judges and connected offences which do not. As for the matter of cases which are pending at the moment when the draft law No. 6529 is enacted, this is regulated by draft article II)4): such cases are continued to be considered by the courts before which they are pending at that moment.

4. Selection and protection of specialised judges

67. It is recalled that according to GRECO "it is of utmost importance that specialised judges for high-level corruption cases be selected in a transparent process based on objective criteria. It is also critical that such judges are adequately protected from undue external – e.g. political – influence and from any possible attack on their independence and safety."[72] Even if draft law No. 6529 does not only concern high-level corruption cases, it does include them – and thus the aforementioned declaration needs to be taken into account. It is therefore highly unsatisfactory that the draft does not envisage any specific measures to protect the judges' independence and safety, and that it does not provide for any specific safeguards in the selection procedure.[73] In this connection, the further question arises of how the selection of anti-corruption judges from the existing judicial body would be co-ordinated with the planned vetting of all sitting judges. For the time being, such vetting has only been carried out with respect to Supreme Court judges. Is appears particularly worrying that at the appeal courts, specialised judges might be elected by the relevant assembly of judges (which generally would be welcome, in terms of independence of the judiciary) before the latter have undergone the vetting procedure.

5. Legislative procedure

68. Similar questions as for draft law No. 6011 could also be raised with respect to draft law No. 6529, as the latter was also submitted to Parliament by MPs. It could be argued that the appointment of specialised anti-corruption judges in local and appeal courts (i.e. the setting-up of specialised chambers) amounts to a reorganisation of those courts and that the deletion of the LJSJ provisions on the HACC is to be considered as a dissolution of a court. In that case, the procedure foreseen in Article 125 of the Constitution would have to be applied.

[70] The formulation of GRECO's statement was based on the assumption that Ukraine would set up a specialised court as foreseen by the LJSJ.
[71] See GrecoEval4Rep(2016)9, paragraph 120.
[72] See GrecoEval4Rep(2016)9, paragraph 120.
[73] Pursuant to draft article I)1b), specialised judges are to be appointed at local courts according to the general procedure for the appointment of judges, and they are elected at appeal courts by the relevant assembly of judges.

IV. Conclusion

69. The Venice Commission welcomes the recent statements made by the President of Ukraine that there is an urgent need for creating an independent and "efficient special anti-corruption judicial body", to be formed on a competitive basis from judges with impeccable reputation, in line with Council of Europe and Venice Commission standards. The Commission furthermore notes that in the view of the international community, the only way forward in the fight against high-level corruption in Ukraine is the prompt establishment of a high specialised anti-corruption court (HACC), as foreseen in the Law "On the Judicial System and the Status of Judges" (LJSJ), whose judges are selected in a transparent procedure with international involvement.

70. The Venice Commission acknowledges that Ukraine has launched a comprehensive reform of the judiciary which includes significant constitutional and legal amendments – i.a. with respect to judges' appointment –, the reform of the High Council of Judges (HCJ) and the High Qualifications Commission of Judges (HQC) and an evaluation procedure for all sitting judges with regard to competence, professional ethics and integrity criteria. This reform is clearly aimed at reconstructing the Ukrainian justice system in accordance with the standards of the Council of Europe and securing the rule of law in Ukraine. While this is a promising and commendable – but still on-going – process, the Venice Commission welcomes the current initiative to take additional, specific and rapid measures to establish a HACC competent for high-profile corruption cases – bearing in mind the urgency of the matter and the fact that such cases are particularly sensitive and complex.

71. The Venice Commission is of the opinion that many of the provisions of the draft law on anti-corruption courts (draft law No. 6011) provide a good basis for the establishment of the HACC in line with Council of Europe and Venice Commission standards. That said, several recommendations should be taken into account, in particular, to reduce the risk that the law could be considered unconstitutional.

72. While it will ultimately be up to the Constitutional Court, in a given case, to decide on the constitutionality of the law, the Venice Commission takes the view that the HACC has clear characteristics of a specialised court, rather than a special or extraordinary court, and that it does not jeopardise the unity of the judiciary. That said, special rules for anti-corruption courts and judges (including their appointment and status) which deviate from the general LJSJ provisions should be limited to what is necessary for them to work effectively.

73. Therefore, the Venice Commission formulates the following main recommendations:

- Having regard to the recent call by the President of Ukraine for the creation of an independent and "efficient special anti-corruption judicial body", and in order to dispel any doubts about the constitutionality of the legislative procedure, the Venice Commission invites the President of Ukraine to submit his own draft law on anti-corruption courts – which should be based on the recommendations contained in the present opinion – to the *Verkhovna Rada*, in an expeditious manner. Draft law No. 6011 needs to be withdrawn to make such a legislative initiative possible.

- The key components of draft law No. 6011 should be maintained, namely the establishment of an independent HACC and appeal instance whose judges are of impeccable reputation and are selected on a competitive basis in a transparent manner; temporarily, international organisations and donors active in providing support for anti-corruption programmes in Ukraine should be given a crucial role in the body which is competent for selecting specialised anti-corruption judges, similar to the role envisaged for them in draft law No. 6011; the jurisdiction of the HACC and of the appeal instance should correspond to that of the National Anti-Corruption Bureau (NABU) and of the

Special Anti-Corruption Prosecutor's Office (SAPO), subject to the requirement that the courts' jurisdiction be precisely defined by law.

- It needs to be ascertained that the Appeals Chamber is in effect separate from the rest of the HACC, in particular regarding its composition. Furthermore, the uniform application of the law by cassation courts should be ensured by the Grand Chamber of the Supreme Court in accordance with the general rules.

- Additional safeguards should be introduced to ensure that the decision-making body in the appointment procedure of judges is sufficiently independent of the executive and legislative powers. This could be achieved, for example, by giving a non-political agency such as the High Qualifications Commission of Judges (HQC) the right to nominate members to that body, in addition to the members proposed by international donors. Another option would be not to create an additional body such as the proposed Competition Commission but, as a temporary measure pending completion of the judicial evaluation, to include experts proposed by international donors as supernumerary members of the HQC to participate in the selection procedure for judges in the anti-corruption courts and to give them a crucial role in that procedure. The procedure for involving international organisations and donors in the selection procedure needs to be regulated more in detail so as to provide for a high degree of transparency and compliance with the Constitution.

74. In addition, the draft law needs to be further refined in order to provide for a clear and precise legal framework. In particular, care must be taken to harmonise the draft with existing legislation and, where necessary, to provide for amendments to the LJSJ. Clear legal provisions which allow determining the competent court and the procedure to be followed in cases involving both offences which fall under the HACC jurisdiction and connected offences which do not, are also required. Special rules on self-governing bodies for anti-corruption judges and disciplinary proceedings against them do not appear necessary and should be removed. The level of remuneration for such judges should be reconsidered; it should be commensurate with the increased demands of their position but should not differ too much from generalist judges' remuneration.

75. As far as draft law No. 6529 is concerned, the Venice Commission wishes to stress that it deviates from the current law and international obligations of Ukraine to set up a specialised anti-corruption court. The Commission cannot see how the appointment of specialised judges at all general local courts, courts of appeal and the Supreme Court could be justified and be implemented in practice. It appears questionable whether the referral of all kinds of corruption-related offences to the specialised judges would be an effective tool for enhancing the fight against high-level corruption in particular. Furthermore, the scope of competences of the specialised judges under draft law No. 6529 is unclear, and the absence of any specific safeguards in the selection procedure and of any specific measures to protect the judges' independence and safety is highly unsatisfactory. The aforementioned shortcomings conflict with the requirements on specialised (anti-corruption) judges established by competent Council of Europe bodies, in particular, the CCJE and GRECO.

76. The Venice Commission remains at the disposal of the Ukrainian authorities for further assistance in this matter.