



**DECISION**  
**of the Constitutional Court of Ukraine**

**in the case pursuant to the constitutional submission of 47  
Members of Parliament of Ukraine  
regarding the conformity with the Constitution of Ukraine  
(constitutionality) of certain provisions of the Law of Ukraine  
"On Prevention of Corruption", the Criminal Code of Ukraine**

Kyiv City

Case No.2- 24/2020(393/20)

28 October 2019

№ 13- A/2020

The Grand Chamber of the Constitutional Court of Ukraine, comprised of  
judges:

Oleksandr Tupytsky – presiding,  
Serhiy Golovaty, i,  
Victor Gorodovenko,  
Iryna Zavgorodna,  
Oleksandr Kasminin,  
Viktor Kolisnyk,  
Victor Krivenko,  
Vasyl Lemak,  
Oleksandr Litvinov,  
Volodymyr Moysyk,  
Oleg Pervomayskyi,  
Serhiy Sas,  
Ihor Slidenko – reporting,  
Petro Filyuk,  
Galyna Yurovska,

considered at the plenary session the case pursuant to the constitutional submission of 47 Members of Parliament of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption" from October 14, 2014, No.1700–VII (Bulletin of Verkhovna Rada of Ukraine, 2014, No.49, Art. 2056), as amended, the Criminal Code of Ukraine.

Having heard the judge-reporter I. Slidenko and having studied the case materials, the Constitutional Court of Ukraine hereby

**e s t a b l i s h e d :**

1. The subject of the right to constitutional submission – 47 Members of Parliament of Ukraine – submitted to the Constitutional Court of Ukraine a petition to recognize as non-compliant with the Constitution of Ukraine (unconstitutional), certain provisions of the Law of Ukraine "On Prevention of Corruption" of October 14, 2014, No.1700–VII, as amended, (hereinafter – the Law No.1700), the Criminal Code of Ukraine (hereinafter – the Criminal Code of Ukraine).

Members of Parliament of Ukraine requested to recognize as non-compliant with the Constitution of Ukraine (unconstitutional), provisions of ss.8, s.1 of Art. 11, ss. 2, 10<sup>1</sup> of s.1 of Art. 12, pars. 2, 3 of s.1 of Art. 47, s.1, 3 of Art. 50, Art. 51, s.2 of Art. 52 of Law No.1700, Art. 366<sup>1</sup> of the Criminal Code of Ukraine.

The authors of the petition believe that the contested provisions of Law No.1700, Art. 366<sup>1</sup> of the Criminal Code of Ukraine do not comply with s.2 of Art. 3, s.2 of Art. 6, s.1, 2 of Art. 8, s.2 of Art. 19, Art. 21, s.1, 2 of Art. 24, s.1, 2 of Art. 32, s.2 of Art. 61, s.1 of Art. 62, s.1 of Art. 64, s.1 of Art. 68 of the Constitution of Ukraine.

2. The Constitutional Court of Ukraine, deciding the issues raised in the constitutional submission accounted for the following.

According to the Constitution of Ukraine, the bodies of legislative, executive, and judiciary branches exercise their authority within the limits established by the Constitution and according to the laws of Ukraine (s.2 of Art. 6); in Ukraine, the principle of the rule of law is recognized and effective; The Constitution of Ukraine is the superior law; laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform thereto (s.1,2 Art. 8); the independence and immunity of judges shall be guaranteed by the Constitution and laws of Ukraine. Any influence on a judge is prohibited (s.1, 2 Art. 126); independence and inviolability of a judge of the Constitutional Court of Ukraine are guaranteed by the

Constitution and laws of Ukraine; any influence on a judge of the Constitutional Court of Ukraine is prohibited (s.1, 2 Art. 149).

3. According to s.1 of Art. 6 of the Constitution of Ukraine, state power in Ukraine is exercised on the principles of its division into legislative, executive, and judicial.

The constitutional system of the division of state power means that each of the branches of power has its own system (structure) of subjects, institutions, means, forms, and methods of governance (exercise of power), based exclusively on the ideas of freedom, rule of law, guaranteeing and observing human and citizen rights and freedoms and restriction of arbitrary governance. The fundamental principle of constitutionalism and the guarantee of good governance is the division of state power into independent branches with their own competence, defined by the Constitution and laws adopted on its basis.

The fundamental and integral element of such a system is the independent bodies of the judiciary and constitutional control, whose determinant functions are aimed at the protection of human and citizen's rights and freedoms, the interests of legal entities, as well as at guaranteeing the system of state power separation power in general.

The purpose of functional separation of state power into legislative, executive, and judicial (Art. 6 of the Constitution of Ukraine) is to differentiate powers between various state bodies and prevent the appropriation of the absolute state authority by one of the branches of power, which means that each of them performs its functions and exercises powers in accordance with the Constitution and laws of Ukraine (par.1 of s.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine from June 24, 1999 No.6-пп/99; par.2 of ss. 2.1, s.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine from July 8, 2016 No.5-пп/2016).

Exercise of state power following these constitutional provisions, in particular on the basis of its division into legislative, executive, and judicial, thanks to the system of checks and balances defined by the Fundamental Law of Ukraine, ensures the stability of the constitutional order, prevents usurpation of state power and usurpation of the exclusive right of the people to determine and change the

constitutional order in Ukraine (par.6 of ss.3.1 of s.3 of the reasoning part of the Decision of the Constitutional Court of Ukraine of June 13, 2019, No.5-p/2019)).

It is the bodies of the judiciary and constitutional control that carry out, in particular, the main functions of proper legal scrutiny over legislative and executive powers, as well as exercise control over the activities of these branches of power in order to prevent them from exceeding limits of their authority.

The purpose of the judiciary is to control the observance of legality, and constitutional control aims to ensure the constitutionality of the activities of the legislative and executive authorities. Bodies of the judiciary and constitutional control are a counterweight to the legislature and executive power because they can revise the acts of these branches of state power in terms of their legality or constitutionality.

The Constitutional Court of Ukraine emphasizes that the exceptionalism of the judiciary and especially constitutional control, among other things, is due to a special procedure for the formation of judicial corps, including internal bodies comprised of judges only that resolve issues of judge's liability.

4. The Constitutional Court of Ukraine proceeds from the fact that the judiciary, taking into account the very nature of its functions, is the least dangerous for democratic governance and other branches of state power, as well as for natural human rights determined by the Constitution of Ukraine, because it has the least opportunities for their violation or negative impact thereon. After all, the legislature sets the rules, the executive branch enforces them, and the judiciary does neither. The judiciary has neither military nor financial power, nor direct leverage over other branches of state power, so it is the most vulnerable to the encroachments by other branches of state power. With this in mind, one of the main tasks of the Constitutional Court of Ukraine is to ensure proper implementation of the principle of separation of state power, maintain the system checks and balances of power in order to prevent the disproportionate strengthening or inadequate influence of one branch of state power over another. Objective application and proper interpretation without any undue advantages are possible only if the Constitutional Court of Ukraine and the judiciary are independent in general are not subject to negative impact and pressure

of legislative and executive powers, which are guided not so much by the interests of law, but by the interests of politics and parties.

5. In Ukraine, the principle of independence of judges and courts is enshrined at the constitutional level (Arts. 126, 127, 129 of the Constitution of Ukraine) and legislation (Arts. 6, 48, 126 of the Law of Ukraine "On the Judiciary and Status of Judges"). The independence and immunity of judges of the Constitutional Court of Ukraine are guaranteed by the Constitution of Ukraine (Art. 149) and the Law of Ukraine "On the Constitutional Court of Ukraine" (Arts. 2, 24).

Effective exercise by the judiciary of its functions is possible only if independence thereof, which is a characteristic feature of the judiciary, is guaranteed. Courts must be completely independent of legislative and executive bodies. The independence of the judiciary is ensured by its autonomy within the system of separation of state power, the inability of other branches of state power to influence the court decisions, as well as guarantees of independence of judges. The same applies to the liability of judges, the procedure thereof being closely related to ensuring the independence of judges. After all, the mission of the judiciary lies primarily in the protection of human and citizen's rights and freedoms and directly relates to the constitutional right to judicial protection.

Judges administer justice by exercising the judicial authority within the limits set by the Fundamental Law of Ukraine and the Law "On the Judiciary and Status of Judges". Judges of the judiciary and the Constitutional Court of Ukraine perform their duties on a professional basis, have the same legal status, based on common elements, regardless of the place of the court's position within the judiciary system or the administrative position held by a judge in court. The uniformity of the legal status exists due to, in particular, the single procedure for acquiring the status of a judge, a set of rights and duties of a judge, the unity of legal guarantees that enable judges to be impartial, objective, neutral and independent. The acquisition of the status of the judge is connected with the acquisition of guarantees of independence stipulated by the Constitution and laws of Ukraine, which was repeatedly emphasized by the Constitutional Court of Ukraine in its decisions.

The Constitutional Court of Ukraine noted that reducing the level of guarantees of judges' independence may indirectly lead to restrictions of the possibility to exercise the right to judicial protection; it is not allowed to reduce the level of independence guarantees and immunity of judges in case of adoption of new laws or amendments to the current laws (the third sentence of par.5 of ss.4.3 of s.4 of the reasoning part; par.2 of ss.1.3 of s.1 of the resolutive part of the Decision from December 1, 2004 No.19-pп/2004).

The Constitutional Court of Ukraine argued that the provision of s.2 of Art. 126 of the Constitution of Ukraine "*Any influence on a judge is prohibited*" should be understood as ensuring the independence of judges in connection with the administration of justice, as a prohibition of any actions against judges regardless of their manifestation on the part of state bodies, institutions and organizations, local self-government, their officers and officials, individuals and legal entities aimed at preventing the exercise of professional duties by judges or inclining them to issue an unlawful decision, etc. (s.2 of the Decision from December 1, 2004 No.19-pп/2004).

The provisions of the Constitution of Ukraine concerning the independence of judges, which is an integral part of the status of judges and their professional activities, are connected with the principle of separation of state powers and justified by the need to provide the foundation for the constitutional order, human rights, to guarantee the autonomy and independence of the judicial branch of power (par.2 of ss.2.2 of s.2 of the reasoning part of the Decision of the Constitutional Court of Ukraine No.3-pп/2013 from June 3, 2013).

The constitutional principle of independence of judges ensures an important role of the judiciary in the mechanism of protection of the rights and freedoms of citizens and remains the key to the exercise of the right to judicial protection under Art. 55 of the Fundamental Law of Ukraine; any reduction in the level of guarantees of judicial independence contradicts the constitutional requirement of continuing safeguard of independent justice and the citizens' right to protection of their rights and freedoms by an independent court, as it leads to restriction of the means for exercising this constitutional right, and therefore contradicts Art. 55 of the

Constitution of Ukraine (par.2 of s.3 of the reasoning part of the Decision of the Constitutional Court of Ukraine from June 3, 2013 No.3-пп/2013).

The Constitution of Ukraine defines fundamental approaches to ensuring the independence and immunity of judges, and therefore grants them the highest level of protection – constitutional; the laws of Ukraine may be expanded in the scope of guarantees of independence and immunity of judges, which should be sufficient for their activities to be carried out impartially, objectively, neutral and independently; fixing at the constitutional level the provision allowing justice in Ukraine to be carried out exclusively by courts, and the provision concerning the independence of judges creates the most important guarantee of respecting the constitutional rights and freedoms of a person and a citizen; such consolidation is aimed at creating an effective mechanism for the fulfillment of the objectives assigned to the judiciary, which consist primarily of the protection of human and citizen's rights and freedoms, ensuring the rule of law and constitutional order in the State; consequently, the protection of judges at the level of the Constitution of Ukraine is the most important guarantee of the independence of the judiciary, its impartiality, objectiveness, neutrality and independence, proper performance duties by the judges to protect the rights and freedoms of human and citizen, secure the rule of law and constitutional order in the State (pars. 3, 4, 6 ss.3.1 of s.3 of the reasoning part of the Decision of the Constitutional Court of Ukraine from December 4, 2018 No.11-p/2018).

The Constitutional Court of Ukraine stresses that any pressure against the judiciary exerted by representatives of the legislative and executive authorities is impossible, including during the consideration of cases; it is not allowed to interfere with judges' activities in order to force them to adopt certain decisions. The independence of the judiciary is one of the main principles of its effective operation, that is, any influence of legislative and executive power is excluded completely.

Thus, the independence of judges is an integral part of their status, and the constitutional principle of independence of judges ensures an important role of the judiciary in the mechanism of the protection of rights and freedoms of citizens and secures the exercise of the right to judicial protection.

The independence of judges is the main precondition for the functioning of an independent and authoritative judiciary capable of ensuring objective and impartial

justice, effectively protecting the rights and freedoms of a person and a citizen. The principle of independence of judges means procedural activity during the administration of justice in conditions that exclude third-party influence on judges. Guarantees of independence of judges are defined as proper means of minimization and elimination of negative influences on judges during the administration of justice aimed at rendering a legitimate and substantiated decision.

The independence and autonomy of the judiciary and constitutional control mean that they perform their functions without any interference with their activities, do not depend on the bodies of legislative and executive power, so that any influence on the judiciary must be stopped at the stage of appointment of judges.

The Constitutional Court of Ukraine notes that carrying out functions assigned to the judiciary and constitutional control, including the protection of human and citizen's rights and freedoms, control over the constitutionality of the activities of public authorities, guaranteeing the system of separation of state power is impossible in case any forms of pressure on judges of the judiciary and the Constitutional Court of Ukraine are possible.

Thus, the institutional independence of the judiciary is a prerequisite for the independence and impartiality of each individual judge, whereas independence, the impartiality of each of them is the precondition for ensuring the institutional independence of the judiciary as a whole.

6. The Constitutional Court of Ukraine takes into account the fact that the main focus of ensuring the independence of the judiciary is the creation of specific institutions, meant to withdraw the judiciary bodies from the field of administrative control and the actual management of executive and legislative bodies.

The independence of the judiciary is undoubtedly a significant part of the rule of law principle and is designed to ensure that every person has the right to a fair trial, and therefore it is not a privilege for judges, but rather serves as a guarantee of respect for human rights and fundamental freedoms, which ensures trust in the justice system (par.7 of the Preamble of Recommendation CM/Rec(2010)12 of the Committee of Ministers to the Member States on judges: independence, efficiency,



and responsibilities, from November 17, 2010, (hereinafter referred to as “the Recommendation”).

In turn, the independence of the judiciary ensures the independence of each individual judge, which is a fundamental aspect of the rule of law (s.4 of the Annex to the Recommendation).

External independence of judges is not a prerogative or privilege granted in judges’ own interest, but rather in the interest of the rule of law and persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights, and impartial application of the law. Judges’ impartiality and independence of judges are essential to guarantee the equality of parties before the court. (s.11 of the Annex to the Recommendation).

The judiciary shall be independent of the Executive and Legislative (s.2.04 of the Montreal Universal Declaration on the Independence of Justice ( adopted at the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) on June 10th, 1983); the independence of the judiciary shall be guaranteed by the State; it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. (s.1 of the Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985)); the State shall not allow any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (par.2.02 of the Montreal Universal Declaration of Independence of Justice; par.2 of the Fundamental Principles of Judicial Independence).

Protection and strengthening of the judiciary in relations with the executive and legislature should be carried out by measures ensuring that members of the executive and legislature respect the judiciary and refrain from improper, unbiased, or exclusively politically-motivated public criticism of individual judges and ensure that the day-to-day administration of courts is carried out efficiently and reasonably on the basis of legal norms and without excessive interference by the executive or legislative power; disciplinary proceedings or criminal investigations against a judge, it is imperative that such proceedings be carried out in accordance with the necessary full procedural guarantees before an independent, non-political, authority; sanctions

must be applied in a proportionate manner and must not be imposed arbitrarily or for political motives or for any reason not related to the suitability of the judge to exercise the judicial office. (par."C" and Action 1.3 of the Annex to the Council of Europe Action Plan on Strengthening the Judicial Independence and Impartiality from April 13, 2016, No.CM(2016)36 final).

The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges. (Ss."b" of s.2 of Principle I of the Recommendation of the Committee of Ministers of the Council of Europe "On Independence, Effectiveness, and Role of Judges" from 13 October 1994, No.R(94)12).

As for anti-corruption policy and bringing judges to liability, disciplinary bodies must be independent of the government, while disciplinary proceedings or recusal proceedings against judges should be determined in accordance with established procedures guaranteeing the rights of judges to a fair, transparent, and independent consideration of the case.

Anti-corruption reform in Ukraine has become an indisputable requirement of society. However, both anti-corruption and judicial reforms should be implemented without violating the principle of independence of the judiciary and in compliance with the principle of constitutionality. To have an impact on corruption, judicial reforms must address issues relating to judicial independence, accountability, and transparency. This includes creating structures for an independent judiciary capable of self-governance.

The Conclusion of the Consultative Council of European Judges (CCJE) of November 9, 2018 No.21(2018) "Preventing corruption among judges" states that corruption among judges is one of the main threats to society and the functioning of a democratic state. It undermines judicial integrity which is fundamental to the rule of law and is a core value of the Council of Europe. There is reason to argue that effective prevention of corruption in the judiciary relies heavily on political will in the relevant country to truly and sincerely provide institutional, infrastructure, and other organizational guarantees for an independent, transparent and impartial judiciary. However, the fight against corruption should not affect the independence of the judiciary. Besides, the process of corruption vetting,

dismissal and prosecution of persons that failed such vetting can be used as a tool for abuse and removal of politically "undesirable" judges. The mere fact of being a judge in a Member State, where the judiciary is systemically compromised, is insufficient by democratic standards to establish liability on the part of individual judges. This also applies to guarantees that the vetting process must be carried out by competent, independent, and impartial authorities. Categories of civil servants have different levels of responsibility and authority, so it is necessary to ensure different rules of declaring, in particular, higher judicial bodies have the right to demand dedicated acts regulating this issue, and the declarations of judges may be scrutinized by a special body within the judiciary.

Corruption is constrained through structural reforms, robust and lengthy anti-corruption laws, and a coherent institutional mechanism for implementation thereof and ensuring that independent, fair, and impartial justice is maintained. However, in order for the fight against corruption to be successful, independent judiciary and law enforcement agencies free from political and lobbying interference are needed.

Thus, from the international standards of independence of the judiciary, we conclude that it is the duty of all state and other institutions to respect and observe the independence of the judiciary, which independently, without outside influence from any public authorities and officials, carries out all its functions.

7. When deciding this case, the Constitutional Court of Ukraine takes into account the fact that the independence of judges from other public authorities is crucial in any democracy.

In its decisions, the European Court of Human Rights has repeatedly emphasized the importance of respecting the principle of separation of state power and non-interference of the executive and legislative branches of power in the affairs of the judiciary, which is an important factor in ensuring the true independence of the judiciary and judges in particular. For instance, attention is focused on the importance of judiciary independence from the executive branch (par.95 decision in case "Ringeisen v. Austria (merits) from 16 July 1971 (application No.2614/65) and in compliance with the principle of separation of powers (par.40 of decision in case "Sacilor-Lormines v. France of 9 November 2006) (application No. 65411/01). In

addition, the importance of the concept of separation of powers between the executive and judicial branches becomes increasingly important in the practice of this court (par.78 of the decision in case "Stafford v. the United Kingdom" (application No.46295/99 from March 28, 2002).

In the context of the interpretation of the term "established by law", which is used in Art. 6 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), it is stated that the influence of the executive branch on the judiciary contradicts the principle that provides that the judiciary in a democratic society should not depend on the discretion of the executive branch (par.34, par.37 of the decision in case "Gurov v. Moldova" from 10 October 2006 (application No.36455/02).

The requirement of Art. 6(1) of the Convention that tribunals must be independent and impartial is directly related to the concept of separation of powers. Art. 6 of the Convention is inseparable from the notion of judicial independence, and the rigid and visible separation between the legislative and executive powers, on one hand, and the judiciary of the state on the other, is necessary to ensure the independence and impartiality of judges, and therefore the trust of the general public in the judiciary. Compromise in this area cannot but undermine this certainty (pars. 2, 7 of the dissenting opinion of Judge Margarita Tsatsi-Nikolovskaya to the decision in the case "Kleyn and Others v. The Netherlands from 6 May 2003 (statements Nos.39343/98, 39651/98, 43147/98 and 46664/99).

The European Court of Human Rights emphasized that when determining whether a body can be considered "independent", especially from the executive branch, one should, in particular, take into account the method of appointment of its members, duration of their work, the term of office, the presence of guarantees against external pressure and whether the body demonstrates the visibility of independence (par.34 of the decision in the case "Pohoska v. Poland" from 10 April 2012 (application No. 33530/06), and the term "independent" itself in par.1 of Art. 6 of the Convention contains two elements, namely the independence of the courts from the executive branch and their independence from the parties to the proceedings (par.74 decisions in the case "Leo Zand v. Austria" from 12 October 1978 (application No. 7360/76).

8. The Constitutional Court of Ukraine notes that realization of the principle of independence of the judiciary, and therefore judges, translates in the autonomy thereof from other branches of state power, which means the formation of an independent, autonomous, and self-government judiciary outside the structures of the legislative and executive branches of government.

However, as practice shows, the legislator may disregard the basic constitutional principles of separation of state power in terms of independence of the judiciary, endows bodies and officials that do not belong to the judiciary with a significant mandate for the organization and operation of courts, shaping the judiciary and status of judges, etc. outside the constitutionally-established competence thereof. Thus, it creates preconditions for unlawful influence on the court, interference with activities of the judiciary, violation of the principles of independence and autonomy of judges.

The Constitutional Court of Ukraine stresses that any forms and methods of control in the form of inspections, monitoring, etc. of the functioning and activities of courts and judges should be carried out solely by the judiciary bodies and exclude the creation of such bodies in the system of both executive and legislative power.

Consequently, the Constitutional Court of Ukraine considers that at the legislative level such relationships should be created that exclude undue pressure, influence or control by the executive or legislature over the judiciary and prevent the emergence of normative regulation, allowing for legislative control over the judiciary and judges exercising their authority, which would lead to interference in the activities of the judiciary encroachments against its independence, contrary to the provisions of the Fundamental Law of Ukraine. Thus, by creating appropriate bodies, introducing liability (sanctions), certain types of control, the legislator must act exclusively on the principles of independence of the judiciary, non-interference in the activities of courts and judges.

9. In the context of the peculiarities of the disputed provisions of Law No.1700, the Constitutional Court of Ukraine considers ss.8 of s.1 of Art. 11 of Law No.1700 as

a holistic norm, since the separation of any provision is impossible due to the threat of distortion of the will of the legislator.

10. Ss.8 of s.1 of Art. 11 of Law No. 1700 is the basis and ground for the institutionalization of the entirety of the provisions of Law No.1700 concerning the oversight powers of the National Agency for the Prevention of Corruption as an executive body, in particular ss.6 of s.1 of Art. 11, ss.1, 2, 6–10<sup>1</sup>, 12, 12<sup>1</sup> s.1, s.2–5 of Art. 12, s.2 of Art. 13, s.2 of Art. 13<sup>1</sup>, Art.35, pars. 2, 3, s.1 of Art. 47, Arts. 48–51, s.2-3 of Art. 52, Art. 65 of Law No.1700, namely: powers and rights of the National Agency for the Prevention of Corruption, authorized persons and authorized units for the prevention and detection of corruption, peculiarities of conflict of interest settlement, which arose in the course of activities of certain categories of persons authorized to perform the functions of the State or local self-government, registration, and publication of declarations, control, and verification of declarations, establishing the timeliness of their submission, full verification of declarations, monitoring of the lifestyle of subjects of declaring undertaking additional measures of financial control, liability for corruption or related offenses.

Implementation of these norms without ss.8 of s.1of Art. 11 of the Law No.1700 is not possible. Therefore, the approach of the Constitutional Court of Ukraine is to comprehensively consider the scope of the said norms that institutionalize the controlling powers of the National Agency for the Prevention of Corruption, in their totality.

11. The Constitutional Court of Ukraine takes into account the fact that the National Agency for the Prevention of Corruption, in accordance with Law No.1700 is a body created and operating on the basis of the law, being one of the central body of executive power.

12. According to s.1of Art. 4 of Law No.1700, the National Agency for the Prevention of Corruption is a central executive body with a special status that ensures the formation and implementation of the state anti-corruption policy.

The separation of powers between branches of state power is a key aspect of the rule of law principle. Therefore, adherence to the rule of law imposes legal restrictions on the executive branch, because it cannot function outside the Constitution of Ukraine and the role assigned thereto upon the division of state power.

Systematic and functional analysis of the powers and rights of the National Agency for Prevention of Corruption gives grounds to assert that it was endowed with controlling functions that have a direct and immediate impact on the judicial branch of power, in particular on judges of the judiciary system and the Constitutional Court of Ukraine in their performance (exercise) of administration of justice or constitutional control.

The Constitutional Court of Ukraine emphasizes that according to the standards of constitutionalism and values vested with the Constitution of Ukraine, there is no place for the control of the executive branch of power over the judicial.

13. The Constitutional Court of Ukraine thus ascertains that the National Agency for the Prevention of Corruption, as an executive body, exercises control over constitutionally established institutions, namely the courts and the Constitutional Court of Ukraine.

Since the judicial power is independent, the independence and immunity of judges within the judiciary system and Constitutional Court of Ukraine are guaranteed by the Constitution of Ukraine, the executive branch is separated from the judicial.

Taking this into account, the Constitutional Court of Ukraine concludes that certain provisions of Law No.1700 relating to the powers of the National Agency for Prevention of Corruption in terms of controlling functions (control) of the executive branch over the judicial are unconstitutional, namely: powers and rights of the National Agency for the Prevention of Corruption, authorized persons and authorized units for the prevention and detection of corruption, peculiarities of conflict of interest settlement, which arose in the course of activities of certain categories of persons authorized to perform the functions of the State or local self-government, registration, and publication of declarations, control and verification of declarations,

establishing the timeliness of their submission, full verification of declarations, monitoring of the lifestyle of subjects of declaring undertaking additional measures of financial control, liability for corruption or related offenses.

14. The Constitutional Court of Ukraine draws the legislator's attention to the fact that by introducing the powers and rights of the National Agency for the Prevention of Corruption and other executive bodies applicable to judges that enjoy the special status and belong to the judicial branch of power, it should distinguish between the judges of the judiciary system and judges of the Constitutional Court of Ukraine, taking into account the principle of independence of the judiciary and the Constitutional Court of Ukraine. The principle of separation of state power and its practical implementation, that is - the balance of power, can limit the judicial power and constitutional control only through very few means, including amendments to the Constitution of Ukraine and the procedure of individual liability of judges as carriers of the judicial power.

15. The Constitutional Court of Ukraine notes that declaring incomes by persons exercising public authority is an indisputable requirement in any modern democratic State. There is no doubt about the fact that public officials of the State must submit a declaration of income. However, based on the principle of independence of the judiciary, social significance, and importance of ensuring the true independence of judges, pursuant to international principles and standards, such declaration and its verification should be carried out on the basis of the principle of independence of the judicial power.

16. Thus, the Constitutional Court of Ukraine, having analyzed ss.8 of s.1of Art. 11 of Law No.1700, as well as the related provisions of ss.6 of s.1of Art. 11, ss. 6–7s.11 Art.12, s.2 Art. 13, ss. 5-6s.2 of Art. 13<sup>1</sup>, Art. 35, s.4 Art.48 of Law No.1700 and taking into account the principle of independence of the judiciary and the Constitutional Court of Ukraine, concluded that ss. 6,8 of s.1 of Art. 11, ss. 1, 2, 6–10<sup>1</sup>, 12, 12<sup>1</sup> s.1, s.2–5 of Art. 12, s.2 of Art. 13, s.2 of Art. 13<sup>1</sup>, Art. 35, pars. 2, 3, s.1of Art. 47, Arts. 48–51, s.2-3 of Art. 52,



Art. 65 of Law No.1700, of Law No. 1700 contradict Art. 6, s.1, 2 of Art. 126, s.1, 2 of Art. 149 of the Constitution of Ukraine.

17. Pursuant to Art. 366<sup>1</sup> of the Criminal Code of Ukraine, where the subject of declaring submits knowingly inaccurate information in the declaration of a person authorized to perform the functions of the state or local self-government as provided by Law No.1700, or intentional failure by the same subject to submit the said declaration are punishable by a fine ranging from two thousand five hundred to three thousand tax-free minimum incomes of citizens or public works between one hundred and fifty to two hundred and forty hours, or imprisonment for up to two years, with deprivation of the right to hold certain positions or engage in certain activities for up to three years.

According to the note to Art. 366<sup>1</sup> of the Criminal Code of Ukraine, the subjects of the declaration are persons who, in accordance with s.s1 and 2 of Art. 45 of Law No. 1700, are obliged to submit a declaration of a person authorized to perform state or local self-government functions.

Liability under this article of the Code for the submission by the declaring subject of knowingly inaccurate information in the declaration on the property or other object of declaration, which has value, arises if such information differs from accurate in the amount of more than 250 subsistence minimums for able-bodied persons.

"A separate expression of justice is whether the punishment is proportionate to the crime committed; the notion of justice stipulates that the punishment for a crime should be measurable with the crime... punishment should be in a fair ratio with the severity and circumstances of the circumstance of the crime and the personality of the guilty"; "the rule-of-law state, considering punishment primarily as correctional and preventive means, should not use excessive, but only necessary and justified measures" (par.5 of ss.4.1 of s.4, par.4 of ss.4.2 of s.4 of the reasoning part of the Decision of the Constitutional Court of Ukraine from November 2, 2004 No.15-pp/2004).

The Constitutional Court also stresses that restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unjust; they should be

established solely by the Constitution and laws of Ukraine, pursue a legitimate goal, be backed by the societal need to achieve this legitimate goal, be proportionate and justified; in the case of limitation of a constitutional right or freedom, the legislator must impose such legal regulation, that enables the optimum achievement of a legitimate goal with minimal interference with the exercise of such right or freedom and does not erode the essential content of such right” (par.3 ss.2.1 s.2 of the reasoning part of the Constitutional Court Decision from 1 June 2016, No.2-рп/2016).

Criminalization of a particular act of a person is possible if it meets, in particular, the totality of the following criteria: significant (major) public danger of such action; spread of similar action(s) in society; ineffectiveness of other legal or regulatory means of influence against these actions; the impossibility of successful combat against such action(s) with less repressive methods.

In the case of non-compliance by the legislator with these criteria of criminalization, there may be a situation where an act that bears no sufficient nature and degree of public danger becomes criminalized as such. In this case, criminalization is carried out in the absence of grounds therefor, the outcome is that an act which is not objectively criminal actually gets criminalized. Consequently, legislative foundations are thus created for unreasonable criminal responsibility for acts for which entail a less severe legal liability. The above violates the constitutional principle of the rule of law (s.1 of Art. 8 of the Fundamental Law of Ukraine).

Compliance with the requirement of clarity and non-ambiguity of the norms that establish criminal liability is especially important, given the specifics of the criminal law and the consequences of criminal liability, since this type of legal liability is associated with possible significant restrictions on human rights and freedoms (the first sentence of par.7 s.3 of the reasoning part of the Decision of the Constitutional Court of Ukraine from February 26, 2019, No. 1-p/2019).

In accordance with the position of the European Court of Human Rights, when it comes to deprivation of liberty, it is extremely important to ensure the general principle of legal certainty; the requirement of "quality of the legal provisions" within the meaning of Art. 5(1) of the Convention means that if national law allows for

deprivation of liberty, such a law should be sufficiently accessible, clearly worded, and predictable in terms of application in order to exclude any risk of arbitrariness (par.19 decision in the case “Novik v. Ukraine” from 18 December 2008 (application No. 48068/06)).

By its legal nature, the subject of declaration filing knowingly inaccurate information in the declaration, as well as intentionally failing to submit a declaration, although indicative of violations of the requirements of anti-corruption legislation, such acts are not able to cause significant harm to an individual or legal entity, society or State in the amount justifying recognition thereof as socially dangerous in accordance with the requirements of Art. 11 of the Criminal Code of Ukraine.

The Constitutional Court of Ukraine considers that declaring of knowingly inaccurate information in the declaration, as well as the intentional failure of the subject of declaring to file the declaration should be the basis for other types of legal liability.

The body of constitutional jurisdiction noted that despite the fact that corruption is one of the main threats to the national security of Ukraine, combating corruption should be carried out exclusively by legal means in compliance with the constitutional principles and provisions of the legislation adopted in accordance with the Constitution of Ukraine (par.4 of ss.2.2 of s.2 of the reasoning part of the Decision from February 26, 2019, No.1-p/2019).

Examining the corpus delicti provided for in Art. 366<sup>1</sup> of the Code, the Constitutional Court concluded that the application of legal constructions lacking a clear list of laws makes it impossible to unambiguously define the range of subjects of crime, and reference norms make it impossible to establish the range of their addressees. As a result, persons who cannot be subject to the crime of filing knowingly inaccurate information and therefore knowingly failed to do so may be held liable for intentional failure to submit a declaration. This is inconsistent with the concept of a state governed by law and the principle of the rule of law established in Art. 8.1 of the Fundamental Law of Ukraine, in particular its elements such as legal certainty and predictability of the law.

The Constitutional Court considers that the establishment of criminal liability for declaring knowingly inaccurate information in a declaration, as well as the

intentional failure of the subject to submit declaration is an excessive punishment for committing these offenses. The negative consequences suffered by a person brought to criminal liability for committing crimes under Art. 366<sup>1</sup> of the Code are disproportionate to the damage that has occurred or could have occurred in the event of the commission of the relevant acts.

18. Thus, the above indicates that the legislator did not adhere to the principles of fairness and proportionality as elements of the rule of law principle, and therefore Art. 366<sup>1</sup> of the Criminal Code of Ukraine contradicts s.1 of Art. 8 of the Fundamental Law of Ukraine.

Taking into account the above, the following Arts. 147, 150, 151<sup>2</sup>, 152, 153 of the Constitution of Ukraine, on the basis of Arts. 7, 32, 35, 65, 66, 74, 84, 88, 89, 91, 92, 94 of the Law of Ukraine "On the Constitutional Court of Ukraine", the Constitutional Court of Ukraine

#### **d e c i d e d:**

1. to declare them non-compliant with the Constitution of Ukraine (unconstitutional):

- ss. 6,8 of s.1 of Art. 11, ss. 1, 2, 6–10<sup>1</sup>, 12, 12<sup>1</sup>, s.1, s.2–5 of Art. 12, s.2 of Art. 13, s.2 of Art. 13<sup>1</sup>, Art. 35, pars. 2, 3, s.1 of Art. 47, Arts. 48–51, s.2-3 of Art. 52, Art. 65 of the Law of Ukraine “On Prevention of Corruption” from October 14, 2014, No.1700–VII, as amended;
- Art. 366<sup>1</sup> of the Criminal Code of Ukraine.

2. Ss.s 6,8 of s.1 of Art. 11, ss. 1, 2, 6–10<sup>1</sup>, 12, 12<sup>1</sup>, s.1, s.2–5 of Art. 12, s.2 of Art. 13, s.2 of Art. 13<sup>1</sup>, Art. 35, pars. 2, 3, s.1 of Art. 47, Arts. 48–51, s.2-3 of Art. 52, Art. 65 of the Law of Ukraine “On Prevention of Corruption” from October 14, 2014, No.1700–VII, as amended, Art. 366<sup>1</sup> of the Criminal Code of Ukraine, found unconstitutional, expires on the date of adoption of the present Decision by the Constitutional Court of Ukraine.

3. Decision of the Constitutional Court of Ukraine is binding, final, and cannot be appealed.

The Decisions of the Constitutional Court of Ukraine shall be published in the "Bulletin of the Constitutional Court of Ukraine".

## **CONSTITUTIONAL COURT OF UKRAINE**