

**TECHNICAL ASSESSMENT OF THE
NATIONAL ANTI-CORRUPTION
BUREAU OF UKRAINE**

March 2018

Foreword

The National Anticorruption Bureau of Ukraine (NABU) is a new institution at the forefront of the anticorruption fight in Ukraine. Together with a specialized prosecutor's office, it targets high-level corruption that remains widespread in Ukraine. NABU operates in a challenging environment. From the first days of its existence, the public has placed on it extremely high expectations of delivering immediate and tangible results. This places an enormous pressure and responsibility on the institution.

This report presents findings of the independent technical assessment of NABU's effectiveness, efficiency and independence. It was commissioned by the international partners (US Embassy in Ukraine and the EU Anticorruption Initiative in Ukraine) on request of NABU.

The objectives of this assessment were to analyze whether NABU's internal systems have been suitably designed and operated effectively and efficiently during the evaluation period, as well as to identify the internal and external threats for NABU's independence and how they should be addressed. The assessment is both backward-looking as it assesses prior performance and forward-looking as it provides recommendations for the improvement.

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Experts prepared this report based on replies to the baseline questionnaire and other materials provided by NABU; interviews with NABU leadership, management, detectives and other staff; and interviews with SAPO, GPO and other stakeholders, including international and non-governmental organizations. The expert team carried out three field missions totaling four weeks of on-site work in Ukraine, which included reviews of summaries of case files and a one-day visit to NABU's Territorial Office in Lviv. Experts also conducted additional desk review and analysis. A detailed methodology of the assessment is attached to the report.

The opinions expressed and arguments employed in this report are those of the team of experts and do not necessarily reflect the official views of the US Government or the EU and its member states.

Table of contents

| | |
|--|----|
| Acronyms..... | 6 |
| Key findings..... | 7 |
| Key recommendations..... | 9 |
| Report summary..... | 11 |
| Introduction..... | 15 |
| Background | 17 |
| Assessment findings..... | 20 |
| Operational performance and case work..... | 23 |
| Registration of crime notifications..... | 23 |
| Management of Investigations | 25 |
| Use of arrest powers..... | 28 |
| Special Operations Department..... | 29 |
| Access to electronic databases and other information sources | 30 |
| Performance statistics | 34 |
| Statute of limitations and time limits on investigations..... | 36 |
| Investigation of members of parliament..... | 40 |
| Investigations based on asset declarations..... | 41 |
| Plea agreements..... | 42 |
| Undercover work..... | 43 |
| Cooperation and coordination with SAPO..... | 46 |
| External communications on investigations..... | 47 |
| Organizational capacity and management..... | 50 |
| Management structure, internal reporting..... | 50 |
| Business processes and electronic case management | 50 |
| Internal monitoring and evaluation of NABU's performance | 51 |
| Human resource management | 52 |
| Training of staff..... | 54 |
| Policy guidelines | 54 |
| Internal control functions | 55 |
| Internal communications | 57 |
| Computer forensics | 57 |
| IT capacity and security..... | 58 |
| Limits on the number of staff | 58 |
| Regional offices..... | 60 |
| Independence and risk management..... | 61 |
| Legislative framework | 61 |
| Investigative jurisdiction..... | 64 |
| External interference and internal autonomy of detectives | 66 |
| Financial autonomy..... | 66 |
| Mutual legal assistance powers..... | 67 |
| Wiretap authority | 69 |
| Undercover identities | 70 |
| Forensic experts | 71 |
| Independence of SAPO | 71 |
| Judiciary..... | 72 |

| | |
|--|-----------|
| Annexes | 76 |
| Assessment Objectives, Scope, and Methodology | 76 |
| List of main data sources used | 78 |
| NABU organizational chart | 80 |
| Key indicators of NABU investigations | 81 |
| Statistics of NABU investigations | 82 |

Figures

| | |
|---|----|
| <i>Figure 1. Ukraine in international corruption indicators</i> | 17 |
| <i>Figure 2. NABU proceedings by source of information</i> | 23 |

Tables

| | |
|---|----|
| <i>Table 1. Level of public trust in NABU and other institutions</i> | 18 |
| <i>Table 2. Key figures of NABU work</i> | 35 |
| <i>Table 3. Complexity of NABU investigations</i> | 36 |
| <i>Table 4. Statutes of limitation for offenses in NABU's jurisdiction</i> | 37 |
| <i>Table 5. NABU staff as of September 2017</i> | 59 |
| <i>Table 6. Annual funding of NABU</i> | 67 |
| <i>Table 7. Comparison of funding of different law enforcement and anti-corruption agencies</i> | 67 |
| <i>Table 8. Statistics on MLA requests by NABU</i> | 68 |
| <i>Table 9. Types of crimes investigated by NABU</i> | 82 |
| <i>Table 10. Categories of officials investigated by NABU</i> | 83 |
| <i>Table 11. Number of proceedings under NABU investigation</i> | 83 |
| <i>Table 12. Statistics on NABU performance</i> | 84 |

Acronyms

| | |
|-------|---|
| CC | Criminal Code of Ukraine |
| CPC | Criminal Procedure Code of Ukraine |
| ECHR | European Convention on Human Rights |
| EU | European Union |
| EUR | Euro |
| FATF | Financial Action Task Force |
| FBI | U.S. Federal Bureau of Investigation |
| FIU | Financial Intelligence Unit |
| GRECO | Group of States against Corruption |
| HACC | High Anticorruption Court |
| HR | human resources |
| IMF | International Monetary Fund |
| LEA | law enforcement agency |
| MFA | Ministry of Foreign Affairs |
| MLA | mutual legal assistance |
| MoU | Memorandum of Understanding |
| MP | member of parliament |
| NABU | National Anticorruption Bureau of Ukraine |
| NACP | National Agency for Corruption Prevention |
| NGO | Nongovernmental organization |
| OECD | Organization for Economic Cooperation and Development |
| PGO | Prosecutor's General Office |
| SAPO | Specialized Anticorruption Prosecution Office |
| SOD | Special Operations Department |
| STR | Suspicious transaction report |
| UAH | Hryvnia, Ukraine's currency |
| UNCAC | United Nations Convention against Corruption |
| USD | U.S. Dollars |

Key findings on NABU's independence, effectiveness, and efficiency

Independence

NABU is a state law enforcement agency with a high level of statutory autonomy and safeguards for independent operation. Among other things, NABU was set up as a stand-alone institution not subordinate to any other government agency, there was a special procedure for the competitive and open selection of NABU's Director and staff, and the Director has a secured tenure and may not be dismissed based on political discretion. In addition, NABU's Civil Oversight Council performs external oversight and plays a key role in ensuring NABU's accountability.

The assessment team found no signs of external interference in NABU's work. Despite a constant barrage of public statements of criticism towards NABU and potential external attempts to influence the course of individual investigations, there were no indications that any of NABU's proceedings were biased or influenced by undue external interests – political, corrupt, or otherwise. Furthermore, according to NABU officials, the agency has received sufficient funding from the state budget and international partners to be able to effectively operate within its staffing limit. Therefore, it appears that NABU's financial autonomy has been ensured in practice as well.

As to the internal autonomy of NABU detectives, the assessment team found no indication of inappropriate internal administrative pressure or undue interference in individual proceedings.

The assessment team considers it essential for the success of Ukraine's fight against corruption that NABU remains totally independent. However, since autumn 2016, draft laws have been proposed in the parliament that would have significant impact on NABU and indicate a relatively instable legislative landscape within which NABU must operate. The assessment team believes that the Ukraine government should avoid changes in the legislative framework regulating NABU's operation without prior consultation with NABU and other relevant stakeholders. Moreover, the assessment team believes NABU should have the authority to directly intercept telecommunications without relying on any other agency's technical means. In addition, NABU should have the authority to establish special procedures regarding undercover personnel recruitment and, under supervision from the Specialized Anticorruption Prosecutor's Office (SAPO), to establish undercover identities and grant state secrets clearance to its undercover agents.

The assessment team supports increasing the independence of SAPO through its establishment as a fully autonomous public prosecution office, in particular by limiting the role of the Prosecutor General in the organization of SAPO's work, deciding on its number of staff, and its organizational structure.

Effectiveness and Efficiency

NABU has accomplished a significant amount in the relatively short period of time it has been in existence. It employs a professional, energetic, and extremely engaged staff that in less than three years has grown from an organization in law only to a thriving anti-corruption law enforcement organization. In addition to hiring its almost entire complement of staff, NABU had to secure the office space and procure the equipment required to function. NABU also established and staffed regional offices in three key geographical areas of the country. Further, while building its operation

from the ground up, NABU accomplished significant investigative results. According to the statistics provided by NABU, from its inception less than three years ago until March 2018, NABU has opened 543 criminal proceedings and issued 181 notices of suspicion. NABU also seized more than UAH 650 million and USD 160 million (as of the end of 2017). In addition, there are currently 120 NABU criminal investigations pending in court.

NABU's investigations vary in scope and complexity and involve corruption schemes at many levels and often require the use of specialized investigative techniques to examine complex financial transactions, contracts, and business operations. Notwithstanding the matters noted above regarding NABU's ability to carry out its operations independently, NABU has in-house operational and support units with adequate leadership and capacity to perform its work.

The assessment team reviewed a sample of actual NABU investigations, both internal and external. The reviews showed that NABU had assessed the various elements of the cases in a relevant manner and had organized the investigation in a professional way without major delays. The investigating process could be improved, however, if a greater level of cooperation between detectives and prosecutors was established.

In light of the fact that many of NABU's investigations remain pending and were therefore outside of the scope of this assessment, it is the assessment team's opinion that NABU's performance since its inception in 2015 has been effective and met the necessary efficiency. A full assessment of the efficiency and effectiveness of NABU's work, however, can only be considered when a number of cases in which the indicted person denies guilt have been concluded by the courts. Only a very small number of NABU's cases that have reached the court have fully concluded and in all of these instances, except one, plea agreements were arranged. According to NABU statistics, as of mid-November 2017, out of 97 NABU proceedings pending in court, in 34 cases the court proceedings have not started at all and in 39 cases court review started but was either delayed or was in the early preliminary stage. There are cases where the court hearings have not even started from 5 to 16 months after NABU concluded its investigation and the indictment was filed with the court. Therefore, there is an urgent need for resolving capacity issues with the judiciary and setting up a specialized court for high level corruption.

In October 2017 the parliament adopted amendments in the Criminal Procedure Code (CPC) that could impact the effectiveness of NABU investigations. These amendments addressed, for example, the way that the duration of procedural terms is calculated, the competent court in pretrial investigations, and the conditions for obtaining a search warrant. The assessment team believes it is necessary that the recent amendments to the CPC are closely reviewed to assess their impact on NABU and its ability to effectively investigate corruption crimes.

Lastly, the assessment team also believes that NABU's effectiveness is significantly impacted by its relationship with its partners in Ukraine's fight against corruption, namely SAPO and National Agency for Corruption Prevention (NACP). In light of that, NABU should ensure that it holds regular meetings with both SAPO and NACP to facilitate the necessary communication and cooperation between the agencies. The report also raises a number of other issues and makes recommendations to various stakeholders to take legislative or regulatory measures to improve NABU's operational environment.

Key recommendations

Throughout this report, the assessment team offers a wide range of recommendations in support of NABU's independence and its effectiveness and efficiency in helping fight corruption in Ukraine. While many recommendations are directed to NABU and identify suggested improvements to its operations, some of the recommendations are outside of NABU's ability to undertake because they call for changes to the greater environment in which NABU operates. These recommendations instead require action from external stakeholders. Below are the most significant and highest priority recommendations resulting from this assessment:

High priority recommendations requiring external action

1. Avoid changes in the legislative framework regulating NABU operation without prior extensive consultations involving NABU, SAPO, other LEAs, civil society, experts, and other stakeholders.
2. Amend Article 263 CPC to authorize NABU to directly intercept telecommunications without relying on any other agency's technical means.
3. To eliminate ambiguity, amend the NABU Law to provide for special procedures regarding undercover personnel recruitment and allow NABU to grant state secrets clearance to its undercover agents without the need to rely on the Security Service. Amend the law to authorize NABU access to relevant databases and registers held by public authorities in order to enter necessary data required for NABU undercover operations under SAPO supervision.
4. Revise the status of SAPO to make it an autonomous public prosecution office, which will limit the role of the Prosecutor General in the organization of SAPO's work, deciding on its number of staff, and its organizational structure.
5. Urgently improve working conditions and capacity of the district court that is reviewing NABU pretrial motions; ensure that the dissolution of courts during the judicial reform does not delay or otherwise affect the investigations and trials of NABU cases.
6. Ensure swift establishment of the new High Anticorruption Court and selection of its professional judges with high integrity through an open and competitive selection process in line with the international recommendations.
7. Analyze application of amendments in the Criminal Procedure Code introduced by the Law #2147 of October 3, 2017, to review their impact on the effective investigation of corruption crimes led by NABU.
8. Ensure NABU has the necessary and effective access to NACP's database of asset declarations.

High priority recommendations requiring internal NABU action

1. Review provisions of the Criminal Procedure Code on the registration of crime notifications to ensure clarity and legal certainty then develop, disseminate, and provide training on NABU policy guidelines for treatment of incoming allegations of crime and their registration in the Unified Register of Pretrial Investigations.
2. Take steps to initiate regular meetings between NABU and NACP to facilitate the necessary communication and cooperation between the two agencies.
3. Conduct regular meetings between leadership and managers in NABU and SAPO to discuss contentious issues and individual complicated proceedings, while respecting autonomy of the detectives and prosecutors in charge of cases; ensure adherence to and implementation of the MoU between NABU and SAPO including guidelines concerning investigation.
4. NABU and SAPO leadership should participate in leadership development programs.
5. Ensure that the leadership of the External Communications office is briefed and consulted with during the planning phase of important operations and regarding other matters that may affect NABU and require public communication (e.g., when there are possible conflicts with other institutions or any other issues that may affect public perception of NABU).
6. Building upon existing policy and the MoU agreement with SAPO, develop internal NABU media relations and social media policy clearly identifying primary reliance on jointly issued statements wherever possible, addressing who can release information and what information can be released in different situations, in particular addressing disclosure of sensitive information obtained during the investigation, and including talking points and best practice responses to media inquiries.

Report summary

The National Anticorruption Bureau of Ukraine is a new institution at the forefront of the anticorruption fight in Ukraine. Together with a specialized prosecutor's office, it targets high-level corruption that remains widespread in Ukraine, threatening the country's governance system as well as its economic and social well-being. Various stakeholders perceive corruption as Ukraine's primary challenge that should be urgently addressed.

This report presents findings of an independent technical assessment of NABU's operational and institutional independence and its effectiveness and efficiency in practice. It was commissioned by the international partners (US Embassy in Ukraine and the EU Anticorruption Initiative in Ukraine) at the request of NABU. The assessment is both backward-looking as it assesses prior performance and forward-looking as it provides recommendations for improvement to NABU's operations as well as suggestions for modernizations to the governmental and legal environment arena within which it exists.

NABU operates in a challenging environment. From the first days of its existence, the public has placed on it extremely high expectations for delivering immediate and tangible results. This places an enormous pressure and responsibility on the institution. The assessment team believes that NABU, in all matters relating to its investigative work, is an independent and effective organization that has accomplished a significant amount in the short period of time it has been in existence. It employs a professional, energetic, and extremely engaged staff that in less than three years has grown from an organization in law only to a thriving anti-corruption law enforcement agency with a workforce of over 600. Further, while building its operation from the ground up, NABU accomplished significant investigative results. From its inception less than three years ago, NABU has opened 543 criminal proceedings, issued 181 notices of suspicion, and seized more than UAH 654 million and USD 160 million. In addition, there are currently 120 NABU criminal investigations pending in court. Overall NABU was successful in showing that impunity for corruption is no longer the status quo and no one is untouchable. As a result, NABU has higher trust from the people of Ukraine than any other anticorruption institution.

As easy as NABU's impact is to see, the assessment team also identified suggested improvements for the consideration of NABU and its stakeholders. NABU is challenged by existing legislation and regulations relating to the immediate registration of crime notifications, limits on the use of plea bargains, and constraints on the amount of time that can be dedicated to its cases, which can involve sophisticated corruption schemes and complex financial transactions that sometimes require years to fully investigate. In addition, the assessment team believes that it is important for NABU to carefully execute its extraordinary arrest powers and access to information to ensure that it mitigates the potential risk that detractors will exploit NABU's use of these approved yet progressive techniques to portray the agency as operating outside of its mandate. The assessment team also found that NABU's operational performance and case work are enhanced by its use of analytical and computer forensic tools and techniques and NABU's special operations unit is a highly trained cadre of dedicated law enforcement professionals. Although the assessment team makes recommendations to enrich these activities, the team believes that these are notable examples of the high level of expertise throughout the organization.

Moreover, NABU has worked extensively to perform public outreach to educate the citizenry on the need to fight corruption and explain its activities and ways of operation. Such outreach activity is unique for law enforcement agencies in Ukraine and has helped distinguish NABU from other agencies. NABU has also proactively issued reports about its ongoing investigations and provided up-to-date information and illustrations explaining complicated crimes it has been tackling. This is a commendable practice in general, at the same time the assessment team recommends that NABU establish clear policy guidelines on disclosing sensitive materials, in particular those affecting privacy and presumption of innocence of individuals involved. NABU should continue closely coordinating with the Specialized Anti-Corruption Prosecutors Office before releasing operational or other information about ongoing investigations to the public.

NABU needs to also ensure that it has effective cooperation and collaboration with its partners in Ukraine's anti-corruption arena, namely SAPO and the National Agency for Corruption Prevention. The assessment team believes that it is essential that NABU has cooperative and progressive relationships with both SAPO and NACP and that NABU recognizes its position as a partner with the other agencies. Therefore, NABU, SAPO and NACP officials should work to establish and ensure the agencies are working with common objectives and maintaining effective communication channels. Further, it is important to ensure adherence and regularly review the implementation of the Memorandum of Understanding that was reached between NABU and SAPO in 2017.

The assessment team also examined NABU's organizational capacity and management and found that the agency's success is limited by the personnel caps dictated by the law creating the organization. NABU is limited to a total of 700 positions and NABU leadership pointed to this matter as a primary factor impacting their ability to achieve greater results and further NABU's reach, such as its inability to establish more than the current three territorial offices. In addition, the team identified various areas that could benefit from enhancements to NABU's practices and procedures. The team believes that NABU should streamline certain areas of its internal operations, such as its document processing and management structure. The team also believes that NABU should promote a greater level of internal communication within the organization and evaluate its ability to meet the information technology and security needs of the organization. NABU staff would also be helped by the maturing of NABU's human resources operations, including the development of an employee performance assessment process, the enrichment of NABU's body of policy beyond the level of organizational regulations, and the establishment of a training program to ensure that all staff members receive the appropriate foundation of instruction and development as well as provide employees with opportunity for advancement. As the organization moves out of its infancy, NABU must turn towards strategic management and evaluation of its performance, to include implementation of a robust internal monitoring and evaluation system, written policies and procedures that establish clearly defined roles and responsibilities of staff, and effective employee performance measures, to ensure its sustainability.

NABU has developed a strong internal control unit that performs its tasks as required by the NABU Law and works closely with the Civil Oversight Council, which performs external oversight and plays a key role in ensuring NABU's accountability. The assessment team believes that NABU should conduct additional training for NABU staff on the issues of integrity, notably on conflict of interest, continue carrying out spot checks of the use of operational funds, and to strengthen disciplinary proceedings and the role of the disciplinary panel. Due to NABU's special role and

mandate, its personnel should abide by the highest standards of conduct; the assessment team therefore recommended NABU to also include perceived conflicts of interest in their conflict of interest policies.

The legislation creating NABU provided robust guarantees of independence and effective functioning of NABU, such as its status as a stand-alone institution not subordinate to any other government agency, a unique open and competitive hiring processes for leadership and staff, and its exclusive investigative jurisdiction. During the assessment, the team noted numerous attempts to influence and pressure NABU from outside, which especially intensified in the end of 2017. But the team found no signs that attempts of such external interference in NABU's work were successful or that investigations it conducted were skewed by undue interests. In addition, the assessment team found that NABU generally received sufficient funding and NABU's financial autonomy has not been impugned. However, the instability of the legislative framework remains a serious threat to NABU's operations and NABU leadership must do what it can to acknowledge and manage this risk.

In addition, NABU is limited in its capacity to independently carry out wiretaps and other interceptions of communications as well as undercover operations because these investigative activities require involvement of other agencies' infrastructure. This has seriously compromised NABU's autonomy. The assessment team sees that the current construct creates the potential for NABU investigations to be compromised and believes that the construct hampers NABU's operational independence. NABU has also faced obstacles in implementing its power to directly cooperate with foreign jurisdictions and international organizations when seeking relevant evidence through the mutual legal assistance process. In addition, although NABU obtained access to most of the public registers existing in Ukraine, it has problems with accessing asset declarations registers and bank data; limits to NABU's access should be addressed. Unfortunately, NABU cannot take independent action to resolve the obstacles it faces in obtaining assistance and currently unavailable information, carrying out wiretaps, or establishing undercover operations. Instead, NABU must partner with other elements of the Ukraine government and leverage the assistance of domestic and international stakeholders to apply the appropriate pressure to achieve the needed independence.

It is in NABU's best interest to advocate strongly not only for itself and its independence, but also for increasing SAPO's independence, strength, and sustainability. Moreover, the judiciary is an essential link in NABU's proceedings and the Ukraine courts have been regarded as a weak link with very low public trust in the anti-corruption movement. Ukrainian authorities committed before the IMF to set up an anticorruption court by mid-June 2017 and that it would become operational in early 2018. In early December 2017, the IMF urged the Ukrainian authorities to move quickly with legislation to operationalize an independent anticorruption court consistent with the recommendations of the Venice Commission of the Council of Europe. The assessment team considers it crucial that the lack of capacity and other concerns in the courts are urgently resolved by establishing a specialized court in line with international recommendations.

In sum, with an experienced and dynamic management team, NABU has effectively and efficiently accomplished significant results and managed to achieve its objectives despite a complicated operational environment. NABU was successful in starting and concluding a number of high profile anticorruption investigations against senior officials in the public administration, judges, prosecutors and other influential targets that were once untouchable. Achieving some additional results lies beyond NABU's current reach and require additional policy steps. In addition, NABU's independence has been challenged by the imperfect and unstable legislative environment and lack of

cooperation or impediments from other law enforcement agencies. While additional steps could be taken to ensure consistent operational approach and strict adherence to human rights and other relevant standards, any possible missteps that could have happened do not lead to a conclusion that there has been a systemic or pervasive practice of abuse within NABU that contributed to the lack of success in important individual criminal proceedings. NABU leadership managed to oversee and ensure the establishment from scratch of a completely new and well-functioning investigative agency and is now facing a not less daunting task of ensuring the agency's sustainability.

This report provides an overall assessment along with significant detail on NABU's objectives, activities, and results as well as the environment in which it operates. The assessment team obtained a comprehensive understanding of NABU through the review of NABU documents and of a sample of NABU cases along with our interviews with NABU leaders, employees, and external stakeholders such as judges, prosecutors, members of civil society, international partners, and others. The work afforded the team the ability to make an assessment of NABU and offer a collection of far-reaching recommendations ranging from internal enhancements to NABU's business processes to supporting resolutions for judicial reforms, including the development of an anti-corruption court. The assessment's methodology is briefly explained in the annex to this report.

Introduction

This is a report of the external technical assessment of the National Anticorruption Bureau of Ukraine conducted by a team of independent experts. It aims to analyze NABU's operational and institutional independence and its effectiveness and efficiency in practice.

The purpose of the assessment of NABU was to determine: a) whether NABU has been effective and efficient in its activities; and b) whether its independence has been ensured. The report evaluated the period from the start of NABU's operation in December 2015 through the end of the field work stage of this assessment in December 2017 (with some statistical data up to March 2018).

The assessment was based on the standards and principles applicable to anticorruption agencies according to international instruments, including:

- UN Convention Against Corruption (Article 36)
- Council of Europe Criminal Law Convention on Corruption (Article 20)
- Council of Europe Resolution (97) 24 on the twenty guiding principles for the fight against corruption (Guiding Principle 3)
- European Partners Against Corruption, Anti-Corruption Authority Standards
- Jakarta Statement on Principles for Anti-Corruption Agencies.

The assessment was guided by principles of integrity, objectivity, independence, transparency and evidence-based assessment. Experts carried out their tasks without influence or pressure from NABU, any other public authorities, or other stakeholders. Experts had a full autonomy in preparing and reporting their conclusions. During the assessment, experts acted in their personal capacity and did not represent their employing organizations or position of the organizations/governments that supported this assessment.

The experts understood NABU's **effectiveness** to mean the extent to which its activity attained the agency's objectives during the period under evaluation. In other words, the team examined progress made towards achievement of NABU's objectives and intended results. According to NABU Law, the agency's goal is to counter criminal corruption offenses committed by senior public officials that threaten national security. To this end, the Bureau is tasked with prevention, detection, suppression, investigation, and solving of corruption offenses under its investigative competence, as well as with prevention of committing new offenses. The assessment also looked into whether NABU has attained its objectives **efficiently**, i.e. how economically resources/inputs (funds, expertise, time, etc.) have been converted to results.

The **independence** of NABU means freedom from undue third-party interference in legal and practical terms, the least possible degree of government participation in agency's work and decision-making, financial autonomy. It includes both the institutional and operational independence.

The assessment aimed to answer the following Key Assessment Questions.

Key Assessment Questions:

- 1. To what extent did NABU's activities correspond to overall aims and objectives of the agency?**
- 2. To what extent were NABU's objectives achieved taking into account existent context?**
- 3. To what extent has NABU been efficient in the use of its resources?**
- 4. What were the main successes and failures of NABU in achieving its objectives?**
- 5. How did NABU's management contribute to the successes and failures of NABU in achieving its objectives?**
- 6. To what extent has the legal framework ensured NABU's institutional and operational independence?**
- 7. To what extent has NABU's institutional and operational independence been ensured in practice?**
- 8. What are current challenges to NABU's independence?**
- 9. To what extent have criminal proceedings (cases) been properly organized, recorded, quality assured and investigated?**
- 10. Based on the evidence obtained by the assessment, have there been any serious mistakes of procedural nature or serious human rights violations contributing to the lack of success in important individual criminal proceedings?**
- 11. What recommendations can be made to improve NABU's performance in a sustainable way and strengthen its independence?**

This report is based on the following methodology:

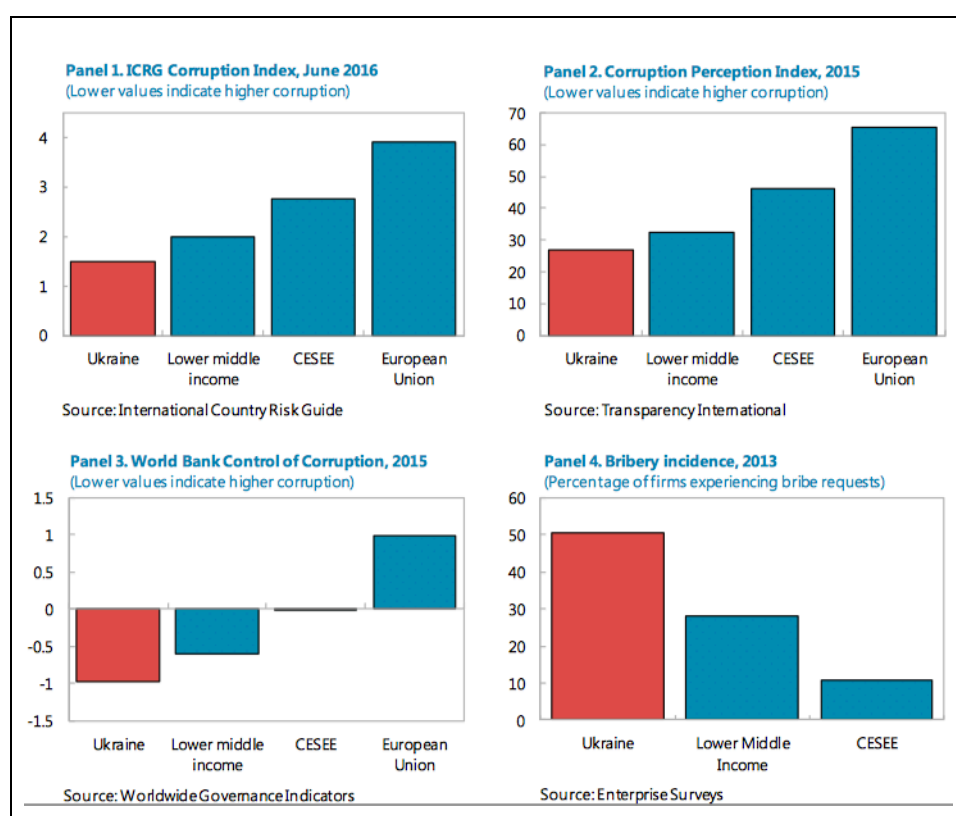
- Study of replies to a questionnaire, statistics, and other materials provided by NABU;
- Interviews with NABU leadership, management, detectives, and other staff (both in focus groups and individually);
- Interviews with SAPO, GPO, and other stakeholders, including international and non-governmental organizations (both in focus groups and individually);
- Three field missions in Ukraine (all in 2017): October 2-6 (Kyiv), November 6-10 (Kyiv), December 4-7 and 11-15 (Kyiv), December 8 (Lviv);
- Desk review and analysis (list of materials reviewed is attached).

The team also reviewed a sample of actual cases, both internal and external, that had been conducted and concluded by NABU as of the start of the assessment. To protect the integrity of the assessment and not to undermine any pending cases, the team decided to review only proceedings that were not pending in court or otherwise, i.e., proceedings closed by NABU/SAPO due to insufficient evidence or other reasons (one case), and proceedings with a final court decision (two cases). In addition, the team reviewed two complaints to NABU that could include notification of crime but were not registered as such. The team also reviewed one internal investigation into alleged misconduct of a NABU employee. Overall the team reviewed six cases that helped to contextualize and explain the findings of the assessment. The detailed methodology of the assessment is in the annex to this report.

Background

Corruption remains one of the key challenges that undermine Ukraine's development. Its systematic nature threatens the country's governance system as well as its economic and social well-being. Various stakeholders perceive corruption as Ukraine's primary challenge that should be urgently addressed. A 2017 national poll for the third year in a row showed that the Ukraine population believed that anticorruption remained the most important reform in the country.¹ In December 2017, another poll found that 80 percent of people believed that the fight against corruption in Ukraine has been unsuccessful, including 46 percent who believed that it has been a complete failure. The same poll showed that 43 percent of the population saw no institution in Ukraine that was actively combatting corruption; among existing institutions the following were seen as fighting corruption: media and journalists (26 percent), NABU (24 percent), anticorruption NGOs (21 percent), population itself (12 percent), Western countries (11 percent).² A 2017 IMF report provides international perspective and indicates that all data sources provide a remarkably consistent picture about the severity of the corruption problem in Ukraine (see the Figure below).

Figure 1. Ukraine in international corruption indicators



Source: IMF, Ukraine: Corruption and Growth, March 2017, <https://goo.gl/6A6Mbw>.

¹ Source: Democratic Initiatives Foundation, December 2017, <https://goo.gl/LVcFYn>. The same poll showed that experts also believed that genuine fight against corruption was as a number one priority (<https://goo.gl/UD3cGP>).

² Source: Democratic Initiatives Foundation, January 2018, <https://goo.gl/MgcucL>. Among other institutions, the following percent of people believed that they combatted corruption: Parliament (0.8), Government (2), President (3), Police (3), PGO (5), Security Service (6), NACP (9), courts (2), local authorities (2).

After the Revolution of Dignity in 2014, Ukrainian authorities and civil society jointly developed and launched several major anticorruption reforms. These efforts were advocated for and supported by the international community. The reforms included revision of the corruption prevention legislative framework, in particular by strengthening the financial disclosure system for public officials, introduction of new criminal corruption offenses, setting up of assorted anticorruption institutions³, and radically improving access to information held by public authorities. One of these reforms was establishment of NABU, a law enforcement body designed to detect and investigate corruption crimes committed by high-ranking public officials.

Citizen trust in NABU has been increasing (see the Table below). The assessment team believes that the initial high level of distrust can be attributed to overall extreme lack of trust in public institutions in Ukraine, especially among law enforcement agencies. However, it is clear that trust in NABU has increased over the last year while distrust has decreased. By contrast, other public entities in Ukraine are experiencing the opposite in public opinion.

Table 1. Level of public trust in NABU and other institutions

| Institution | Level of trust, % | | Level of distrust, % | |
|--------------------------------|-------------------|----------|----------------------|----------|
| | Dec 2016 | Dec 2017 | Dec 2016 | Dec 2017 |
| NABU | 26.7 | 35.1↑ | 55.8 | 47.1↓ |
| Prosecution office | 11.9 | 9.3↓ | 79 | 83.3↑ |
| Police (without patrol police) | 22.9 | 21.7↓ | 67.2 | 67.5↑ |
| Patrol police | 45.8 | 34.7↓ | 40.7 | 53.5↑ |
| Security Service | 32.3 | 29.6↓ | 52.3 | 56.1↑ |
| Courts | 10 | 8.6↓ | 82.5 | 83.3↑ |

Source: National surveys by Democratic Initiatives Foundation, <http://dif.org.ua>.

NABU is a pretrial investigation agency targeting mainly high-level corruption. The NABU Law establishes the agency’s mandate, powers, and various matters of organizational structure; the Criminal Procedure Code of Ukraine defines its investigative jurisdiction. The Specialized Anti-Corruption Prosecution Office has the role of procedural leadership in criminal proceedings carried out by NABU, it approves notices of suspicion and the filing of charges and supports public prosecution in court in cases that have been investigated by NABU.

NABU is an autonomous state law enforcement agency established with the intent of operating with a high level of independence. Included within the NABU Law are safeguards of NABU’s independence, such as its status as a stand-alone institution not subordinate to any other government agency, a unique open and competitive hiring processes for leadership and staff, its exclusive investigative jurisdiction, and authorization for access to necessary information within the purview of other government agencies. The parliament adopted the Law on NABU in October 2014, and it came into force in January 2015. The President of Ukraine issued a formal decision on the establishment of the new anti-corruption agency in April 2015. The President of Ukraine appointed the Head (Director)

³ Among them: the National Agency for Corruption Prevention, responsible for verifying asset declarations and conflicts of interest of all public officials, the National Asset Recovery and Management Agency (ARMA), and the State Bureau of Investigations.

of the National Bureau on 16 April 2015 following an open call for candidates and evaluation conducted by an independent panel. The panel consisted of nine members nominated by the President, Cabinet of Ministers, and the parliament (three members each). The panel proposed two candidates from whom the President selected one. In July 2015, NABU launched a competitive selection of its detectives and other staff. NABU started its first investigations in December 2015 following the establishment of SAPO and appointment of the first SAPO prosecutors.

SAPO was established based on the new Law on the Prosecution Service (enacted in July 2015). It was formally set up in September 2015. The Prosecutor General of Ukraine appointed the Chief Prosecutor of SAPO on 30 November 2015 following a competitive selection conducted by a panel composed of 11 members—seven members determined by the parliament and four senior prosecutors appointed by the Prosecutor General.

Assessment findings

It is the opinion of the assessment team that NABU, in all matters relating to its investigative work, is an independent and effective organization that has accomplished a significant amount in the relatively short period of time it has been in existence. It employs a professional, energetic and extremely engaged staff that in less than three years has grown from an organization in law only to a thriving anti-corruption law enforcement agency with a workforce of over 600, that includes detectives—some of whom are former prosecutors and defense attorneys—analysts, computer forensic specialists, a well trained and equipped special operations group, a legal staff, expert support and human resources staff, and an experienced and dynamic management team. In addition to hiring the staff needed to carry out its important mandate of fighting corruption at the highest levels of government, NABU had to secure the office space and procure the equipment required to function—from simple items such as desks and chairs, to sophisticated law enforcement tools and an internal computer network. NABU also established and staffed regional offices in three key geographical areas of the country. Further, while building its operation from the ground up, NABU accomplished significant investigative results. From its inception less than three years ago, NABU has opened 543 criminal proceedings, issued 181 notices of suspicion, and seized more than UAH 654 million and USD 160 million. In addition, there are currently 120 NABU criminal investigations pending in court.

This report contains detailed information on the results of the assessment. The findings are arranged into three sections: operational performance and case work, operational capacity and management, and independence and risk management. Below is a recap of the key assessment questions (as noted on page 16), along with the assessment team's answer to each.

Answers to Key Assessment Questions:

1. To what extent did NABU's activities correspond to overall aims and objectives of the agency?

NABU activities fully corresponded to overall aims and objectives of the agency which was to prevent, uncover and investigate high-level corruption crime in an impartial and independent manner.

2. To what extent were NABU's objectives achieved taking into account existent context?

With an experienced and dynamic management team, during the evaluated period, NABU has effectively and efficiently accomplished significant results and managed to achieve its objectives despite a complicated operational environment. NABU's ability to achieve maximum results is affected by limitations within the judicial system, to include the absence of a specialized anticorruption court and lack of judges and staff at the district court responsible for reviewing NABU pretrial motions.

3. To what extent has NABU been efficient in the use of its resources?

The assessment team found no evidence of inefficiencies in using resources available to NABU. NABU has been provided with sufficient budgetary funding and technical assistance support; organization of training activities could be further streamlined. NABU is lacking human resources due to limits on its staff set in the law.

4. What were the main successes and failures of NABU in achieving its objectives?

NABU succeeded in starting and concluding a number of high profile anticorruption investigations against senior officials in the public administration, judges, prosecutors and other influential targets that were once untouchable. Making the new agency operational within a relatively short period of time is a success as well. NABU has become an independent law enforcement agency that is not controlled by political or personal interests. NABU has shown a high level of openness and public outreach in its activities. Citizens' trust in NABU has been increasing. NABU could improve its relations with SAPO – an indispensable body to NABU's effective operations.

5. How did NABU's management contribute to the successes and failures of NABU in achieving its objectives?

NABU's management ensured the quick start of the agency's operation and launching and effectively concluded a number of significant investigations; it also safeguarded NABU's independence in practice despite significant external pressure and attempts to undermine NABU operations and its leadership. NABU leadership managed to withstand the pressure and is now facing a daunting task of ensuring the agency's sustainability.

6. To what extent has the legal framework ensured NABU's institutional and operational independence?

The legal framework provided a solid basis for NABU's independent and effective operation. There are, however, several deficiencies that should be urgently addressed (e.g. assigning an autonomous wiretap capacity to NABU). NABU's legislative framework has been unstable. For example, there were several attempts to amend the legislation in a way that would deteriorate NABU's operational environment; however, due to civil society and international community criticism, most of such attempts have thus far failed.

7. To what extent has NABU's institutional and operational independence been ensured in practice?

NABU's institutional and operational independence has been mainly ensured in practice. The assessment team found no evidence of external interference in the individual investigations or cases of undue internal influence by NABU leadership that would undermine autonomy of NABU detectives in their investigations. NABU's independence, however, remains under increasing threat and should be defended with all available means.

8. What are current challenges to NABU's independence?

Challenges to NABU's independence appeared in the form of attempts to amend the legislation, failure to improve the legislative framework to address its deficiencies, attempts to undermine some of NABU operations in practice (e.g. its undercover activities), attacks in various form on NABU's leadership, lack of cooperation or impediments from other law enforcement agencies.

9. To what extent have criminal proceedings (cases) been properly organized, recorded, quality assured and investigated?

Taking into account that NABU is a newly created agency with new staff, its criminal proceedings were in general sufficiently well organized, recorded, quality assured and

investigated. Additional steps could be taken to improve operation in the following areas: more stringent planning of investigations, closer supervision of individual investigations, improved cooperation with SAPO prosecutors, simplifying chain of command to remove unnecessary stages of management approval, introduction of electronic case management, closer integration of detective and analytical teams.

10. Based on the evidence obtained by the assessment, have there been any serious mistakes of procedural nature or serious human rights violations contributing to the lack of success in important individual criminal proceedings?

While additional steps could be taken to ensure consistent operational approach and strict adherence to human rights and other relevant standards, the assessment team did not identify any serious procedural mistakes, human rights violations, or pervasive practices of abuse within NABU.

11. What recommendations can be made to improve NABU's performance in a sustainable way and strengthen its independence?

See the Key Recommendations section above and also recommendations throughout the text of this report.

Operational performance and case work

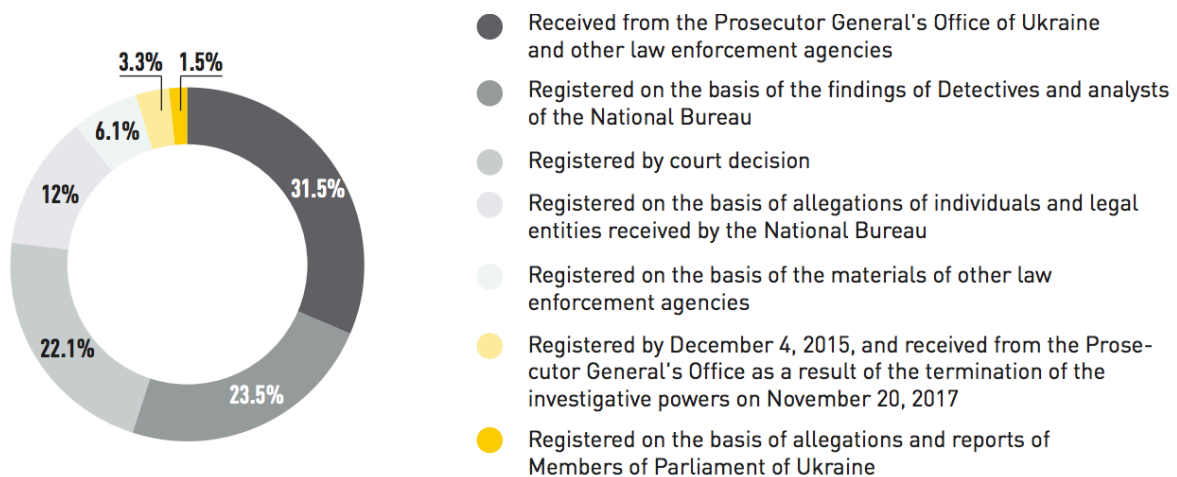
Registration of crime notifications

According to the Ukrainian CPC (Article 214), a crime notification received by an investigative agency is supposed to trigger registration of the criminal proceedings within 24 hours after receiving the notification. Proceedings are to be registered in the Unified Register of Pretrial Investigations. Registration marks the official start of the pretrial investigation. According to Article 214 CPC, paragraph 6, the investigator shall immediately, in written form, inform the public prosecutor about the initiation of each pre-trial investigation, the grounds for initiating the pre-trial investigation, and other information as specified in the CPC. In 2017, NABU received 542 notifications of crime within its jurisdiction.⁴

This procedure was introduced in 2012 by the new CPC and replaced the previous practice in which an investigative body made a decision on the registration of a criminal case after initial verification of the information received. The previous arrangement was prone to corruption as it allowed significant discretion; it also allowed appealing the decision on the case opening and thus delaying or stopping the investigation before it even started. The practically automatic registration of proceedings was supposed to remove such discretion and ensure registration of all allegations that *prima facie* look credible.

Figure 2. NABU proceedings by source of information

Breakdown of the criminal proceedings according to the sources of information
as of 31.12.2017



Source: NABU report.

⁴ Source: NABU biannual report, February 2018, available at <https://goo.gl/b4ciQM>.

However, as practice in NABU and other investigative agencies shows, the immediate registration of all submissions would inundate the agency with tens of thousands of proceedings requiring formal investigative action prior to closure, regardless of any potential frivolity of the notification.⁵ The registration system can also be misused. For example, a citizen could report allegations of corruption against 20 members of parliament, ask for a copy of the subsequent registrations, then go to the media and report that these 20 members of Parliament are now under investigation for corruption.

In addition, the language of the CPC provision (Article 214) is slightly vague, as it speaks about “notification of a criminal offense that has been committed” without providing any details on the threshold of facts that should be included in the notification to trigger immediate registration. Another provision of Article 214, however, notes that the registration in the Unified Register should include a short “description of circumstances that may indicate the commission of a criminal offense.” This requirement suggests that this information must be present in the notification in order for it to be registered and then investigated and therefore allows the investigative agencies, including NABU, to apply this threshold when dealing with incoming reports of possible crimes.

The standard approach used by NABU is to handle incoming citizen complaints according to the Law on Citizen Petitions, and to require a minimum amount of information to be present before official registration in line with the requirements of the CPC. The Law on Citizen Petitions requires that a complaint is reviewed, and an initial reply is provided within 30 days with the possibility of extension. If during such review NABU finds elements of a crime that require pursuing, it can register criminal proceedings on its own initiative. This method allows for prioritizing the review of incoming complaints, minimizes the potential for the registration process to be misused through frivolous reports, and provides appropriate opportunity for ensuring that registered matters require investigation.

A person who submitted a notification of crime under the CPC is allowed to appeal in court the decision of the investigative agency not to register the criminal proceedings based on the notification. Courts usually uphold such appeals (e.g., according to NABU, about 90 percent of appeals have been upheld in NABU cases) and instruct the investigative agency to register the proceedings. In 2015-2017, investigative judges ordered NABU to register criminal proceedings based on the crime notification in more than 100 cases. There are also cases when SAPO prosecutors registered proceedings based on a report that did not trigger registration by NABU.

The assessment team is of the opinion that the manner in which NABU is processing complaints is in most cases rational, reasonable, and in accordance with the manner in which law enforcement agencies in other countries are handling complaints. However, the assessment team believes that a more uniform approach and better coordination with SAPO would best serve both entities.

Recommendation:

- ***Review provisions of the Criminal Procedure Code on the registration of crime notifications to ensure clarity and legal certainty then develop, disseminate, and provide training on NABU policy guidelines for treatment of incoming allegations of crime and their registration in the Unified Register of Pretrial Investigations.***

⁵ According to NABU biannual report (February 2018), only in the second half of 2017 it received about 10,500 complaints and requests from the public, members of parliament, etc.

Management of Investigations

During its assessment of NABU, the assessment team conducted interviews of NABU management, its supervisors, line detectives, analysts and support staff to gain a broad understanding of the management and supervision of its investigations. The assessment team also reviewed summaries of investigations conducted by NABU and interviewed SAPO prosecutors who work with NABU's detectives.

NABU's investigations vary in scope and complexity and involve corruption schemes at many levels. The focus of a NABU corruption investigation can include public officials, programs, and complex procurement fraud schemes, often requiring the use of specialized investigative techniques, examining complex financial transactions, contracts, and business operations. In many cases, a wide variety of skills and knowledge are necessary to perform the extensive range of activities required of these diverse investigations. To best manage and supervise its investigations, NABU, similar to law enforcement agencies in other countries, established investigative units that specialize in specific areas of crime and corruption. Detectives are assigned to units based on their experience, knowledge, skills, and professional abilities. For those investigations involving large and complex issues, it is not uncommon for NABU to assign multiple detectives to the case.

At the time of the assessment, NABU employed approximately 240 detectives, each assigned to a unit that specializes in an area of corruption, such as the transportation industry or the judiciary. NABU's leadership maintains oversight of the many ongoing investigations and determines the scope and depth of each case. This oversight is accomplished in the form of operational and staff meetings, which involve reports and briefings from detectives and heads of the detective units on the work performed and the accomplishment of instructions given. Deadlines are established and performance is observed.

According to NABU detectives, they prepare investigative plans of pre-trial investigations which are discussed with SAPO in almost all criminal proceedings and include determining the elements of the crime to be proved during the pre-trial investigation as well as proposed investigative actions. Upon receipt of new information during the pre-trial investigation, investigative plans are operationally corrected, and alternative investigative steps or actions are carried out. The implementation of such investigative plans is controlled by NABU leadership. The tactics and activities planned during each investigation vary. Detectives require authorization to obtain an eavesdropping warrant or a warrant for the search and seizure of documents, interrogation of witnesses etc. In each case, the strategy of such actions is coordinated with SAPO prosecutors.

The assessment team believes that it is important to ensure full implementation of the MoU signed between NABU and SAPO, in particular, to ensure preparation of investigative plans in all proceedings: investigative plan should be drawn within 5 business days upon the commencement of pretrial investigation (in complex cases – within 10 days), and should be agreed between the lead detective and prosecutor team leader; the investigation plan should take into account directions given by prosecutor and head of pretrial investigative body; it should include elements indicated in the MoU; the plan should remain flexible and adapted during the course of investigations in close collaboration between the detective team and SAPO prosecutors. It may be also useful to develop template investigative plans for different types of offenses investigated.

A vital unit of NABU, and one that is critical to effectively and efficiently managing its substantial workload, is the Analytical Department. The Analytical Department provides essential analytical and research support to the detectives and is involved in almost every investigation. Analysts are utilized by the detectives to review and analyze banking and other financial records and conduct research on corporations, persons, and other entities of importance to an investigation. During the assessment, the team met with several members of the Analytical Department, to include its department head, in an effort to understand how the department functioned and interacted with other NABU units. The assessment team also met with several detectives and discussed how they utilized the analysts during the course of their investigations.

Upon NABU's inception, the analytical unit was fully centralized and detached from the detective units. Recently this arrangement was changed, and the Analytical Department began assigning analysts to support each of the detective units; the detectives directly give tasks to the analysts attached to their unit. According to the head of the Analytical Department, this allowed for better collaboration and integration between detectives and analysts. At the same time, the analysts do not report to the supervisors overseeing those detective units and therefore their workload and work performance are not within their control or oversight. As this is a recent development, the assessment team recommends that NABU management evaluate whether such approach is the most effective one.

The assessment team also recommends that NABU analysts become more actively involved in the investigation from the start of the proceedings, including in the drafting of the investigative plan. To fully implement such approach, however, the staff of analytical service should be increased.

To see to what extent criminal proceedings have been properly organized, recorded, quality assured, and investigated, the assessment team reviewed a sample of actual investigations, both internal and external, that had been conducted and concluded by NABU by the time the assessment started. To protect the integrity of the assessment and not to undermine any pending cases, the assessment team reviewed only proceedings that were not pending in court or otherwise, i.e., proceedings closed by NABU/SAPO due to insufficient evidence or other reasons (1 case), and proceedings in which a final court decision had been delivered (2 cases). In addition, the assessment team reviewed two complaints addressed to NABU that could include notification of crime but were not registered as such. The reviews showed that NABU had assessed the various elements of the cases in a relevant manner and had organized the investigations in a professional way, without delays. Further, the assessment team determined that the necessary evidence had been provided - which in two cases had led to a plea agreement with the indicted person. However, a full assessment of the effectiveness of the investigation can only be considered when a number of cases, to include those where the indicted person denies the guilt and the case proceeds to a trial, have been concluded by the courts.

Interlocutors outside of NABU interviewed by the assessment team had the general perception that NABU's work was of high quality, generally higher than the work performed by the police. However, this does not mean that improvements cannot be made, improvements which can make the work even better and more efficient. For example, although many detectives were very pleased with the cooperation and coordination they already had with the prosecutors, some detectives called for greater cooperation and better and closer coordination with SAPO prosecutors; this is discussed in greater detail in the "Coordination and cooperation with SAPO" section of this report.

In all criminal proceedings, where there are damages or possibilities for confiscation of property, NABU detectives are making significant efforts to establish property to compensate for damages and to enforce the judgment on confiscation of property. To this end, detectives and analysts collect information on the financial status of suspects through utilization of relevant databases and registries of movable and immovable property, disclosure of information about existing bank accounts, submission of corresponding requests to the FIU, establishment of the affiliated legal entities and authorized natural persons for which the property has been officially registered with the purpose of concealing their real owners. In the case of the establishment of the property, which could be used to compensate for damages or could be confiscated by the court decision, the detectives work to immediately initiate its seizure.

As a result of its work, the assessment team believes that NABU senior managers are cognizant of the investigative measures taken by its detectives and through training and proper oversight reinforce the implications of engaging in conduct that violates human rights or taking investigative steps that may result in the inadmissibility of evidence. Moreover, in clause 1.1. of section III of the Code of Professional Ethics of Employees of the National Anti-Corruption Bureau of Ukraine approved by the Order of the Director of the National Bureau dated 01 June 2016 No. 242, which is communicated to each NABU detective against signature and handed over the copy for everyday use, one of the standards of ethical conduct for NABU employees is "integrity", according to which NABU employees shall gain evidence only in a way prescribed by current legislation of Ukraine. In addition, key procedural decisions, such as detentions and notices of suspicion, are agreed by heads of the detective units and prosecutors with SAPO to ensure the exercise of effective control over the legality of such actions.

Following its review, the assessment team developed a number of recommendations for NABU to consider in its quest for improving its investigative operations and building upon the successes of its organization. As a new organization, NABU does not have written policies and procedures for many of its law enforcement and administrative functions, which are imperative to an organization's ability to establish boundaries for acceptable behavior and guidelines for standardizing processes and best practices. From the assessment team's interviews with detectives and reviews of case information, it appeared that detectives were conducting investigations in a generally consistent manner; however, investigations and business processes could be improved and carried out more efficiently and effectively with the implementation of written operational policies and procedures, such as procedures for standardizing case file reviews and policies for case timeliness and performance measures.

Recommendations:

- ***In consultation with SAPO, further develop quality standards for investigations that focus on investigative planning, execution, reporting, and information management, including policy guidelines for investigative case plans, routine and standardized case file reviews by supervisors, and case timeliness. NABU should also ensure that detectives receive periodic training on these guidelines as well as new laws and court decisions affecting investigative operations, including arrest and detention.***
- ***Continue to evaluate the assignment and use of analyst resources to optimize NABU investigations.***

Use of arrest powers

CPC Article 208.1 authorizes the arrest of suspects without the issuance of a court order if the relevant crime provides for possibility of imprisonment as a sanction, and only in the following situations: (1) person was caught during commission of a crime or making an attempt to commit it; (2) if immediately after the commission of crime, an eye-witness, including the victim, or totality of obvious signs on the body, clothes or the crime scene indicates that this individual has just committed the crime; or (3) if there are justified grounds to believe that a suspect in commission of a serious or especially serious gravity corruption crime referred by law to the investigative jurisdiction of NABU may abscond to evade criminal liability. The third provision for arrest without court order was added in February 2015, after the NABU Law was enacted.

According to CPC Article 211, an individual arrested without an investigative judge's ruling shall be released or brought to court for consideration of a motion to impose on him/her a measure of restraint, no later than 60 hours after the moment of apprehension. Overall, the period of arrest without court order may not exceed 72 hours after the moment of arrest. A written notice of suspicion shall be served to the arrested person within 24 hours after he/she has been apprehended. If the person has not been served the notice of suspicion within this term, such person shall be immediately released (Article 278 CPC).

CPC Article 208.1 does not require the prosecutor to pre-authorize an arrest. In such cases, the detective must notify the prosecutor after the fact. However, as a recent study showed, in practice, detectives often obtain prior informal authorization from the prosecutor, as once arrested the person must be provided a notice of suspicion within 24 hours and such notice must be approved by the prosecutor, who may refuse it if he/she did not endorse the arrest.⁶

Human rights defenders and representatives from the Ombudsman's office have criticized the provision that introduced the new ground for a suspect's apprehension without court order in NABU proceedings. They have indicated that such a provision may be outside of the limits allowed by the Constitution of Ukraine. Article 29 of the Constitution provides that no one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law. In the event of an urgent necessity to prevent or stop a crime, bodies authorized by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by a court within 72 hours. The Ombudsman requested the Constitutional Court of Ukraine to review the constitutionality of this provision; consideration of the request is pending.

Some interlocutors criticized NABU for allegedly overusing the arrest powers under Article 208.1 and applying it in situations when there is no known impending risk of the suspect absconding and when the crime was committed a long time ago with none of the grounds for arrest without court order being present.

In the assessment team's opinion, as long as this arrest provision has not been overturned by the Constitutional Court or amended by the parliament, it stands and may be applied by NABU, which has no authority to question provisions of the valid law. Application of the provision should be, of course,

⁶ See Study report on the Role of the public prosecutor at the pre-trial stage of criminal proceedings, Kyiv, 2017, pages 88-89, available at <https://goo.gl/SgTydD>.

within limits set by the law and may not be abused. The unique nature of the authority, however, can result in NABU being an easy target for criticism, especially if a perceived inappropriate use of force is applied during arrest operations. This places upon NABU a significant responsibility to execute these unique authorities in a judicious manner that fully respect the spirit of the new regulation. Therefore, NABU must use this authority with great care and ensure that its law enforcement officers are well trained on the allowances and limits of their authority. The assessment team notes that none of NABU apprehensions under Article 208 CPC have been successfully challenged in court; the team also notes the inherent safeguards of prosecutors approving the notice of suspicion that has to be issued within 24 hours after such apprehension.⁷

Recommendation:

- ***Develop written policy guidelines for planning and effecting arrests with and without a court order, including on appropriate use of force and arrestee transport procedures, as well as guidance on the coordination of arrests between NABU and SAPO.***

Special Operations Department

During its assessment of NABU, the assessment team conducted a review of the Special Operations Department (SOD). The review included interviews of staff and an inspection of SOD facilities and equipment.

SOD is a unit within NABU which uses specialized equipment and tactics, including firearms, to provide a full-time unit capable of responding to confrontations with criminals and threats to the safety and security of NABU and its staff. In addition, SOD officers routinely assist NABU detective units with executing search warrants, affecting arrests, and carrying-out surveillance operations. The unit is located separately from NABU headquarters in a complex that includes training and exercise facilities and equipment and temporary bedding quarters for its on-call officers.

In 2017, the U.S. Federal Bureau of Investigation (FBI) conducted a review of SOD and made recommendations for improving the already well-functioning unit, which primarily included recommendations for additional training and equipment upgrades. The FBI review concluded that NABU SOD personnel are dedicated, enthusiastic and motivated to carry out their intended mission of executing tactical operations in support of NABU investigations. The review also concluded that leadership of SOD is highly experienced and skilled and enjoys a healthy and positive relationship with the individual officers on the team. The FBI review concluded further that the team has received some valuable training, and their individual equipment is generally of good quality.

Recommendation:

- ***Continue implementation of the recommendations made by the FBI following its review of NABU's Special Operations Department and develop written policy guidelines for the preparation, approval, and execution of operational plans. This should include developing policy guidelines related to all detectives receiving periodic training in***

⁷ According to information provided by NABU, as of September 2017, NABU had used paragraph 3 of CPC Article 208.1 with regard to 111 people, from which 108 received a notification of suspicion within 24 hours. Also, 5 people were detained on two separate occasions based on this provision.

defensive and control tactics and that they train and qualify regularly on the use of firearms.

Access to electronic databases and other information sources

NABU has broad powers with regard to access to information. The NABU Law authorizes it to have direct access to databases, registers, and information systems of public authorities. NABU has access to more than 20 databases to use in its analytical and investigative work, including registers of companies, real estate, land cadaster, vehicles, powers of attorney, civil acts, border crossings, and tax information. With regard to some databases, NABU has read-only access through a web-interface that does not allow bulk analysis of data; this is mainly due to limited technical capacities of the databases and information registers held by public authorities. NABU has not yet obtained access to some information sources that it believes would be beneficial to its work, including the analytical module of the tax information system and databases of the National Securities Commission and Pension Fund of Ukraine.

Bank information. According to Article 17 of the NABU Law, upon written request from NABU's Director or Deputy Director, NABU is entitled to receive from banks, depositary, financial, and other institutions, investigative information and documents on the operations, accounts, deposits, and agreements of individuals and legal entities. However, information constituting *bank secrets* can be obtained from banks only according to the procedure stipulated in the Law of Ukraine on Banks and Banking Activity. This limits NABU's authority in regard to the scope and form of information that can be obtained. In particular, without a court order, bank secrets can be disclosed only related to legal entities and natural persons who have an entrepreneur status (individual entrepreneurs) rather than all individuals. Also, there is no procedure for disclosure of bank secrets that are held by the National Bank of Ukraine. In addition, NABU can request access to bank secrets only in written form, which limits the possibility of electronic exchange of information.

In December 2017, the National Bank of Ukraine amended its regulations on the disclosure of bank secrets, in particular, by requiring banks to provide requested information to LEAs in electronic form.⁸ NABU and other LEAs requests, however, would still have to be sent in written form as required by the law. On the positive side, the new amendments introduced a standard format in which banks should provide information when replying in the electronic form. However, the scope of information about account operations to be provided in response to a NABU request is limited by excluding information about counterparties of the transaction (e.g., what person or entity received or made payment to the account, at/from what account). This significantly limits NABU's capacity to analyze transactions and financial flows because NABU would be able to see how much money left the account of the person of interest but will not be able to see where the money went.

There is no central register of bank accounts in Ukraine. NABU and other LEAs cannot readily verify in which Ukraine banks a person has accounts without requesting this information from the tax authorities that can send out relevant requests to banks or by obtaining information from the FIU (which is limited to the suspicious transaction reports). In its 2015 Third Round Monitoring Report, OECD recommended Ukraine consider establishing a centralized register of bank accounts of legal

⁸ Text of amendments available at <https://goo.gl/dKJNmr>.

entities and natural persons, including information about account beneficiaries that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.⁹ A similar recommendation was included in the Fourth Round Monitoring Report.¹⁰ Such action would be in line with the best practice of some countries (e.g., France, Germany, Italy, Slovenia, Romania) and FATF recommendations.¹¹

Establishing needed access to the various Ukrainian law enforcement, financial, and other related electronic databases is critical to the independence of NABU and its ability to effectively and efficiently conduct anti-corruption investigations. It is noted that to help prevent any misuse of such databases by its staff, NABU established an Internal Control Department that provides training on proper database use. It also conducts periodic audits and evaluations of employee database use and investigates any reported or suspected misuse.

Recommendations:

- ***Amend legislation to provide NABU with possibility of accessing bank information, including bank secrets concerning natural persons, held by banks to the extent provided by the NABU Law. NABU requests should be addressed and processed in electronic form with information provided in a machine-readable format.***
- ***Ensure that the National Bank regulations allow NABU to access information about counterparties to bank transactions of natural persons, individual entrepreneurs and legal entities.***

Monitoring of bank accounts. After enactment of the NABU Law, the CPC was supplemented with Article 269-1 "Monitoring of bank accounts," which introduced a new covert investigative measure available only to NABU. The new article provided that a prosecutor may apply to an investigative judge to issue an order on the bank accounts to determine whether there is a justified suspicion that the account holder is engaged in criminal activity using the bank account or in order to trace or detect assets that are subject to confiscation in criminal proceedings within NABU's investigative jurisdiction. According to the investigating judge's decision on the monitoring of bank accounts, a bank is obliged to provide NABU with information on operations carried out on one or more bank accounts in a real-time mode. The bank is banned from disclosure of information about NABU's monitoring of bank accounts.

Article 269-1 was included in Section 3 called "Other types of covert investigative (detective) actions" of Chapter 21 "Covert investigative (detective) actions" of the Code. That meant that this investigative measure was classified as a covert action, information about the fact and methods of which is a state secret. Consequently, the prosecutor's motion on granting permission to monitor bank accounts and the corresponding resolution of the investigative judge should be stamped with a "Classified" seal and restricted in access. This prevents application of this measure in practice as banks

⁹ OECD (2015), Anticorruption Network for Eastern Europe and Central Asia, Istanbul Anticorruption Action Plan, Third Monitoring Round Report on Ukraine, page 80, available at <https://goo.gl/lymhja>.

¹⁰ OECD (2017), Anticorruption Network for Eastern Europe and Central Asia, Istanbul Anticorruption Action Plan, Fourth Monitoring Round Report on Ukraine, page 140, available at <https://goo.gl/qrpqMv>.

¹¹ See FATF revised Recommendation 31 (powers of law enforcement and investigative authorities): "...In addition, countries should have effective mechanisms in place to identify, in a timely manner, whether natural or legal persons hold or control accounts."

are not equipped and authorized to deal with classified documents and cannot receive and execute such orders.

The monitoring of bank accounts in real time without alerting the person of interest is an effective measure to track money flows and facilitates investigations. It is regrettable that this new instrument has not been applied in practice. The following could be done to remove existing obstacles: (1) place monitoring of bank accounts in a different chapter of the Criminal Procedure Code to avoid it being classified as state secrets; or (2) amend regulations on the organization of covert investigations, which are approved by the joint order of the PGO, Ministry of Interior, Security Service, and NABU, to exclude bank account monitoring from the requirement to treat relevant documents as state secrets (relevant information would still be protected from unauthorized disclosure as part of bank secrets).

Recommendation:

- ***Support legislative amendments to ensure that NABU is able to effectively apply in practice Article 269-1 CPC on the monitoring of bank accounts.***

Financial monitoring information. According to the Law of Ukraine on the Prevention and Counteraction to Laundering of Criminal Proceeds, the State Service of Financial Monitoring (FIU), if there are sufficient grounds to believe that a financial operation can be connected with money laundering or another crime, should inform the competent LEAs and submit to them so called “summarized materials.” Such summarized materials are considered to be a notification of a criminal offense that triggers a pretrial investigation. In June 2015, NABU signed an MoU with the State Service of Financial Monitoring on cooperation and exchange of information.

From the statistics provided by NABU it appears that NABU registered only one criminal proceeding based on the FIU report in 2017 and none in 2015-2016. This is a very low number that may indicate that cooperation between NABU and FIU could be optimized.

Some interlocutors noted that the State Service of Financial Monitoring does not have sufficient capacity to process all of the suspicious transaction reports (STRs) it receives from banks and other designated entities and that often reports forwarded to the LEAs, including to NABU, are outdated and not very useful. The FIU also does not share the history of bank account operations that it receives from banks after the STR was filed with the FIU. This is all the more troubling because the FIU receives information about transactions conducted by the Politically Exposed Persons (PEPs), including domestic PEPs. Such information could be extremely valuable for NABU and other LEAs to use. It should also be noted that the FIU provides information on paper, as electronic exchange of data has not been implemented.

The assessment team believes that NABU and FIU could increase their efforts to facilitate the necessary cooperation and efficient exchange of information between the two agencies. This could be accomplished through the establishment of regularly scheduled meetings of officials of the two organizations.

Recommendation:

- ***Coordinate with the FIU to establish regular meetings between NABU and FIU to facilitate the necessary cooperation and efficient exchange of information between the two agencies, in electronic form, to ensure that NABU receive up-to-date and***

comprehensive information about financial transactions that are connected to money laundering or other crimes in NABU's jurisdiction.

Asset declarations. Ukraine has an advanced system of asset declarations of public officials. More than 1 million public-sector employees file annual and other types of declarations through an online system with immediate publication of information from such declarations on a public website. Declarations capture a broad scope of information about assets, income, expenditures, financial liabilities, and interests of public officials and their family members. The system was launched in September 2016 based on the Corruption Prevention Law and is run by NACP.

Asset declarations provide a lot of useful information that is often used by NABU and they are another important tool for NABU to effectively fight corruption. Further, there is criminal liability for declarants who knowingly submit false information in an asset declaration, if such false information concerns assets valued at more than about USD 15,000 (Article 366-1 CC), and for willful non-submission of the declaration. There is also a criminal liability for illicit enrichment (Article 368-2 CC). Illicit enrichment crime in the current wording was introduced in March 2015 and foresees liability for acquiring by a person authorized to perform functions of the state or local self-government in ownership of assets in significant amount if there is no evidence confirming the legality of their source (or transfer of such asset to another person). Article 368-2 of the CC does not directly link the offense to the public official's asset declaration, but the latter can be used as a piece of evidence to prove that there were no legal sources that could explain income that was used to acquire certain assets. NABU has jurisdiction to investigate crimes under both Article 366-1 and 368-2 of the CC.

Under the Law on Corruption Prevention, NACP, among other tasks, is authorized to verify asset declarations submitted in the online system. The purpose of such verification is to check that information that was declared is accurate and complete, that the identified value of declared assets is correct, and to check for signs of conflict of interest and of illicit enrichment. NACP is an administrative body and has no power to conduct criminal investigations. If NACP comes across signs of a criminal offense, it is supposed to pass on relevant information to a law enforcement agency that has competence to investigate such offense, including NABU.

In January 2017, NACP and NABU signed a Memorandum of Cooperation that regulated, among other matters, issues of data exchange. Following long negotiations between NACP and NABU in May 2017, the latter obtained access to the database of the asset declarations held by NACP. Such access covered all information, including confidential information that is not available on the public website. However, NABU's ability to query the database was limited to individual records and there was no capacity to "mine" data or download it in bulk. Access provided by NACP was sufficient for NABU detectives to access individual declarations of persons of interest, but not suitable for using it in data analysis, in particular in combining with other data sources (e.g., other government-held databases to which NABU has access). Also, NABU detectives and analysts could only search by name of the declarant and were not able to search all text within the database.

NABU units keep track of the detectives' access to the asset declaration register to ensure that there is no abuse of access rights. Logs of such access are submitted monthly to NABU's Internal

Control Department and are regularly verified. Access to the register can also be a part of the integrity testing conducted by NABU's Internal Control Department.¹²

In December 2017, NACP made a public statement alleging that a NABU detective inappropriately tampered with data in the asset declaration database and that NACP would suspend NABU access altogether.¹³ At the time of this assessment, NABU officials were looking into the incident. It is unfortunate that the incident was subsequently used by NACP to fully block NABU's access to the important database of asset declarations. It also appears to contradict the NABU Law that authorizes NABU to have access to the information registers and databases held by public authorities. If there was indeed a willful interference with NACP system by NABU detective, it should be investigated and the subject employee should be held to account for his actions. However, even if true, the actions of one employee should not be justification to remove access for the entire agency.

The assessment team believes that, as partners in the effort to fight corruption in Ukraine, it is essential that NABU and NACP have a cooperative and progressive relationship with common objectives. Therefore, NABU and NACP officials should work to establish effective communication channels between the two agencies and jointly promote the development of an improved database structure that will allow for additional investigative exploitation.

Recommendation:

- ***Take steps to initiate regular meetings between NABU and NACP to facilitate the necessary communication and cooperation between the two agencies and to ensure that NABU has the necessary and effective access to the database of declarations held by NACP as required by the law, including bulk access to facilitate analysis of declarations.***

Performance statistics

Analysis of NABU's operational statistics shows a steady increase in the number of criminal proceedings undertaken by the agency as it was gradually launching its operation – from 56 in January 2016 (one month after the start of operation) to 460 in November 2017. Together with SAPO, NABU concluded about 100 investigations which is an impressive result taking into account how young the organization is and the inherent complexity of corruption and financial investigations.

The key statistics of NABU's work are depicted in the following table and detailed statistics on NABU operation are presented in an annex to the report.

¹² The procedure is different in the Analytical Department where analysts record their access of any database, including on asset declarations, in one log which is not submitted to the Internal Control Unit. The latter, however, can access the log and verify the records during an internal investigation.

¹³ Source: <https://goo.gl/5Tpbzf>.

Table 2. Key figures of NABU work

| | |
|---|---|
| Number of staff (out of max. 700) | 626 |
| Number of detectives (in the detective units) | 237 |
| Criminal proceedings under investigation | 543 |
| Persons who received notices of suspicion | 181 |
| Criminal proceedings pending trial | 120 |
| Convictions | 1 |
| Proceedings ended with plea agreement | 19 |
| Average duration from criminal registration to the first notice of suspicion | 6 months |
| Average duration from registration of criminal proceeding to indictment | 8 months |
| Proceedings with duration of more than 6 months after the first notice suspicion | 22 |
| Amount of alleged damages in crimes investigated by NABU | UAH 153 bln |
| Average amount of undue advantage (e.g., bribe) in NABU cases with indictment | UAH 27.5 mln |
| Number of NABU proceedings in which amount of undue advantage (e.g., bribe) exceeded UAH 10 mln | 94 |
| Amount of money seized in NABU proceedings | UAH 654 mln, USD 158 mln |
| Other assets seized by NABU | |
| | Corporate rights UAH 221 mln |
| | Vehicles 46 |
| | Land plots 221 |
| | Other real estate (buildings, apartments, etc.) 137 |
| Confiscation of assets | UAH 20 million in 1 case |

Note: Data as of September 2017, except for fields marked with * where data is presented as of March 1, 2018.

The offenses that are most often investigated by NABU are misappropriation (embezzlement), passive bribery by public officials and abuse of office. There are, however, very few proceedings on money laundering, which could be explained by a lack of training and reluctance to pursue money laundering separately or without prior conviction for the predicate offense.¹⁴ This is unfortunate because money laundering most likely is present in many if not almost all cases that fall under NABU's jurisdiction. It should be more actively pursued.

As to suspects who are targeted by NABU investigations, they have mostly been judges (including chief judges and judges of the high specialized courts), prosecutors, and managers of state-owned enterprises. At the same time, NABU has investigated a number of other high-level officials, including deputy ministers, leaders of central executive authorities (e.g., head of the State Fiscal Service, head of the State Audit Service), and several members of parliament. It is notable that NABU has investigated mostly current public officials and has not focused its attention on former officials who are no longer as influential as they used to be.

¹⁴ Similar conclusion was recently reached by the Council of Europe's MONEYVAL evaluation of Ukraine with regard to money laundering enforcement in Ukraine in general. See report at <https://goo.gl/HFzHHk>.

Overall it appears that during the period examined by this assessment NABU has achieved its objective according to NABU Law, namely to counteract corruption crimes that were committed by high level public officials and pose a threat to the national security.

The assessment team heard from some interlocutors that most of NABU’s cases are relatively simple ones and involve bribery caught in the act following a complaint from the person who was extorted or solicited a bribe. In such cases the offender is usually caught in the act which is documented to present direct evidence of the offense. Such cases are relatively easy to investigate compared with more complex crimes (e.g., embezzlement, money laundering) that require time intensive and resource consuming financial investigation. The assessment team analyzed the list of NABU proceedings and the analysis disproved this opinion (see the Table below).

Table 3. Complexity of NABU investigations

| | NABU proceedings analyzed | Crimes of passive or active bribery, trafficking in influence that were investigated proactively | Percent Proactive |
|--|----------------------------------|---|--------------------------|
| NABU proceedings where at least one notice of suspicion has been delivered (regardless of the current stage of proceeding – whether the investigation continues, was suspended, or case is pending in court) | 158 | 57 | 36% |
| NABU cases pending in court | 92 | 43 | 46% |

The larger proportion of proactively investigated proceedings among cases that are already pending in court can be explained by the fact that it is easier and takes less time to bring such cases to court than other more complex investigations that are still ongoing.

Experts are also aware of the opinion that due to conservative judicial thinking prosecutors are reluctant to prosecute bribery cases where the actual criminal act was not recorded (i.e. where there was no controlled giving of a bribe by the collaborating witness). Reportedly, judges are reluctant to accept indirect evidence of bribery offenses. This limits the possibility of financial investigations and evidence that could be used to prove corruption offenses.

Recommendation:

- **Conduct joint trainings for NABU detectives and SAPO prosecutors on effective investigation and prosecution of money laundering to improve enforcement for this offense.**

Statute of limitations and time limits on investigations

Limitation periods can become obstacles for effective investigation if they are too short and do not allow for interruption or suspension. This is especially relevant in cases of complex financial investigations and in cases that rely on information obtained through MLA from foreign jurisdictions. In both situations there is a need to track financial operations and obtain and analyze a lot of evidence. This section will review two types of such limitation periods that may affect NABU’s operation – statute of limitations under the Ukrainian Criminal Code and time limits for investigation according to the Ukrainian Criminal Procedure Code.

Under the Ukrainian Criminal Code, the **statute of limitation** limits the period when the person can be brought to criminal liability following the commission of the offense. Expiration of this period is grounds for releasing the perpetrator from liability. The statute of limitation for each specific offense is based on the category of its gravity (minor gravity, medium gravity, serious gravity, and especially serious gravity offense). The gravity of offense is determined by the duration of the maximum imprisonment term available under the offense as a sanction. Therefore, the statute of limitation for minor gravity offenses is 2 or 3 years, medium gravity – 5 years, serious gravity – 10 years, and especially serious gravity – 15 years.

According to international standards, a statute of limitation for corruption crimes that is less than 5 years is considered problematic from the point of view of effectiveness of corruption investigations and prosecutions.¹⁵ A list of corruption offenses within NABU’s jurisdiction for which the statute of limitation is 3 or 5 years is provided below in the table.

Table 4. Statutes of limitation for offenses in NABU’s jurisdiction

| Three years | Five years |
|--|--|
| | Misappropriation, embezzlement of property (Art. 191, parts 1-2) |
| | Illegal takeover of property of enterprise (Art. 206-2, parts 1-2) |
| Illegal use of budgetary funds (Art. 210, part 1) | Issuing of illegal legal acts that reduced budgetary revenues or increase expenditures (Art. 211, part 1) |
| Active bribery of employee of an enterprise, establishment or organization – Basic offense (Art. 354, part 1) | Active bribery of employee of an enterprise, establishment or organization – Repeatedly or by prior conspiracy (Art. 354, part 2) |
| Passive bribery of employee of an enterprise, establishment or organization – Basic offense (Art. 354, part 3) | Passive bribery of employee of an enterprise, establishment or organization – Repeatedly or by prior conspiracy (Art. 354, part 4) |
| Declaring of false information (Article 366-1) | Abuse of authority – Basic offense (Art. 364, part 1) |
| | Passive bribery of public official (Art. 368, part 1) |
| Illicit enrichment – Basic offense (Art. 368-2, part 1) | Illicit enrichment – committed by an official holding a responsible position (Art. 368-2, part 2) |
| | Active bribery of public official (Art. 369, part 1) |
| Active trafficking in influence (Art. 369-2, part 1) | Passive trafficking in influence (Art. 369-2, part 2) |

Source: Criminal Code of Ukraine.

According to information available on NABU’s website, in at least two cases, defendants were released from liability due to an expiration of the statute of limitations. (In both proceedings, persons were accused of fake entrepreneurship, not of corruption.¹⁶) The assessment team believes that as more and more NABU cases go to court and in view of delays in consideration of some of them (see relevant section of this report about delays in courts), the statute of limitations may become an issue in the future. Enacting legislative fixes will increase the effectiveness of NABU while also deterring public officials from engaging in acts of corruption.

¹⁵ The OECD Anticorruption Network for Eastern Europe and Central Asia based on its monitoring reports and experience of other monitoring mechanisms (OECD Working Group on Bribery, GRECO) recommended that the statute of limitation should at least be 5 years (and provide for possibility of suspension/interruption). It also recommended to suspend the statute of limitation for the time when a person enjoys immunity from prosecution and to interrupt the statute of limitations period by bringing of charges or other procedural actions. Source: OECD/ACN (2016), Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2015, pages 125-127, 159, available at <https://goo.gl/AH4j24>.

¹⁶ Criminal proceedings ## 5201700000000507 and 5201700000000126.

Recommendation:

- ***Amend legislation to allow limitation period should be interrupted when the person is indicted, and the case goes to court and that the limitation period also should be suspended during the period of an official enjoyed immunity from criminal prosecution.***

The CPC sets **limits on the duration of pretrial investigations**. Relevant provisions were recently amended.¹⁷ The current CPC—before enactment of the new amendments—does not limit the duration of an investigation from time of registration of the criminal proceedings until the notice of suspicion is served. Until the notice is served, there are no suspects in the proceedings and the investigation is formally about the fact of an alleged crime; therefore, the legislators considered that there was no need to limit that period. However, once a person formally becomes a suspect the individual's rights and freedoms are affected and the CPC limits the duration of pretrial investigation to two months from the day of serving the notice of suspicion. The pretrial investigation duration may be extended, so long as it does not exceed 6 months from the notification of suspicion in crimes of minor and medium gravity and 12 months in crimes of serious and especially serious gravity. In NABU proceedings, the extension of the pretrial investigation period (within the maximum terms mentioned above) is authorized by the SAPO Chief Prosecutor, depending on the complexity of the investigation.

The prosecutor or investigator (with agreement of the prosecutor) may decide to suspend the duration of the pretrial investigation in the following situations: the suspect is seriously sick and is prevented from participating in the proceedings; the suspect absconded and is wanted; the investigative judge refused to conduct *in absentia* proceedings; or the procedural actions require international cooperation (e.g., sending an MLA request). The suspension decision can be challenged before the investigative judge.

In October 2017, the parliament of Ukraine adopted amendments in the CPC that changed the way duration of procedural terms is calculated and changed other rules of criminal procedure.¹⁸ The amendments were a part of what was said to be the most voluminous draft law in the history of Ukraine – a draft law that contained three new detailed codes regulating civil, administrative, and economic court proceedings, as well as amendments to a number of other laws. During plenary consideration of the draft law, the parliament approved several amendments that could affect the operation of NABU and other investigative agencies. Due to criticism from different stakeholders (e.g., civil society, experts, LEAs), the parliament's committee responsible for the draft law decided to replace the text of some amendments it previously agreed upon. As a result, until the publication of the law in late November 2017, it was not clear what would be the final wording of the amendments and how they would affect NABU's work. Such uncertainty as such is detrimental to the rule of law.¹⁹

¹⁷ The new amendments were adopted in October 2017 and will take effect in March 2018.

¹⁸ Law #2147-VIII of October 3, 2017.

¹⁹ In additional twist, one of the amendments that the parliament supported while considering that draft law provided that PGO would continue investigating criminal proceedings it started before creation of NABU. The amendment was important to avoid transfer to NABU of hundreds of "old" cases that were pending in PGO. After adoption of the law and before its promulgation by the President, anticorruption activists sounded alarm alleging that the final text was missing this important amendment (source: <https://goo.gl/gqiz14>). In the end, the text, as it was published, did include the said amendment. Whether a willful attempt to modify the text or a simple mistake due to hasty legislative procedure, this seems to be another example of an unstable legislative environment in which NABU operates.

These amendments will come into effect on March 15, 2018, and while not as harmful as previously expected they could still put **additional limits on NABU's operation**, including through the following provisions:²⁰

- 1) The term of a pre-trial investigation from the moment when the information about a criminal offense was entered into the Unified Register of Pre-trial Investigations to the date when the person was notified of the suspicion shall be as follows: (1) six months for a criminal proceeding concerning a criminal misdemeanor; (2) twelve months for a criminal proceeding concerning a crime of minor or medium gravity; (3) eighteen months for a criminal proceeding for a grave or especially grave crime. This maximum duration can be extended by the investigative judge without limits on the number of extensions. Once the notice of suspicion is served, the Code gives two more months to conclude the pretrial investigation of a crime. After the notice of suspicion is served, the investigation can go on for no longer than two months (as under the current regime). The extension of this period will have to be authorized by the investigative judge as well (in addition to the prosecutor under the current law).
- 2) The period of a pre-trial investigation shall be calculated from the moment when the information about a criminal offense was entered into the Unified Register of Pre-trial Investigations to the date of submitting the case to the court with an indictment (CPC article 219). The duration of terms of pretrial investigation will start from the moment of registration of criminal proceedings, not of delivering a notice of suspicion as before. While the new provisions allow indefinite extension of the investigation term, each such extension will have to be agreed to by the investigative judge, not the prosecutor as was the situation before. Decision of the investigative judge on the motion to extend the pretrial investigation is not subject to appeal.
- 3) Parties to the proceedings may appeal a decision to serve a notice of suspicion. This will introduce additional possibility to interrupt and delay investigations. It also seems to contradict the nature of this notice, which serves to notify the person that they became a suspect in the proceedings and have respective procedural rights. The notice of suspicion is not an indictment, it is not a procedural decision (Article 110 CPC), and it does not have to be based on the comprehensive and full scope of evidence. The Prosecutor General of Ukraine has stated that allowing individuals to challenge it in court may seem excessive.

While the new provisions allow indefinite extension of the investigation term, this process will now involve the investigative judge rather than only the prosecutor required under the current system. In addition, the new provisions do not provide for any appeal of the decision of the investigative judge on the motion to extend the pretrial investigation. In view of the existing challenges the judiciary faces in Ukraine (see relevant section of this report), the assessment team believes that this may create additional risks for NABU in the effective completion of its investigations. It should be thoroughly examined if the rules concerning statute of limitations hampers the effective investigation of corruption crimes taken into account that in some cases it may be necessary to serve a notice of suspicion at the same time the information about a criminal offense is entered into the Unified Register of Pre-trial

²⁰ The new provisions will apply only to the new proceedings that will be registered after March 15, 2018, and will not affect ongoing investigations.

Investigations also taken into account that these investigations can take 3 – 4 years and according to the result take steps to change the rules of statute of limitation.

Recommendation:

- **Analyze application of the amended Criminal Procedure Code provisions and support their revision if needed to remove impediments for effective investigation of complex corruption crime, in particular consider possibility to appeal judicial rejection of the time extensions during pretrial investigation.**

Investigation of members of parliament

NABU has an exclusive jurisdiction over investigation of members of parliament (MPs) for committing corruption or other related offenses. At the same time MPs have broad immunity linked to their status that affects investigation of their crimes. According to the Constitution of Ukraine, MPs can be arrested, detained, or notified of suspicion only upon prior consent of the parliament (by absolute majority of members). An MP may not be even apprehended if caught *in flagrante delicto* – during or immediately after commission of the crime. In addition to this constitutional provision, the CPC affords additional protection by requiring that search, interception of communications or any other covert or restrictive investigative measures against an MP should also be authorized by the parliament.

In each case when such an authorization is required, the prosecutor (SAPO prosecutor for NABU cases) should initiate it and the Prosecutor General support it by formally filing the request with the parliament. The parliament’s Rules of Procedure include a cumbersome procedure of reviewing such requests, including the consideration in the parliament’s committee. The Rules of Procedure do not contain any specific criteria for rejecting such requests. Overall, the whole process is prone to politicization and has been criticized by international organizations.

As an example of a case involving MPs, the case of “amber mafia” can be mentioned. In June 2017, NABU detectives under the procedural guidance of SAPO prosecutors detained seven persons allegedly involved in receiving undue advantage from a NABU undercover agent (posing as a representative of a foreign company) in exchange for assistance in advancing the company’s amber mining business in Ukraine. Having received more than USD 300,000 in alleged bribes, two MPs and their accomplices agreed to prepare draft laws and use their position to unlawfully influence various public officials, courts and prosecutors to promote the interests of the foreign company.²¹ As a part of the investigation, SAPO requested the immunities of the two MPs to be lifted. The Parliament authorized the delivery of the notice of suspicion but not the detention of the MPs as was requested.²²

²¹ See more details in NABU’s press-release: <https://goo.gl/jWronT>.

²² As noted in the OECD report, the Rules of Procedure Committee of the Parliament did not support most of the requests for lifting immunity and was heavily criticized for this by the civil society organizations. The OECD report also notes that the acting chair of the committee was later seen having lunch with one of the MPs whose immunity the committee refused to lift shortly after the decision was taken. Source: OECD (2017), cited above, pages 71-72, available at <https://goo.gl/TnBcSE>.

GRECO and OECD in their monitoring reports both criticized existing legislation and practice with regard to immunity of parliamentarians and made recommendations for changes to the current practices.²³

The extensive scope of immunities of parliamentarians impacts NABU's operational effectiveness, as well as its independence, and the situation is exacerbated by the complicated procedure for filing a request to lift such immunity. Relevant requests have to be prepared by a NABU detective, then approved by a SAPO prosecutor, and then sent for endorsement to the Prosecutor General. Even if the parliament agrees to arrest and notify of suspicion one of its members, the notice of suspicion has to be agreed to by the Prosecutor General before it is delivered to the person (Article 481 CPC). This puts additional constraints and further limits NABU's autonomy and effectiveness in pursuing corruption crimes of MPs.

Taking into account the need to ensure autonomy of NABU and SAPO and the high position of the SAPO Chief Prosecutor (who is *ex officio* a Deputy Prosecutor General), it seems reasonable to bypass the approval by the Prosecutor General and authorize the SAPO Chief Prosecutor to directly address the parliament with the request to lift immunity and grant necessary authorizations, as well as to issue notice of suspicion without approval of any other official.

Recommendation:

- ***Authorize the SAPO Chief Prosecutor to directly request in the parliament lifting the immunity and to make final decision on issuing the notice of suspicion to MPs.***

Investigations based on asset declarations

As was noted above, NABU investigates crimes of false statement in asset declarations of public officials (Article 366-1 CC) and illicit enrichment (Article 368-2 CC). Both criminal offenses are linked (in different ways) to asset declarations that are submitted according to the Law on Corruption Prevention in the online system administered by the National Agency for Corruption Prevention.

In November 2017, two members of parliament registered a draft law proposing to amend Article 214 CPC and to establish that registration of criminal proceedings under Articles 366-1, 368-2 CC is allowed only if NACP formally proved a false statement in the declaration or signs of illicit enrichment.²⁴

In December 2017, NACP approved its "clarification" stating that NABU and other agencies may investigate false statements in asset declarations or illicit enrichment only based on the relevant conclusion of NACP following a verification of the asset declaration. NACP considered that it has an exclusive competence among public agencies to verify declarations and that only NACP can establish a violation of the false statement provisions or illicit enrichment based on such verification of the declaration. NACP concluded that verification of the declaration by NACP, finding of a violation as a result of such verification, and issuing an NACP decision that reflects this should precede any criminal proceedings under Article 366-1 or 368-2 CC.

²³ See GRECO Fourth evaluation round report on Ukraine, available at <https://goo.gl/MNrKvV>. See also: OECD (2015), cited above, page 65, available at <https://goo.gl/xiRFsp>; OECD (2017), cited above, page 127, available at <https://goo.gl/TnBcSF>

²⁴ Draft law 7315, available at <https://goo.gl/naUMDr>.

It should be mentioned that SAPO approved several requests for lifting immunities of members of parliament in the cases of alleged false statement and illicit enrichment without having a prior finding of the violation by NACP (and that Prosecutor General also endorsed such requests by forwarding them to the parliament). In January 2018, SAPO approved serving notices of suspicion to the head of the State Audit Service under both of these crimes without preceding NACP conclusions.²⁵

The assessment team sees concerns with NACP's approach. Current provisions of the Criminal Code or Criminal Procedure Code do not set any limits on NABU's or other investigative agency's authority to investigate false statement in the declaration or illicit enrichment if the offense falls under the agency's jurisdiction. NACP finding of signs of possible false statement or illicit enrichment is only one of the sources of possible allegation about these crimes, others can come from citizen complaints, referrals from other law enforcement agencies, or analysis by NABU. There does not seem to be any direct link between the power to conduct criminal investigation by NABU in such cases and the work of an administrative body like NACP. NABU cannot indeed conduct "verifications" of asset declarations in the meaning of the Corruption Prevention Law, but it can analyze available information and make conclusions on its own about possible false statement in the asset declaration and, moreover, illicit enrichment where asset declaration is only one of the possible sources of information about a person's lawful income.

Investigations conducted by NABU cannot be contingent on the activity of an administrative body that is not part of the criminal justice system. Moreover, interlocutors interviewed by the assessment team and other independent reports noted that NACP did not appear to be an effective institution; there were also whistleblower reports alleging corruption and political interference in the leadership of NACP.²⁶

Recommendation:

- ***Issue joint NABU and SAPO opinion on the autonomous nature of the investigation of false statements in asset declarations of public officials and illicit enrichment.***

Plea agreements

The CPC of 2012 introduced the possibility of using a plea agreement in criminal proceedings. The code limited categories of criminal offenses in which a guilty plea agreement could be entered to misdemeanors and crimes of insignificant, medium, or serious gravity (thereby excluding especially serious gravity crimes). This provision was amended in February 2015 to make an exception for NABU cases, by allowing a guilty plea agreement between the accused and the prosecutor in especially serious gravity crimes in NABU's jurisdiction if the accused exposed another person who committed a crime in NABU's jurisdiction.

At the same time, the CPC does not allow an exemption from the criminal liability or punishment for corruption crimes. For instance, in such crimes it is not allowed to impose sanctions below the minimum sanction limit available under the offense or to conditionally release from the

²⁵ See NABU press-release: <https://goo.gl/RLQbcm>.

²⁶ See, for example, report of the International Anticorruption Advisory Board, 29 November 2017, paragraphs 11-12. See reports about whistleblowers from NACP: <https://goo.gl/QYmuSJ>, <https://goo.gl/UpSe4y>, <https://goo.gl/uiCri9>, <https://goo.gl/QzNMTY>.

execution of punishment, including imprisonment, which limits the range of incentives that can be applied as a part of the plea agreement.

SAPO has used guilty plea agreements in a number of proceedings (with at least 15 agreements approved by final court decisions) in order to obtain evidence of corruption of higher level. For example, such agreements were concluded in the proceedings of the so called Onyshchenko gas case, case of Kyoto money, case of the State Food and Grain Corporation of Ukraine, and case of the Southern Ukraine Nuclear Power Station. Taking into account that there were no convictions in NABU proceedings other than through a plea agreement, this number of court approved plea agreements is quite high.²⁷

The use of plea agreements in NABU proceedings could be even more extensive and beneficial if the legislation was more flexible. Plea agreements not only save time and resources for investigation when the suspect acknowledges his guilt, but also allows investigators and prosecutors to move up the chain of perpetrators to reach the highest level. The latter is especially important in NABU cases which are supposed to target the most senior public officials and masterminds of the corrupt deals. Cooperation of other participants of the criminal enterprise is crucial in this regard, especially since corruption is a hidden crime in which breaking the silent pact of perpetrators is often very difficult to achieve. This justifies special proceedings and possibilities allowed for plea agreements in NABU cases.

Recommendation:

- ***Consider making changes in the legislation to extend the scope of incentives available to negotiate plea agreements in the proceedings investigated by NABU.***

Undercover work

Developing undercover capacity has been a priority for NABU. To this end, NABU set up a separate unit of detectives that was tasked with organizing special operations of exposing corrupt organized groups through infiltration or cooperation with confidential informants. It is important that such types of operational activity should be well developed in NABU for it to effectively perform its mandate.

In November 2017, NABU undercover work became a focus of public attention following allegations made by the Prosecutor General that NABU had violated a number of laws in conducting such activity during an operation in the State Migration Service (see more details under the “Wiretapping powers” section of this report). The incident drew attention to several related issues, as discussed below.

Recruitment of undercover agents. The NABU Law stipulates that all NABU staff should be recruited only through a competitive selection without any exceptions. The drafters apparently intended to ensure high competence and integrity of NABU staff by introducing a recruitment approach that was different from all law enforcement bodies that existed at the time. This provision,

²⁷ Compared with the information on the proportion of guilty plea agreements in the general number of criminal case verdicts in Ukraine: approximately 13 percent in 2014, 10 percent in 2015, 9 percent in 2016. Based on the information from: Study report on the Role of the public prosecutor at the pre-trial stage of criminal proceedings, Kyiv, 2017, pages 113-114, available at <https://goo.gl/SgTydD>.

however, created an obstacle for the recruitment of future undercover agents whose identity should be secret by definition.

While the NABU Law requires competitive selection of NABU staff, it also delegates the power to determine specific procedures for such recruitment to NABU's Director. This allowed the latter to establish special procedures for the recruitment of undercover personnel, which preserves the competitive approach but removes the element of transparency that contradicts the nature of the undercover work. According to the state secrets legislation of Ukraine, information about the fact that a person is employed as a covert employee of an operative units is classified.

NABU's Director established a special procedure for selection of the undercover personnel that includes tests, interviews and other stages similar to ordinary personnel hiring, except for publically announcing a call for candidates and information about the interim and final results of the selection. Candidates are directly invited by NABU to take part in the selection. Such candidates submit asset declarations, which are not public²⁸, and are vetted according to the requirements of the anticorruption legislation of Ukraine.

NABU officials explained that such closed recruitment procedures that have been conducted to date ensured genuine competition as the selection commission chose winners of the competitions from several applicants who applied, and some candidates failed to pass the tests.

The respective unit of NABU has a certain number of staff members who were recruited through an open general competition. It should also be noted in this regard that none of the law enforcement or intelligence agencies that operate in Ukraine have ever chosen their undercover staff through competitive selection process.

In the assessment team's opinion, it appears that the special recruitment procedures were within the limits set by the law that delegated regulation of the detailed procedures to NABU's Director. It is also understandable that the recruitment of undercover staff requires a special approach that reflects the nature of the relevant work.

Access to classified information. One of the alleged violations committed by NABU in its undercover work was that its agents did not have state secrets clearance required to work with undercover operations materials that are classified. According to NABU, personnel that deal with classified documents, in particular by preparing and organizing execution of the undercover operation, have necessary clearance. While undercover agents who infiltrate criminal organizations do not have such clearance, they do not need it as technically they do not deal with the classified documents (by analogy with confidential informants who are not staff members of the law enforcement agencies and provide information within the undercover operation but do not obtain state secrets clearance for that matter). Such arrangement was established in the regulations approved by the Director of NABU.

Obtaining state secrets clearance is another area where NABU depends on the external agencies in a way that may compromise its autonomy and effective functioning. Security clearance is granted

²⁸ The requirement to submit asset declarations by candidates for undercover positions in NABU actually goes beyond what the current law requires. The Corruption Prevention Law (Article 52-1) established an exception from the general system of the asset disclosure of public officials. While ordinary public officials are supposed to file their asset declarations through an online system with immediate publication of the declarations online, officials holding positions that are classified and candidates to such positions are supposed to submit their declarations into a separate system according to the regulations that NACP should have developed. As such regulations are absent, respective declarants are not obliged to file their declarations.

by the Security Service of Ukraine. The clearance procedure requires full disclosure of the agent's identity and the individual's personal information, including information about relatives. This process should be held inside NABU as a matter of operational security. Besides, NABU may need to infiltrate the Security Service itself which would be impracticable should that agency have access to the real identities of all NABU undercover agents.

Planning and implementation. Ukrainian law provides for two types of detective measures – those conducted under the Law on the Operative and Detective Activity that regulates intelligence gathering, initial detective measures outside of the criminal procedure, and investigative measures as a part of the pretrial investigation under the Criminal Procedure Code. If during the initial detective work the law enforcement agency finds elements of a crime it should immediately refer relevant information to the pretrial investigative body for the criminal investigation. NABU is authorized to conduct both activities.

With undercover work, it usually starts as operative and detective work, which does not require authorization of the prosecutor. The special undercover operation is based on the resolution of the head of NABU's detective unit and is notified to the prosecutor within 24 hours. It includes details about the object of the operation, goals, limits, what is allowed, and what is not allowed (including entrapment, which is discussed below). The operation is conducted based on the action plan with details on how the operation should be implemented. Detectives who have state secret clearance draw up regular reports that are attached to the file. In the end, the detective prepares a protocol of the operation with chronological details of the measures undertaken and their results.

If during the special operation there is a need to conduct an imitation of a crime (e.g., bribery) NABU requests a SAPO prosecutor issue relevant authorization for the covert investigative measure under the CPC. Any intrusive measures (e.g., surveillance, wiretapping) have to be authorized by the investigative judge following approval by the SAPO prosecutor.

There appears to be sufficient level of oversight over special operations from the side of SAPO prosecutors and judicial control for covert measures that interfere with human rights.

Entrapment. One of the concerns raised in November 2017 by the Prosecutor General was the alleged use of entrapment by NABU undercover agents. The experts will not provide their assessment as to whether there was a violation of the Ukrainian law or human rights standards relating to the specific NABU operation as there are criminal investigations pending in this regard. They will, however, review the relevant NABU procedures.

In Ukraine, entrapment (provocation of bribery) is prohibited and prosecuted as a criminal offense. Ukraine is also a party to the European Convention of Human Rights that prohibits entrapment as a part of the safeguards under its Article 6.

According to NABU, the resolution that authorizes a special undercover operation includes specific safeguards against the use of the entrapment. The assessment team reviewed a template of the resolution, which indeed included specific guidelines in this regard, including:

- The limiting of the special operation by establishing trusted relations with the organized group participants and limiting the direct activity within such group to passive methods as understood by the European Court of Human Rights.

- Prohibition to carry out the special task in an active manner as understood in the case law of the European Court of Human Rights in cases of *Ludi v. Switzerland*, *Vanyan v. Russia*, *Romanauskas v. Lithuania*, *Teixeira de Castro v. Portugal*, *Veselov and other v. Russia* (to initiate the crime, make a repeat proposal to commit a crime, insistently ask to commit the crime, increase the amount of the unlawful advantage, exert other pressure that instigates the crime, etc.).
- Prohibition to take part in the organized group in the role of the instigator, provoke organized group participants to commit a criminal corruption offense.

Such provisions, and especially reference to the ECHR case law, are commendable. They should be augmented by regular training of NABU detectives and SAPO prosecutors based on analysis of practical cases. It is also recommended that detailed guidelines be developed on the conduct of the undercover operations with the focus on compliance with the human rights standards.

Recommendations:

- ***To eliminate ambiguity, amend the NABU Law to provide for special procedures regarding undercover personnel recruitment and allow NABU to grant state secrets clearance to its undercover agents without the need to rely on the Security Service.***
- ***Together with SAPO develop guidelines on the conduct of undercover operations and conduct regular training of NABU detectives and SAPO prosecutors on the prevention of entrapment practices.***

Cooperation and coordination with SAPO

NABU's work is closely linked with SAPO. NABU cannot pursue its investigations without and depends on SAPO in all crucial decisions related to the investigations. It is therefore essential that both new institutions have an effective cooperation strategy and closely coordinate their work. The assessment team heard both from NABU and SAPO, as well as from other interlocutors, that there have been significant tensions between the two agencies. Having disagreements between investigators and prosecutors related to individual proceedings is a normal practice that has objective reasons. It should not, however, lead to institutional rivalry and public confrontations as it would ultimately do no good to any of the institutions and would impact their performance. It also makes both NABU and SAPO vulnerable to external attacks which have recently intensified.

Both NABU and SAPO leadership seem to have an understanding that they share common goals and results and are interdependent. Also, there are usually good working relations on the level of line detectives and prosecutors. In this regard, the experts welcome the signing of an MoU between NABU and SAPO in the summer 2017. The MoU provides detailed and elaborate guidelines for the joint operation and coordination of all key issues dealt with by NABU and SAPO. While the document formalizes some procedures and may make detectives and prosecutors apply additional efforts, if followed, it would ultimately allow establishing common ground and avoid conflicts that would negatively impact operational work. It is important to ensure implementation of the MoU and to conduct joint regular reviews of its implementation.

The assessment team was glad to find out that, following the MoU signing, NABU and SAPO instituted new procedures to coordinate external communication in individual proceedings. Coordinating messages and any information released on individual cases, especially of a sensitive nature and that may affect the investigation or rights of others, is important for building trust between the two institutions and ensuring effective proceedings.

It should also be remembered that prosecutors have the ultimate responsibility for the criminal investigation and have to support the case in court. In addition, the Ukrainian CPC extends their role to actually leading investigations, not just maintaining accusation once it reaches the court. SAPO prosecutors are experienced and have been recruited through a competitive process. It is important that there is close coordination and open communication before and after each step of the investigation.

To facilitate better cooperation and understanding of the tasks of detectives, NABU and SAPO could collaborate in the development of procedural standards for consideration of evidence and charging decisions, including for filing of a notice of suspicion and an indictment, and at what level such decisions can be made in particular types of cases. In the same way they could also provide substantive guidance documents, including documents setting out the nature of potential criminal violations, their elements, and evidence typically necessary to establish same, as well as common defenses and evidence typically necessary to overcome same, with checklists where possible.

One more aspect where additional efforts could be taken is the follow up in cases that were transferred to court. In many countries, detectives follow their cases in court, which means that the detective not only helps the prosecutor in terms of practical matters, but also assists the prosecutor during the court hearings to find information in the case. The detective could in this way learn how the evidence is dealt with by the court. The assessment team believes that NABU detectives should continue providing support to SAPO prosecutors also after the case with indictment reaches the court.

Recommendations:

- ***Conduct regular meetings between leadership and managers in NABU and SAPO to discuss contentious issues and individual complicated proceedings, while respecting autonomy of the detectives and prosecutors in charge of cases, and ensure adherence to and implementation of the MoU between NABU and SAPO including guidelines concerning investigation.***
- ***Develop joint NABU and SAPO guidelines on the role of detectives in NABU proceedings following the delivery of an indictment; such guidelines could become a part of the MoU between the two institutions. NABU and SAPO should also develop procedural and substantive guidelines/standards for collection and consideration of evidence and charging decisions.***
- ***NABU and SAPO leadership should participate in leadership development programs.***

External communications on investigations

NABU's external communications office is a professional and capable unit that performs important functions of media relations, media monitoring, strategic communications, and awareness raising. In November 2017, the FBI Office of Public Affairs, on request of the U.S. Embassy in Ukraine INL section, conducted a review of NABU external communication office and this assessment will build on that review.

The FBI review found that NABU's Communications Office is strong but can be improved by having an increased level of access to NABU's leadership, so the office can be aware of impending operations and pressing matters and can proactively formulate a communications strategy. The assessment team shares this recommendation as it also heard of cases when NABU communications unit was not aware of the ongoing operations and could only retroactively prepare NABU's communications strategy. It is therefore important that the leadership of the External Communications office take part in the discussions held at NABU's leadership level with regard to important operations that are being prepared and other matters that may affect NABU and require public communication (e.g., when there are possible conflicts with other institutions or any other issues that may affect public perception of NABU).

The assessment team also agrees with the FBI review's conclusion that the communications office could be even more efficient by eliminating unnecessary activities while refining policies and procedures that are working, and focusing the communications strategy on themes of increasing public trust through greater awareness of NABU's mission, its purpose, and its unique role in addressing corruption in Ukraine. The assessment team also thinks that some additional functions, e.g., verifying statistics and other data, put too much strain on the communications office and could be dealt with by other units of NABU as it appears to go beyond the usual communications function.

The External Communications office's work on the ongoing investigations has two directions: reacting to public comments and publications or responding to media inquiries and proactive informing about NABU operation. Before the information on the ongoing investigation is published or provided on request to media/journalists, the message has to be approved by the detective in charge and then by the whole hierarchy from the head of the detective's unit to NABU's Director/Deputy Director. While NABU is known for providing quick feedback to queries or publications, there may be a need to streamline the approval process to eliminate needless bureaucracy.

Since August 2017, following the MoU signed with between NABU and SAPO, external communication on pending investigations is to be closely coordinated between the two institutions and NABU is to release statements after obtaining SAPO's feedback. This is a commendable practice that should be continued. However, the assessment team also heard of at least two examples when conflicting messages were issued after August 2017; it is important to analyze these instances and adjust the coordination mechanism based on the lessons learned.

NABU as a new institution has yet to develop a comprehensive media policy; currently it has several separate instructions but no single policy document. As noted in the FBI review, having such a policy could help ensure a consistent and centralized approach to media and public affairs and lead to a more effective media strategy. The media policy should also cover NABU's approach to working with social media (e.g., who can and what to publish, how to react to comments). As it matures, NABU should develop its media relations and social media policy in collaboration with SAPO.

One of the contentious issues is the stage at which it is appropriate to disclose information about a pending investigation. For example, the U.S. practice is not to confirm or otherwise comment about ongoing investigations before charges are publicly filed. The exception is when the community needs to be reassured that the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety. It can be argued that in NABU cases it is in the public interest to know that a high-profile investigation has been started and progressing in many

investigations. However, a balance should still be found and any disclosure before the notice of suspicion is served should be limited and made only exceptionally. It should also be taken into account that information about NABU investigations is often disclosed not by NABU itself but by complainants who have the right to be informed that their complaint resulted in a criminal proceeding or by the media who can obtain such information from the public register of court decisions when NABU applied to court for the authorization of certain investigative actions.

The assessment team was glad to find out that NABU introduced in its public statements specific language to ensure that the information disclosed is not perceived as an assumption of person's culpability and to uphold the presumption of innocence. NABU's Internal Control Department provided relevant guidelines to the communications office. This in line with the human rights standards and should be routinely followed in any statement made or information provided by NABU and its officers (in writing, online, or orally). The current language included in the online press releases consist of one sentence referring to the article of the Constitution of Ukraine. This text could be expanded to explain in layman terms, depending on the case, that registration of criminal proceedings is automatic under the Ukrainian law and does not mean that the case will progress and result in the suspicion or indictment, that filing of the notice of suspicion does not establish person's culpability and the individual is considered innocent until found otherwise by the court, and that indictment may or may not be confirmed in court and that final verdict may be different from the charges filed.

In view of the presumption of innocence issues, it is also important to have a clear policy on the release of sensitive materials at the pretrial investigation stage, including results of surveillance, transcripts of wiretaps, or any other information coming from covert measures, as well as information about results of searches. Such information (especially audio and video recordings) should not be ordinarily released and should be disclosed to the minimum extent necessary only in exceptional cases and only if approved by SAPO. NABU should also abstain from commenting on court/investigative judge decisions, in particular on the bail amount set and other precautionary measures agreed or denied by the court.

The assessment team welcomes the agreement between NABU and SAPO that any public communication on investigations after the indictment should originate from SAPO only. All media inquiries on such cases should be referred to SAPO.

Recommendations:

- ***Ensure that the leadership of the External Communications office is briefed and consulted with during the planning phase of important operations and regarding other matters that may affect NABU and require public communication (e.g., when there are possible conflicts with other institutions or any other issues that may affect public perception of NABU).***
- ***Building upon existing policy and the MoU agreement with SAPO, develop internal NABU media relations and social media policy clearly identifying primary reliance on jointly issued statements wherever possible, addressing who can release information and what information can be released in different situations, in particular addressing disclosure of sensitive information obtained during the investigation, and including talking points and best practice responses to media inquiries.***

Organizational capacity and management

Management structure, internal reporting

NABU consists of the head office in Kyiv and three territorial offices. NABU leadership includes a Director, a First Deputy Director and two Deputy Directors. The organizational structure of NABU (see Annex for the full organizational chart) includes two units of detectives: the Main Detective Unit consisting of four Units and 15 Divisions within Units and the Second Unit of Detectives. There are also 14 other structural units (called departments or divisions) within NABU's Head Office. There are 91 managerial positions within the Head Office and Territorial Offices of NABU (out of about 600 employees) or about 6.5 staff members per manager. The number of managerial positions will increase should all the vacancies be filled.

The analysis of structure of the detective units shows that a line detective working in a division of one of the four units within the Main Unit of Detectives may have above him up to five managers: head of division or his deputy, head of unit or his deputy, head of the Main Unit, First Deputy Director of NABU, Director of NABU. The basic level division of detectives includes on average 15 detectives. The number of managers within the detective structures raises question of effective organization of work as managers primarily supervise detectives and have administrative tasks.

The high level of compartmentalization of structural units within NABU may also lead to complicated lines of reporting. For example, some decisions or actions of the detectives have to be approved by the full line of managers above them and this may slow down the investigative process and lead to excessive bureaucratization. It appears that horizontal interaction between structural units within NABU is limited and the decision-making chain often involves NABU leadership, both on administrative and operational matters. It should be also explored whether NABU detectives could be provided with more autonomy in some decisions and working with SAPO prosecutors directly without the need to obtain approval of all key steps in each investigation from the leadership of the Main Detective Unit and NABU executives.

Recommendation:

- ***Review distribution of tasks among NABU leadership positions and analyze the management structure and reporting lines within NABU and adjust them, if found necessary, to ensure efficient distribution of tasks and to streamline the operations.***

Business processes and electronic case management

A key element impacting NABU's ability to perform at a more optimal level of efficiency is its business processes and operations. NABU has written procedures and guidelines that provide instruction to staff on a wide-range of business processes, to include document flow, complaint processing, management of financial and procurement operations, and records management, to name a few. During the assessment, the team discussed various NABU business processes with NABU staff and stakeholders and concluded that NABU would benefit from an in-depth evaluation of its business processes and operations to identify methods for improving performance and streamlining tasks. Instituting improvements in this area will enable NABU to optimize the use of its limited staff.

Another key element impacting NABU's ability to perform at a more optimal level of efficiency is the absence of an automated electronic case management system. As with any investigative agency, NABU detectives are required to document each investigative step and pertinent investigative activity. They are also required to properly document this information in their case files. The case file is used by the detectives to store investigative records that includes documentation from the inception of a case to its conclusion. Currently, NABU uses paper as its system for maintaining investigative records. Developing an automated electronic case management system will allow NABU to move from a primarily paper-based case management system to a more efficient and streamlined electronic record system.

An electronic case management system will allow NABU supervisors and others involved in the investigative process to seamlessly review, comment on, and approve documents into an electronic case file. Such a system will provide electronic access for all authorized users and allow for critical key word and name search capabilities, which currently do not exist, yielding quick access to a vast library of relevant documents and information.

Recommendations:

- ***Analyze NABU business processes in an effort to identify methods for optimizing performance and streamlining operations.***
- ***Develop an automated electronic case management system.***

Internal monitoring and evaluation of NABU's performance

Effective internal monitoring and evaluation systems are a hallmark of successful organizations. Such systems are critical to ensuring that an organization is not only following its established mission and vision but also continually progressing and improving its performance. A successful organization-wide monitoring and evaluation system requires a results-based management approach actively promoted by the organization's leaders.

NABU currently has a well-established and functioning mechanism for tracking and reporting various performance statistics. NABU is required to publicly report its activities on a semiannual basis. The assessment team found that NABU complied with this requirement and issued comprehensive and impressively illustrated reports that positively represented the professionalism of the organization. The reports include NABU's operational outputs, such as the number of proceedings initiated, notices of suspicion issued, the number of cases in the courts, and assets seized. The reports also include narrative summaries of key events during the reporting period, relevant legislative matters, and internal organizational support activities such as employee development and financial management. Notably, the reports also discuss consequential cases from the reporting period and often include diagrams or other illustrative depictions of the of the alleged corruption schemes.

However, at the start of the assessment, NABU did not have a formal strategic plan and was not actively measuring its performance against established benchmarks. With the assistance of its international partners, NABU now has a strategic plan, which should aid the organization in establishing a monitoring and evaluation system that will guide continual progress. A robust monitoring and evaluation system should assess the organization's effectiveness in meeting its objectives and offer comparative analysis to other organizations operating in similar environments.

As a unique government entity in Ukraine, NABU will have to build its monitoring and evaluation system from scratch. While resources exist from other countries that have similarly developed organizations targeting corruption, NABU should consider its specific environment in order to identify meaningful ways to measure its effectiveness and success, such as evaluating incoming complaint activity from the public, which can speak to public awareness and confidence in NABU's effectiveness. NABU should also ensure that its monitoring and evaluation system works in conjunction with an effective human resources infrastructure that monitors, measures, and manages collective and individual staff performance (as described in the following section of this report).

Recommendation:

- ***Develop a robust monitoring and evaluation system to assess organizational effectiveness.***

Human resource management

Many interlocutors the assessment team interviewed noted that NABU personnel are dedicated and professional due to high recruitment requirements. Despite stringent requirements NABU has seen a very high competition for the positions it advertised (overall during past two years, NABU's HR unit processed more than 30,000 applications; for one of the announcement of 12 vacancies of detective positions more than 4,000 candidates applied).

The recruitment process is also affected by changes in the legislation, especially the Civil Service Law, a new version of which was enacted in 2015. According to the Corruption Prevention Law, candidates for certain positions in NABU have to be vetted under several criteria by several agencies, which also takes time. Additional vetting is conducted by the Ministry of Justice according to the Lustration Law.

It appears that NABU has built a sound recruitment process that includes:

- transparent advertising of the vacancies on NABU's website and publication of information about candidates and each stage of the procedure to inform the candidates and the public;
- anonymous testing on the knowledge of legislation (with different scope of testing for different positions depending on the profile);
- additional tests for candidates for positions of detectives, analysts, internal control officers; such tests include: testing of general skills, computer skills, and psychological evaluation during an interview with a specialist;
- interview with candidates that passed the test, including practical tasks during interviews;
- probationary period up to six months if deemed necessary by the selection panel and approved by NABU's Director.

What could be improved in terms of the procedure is the form of the selection panel opinion that is prepared in the end of the process and submitted to the Director along with an appointment recommendation. Such opinion could include assessment of the candidates that are recommended for appointment with explanation why they merit appointment compared with other candidates.

NABU is the only LEA in Ukraine in which civil society representatives are directly involved in the recruitment process. The Civic Oversight Council delegates three of its members to be members

of NABU's recruitment panel. NABU also takes into account public opinion when selecting its personnel, especially to the managerial positions. For examples, NABU had to announce a competition for the head of the Odesa regional office six times because several times a candidate that was selected was criticized in the media and to take into account public opinion NABU had to review recruitment results and make a new call for candidates.

As to turnover of staff, according to NABU, 43 employees resigned or were dismissed as of October 2017, including 16 detectives, out of which two detectives were dismissed for disciplinary offenses and three detectives transferred to another public office position outside of NABU. Overall, 7 percent turnover of staff does not appear to be excessive.

NABU estimates that with the current number of detectives (about 240), its overall personnel should be 900 with additional staff allocated, in particular, in the Analytical Department, Technical Operations, IT, and Special Operations Department. If the number of detectives was increased to 350, then the estimated number of personnel should be 1,235.

Several steps could be taken to improve and simplify recruitment procedures in NABU:

- 1) All candidates who applied could first take general skills tests and only then would take tests for knowledge of the legislation. General skills tests would remove about 60 percent of candidates, while most candidates pass legislation test.
- 2) Electronic submission of documents by applicants would significantly simplify the recruitment process. This requires changes in the Civil Service Law.
- 3) More flexibility could be given as to the documents required from candidates to apply (e.g., to require at the initial stage only CV and a letter of motivation). This would also need changes in the Civil Service Law.

NABU's HR unit has only 10 staff members and this number of staff is considered to be too low for an organization such as NABU. Even according to the Ukrainian legislation, the HR unit should have 1 staff member per 20 civil servants. According to NABU, taking into account this standard and standards for HR units in LEAs to service ranking officers, NABU HR unit should have 42 staff members, or four times more than the current number.

NABU has started implementing a performance management system as required by the new Civil Service Law. Each employee would have a set of individual performance indicators and would be evaluated based on his/her performance. It is a new practice and NABU (as all other public institutions in Ukraine) lacks experience in this regard.

According to NABU Law, remuneration of NABU staff cannot include bonuses (discretionary payments decided by the management). At the same time the Law set relatively high salaries for NABU staff (unlike for most other officials for whom the level of salary is determined by the Government). While such a rule ensures internal autonomy of NABU detectives and other staff by removing discretion of managers, it limits NABU options in terms of recognizing its staff and acknowledging achievements.

Recommendation:

- ***Develop and implement a comprehensive HR strategy for NABU including issues of performance evaluation of NABU staff, mentoring (coaching), training, and staff incentives (distinctions, training opportunities, etc.) to promote better performance.***

Training of staff

NABU employees consist of many different types of positions, including not only detectives and investigative analysts, but numerous individuals in support positions, including financial management officials, document processors, and information technology specialists. While the development needs of each of these positions and individuals varies, the constant is that all employees should receive adequate professional development and opportunities for advancement of their skills.

The assessment team reviewed NABU's efforts to provide training to its complement of employees and provided feedback from NABU staff on the development received. The assessment team found that NABU tailored its initial training of detectives to the specific needs of each of the three hiring waves. NABU officials stated that this was necessary due to significant differences in the backgrounds and experience levels of each cadre. NABU officials also stated that they had not yet formalized an employee development infrastructure, either for its detectives or other staff.

The assessment team believes that NABU should increase its attention to employee training matters and note that several sections and recommendations in this report discuss a need for regular training employees on specific matters such as new rules in legislation, how to make searches, the use of IT, the use of force, arrest actions, and the registering of proceedings. The organization should design a development system that provides benchmarks for the development and advancement of individuals in various positions and helps ensure that all employees have the knowledge and skills necessary to perform their duties. Having such an infrastructure will also help ensure that employees receive consistent instructions on matters of organizational policy.

Recommendation:

- ***NABU should fully implement an employee development system that helps ensure that employees receive the training necessary to perform their duties and obtain development for advancement.***

Policy guidelines

As a newly created agency, NABU began its existence with a need to create an infrastructure of standard operating procedures and organizational policies. NABU's body of policy would need to cover numerous aspects of the organization's administration and operations, from distribution of authorities, roles, and responsibilities, to personnel management, to safety and security, to operational procedures such as investigative techniques, use of force, and chain of command delegations. These policies are essential for ensuring consistency in operations and for providing guidance to employees, particularly those with little experience.

NABU developed a collection of regulations delineating the authority, roles, and responsibilities of its various organizational components. These formal regulations form the foundation of NABU's overall policy library. However, due to the unique and independent nature of NABU, there is significant work to be done in the further development of this library through the drafting and implementation of guidance and standard operating procedures to instruct NABU's employees in all matters of the organization's operations. The assessment team believes that NABU leadership team

should ensure that its policy library is fully developed by devoting resources to this task and establishing a schedule for its completion.

Recommendation:

- ***NABU should fully develop its policy library and ensure that the full complement of NABU staff is familiarized with the guidance.***

**Internal control functions
(including policies for conflict of interest, disciplinary cases, and cashier funds)**

Due to NABU's special role and mandate, its personnel should abide by the highest standards of conduct. While NABU fights high-level public corruption throughout Ukraine, NABU's Internal Control Department is responsible for preventing, identifying, and investigating offenses of misconduct by NABU employees. Included within the internal control department's duties are managing NABU's conflict of interest and ethics program, reviewing allegations of misconduct, performing integrity checks, and other matters of risk management, such as performing internal audits and institutional security. In addition, the Internal Control Department manages NABU's polygraph program. The assessment concluded that NABU's Internal Control Department performs its tasks as required by NABU law and is a strong contributor to NABU's perception as an organization with high integrity.

Ethics, Professional Conduct, and Conflict of Interest Policies. NABU has developed and executed ethics, professional conduct, and conflict of interest policies to be followed by NABU employees. The policies provide a strong foundation for helping to ensure NABU's integrity and cover such matters as political neutrality, accountability, lawfulness, professionalism, and independence. The policies also cover conflicts of interest and the actions to take in the event that such a conflict is identified, which require immediate notification and resolution.

However, the assessment team found that the internal control unit's policies on conflicts of interest cover only real and potential conflicts and do not include *perceived* conflicts of interest. In practice this means that if there is an allegation that an employee has acted inappropriately due to a conflict of interest, the internal control unit will investigate and then will take action only if the employee is found to have a real or potential conflict of interest. If the internal investigator confirms that the employee's actions were not impacted by the presence of a conflict, no action is likely to be taken even if an individual external to NABU could reasonably conclude that a conflict likely interfered with the employee's actions. The assessment team believes that NABU should also give weight to perceived conflicts of interest when performing its investigations. The assessment team believes that NABU should conduct additional training for NABU staff on the issues of integrity, notably on perceived conflicts of interest.

Disciplinary Procedures. NABU's internal control unit works closely with the Civil Oversight Council, which performs external oversight and plays a key role in ensuring NABU's accountability. NABU's Disciplinary Commission consists of five members, three of which are out of NABU employees (two Deputy Directors and head of the Legal Department) and two are members of the Civil Oversight Council selected by the Council itself. The main task of the Disciplinary Commission is to examine the necessity of taking disciplinary actions to NABU employees. Following an internal

investigation by the Internal Control Department that sustains an allegation of misconduct by a NABU employee, the Disciplinary Commission convenes a meeting and assesses the circumstances of the misconduct case. The Disciplinary Commission then makes recommendations on disciplinary action and provides a report to NABU's Director. NABU's Director then makes a decision on the relevant disciplinary action to the NABU employee or absence of grounds for it.

The assessment team found that the Disciplinary Commission is forwarded the results of only those internal investigations in which the Internal Control Department affirmatively determines the presence of misconduct. Because the Commission does not receive a report on the results of those internal investigations where no employee misconduct is found, there is no oversight of investigations that result in an exoneration. Thus, there is no external review to determine the thoroughness or accuracy of each internal investigation, especially those where no misconduct is found, leaving NABU open to criticism by entities skeptical of NABU's ability to police itself. Moreover, there are no established procedures for the full composition of the Disciplinary Commission to receive classified information. As a result, any internal investigation involving such sensitive materials excludes civil society members from the full composition of the Disciplinary Commission. The assessment team believes that NABU needs to strengthen its disciplinary proceedings and the role of the disciplinary panel to include all internal investigations, including those that fail to conclude any misconduct.

Controls over Cashier Funds. To assist with the efficient execution of operations, NABU maintains cash banks available to use for paying confidential informants and other urgent investigative expenses. The assessment team discussed these cash banks with the head of NABU's internal control unit who indicated that the organization had policies governing the use and accounting for these funds. However, the procedures for spontaneous, unannounced audits of these cash banks were not included in NABU's current policies. During a subsequent meeting with NABU's internal control unit chief, the assessment team was informed that, following our initial meeting, the unit had incorporated these audit procedures into its oversight of NABU's operations. The assessment team was impressed with NABU's quick and progressive response to our inquiry and the resulting improvement to NABU's fiscal administration. The assessment team believes that NABU must now incorporate these procedures into its official policy documents to ensure that the task is performed consistently and routinely.

Recommendations:

- ***Update NABU's conflict of interest policies to include perceived conflicts of interest and conduct additional training for NABU staff on this issue***
- ***Strengthen disciplinary proceeding procedures and the role of the disciplinary panel to include reviews of all internal investigations, including those that do not conclude with a finding of misconduct by the employee.***
- ***Develop formal policies outlining the recently developed spontaneous cash audit practices to ensure that the task is performed consistently and routinely.***

Internal communications

Internal communications refers to the sharing and transfer of information inside of an organization. Within a law enforcement agency, it can be very valuable for the body of employees to regularly confer and share experiences and information. Such synergistic information sharing can lead to innovation, operational improvements, and investigative advances through deconfliction and lead exploitation.

The assessment team spent several days working in NABU's offices and spoke with numerous NABU employees and stakeholders. This provided the opportunity to observe the organization from the inside. Through the assessment, aspects of NABU's internal communication in action were seen and the internal communication were discussed with NABU personnel from various units within the agency. The general impression was that communication within NABU needed improvement. It was also observed that there were internal communication gaps wherein employees were not effectively coordinating or communicating with coworkers in other units.

During the assessment, it was told that NABU employees were discouraged from sharing operational information with coworkers. This strategy was promoted to mitigate the risk of information leaks or the potential for investigations to be compromised. In addition, NABU's physical space does not facilitate the easy exchange of information. NABU's offices are not designed with an open concept and employees somewhat must go out of their way to interact with their colleagues. NABU recently opened its cafeteria and this seems to be a positive achievement. The cafeteria allows NABU employees to socialize and interact and may spur increased internal communication of all kinds and with more individuals. The assessment team believes that NABU should promote internal communication to help optimize operations and enhance information sharing.

Recommendation:

- ***Develop and implement an internal communication policy to help optimize operations and enhance information sharing within the agency.***

Computer forensics

In today's digital age, computers, mobile phones, network servers and other electronic devices are used every day to communicate throughout the world, surf the internet, maintain databases, and participate in countless other activities. In many cases, computers and other electronic devices provide a means of committing a crime and serve as a convenient storage device for evidence of crime. Virtually every class of crime, to include public corruption-related offenses, involves some form of digital evidence. Whether it is computer network logs, e-mail, image files, or video, law enforcement organizations must have the capability and the expertise to acquire, preserve, and analyze digital evidence stored on electronic devices.

During this assessment, the assessment team evaluated NABU's Computer Forensics Unit, which included an inspection of the lab and an interview of the unit chief. The Unit, which was established in 2017, consists of four computer examiners who use modern computer forensics tools to effectively acquire, preserve, and analyze digital evidence. The forensic examiners closely collaborate with the detectives during the examination process to ensure the capture of all relevant evidence and

information in support of various investigations. The Unit is part of the Analytical Department, even though it performs autonomous function and has no direct link to the work of analysts.

Recommendations:

- ***Develop an operations manual that provides a framework for performing high-quality digital forensics in support of NABU investigations, including ensuring computer examiners within the Computer Forensics Unit receive periodic training and software and hardware equipment upgrades.***

IT capacity and security

As an independent government agency responsible for investigating corruption allegations against high level public officials, it is necessary for NABU to maintain its own information technology network. This includes not just planning for and building the physical network, including the installation of necessary equipment, but also the need to secure that network from external infiltration or sabotage. These responsibilities are significant and NABU has done an admirable job to establish NABU's IT infrastructure from the ground up with the help of international partners.

As NABU matures, it should turn to long-term IT planning, including the development of an enterprise architecture strategy. To do so, NABU will need to determine if it has in-house resources that can perform the full range of IT functions to include long-range planning and strategy development. Due to the highly technical nature of this responsibility and the mandated limits on staffing numbers, it is uncertain if NABU can devote the necessary in-house resources to achieve the necessary progress in this area and NABU may need to seek assistance of international partners.

Recommendation:

- ***Develop and implement a comprehensive IT Strategy that addresses issues of information security and capacity of IT personnel.***

Limits on the number of staff

The NABU Law limits the maximum number of staff that can be employed in the Bureau's central and territorial units at 700, including not more than 200 ranking officers. This means that NABU can recruit up to 500 civil servants, including detectives, and up to 200 ranking officers who can serve in the special operations department and other units. The situation with recruitment of staff in different units of NABU is shown in the table below.

Table 5. NABU staff as of September 2017

| Name of the structural unit | Number of available positions | Number of vacancies |
|--|-------------------------------|---------------------|
| NABU Leadership | 4 | 0 |
| Chief Detective Unit | 246 | 32 |
| Second Detective Unit | N/a | N/a |
| Operations and Technical Department | N/a | N/a |
| Analytics and Information Processing Department | 41 | 3 |
| Accounting and Reporting Department | 16 | 1 |
| Department of Informational & Analytical Systems & Technologies | 17 | 0 |
| Supply and Control Department for Financial Resources and Property | 19 | 1 |
| Legal Department | 15 | 1 |
| Public Relations Department | 19 | 0 |
| External Communications Department | 14 | 1 |
| Internal Control Department | 19 | 2 |
| Lviv Branch Office | 8 | 0 |
| Odessa Branch Office | 7 | 2 |
| Kharkiv Branch Office | 7 | 2 |
| Special Operations Department | N/a | N/a |
| Human Resources | 10 | 0 |
| Document Control Division | 10 | 0 |
| Information Security Division | 8 | 0 |
| Office of the Bureau's Director | 7 | 1 |
| TOTAL | 700 | 73 |

Source: Information provided by NABU. "N/a" – information not available.

After two and half years of existence NABU, about 10 percent of the established positions are vacant. This can be explained by the lengthy recruitment procedure that involves several stages of competitive selection. NABU was the first LEA in Ukraine that by law was required to recruit all its staff through competitive selection. This complicates the recruitment process but gives the benefit of highly skilled and motivated staff (see above).

Overall the existing maximum number of staff appears to be insufficient for the current scope of NABU duties. In many sections of this report when analyzing effectiveness and efficiency of the different NABU units, experts noted insufficient number of staff due to limits sets by the NABU Law. This is true, in particular, for the regional offices (see below), technical operations and special operations departments, HR unit, analytical service, and others. With more staff, NABU could take up and pursue more cases and significantly strengthen its operation in particular by opening additional regional offices. While current NABU staff does excellent job in performing its tasks, its workload is significant and there is a risk of burnout.

Recommendation:

- ***Raise the maximum limit for NABU personnel to strengthen NABU operation and ensure its sustainable development.***

Regional offices

The law creating NABU allows for the establishment of territorial offices. Specifically, the law contemplates the creation of up to seven regional outposts. As of January 2018, NABU had established a total of three such offices in the following cities: Kharkiv, Lviv, and Odessa. These territorial offices are responsible for accepting and processing complaints or referrals from citizens, coordinating with Ukrainian government officials operating within the area, cooperating with foreign government officials on joint law enforcement matters, performing outreach functions to inform local residents of NABU's work, and performing investigative work on cases managed by regional personnel. The offices are not legal entities and operate under the auspices of the central NABU office.

The assessment team performed fieldwork at the Lviv Territorial Office in December 2017. The team received a tour of the facility and met with the Director and Deputy Director of the Territorial Office, as well as available Detectives and Specialists. Also, personnel in Lviv demonstrated the processes for the intake of incoming complaints and the development and processing of responses. The office maintains an open office to receive corruption complaints and case referrals from local citizens and has private facilities that allow citizens to be interviewed in a confidential manner. The investigation is carried out in conformity with the investigation unit in Kyiv.

Although the fieldwork was limited, the assessment team believes that the Lviv Territorial Office is a high-functioning operation with excellent leadership and personnel. The assessment team did not assess the office's productivity or the quality of the work performed, but nothing came to the attention to indicate that either was lacking. The assessment in Lviv demonstrated that these outposts hold great promise for extending the reach of NABU and providing greater opportunities for the public to see NABU's work.

According to NABU officials, having three territorial offices is currently sufficient and any future plans to open additional offices will be dependent in large part upon the availability of resources. The three operational offices have been allocated a total of 68 positions, which is roughly 10 percent of the overall statutorily established staffing level of 700. It is obvious to the assessment team that the staffing limitation established by the NABU Law significantly limits its ability to establish and maintain additional territorial offices. In addition, each of the current offices cover large geographic areas and are responsible for a jurisdiction consisting of between four and eight regions (Oblasts), some of which are on the border thereby increasing the complexity of operations because their responsibilities include coordinating with international partners.

Independence and risk management

Legislative framework

The initial legal framework afforded NABU a high level of autonomy and extensive safeguards of independent operation. The Law on NABU was adopted in October 2014, took effect in January 2015, and then was significantly amended in February 2015 to further strengthen its provisions. Among NABU's independence safeguards provided by the law are the following:

- NABU's creation and operation regulated by a special law;
- NABU set up as a stand-alone institution not subordinate to any other government agency;
- special procedure for the competitive and open selection of NABU's Director conducted by a special panel of independent members with high public reputation. NABU was the first law enforcement agency in Ukraine with its head selected based on the results of an open competition;
- secured tenure of NABU's Director who may not be dismissed based on political discretion;
- open and competitive selection of NABU staff;
- high level of NABU staff compensation;
- allowance to have in-house all necessary operational and support units to be able to perform its functions autonomously;
- organization of NABU's work is regulated by NABU Director's decisions;
- strong internal control function with the authority to conduct integrity testing and lifestyle monitoring of NABU staff and carry out criminal investigations;
- extensive powers of NABU, including to access necessary information;
- clearly delineated and exclusive investigative jurisdiction determined in the CPC;
- possibility to take over cases from other LEAs if needed to facilitate investigation of crimes under NABU's jurisdiction;
- NABU determined as a central authority for conducting MLA;
- dedicated public prosecution office working only with NABU proceedings.

While the legislation creating NABU in general provided robust guarantees of independence and effective functioning of NABU, it had some deficiencies that are explained in other sections of this chapter.

The Law on NABU was amended several times since February 2015 but the changes were of a minor technical nature. However, since autumn 2016 there have been a number of attempts that could affect NABU's independence and leadership. While these attempts have failed so far, they show that the instability of the legislative framework remains a serious threat to NABU's operation. Some examples of attempts to change legislation regulating NABU operation are described below. The assessment team considers it essential in the fight against corruption that NABU remains totally independent and will warn against any step that would weaken the organization's independence.

In September 2016, a group of members of parliament registered a draft law (# 5177²⁹) that proposed, among other things, NABU being required to inform the PGO about its outgoing MLA requests. The draft would also delete CPC provisions that require the Ministry of Justice and PGO inform NABU about MLA cases they have processed if they concern financial or corruption crimes. The draft also proposed to remove provision from the NABU Law that allowed it to carry out legal cooperation and obtain assistance from foreign jurisdictions.

In October 2016, a member of parliament introduced a draft law (# 5212³⁰) proposing to allow the Prosecutor General “in exceptional cases” to transfer proceedings within NABU’s competence to another investigative agency. Another proposal included in the draft law would also limit possibility for SAPO prosecutors to transfer proceedings to NABU (when deemed necessary to detect or investigate crimes under core NABU jurisdiction) – in such situations the PG would be an ultimate arbiter and could cancel such decision if opposed by another agency.

In April 2017, parliament adopted in the first reading a draft law that made it possible to close proceedings under NABU investigation through manipulation with the competence of the LEAs. The draft law (# 6220³¹) proposed to prohibit registration of new criminal proceedings and require closing of the pending proceedings if there was a prior valid decision on the termination of the criminal proceedings concerning the same circumstances. Civil society activists asserted that such provision would allow LEAs to open criminal proceedings and close it shortly afterwards with the goal to preclude other agencies, notably NABU, to start or continue its investigation in the same facts.³² They referred, in particular, to the examples where proceedings were opened by LEAs in violation of the investigative jurisdiction rules. Due to opposition from the civil society and international community, the draft law’s consideration was suspended (even though the draft was not fully rejected).

In October 2017, the parliament of Ukraine adopted amendments in the CPC that changed the way duration of procedural terms is calculated (described previously in the relevant section of this report) and also changed other rules of criminal procedure:³³

- 1) Request for authorization of measures to ensure criminal proceedings during the pretrial stage (e.g., measures of restraint, access to documents, seizure of assets, arrest), as well as searches, have to be filed with the investigative judge of a court that is located in the area where the investigative agency is registered as a legal entity. In NABU’s case this means that detectives of its regional offices will have to file such requests only in Kyiv, because none of the regional offices has the status of a legal entity due to the overall limitation on NABU’s staff. This will seriously impact the effectiveness of NABU’s work in the regions, in particular because all such requests have to be filed in writing and will require detectives to travel to Kyiv to obtain authorization for each motion. Also, other court proceedings during pre-trial investigation (e.g., hearing of witnesses and questions of detaining the accused) have to be held in Kyiv and not in the jurisdiction of the local court. The assessment team thinks that the new change of the law, which stipulates that the pretrial court hearings shall be held where the pre-trial investigation body is located

²⁹ Available at <https://goo.gl/FRz3s5>.

³⁰ Available at <https://goo.gl/wJK9Yz>.

³¹ Available at <https://goo.gl/E5QTTM>.

³² Source: <https://goo.gl/RCwzC5>.

³³ Law #2147-VIII of October 3, 2017. Amendments in the CPC will come into effect on March 15, 2018.

(registered) as a legal entity, should be altered so the pretrial investigation steps also can be held at the territorial court.

- 2) The search motion filed with the investigative judge has to include justification that the investigative agency cannot obtain access to objects, documents, or information on a voluntary basis by requesting them. The judge should deny the motion if the prosecutor or investigator fail to prove that according to the established circumstances the search is the most pertinent and effective way of finding and seizing objects and documents relevant for the pretrial investigation. The judge will also have a very broad discretion to dismiss a search motion. If dismissed, the investigative agency may re-submit its motion only with additional arguments adduced. The assessment team assumes that that the new rules do not hamper access to search and do not lead to absurd situations where the investigative agency would have to request to voluntarily hand over incriminating evidence – which in any way would be a violation of the human rights convention concerning the prohibition about self-incrimination.
- 3) Forensic examination during the pretrial stage may be ordered only by an investigative judge; under previous provisions, the investigator or prosecutor could order examination on their own. The investigative judge will have to choose the expert or expert institution and may reject questions offered for the forensic examination.

On 6 December 2017, two members of parliament submitted a draft law proposing to change the grounds for dismissal of NABU's Director.³⁴ The draft law would give the parliament authority to dismiss heads of the independent anti-corruption agencies (i.e., NABU, SAPO, NACP, State Bureau of Investigations) through a no-confidence vote by simple majority. The vote could be initiated by the President, Government, or 150 parliamentarians. The draft law also proposed an additional ground for dismissal of NABU's Director – if he commits an administrative corruption offense (e.g., a conflict of interest-related violation as established by court). The draft law was submitted immediately after the incident when the SBU and PGO disrupted an undercover operation of NABU in the State Migration Service. While it concerned not only NABU but other agencies as well, the timing of the draft law and public statements around it pointed at NABU as the primary target of the amendments. The draft law was submitted on Wednesday and already on Thursday the parliament planned to vote for it. According to the media reports, the public criticism of the civil society and urgent interventions of international organizations and foreign governments prevented the consideration of the draft law.³⁵ The draft law, however, was not withdrawn and the parliament can return to its consideration.

Recommendations:

- ***Avoid changes in the legislative framework regulating NABU's operations without prior extensive consultations with NABU, SAPO, other LEAs, civil society and experts, and other stakeholders.***
- ***Analyze application of amendments in the Criminal Procedure Code introduced by Law #2147 of October 3, 2017, to review their impact on the effective investigation of corruption crimes as led by NABU.***

³⁴ Draft Law #7362, available at <https://goo.gl/dNKAdz>.

³⁵ See, for example, <https://goo.gl/qbhGta>, <https://goo.gl/xuR6SY>.

Investigative jurisdiction

NABU's jurisdiction is clearly delineated in the CPC (Article 216.5). It is based on two concurrent criteria: (1) the type of criminal offense (corruption crimes in the public sector, money laundering, false statement in the asset declarations) (Condition 1); and (2) either a category of public official who committed a crime (upper-mid and high level) or the amount of undue advantage or damages inflicted (more than UAH 800,000 or about USD 29,000 in 2017) (Condition 2). If both conditions are present the case belongs to NABU's jurisdiction. NABU also has an exclusive investigative jurisdiction over active bribery of a foreign public official regardless of the amount of bribe or officials involved. NABU does not deal with any administrative offenses, including those related to corruption (e.g., public official's acts under a conflict of interest or non-reporting about noncompliance with anticorruption legislation).

A key feature of NABU's investigative jurisdiction is that it is supposed to be exclusive, not overlapping with any other agency. Prosecutors, including the Prosecutor General, may not transfer any of NABU's investigations to any other agency under any condition. Instead, NABU, upon agreement of the SAPO prosecutor, can take over any proceeding if it is required to investigate crimes within its core jurisdiction described above. Such exceptional provisions aimed to ensure the autonomy of NABU investigations and prevent possible interference from other LEAs and prosecutors' offices.

The main issue in this regard has been the compliance of other LEAs with the requirements of NABU's exclusive jurisdiction. In a number of cases, other investigative agencies **started proceedings even though they seemed to clearly fall under NABU jurisdiction**. As of July 2016, there were 10 cases where SAPO prosecutors had to reject transfer of proceedings from other investigative agencies as they were started in violation of the jurisdictional rules set in the CPC. According to NABU and SAPO, such actions could result in the court finding of evidence collected by an incompetent investigative body as inadmissible.³⁶

The potential for harm resulting from a failure to ensure the proper competence is executed has already occurred. For example, in June 2016 the Kyiv Appellate Court quashed the first instance court decision on the pre-trial detention of the person (city mayor) suspected of taking EUR 1 million bribe referring to the fact the investigation was carried out by an unauthorized investigative authority. In May 2017, the local court refused to start trial in the case of alleged bribe taking by the Deputy Minister of Health and returned the indictment to the prosecution office based mainly on the violation of the jurisdictional rules (the case was investigated by investigators of the local prosecution office and not by NABU under SAPO's guidance).³⁷

Unfortunately, these are not isolated cases of proceedings that were started in violation of the investigative jurisdiction rules. According to interlocutors, the Military Prosecutor's Office is the most frequent "offender" in this regard. Such practice can have catastrophic consequences for individual proceedings and should be stopped.

According to CPC article 17, 3, suspicion and charges may not be based on evidence obtained illegally. In turn, CPC article 87 states that evidence is inadmissible if it is obtained through significant violation of human rights and fundamental freedoms. But in practice, evidence is considered

³⁶ See joint NABU and SAPO statement: <https://goo.gl/AaxYAu>.

³⁷ Decision of the court available at <https://goo.gl/SSEgrX>.

inadmissible if it is not the right investigating agency that has obtained the evidence irrespective of there being no significant violations of human rights or fundamental freedoms.

Another way to manipulate investigative jurisdiction is to **qualify an offense as a crime not falling under NABU's competence**, thus shielding the case from NABU's reach. For instance, a bribe solicitation or taking of a bribe, or active and passive trafficking in influence, can be qualified as fraud if the offender had knowingly no possibility to accomplish what he promised or there was no intent to provide a quid pro quo. Fraud is not covered by NABU's jurisdiction and can be investigated by another agency even if the offender is a high-level official.

The assessment team views this as a challenging situation for NABU and SAPO. The assessment team is of the opinion that if the evidence is obtained in a way that isolated cannot be challenged it should be allowed to be used in the related criminal case – even if the investigating agency – or prosecutor - later on is changed. This is the standard practice within most advanced criminal justice systems throughout the world. The challenge to any fix for the current situation in Ukraine is protecting NABU's authority and jurisdiction over corruption matters while at the same time preventing law enforcement agencies from sabotaging corruption investigations, intentionally or otherwise, by conducting investigations within NABU's purview. The assessment team is therefore of the opinion that the CPC should be changed so that it is clarified that the only reason to reject evidence should be the grounds mentioned in CPC article 87 and that any evidence gathered by an official law enforcement agency using proper collection techniques is admissible. However, it is important that the Prosecutor General ensure that prosecutors and investigative agencies strictly abide by the rules of competence, particularly for those cases within NABU's exclusive jurisdiction. Further, Ukraine should establish procedures for taking disciplinary action against prosecutors and investigators who violate jurisdictional rules that lead to the inadmissibility of evidence.

Under two circumstances, NABU has an exceptional right to take over cases that do not belong to its core jurisdiction (Article 216.5 CPC). The first circumstance is if the proceeding in question concerns crimes within NABU's jurisdiction (i.e. corruption, money laundering, etc.) and the offense inflicted or could inflict grave consequences on the legally protected public interests or human rights. This covers situations when the corruption offense was committed by a low-level official, but it caused serious damages. Transfer of cases in such situations is decided by the SAPO prosecutor. The second circumstance is that NABU detectives may also investigate offenses that belong to the jurisdiction of other agencies (regardless of the type of crime or category of perpetrator) if it serves the purpose of detection, suppression, or solving crimes within NABU's jurisdiction. Such cases are taken over by decision of NABU's Director and approved by the SAPO prosecutor.

However, there is a technical issue that makes implementation of this task difficult. NABU has access to the Unified Register of Pretrial Investigations (a unified database where all criminal proceedings are recorded and tracked) only within the proceedings it has registered there itself. It therefore cannot monitor or follow up on other proceedings that could potentially facilitate its own investigations and that could be transferred from other agencies. Operation of the Unified Register of Pretrial Investigations is regulated by rules set by the Prosecutor General who can change access rights by amending respective regulations.

Recommendations:

- *Following consultations with SAPO, issue Prosecutor General's guidelines to prosecutors and investigative agencies requiring them to strictly abide by the investigative jurisdiction rules set in the CPC in cases falling under NABU's exclusive competence. Any case of violation of such rules should result in disciplinary proceedings against investigators and prosecutors who committed (allowed) it.*
- *Provide NABU and SAPO with full access to the Unified Register of Pretrial Investigations, not limited to proceedings investigated by NABU.*

External interference and internal autonomy of detectives

During the assessment, the team found no signs of external interference in NABU's work. There has been a constant barrage of public statements of criticism towards NABU and there may have been attempts to influence the course of individual investigations. However, none of the interlocutors the assessment team interviewed alleged that any of NABU's proceedings were biased or influenced by undue external interests – political, corrupt, or otherwise. Both NABU staff and external stakeholders confirmed that NABU has been acting independently.

Many interlocutors even attributed problems NABU has encountered to the fact that it has been independent and not susceptible to external pressure, unlike other law enforcement agencies. Some mentioned indirect attempts to influence NABU's leadership and investigations. It was alleged, for example, that this could be seen in criminal proceedings opened against NABU leaders (Director and First Deputy Director), challenges in administrative court claiming violations in the selection procedure of NABU's Director, and administrative protocols against NABU leadership drawn up by NACP.

As to the internal autonomy of NABU detectives, the assessment team found no indication of internal administrative pressure or undue interference in individual proceedings. Detectives have in practice an autonomy in registering or pursuing investigations, provided relevant actions are agreed upon by the supervising prosecutor.

Financial autonomy

As a state agency, NABU's main source of funding is the state budget allocations. The NABU Law requires that NABU is provided with sufficient funding necessary to perform its functions. However, this provision has no direct legal effect on the budgetary process and the final amount of budgetary funding is decided annually in the State Budget law. Information on NABU's funding from the state budget is the following table.

Table 6. Annual funding of NABU

| Year | Funding requested by NABU (UAH) | Funding according to the State Budget Law (UAH) | Actual state budget compared with the requested amount | Amount of international technical assistance provided to NABU (UAH) |
|------|---------------------------------|---|--|---|
| 2015 | - | 247 882 000 | - | |
| 2016 | 893 477 300 | 488 565 800 | 54.6% | 18 707 710 |
| 2017 | 1 324 466 100 | 773 556 800 | 58,4% | 24 004 800 (as of Dec 1, 2017) |
| 2018 | 1 123 139 000 | 857 091 700 | 76.3% | |

Source: Information provided by NABU; State Budget Laws of Ukraine.

Table 7. Comparison of funding of different law enforcement and anti-corruption agencies

| Agency (maximum number of staff) | 2015 | 2016 | 2017 | 2018 |
|--|-------------|-------------|-------------|-------------|
| NABU (700) | 247 882 000 | 488 565 800 | 773 556 800 | 857 091 700 |
| SAPO (52). Started operation in December 2015 | - | 74 888 900 | 119 426 700 | 116 132 800 |
| NACP (311)* | 109 313 600 | 488 565 800 | 162 888 300 | 169 841 100 |
| State Bureau of Investigations (1,500). Bureau's Head was selected in November 2017, establishment of the Bureau will start in 2018 | - | - | 640 684 900 | 651 567 300 |
| Asset Recovery and Management Agency (130) Establishment of the Agency started in 2017 | - | 25 349 600 | 42 333 700 | 253 213 400 |

Source: State Budget Laws of Ukraine.

Note: NACP funding includes only expenses for the agency (excluding funds for the political party state financing that are disbursed through NACP).

While the actual amount of funding allocated to NABU was less than it requested, according to NABU itself, it has received sufficient funding from the state budget and international partners to be able to operate within its staffing limit. The funding was sufficient to cover expenses required to repair premises and pay for utilities, to procure equipment and supplies, fund salaries and payments, finance the special operations fund, and cover court expenses and other mandatory costs. NABU had the opportunity to submit and justify its budget requests before the Ministry of Finance and in the parliament's budgetary committee. Therefore, it appears that NABU's financial autonomy has been ensured in practice.

Mutual legal assistance powers

International cooperation plays an important role in NABU investigations. Many suspects in NABU proceedings have assets or financial interests abroad and obtaining relevant evidence through MLA is crucial for effective investigation.³⁸ According to the NABU Law, NABU has the right to directly cooperate with foreign jurisdictions and international organizations. The Criminal Procedure Code (Article 545.1) authorizes NABU to be a central authority for MLA matters in criminal proceedings within its investigative jurisdiction. This is an exceptional provision, as the Prosecutor's

³⁸ Just in one case related to two state enterprises and former member of parliament, NABU sent more than 50 MLA requests. See more information about the investigation <https://goo.gl/6Lpcoq>.

General Office (PGO) used to be the only central authority at the pretrial stage. The goal of this provision was to make NABU fully autonomous in its investigations and able to carry out international cooperation not dependent on the PGO or any other authority.

Table 8. Statistics on MLA requests by NABU

| Type of MLA request | 2015-2017 |
|--|-----------|
| Number of proceedings in which NABU requested MLA | 245 |
| Number of MLA requests which NABU sent and received assistance | 98 |
| Number of incoming MLA requests processed by NABU | 15 |

Source: Information by NABU.

NABU has faced obstacles in implementing this important power.

Laws of Ukraine on the ratification of the **multilateral international treaties** on legal assistance (e.g. UNCAC, Council of Europe conventions) mention the PGO (for pretrial stage) and the Ministry of Justice (for judicial stage) as the central authorities. The Ukrainian MFA clarified that there was no need to amend the ratification laws, because relevant basis for treating NABU as a central authority was found in another law (Criminal Procedure Code). It explained that it should be enough to send out notifications to the treaty depositaries to notify them about of the authority of NABU to act as a central authority for MLA. NABU drafted the notification letter and received concurrence on the text from the Ministry of Justice and SAPO. In December 2016, NABU submitted the draft letter to the MFA to distribute to the depositaries. It appears, however, that the MFA has not yet sent out the letter.

Also, in Ukraine’s **bilateral treaties** on legal cooperation, NABU is not mentioned as a central authority authorized to receive and address MLA or other legal assistance requests. In this case, according to the Law of Ukraine on International Treaties (Article 19), a bilateral treaty of Ukraine has a superior legal force and cannot be superseded by the CPC provision. Therefore, to obtain cooperation under such treaties, NABU has to request the PGO to send and receive requests. This undermines the autonomy and effectiveness of NABU investigations.

Reportedly, there were also cases where NABU tried to obtain legal cooperation based on its mandate provided in the CPC and the PGO sent letters to the foreign jurisdiction maintaining that any cooperation should be directed through the PGO only. Such letters were then used by the defense attorneys to challenge certain NABU international requests. According to NABU officials responsible for handling international assistance requests, in several cases, this seriously affected the actual investigations of NABU.

The assessment team recommends that SAPO, which is formally a part of the PGO, should be authorized to send and receive international assistance requests on behalf of NABU. By implementing this process, it would still be the PGO acting as a central authority, but the actual execution would be carried out by the independent SAPO prosecutors without involvement of the rest of the PGO. Moreover, according to Article 8 of the Law on the Prosecution Service, SAPO is authorized to carry out international cooperation. This could be achieved through amendments in the internal PGO regulations that can be made by the decision of the Prosecutor General.

Recommendation:

- ***Remove obstacles impeding NABU use of its MLA powers set by the law, in particular by sending out relevant notifications to the multilateral treaty depositaries about the NABU mandate, authorizing SAPO to execute MLA requests in NABU investigations, and pursuing bilateral negotiations between NABU and countries of interest to ensure provision of cooperation based on the multilateral anticorruption treaties.***

Wiretap authority

According to the CPC, NABU is authorized to use wiretaps and other interceptions of communications in its investigations as covert investigative measures that are authorized by the prosecutor and investigative judge. However, NABU is lacking the ability to implement such wiretap orders. This occurs because according to Article 263.4 of the CPC, wiretap authority has been granted to the authorized units of the National Police and Security Service and from the two, only the Security Service has in fact a capacity to carry out wiretaps. Therefore, the Security Service of Ukraine has a de facto monopoly on using relevant equipment. This has seriously compromised NABU's autonomy.

In technical terms, once NABU obtains a court authorization to wiretap, it delivers the order to the Security Service. The wiretapping is technically arranged by the Security Service while NABU officers have direct access to the intercepted communications from NABU's office as they are occurring. The Security Service can simultaneously "eavesdrop" on the wiretapped communications.

The assessment team sees that the current construct creates the potential risk of leaks and the compromise of NABU investigations. Also, the team believes that the current construct hampers NABU's operational independence as was shown by recent events.

In late November 2017, the Security Service and the PGO announced that they stopped an allegedly illegal undercover NABU operation and prevented entrapment of a senior official of the State Migration Service. Several undercover NABU agents were arrested; the Security Service uncovered, searched, and seized documents from NABU's undercover apartment; and in an unprecedented move, the PGO disclosed identities and personal details of several NABU undercover agents by publishing the information on social media and on the PGO's official website.³⁹ This caused a public outcry and numerous statements from foreign governments and international organizations in support of NABU.⁴⁰

³⁹ Details of the NABU operation and PGO actions, as described by NABU, can be found here <https://goo.gl/rJ4zfc>.

⁴⁰ See some of the statements: "Recent events – including the disruption of a high-level corruption investigation, the arrest of officials from the National Anti-Corruption Bureau of Ukraine (NABU), and the seizure of sensitive NABU files – raise concerns about Ukraine's commitment to fighting corruption. These actions appear to be part of an effort to undermine independent anti-corruption institutions that the United States and others have helped support" (US, <https://goo.gl/imrfgC>); "The public disclosure of a corruption investigation by the General Prosecutor Office significantly weakens the capacity of the National Anti-corruption Bureau of Ukraine (NABU) to effectively conduct investigations and undermines public trust in an effective fight against corruption" (EU, <https://goo.gl/zZW9jt>); "The National Anti-Corruption Bureau of Ukraine (NABU), in which the UK has invested significant resource, is a critical piece of the anti-corruption machinery in Ukraine, and has made great strides in its development and its investigations. Recent events, including interference in NABU investigations and the exposing of NABU's undercover officers, are a worrying sign that the future of independent anti-corruption investigations is under threat" (UK, <https://goo.gl/FwVGSU>). See also statements by IMF (<https://goo.gl/P49E5Y>), European Parliament members (<https://goo.gl/nOwQEY>), EU report (<https://goo.gl/qpZbbj>).

According to media reports, the Security Service may have obtained information about the ongoing undercover operation by having access to communications that were being wiretapped on the request of NABU. Having obtained authorization of the PGO, it then started its own undercover operation. It is all the more worrisome that the investigation in question concerned alleged illegal issuing of national passports, a procedure where the Security Service is involved itself at certain stages.

This incident underlined the urgent need to amend the CPC provision and to afford NABU the power to autonomously carry out interception of communications.

In September 2016, Ukrainian authorities committed before the IMF to submit legislation to parliament, for adoption by the end of November 2016, to ensure that NABU has the use of a wide range of investigative techniques, including undercover operations, intercepting communications, accessing computer systems and controlled delivery, without having to rely on other agencies' infrastructure.⁴¹ The commitment was reset to May 2017, but again not delivered.⁴² In its Fourth Round Monitoring report on Ukraine, OECD recommended providing NABU with capacity (legally and technically) to conduct wire-tapping autonomously.⁴³

Back in June 2016, a group of MPs registered in the parliament a draft law proposing respective amendments in the CPC. The draft law was supported by the parliament's anticorruption committee but has not been put for the first reading vote. Until CPC Article 263 is amended to provide NABU with autonomous wiretapping authority, NABU's independence will be challenged and its ability to fulfil its mission could be compromised. Although NABU is not able to rectify this situation itself, officials should continue to advocate for autonomous wiretap authority.

Recommendation:

- ***Amend Article 263 CPC to authorize NABU to directly intercept telecommunications without relying on any other agency's technical means.***

Undercover identities

NABU is limited in its capacity to independently carry out undercover operations as it requires involvement of other agencies' infrastructure to establish "legends" (e.g., create identification documents, include information about the fictitious identity in state databases and registers). To create an undercover identity, NABU has to send a formal request to the respective state authority (e.g., to the State Migration Service to issue an ID, Ministry of Interior for registration of a vehicle, State Border Guard Service for creating records of border crossings, Ministry of Education for information about higher education) and provide details about the agent's real identity and position at NABU; these are details that can compromise the undercover operation.

As NABU targets are not usual criminals, but high-level government officials or individuals with connections in law enforcement and other agencies, such disclosure seriously undermines the secrecy of the undercover operations and puts agents under the risk of being discovered. This is

⁴¹ IMF, Ukraine: Letter of Intent, page 31, <https://goo.gl/N8hdWo>.

⁴² IMF Country Report No. 17/83, April 2017, page 24, <https://goo.gl/ZjvQFU>.

⁴³ OECD (2017), cited above, page 154, <https://goo.gl/zXG2Ab>.

especially the case when the operation's target is an executive within the respective public authority itself (e.g., the State Migration Service or Ministry of Interior).

This issue was reflected in the Ukraine's commitments to the IMF. In one of them (cited above), Ukraine agreed to submit legislation to parliament, for adoption by the end of November 2016, to ensure that NABU has "the use of a wide range of investigative techniques, including undercover operations ... accessing computer systems and controlled delivery, without having to rely on other agencies' infrastructure."⁴⁴ No changes were introduced to implement this obligation.

Recommendation:

- ***Amend the legislation to authorize NABU to have access to relevant databases and registers held by public authorities in order to enter necessary data required for undercover operation of NABU under SAPO supervision.***

Forensic experts

Under Ukrainian legislation, a limited number of forensic institutions are authorized to carry out forensic examinations that would be admissible in court as evidence (specialized institutions under the Ministry of Interior, Ministry of Justice, Security Service, Ministry of Defense, Border Guard Service, Ministry of Health). NABU detectives have to apply to these institutions to obtain forensic expert conclusions in its investigations. NABU's in-house experts can be employed as specialists during the investigation. Such specialists, e.g. in computer forensics, are a valuable resource that should be further developed; they can produce quick results and help steer the investigation in the right direction. However, their conclusions do not have the effect of forensic evidence. This creates a bottleneck in the effective investigation and undermines NABU's autonomy as it has to rely on external institutions.

According to NABU, external forensic expert entities are often overloaded resulting in significant delays in the delivery of forensic opinions. In addition, NABU officials stated that forensic experts sometimes refuse to carry out an examination due to the sensitive nature of NABU investigations or there are doubts as to their impartiality. It has become a weak spot in NABU's operation that should be addressed.

Independence of SAPO

SAPO is a specialized public prosecution unit that deals exclusively with proceedings within NABU's competence. According to the Ukrainian CPC, prosecutors play a crucial role both at the pretrial and trial stage. During pretrial investigation, prosecutors perform the so-called procedural guidance (leadership) – they lead an investigation, can instruct investigators on the actions to be taken, oversee legality of investigator's actions, endorse most of the investigative measures, and can even perform an investigation themselves. The level of a prosecutor's involvement in investigations means, therefore, that NABU's independence is directly tied to that of SAPO.

SAPO also has special provisions in the law regulating its establishment and operation. The new Law on the Prosecution Service that was enacted in July 2015 provided that SAPO should be set up as

⁴⁴ IMF, Ukraine: Letter of Intent, page 31, cited above.

a separate unit within the public prosecution system. Creation of SAPO and determining its structure and staff number is decided by the Prosecutor General upon agreement with NABU's Director. The Law defines SAPO as an autonomous structural unit of PGO. The Chief Prosecutor of SAPO is *ex officio* Deputy Prosecutor General and is subordinated to the PG.

SAPO Chief Prosecutor and Deputy Chief Prosecutors are appointed by the Prosecutor General and the line-level SAPO prosecutors are selected based on an open competitive selection and appointed by SAPO Chief Prosecutor. The SAPO Chief Prosecutor is appointed for a five-year term and within this term the Chief Prosecutor cannot be transferred to any other position with the prosecution service.

SAPO's autonomy is limited by it being a part of the PGO and the SAPO Chief Prosecutor being subordinated to the PG. This is reflected in various ways – from the possibility of appealing the SAPO Chief Prosecutor's decisions to the Prosecutor General who can overrule the SAPO Chief Prosecutor to issues with the registration of incoming mail that has to go through PGO office creating risks of leaking sensitive information.

SAPO also appears to be understaffed, with not enough prosecutors to cover case load of NABU. SAPO currently has 37 prosecutors, including the Chief Prosecutor and two Deputy Chief Prosecutors. (It should be noted that these three individuals, as well as prosecutors who are heads of units, have a procedural status and carry out prosecutorial functions.) Therefore, there are 37 prosecutors to cover more than 450 investigations conducted by about 240 NABU detectives (roughly 6 detectives per prosecutor). This is exacerbated by the procedural requirement for trials to take place at the location where the crime was committed. None of the prosecutors has been attached to any of the regional NABU offices; therefore, prosecutors have to travel to attend trials. In turn, detectives from territorial offices are required to travel to Kyiv to approve motions and attend to other judicial matters during the pretrial stage.

Although the assessment team's objectives were to assess NABU, NABU's effectiveness and independence are impacted by SAPO. Therefore, SAPO's activities, challenges, and weaknesses are certainly relevant to NABU. While the team understands that NABU cannot take actions on behalf of SAPO or the Prosecutor General, the team believes that it is in NABU's best interest to advocate strongly for increasing SAPO's independence, strength, and sustainability.

Recommendation:

- ***Revise the status of SAPO to make it an autonomous public prosecution office, which will limit the role of the Prosecutor General in the organization of SAPO's work, deciding on its number of staff, and its organizational structure.***

Judiciary

NABU is responsible for pretrial investigation, a stage in the criminal proceedings that ends with the indictment by the prosecutor and submitted to court for trial. The judiciary, therefore, is an essential link in the proceedings and is the ultimate decision-maker in the criminal justice system. The Ukraine judiciary has been regarded as a weak link in the anti-corruption movement and has a very

low public trust as shown by numerous opinion polls.⁴⁵ In October 2017, 81 percent of respondents stated that corruption in the judiciary was most widespread compared with other institutions (with 82 percent for parliament and health sector).⁴⁶

There is a widespread belief that existing courts, due to perceived lack of independence and high corruption level, are not capable of adjudicating in high-profile corruption cases involving powerful officials or their allies. There is a lot of anecdotal evidence of courts leaking sensitive information at the pretrial stage or delivering decisions during trial that appear to be biased.

The judiciary has undergone several comprehensive reforms launched after the Euromaidan events in 2014 and the latest reform effort is still ongoing. The reforms have yet to bring tangible results.

At the pretrial stage, NABU's motions to authorize certain investigative measures, such as seizing property and detaining persons pending trial are reviewed and decided upon by investigative judges of one court according to NABU's place of registration as a legal entity, namely the Solomyanskiy district court of Kyiv city. Appeals against decisions of this court at the pretrial stage, if CPC allows an appeal, are handled by the Appellate Court of Kyiv city. When a NABU case goes to trial, it is adjudicated by the court according to the location where the crime was allegedly committed.

Solomyanskiy district court judges work in dire conditions in temporary premises after relocation due to fire in the main court's building. The temporary office is located far from NABU and SAPO offices. The court is understaffed due to the ongoing judicial reforms and re-evaluation of judges to improve integrity and increase trust in the judiciary (see above). The Court is supposed to have 33 judges, but 10 judges are waiting for the reappointment pending which they may not adjudicate and 8 positions are vacant. Only 15 judges are currently working: 9 investigative judges and 5 criminal trial judges.⁴⁷

At the time of the assessment, the assessment team was informed that each of the five trial judges had approximately 100 criminal cases at any time (about 1,000 cases per year) and 6 to 10 hearings each day. In addition to pretrial motions, the court now had nine NABU cases at the trial stage and such cases have to be heard by a panel of three judges according to the CPC. Solomyanskiy district court has reviewed more than 7,100 motions filed by NABU detectives in 2016 and more than 6,900 motions in 2017 (January through early November).

The situation of the Solomyanskiy district court should be urgently addressed, both in terms of the material conditions of its work, and the number of judges and other staff. Any potential future

⁴⁵ A poll conducted in 2011 showed that only 7 percent of people believed that courts were willing to fight corruption in Ukraine and in 2015 it decreased to 3.8 percent. A 2015 survey indicated that 66 percent of people believed that corruption was widespread in the judiciary, equal to road police and more so than any other sector of public authorities, including prosecution services and LEAs (source: <https://goo.gl/tVU8sR>). A survey in March 2015 found that only 10.6 percent of the population trusted the judiciary, while 81.4 percent did not trust it (source: <https://goo.gl/nxRieE>); in October 2017, 9.3 percent of respondents had trust in the judiciary, while 80.6 percent did not (source: <https://goo.gl/m4zZZe>). In December 2016, only 8 percent of population considered the judicial reform to be a successful one (source: <https://goo.gl/NxdeQu>).

⁴⁶ Source: <https://goo.gl/2Mig6e>.

⁴⁷ This situation is not unique for this court, overall in Ukraine only about 2,800 judges are active out of 9,000 positions; many judges are still holding office (and receiving salary) but are not able to perform their judicial duties as their term of office has expired and decision on the life appointment has not been taken.

anticorruption court (see below) will inevitably take time to establish and until then the Solomyanskiy district court will have to ensure that NABU proceedings are not delayed and are properly adjudicated.

The assessment team also heard about plans to reorganize the court system, in particular by dissolving existing district courts and creating new ones in their place covering new judicial districts. It is important to ensure that this does not further complicate the judicial review of NABU pretrial motions and trials in NABU/SAPO proceedings. Dissolving courts and creating new ones will require re-hiring of judges or hiring new ones and this could be a lengthy process. It may also result in the need to form new judicial panels, redistribute cases anew among judges and start proceedings from the beginning.⁴⁸ It is very important to ensure that the judicial review of corruption cases is not affected, that already delayed trials are not suspended even more, and that no NABU investigation is put on hold due to the judicial system changes.

Recommendation:

- ***Urgently improve working conditions and capacity of the district court that is reviewing NABU pretrial motions; ensure that the dissolution of courts during the judicial reform does not delay or otherwise affect the investigations and trials of NABU cases.***

Anticorruption court. Low trust in the existing courts, perceived high level of corruption among judges and court staff, and a lack of independence resulted in the movement for setting up a specialized anticorruption court to deal with cases investigated by NABU. The idea was originally promoted by the civil society and international community. It was later reflected in the new framework Law on the Judiciary and Status of Judges that was adopted in June 2016. It mentioned for the first time the creation of the High Anticorruption Court (HACC). However, setting up a new court required adoption of another law regulating procedure of recruitment of such a court's judges, its establishment, and operation.

The need to set up a specialized court for high level corruption cases was also based on the fact that none of NABU's cases that had reached the court (about 100 of them) had been resolved with verdicts (except for plea agreements). According to NABU statistics, as of mid-November 2017, out of 97 NABU proceedings pending in court, in 34 cases the court proceedings had not started at all and in 39 cases court review started but was either delayed or was in the early preliminary stage. There are cases where the court hearings have not even started from 5 to 16 months after the indictment was filed with the court.⁴⁹

Ukrainian authorities committed before the IMF to set up an anticorruption court by mid-June 2017 and that it would become operational in early 2018.⁵⁰ In January 2017, the Parliamentary Assembly of the Council of Europe “encouraged the authorities to establish a specialized anti-corruption court, and to fight the widespread corruption in the judiciary, which is essential for the

⁴⁸ See statement by lawyers concerning effect of the court dissolution on the so-called Maidan cases pending in courts (cases against persons who violated human rights and abused their office during Euromaidan events in 2014), available at <https://goo.gl/UoD5TK>.

⁴⁹ Source: <https://goo.gl/385MVa>.

⁵⁰ IMF (2017), cited above, page 24.

success of the fight against overall corruption”.⁵¹ In its Visa Suspension Mechanism report (December 2017), the EU called on the authorities to ensure the independence, effectiveness, and sustainability of the anti-corruption institutional framework, in particular by setting up an independent and specialized high anti-corruption court in accordance with the Venice Commission opinion and Ukrainian legislation.⁵²

In its Fourth round evaluation report in June 2017, GRECO stated “a clear need to entrust the handling of high-profile corruption cases – which often imply complex financial transactions or elaborate schemes – to specialized judges,” which “might possibly be accompanied by the establishment, at least for a transitional period, of a specialized court as foreseen by the LJSJ” [Law on the Judiciary and Status of Judges]. GRECO also noted that this should be linked to certain conditions, including guarantees for the unity of the judicial system, ensuring that the same court is also competent to try criminal offenses connected to corruption such as money laundering, selection of specialized 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.⁵³

In early December 2017, the IMF urged Ukrainian authorities to move quickly with legislation to operationalize an independent anticorruption court consistent with the recommendations of the Venice Commission of the Council of Europe, which is essential to credibly adjudicate high-level corruption cases.⁵⁴

Recommendation:

- ***Ensure swift establishment of the new High Anticorruption Court and selection of its professional judges with high integrity through an open and competitive selection process based on the law that complies with the international recommendations.***

⁵¹ See Assembly’s Resolution 2145 (2017), The functioning of democratic institutions in Ukraine, available at <https://goo.gl/D8ThXc>.

⁵² Source: <https://goo.gl/PbAVD5>.

⁵³ GRECO, Fourth round evaluation report on Ukraine, June 2017, paras. 120-121, available at <https://goo.gl/MNrkVv>.

⁵⁴ Source: <https://goo.gl/pkAaiu>.

Annexes

Assessment Objectives, Scope, and Methodology

Objectives. The objectives of the NABU technical assessment were to determine: (a) whether NABU has been effective and efficient in its activities; and (b) whether its independence has been ensured. NABU's *effectiveness* means the extent to which its activity attained agency's objectives during the period under evaluation. In other words, it measures progress made towards achievement of the agency's objectives and intended results. NABU's *efficiency* means how economically resources/inputs (funds, expertise, time, etc.) have been converted to results. The *independence* of NABU means freedom from undue third party interference in legal and practical terms, the least possible degree of government participation in agency's work and decision-making, and financial autonomy. It includes both the institutional and operational independence.

The assessment sought to provide an independent, objective, non-partisan, professional evaluation of the organization.

Scope. The assessment team evaluated NABU from the time it began its investigations after the recruitment of the first SAPO prosecutors (December 2015) through December 2017. The assessment was conducted mainly in Kyiv. The assessment team also performed field work in Lviv, at one of NABU's territorial units.

Assessment team. The assessment team consisted of representatives from Ukraine, the European Union, and the United States. The multi-disciplinary team incorporated perspective and expertise related to Ukrainian law, public corruption prosecutions, criminal investigations, and performance auditing. The team carried out its tasks without influence or pressure from NABU, any other public authorities, or other stakeholders. The team members did not represent their employing organization during the assessment. The assessment team and supporting staff followed an established Code of Conduct.

Methodology. The NABU technical assessment was based on a Terms of Reference document developed prior to the start of the assessment. This was not an audit exercise as such, but it drew on system and performance audit practices and methods. The conclusions in this report are based on sufficient, appropriate evidence and analysis against the assessment objectives and criteria established by the team. The assessment used criteria (benchmarks) developed specifically for this exercise taking into account NABU's functions and modalities of operations. The assessment was guided by principles of integrity, objectivity, independence, transparency, and evidence-based evaluation. Evidence was collected from a diverse range of sources and evidence was considered appropriate if it was relevant, valid, and reliable; evidence was considered sufficient if it was enough to persuade a knowledgeable person that the findings are reasonable.

At the outset of the assessment, NABU was asked to fill in a baseline assessment questionnaire to provide information on its mandate, operations, outputs, outcomes and impact of activities, as well as to provide self-assessment of its capacity and challenges. The assessment team then conducted structured interviews with key stakeholders inside and outside of NABU, including NABU leadership, NABU detectives, analysts, NABU management (heads of departments), SAPO leadership, SAPO prosecutors, investigative judges (including from appeal courts) and judges who tried NABU cases, defense attorneys, representatives from the Prosecutor's General Office, National Agency for Corruption Prevention leadership, civil society organizations (anti-corruption, human rights protection), media, donor organizations, and diplomatic missions. The assessment team also studied available reports and submissions on the corruption situation in Ukraine and NABU's activities.

The assessment included a review of criminal proceedings. To protect the integrity of the assessment and not to undermine any pending cases, the team considered only those proceedings that are not pending in court. To select cases for review, the team first asked NABU to provide a list of concluded investigations and requested SAPO, civil society, and investigative media and journalists to name at least one investigation that should be reviewed. Overall the team reviewed six cases that helped to contextualize and explain the findings of the assessment. The six cases reviewed consisted of one case closed by NABU/SAPO due to insufficient evidence or other reason, two proceedings with a final court decision, two complaints to NABU that could include notification of crime but were not registered as such, and one internal investigation into alleged misconduct of a NABU employee. The team arranged with NABU for the responsible detectives and/or supervisors to be interviewed and for the case to be summarized.

Report. The report was prepared in English and translated into Ukrainian. NABU leadership was provided with the report in draft form prior to finalization.

List of main data sources used

Documents provided by NABU

Replies to the baseline questionnaire, including operational statistics

NABU Strategy of Strategic Development

NABU Internal regulation On the Document Processing Unit

NABU Internal regulation On NABU Director's Support Unit

NABU Internal regulation On the Personnel Unit

NABU Internal regulation On the Main Detective's Unit

NABU Internal regulation On the Lviv Territorial Department

NABU Internal regulation On the Analytics and Data Processing Department

NABU Internal regulation On the Accounting Department

NABU Internal regulation On the Internal Control Unit

NABU Internal regulation On the Department for Financial Resources, Material Supplies, Assets and their Control

NABU Internal regulation On the External Communications Department

NABU Internal regulation On the Department for Information Analytical Systems and Technologies

NABU Internal regulation On the Public Relations Department

NABU Internal regulation On the Legal Department

NABU Internal regulation On detectives' probation

NABU Order on internal control procedures

NABU Instruction on participation of analytics in criminal proceedings

NABU Internal regulation On processing of citizens' complaints and petitions (Regulation on the unit that works with witnesses and complains, call-center)

NABU Instruction On internal investigations

NABU Internal regulation On disciplinary commission

NABU Instruction On organizing, planning and conducting of internal audits

NABU Internal regulation On conflict of interest legislation compliance

Historical timeline of NABU personnel recruitment

Order on the distribution of tasks among NABU's Director, First Deputy Director and Deputy Directors

Position Descriptions of various staff positions within NABU

NABU Communication Strategy

NABU Ethics Code

NABU proposals on the increase in its personnel

NABU personnel breakdown

Report on corruption risks assessment within NABU
Anticorruption program of NABU
Regulation on training system for NABU personnel
Training schedule
Draft NABU policy on IT security
NABU Guidelines on compliance with anticorruption legislation
Summary of NABU's MLA problems

International reports

OECD (2015), Anticorruption Network for Eastern Europe and Central Asia, Istanbul Anticorruption Action Plan, Third Monitoring Round Report on Ukraine, available at <https://goo.gl/1ymhja>.

OECD/ACN (2016), Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2015, available at <https://goo.gl/AH4j24>

OECD (2017), Anticorruption Network for Eastern Europe and Central Asia, Istanbul Anticorruption Action Plan, Fourth Monitoring Round Report on Ukraine, available at <https://goo.gl/qrpGMv>.

GRECO (2017), Fourth evaluation round report on Ukraine, GrecoEval4Rep(2016)9, available at <https://goo.gl/MNrkVv>.

IMF (2017), Country Report No. 17/83, available at <https://goo.gl/ZjvQFU>.

MONEYVAL (2017), Anti-money laundering and counter-terrorist financing measures in Ukraine, Fifth Round Mutual Evaluation Report, MONEYVAL(2017)20, available at <https://goo.gl/HFzHHk>.

Parliamentary Assembly of the Council of Europe (2017), Resolution No. 2145 (2017), The functioning of democratic institutions in Ukraine, available at <https://goo.gl/D8ThXc>.

Other reports and sources

NABU biannual reports (2016, 2017, 2018), available at <https://nabu.gov.ua/reports>.

Study report on the Role of the public prosecutor at the pre-trial stage of criminal proceedings, Kyiv, 2017, available at <https://goo.gl/SgTydD>.

International Anticorruption Advisory Board, opinion of 29 November 2017.

EUAM (2016), Needs analysis and strategic recommendations for the External Communication Department of the National Anti-Corruption Bureau of Ukraine.

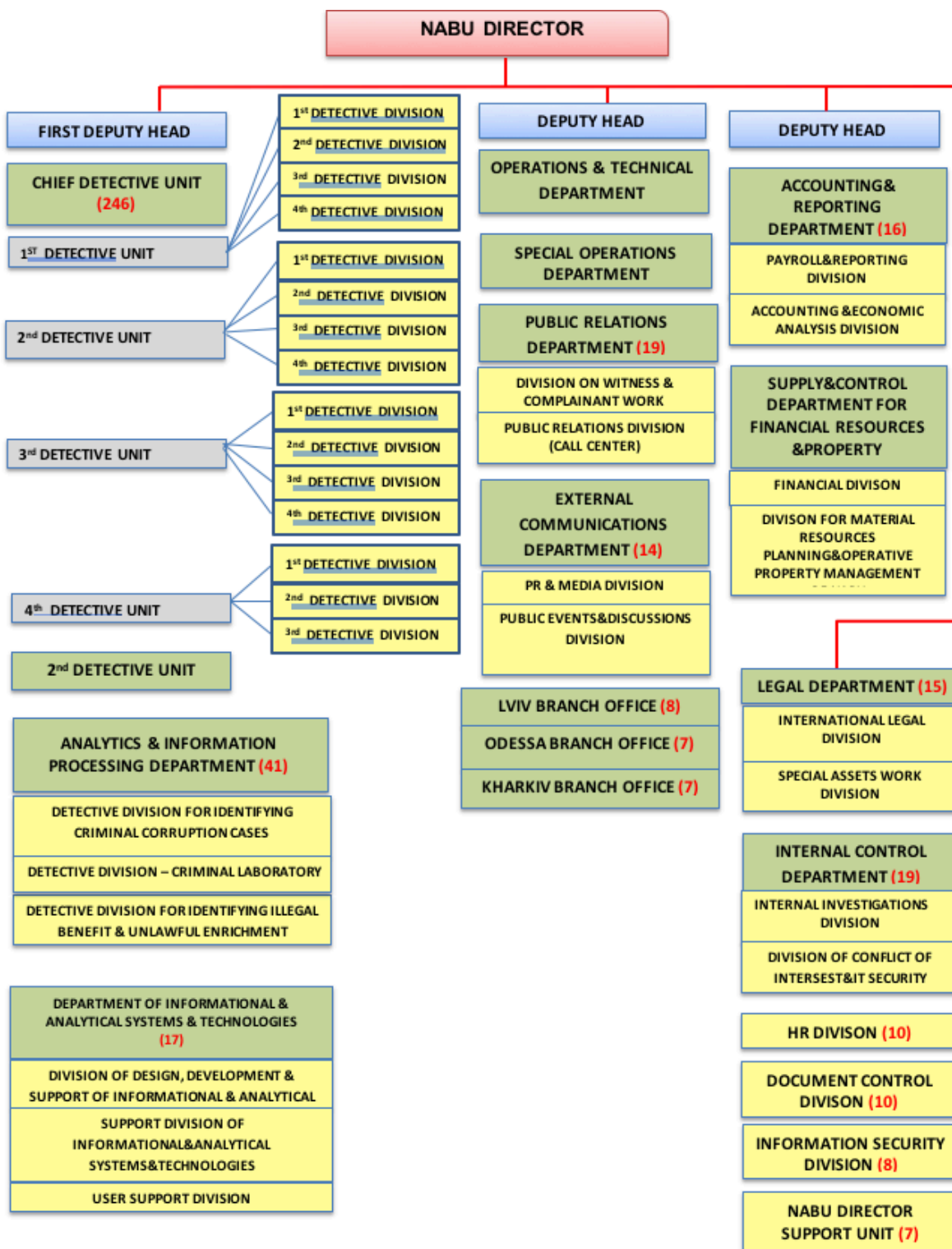
Council of Europe Technical Paper on Internal Control in NABU

Council of Europe Report on field expert mission November 2015

Journalists' Evaluation of the National Anti-Corruption Bureau of Ukraine

Various opinion surveys conducted by Democratic Initiatives Foundation, Razumkov Center, Rating Group and other polling institutions.

NABU organizational chart



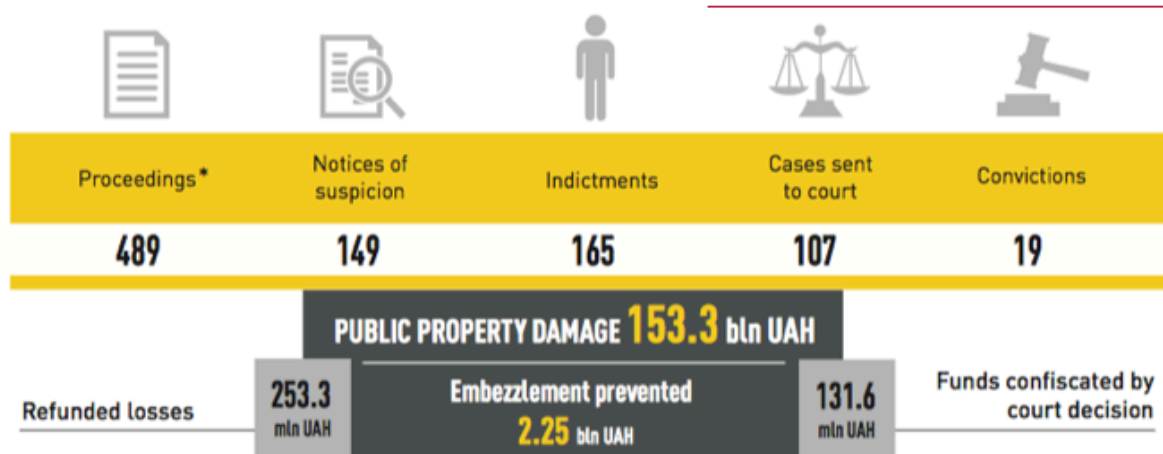
Key indicators of NABU investigations

NABU INVESTIGATIONS: KEY INDICATORS

(as of 29 July 2016)



as of 31.12.2017



* all proceedings, except the completed ones, directed according to investigative jurisdiction, stopped, joined with other criminal proceedings

Source: NABU biannual reports.

Statistics of NABU investigations

Table 9. Types of crimes investigated by NABU

| Crime | Criminal Code Article | Notices of suspicion served | | | Charges brought | | |
|--|-----------------------|-----------------------------|---------------------|----------------------|-----------------|------|------|
| | | 2015-2016 | 2017 (as of Dec.31) | 2018 (as of March 1) | 2015-2016 | 2017 | 2018 |
| Main jurisdiction: | | | | | | | |
| Misappropriation, embezzlement | Article 191 | 57 | 84 | 120 | 14 | 41 | 1 |
| Illegal taking over of assets of a company through agreements using forged documents, stamps, etc. | Article 206-2 | - | - | - | - | - | - |
| Money laundering | Article 209 | 3 | 6 | - | - | 2 | 3 |
| Illegal use of budgetary money | Article 210 | - | - | - | - | - | - |
| Issuing of legal acts that decrease budgetary revenues or increase expenditures contrary to the law | Article 211 | - | - | - | - | - | - |
| Bribery of employees of enterprise, establishment or organization (concerning employees of legal entities of public law) | Article 354 | - | - | - | - | - | - |
| Abuse of office or official powers | Article 364 | 8 | 17 | 22 | 3 | 11 | - |
| Declaring of false information | Article 366-1 | - | 1 | 1 | - | - | 3 |
| Acceptance of proposal, promise or receiving of unlawful advantage by a service person | Article 368, part 1 | - | - | - | - | - | - |
| | Article 368, part 2 | - | - | - | - | - | - |
| | Article 368, part 3 | 26 | 14 | 11 | 20 | 6 | - |
| | Article 368, part 4 | 14 | 16 | 11 | 10 | 8 | - |
| Illicit enrichment | Article 368-2 | 1 | 1 | 1 | 1 | 1 | - |
| Proposal, promise or giving of unlawful advantage to a service person | Article 369, part 1 | - | - | - | - | - | - |
| | Article 369, part 2 | - | - | - | - | - | - |
| | Article 369, part 3 | 4 | 2 | 2 | 5 | 4 | - |
| | Article 369, part 4 | 2 | - | - | 1 | 1 | - |
| Trafficking in influence (active) | Article 369-2, part 1 | 1 | - | - | - | - | - |
| Trafficking in influence (passive) | Article 369-2, part 2 | 4 | 3 | 6 | 4 | 6 | - |
| | Article 369-2, part 3 | - | - | - | - | - | - |
| Misappropriation of weapons, ammunition, explosives, etc. by a military serviceman | Article 410 | - | - | - | - | - | - |

| Other Articles: | | | | | | | |
|---|---------------------|---|---|---|---|---|---|
| Fraud | Article 190 | 2 | 2 | 2 | - | - | - |
| Fake entrepreneurship | Article 205, part 2 | 4 | - | | 2 | 6 | - |
| Creating a criminal organization | Article 255 | 4 | - | 1 | 4 | 2 | - |
| Interference in the activity of a state figure | Article 344 | 1 | - | - | 1 | - | - |
| Forgery of documents, stamps, seals, etc. | Article 358 | - | 2 | - | - | - | - |
| Abuse of power by a service person of the legal entity of private law | Article 364-1 | 3 | - | - | 3 | 3 | - |
| Forgery in office | Article 366 | - | - | 1 | - | - | - |
| Failure to enforce a court decision | Article 382 | 1 | - | - | - | 2 | - |
| Tampering with the court automated system | Article 376-1 | - | 2 | - | - | 2 | - |
| Forgery of documents to register a legal entity | Article 205-1 | - | 1 | 1 | - | - | - |
| Negligent treatment of the military service | Article 425 | - | - | 2 | - | - | - |

Table 10. Categories of officials investigated by NABU

| | Notices of suspicion served | | | Charges brought | | |
|--|------------------------------------|-------------|-------------|------------------------|-------------|-------------|
| | 2015-2016 | 2017 | 2018 | 2015-2016 | 2017 | 2018 |
| Members of parliament | 2 | 3 | 2 | 1 | - | - |
| Members of Government | - | | | - | - | - |
| First Deputy Ministers, Deputy Ministers | - | 2 | 2 | - | - | - |
| Heads of other central executive agencies (not ministries) | 3 | 2 | 2 | 1 | 1 | - |
| Deputy Heads of other central executive agencies (not ministries) | - | - | - | - | | - |
| Civil servants of category A | 3 | 1 | - | 2 | 3 | - |
| Judges | 11 | 15 | 10 | 7 | 5 | 8 |
| Prosecutors | 10 | 2 | 2 | 3 | 15 | |
| Officials of State Fiscal Service | - | - | - | - | 1 | - |
| Officials of law enforcement agencies | 4 | 12 | - | 2 | 2 | |
| Members of oblast councils, councils of Kyiv or Sevastopol | - | 2 | 4 | - | - | 1 |
| Other local self-government officials (category 1-2) | - | - | 2 | - | - | |
| Managers of large enterprises in which state or local community owns more than 50 per cent | 17 | 26 | 29 | 9 | 13 | 5 |

Table 11. Number of proceedings under NABU investigation

| | 1 Jan 2016 | 1 July 2016 | 1 Jan 2017 | 1 July 2017 | 1 September 2017 | 1 November 2017 | 1 March 2018 |
|--|-------------------|--------------------|-------------------|--------------------|-------------------------|------------------------|---------------------|
| Number of criminal proceedings investigated by NABU on the following dates | 56 | 194 | 254 | 371 | 398 | 461 | 543 |

Table 12. Statistics on NABU performance

| | 2015-2016 | 2017 (Jan -Sep) |
|--|---|--|
| Number of proceedings that were registered by prosecutors and assigned to NABU for the investigation | 299 | 167 |
| Average amount of time from the registration of the alleged crime in the Unified Register of Pretrial Investigations and presenting notice of suspicion in cases where such notice was served | 4.2 months | 6 months |
| Number of proceedings against legal persons with information on the stage of proceedings | 2 (in court) | 1 (in court) |
| Number of NABU-led proceedings in which suspects absconded | 10 | 13 |
| Number of requests for pretrial detention filed by NABU and number of them that were denied | 80 (17 denied) | 85 (30 denied) |
| Number of NABU proceedings in which assets were seized (frozen) at the pretrial stage / data on assets seized abroad | 47/3 | 75/5 |
| Overall amount (value) of assets seized (frozen) in NABU proceedings | <i>As of February 1, 2017</i> - Money: UAH 601 mln, USD 80 mln, EUR 7.3 mln - Securities: USD 75.5 mln - Vehicles: 71 - Land plots: 114 - Real estate: 154 | <i>As of August 1, 2017</i> - Money: UAH 590.9 mln, USD 80.2 mln, EUR 7.3 mln - Securities: USD 75.5 mln - Corporate rights: UAH 320.3 mln - Vehicles: 83 - Land plots: 128 - Real estate: 206 |
| Number of NABU requests for seizing (freezing) assets that were filed / number of them that were denied | 113/16 | 145/21 |
| Number of NABU requests to access bank secrets that were filed / number of them that were denied | 1846/120 | 1476/107 |
| Number of NABU investigations that resulted in confiscation of assets through criminal proceedings and amount of such confiscation, including separately numbers/amounts for each of the following types of confiscation measures: | | |
| a. Confiscation as a criminal sanction according to the Criminal Code | 0 | 0 |
| b. Special confiscation according to the Criminal Code | 0 | 0 |
| c. Confiscation under Article 100.9 CPC | 0 | 1 (UAH 20.3 mln) |
| d. Confiscation under Article 100.9 – subparagraph 6-1 of the CPC | 0 | 0 |
| Number of NABU investigations that resulted in confiscation of assets through civil proceedings under Chapter 9 of Section III of the Civil Procedure Code and amount of such confiscation | 0 | 0 |
| Number of NABU proceedings in which MLA was requested / number of them in which MLA was obtained | 245/98 | |
| Number of cases when NABU was responsible for executing incoming MLA requests | 15 | |
| Number of NABU proceedings in which procedural agreements were concluded | 10 | 15 |
| Number of NABU proceedings conducted under <i>in absentia</i> rules | 3 | 5 |
| Number of NABU proceedings in which witness protection was provided | 12 | 5 |
| Average duration of NABU proceedings (from registration till bringing of charges) | 9.4 months | 8 months |
| Number of NABU proceedings that continued longer than 6 months after the first notice of suspicion was served in the proceedings | 4 | 22 |

| | | |
|---|------------------------------------|------------------------------------|
| Overall amount of damages caused by crimes investigated by NABU, including in the on-going pretrial proceedings | UAH 82.9 bln | UAH 87,1 bln |
| Overall / average per case amount of damages compensated as a result of NABU investigations (in proceedings with notices of suspicion served) | UAH 116.7 mln / UAH 0.73 mln | UAH 60.6 mln / UAH 0.8 mln |
| Average amount (value) of crime objects (e.g. undue advantage in bribery and other corruption offenses) in the proceedings under NABU investigation: a. in the current proceedings b. in the proceedings where charges were brought | A) UAH 78.3 mln B) UAH 18.6 mln | A) UAH 59.5 mln B) UAH 27.5 mln |
| Number of NABU proceedings in which the amount (value) of crime object (e.g. undue advantage in bribery and other corruption offenses) was in excess of UAH 10 million | 36 | 58 |
| Number of instances when court/judge found evidence collected by NABU to be inadmissible | 0 | 0 |