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International Anti-Corruption Advisory Board
(IACAB)

“EFFECTIVENESS THROUGH INDEPENDENCE”

Opinion

on how to ensure competent, independent and effective delivery of justice
on cases related to high-level corruption in Ukraine

This Expert Opinion has been prepared within the framework of cooperation between the Verkhovna Rada's Committee on Corruption, Prevention and Counteraction (The Committee) and the European Union Anti-Corruption Initiative in Ukraine (EUACI). The Opinion was written by the Members of the International Anti-corruption Advisory Board, Carlos Castresana, Anca Jurma, Giovanni Kessler, Drago Kos, Martin Kreutner and Daniel Thelesklaf. The Opinion is based on analysis of the legislative framework and operational progress, and meetings with both governmental and non-governmental actors, including representatives of the Ukrainian legislative, executive, judicial, and law enforcement authorities.

The views expressed in this document are solely those of the authors and do not necessarily reflect the views of the EU Anti-Corruption Initiative (EUACI), the European Commission or Danida, or any (other) organization/entity the authors belong to or work for/with.

I. Introduction

1. In the last three years, Ukraine has adopted extensive legislation introducing a new anti-corruption policy and strategy. In particular, it envisaged the creation of a range of new specialized institutions aimed at prevention, investigation, prosecution, tracing, and recovering of the proceeds of corruption and the adjudication of cases related to high-level corruption. Despite the progress of anti-corruption reforms, widespread corruption remains one of the main obstacles to the democratic and economic development in Ukraine. Creation and ensuring operation of the National Anti-Corruption Bureau of Ukraine (NABU) and the Specialized Anti-Corruption Prosecutor's Office (SAPO), mandated to combat high-level corruption, have been some of the biggest achievements of anti-corruption reforms in Ukraine. Unfortunately, final decisions issued by courts are still absent. There is a general frustration in the society with the lack of judicial response to corruption, one of the most pressing issues in Ukraine.

2. Independence in the investigation, prosecution, and adjudication of corruption cases is key to the efficiency of a sound anti-corruption policy. Independence of the relevant bodies is ensured through a sound, fair and accountable system of appointment and revocation procedures, stability of tenure, and availability of proper tools fit to achieve the institutional goals. NABU has been established and is acting independently. In the Prosecution General's Office (PGO), a unit in charge of prosecuting corruption – SAPO – was created to circumvent limitations deriving from political influences over the PGO. An independent specialized anti-corruption court has still not been established.

3. The success of anti-corruption efforts substantially depends on the ability of the judicial system to work independently and effectively without any undue influence from third parties, especially when dealing with cases involving influential stakeholders. NABU and SAPO have started generating a growing number of investigations of high-level corruption cases. In the absence of an independent, specialized anti-corruption court, these cases remain ongoing or pending (to say the least), thus undermining trust in the effectiveness of the anti-corruption bodies. This Opinion identifies key areas of concern and gives recommendations on how to mitigate risks related to the sustainability of efforts directed at tackling impunity for high-level corruption practices.

II. Problematic issues

The Board has identified the following problematic issues in relation to investigation, prosecution and adjudication:

Investigation

4. Abrupt legislative changes without due prior consultation, e.g. in the Criminal Procedure Code. The practice of adopting substantial legislative amendments in sensitive areas, such as the Criminal Procedure Code (CPC), without prior consultations with all relevant stakeholders raises concerns about the quality, effects and even the real intentions regarding these reform attempts. It also calls into question the intention of these reforms and the quality of the legislation adopted. The latest amendments to the CPC were unknown – even after they were approved and signed by both the Speaker of the Parliament and the President – not only to NABU and SAPO but also to all other stakeholders, including key expert community and civil society actors. Based on the information available, major concerns exist in relation to the investigation of high-level corruption cases. Such concerns relate to limited time allocated to investigations, changes to the territorial competence in NABU cases, as well as the delegation to judges of key decisions to during the investigation phase. These are not merely technical issues. Many cases will be closed due to the fact that necessary investigations have exceeded the maximum

stipulated 18-month timeframe. What is more, investigators from all over Ukraine will have to travel to Kyiv, as only courts in Kyiv will be competent to issue decisions in the pre-trial phase. This is even more worrying since many decisions in this phase are reallocated from investigators or prosecutors to judges.

5. Stability of tenure of the head of NABU. The current law on NABU provides for procedures for the appointment of and the term limits for the Head of NABU. The initial law also provided for a limited number of reasons under which the Head could be dismissed. The stability of the position is crucial for institutional independence from any undue political and economic influence. It is important to stipulate in the law precise parameters under which the Head can be dismissed. However, the provision of the law stipulating the sanction of dismissal of the Head of NABU as a result of a negative audit is disproportionate. As a rule, audits are used to improve performance and processes, and should not be instrumentalized as a tool to remove the head of an institution. The link between the audit and the revocation procedure was not included in the original law, but was introduced through a later amendment. As a political body chooses the auditors and as the revocation procedure is also handled by a political body, concerns have arisen with regard to potential political influence on the audit and the legitimacy of its conclusions. To prevent this, NABU auditors should be selected and appointed in a transparent manner and in strict accordance with the rules of procedure for adopting such a decision. Candidates should be recognized professionals with experience in investigating corruption abroad, as required, e.g., by the Memorandum of Understanding between Ukraine and the International Monetary Fund (IMF).

6. Lately, managers and staff of NABU have been subject to numerous investigations, which appear to be biased and politically motivated. One of the most common ways in discrediting the anti-corruption activities of NABU staff and managers, and their personalities, is the introduction of dubious administrative and criminal allegations and procedures.

7. Maintaining the exclusive jurisdiction of NABU over the investigation of corruption crimes committed by senior officials. The exclusive jurisdiction of NABU to investigate corruption crimes committed by high-level officials was set by law. However, there have already been several attempts to introduce amendments to the legislation that could give the Prosecutor General's Office the opportunity to disregard the exclusive mandate of NABU to investigate the aforementioned crimes. Furthermore, there have been cases of bribery/extortion against senior officials prosecuted by PGO directly. Some cases were rejected by the courts on the grounds of non-competence of PGO. Maintaining the exclusive jurisdiction of anti-corruption investigations by NABU, in order to avoid overlap and, most importantly, to avoid the side-stepping of independent bodies, is key for the effectiveness and the independence of the investigation.

8. Operational dependence on interception of communications from the Security Service of Ukraine (SSU). At present, NABU can intercept communications only through the SSU's channels. As a result, there are leaks of information. In order for NABU to be fully operational and, at the same time, to comply with international (such as, e.g. European Court of Human Rights) and national legal requirements in regard to basic human rights, it should have access to (and hold responsibility for the usage of) a wide range of investigative techniques, including for intercepting communication, without having to rely on intelligence agencies' support. It is self-explanatory that all authorities intercepting communication as a means of investigation shall also observe and be accountable for the necessary safeguards for protecting fundamental human rights.

9. Need of a balanced disclosure rule regarding the pre-trial phase. Given the nature of the criminal investigations, the restriction of public access to information is crucial for its effectiveness. Publishing court rulings in the pre-trial phase, even before they are enforced, is a legal requirement in Ukraine today. Publishing of information on ongoing investigations, even without names, poses a serious threat to the effectiveness of investigations (for example in the

case of court rulings on temporary access to documents). This is especially dangerous in anti-corruption investigations due to the planned shift of competences from investigators to judges that will accelerate the detrimental effects of this practice.

10. Overloading NABU with cases due to termination of PGO's pre-investigative powers. A recently adopted provision states that PGO no longer holds investigative powers, thus all cases that were registered before December 2015 (old cases) and that fall within the competence of NABU will now have to be transferred to NABU. Subsequently, thousands of cases are to be transferred to NABU. However, given the limited human resources of NABU, which currently has only around 200 detectives, may become a serious challenge and overburden NABU. This would impede the activity of NABU. This is not a new idea; transferring old cases to the newly set-up NABU was already explored in 2014. Moreover, given amendments limiting the duration of investigation, these cases already face expiration risks that should be handled by PGO directly, without transferring such cases to NABU. A transitional provision addressing this issue adopted by the Rada appears to have been excluded from the final text. NABU's capacity to perform its mandate is seriously hampered by such abrupt decisions.

11. Impact of the lack of performance of NACP on NABU's work. In the framework of new anti-corruption institutions, the National Agency on Corruption Prevention (NACP) is responsible for the verification of electronic asset declarations. The results of these verifications are to be sent to NABU if false information provided in the statements exceeds the set threshold or if evidence of illicit enrichment is found. However, according to available statistics during the last year, NACP has verified fewer than 100 declarations. Among those, not a single verification has shown signs of illicit enrichment, while discrepancies over the set threshold were found only in a few cases, mainly not in relation to senior level officials declarations. Also, the quality of such verifications is allegedly not satisfactory. Moreover, the signs of serious external influence on the NACP leadership have been reported lately, and claims of falsifications of verification results were voiced by whistle-blowers from within the NACP structure.

12. NABU has also conducted verifications with regard to illicit enrichment cases. Concerns arose regarding the possibility of conducting criminal investigations on illicit enrichment in the absence of official verification results from NACP. Given the fact that NACP is the main institution responsible in this field, there are interpretations of the legal texts amounting to the fact that NABU and SAPO actions in this field are dependent on NACP assessment. This would mean that an administrative body, NACP, has *de facto* control over the investigations performed by NABU and SAPO. In addition, challenges to NACP's independence – as noted above – raise further concerns with regard to the impact of this mechanism on criminal investigations.

Prosecution

13. Abrupt changes to legislation without due prior consultations. The same concerns expressed in the section on investigation are relevant here.

14. Political appointment and the role of the Prosecutor General. The question of political independence of the Prosecutor General (PG) has been under discussion in Ukraine for many years, given that the (PG) is in fact a political appointment. The PG is the most important figure of the prosecution service, having a significant impact on the work of prosecutors and investigative bodies. Independence of the prosecution from political influence can only be achieved by an appointment procedure that is based on objective, merit-based criteria and is free from political influence. This is crucial for the independence of the judiciary.

15. Operational and administrative dependence of SAPO from PGO. The current wording of the law on SAPO provides for a certain level of autonomy. However, SAPO still remains a structural unit of the PGO, with the Head of SAPO being a Deputy Head of the Prosecutor General.

Although the Head of SAPO enjoys full rights to appoint and dismiss staff in SAPO, some administrative issues are subject to the PG's decision, e.g. business trips are still to be approved by the PG. The situation is similar for assets, e.g. all service vehicles are attached to the PGO, while SAPO has no ownership of such vehicles. Operational independence is obstructed by the fact that the registration of all crime reports is conducted by the PG's registration office. In addition, administrative issues of this kind could potentially obstruct or affect the effectiveness of SAPO. SAPO prosecutors have access to the Registry of Pre-Trial Investigations. However, SAPO reportedly does not always receive crime reports intended for them, allegedly because the PG's registry office often sends crime reports to other structural units of the PGO, infringing SAPO's competence as foreseen granted by the law.

Adjudication

16. Lack of an independent and credible court for the adjudication of high-level corruption cases. In general, judges in Ukraine do not enjoy the necessary credibility and are not perceived by most interlocutors as reliable stakeholders, due to reasons including various allegations of corruption in the courts. In recent years, Ukraine has launched a comprehensive judicial reform aiming at a major re-set of the judiciary. However, the reform of the entire judicial system might take years, meanwhile cases already under investigation by NABU and SAPO have been reportedly blocked in courts.

17. Delays in proceedings of anti-corruption cases in courts. According to official statistics provided by NABU and SAPO, the hearing of cases was delayed in almost $\frac{3}{4}$ of cases investigated by NABU and prosecuted by SAPO during the last year. As of October 2017, of 93 criminal proceedings sent by SAPO to court, only 24 court decisions were taken, including 7 non-final and 17 final decisions (including 15 plea agreements). Among the reported reasons for the delays of consideration are vacations of judges, non-appearance of advocates in trials, etc. In some cases, even preliminary hearings do not take place for more than a year.

18. Lack of expertise of and trust in judges dealing with corruption cases. Corruption cases are in general more complex than other criminal cases, and they often involve public figures. The hearing of complex corruption cases involving senior officials might pose a great challenge to the judges of local courts who allegedly lack the necessary expertise, trust and independence. It is important to note that the hearing of cases investigated by NABU and prosecuted by SAPO requires judges to be of impeccable reputation, have relevant expertise and outstanding professional qualities. Reforming the entire judiciary and ensuring that the judges at all levels and in the whole country are selected based on transparent and objective criteria and fulfill the necessary requirements of integrity, independence and solid professional knowledge, should continue to be one of the main goals of the Ukrainian authorities. A reformed judiciary will be the best answer for society for justice delivery. However, given the current state of affairs in Ukraine, setting up a specialized anti-corruption court competent in adjudicating high-level corruption cases appears to be the most appropriate solution, as shown, *inter alia*, by the opinion of the Venice Commission.

III. Recommendations

Based on this analysis, the following is recommended in order to ensure competent, independent and effective delivery of justice for cases related to high-level corruption:

Investigation and prosecution

1. Ensure NABU's independence:

A. Abolish the possibility for the Head of NABU to be dismissed following negative opinion of an audit. The stability of tenure of the NABU leadership is crucial for its institutional independence and should be safeguarded. In addition, the audit of NABU should be conducted without and protected against any undue influence, and should follow a clear and accountable procedure/methodology. NABU auditors should be selected and appointed in a transparent manner and in strict accordance with the rules of procedure for adopting such a decision. Candidates for auditors should be selected among recognized professionals with experience in investigating corruption abroad;

B. Ensure the exclusive jurisdiction of NABU in anti-corruption investigations against senior officials. In order to avoid overlapping and, most importantly, in order to avoid bypassing of NABU, it must be ensured that investigations of corruption offences committed by senior officials, already provided by the law under the competence of NABU, are not allocated to other bodies. In case of doubt regarding conflicting competence, priority should be given to NABU;

C. Adopt legislation giving NABU the right to intercept communication without having to rely on the intelligence agency's services. In this context, ensure resources for NABU to acquire technical equipment needed for interception of communication, and provide for an independent control mechanism for the use of this investigative tool with respect for national legislation and international human rights protection standards/legislation;

D. Adopt a balanced disclosure rule regarding the pre-trial phase in order to ensure that investigations are not undermined by excessive publication of judicial decisions issued in this phase;

E. Prevent the inundation of NABU with old cases registered by PGO before December 2015, following entry into force of the legislation eliminating the investigative powers of PGO.

2. Reverse the amendments to the CPC that prevent NABU and SAPO from investigating and prosecuting high-level corruption effectively. Any amendments to the relevant legal framework should entail proper consultations with all stakeholders, including the institutions directly affected by them. Moreover, no legislative initiative or amendment regarding the CPC should hinder or make criminal investigations overly cumbersome.

3. Ensure the adequate operational and administrative independence of SAPO from the PGO.

4. Consider reviewing the appointment procedure of the PG and the role in order to ensure that the judicial function is performed independently.

Adjudication

5. Establish as a matter of priority a specialized independent anti-corruption court, in line with, *inter-alia*, the opinion of the Venice Commission. Judges must be independent, and in order to ensure such independence the following mechanisms should apply:

A. exclusive competence of judges: Considering that Ukraine has already established NABU and SAPO in order to investigate and prosecute specific crimes committed by officials limited to those holding top level positions, a competent and qualified independent court shall provide for the missing element and complement that judicial chain;

B. special selection procedure of judges: Given the nature of often complex anti-corruption cases involving senior officials, it is important to make sure that judges considered not only have necessary qualifications, but are also fully independent and trusted by society. Remembering the rather positive experience of attracting respected foreign experts to the selection process for NABU leadership, the selection process of judges may benefit from the involvement of foreign experts in a similar way. Given that according to Ukrainian legislation the selection process is conducted by a specially designated body - the High Qualification Commission of Judges - this could be done on the basis of existing procedures by involving international experts in the selection process;

C. remuneration and security safeguards for judges: The judicial reform in Ukraine has set reasonably high salaries for the judges, which is always an important factor for their independence. Given the importance of the cases that these judges will be working on, it seems logical to set the salaries at a reasonably decent level. Providing security safeguards is equally important, given the possible risks arising for the judges adjudicating cases of corruption involving senior officials;

D. administrative independence: The anti-corruption court should have the power to select its own administrative and other staff. It is important to limit the risk of intrusion into and undue influence upon the work of the court through other channels, including staff selection;

E. expertise to deal with complex corruption cases: The judges considering cases under the investigation of NABU and SAPO should have impeccable reputation, relevant specialized knowledge and highly professional qualities. It is also important to ensure necessary training for the judges selected.

6. Develop a mechanism to ensure a balance between the protection of anti-corruption law enforcement and judicial professionals against ill-founded and potentially corrupt attacks, and their accountability in cases of their factual misbehavior. Members of law enforcement and judicial bodies investigating high-level corruption are exposed to particular risks when fulfilling their duties.