

INVESTIGATION OF TOP-CORRUPTION IN UKRAINE

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I. ANTI-CORRUPTION REFORMS IN UKRAINE: MAIN CHALLENGES AND POSSIBLE SOLUTIONS

After the Revolution of Dignity largely instigated by endemic corruption, Ukraine adopted a comprehensive anti-corruption package of laws and established new specialized institutions: National Anti-Corruption Bureau of Ukraine (NABU), Specialized Anti-Corruption Prosecutor's Office (SAPO), National Agency on Prevention of Corruption of Ukraine (NACP) and Asset Recovery and Management Agency (ARMA). Ukraine also achieved an unprecedented level of transparency, inter alia, by introducing the electronic asset disclosure, e-procurement, opening up the public registries and making a number of datasets publicly available in open data format. Civil society continues to play a significant role in pushing the reforms forward and the international community supports Ukraine's anti-corruption fight. The formation of the legislative, policy and institutional foundations for fighting and preventing corruption and putting in place various transparency initiatives are the main accomplishments in Ukraine since the last monitoring round.

Despite the achievements, the level of corruption remains very high. Anti-corruption enforcement, particularly against the high-level officials, is stalling and meets enormous resistance and the public trust in the Government has further decreased in recent years. Yet, the most pressing challenge for Ukraine now is ensuring the sustainability of the institutional framework and boosting anti-corruption efforts that are being constantly undermined by the governing elite. The recent measures aimed at discouraging the anticorruption activism are alarming and must be stopped urgently. Enabling an environment for open and full participation of civil society in anti-corruption policy development and monitoring must be ensured.

Ukraine has not yet firmly established itself on its path of steady anti-corruption reforms but is certainly on a right trail. However, the political will of the Government to genuinely fight corruption is seriously questioned. Resilience, persistence and full determination of the anti-corruption fight of the Ukrainian society at large will be critical in the coming years. Time has long come for Ukraine to take decisive steps to root-out pervasive corruption.

NABU is the first law enforcement agency in the modern history of Ukraine that, to such a wide extent, began taking proactive measures in detecting corruption cases. There are abundant examples where such detection methods have been effective. Because many of the investigative techniques require court approval obtained by the SAPO, SAPO also is credited for these achievements.

The number of detected cases by NABU is impressive, especially if compared to limited enforcement efforts on high-profile corruption cases before their establishment. As of end of June 2018 detectives of NABU were working under procedural supervision of the SAPO prosecutors on 370 proceedings with 220 persons in the status of suspects.

Firstly, NABU is staffed with detectives, which is a new "procedural position" in Ukraine; it combines the functions of the intelligence officers (operatives) and investigators. This position ensures that the primary job of detectives is to detect. Secondly, along with detectives, NABU has been staffed with analytical officers (analytics) working within NABU's Department on analytics and information processing. Both detectives and analysts have access to and use in their work the main registries and databases. They undergo numerous trainings on detection and investigative methods that are being applied world-wide in complex corruption

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cases. NABU has also made effective use of mentoring by foreign law enforcement officers and analysts who are experts in this area. And finally, its leadership seems to be setting the tone from the top, encouraging its staff to be proactive. These results go hand in hand with proper resourcing and would not be possible without the independence that the detectives have been enjoying so far.

There are other new possibilities that opened to law enforcement in terms of detection. Among them, access to open source databases of information, such as the Unified Court Registry, and registry of legal entities, as well as databases that contain closed information, such as the asset declarations database to which detectives have access. These should open new possibilities, and it is encouraging to see that they have already being utilized in Ukraine for the purposes of detection and investigation of corruption.

Establishment of the NABU was finalized and it became fully operational and managed to meet the expectations of delivering real high-profile investigations. The SAPO has also since then been established and became fully operational. Again, just like the NABU is has delivered procedural guidance on NABU cases and submitted high-profile cases to courts. Unfortunately, further progress on these cases stopped there. Nevertheless, these two new institutions (the NABU and the SAPO) demonstrated that high level officials and grand corruption are no longer beyond the remit of the law enforcement in the country. They also sent some unsettling messages to the powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine.

New law enforcement anti-corruption bodies are being attacked in various forms from media and legislative initiatives, to investigation and prosecution of the leadership and staff, as well as to various other methods applied to prevent them from doing their jobs. Measures need to be taken to ensure that their independence is preserved and that the cases that they have accumulated are finally resolved:

- (i) Establish without delay specialized anti-corruption courts insulated from corrupt and political influences which can fairly and effectively hear and resolve high level corruption charges. Select the judges through a transparent, independent and highly trusted selection process which will guarantee integrity and professionalism.
- (ii) Ensure strict compliance with exclusive jurisdiction of NABU and SAPO.
- (iii) Provide NABU with capacity (legally and technically) to conduct wire-tapping autonomously.
- (iv) Step up the level of investigations and prosecutions of corruption throughout all responsible government bodies.
- (v) Ensure that independence of the National Anti-Corruption Bureau is maintained without undue interference into its activities, including by providing for independent and unbiased audits of its activities and safeguarding against abuse of criminal process.
- (vi) Ensure that operational and institutional autonomy of the Specialized Anti-Corruption Prosecutor's Office is maintained.

II. INVESTIGATION OF EMBEZZLEMENT OF BUDGET FUNDS (CASE STUDY 1)

The article 191 of the Criminal Code of Ukraine prohibits the embezzlement of budgetary funds by the abuse of official position in especially large size, committed by a group of persons by prior conspiracy.

A. The Initial Information

Based on the results of the processing of open sources of information, circumstances have been established that may indicate a commitment of criminal offence, stipulated by Part 5 of Art. 191 of the Criminal Code of Ukraine. Namely, in the period of 2017-2018, officials of "Anaconda LLC", "Fifth Element LLC" by prior conspiracy with Deputy Minister of Health of Ukraine — the chairman of the tender committee Mr. Safarsky and Deputy Director of the Procurement Department of the Ministry — the secretary of the tender committee Mrs. Lavrova committed an embezzlement of budgetary funds by the

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abuse of official position in especially large size.

1. Breach of Procurement Procedure

(a) 31st of August 2017 Ministry of Health of Ukraine announced the planned purchase of medical products for the treatment of patients with vascular diseases (4 lots). Expected cost of purchase was total USD 5,000,000.00;

(b) The proposals were provided by 5 enterprises, among them — “Anaconda LLC” and “Fifth Element LLC”. It was established that “Fifth Element LLC” is an enterprise closely associated with “Anaconda LLC” (founders — Mr. Petrov and Mrs. Petrova, director — Mr. Petrov), since the original founders of the “Fifth Element LLC” were Mr. Petrov and Mrs. Petrova, the director was Mr. Petrov, and today the founder and director of “Fifth Element LLC” is Mrs. Ivanova, who has close business connections with Mr. Petrov and Mrs. Petrova. Also, “Anaconda LLC” and “Fifth Element LLC” are official sellers of medical products produced by “BSE Company” (USA);

(c) With abuse of influence of Mr. Safarsky and Mrs. Lavrova, the technical demands for medical products for the treatment of patients with vascular diseases were prepared by responsible officials in a way that allows participation in procurement only for enterprises that sell medical production of “BSE Company” (USA). The consequences are that 3 out of 5 enterprises (besides “Anaconda LLC” and “Fifth Element LLC”) were eliminated from procurement procedure. As a result of the procurement process, the contracts were concluded with 2 remaining enterprises out of 5, namely:

- “Anaconda LLC” in accordance with 3 out of 4 lots for the total amount of USD 4,000,000.00;
- “Fifth Element LLC” in accordance with 1 out of 4 lots for the total amount of USD 1,000,000.00;

(d) After transferring of budgetary bunds from bank accounts of the Ministry to the bank accounts of “Anaconda LLC” and “Fifth Element LLC” as payment for further delivery of necessary medical products, officials of these enterprises give bribes to Mr. Safarsky and Mrs. Lavrova in the amount of money equivalent to 15 percent of the total contract price (USD 750,000.00).

2. Breach of the Legal Order of Work of Customs Authorities

(a) “Anaconda LLC” and “Fifth Element LLC” purchased medical products from the manufacturer “BSE Company” (USA). “BSE Company” (USA) sends the original invoice to the address of “Anaconda LLC” and “Fifth Element LLC” in paper form. After this, Mr. Petrov personally counterfeits an invoice by creating a similar invoice, but with an overstatement of the purchase price. For this purpose, Mr. Petrov uses counterfeit stamps of “BSE Company” (USA). After delivering the purchased products to Ukrainian customs, the replacement of the original invoice is forged by customs officials;

(b) In accordance with the Ukrainian legislation on prices of medicines and medical products purchased at the expense of the state budget, the marginal trade (retail) allowances may not be higher than 10 percent of the purchase price, taking into account taxes;

(c) “Anaconda LLC” and “Fifth Element LLC” add 10 percent to the purchase price and sell medical products to the Ministry under the terms of the signed contracts. The state budget incurs losses due to the overcharging of purchased medical products.

3. Money Laundering

(a) Money for the delivered goods and products according to the conditions of foreign economic contracts is transferred to the bank accounts of the following companies:

- ICP Limited (Dublin, Ireland);
- GSG Limited (London, United Kingdom).

These companies have signs of “shell”-companies and can be used for withdrawals of budgetary funds and money laundering. The shipper and recipients of the mentioned funds is “BSE Company” (USA);

(b) It is ascertained that bank accounts of “ICP Limited” and “GSG Limited” are being controlled and managed by officials of “Anaconda LLC” and “Fifth Element LLC”;

(c) After transferring of budgetary funds from bank accounts of the Ministry to the bank accounts of “Anaconda LLC” and “Fifth Element LLC” as payment for further delivery of necessary medical products, officials of mentioned enterprises transfer these funds to the accounts of “ICP Limited” and “GSG Limited”. After this transaction, according to the conditions of foreign economic contracts of “Anaconda LLC”/ “Fifth Element LLC” and “BSE Company” (USA), amount of money for delivered goods is transferred from accounts of “ICP Limited” and “GSG Limited” to the bank accounts of “BSE Company” (USA);

(d) Residual amount of money from bank accounts of “ICP Limited” and “GSG Limited” is transferred to personal bank accounts of “Anaconda LLC” and “Fifth Element LLC” officials as “financial help”;

(e) “Anaconda LLC” and “Fifth Element LLC” officials withdraw money from accounts in cash, and use them for purchasing different assets — real estate, cars, stocks, bonds, collectibles, precious metals, commodities etc. Also part of this money is used for giving bribes for officials in Ministries, customs etc.

4. Tax Avoidance

(a) The consequences of overpricing and counterfeiting of invoices are that the real number of delivered goods to “Anaconda LLC” and “Fifth Element LLC” is several times higher than the number of goods declared during customs procedures;

(b) Officials of “Anaconda LLC” and “Fifth Element LLC”, using their close connections with chief medical officers of different clinics and understanding the real needs of the population for medical products for the treatment of patients with vascular diseases, sell the undeclared medical goods without documentation and without preparation of accounting documents.

B. Special Investigative Techniques During Investigation

1. Main Challenges During Investigation

(a) find evidence of inappropriate behaviour and criminal intention of officials of the Ministry of Health of Ukraine (abuse of authority, abuse of influence, bribery, embezzlement of budgetary funds);

(b) find evidence of inappropriate behaviour and criminal intention of officials of Ukrainian customs (abuse of authority, bribery, forgery);

(c) find evidence of inappropriate behaviour and criminal intention of officials of “Anaconda LLC” and “Fifth Element LLC” (proposing and giving a bribe, forgery, counterfeiting of documents and stamps, tax avoidance, money laundering, embezzlement of budgetary funds);

(d) find evidence with help of mutual legal assistance and joint investigation teams of inappropriate behaviour and criminal intention of officials of “ICP Limited” and “GSG Limited” (money laundering, creation of “shell”-enterprises);

2. Investigative Techniques

(a) electronic surveillance;

(b) undercover audio and video recording of suspects;

(c) wiretapping;

(d) physical surveillance;

(e) communications interception by installing video recording devices in offices and houses of suspects;

(f) communications interception by installing audio recording devices in clothes/goods of suspects;

- (g) interceptions of e-mail communications;
- (h) conducting searches in houses and offices of suspects;
- (i) interviewing of victims and witnesses;
- (j) interviewing of suspects;
- (k) requests on information about cash flow on bank accounts of mentioned companies, including the precise time of receipt of money, and information about further transferring of this money;
- (l) requests on tax and customs documentation;
- (m) mutual legal assistance — requests to the law enforcement agencies of other countries.

III. INVESTIGATION OF BRIBERY IN THE JUDICIAL SYSTEM (CASE STUDY 2)

The article 368 of the Criminal Code of Ukraine prohibits acceptance of an offer, promise or receipt by the official of illegal benefit, as well as a request to provide such benefits for themselves or a third person for the Commission or such officer in the interests of the person who offers, promises or provides illegal benefit, or in the interests of a third person of any action with the use of her power or official position.

A. The Initial Information

Circumstances have been established that may indicate commission of a criminal offence, stipulated by Part 4 of Art. 368 of the Criminal Code of Ukraine. Judges of the Chamber of Criminal Cases of the Supreme Court of Ukraine, through an intermediary of an attorney-at-law, demanded a victim of a bribe of USD 120,000 to satisfy a cassation appeal against a court order of the appellate instance.

1. Case Elements Description

(a) The Supreme Court of Ukraine opened the cassation proceedings following a cassation appeal by victim Mrs. Sidorova on the decision of the court of appellate instance;

(b) In order to receive legal aid Mrs. Sidorova went to attorney-at-law Mr. Kozlov for consultation, informing him about the circumstances of the court case and providing him with copies of court decisions and other documents relating to the cassation appeal;

(c) After listening to the circumstances of the case and having read the documents provided by Mrs. Sidorova, Mr. Kozlov, for the purpose of personal enrichment, decided to seize the money of Mrs. Sidorova and persuade her to give a bribe to a judge of the Supreme Court of Ukraine;

(d) In the presence of Mrs. Sidorova, Mr. Kozlov called his classmate — judge of the Supreme Court of Ukraine Mr. Pavlov and arranged with him a personal meeting. Also, Mr. Kozlov has indicated that Mrs. Sidorova should prepare for giving a bribe to judges in the amount of USD 120,000;

(e) During the next meeting, Mr. Kozlov informed Mrs. Sidorova about the mechanism and stages of the bribe, and commented on the need to provide the bribe in three stages:

- initially in the near future, USD 10,000 for putting the case to the list of cases that will be considered by the court in the near future;
- USD 55,000 after receiving the court decision about appointment to trial of the case under the cassation appeal;
- USD 55,000 two days prior to the date of the judicial review of the cassation appeal.

2. Special Investigative Techniques During Investigation

(a) Main challenges during investigation:

- find evidence of inappropriate behaviour and criminal intention of attorney-at-law Mr. Kozlov as an intermediary giving a bribe to the judge;
- find evidence of acceptance of an offer and receipt of bribe by the judge of the Supreme Court of Ukraine Mr. Pavlov;

(b) Investigative techniques:

- electronic surveillance;
- undercover audio and video recording of suspects;
- wiretapping;
- physical surveillance;
- communications interception by installing video recording devices in offices and houses of suspects;
- communications interception by installing audio recording devices in clothes/goods of suspects;
- using identified money for further giving to suspects;
- conducting searches in houses and offices of suspects;
- interviewing of victims and witnesses;
- interviewing of suspects.