

Evaluation Report

on

Area of intervention 10.4: Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector

National experts

Oksana Nesterenko

Andrii Biletskyi

November 2019

Kyiv



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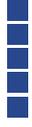
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INTRODUCTION

The report was drafted as a part of overall evaluation of the JSRS and JSRSAP by Oksana Nesterenko¹ and Andrii Biletskyi², national experts of EU Project Pravo-Justice (PJ). It relates to area of intervention 10.4. «Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector».³

The evaluation was carried out according to the methodology (matrix) developed on the basis of the corresponding template. The report was developed with the support of Pravo-Justice team and valuable cooperation from the Supreme Court (department of analytical and legal work of the Supreme Court), the High Anti-Corruption Court (Chief of Staff of the High Anti-Corruption Court, the department of legal support of the High Anti-Corruption Court), the National Anti-Corruption Bureau of Ukraine (First Deputy Director of the National Anti-Corruption Bureau, Department of Analytics and Information Processing), selected experts and lawyers who held meetings for the purposes of respective evaluation.

The report is done according to a single table of contents and technical template. The sections of this report are divided according to the outcomes of Section 10.4, in particular:

- Enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption cases;
- Interoperable IS between PPO, judiciary and law enforcement bodies dealing with corruption cases
- Information on successful and unsuccessful prosecutions of corruption available online;
- Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings.

Main points and important conclusions are emphasized in the text.

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Dr. Oksana Nesterenko - a former scholarship holder of Fulbright Program (September 2013-June 2014). She is the author and co-author of a number of studies and publications, including «Assessing the Implementation of the Anti-Corruption Strategy: Successes and Challenges», «Civil Society Against Corruption in Ukraine», «Information in Ukraine: The Right to Access». At the moment, Dr. Nesterenko Interdisciplinary Scientific and Educational Center for Combating Corruption in Ukraine NaUKMA, Kyiv, Ukraine. She is a member of the Scientific Advisory Board of the Constitutional Court of Ukraine, the Anti-Corruption Group of the Reanimation Package of Reforms. She received her PhD in Constitutional Law from Yaroslav Mudryi National Law University, Ukraine (2008).

² Andrii Biletskyi, national expert of EU Project Pravo-Justice, administrative director and senior researcher at the Interdisciplinary Scientific and Educational Center for Combating Corruption at the National University of Kyiv-Mohyla Academy, was part of the working group to draft the Law on Amendments to the Draft Law to the Law of Ukraine «On Prevention of Corruption» No. 1010, an expert on USAID New Justice projects, has repeatedly participated in research projects on anti-corruption topics («Research for the Sustainability of Anti-Corruption Reforms», research of Transparency International Ukraine, etc.) holds a PhD in criminal law and criminology; criminal and penal law

³ The part of the Action Plan under consideration are attached to this report. See Annex III.





ABBREVIATIONS

| | |
|-------|---|
| NABU | National Anti-Corruption Bureau of Ukraine |
| PGOU | Prosecutor General's Office of Ukraine |
| SAPO | Specialized Anti-Corruption Prosecutor's Office |
| HACC | High Anti-Corruption Court |
| HCJ | High Council of Justice |
| SJA | State Judicial Administration |
| QDCPP | Qualification and Disciplinary Commission of Public Prosecutors |
| NBI | National Bureau of Investigation |



BASELINE

The section outlines the overall state of affairs for the area under consideration prior to the adoption of JSRS and JSRSAP.

1. Combating and Preventing Corruption in JSIs has been considered by Ukrainian authorities as one of the priorities of state policy since mid-1990s⁴, however, before 2014, most concepts or programs did not include systematic measures, evaluations of implementation of these measures, and expected clear results on issues such as preventing and combating corruption in the administration of justice and improving the efficiency of the judiciary and law enforcement bodies in the fight against organized crime and corruption.

2. The first document declaring the need to develop a systematic approach to preventing and combating corruption in Ukraine, including the judiciary, became Decree of the President on the Concept of Combating Corruption for 1998-2005⁵. Although this document did contain some specific measures⁶, and, in addition, obliged the Cabinet of Ministers of Ukraine to develop a program of urgent measures aimed at combating corruption, including the judiciary and the administration of justice, however the mentioned document, as well as the annual plans⁷ and other regulations adopted to implement the said Concept provided more tactical measures than strategic steps in this area. In other words, the first attempt to develop and implement a reform of the judiciary system aimed at enhancing the effectiveness of the judiciary in preventing and combating corruption proved to be ineffective. In Istanbul Anti-Corruption Action Plan for Azerbaijan, Armenia, Georgia, Kazakhstan, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine. Summarizing the recommendations (2004), it was noted that «although a wide range of legal instruments and strategic documents are available in Ukraine, effective coordination, implementation and enforcement remains ineffective.» Among the specific recommendations provided by the Istanbul Plan, Ukraine was invited “to update, on the basis of an analysis of the implementation of the Anti-Corruption Concept for 1998-2005, national strategy to combat corruption, taking into account the amount of corruption in society and corruption schemes in certain institutions, such as the police, the judiciary, tax and customs services, education, health care. The strategy should focus on the implementation of priority pilot projects with preventive and repressive elements in selected high-risk governmental institutions, including the development of anti-corruption action plans. The strategy should provide for «effective monitoring and reporting mechanisms» and “set up specialized anti-corruption prosecuting services; consider the

4 Istanbul Anti-Corruption Action Plan for Azerbaijan, Armenia, Georgia, Kazakhstan, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine <https://www.oecd.org/countries/ukraine/43846543.pdf>

5 Decree of the President of Ukraine No. 367/98 dated 24.04.1998 “On Concept of Corruption Combatting for 1998-2005” <https://zakon.rada.gov.ua/laws/show/367/98>.

6 Developing a code of honor for a judge, narrowing judicial discretion in corruption cases, generalizing the needs of law enforcement agencies and courts in financing and logistical resources, drawing up agreed plans and calculations for providing the necessary bodies with the necessary equipment, vehicles, communications, and other material resources, to envisage in draft state budget funds for the implementation of measures aimed at combating corruption; ensure proper equipping with special equipment and forensic facilities of special units of the National Bureau of Investigation of Ukraine, Ministry of Internal Affairs of Ukraine and Security Service of Ukraine to carry out effective law enforcement tactical intelligence operations as to detection of facts of corruption.

7 Resolution of the Cabinet of Ministers of Ukraine dated 10 May 1999 No. 799 «On the plan of measures aimed at combating corruption for 1999» Resolution of the Cabinet of Ministers of Ukraine dated 3 July 2000 No. 1050 «On a plan of measures aimed at combating corruption for 2000” <https://zakon.rada.gov.ua/laws/main/1050-2000-n>; Resolution of the Cabinet of Ministers of Ukraine dated 6 May 2001 No. 179-p « On a plan of measures aimed at combating corruption for 2001 » <https://zakon.rada.gov.ua/laws/main/179-2001-p>; Resolution of the Cabinet of Ministers of Ukraine dated 15 May 2003 No. 270-p « On a plan of measures aimed at combating corruption for year 2003» <https://zakon.rada.gov.ua/laws/main/270-2003-p>



creation of a national anti-corruption body that will specialize and have the power to detect, investigate and prosecute corruption offenses”.

3. Concept of countering corruption in Ukraine “On the way to integrity” adopted in 2006⁸ compared to the previous concept for 7 years, there was some progress on the anti-corruption strategy in the judiciary, but a key recommendation of the Istanbul Anti-Corruption Action Plan for Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyz Republic, Russian Federation, Tajikistan and Ukraine on the fact that effective monitoring and reporting mechanisms should be established was not taken into account, but the responsibility for defining specific measures for the implementation of the Concept was entrusted to the Cabinet of Ministers of Ukraine.

4. In 2011, the National Anti-Corruption Strategy 2011-2015 was approved⁹, which envisaged the approval of the State Program for Prevention and Combating Corruption for 2011-2015¹⁰. The latter was in line with the National Anti-Corruption Strategy and contained a list of measures, expected outcomes, indicators, timeframes in various fields including JSIs¹¹. At the same time, the list of measures, expected outcomes and indicators was not sufficiently clear and did not give a clear understanding of the strategy of improving the efficiency of the functioning of the judiciary and law enforcement in the fight against organized crime and cases of corruption, including the development of prosecutorial and judicial capacity as to consideration of corruption cases.

5. The Strategic Plan for the Development of the Judiciary of Ukraine for 2013-2015, proposed by the Council of Judges, identified strengthening the independence and autonomy of judges and the innovative use of technology and improving judicial procedures as strategic objectives, but the document did not pay particular attention to raising the level of the effectiveness of the work of the judiciary and law enforcement agencies in the fight against organized crime and cases of corruption.

6. Until 2014, there were no specialized law enforcement and judicial authorities in Ukraine that were entrusted with a duty to combat corruption, and no prior anti-corruption concept or program provided for the establishment and development of targeted and specialized institutions. All previous strategies have focused on reforming the judiciary as a whole, as well as individual Mol and SSU structural units¹², because it was their function to combat corruption. However, despite 16 years of planning of anti-corruption reforms aimed at enhancing the efficiency of the work of the judiciary and law enforcement agencies in the fight against organized crime and corruption, efforts by these bodies have been insufficient. And as of 2014, they were mostly not engaged **in investigating of top corruption cases, and if such activities occurred, they were politically motivated.**

8 The Decree of the President of Ukraine «Concept of Overcoming Corruption in Ukraine “On the way to integrity” dated 11 September 2006 No. 742/2006 <https://zakon.rada.gov.ua/laws/show/742/2006>.

9 The Decree of the President of Ukraine dated 21 October 2011 No. 1001/2011 « On National Anti-Corruption Strategy for 2011-2015» <https://zakon.rada.gov.ua/laws/show/1001/2011>

10 Resolution of the Cabinet of Ministers of Ukraine dated 28 November 2011 No. 1240 « On approval of the State Program for Prevention and Combating Corruption for 2011-2015» <https://zakon.rada.gov.ua/laws/main/1240-2011-п>

11 Measures such as: improving the system of specially authorized entities in the field of combating corruption, improving the skills of judges, prosecutors and law enforcement agencies, preventing corruption in law enforcement agencies, etc.

12 In particular: Department of the State Service for Combating Economic Crime of the Ministry of Internal Affairs, Internal Security Service (in cases of committing such offenses by police officers), bodies of inquiry and pre-trial investigation in case of their direct detection of corruption offenses while performing their basic functions, as well as the Security Service of Ukraine (Main Division on the fight against corruption and organized crime of the SSU).



7. Some changes in the area of combating corruption occurred in 2014. Thus, the Laws of Ukraine «On the Principles of State Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2014-2017» were adopted, this was the first anti-corruption strategy approved by law, not by-law. The new Strategy provided for the creation of a specially authorized body for detecting and investigating corruption crimes. Together with the anti-corruption strategy, the anti-corruption legislation was substantially updated, in particular, the Law of Ukraine «On Prevention of Corruption» and the Law of Ukraine «On the National Anti-Corruption Bureau of Ukraine» were adopted. Due to these normative legal acts, as well as the Regulation on the Specialized Anti-Corruption Prosecutor's Office of the General Prosecutor's Office of Ukraine adopted in 2015 and the Law of Ukraine «On the Supreme Anti-Corruption Court» adopted in 2018, a system of investigative and judicial bodies as to cases concerning high-level corruption was created. This system includes: the National Anti-Corruption Bureau of Ukraine, the Specialized Anti-Corruption Prosecutor's Office and the High Anti-Corruption Court of Ukraine. With the creation of this system, Ukraine has chosen a vector to counteract corruption in Ukraine.

8. At the time of the development of the JSRS for 2015-2020, the situation in the area of developing the capacity of the prosecutor's office and the judiciary to deal with corruption cases was characterized by haphazardness, inconsistency and incoherence, there was no consistency both between judiciary reform strategies and anti-corruption strategies that were adopted and between the various public authorities at the level of implementation of those measures. In addition, the declared activities were fragmentary and defined neither a specific strategy in this area nor a comprehensive action plan.

Baseline: Enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption cases.

9. The issue of ensuring independence of prosecutors and judges, including the proper level of protection of prosecutors and judges dealing with corruption cases, was not given due consideration in any anti-corruption concept, strategy or program. The first National Anti-Corruption Program (1997) did not address the issue of ensuring the independence of prosecutors and judges. The Concept of Combating Corruption in Ukraine "On the Way to Integrity"¹³ the existence of non-procedural (factual) dependence of judges on high-level courts, the imperfection of legal regulation of immunity of judges, which leads to narrowing of guarantees of their independence; poor efficiency in ensuring the safety of persons involved in criminal proceedings, including judges, their families and close relatives, were identified as one of the main corruption risks in the judiciary, but for addressing this problem only a few not clearly defined measures were proposed¹⁴. Other anti-corruption strategies

13 Decree of the President «Concept on Countering Corruption in Ukraine «On the way to Integrity» of September 11, 2006 No. 742/2006 <https://zakon.rada.gov.ua/laws/show/742/2006>.

14 In particular: extending the guarantees of independence of judges, taking measures to prevent possible non-procedural (factual) dependence of judges and focusing the professional interests of judges solely on the problems of justice by extending the administrative powers of the presidents of courts to ensure the work of judges and courts; to study the feasibility of legislative entrustment to a certain body of authority to provide official explanations and recommendations on issues related to the regulation of judicial conduct and to publish a collection of decisions on disciplinary cases; introduction of a mandatory procedural form of automated, devoid of subjective influence allocation of cases before the court; developing a unified procedure for bringing judges to administrative and disciplinary responsibility for committing corruption or other corruption-related offences; providing in the relevant legislative acts such grounds for dismissal of a judge or bringing him to disciplinary responsibility as committing corruption or other corruption-related offence, as well as providing for guarantees of justified and fair prosecution of judges for committing corruption or other acts related to corruption.



also indirectly addressed the issue of ensuring that prosecutors and judges dealing with corruption are adequately protected.

10. The old Law of Ukraine «On the Prosecutor’s Office» of 05.11.1991 No. 1789-XII contained a single article which enshrined guarantees of the independence of prosecutors (Article 7). It stated that interference with the prosecutor’s office by any authority or third party was not allowed. The new Law on the Prosecutor’s Office, adopted in 2014, created new prosecutorial self-government bodies – the Council of Prosecutors and the Qualification and Disciplinary Commission of Public Prosecutors, which made it possible to implement the principle of prosecutor’s independence through the introduction of transparency in the selection and bringing prosecutors to disciplinary responsibility and their dismissal. Experts note that the law laid a solid foundation for bringing Ukrainian prosecutor’s office to European standards.¹⁵ All of these provisions on guarantees of independence also apply to the Specialized Anti-Corruption Prosecutor’s Office.

11. Until 2014, there was no specifically authorized body of judicial self-government in Ukrainian law and practice that would be responsible for appointing and dismissing judges. In the old Law of Ukraine “On Judiciary and Status of Judges” of 07.07.2010 No. 2453-VI there were mechanisms for political influence on the processes of appointment and dismissal of judges.

Baseline: Interoperable IS between PPO, judiciary and law enforcement bodies dealing with corruption cases.

12. At the time of the adoption of JSRS for 2015 - 2020, in accordance with paragraph 22 of the Code of Criminal Procedure of Ukraine, a Unified Register of Pre-trial Investigations, a Unified State Register of Court Decisions was established, and an automated system was created courts (Д-3, ДДС, etc.), which were considered as part of the gradual introduction of e-court concept. However, the creation of a single information system (e-Case Management System) between prosecutors, the judiciary and law enforcement agencies that investigate or consider corruption cases was not determined separately.

Baseline: Information on successful and unsuccessful prosecutions of corruption available online.

13. In general, before the adoption of the aforementioned normative legal acts in the field of combating corruption, the law enforcement agencies of Ukraine kept records and statistics on corruption offenses committed. With the adoption of the new Criminal Procedure Code of Ukraine in 2012, the Unified Register of Pre-trial Investigations was introduced, the responsibility for which was vested in the Prosecutor General’s Office of Ukraine. According to para. 6 Art. 14 of the Law of Ukraine «On the Prosecutor’s Office» of 05.11.1991 № 1789-XII together with the bodies of pre-trial investigation and in agreement with the specially authorized central body of executive power in the field of statistics the Prosecutor General’s Office of Ukraine is developing a system and methodology for keeping records of criminal offences, persons who committed them and the stages of criminal proceedings¹⁶. Therefore, on the website of the Prosecutor General’s Office of Ukraine there is a section «Statistics on the state of crime and the results of prosecutorial and investigative activity», which contains

15 Disciplinary responsibility of prosecutors in Ukraine: Summary/O. Banchuk, M. Kamenev, E. Krapivin, B. Malyshev, V. Petrakovsky, M. Tsapok. K.: Moskalenko OM, 2019. 140 p.

16 Law of Ukraine “On the Prosecutor’s Office” <https://zakon.rada.gov.ua/laws/show/1789-12>

statistics on registered criminal offences, including corruption, and the results of their pre-trial investigation. Report form (Form No. 1) «SINGLE REPORT ON CRIMINAL OFFENSES» (monthly), approved by the order of the GPO of October 23, 2012 No. 100 in agreement with the State Statistics Committee of Ukraine¹⁷. In addition, by the Joint Order of the Prosecutor General's Office, the Ministry of Internal Affairs, the Security Service, the Ministry of Income and Charges, the Ministry of Defence, the State Judicial Administration of Ukraine dated 22.04.2013 № 52/394/172/71/268/60 approved the Instruction on keeping records of criminal and administrative corruption offences. The Instruction approved two types of information cards (record-keeping documents): Form 1-K - Information card on criminal or administrative corruption offence; Form 2-K - Information card on the results of a court proceeding on a criminal corruption offence or on a case of an administrative corruption offence¹⁸. All of the above statistical reporting documents are available online.

Baseline: Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings

14. There were analytical units within the structure of the Prosecutor General's Office, the Supreme Court of Ukraine which carried out the relevant activities. However, the main problem was that such activity was not systematic and therefore needed focused study. In addition, with the creation of the NABU and the SAPO, the need to create such analytical units in these anti-corruption bodies became urgent.

¹⁷ The Oder of the GPO dated 23 October 2012 No. 100

¹⁸ Instruction on keeping records of criminal and administrative corruption offences <https://pp.ck.court.gov.ua/userfiles/Korupciya.pdf>



ADEQUACY OF JSRS, JSRSAP AND ITS PARAMETERS

Overall assessment

The Section assesses the overall adequacy of the set of interventions, structure, indicators, formulations and other parameters of JSRSAP segment under consideration.

15. The JSRSAP for 2015-2020 consists of a significant number of interrelated components. Each of these components is important for achieving the objective of JSRS – to identify priorities for reforming the JSIs in order to put into practice the rule of law and to ensure the functioning of the judiciary, which meets public expectations of an independent and fair court, as well as of European values and human rights standards.

16. The JSRS and JSRSAP have a well-defined structure, are well thought out and are logically consistent. The JSRS clearly outlines the scope of the intervention, the main tasks it entails, and the ways in which they can be addressed. Equally important is the inclusion of the Strategic Planning and Coordination Unit – because of the large number of entities, the implementation of this Strategy must be comprehensive and coherent. The strategy identifies only a few indicators of its implementation, but to a large extent, they are disclosed in separate sections of the JSRSAP. Therefore, they are complete, sufficient and appropriate for the objectives set.

17. JSRSAP was drawn up to implement the JSRS, which includes 12 sections, which include various measures to reform the judiciary sector. The combination of various aspects made it possible to outline areas of intervention in particular areas, such as: ensuring the independence, impartiality and impartiality of judges, increasing the transparency and openness of judges, bringing the powers and activities of prosecuting authorities to European standards, improving the efficiency of judicial and law enforcement agencies in the fight against organised crime and corruption cases and more. The last section will be analyzed in this report. Selection of Section 10. «Improving the efficiency of the work of the judiciary and law enforcement agencies in the fight against organized crime and cases of corruption» meets the objectives outlined in JSRS.

18. JSRS and JSRSAP are written in Ukrainian and English. Since the Ukrainian version was approved by the Decree of the President of Ukraine dated May 20, 2015 No. 276/2015, it is the Ukrainian version that most experts are guided by. However, there are some differences between the two versions of the document. For example, in the English version of section 10.4 of the document, the name of one result is «Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings». However, the Ukrainian version does not contain the word «courts»– «Аналітико-дослідницькі підрозділи прокуратури регулярно вносять пропозиції щодо вдосконалення нормативно-правової бази та практики для виправлення недоліків, виявлених завдяки аналізу невдалих спроб судового переслідування корупційних дій при скоєнні окремих видів злочинів». The same applies to the formulation of outputs, in particular in section 10.4, one of the outputs in English is formulated as «Reviewed regulatory framework on protection of prosecutors and judges from undue pressure when dealing with corruption cases»; in Ukrainian «Перегляд нормативно-правової бази щодо захисту прокурорів від неналежного тиску під час ведення корупційних справ». Further, in outcomes in both language versions it is indicated that «Enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption



cases». The reason for the availability of the English and Ukrainian language versions of the document may be due to the number of specialists involved in the development of JSRSAP. In the future, there is a need for consensus on the consistency of both versions. In the future, this report will be based on a version containing an expanded list of institutions (prosecutors and judges).

19. JSRS and JSRSAP were developed by experts in different fields of knowledge and sets the priorities for reforming the judiciary - the JSIs, both at the level of constitutional changes and at the level of implementation of the first priority urgent measures that will provide the necessary positive changes in functioning of respective legal institutes. As stated in the explanation to the JSRS itself, it was adopted in the light of other strategic documents that define the vectors and directions of Ukraine's development. For example: EU-Ukraine Association Agreement in Articles 14 and 22 defines that in the framework of cooperation in the field of justice, freedom and security, the Parties to this Agreement attach particular importance to the strengthening of the rule of law and to the strengthening of institutions of all levels in the field of governance in general and of law enforcement and judicial authorities in particular. Cooperation between the Parties shall be directed in particular, at strengthening the judiciary, enhancing its effectiveness, guaranteeing its independence and impartiality, and combating corruption. Justice, freedom and security cooperation will be based on the principle of respect for human rights and fundamental freedoms. In addition, the parties cooperate to combat criminal and illegal organized or other activities, including corruption, and with the aim to prevent it. The JSRS and JSRSAP also refer to Ukraine 2020 Strategy, which defines the main directions and vectors of reform for the country's development. One of the key vectors stands out for the security vector, which includes, among other things, judicial reform, renewal of authorities and anti-corruption reform.

20. The 2014-2017 anti-corruption strategy envisages a number of key areas in which corruption is urgently needed to be prevented: in representative bodies; establishment of public service possessing integrity; in the activity of executive bodies; in the field of public procurement; in the judiciary and criminal justice; in private sector. Given that the JSRS and the JSRSAP have as their primary purpose the priority of reforming the JSIs in order to give practical effect to the rule of law and to ensure the functioning of the judiciary, which meets the public expectations of an independent and just court, European human rights values and standards, and, inter alia, include measures to improve the Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector (section 10.4 of the JSRSAP), we can say that the JSRS provisions were fully based on key strategic documents adopted by Ukraine in 2014-2015.

21. In addition, it is also worth considering the extent to which the JSRSAP, namely Section 10.4 "Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector» complies with the provisions of the Anti-Corruption Strategy 2014-2017 and the State Program for its Implementation¹⁹. The latest in section "Preventing Corruption in the Judiciary and Criminal Justice Bodies" indicates that reputable international and national studies indicate a high level of corruption and, therefore, a low level of trust in the judiciary,

¹⁹ On approval of the State Program on Implementation of the Principles of State Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2015-2017: Resolution of the Cabinet of Ministers of Ukraine dated 29.04.2015 No. 265. <http://zakon3.rada.gov.ua/laws/show/265-2015-%D0%BF>



prosecutors and other criminal justice bodies²⁰. To some extent, the measures provided for in the Anti-Corruption Strategy 2014-2017 and the State Program for its implementation are aligned with the outputs planned in JSRSAP section 10.4, for example: 1) both documents indicate the need to provide sufficient guarantees of independence in prosecutors' activities; 2) both point to the need for training for judges on standards related to the prevention and counteraction of corruption. It should be noted that in section 10.4. JSRSAP proposes a broader range of measures to improve the Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector than those envisaged in the Anti-Corruption Strategy 2014-2017 and the State Program for its Implementation (additionally providing for the proper functioning of special divisions of prosecuting divisions of corruption cases, especially high profile corruption cases; proper functioning of special panels of judges to handle corruption cases, especially high profile corruption cases; revision of the legal framework for the protection of prosecutors from undue pressure during corruption cases; analysis and publication of statistics on delivering sentences and judicial consideration of corruption cases in the Annual Report of the Prosecutor's Office and the Judiciary), the same conclusions can be drawn for the parameter «expected outcomes».

21. One of the contradictory features of the JSRS and the JSRSAP is the simultaneous setting forth in different sections of the document on implementation of e-Justice and IS between prosecutors, the judiciary and law enforcement agencies, which creates uncertainty as to whether separate information system should be introduced in addition to the e-court, a system between prosecutors, the judiciary and law enforcement agencies investigating or considering corruption cases.

²⁰ On the Principles of State Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2014-2017: Law dated 14.10.2014 No. 1699–VII. Vidomosti of the Verkhovna Rada of Ukraine. 2014. No. 46. P. 2047.



ACCURACY OF MONITORING OF AND REPORTING ON JSRSAP IMPLEMENTATION

The Section concerns accuracy of monitoring (maintaining the instrument-specific MT) and appropriateness of narrative or other reporting formats on JSRSAP implementation, as well as provides analysis, specific examples of inaccuracy, other shortcomings and relevant recommendations

22. An integral part of each strategy is its monitoring and evaluation. Monitoring helps to measure the process of achieving the concrete results that have been identified in the plan for the implementation of a specific strategy. Evaluation enables the strategy to be measured systematically and objectively. Monitoring and evaluating the strategy also helps to identify the possibility of adjusting the strategy and action plan to it, identifying its weaknesses.

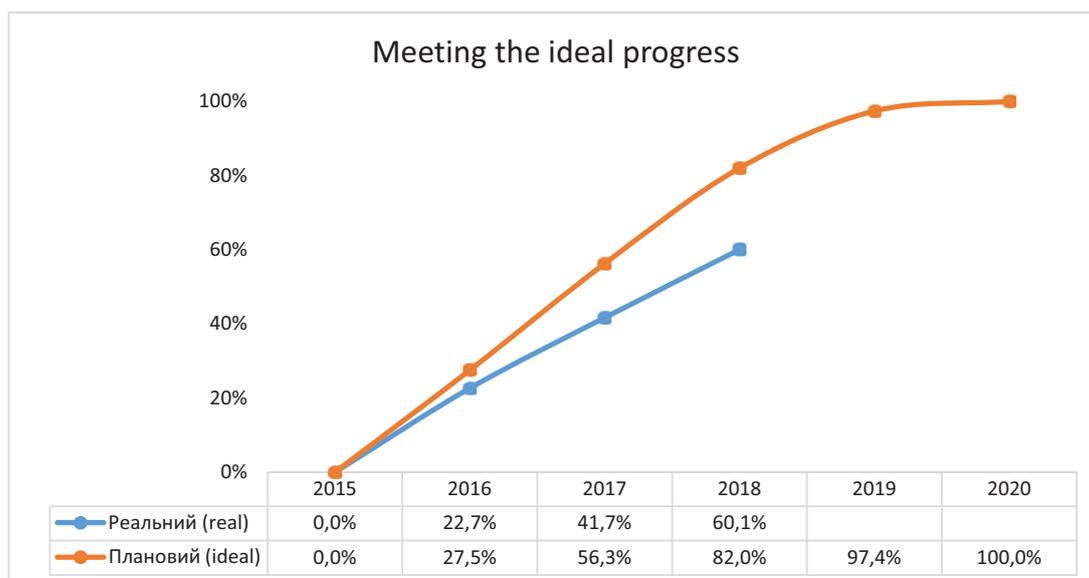
23. The JSRS and the JSRSAP also identified the outcomes to be achieved and which define the reporting system for implementation. The Presidential Decree, which approved this Strategy, stipulates that the Cabinet of Ministers of Ukraine shall annually inform, by April 1, about the status of implementation of the JSRSAP for 2015-2020. In its turn, the Cabinet of Ministers of Ukraine, in its Decree No. 864-p of 19.08.2015, determined that an institutional coordinator, from among the bodies responsible for their implementation, was appointed for each individual action of the JSRSAP, based on the competence of such bodies. In addition, this Decree made it obligatory to inform the Cabinet of Ministers of Ukraine on the status of implementation of the JSRSAP for the previous year of these institutional coordinators. The General Prosecutor's Office, the Ministry of Justice of Ukraine, NABU, the courts, the SJA and the National School of Judges were designated as institutional coordinators for the implementation of section 10.4 of the JSRSAP.

24. Despite defining the procedure and deadline for reporting on the implementation of the JSRSAP in by-laws, the institutional coordinators were faced with the uncertainty of reporting format. The report submitted by the institutional coordinators did not meet the requirements of the JSRS and JSRSAP. Therefore, there was a problem when no monitoring and evaluation systems were established from the beginning of the implementation of the JSRS and JSRSAP.

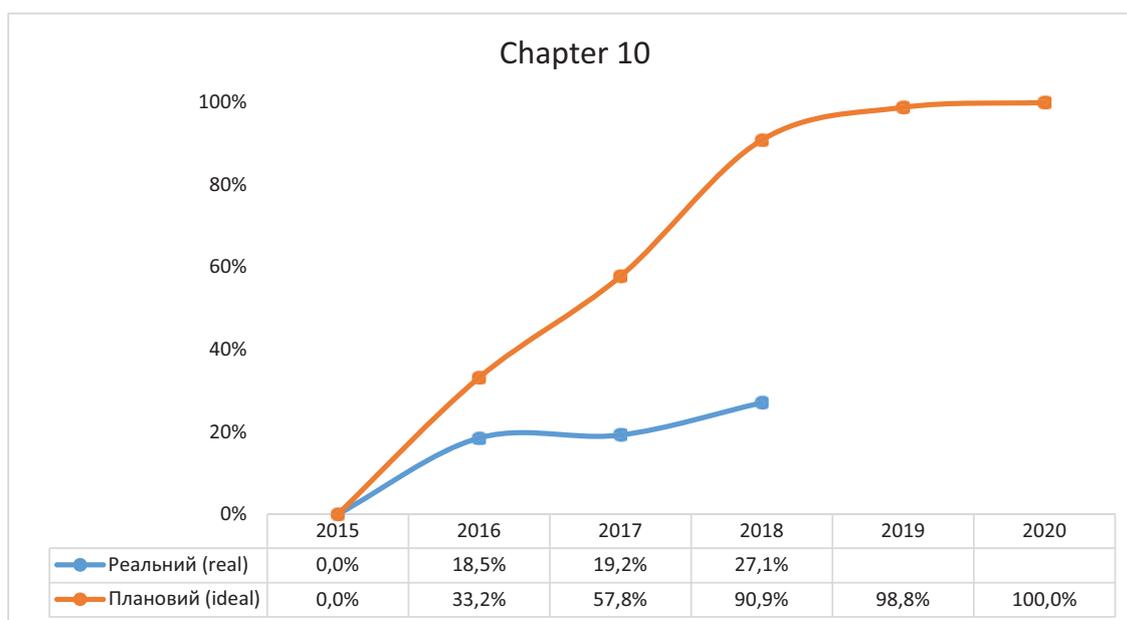
25. To this end, with the assistance of the Council of Europe and Pravo-Justice project, a methodology for reviewing the progress of the justice sector in Ukraine was introduced, which provided specific guidance for coordinators to evaluate the measures envisaged by JSRS and JSRSAP. In the future, Pravo-Justice project experts created a special monitoring tool, which provided an assessment of the activities performed with the help of an Excel-based module. The monitoring tool allows to build a timetable for the implementation of the measures provided for in JSRSAP. Specific institutional coordinators are responsible for the management and analysis of this Instrument (in the case of Section 10.4 – Prosecutor General's Office of Ukraine).

26. Overall, it can be concluded from the monitoring tool that the JSRS and the JSRSAP have been implemented at the level of 60.1% out of the planned 82% as of 01.01.2019.





27. In assessing the implementation of section 10 of the JSRAP, the following situation can be observed:



28. The accuracy of monitoring of the implementation of the JSRS and of the outputs provided for in the JSRSAP in this specific section (10.4) was carried out by the GPO staff. In respect of it the following should be noted: in certain cases, those who did the implementation evaluation did not take into account existing achievements. For example, in mid-2018 the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On the High Anti-Corruption Court”. The relevant achievement should have been recorded in the monitoring tool, but it did not happen. Similar is the situation with the publication of statistics on sentencing and judicial consideration of corruption cases in the annual reports of prosecutors and the judiciary: NABU and the SAPO began to provide reports on their activities from the beginning of their work; The SJA also issued relevant statistical information during this time period. Therefore, some progress has been made in fulfilling the objectives set out in Section 10.4. of the JSRSAP were not taken into account during the evaluation.

ATTAINMENT OF RELEVANT JSRS AND JSRSAP OUTCOMES

The Section concerns findings, data, analysis, assessment results, and suggests approximate estimation of scores in terms of attainment of the outcomes and their relevant blocks indicated in the relevant paragraphs and subtitles.

Outcome: Enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption cases – Level of attainment 50%²¹

29. One of the outputs set out in Section 10.4 of the JSRS and JSRSAP is to review the legal framework to protect prosecutors and judges from undue pressure when conducting corruption cases. Starting in 2014, the then government directly set out the legislative framework to ensure the independence of prosecutors and judges and to bring their activities up to European standards. As both a specific output and a specific outcome contain two categories of institutions (prosecutors and judges), it is proposed to consider them separately.

Judges

30. At the legislative level, norms on the independence of judges, including those dealing with corruption cases, began to appear in 2014. The reform of the judiciary began with the Law of Ukraine «On restoring trust to the judiciary in Ukraine», which aimed, among other things, to affirm the principles of independence and impartiality in the work of judges²². Experts noted that although the law provided judges with tools for «self-purification and punishment of those at fault», they retained previous staff on the positions that had a significant impact on the judicial decision-making process²³.

31. Further, the Law of Ukraine “On ensuring the right to a fair trial” was adopted, which in particular clarified the provisions of the Law of Ukraine “On the Judiciary and the Status of Judges” and added the procedure of evaluation of judges. Experts point out that this Law clarified and strengthened safeguards against unlawful pressure by enhancing their independence and inviolability. The law substantially specified the stages and procedure for the appointment of a judge to the position, including the procedures for selecting candidates, selection and qualification examinations, preparing and training candidates for judicial office. The norms were set forth on the election of judges indefinitely and their appointment and transfer to other courts, which should be held only on a competitive basis²⁴. The then Council of Judges delayed the evaluation procedure until the deadline for evaluation of judges of the Supreme and High Courts had expired²⁵.

21 Taking into account the recent reforms in the prosecuting authorities, the level of attainment of this output should be reduced to 30%

22 the Law of Ukraine «On restoring trust to the judiciary in Ukraine» <https://zakon.rada.gov.ua/laws/show/1188-18>

23 Judicial reform: how citizens can make it successful / [R. Kuibida, O. Lebed, R. Likhachov, O. Trubenkova]; under general edition of R. Kuibida. - K.: IE Moskalenko OM, 2018. – p. 62

24 I want to understand the judicial reform: what you need to know. URL: <http://sudovareforma.org/institution/hochu-rozibratysya-u-sudovij-reformi-shho-treba-znaty/>

25 Judicial reform: how citizens can make it successful / [R. Kuibida, O. Lebed, R. Likhachov, O. Trubenkova]; under general edition of R. Kuibida. - K.: IE Moskalenko OM, 2018. – p. 62



32. The greatest results in the introduction of legislation on the protection of judicial independence were achieved in 2016 - at that time the Verkhovna Rada of Ukraine adopted amendments to the Constitution of Ukraine, namely to Section VIII - Justice, and adopted a new version of the Law of Ukraine "On the Judiciary and the Status of Judges". The main purpose of these changes was to remove the judicial branch from political pressure, strengthen guarantees of independence and inviolability of judges. This was ensured, inter alia, by updating the procedures for selecting judges, dismissing them, and introducing a new body of judicial administration, the HCJ (which replaced the High Council of Justice).

33. These amendments significantly changed the procedure for appointing judges: they were previously elected first by the President of Ukraine for 5 years, and then the Verkhovna Rada of Ukraine appointed them indefinitely. It can be argued that the future career of a judge depended solely on the decisions of higher authorities²⁶ and thus had a political impact on their activities. Currently, according to the Law of Ukraine "On Judiciary and the Status of Judges", the appointment of a judge is carried out by the President of Ukraine on the basis and within the framework of the submission of the HCJ (Article 80).²⁷ According to experts, as a result of judicial reform in Ukraine, a system of appointment of judges has been fully formed, which fully meets the European standards of judicial independence²⁸.

34. However, in practice the independence of judges is questioned. Verbal analysis and application of the systematic way of interpreting the provisions of the Draft Law on Amendments to the Constitution of Ukraine (as to Justice) make it possible to state that the entry into force of these amendments within two to three years may create risks for the existence of higher political corruption due to the possibility of unlimited influence of the President of the country of the judicial branch and violation of the principle of checks and balances due to the significant weakening of the role of the Verkhovna Rada of Ukraine in the process of forming the judicial branch of power.

35. It is about the provisions of Articles 125, 128, 131 of the Constitution of Ukraine, namely the provisions on the appointment of judges by the President of Ukraine: these provisions which enable the President to influence the decisions of the High Council of Justice. According to the aforementioned articles of the Constitution of Ukraine, the appointment of a judge to the post is made by the President of Ukraine upon submission of the HCJ. At the same time, as is known, the HCJ consists of 21 members, 10 of whom are elected at the congress of judges of Ukraine from among judges or retired judges. As the President, in accordance with the Law of Ukraine "On Judiciary and Status of Judges", makes the final decision on the appointment of a judge to the post, 10 members of the High Council of Justice may be loyal to the President of the country. In addition, the President of Ukraine separately appoints two more HCJ members. This, in turn, means that the President has a majority vote in the HCJ when making any decision (regarding a judge's violating incompatibility requirements; dismissing a judge; consenting to a judge's detention or arrest; temporary suspension judges from the administration of justice, etc.). Experts also note the following: it is indicated

²⁶ Judicial reform: how citizens can make it successful / [R. Kuibida, O. Lebed, R. Likhachov, O. Trubenkova]; under general edition of R. Kuibida. - K.: IE Moskalenko OM, 2018. - p. 62

²⁷ The Law of Ukraine "On the Judiciary and the Status of Judges"

²⁸ Annual report on the state of independence of judges in Ukraine. URL: http://www.vru.gov.ua/content/file/%D0%A9%D0%BE%D1%80%D1%96%D1%87%D0%BD%D0%B0_%D0%B4%D0%BE%D0%BF%D0%BE%D0%B2%D1%96%D0%B4%D1%8C_%D0%B7%D0%B0_2017_%D1%80%D1%96%D0%BA_.pdf (дата звернення 17.11.2019)
10 фактів про судову реформу. URL: <https://www.ukrinform.ua/rubric-society/2683461-10-faktiv-pro-sudovu-reformu.html> (дата звернення 17.11.2019)



that the High Qualification Commission of Judges and HCJ has staff who are politically dependent on the authorities (in particular, the Presidential Administration)²⁹. The President's interference with the independence of the judiciary should be mentioned separately, namely by approving changes in the judiciary regarding the re-election of Supreme Court judges and reducing the number of its staff without due process, as well as subordination of the new High Qualification Commission of Judges to the unreformed HCJ³⁰.

36. Among other things, experts point out that there is unlawful pressure on judges considering cases of corruption offenses, including during the pre-trial stage, on the part of the HCJ. For example, a number of disciplinary sanctions were imposed on judges who became known for their anti-corruption activities³¹. Those few judges who testified about interfering with justice or showing independence were prosecuted. At the same time, judges who have discredited themselves (for example, by working in self-proclaimed DPR\LPR, making dubious decisions, discussing ways to avoid qualification evaluation, etc.) still remain Ukrainian judges.³² In general, the effectiveness of the HCJ's activity as a body ensuring the independence of the judiciary is considered insufficient in this respect³³. There is a widespread opinion in the expert community about the impossibility of ensuring the true independence of the judicial system by the HCJ. This is explained by the procedure for selecting members of the HCJ - some of them are appointed by congresses of judges of Ukraine. Therefore, dependent judges who have worked within the system for a considerable amount of time objectively cannot elect such HCJ members who will be independent and will be able to properly select judges possessing integrity, evaluate their performance and hold judges accountable.

37. In the already mentioned Annual Report on the State of Independence of Judges in Ukraine, the HCJ collects and summarizes the most widespread violations of the guarantees of independence of judges: inadequate provision of guarantees of independence of judges by prosecuting authorities and national police (when handing over notifications of suspicion to a judge), improper performance of duties by National Police bodies on ensuring the safety of courts and judges (free access to the premises of courts and judges, blocking their work), failure to enter information in the Unified Register of Pre-trial Investigations concerning the interference with the activities of judges, the pressure on judges by the MPs. Disrespect for the judiciary by other branches of government³⁴. The above facts make it possible to conclude that, despite the fact that at the legislative level the guarantees of independence of judges were brought to European standards, in practice, on the contrary, their breach is observed.

29 How to stop the corrosion of justice <http://www.pravo.org.ua/ua/news/20873759-yak-zupiniti-koroziyu-pravosuddya>

30 Zelensky's judiciary reform poses great risks for the independence of judges - Western ambassadors <https://www.eurointegration.com.ua/news/2019/10/17/7101959/>

31 whistleblower judge Larysa Holnyk at one time refused to have wrongful profit and reported pressure on her to force her to make a decision in favor of the mayor of Poltava.

How to Save Anti-Corruption Reform in Ukraine (Based on Romania's Experience)? <https://ces.org.ua/wp-content/uploads/2019/09/StateWatch-UA.pdf>

32 How to stop the corrosion of justice <http://www.pravo.org.ua/ua/news/20873759-yak-zupiniti-koroziyu-pravosuddya>

33 Annual Report on Ensuring Independence of Judges in Ukraine http://www.vru.gov.ua/content/file/%D0%A9%D0%BE%D1%80%D1%96%D1%87%D0%BD%D0%B0_%D0%B4%D0%BE%D0%BF%D0%BE%D0%B2%D1%96%D0%B4%D1%8C_%D0%B7%D0%B0_2017_%D1%80%D1%96%D0%BA_.pdf

34 ibis.



Prosecutors

38. On October 14, 2014, a new version of the Law of Ukraine «On the Prosecutor's Office» was adopted, which was prepared taking into account the recommendations of a large number of national and international experts. The innovations of this Law were: depriving the prosecutor's office of the function of supervision; liquidation of investigative units in prosecuting authorities; significant restriction of the sphere of activity of the prosecutor's office; formation of new bodies of prosecutorial self-government - the Council of Prosecutors and the Qualification and Disciplinary Commission of Prosecutors. According to experts, such bodies will allow to realize the principle of independence of the prosecutor through introduction of transparency. in the process of selecting and bringing to disciplinary responsibility or dismissing prosecutors³⁵. A year later, on September 22, 2015, the Prosecutor General of Ukraine issued an Order on the establishment of the SAPO (on the rights of an independent structural unit). Subsequently, in 2016, the Regulation on the CAPO of the GPO were also approved³⁶.

39. The general principles of independence of prosecutors (including the SAPO) are provided for by the above-mentioned Law of Ukraine "On the Prosecutor's Office of Ukraine", namely Art. 16, which provides a list of the following guarantees: 1) special procedure for appointment, dismissal, disciplinary responsibility of prosecutors; 2) the procedure for exercising powers determined by procedural and other laws; 3) prohibition of unlawful influence, pressure or interference with the exercise of the prosecutor's powers; 4) establishing by law the order of financing and organizational support of the prosecutor's office; 5) proper financial, social and pension support of the prosecutor; 6) functioning of prosecutorial self-government bodies; 7) determining by law the means of ensuring the personal safety of the prosecutor, his family members, property, as well as other remedies.

40. It should be noted that not everyone agrees with the legal nature of the existence of the SAPO as an independent structural unit. It is stated that such a legal status of the SAPO makes it necessary for this body to be subordinated to the GPO in administrative and organizational matters. Areas of activity of the SAPO, which are not directly regulated by the legislation, will thus be decided by the rules existing in the GPO. Therefore, the SAPO will fall under organizational and administrative dependence on the GPO³⁷.

41. The law distinguishes two types of appointments of SAPO prosecutors: 1) appointment to positions of SAPO prosecutors and 2) appointment to administrative positions in SAPO. In the first case, the appointment is made by the head of this prosecutor's office based on the results of the open competition, which is conducted by the competition commission consisting of the head of the SAPO and the persons designated by him and the Prosecutor General³⁸. The composition of the commission and the procedure for holding an open competition is determined by the head of the SAPO³⁹. In the second case, it is based on the results of an open competition (either by the Prosecutor General or the head of the SAPO). The organization and holding of the competition are carried out by a competition commission, which consists of: 1) four persons, appointed by the Council of Prosecutors of Ukraine;

³⁵ 4 years of change in the Prosecutor's Office of Ukraine: two steps forward, one back. URL: <http://www.pravo.org.ua/ua/news/20873335-4-roki-zmin-u-prokuraturi-ukrayini-dva-kroki-vpered.-odin-nazad>

³⁶ Order of the Prosecutor General of Ukraine No. 149 URL: <https://zakon.rada.gov.ua/rada/show/v0149900-16>

³⁷ 4 years of change in the Prosecutor's Office of Ukraine: two steps forward, one back. URL: <http://www.pravo.org.ua/ua/news/20873335-4-roki-zmin-u-prokuraturi-ukrayini-dva-kroki-vpered.-odin-nazad>

³⁸ Order of the GPO on approval of the Regulation on the organization of staff work in the bodies of the prosecutor's office. URL: <https://zakon.rada.gov.ua/laws/show/en/z0113-18>

³⁹ The Law of Ukraine «On the Prosecutor's Office». URL: <https://zakon.rada.gov.ua/laws/main/1697-18>



2) seven persons designated by the Verkhovna Rada of Ukraine⁴⁰. It follows from this that two-thirds of the composition of the competition commission for the appointment to administrative positions (including the executive) in the SAPO are appointed by MPs. Therefore, there is a risk of political dependence of the commission on Parliament.

42. As already mentioned, two special bodies were created to strengthen the independence of prosecutors - the Council of Prosecutors and the QDCPP. The first of these bodies was intended to protect prosecutors from unlawful pressure from any third parties. One of the powers of the Council of Prosecutors is to «consider prosecutors' appeals and other communications about the threat to prosecutors' independence, to take appropriate measures based on the consequences of considering (inform the relevant authorities of the grounds for bringing criminal, disciplinary or other liability; initiate consideration of security measures; publish statements on behalf of the Public Prosecutor's Office regarding the facts of violation of the prosecutor's independence, and address relevant international organizations with respective communications etc.)⁴¹». According to experts, despite the fact that the regulations on the activities of the Council of Prosecutors were fully in line with international standards (it was elected at a conference of prosecutors, there was an even distribution between the representation from the Prosecutor General's Office, local and regional prosecutors' offices, the legal community), in practice it appeared that the Council was fully under the control of the Prosecutor General⁴².

43. The second body, The QDCPP, among other things, should consider disciplinary proceedings against prosecutors (including the Specialized Anti-Corruption Prosecutor's Office). Experts generally appreciate the work of QDCPP. It is noted that the new disciplinary procedure provides procedural guarantees for the protection of prosecutors' rights. The activities of this commission are based on the Law, characterized by the consistency and predictability of the decisions it adopts. Among the negative aspects of the QDCPP's activities are: the closeness of the QDCPP's decisions to refuse to open disciplinary proceedings, and the lack of possibilities to appeal them; inadequate enforcement of the principle of competitiveness in disciplinary proceedings; failure to lay down rules on the admissibility of evidence; display of loyalty to the Prosecutor General and staff of the Prosecutor General's Office of Ukraine; consistent refusal to open proceedings in prosecutors' violations of anti-corruption legislation⁴³.

44. Since the SAPO prosecutors have the primary task of carrying out procedural guidance in criminal proceedings for statutory corruption offenses, it is important to examine the principles of their independence at the pre-trial stage. In addition to the above provisions of Art. 16 of the Law of Ukraine «On the Prosecutor's Office», the procedural independence of the prosecutor of the SAPO during the pre-trial investigation is guaranteed: 1) Part 5 of Art. 8-1 of the Law of Ukraine «On the Prosecutor's Office» – the Prosecutor General, his first deputy and his deputies have no right to instruct prosecutors of the Specialized Anti-Corruption Prosecutor's Office and to carry out other actions directly related to the carrying out by the prosecutors of Specialized Anti-Corruption Prosecutor's Office of their powers. Written orders of an administrative nature concerning the organization of activities of the Specialized Anti-Corruption Prosecutor's Office are issued with the obligatory consent of the head of the

40 ibis.

41 ibis.

42 Interview with an expert

43 Disciplinary responsibility of prosecutors in Ukraine: Summary/O. Banchuk, M. Kamenev, E. Krapivin, B. Malyshev, V. Petrakovsky, M. Tsapok. K. : Moskalenko OM, 2019. P. 5-6.



Specialized Anti-Corruption Prosecutor's Office⁴⁴; 2) Art. 480 of the CPC of Ukraine determines the special status of SAPO prosecutors in case if criminal proceedings are opened against them (in such a case the notification of suspicion is served exclusively by the Prosecutor General of Ukraine)⁴⁵.

45. Studies show that SAPO prosecutors consider themselves more independent than dependent. Prosecutors also note that, in practice, the SAPO chief and his deputies, department heads and units heads have some leverage to influence their procedural decisions. At the same time, there is a lack of influence on the procedural actions of the prosecutors of the SAPO by the representatives of the Prosecutor General's Office of Ukraine. In practice, the dependence of the SAPO prosecutors on their managers is manifested in the need to coordinate their own procedural decisions: conclusion of a plea agreement, decision on detention; on notification of suspicion; the closure of criminal proceedings; election or replacement of a preventive measure, referral of an indictment to court, etc. Despite the subjective feeling of independence of the prosecutors of the SAPO, the phenomenon of informal agreeing of procedural actions with the management is quite widespread, which makes it possible to interfere with their activity during the pre-trial investigation⁴⁶.

46. Among other levers of influence are the system of cancellation of bonus for prosecutors is also distinguished - the Council of Prosecutors notes that the decision to take such a measure lacks objectivity. Due to the fact that the heads of regional prosecutor's offices perceive cancellation of bonus as the only possible and most effective lever of influence over subordinates, it can lead to a decrease in the level of prosecutors' independence⁴⁷. At the same time, this practice is not widespread in the daily activities of the SAPO⁴⁸.

47. The practice of activity of specialized anti-corruption institutions in Ukraine shows that a significant problem is the change in investigative jurisdiction of criminal proceedings for corruption offenses. Despite the fact that national law provides for clear rules for determining the investigative jurisdiction of corruption offenses and forbids to refer them to be investigated by another body, the Prosecutor General or the head of the SAPO have repeatedly violated these rules⁴⁹. Such actions adversely affect not only the NABU detectives but also the SAPO prosecutors, who play the role of procedural leaders in criminal proceedings for corruption crimes.

48. In both cases (the independence of judges and prosecutors), we can observe a large number of legal safeguards and mechanisms to protect against unlawful pressure. All these legal norms meet the best European standards. However, in practice there is a situation where any third party (representatives of the authorities, public sector, ordinary citizens) disregard the legislative requirements and interfere with the official activity of the employees of the judicial authorities and the prosecutor's office.

44 The Law of Ukraine «On the Prosecutor's Office. URL: <https://zakon.rada.gov.ua/laws/main/1697-18>)

45 Criminal Procedure Code of Ukraine. URL: <https://zakon.rada.gov.ua/laws/main/4651-17>

46 Prosecutor: manages? Controls? Oversees? Investigates: report on the results of the study «The role of the procedural leader - the prosecutor of the Specialized Anti-corruption Prosecutor's Office at the pre-trial stage of the trial»/Belousov Y., Wenger V., Orlean A., Yavorska V., Mitko V., Chuprov V.; under general edition of Belousova Y. - K. 2018. P. 49-53.

47 Report of the Council of Prosecutors of Ukraine on the fulfillment of the tasks of the prosecuting authorities, the state of financing and organizational support of the prosecutor's office. URL: https://www.gp.gov.ua/ua/file_downloader.html?m=fslib&t=fsfile&c=download&file_id=205790

48 Prosecutor: manages? Controls? Oversees? Investigates: report on the results of the study «The role of the procedural leader - the prosecutor of the Specialized Anti-corruption Prosecutor's Office at the pre-trial stage of the trial»/Belousov Y., Wenger V., Orlean A., Yavorska V., Mitko V., Chuprov V.; under general edition of Belousova Y. - K. 2018. P. 52

49 NABU and SAPO consider inadmissible change of jurisdiction in the case of Oshchadbank and urge to return the case - a joint statement. URL: <https://nabu.gov.ua/novyny/nabu-i-sap-vvazhayut-neprypustymoyu-zminu-pidslidnosti-u-spravi-oshchadbanku-ta-zaklykayut>

Outcome: Interoperable IS between PPO, judiciary and law enforcement bodies dealing with corruption cases – 30 %

49. As of November 2019, an interoperable IS is planned to be introduced only between anti-corruption bodies investigating or investigating corruption cases, is in the stage of implementation (NABU, SAPO, HAAC), beta version is planned to be launched from May 2020. According to the tender documentation, IS it will include the following functions: 1) providing electronic communication between detectives, prosecutors and the court investigating or investigating corruption cases; 2) replacement of paper documents with electronic ones, with the possibility of using electronic digital signature; 3) the possibility to create new and join old criminal proceedings in the system of corruption crimes; 4) appointing detectives and prosecutors in criminal proceedings, setting up investigative and prosecution groups; 5) documenting the procedural actions, as well as creating, reviewing and approving the relevant procedural documents (protocols, complaints, etc.) in electronic form; 6) the ability to download and view all necessary documents, including evidence; 7) entering and changing information about participants in criminal proceedings; 8) planning of carrying out of procedural actions, tracking of the current state and deadlines of their carrying out; 9) implementation of automated data exchange with external state registers and databases; 10) separation and control of access to the system of users to ensure the rights to information in accordance with the procedural status of users, profiles and standards of access and restrictions on the protection of information in the part of the pre-trial investigation. IS will ensure communication between NABU (Ascot), prosecutor's office (Megapolis), court systems at all stages (pre-trial investigation, preliminary proceedings, court proceedings)⁵⁰. It is worth noting that the main challenges for the implementation of the relevant system are: 1) inconsistency regarding the model, concept of the relevant IS; 2) NABU, SAPO and HAAC are only passively involved in this process; 3) Even among the NABU, the SAPO, and the HAAC, there is a lack of consistency in access to the relevant system of advocates; 4) Disagreement on the need to amend the CPC of Ukraine and by-laws, and in the absence of such amendments to the issue of the admissibility of relevant IS procedural documents in court proceedings in the absence of relevant amendments to the legislation; 5) Failure to include the SC in the creation of an appropriate system.

Outcome: Information on successful and unsuccessful prosecutions of corruption available online. – Level of attainment 70%

50. Ensuring transparency and openness of information is one of the tools of successful fight against corruption. To achieve this, in Section 10.4. an output was formed to analyze and publish statistics on sentencing and judicial review of corruption cases in the Annual Report of the Prosecutor's Office and the Judiciary. The implementation of this measure was entrusted to the prosecuting authorities, courts and NABU, respectively.

51. On the web-site of the GPO (<https://www.gp.gov.ua/>) on the main page there is the section «Combating Corruption». It shows general statistics on the number of reported corruption offenses (for 2017 - 9425, for 2018 - 9155, as of November 2019 - 8715), the number of criminal proceedings brought to court (2017 - 3139 , 2018 - 3126, as of November 2019 - 2963) and the number of convicted persons (2017 - 1692, 2018 - 766, as of November 2019 - 450). On the same site, the section «Statistics on the state of crime and the results of prosecutorial and investigative activity» there are reports on registered criminal offenses

⁵⁰ Contract notice: 2019/S 063-146918: Open procedure: eCase Implementation – EUACI. URL: <https://um.dk/en/about-us/procurement/contracts/long/contract-opportunities/newsdisplaypage/?newsID=A6D021F5-1BA0-4C8F-921A-CF14F912B0F2>



and the results of their pre-trial investigation, which, among other things, takes into account information on the number of registered corruption offenses, the number of persons who were given notices of suspicion of committing such crimes, the number of offenses, the proceedings in which were sent to court. These reports also contain separate sections with information on criminal offenses which are in pre-trial investigation by prosecutorial bodies and the National Anti-Corruption Bureau of Ukraine⁵¹. It should be noted that data on open investigated cases are available only in NABU, since the Law regulating the activity of this body contains a direct indication of the need to include such data in the report on NABU activity⁵².

52. It should be noted that the validity of the data published by the GPO on the fight against corruption has been repeatedly questioned by experts and civil society representatives. For example, the following is an example of the distortion of statistical information: in 2018, the Prosecutor General emphasized that 1692 persons were convicted in Ukraine for committing corruption offenses. In fact, in 2017, only 1,365 court decisions entered into force and the number of convicted persons was 1048⁵³. The methodology of calculating “counted facts”, “directed to court”, “persons sentenced” indicators of the section “Fight against corruption” on the GPO website raises no fewer questions from experts⁵⁴.

53. NABU and SAPO additionally publish their activity reports on the NABU website (<https://nabu.gov.ua/>) and also provide briefings on the presentation of their activity reports for every six months. These reports are available on NABU website (section «Activity reports» - <https://nabu.gov.ua/reports>) and are publicly available. In the era of digital transformation and the spread of citizen activity on social networks, news about the activities of pre-trial investigation of corruption offenses of NABU and SAPO is actively published on the social networking pages of these law enforcement agencies. Therefore, anyone can follow the cases of successful or unsuccessful prosecution of persons suspected/accused of corruption.

54. In the judiciary, the SJA is responsible for reporting on corruption offenses proceedings. The primary indicator of success and/or failure of prosecution is the number of persons convicted of criminal offenses. Statistics as to this indicator can be found in the ‘Open Data’ section of the SJA website (<https://aj.court.gov.ua/dsa/inshe/oddata/>). The SJA has two statistical reports that provide quantitative and qualitative data on the kind of people convicted (Form No. 7 and Form 6, respectively). Of course, experts also have questions about filling in these statistics: for example, it is indicated that such information is incomplete and does not allow to fully investigate the state of combating corruption in the country. It is stated that the form No. 7 (report on the kind of persons convicted) is filled by persons who are not of primary importance for statistical accounting in cases of corruption (lack of data on sentencing of judges, prosecutors, heads of central executive authorities and other specific categories of persons authorized to perform functions state and local government⁵⁵).

55. Currently, the issue of reporting on the process and results of the trial of corruption offenses may be referred to the newly established HACC. The Law of Ukraine “On HACC”

51 Statistical information on the state of criminality and the results of prosecutorial and investigative activity. URL: <https://www.gp.gov.ua/ua/statinfo.html>

52 The Law of Ukraine “On NABU” URL: <https://zakon.rada.gov.ua/laws/main/1698-18>

53 Alternative report on the evaluation of the effectiveness of the implementation of state anti-corruption policy/[M. Khavroniuk, O.V. Kalitenko, D.O. Kalmykov, etc.]; under the general edition of M.I. Khavroniuk. - K., 2019. P. 287

54 Ibis, P. 287

55 Statistical information on enforcement of criminal legislation on combating corruption. URL: <http://www.pravo.org.ua/ua/news/20872097-3.4.-statistichna-informatsiya-schodo-zastosuvannya-kriminalnogo-zakonodavstva-pro-protidiyu-koruptsiyi>



contains the relevant norm, namely: para. 2, Part 1, Article 4 provides for the power of the HAAC to analyze the judicial statistics, to study and summarize the case law in criminal proceedings referred to its jurisdiction, to inform the Supreme Court about the results of the case law analysis and to submit proposals to it for opinions on draft legislative acts, draft legislative acts related to the organization and activities of the High Anti-Corruption Court, special requirements for judges of this court and the guarantees of their activity, as well as their publication on its official website⁵⁶. To this end, a department of court statistics, analytical work and case law analysis of the HAAC. This section will be discussed in more detail in the relevant section of this report, which focuses on the work of think tanks in law enforcement and the judiciary. Given that HAAC is a relatively new body (started functioning only in September 2019), there is no significant statistics, including reports, on the state of prosecution of perpetrators of corruption offenses yet. However, like other anti-corruption bodies, HAAC actively disseminates information about the course of court cases consideration on its Facebook page.

56. Summarizing the above, it should be mentioned that the task of providing Internet access to information on successful or unsuccessful prosecutions for corruption can be considered accomplished by 70%: information on the status of the pre-trial investigation is published in NABU and SAPO reports; statistical information on the number of registered criminal offenses, the report on the kind of persons convicted and prosecuted and types of criminal penalties are also available on NABU, GPO and SJA websites, respectively. However, based on expert conclusions, the following should be noted: all this information is inconsistent, it lacks quality, systemic approach. In some cases, information is only partial and does not reveal complete information on the state of countering corruption (information on the kind of persons convicted) or statistical information is not credible and its validity is questioned (statistical information from the website of the Prosecutor General's Office of Ukraine). Emphasis is given to the prioritization of one statistical information (the number of registered criminal proceedings on corruption offenses, the number of cases of corruption offenses sent to court, the number of convicted persons who committed these offenses) while neglecting other (the number of investigative cases opened, the number of investigative cases closed during the pre-trial investigation, including as a result of corruption intervention, data on the amount of damages and injury caused by corruption offenses, data on funds and other property received as a result of committing corruption offenses and which were returned to Ukraine^{57,58}.

Outcome: Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings – Level of attainment 50 %.

57. In this direction, the Supreme Court of Ukraine made significant progress during the evaluation period. A joint department of analytical and legal work was set up in the Supreme Court, which allowed for a more coherent analysis and preparation of appropriate recommendations. The department consists of 90 employees, that is, there is enough professional capabilities. As of today, the SC's Department of Analytical and Legal Work has worked on

56 The Law of Ukraine «On the HAAC». URL: <https://zakon.rada.gov.ua/laws/main/2447-19>

57 Alternative report on the evaluation of the effectiveness of the implementation of state anti-corruption policy/[M.I. Khavroniuk, O.V. Kalitenko, D.O. Kalmykov, etc.]; under general edition of M.I. Khavroniuk. - K., 2019. P. 287

58 Statistical information on the enforcement of criminal legislation on combating corruption. URL: <http://www.pravo.org.ua/ua/news/20872097-3.4.-statistichna-informatsiya-schodo-zastosuvannya-kriminalnogo-zakonodavstva-protidiyu-koruptsiyi>



about 40 draft laws for 2019, and in 2018, 60 draft laws were worked on. The relevant SC department summarizes the case law on corruption offenses and administrative corruption offenses as to judges. On the basis of appropriate analysis, they either give recommendations to judges on the interpretation of the rules, and if the cause of the problem identified is a gap in the law, they report the problem to lawmakers. The Supreme Court of Ukraine cooperates closely to improve the legal framework with the law enforcement committees, legal policy committee, and cooperate with the Ministry of Justice of Ukraine and hold joint meetings. The SC also coordinates the analytical work with NABU at the level of top management of the respective institutions. Regarding the newly created High Anti-Corruption Court, an analytical unit has been set up, however, the court does not plan to make any relevant proposals to improve the legal framework, as their mandate does not provide for such powers. The analytical unit also operates at NABU, but they consider that their main task is to work on legislative amendments and get them across to NABU staff, rather than analyzing law enforcement to develop proposals for improving the regulatory framework.



CONCLUSIONS

This section sets out general views on the level of attainment of the outcomes of the relevant area(s) of the JSRS and JSRSAP, and provides recommendations for improving them.

58. Experts estimate that over the three years, some progress has been achieved on the outcomes of 10.4 component planned for the 2015-2020 general period. The overall attainment level of this component could be determined as 52%.

General recommendations:

- To strengthen communication at the level of the judiciary and law enforcement agencies, as well as newly created anti-corruption bodies (NABU, SAPO, HAAC) in order to achieve adequate results provided for by component 10.4, especially with regard to the implementation of the interoperable IS between prosecutors, the judiciary and law enforcement agencies, that investigate or consider corruption cases.
- When developing a strategy for the next cycle, it is important to take into account the experience of implementing the previous cycle strategy. The new strategy should be based on the outcomes of the 2015-2020 JSRS and JSRSAP already achieved.
- When defining the anti-corruption component and its parameters in the JSRS for the next cycle, it is important to align it with the anti-corruption strategy for the relevant period.
- To ensure further coherence and consistency between the language versions of the JSRS and JSRSAP to avoid legal uncertainty;
- To include target institutions (National Police, State Bureau of Investigation, newly created bodies (Bureau of Financial Investigation) involved in the implementation of the JSRS and JSRSAP in the direction of combating corruption);

Recommendations on ensuring enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption cases:

- Continue implementing independence standards for prosecutors and judges dealing with corruption cases;
- Establish a proper management system in prosecuting bodies that investigate corruption cases, which will guarantee the procedural independence of SAPO prosecutors by adopting relevant acts at the legislative level or at by-law level;
- Enhance the financial independence of prosecutors, including SAPO prosecutors, by limiting the practice of cancellation of bonuses;
- In order to limit the influence on the official activity of SAPO employees, to determine the exceptional incidents in which SAPO Chief may change the prosecutor in criminal proceedings on corruption offenses;

Recommendations on interoperable IS between PPO, judiciary and law enforcement bodies dealing with corruption cases:

- Amendments to the Criminal Procedure Code of Ukraine and laws governing the activities of prosecutors, the judiciary and law enforcement agencies, as well as amend-

¹² <http://www.probation.gov.ua>



ments to by-laws in order to create a legal framework for the introduction of an interoperable IS between prosecutors, the judiciary who investigate or consider corruption cases.

Introducing amendments to the Criminal Procedure Code of Ukraine to strengthen the prohibitions on the transfer of criminal proceedings, which are under the control of NABU (and, accordingly, SAPJ), to other bodies of pre-trial investigation;

Strengthen communication between NABU, SAPO, HACC, and involve the Ministry of Internal Affairs, NBI, the Prosecutor General of Ukraine in establishing an interoperable IS between prosecutors, the judiciary and law enforcement agencies investigating or considering corruption cases.

Recommendations on information on successful and unsuccessful prosecutions of corruption available online:

- Determine, at the legislative or by-law levels, the methodology for calculating anti-corruption indicators;
- Develop and implement requirements relating to statistics in the field of combating corruption;
- Identify specific bodies in the judiciary and criminal justice system that will be responsible for maintaining, analyzing and processing statistics in the area of combating corruption, publishing them;
- Establish a single information system between prosecutors, the judiciary, and law enforcement agencies investigating or investigating corruption cases, to facilitate the collection and processing of such statistical information.

Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings.

- Intensify the work of the relevant departments in the Prosecutor General's Office of Ukraine, HACC and NABU within the next year. Establish a regular format for cooperation and coordination, including meetings of analytical and research units of prosecutorial office and on the basis of SC in order to summarize proposals to improve the legal framework and practice to remedy the shortcomings of unsuccessful attempts to prosecute corruption cases.
- In the next strategy, to envisage among the duties of the HACC to analyze the unsuccessful attempts to prosecute corruption in committing certain types of crimes, to make annual reports and on that basis to make proposals for improvement of the legal framework through the SC.

ANNEX I: ASSESSMENT-SPECIFIC MATRIX

Matrix of identification of methodology/evaluation of specific measures

Evaluation complex **No6**

Area of intervention 10.4

Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector

| Outcomes | Desk re-search | Third-party reports | Panel discussions | Interviews | Surveys | Data analysis | Other methods | Comments | Level of attainment |
|--|----------------|---------------------|-------------------|------------|---------|---------------|--------------------|----------|---------------------|
| – Enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption cases; | 1-2 | 1-2 | - | - | - | 1-2 | | | 50% |
| – Interoperable IS between PPO, judiciary and law enforcement bodies dealing with corruption cases; | 1-2 | 1-2 | - | 1-2 | - | 1-2 | Focus group 1-2 | | 30% |
| – Information on successful and unsuccessful prosecutions of corruption available online; | 1-2 | 1-2 | - | - | - | 1-2 | - | | 70% |
| – Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings; | 1-2 | 1-2 | - | 1-2 | - | 1-2 | - | | 50% |



ANNEX II LIST OF SOURCES USED

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ANNEX III EXTRACT FROM JSRSAP

| Chapter 10 Increasing Effectiveness of Justice Sector in Fight Against Organised Crime and Corruption | | | | | | |
|---|--|-------------|-------------|---|--|---|
| Action | Implementation Deadline | | | Performance Criteria | | |
| | End of 2016 | End of 2018 | End of 2020 | Measures/Outputs | Responsible Body / Means | Outcomes |
| Area of Intervention 10.4 Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector | | | | | | |
| 10.4.1 | Development of capacities of prosecution and judiciary to deal with corruption cases, including 'elite' corruption | | | | | |
| | | | | 1. Specialised units at PPO for investigating corruption, especially 'elite' corruption, fully operational | PPO, NABU / Decisions, contracts, job descriptions, placement plans, trainings, practice guides, manuals, forensic and other technical equipment, hardware and software procured | <ul style="list-style-type: none"> – Enhanced degree of protection from undue pressure in law and practice for prosecutors and judges dealing with corruption cases; – Interoperable IS between PPO, judiciary and law enforcement bodies dealing with corruption cases – Information on successful and unsuccessful prosecutions of corruption available online; – Research and analysis units at PPO and courts regularly suggest improvements in regulatory framework and practice in order mend gaps established in analysing unsuccessful attempts to prosecute corruption in selected types of wrong-doings |
| | | | | 2. Specialised sections of judges for dealing with corruption cases, especially 'elite' corruption, fully operational | SJGB, NABU, CJ, SC, HCSs, Courts of Appeal, District Courts, SJA / Decisions, contracts, job descriptions, placement plans, trainings, practice guides, manuals | |
| | | | | 3. Reviewed regulatory framework on protection of prosecutors and judges from undue pressure when dealing with corruption cases | PPO, CJ, NABU, MOJ, Parliament / Decisions, statutes and rules amended | |
| | | | | 4. Practice guides and training modules for prosecutor and judges dealing with corruption cases developed, disseminated and updated regularly | PPO, NABU, Training Centres and Academies / Decisions, trainings, publications | |
| | | | | 5. Statistics on prosecutions and trails of corruption cases published and analysed in Annual Activity Reports of PPO and judiciary | PPO, NABU / Reports | |





Evaluation Report

on

Area of intervention 10.4 Increased Effectiveness in Combatting Corruption by Dedicated Capacities of Justice Sector

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