

TI UKRAINE

GFAR PROGRESS REPORT ON UKRAINE – DECEMBER 2019

DEVELOPMENTS IN GFAR COUNTRIES SINCE DECEMBER 2017

KEY FINDINGS

Adequacy of Legal Framework

To date, a number of legislative gaps remain which negatively affect identifying and investigating corruption-related crimes. Since March 2018, there have been effective standards that complicate the investigation process: forensic reviews can only be held following the decision of the investigative judge and only in public institutions, the time limit for pretrial investigations was dramatically cut and the option to appeal being served with charges has been re-introduced (a corruption risk that had been eliminated when new procedural legislation was adopted in 2012). According to the impact assessment carried out by the Public Oversight Council under the NABU, this has significantly complicated the work of the Bureau and other law enforcement agencies.¹

Due to discrepancies between the Criminal Procedural Code with the new legislation on asset finding and recovery, as well as the limits applying to the ARMA's (which cannot participate in the decision-making concerning transfer of assets for management) in combination with a broad discretion of the investigative judge in this respect, a significant share of assets have not been transferred for management.

An equally negative development is the abolishment of criminal liability for illicit enrichment. This liability was introduced in Ukraine in 2015 as part of the Action Plan for visa liberalization with the EU. Under this article, the NABU carried out pretrial investigations not only into the ousted president, but also into a number of governmental and other elected officials who were in office after the Revolution. After the Constitutional Court of Ukraine determined the provision of the Criminal Code of Ukraine on illicit enrichment unconstitutional, the SAPO had to terminate over 60 criminal proceedings.

Adequacy of Institutions

After the Revolution of Dignity of 2013-2014, punishing high-ranking perpetrators of crimes, unveiling all the corrupt schemes of the former president and his inner circle and bringing them all to liability came to the forefront. In view of that, during the four last years, the NACP² (a special preventative anti-corruption agency), the NABU³ (a law enforcement agency), the SAPO (specialized anti-corruption

¹ <https://rgk-nabu.org/uk/diyalnist-rhk/korysni-dokumenty/analiz-zakonodavchogo-regulyuvannya-poryadku-zdiysnennya-dosudovogo-rozsliduvannya-do-ta-pislya-popravok-lozovogo-do-kriminalnogo-protseusalnogo-zakonodavstva-ukraini>.

² National Agency for Corruption Prevention.

³ National Anti-Corruption Bureau of Ukraine.

prosecution as a structural unit of the Prosecutor General's Office), the ARMA⁴ (an agency for finding, tracing and management of seized assets) were created.

The NABU was created as an independent law enforcement agency with clearly defined jurisdiction (corruption-related crimes committed by high-ranking officials). It was this independence, alongside with international and public support, that provided the necessary impetus for hundreds of criminal investigations launched by the agency. At the same time, the SAPO, which performs procedural control over the activity of NABU detectives, remains a structural unit, remaining institutionally and financially dependent of the PGO, which has a negative impact on the speed and effectiveness of investigations., Established in April 2019, the High Anti-Corruption Court handed down its first decision in October 2019.. Now it is more likely to assess how effective the newly created anti-corruption agencies are.

2016 was also the year in which the ARMA was created — an agency based on the model of international institutions designed to locate, trace and manage assets obtained through criminal activity. Before the ARMA was created, seized assets were either returned to their owner for management or were confiscated and remained unused, losing their economic value day by day. The ARMA's work is based on the principle of retaining the economic value of an asset for the duration of the entire criminal proceedings, which means that the seized property is either transferred to a temporary manager or, in certain cases, sold, with the money being deposited into a special account until the court reaches the final verdict in the case. During the relatively short period of its activity, the ARMA has already become a member of the ARO/AMO network, which is an international platform for public institutions designed to trace and recover assets.

At the same time, Ukraine still lacks a comprehensive strategy on recovery of assets obtained through criminal activity. Thus, the ARMA's achievements are rather incidental and do not reflect the results of systemic work on recovery of criminally obtained assets.

Transparency and Accountability

According to Open Data Barometer, published at the end of 2018, Ukraine is the runner-up among the countries having achieved the greatest progress during the last four years in terms of publication and use of open data for authority accountability⁵. This was preceded by implementation of electronic asset declarations, the launch of the public procurement system "ProZorro" and the introduction of open access to over a hundred public registers⁶.

In addition, public councils were formed under the newly created NABU, NACP and ARMA, consisting of civil society representatives tasked with civic oversight of the respective institution's activity.

⁴ National Agency of Ukraine for Finding, Tracing and Management of Assets Obtained through Corruption and Other Crimes, or Asset Recovery and Management Agency.

⁵ https://opendatabarometer.org/?_year=2017&indicator=ODB.

⁶ <https://www.kmu.gov.ua/ua/news/248570652>.

Despite the experience of an openness that is unique for Ukraine, agencies do not always consistently publish information. The Unified State Register of Seized Assets has not yet been created, even though its creation was stipulated by the specialized law on the ARMA. Information on the Agency's activity is only relatively open — information on specific assets or managers can only be obtained by monitoring court decisions or upon requests for information, with the ARMA having a tendency to ignore the latter. The process of transferring assets for management is also not sufficiently transparent. The ARMA often fails to publish open calls for asset managers or manually sends such calls to verified entities the Agency has worked with before.

At the same time, on a legislative level, the fundamental principles of asset finding and recovery have been formalized. This experience can later be used in the Agency's activity on the international level.

Enforcement Experience

Ukraine already has quite successful experience of cooperation with the designated agencies of other countries. For instance, in 2018, French law enforcement noticed that an expensive estate in Burgundy was sold. After a short investigation, the final beneficiary of the financial operation turned out to be a Ukrainian citizen. French officers sent a request to Ukraine. It turned out that Ukrainian law enforcement had been investigating the Ukrainian citizen detained in France for alleged corruption-related crimes, but the case was closed after a forged death certificate was presented.

At the same time, the process of transfer of foreign assets under the ARMA's management is yet to be established — in certain cases, law enforcement bodies did not even file a respective motion with the court. In certain other cases, foreign assets were never transferred to the ARMA (the case on former SFS head Myroslav Prodan and his real estate in Turkey).

The ARMA works predominantly at the national level. In 2018, ARMA received Yanukovich's Mezhyhiria residence for management. This used to be a public residence until it was privatized by Yanukovich. This privatization became a symbol of the sheer scope of the former president's and his inner circle's corruption. At the end of 2018, the ARMA announced a call for the management for the residence. The peculiarity of this asset is that its maintenance and management require significant funding and it is not profitable. This immediately makes the asset not very attractive for a potential manager. As a result, only two companies were competing, and the competition itself was not transparent. The Mezhyhiria case is interesting because it highlighted the problem of the social aspect of the asset status. After Yanukovich fled the country, Mezhyhiria turned into a national park, annually attended by millions of Ukrainians and foreigners. That is why it is important to establish additional criteria for potential managers to ensure adequate functioning of the asset as well as, where appropriate, to facilitate entrepreneurial activities on the estate, and to support socially important civic initiatives.

Engagement of Non-Governmental Stakeholders

An area of improvement is the engagement of public and international experts in the monitoring of public agencies' activity. The role of international experts in recruitment of High Anti-Corruption Court judges was a unique experience⁷.

Public councils under the newly created NABU, ARMA and NACP are designed to supervise the activity of the respective agency, the use of funding, provide anti-corruption expert reviews of legislative acts and participate in recruitment. Public engagement in selection boards, including those for heads of anti-corruption agencies, has also proven important.

At the same time, the initiative to engage representatives of civil society usually comes not from the institution, but from the public. This somewhat hampers the activity of public councils, which have very limited authority.

International Cooperation⁸

Laundering activities e.g by transferring funds abroad and other activities to give them a legal appearance remain an inherent part of corrupt schemes investigated by NABU detectives. A preliminary assessment of NABU and SAPO investigations shows that the damage caused to the government through corruption involving foreign countries exceed UAH 7 billion. To investigate all the circumstances of the crimes, requests for international legal assistance have to be addressed to the competent agencies of other countries.⁹

In its turn, the ARMA has started cooperation with a number of international partners and networks¹⁰, including StAR and Camden Assets Recovery Interagency Network (CARIN).

Another important step is that the Government of Ukraine has approved the draft Presidential Decree introducing a mechanism for the engagement of "private detectives"¹¹ in the process of tracing property

⁷ Head of the Public Council of International Experts Sir Anthony Hooper emphasized that Ukraine made a significant achievement by creating a completely new approach to ensuring the transparency of recruitment of judges that no other country had done before. Source: <https://www.ukrinform.ua/rubric-polytics/2629669-vidbir-do-visogo-antikorsudu-bezprecedentna-prozorist-ta-unikalnij-svitovij-dosvid.html>.

⁸ See <https://arma.gov.ua/news/typical/arma-rozglyanulo-935-zvernen-vid-pravoohoronnih-organiv-ukraini-ta-inozemnih-derjav>.

⁹ Top five countries by the number of NABU requests: Latvia, Cyprus, the UK, Germany and Switzerland. Source: <https://nabu.gov.ua/sites/default/files/reports/zvit.pdf>.

¹⁰ In 2018, the ARMA was included on the list of competent agencies designated to prevent and fight crimes and cooperate with the Europol; it acquired the observer status in the Balkan Asset Management Interagency Network (BAMIN), started cooperation with the United Nations Interregional Crime and Justice Research Institute (UNICRI). Source: <https://arma.gov.ua/files/general/2019/02/25/20190225105244-44.pdf>.

¹¹ i.e. lawyers who are entitled to practice law in the foreign jurisdiction concerned.

abroad.¹² This would enable foreign detectives to participate in the process of tracing assets with a view to their “freezing”/seizure in a foreign country when such assets are under investigation in Ukraine. The engagement of private detectives would be paid on the basis of a success fee, and through such detectives, Ukraine will be able to appeal to foreign judges in a civil proceeding to freeze assets located outside of Ukraine.

To date, the grand corruption-related crimes of former president Yanukovich and his inner circle has not been on trial. According to the GFA report, during 2004-2013, over USD 11 billion flowed out of Ukraine every year.¹³ Lack of effective investigation on the national level and absence of court verdicts, as well as flawed mechanism of sanctions against individuals lead to gradual weakening of the sanctions regime by the EU. Even though currently there are sanctions against Yanukovich and his inner circle in place, sanctions have already been disputed in recent years.¹⁴

RECOMMENDATIONS:

Institutions:

- Reboot of the National Agency for Corruption Prevention. In particular, Transparency International Ukraine emphasizes that a new competition should be held to replace NACP members, that the Agency must lose its [collegiate](#) nature and that external audit must be performed;
- Systemic changes in the Specialized Anti-Corruption Prosecutor’s Office: reelection of the SAPO management under a new procedure, strengthening of the procedural status of the Head and Deputy Head of the SAPO, granting the SAPO a status of a separate legal entity similarly to a regional prosecutor’s office;
- Reinforcement of the ARMA: harmonizing CPC provisions with the specialized law, changes to regulatory acts of Ukraine which govern management activity, discussions about the adequacy of the social component in the ARMA’s activity.

Legal Framework

- Restoring criminal liability for illicit enrichment.

Transparency and Accountability

- Enforcement of systematic publication of information on the activity of anti-corruption infrastructure agencies in official sources;
- Ensuring public access to information on assets transferred to the ARMA for management;
- Creation of the Unified State Register of Seized Assets.

¹² See <https://arma.gov.ua/en/news/typical/arma-rozrobleno-mehanizm-zaluchennya-inozemnih-detektiviv-do-povernennya-v-ukrainu-aktiviv-zdobutih-zlochinnim-shlyahom>. The draft has not been submitted to date.

¹³ https://secureservercdn.net/45.40.149.159/34n.8bd.myftpupload.com/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf.

¹⁴ <https://www.eurointegration.com.ua/articles/2019/07/12/7098401/>.

Engagement of Stakeholders

- Further engagement of the public in monitoring of public agencies through public councils;
- Ensuring the participation of public council representatives in selection boards (for instance, currently, the public is not engaged in the recruitment process in the ARMA and in the NACP);
- Engagement of independent international experts in the recruitment of heads of anti-corruption agencies and audit of these agencies' activity.

International Cooperation

- Compliance with GFAR principles concerning management and transfer of stolen assets seized in corruption-related crimes and Ukraine's fulfillment of undertaken cooperation commitments in the context of tracing and recovery of such assets;
- Adequate investigation by pretrial investigation agencies and prosecution into crimes committed by Yanukovich and his inner circle.