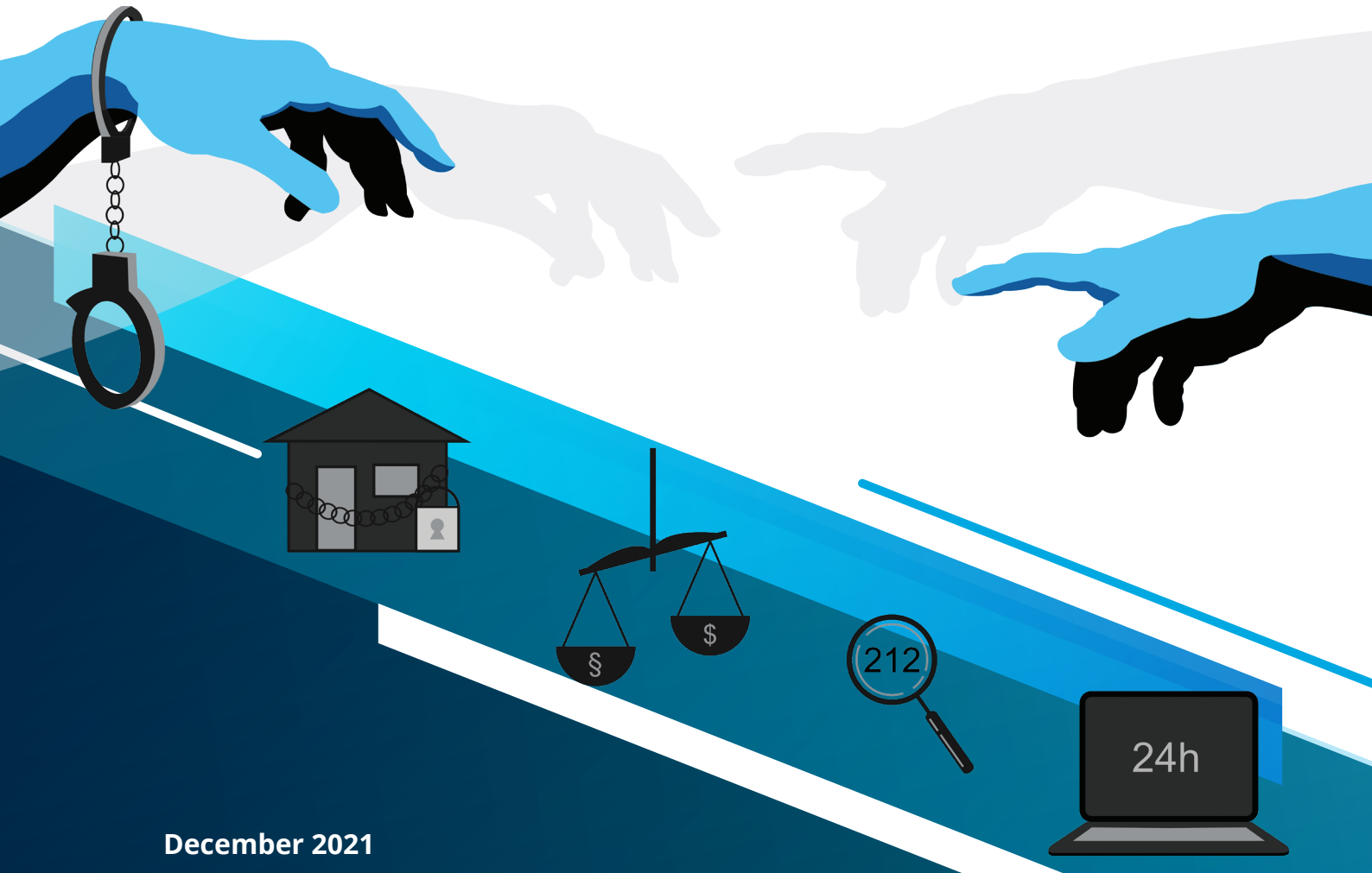
Business OMBUDSMAN Council

ABUSES AND PRESSURE INFLICTED BY LAW ENFORCERS ON BUSINESS

SYSTEMIC REPORT



December 2021

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LIST OF ABBREVIATIONS

Abbreviations	Definition
BES	Bureau of Economic Security of Ukraine
PD MD NP	Police department of the Main Directorate of the National Police
VRU	Verkhovna Rada of Ukraine
SC	Supreme Court
SCU	Supreme Court of Ukraine
GPO	General Prosecutor's Office
MID NPU	Main Investigatory Department of the National Police of Ukraine
MD	Main Department
MD SFS	Main Department of the SFS in a region
MD NP	Main Department of the National Police
Disciplinary Statute of the NPU	Law of Ukraine "On the Disciplinary Statute of the National Police of Ukraine", No.2337-VIII, dated March, 15 2018, as amended
SFS	State Fiscal Service of Ukraine
USRCD	Unified State Register of Court Decisions
SRL	Single record logbook
URPI	Unified Register of Pre-Trial Investigations
ECHR	European Court of Human Rights
Law No. 113-IX	Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office" No.113-IX, dated September 19, 2019
Law No. 1498-IX	Law of Ukraine "On Amending the Criminal Procedure Code of Ukraine on Introduction of information and telecommunication Pre-Trial Investigation System" No. 1498-IX, dated June 1, 2021
Law No. 2213-VIII	Law of Ukraine "On Amendments to Certain Legislative Acts to Ensure Observance of the Rights of Participants to Criminal Proceedings and Other Persons by Law Enforcement Bodies During the Pre-Trial Investigation" No. 2213-VIII, dated November 16, 2017

Abbreviations	Definition
Law of Ukraine "On forensic examination"	Law of Ukraine "On forensic examination" No. 4038-XII, dated February 25, 1994, as ammended
Law of Ukraine "On the Prosecutor's Office"	Law of Ukraine "On the Prosecutor's Office" No. 1697-VII, dated October 14, 2014, as ammended
AFU	Armed Forces of Ukraine
Guide for scheduling and conducting forensic examinations and expert reviews	Guide for scheduling and conducting forensic examinations and expert reviews, approved by the Order Ministry of Justice of Ukraine No. 53/5, dated August 10, 1998
IT PIS	Information and telecommunication pre-trial investigation system
IPNP ITS	"Information Portal of the National Police of Ukraine" Information and Telecommunication System
Personnel Commission	Personnel commission on consideration of the disciplinary complaints regarding committing an offense by a prosecutor and conducting of disciplinary proceedings established by the General Prosecutor`s Order No. 9, dated January 9, 2020
CC	Criminal Code of Ukraine
CMU	Cabinet of Ministers of Ukraine
KCSA	Kyiv City State Administration
Concept	Concept of the Introduction of Information and Telecommunication Pre-Trial Investigation System, unified for all law-enforcement bodies, which was developed by the Interdepartmental Working Group on the Introduction of Electronic Criminal Proceeding
CP	Criminal proceeding
CPC	Criminal Procedure Code of Ukraine
CCU	Constitutional Court of Ukraine
NABU	National Anti-Corruption Bureau of Ukraine
Order No. 100	Order of the Ministry of Internal Affairs of Ukraine No. 100 Of February 8, 2019
Order No. 633	Order of the SFS of Ukraine No. 633, dated July 18, 2016
NPU, police	National Police of Ukraine
PGO	Prosecutor General's Office

Abbreviations	Definition
VAT	Value added tax
Previous Report	Systemic Report "Abuse of Powers by the Law Enforcement Authorities in their Relations with Business" (January, 2016)
Regulation No. 298	Prosecutor General's Order No. 298, dated June 30, 2020
Regulation on DC in the NPU	Regulation on Disciplinary Commissions in the National Police of Ukraine, approved by the Order of the Ministry of Internal Affairs of Ukraine No. 893, dated November 7, 2018
Council	Business Ombudsman Council
SSU	Security Service of Ukraine
ID	Investigative Department
"ID FI" or "tax police"	Investigative departments of financial investigations of the SFS of Ukraine
ID MD NP	Investigative department of the Main Directorate of the National Police in a region
GRECO	Group of States against Corruption

1 FOREWORD

This systemic report of the Business Ombudsman Council (**"Council"**) explores the problem of abuses and pressure inflicted on businesses by law enforcers (**"Report"**).

More than 5 years have passed since January 2016, when the Council's Systemic Report "Abuse of Powers by the Law Enforcement Authorities in Their Relations with Business" (**"Previous Report"**) was published.

At that time the Council was at the early stage of its activity, having received just **621** complaints from businesses, of which **112 (18%)** purported to challenge malpractices at the part of law enforcers.

We have come a long way since then. As at November 1, 2021 the total number of complaints received by the Council reached **10,028**, out of which some **16% (1595)** represent the number of complaints lodged against law enforcers. As a whole, during all full years of the Council's activity, the share occupied by the latter's category have never been less than 14%: 14% – in 2017; 18% – in 2018; 16% – in 2019; and 15% – in 2020. For 10 months of 2021 the figure is 16%. Such statistics proves that the problem of pressure and abuses at the part of law enforcers actually never lost its significance for the Ukrainian businesses.

Noteworthy, according to the Council's observations, the significance of this problem does not vary depending upon the region. In particular, as at October 25, 2021, the largest number of complaints against law enforcers came from Kyiv City (679 complaints), Kyiv (130), Dnipropetrovsk (177) and Kharkiv (97) oblasts. The smallest number was received from Khmel'nytska (13) and Chernivtsi (6) oblasts. However, if the one were to analyze the percentage stake occupied by this category, the difference between oblasts (the city of Kyiv is not taken into account) is actually insignificant. In particular, while complaints against law enforcers represent 18% of those lodged by businesses from the city of Kyiv, – in Chernivtsi and Khmel'nytska Oblast the figure is 13% and 9% respectively.

In lieu of such situation in Ukraine, it is somewhat ironic that abuses and pressure inflicted by law enforcers on business are not reflected in the methodology of the most well-known international ratings (indices) ranking countries' investment attractiveness and/or quality of business environment. Such generally recognized international rankings as the World Bank's "*Doing Business 2020;*"[1] the Economist Intelligence Unit *Democracy Index 2020*;[2] or *Corruption Perceptions Index 2020*[3] do not (or didn't) examine the issue of law enforcer's pressure on business at all.

Meanwhile, we noticed that the *Rule of Law Index 2020*[4] compiled by World Justice Project, actually examines, among others, criminal justice system as one of the factors affecting the rule of law. In particular, the following is taken into account: 1) pre-trial investigation system's effectiveness; 2) effectiveness and timeliness of the criminal justice system; 3) effectiveness of correctional system in reducing criminal behavior; 4) impartiality of the

[1] *See* the link: https://www.doingbusiness.org/content/dam/doingBusiness/country/u/ukraine/UKR.pdf (discontinued since 2021)

[2] *See* the link: https://www.eiu.com/n/campaigns/democracy-index-2020/

[3] *See* the link: https://www.transparency.org/en/cpi/2020/index/ukr

[4] *See* the link: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf

criminal justice system; 5) freedom of the criminal justice system from corruption; 6) freedom of the criminal justice system from improper state interference; and 7) abidance by the law and rights of the accused.

In the overall ranking, Ukraine is placed 72nd out of 128 countries and jurisdictions, having gained 6 points compared to 2019. However, Ukraine ranks only 90th out of 128 countries and jurisdictions in the criminal justice ranking.

Therefore, in this Report, the Council has set itself the goal of covering the most "painful" problems faced by businesses in their interaction with law enforcers, including those which had not been fully resolved since publication of the Previous Report in 2016. The document comprises 4 comprehensive chapters, containing 27 systemic recommendations and describing circumstances of 29 representative cases from the Council's practice. Most of the recommendations – 23 – were issued to the Ministry of Justice of Ukraine. As a rule, they contemplate developing a respective draft law. Three recommendations were issued to the General Prosecutor's Office; one – to the Ministry of Internal Affairs.

The Report commences with the section focused on the **start of pre-trial investigation**.

We commence by explaining the need to **digitalize procedure of entering data with the Unified State Register of Pre-trial Investigations ("URPI")**. The current procedure is obsolete, as 1) it is based on rather archaic "paper method" of entering information with the so-called "single record logbook"; and 2) due to the need to secure prior "interim" decision of the head of the respective department of the National Police confirming that the information about criminal offence may indeed be entered into the register.

To resolve this issue, the Council recommends amending regulations of the Ministry of Internal Affairs of Ukraine governing registration of applications on committed criminal offense. Once implemented, it would create modern and unified system of registration of applications on criminal offenses. Not only such a system would save time and efforts required to process and transfer information about committed criminal offenses; but also it would create good technical pre-conditions to facilitate adherence with the rule that obliges entering such information into the URPI within 24 hours.

Thereafter we examined the problem of **groundless denials of law enforcers to enter data about committed criminal offences into the URPI** based on applications lodged by businesses. Essentially this problem comprises failure of investigators and/or prosecutors to perform an action involving entering information into the URPI within 24 hours based on applications and notifications that might prove existence of committed criminal offence.

To facilitate formation of unified practice of enforcing laws and regulations in this field, the Council recommends developing and implementing respective Methodological Recommendation (Standards) for prosecutors and investigators, which would, *inter alia*, define a clear procedure and requirements for entering information on criminal offenses into the URPI. It is essential that such requirements – while imposing obligation on authorized bodies to record the information provided by a person about reportedly committed criminal offense by entering it into the URPI – shall exclude the duty of ascertaining whether respective application or notification is actually well-grounded or not.

The chapter ends with the revision of the Council's earlier key recommendation aimed at alleviating pressure inflicted on business due to **groundless launching of criminal proceedings in tax sphere**. In particular, the Council recommends preparing a governmental draft law, which would introduce amendments to the Criminal Procedural Code of Ukraine (**"CPC"**) to clearly specify the term "*actual non-receipt of funds by budgets or state earmarked*

funds", envisaged in Article 212 of the Criminal Code of Ukraine (**"CC"**), as "failure to pay agreed monetary obligations in a manner and terms, prescribed by law".

The next chapter is focused on **inefficiency of pre-trial investigations**.

We start by concentrating on the problem of **delayed pre-trial investigation of criminal proceedings launched prior to March 15, 2018**. This situation arose due to the fact that deadlines, set forth in Article 219 of the CPC to limit duration of criminal investigations, actually do not apply to those investigations that were launched prior to March 15, 2018. As a result, such criminal proceedings have become a convenient tool for law enforcers to inflict unreasonable pressure on business. To address this issue, the Council recommends introducing amendments to the CPC to ensure that once they enter into force, investigation deadlines set in Article 219 of the CPC shall start applying also to criminal proceedings launched prior to March 15, 2018.

Thereafter we examined the issue of parties' **access to information on the progress of pre-trial investigation contained in the URPI**. At present, defense party, victim or representative thereof actually do not have access to general information about criminal proceedings contained in the URPI. Although in summer of 2021 the legislator took positive steps aimed at resolving this problem, the Council has reasonable concerns that introduction of direct technical access to data in the URPI might be affected by delays. Therefore, the Council recommends as follows: 1) to ensure timely development and approval of the document of secondary legislation, which would create the basis for information and telecommunication pre-trial investigation system's functioning; 2) following adoption of such a document – to ensure proper technical functioning of information and telecommunication system of pre-trial investigation.

We then drew attention to the **lack of opportunity to seek extension of the terms of pre-trial investigation**. Under the general rule, only investigator or prosecutor are vested with the right to approach prosecutor or investigatory judge to seek extension of pre-trial investigation's term. Meanwhile, in case of an investigator's or a prosecutor's failure to meet the deadline for submitting the respective motion, pre-trial investigation will be closed. Therefore, the Council recommends amending the CPC to vest a defense party, a victim, as well as their representatives and defenders with the right to independently approach a prosecutor or an investigatory judge with the motion seeking extension of the pre-trial investigation's term.

The chapter ends with comprehensive analysis of various issues related to the current state of legal framework governing **use of forensic examinations**. In particular, we have examined 1) delays with conducting expert examinations; 2) abuses while formulating and/or amending questions subjected for an expert examination; 3) retrieval of additional documents in course of expert examination; 4) victim's procedural rights related to initiation of expert examination; and 5) access to texts of methodologies to be followed while conducting expert examinations.

The set of the Council's recommendations is aimed at enhancing efficiency and transparency of forensic examinations. The key recommendations consist of the following: 1) to introduce an obligation of the investigator, prosecutor to inform in writing about appointment of expert examinations; 2) to oblige specialized public institutions performing forensic examinations to publish the list of examinations received by the institution in accordance with the order of their receipt; 3) to introduce experts' liability for a breach of the examination term; 4) to vest certain persons with the right to challenge investigator's or prosecutor's decision to appoint expert examination; 5) to grant certain persons with the right to challenge a list of questions referred to examination as well as change of

examination's questions initiated by investigator or prosecutor; 6) to oblige investigator, prosecutor to inform a selected category of persons about expert's motion for additional documents requested during expert examinations; 7) to expand victim's rights by enabling it to initiate examination directly; 8) to vest court, parties to criminal proceeding and a victim with the right to access texts of forensic examination's methodologies.

In the next chapter we examined typical **abuses in course of pre-trial investigation**.

One of them is a **lengthy retention of arrested property that was seized by law enforcers from businesses**, thus resulting in disproportional restriction of the latter's rights. In our view, this problem is largely caused by the absence of maximum statutory term to be observed by law enforcers while retaining the property under arrest. To address this issue, the Council recommends 1) specifying "proportionality" as a separate principle of criminal proceedings; and 2) setting a maximum term for retaining arrested property. Upon its expiration the property must be returned to its owner or arrested again (provided that an investigator or a prosecutor were to prove that such an arrest would indeed be necessary).

Another scenario, involving abuse of procedural rights by law enforcers, occurs in course of a **transfer of materials of criminal proceedings from one body of pre-trial investigation to another**. In particular, law enforcers might use the transfer of criminal case files to another body (or to expert institution, for that matter) as a formal ground to abstain from undertaking certain procedural actions and/or explaining why pre-trial investigation is delayed or investigatory judge's requests are not satisfied. To prevent such abuses, the Council recommends developing and implementing Methodological Recommendations for prosecutors, which would, *inter alia*, oblige prosecutors – while establishing facts of ineffective pre-trial investigations or failures to comply with prosecutor's instructions – to approach head of a respective investigation authority with initiative seeking suspension of an investigator from carrying out pre-trial investigation and appointment of another one; as well as to initiate launching of an internal investigation against an investigator or head of a pre-trial investigation body.

Sometimes law enforcers might lodge knowingly groundless motions seeking temporal access to things and documents or imposition of arrest over entrepreneur's property. Here the Council paid particular attention to the practice of lodging **reiterative motions seeking imposition of arrest on property** of entrepreneurs in criminal proceedings, where investigatory judge already issued ruling rescinding such arrest and/or obliging pre-trial investigatory body to return seized property to its legitimate holder.

Due to the absence of effective procedural mechanism to address such abuses at the part of prosecution, the Council recommends amending the Criminal Procedural Code of Ukraine to introduce clear criteria and a proper definition of the "*abuse of procedural rights*" term; and to introduce legislative provision specifically prohibiting abuse of procedural rights.

The Report ends with a comprehensive chapter focused on **disciplinary liability of investigators and prosecutors**. As for the latter category, the Council examined the following aspects: 1) practice of groundless denials to launch criminal proceedings; 2) need to expand grounds for launching criminal proceedings; and 3) challenging results thereof. As for investigators, the Council concentrated on disciplinary liability of the National Police and State Security Service officers. In particular, we emphasized that the latter's liability is not governed by a separate internal document. The Council also suggested improving the following elements of disciplinary liability of police officers: 1) structure of bodies carrying out consideration of a disciplinary case; 2) grounds em-

ployed for bringing to disciplinary liability; 3) procedure employed for consideration of disciplinary cases and rendering decision thereafter; and 4) notification of complainants about results of internal investigation, including a respective appeal procedure.

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In this Report, the Council did not cover issues related to jurisdiction of the State Bureau of Investigation, as this body is entrusted to carry out pre-trial investigation of criminal offenses committed by officials falling under the category of so-called "*special objects*", which might bear only indirect impact on legitimate interests of businesses.

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During preparation of this Report, the Council received valuable professional assistance and commentaries from our colleagues at the Prosecutor General's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the National Police of Ukraine, the Bureau of Economic Security of Ukraine and the State Security Service of Ukraine.

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2 COMMENCEMENT OF PRE-TRIAL INVESTIGATION

This chapter focuses on problems faced by the businesses at a stage when criminal proceeding is launched and pre-trial investigation commences.

Pre-trial investigation commences with launching application or notice on committed crime followed by entering respective data into the URPI. The Council observes that law enforcers are not always adhering to the 24-hours term, foreseen in Article 214 of the CPC for entering data into the URPI. Among other things, this is caused by the obsolete procedure for entering into the URPI data contained in the respective applications regarding a committed criminal offense (Chapter 2.1).

Thereafter we concentrate on groundless refusals of law enforcers to launch criminal proceedings – problem, which has not lost its significance since 2016, when we originally explored it (Chapter 2.2).

At the end of the chapter we focus on the need to improve legal framework governing commencement of criminal proceedings in the tax sphere by preventing practice of launching groundless criminal proceedings based on allegations of tax evasion (Chapter 2.3).

2.1 Digitalization of entering data into the URPI

In modern conditions of rapid technological development, digitalization of public administration functioning is one of the most important ways to simplify relations between businesses and citizens with the state.[5]

It is worth noting that digital technologies have already been partially implemented in the field of administrative services[6] as well as civil, commercial and administrative proceedings.[7]

In addition, the state has taken positive steps towards digitalization of the criminal process through recent adoption of the Law of Ukraine "*On Amending the Criminal Procedure Code of Ukraine on Introduction of information and telecommunication Pre-Trial Investigation System*" No. 1498-IX, dated June 1, 2021 (the **"Law No. 1498-IX"**) aimed at introducing an information and telecommunication pre-trial investigation system (*see* Section 3.2 below for more details).

In this chapter, though, we concentrate on the urgent need to digitalize the first step required for launching the pre-trial investigation, namely: lodging application or notification about reportedly committed criminal offense with subsequent entering of corresponding information into the **URPI**).

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5 Digital transformation is set as a priority task of the Ministry of Digital Transformation of Ukraine for the next 3 years (*see* more at the link: https://www.kmu.gov.ua/news/mihajlo-fedorov-cifrovizaciya-ce-postupove-peretvorennya-usih-derzhavih-poslug-na-zruchni-onlajn-servisi)

6 *See* the Law of Ukraine *"On Administrative Services"* No. 5203-VI, dated September 6, 2012, as amended; as well as the Regulation On the Single State Web Portal of Electronic Services, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 1137, dated December 4, 2019

7 *See* the Law of Ukraine "*On Introducing Amendments to Certain Legislative Acts of Ukraine Aimed at Ensuring Gradual Implementation of the Unified Judicial Information and Telecommunication System*" No. 1416-IX, dated April 27, 2021

Under the general rule, following the receipt of a notice on committed criminal offence, respective information shall be entered into the URPI within a period of time, specified in para. 1 of Article 214 of the CPC – i.e., within 24 hours.[8]

However, according to the Council's observations, law enforcers do not always adhere to the foregoing term. Apart from the reasons comprehensively analyzed below in Chapter 2.3, it is also caused by the outdated procedure for entering data, contained in a notice on committed criminal offense, into the URPI.

Most of the notices on criminal offenses are filed with the National Police of Ukraine (the **"NPU"** or **"police"**). Therefore, in this chapter we will focus on analysis of the processing and registration of such documents specifically by this law enforcement body.

Hence, while entering data into the URPI, the police bodies are guided by the *Procedure for Keeping Single Record of Applications and Notifications of Criminal Offenses and Other Events in Police Bodies (Divisions)*, approved by the Order of the Ministry of Internal Affairs of Ukraine No. 100, dated February 8, 2019 (**"Order No. 100"**).

According to the Order No. 100, registration of applications and notifications of criminal offenses, received by the police, shall be carried out in the "Information Portal of the National Police of Ukraine" Information and Telecommunication System (**"IPNP ITS"**).

In case of temporary lack of a technical possibility to enter such information with the IPNP ITS, the registration is maintained in a single record logbook (**"SRL"**), for data to be subsequently transferred to the IPNP ITS. The unified form of the SRL is set forth in Annex 4 to the Order No. 100, stipulating that the SRL is kept in the traditional hard copy form. Meanwhile, in those instances when keeping records of applications and notifications of CP occurs in both IPNP ITS and SRL, effect of double or parallel recordation occurs.

Besides, pursuant to the Order No. 100, in order to enter data contained in a notice on committed criminal offence into the URPI, prior consent of the Head of the body or department of the NPU is required in all instances. Hence, if signs of committed crime are established upon consideration of a respective notice – police officer shall immediately lodge a report with the head of the police body (department). The latter, in his/her turn, shall order 1) registering police officer's report with the IPNP ITS (SRL); and 2) sending materials to a pre-trial investigation body (police department) for the relevant information to be entered into the URPI not later than 24 hours from the moment of police officer's report registration.[9]

As a police department can receive a considerable number of notices on a committed criminal offence, compliance with such a rule might require from a one person to process a significant amount of information.

As a result, since the SRL is maintained in hard copy and given the need to obtain the foregoing "interim" decision of the head of the police department, – it is clear that the current procedure neither meets modern requirements, nor contributes to meeting the 24-hour deadline set out in Article 214 of the CPC.

[8] *See* Section 3 of Part I of the Prosecutor General's Order No. 298, dated June 30, 2020 (currently regulating the procedure for forming and maintaining the URPI)

[9] *See* para. 11 of Section II of the Order No. 100

It should be noted that individuals have access to an electronic application form on the NPU website.[10] However, even though it is possible to lodge an application on a criminal offense in an electronic form, it is still going through stages envisaged by the Order No. 100.

Meanwhile, in the Council's view, digitization of the procedure of entering information into the URPI could greatly contribute to simplifying and improving it. A set of appropriate measures might include:

1. Introduction of a unified system for recording applications on committed criminal offenses (for instance, by using IPNP ITS only without the SRL).

2. Refusal from keeping "paper-based" records with subsequent "digitization" of all information not received electronically (e.g., scanning hard copy applications).

3. Abolition of the obligation to receive "interim" decisions of the heads of police bodies (departments) for entering information into the URPI.

In our opinion, implementation of the foregoing measures would allow introducing a modern unified system of registration of applications on committed criminal offenses. If introduced, such a system would 1) reduce time and efforts required to process and appropriately transfer/allocate information on criminal offenses; and 2) create adequate technical pre-conditions to facilitate compliance with the rule that the information shall be entered into the URPI within 24 hours.

COUNCIL'S RECOMMENDATIONS:

To introduce a modern unified system of keeping record of applications on committed criminal offenses and to create appropriate technical conditions for entering information with the Unified Register of Pre-Trial Investigations (URPI) within 24 hours, the Council recommends:

1. The Ministry of Internal Affairs of Ukraine – to introduce amendments to the Procedure for Keeping Single Record of Applications and Notifications of Criminal Offenses and Other Events in Police Bodies (Divisions), approved by the Order of the Ministry of Internal Affairs of Ukraine No. 100, dated February 8, 2019, which would:

1.1. Provide for an exclusive use of "Information Portal of the National Police of Ukraine" Information and Telecommunication System (IPNP ITS);

1.2. Envisage termination of a use of a single record logbook or other means of keeping records of criminal offenses in hard copy;

1.3. Provide for digitization of all information received by law enforcement authorities not in the electronic form; and

1.4. Simplify the procedure for entering relevant data into the URPI by law enforcement officers by renouncing "interim" decisions of police bodies (departments) heads as a precondition for entering the relevant data into the URPI.

[10] *See* the link: https://www.npu.gov.ua/podati-zvernennya.html

2.2 Groundless refusals to launch criminal proceedings

Back in 2016, we noted that in its practice the Council faced instances of groundless refusals of law enforcers 1) to enter data about committed criminal offenses into the URPI; or 2) to conduct the pre-trial investigation of the CPs registered based on notices lodged by entrepreneurs, subsequently recognized as victims.

In particular, according to our observations, at least 10% of complaints lodged with the Council to challenge an inaction of an investigator or a prosecutor pertains to their failures to enter data into the URPI and thus commence pre-trial investigation of the respective criminal proceeding.

Meanwhile, it is worth noting that if an application or a notification on committed criminal offense meets general requirements for such documents – the CPC imposes a clear obligation on an investigator or a prosecutor to enter information about the criminal offense into the URPI within 24 hours.[11] In such a case, under the general rule, refusal to accept and register an application or a notification about criminal offense is not allowed.[12]

If applicant has nonetheless been denied launching criminal proceedings and entering data into the URPI, the only recourse mechanism is the right to challenge such inaction of an investigator and/or a prosecutor with court pursuant to Article 303 of the CPC.

This problem is well illustrated by the following case from the Council's practice.

Case No. 1. Failure to enter data into the URPI

In September 2020, the Council was approached by the Polish company challenging the systematic inaction of the officials of the MD NP in Poltava Oblast. One of its elements was continuous refusal to launch criminal proceedings based on the company's application.

The complainant, in particular, alleged that the police refused to enter information into the URPI, contained in its application dated August 19, 2020, reportedly evidencing that the criminal offence, foreseen under Part 1 of Article 382 of the CC ("Failure to enforce a court decision") was committed.

Having examined materials of the complaint, the Council approached the Head of the Police Department No. 2 of Kremenchuh Department of the MD NP in Poltava Oblast with a request to enter information, set forth in the complainant's application, dated August 19, 2020, into the URPI and provide the complainant with a respective extract.

While doing so, the Council noted that the law obliges an investigator to enter information into the URPI within 24 hours. Moreover, the relevant legislative provisions do not oblige an investigator or a prosecutor to assess such an application (notification) for presence of signs of a crime to determine whether the relevant information should actually be entered into the URPI. In its letter, the Council also referred to the respective position of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases, set forth in the letter No. 9-49/0/4-17, dated January 12, 2017.

[11] *See* para. 1 of Article 214 of the CPC

[12] Ibid., para. 4 of Article 214

It was only after the Council's request made at the end of September 2020 that the corresponding police department finally entered information on the criminal offense into the URPI and launched a pre-trial investigation into the criminal proceedings in October 2020. Thus, in this part the subject of the complaint was resolved. As for another element of the complaint – the Council issued recommendation, which was successfully implemented by the MD NP in Poltava Oblast in January 2021.

It is worth noting that the CPC obliges entering information into the URPI based on applications and notifications actually evidencing that a crime might have been committed, rather than just any application received by pre-trial investigation authorities.

And, indeed, sometimes there are cases when it can be concluded from a person's application that he or she only draws investigation body's attention to the probable fact of committing a crime.

It is worth stressing, though, that "*signs of a criminal offense*" and "*corpus delicti/body of crime*" terms are actually not identical in meaning. Therefore, refusal to enter information into the URPI due to the alleged absence of signs of a body of crime in a respective application or notification is groundless. Thus, even when preliminary (initial) analysis of information provided by a person indicates absence of a body of crime – such information should nonetheless be entered into the URPI to be followed by subsequent closure of criminal proceedings pursuant to Article 284 of the CPC.[13]

Meanwhile, according to the Council's observations, while considering the respective category of cases, practice of law enforcement bodies and investigatory judges lacks common approach to enforcing respective provisions of the CPC.

One approach contemplates the so-called "automatic" entry of information about a criminal offense, provided that such information is set out in an application or a notification of a criminal offense. This approach does not involve assessing a person's respective application to ascertain whether information set forth therein actually contains signs of a committed crime. The second approach, though, does not provide for automatic entry of information contained in applications or notifications on criminal offense – only applications identified as those that, in the opinion of a person examining them, may indeed evidence the fact of committed crime are entered into the URPI.[14]

In view of the above, we believe that it would be appropriate for the Prosecutor General's Office (**"PGO"**) to develop and implement the relevant Methodological Recommendations (Standards) for prosecutors and investigators. It appears that such a document would, *inter alia*, set out a clear procedure and requirements for entering information about a criminal offense into the URPI after receipt of application or notification about criminal offense.

Importantly, such requirements – while obliging **authorized bodies to record information about reportedly committed criminal offense by entering it into the URPI** – shall exclude the duty of ascertaining whether respective application or notification is actually well-grounded or not.

[13] *See* Generalization of the Supreme Court of Ukraine No. 9-49/0/4-17, dated January 12, 2017 *On Practice of Reviewing Complaints Against Decisions, Actions or Inaction of Pre-Trial Investigation Bodies or a Prosecutor During Pre-Trial Investigation*

[14] Ibid.

COUNCIL'S RECOMMENDATIONS:

To prevent instances of groundless refusals to enter data about committed criminal offenses with the Unified Register of Pre-Trial Investigations (URPI), the Council recommends as follows:

2. The Prosecutor General's Office of Ukraine – to develop and implement Methodological Recommendations (Standards) for prosecutors which would:

2.1. Determine the procedure and requirements for entering information about a criminal offense into the URPI upon receipt of application or notification about criminal offense; and

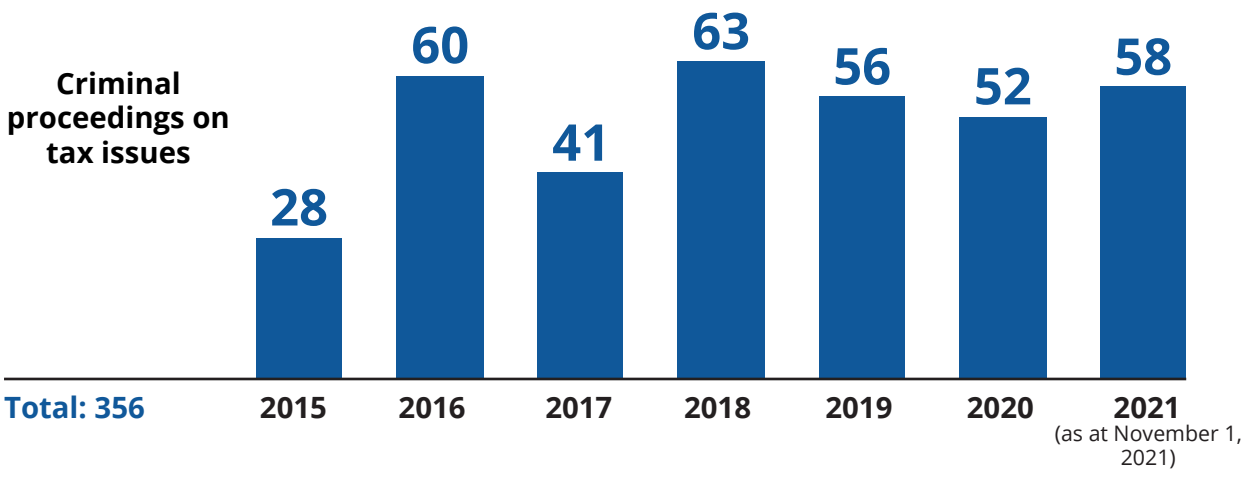
2.2. Take into account that such requirements do not envisage assessing whether application or notification about a criminal offense is well-grounded; they only oblige authorized bodies to record the information about criminal offence provided by a person by entering it into the URPI.

2.3 Criminal proceedings for tax evasion

Complaints lodged by businesses to challenge various malpractices occurring during investigation of criminal proceedings in tax sphere has always constituted at least 23% of all complaints lodged with the Council against law enforcers. First of all, these are complaints challenging abuses by officials of investigative departments for financial investigations of the SFS (**"ID FI"** or **"tax police"**) comprising groundless launch of criminal proceedings under Article 212 of the CC ("*Tax evasion*").

In particular, in course of all full years of the Council's activity (except for 2017) the number of complaints against the Tax Police always exceeded 50. Thus, only in Q1 2021 entrepreneurs lodged 16 complaints against decisions, actions or inactions of the Tax Police; in Q2 – already 25% more – 20 complaints. In Q3 2021, we already received 21 complaints – another 5% rise in comparison with Q2 2021.

Dynamics of complaints lodged with the Council against ID FI (Tax Police)



The relevance of this issue is supported by the PGO's recent statistics on pre-trial investigations of criminal proceedings launched under Article 212 of the CC[15]. In particular, in 2020 some **910** criminal proceedings were registered under Article 212 of the CC. Amongst them, **124** proceedings were closed and **only 10 indictments** were furnished with the court.

For January-October 2021 out of 746 criminal proceedings registered under Article 212 of the CC only 20 indictments were sent to court. In addition, 21 proceedings were forwarded to the court with a request to release from criminal liability.[16]

The foregoing statistics shows that most criminal proceedings launched every year under Article 212 of the Criminal Code are actually closed due to the absence of a body of crime (corpus delicti). This trend can be well illustrated by the following cases from the Council's practice.

Case No. 2. Criminal proceedings against event agency closed due to the absence of corpus delicti

On September 14, 2018, the Council was approached by event agency specialized in organizing events in the B2B segment. The company complained that the ID FI of the MD SFS in the city of Kyiv opened criminal proceedings based on groundless allegations of tax evasion.

In September 2017, the tax authority audited the company's activities and concluded that income tax and VAT were understated to the tune of UAH 18.5 mln. The company challenged decision of the tax authority with the court. The Circuit Administrative Court decision in the complainant's favor was subsequently upheld by the Court of Appeal.

The tax police nonetheless launched criminal proceedings against the company by invoking "tax evasion" article. The complainant has unsuccessfully approached the tax police seeking closure of the criminal proceeding due to the absence of a body of crime. Therefore, the company lodged the complaint with the Council.

At the end of September 2018, the Council sent letters to the Prosecutor's Office in the city of Kyiv and the Main Investigatory Department of ID FI in support of the complainant. However, law enforcers replied that there were no grounds for closing criminal proceedings.

As in the complainant's case there was no such mandatory element of the crime as "actual non-receipt of funds by budgets or state earmarked funds" (in the form of tax debt or agreed tax liabilities), on November 9, 2018 the complainant filed a motion with the General Prosecutor's Office (**"GPO"**) seeking closure of CP.

On November 27, 2018, the Council asked the GPO to comprehensively and impartially consider the complainant's motion to close the CP and to examine the grounds for further pre-trial investigation of the case.

[15] *See* the link: https://www.gp.gov.ua/ua/stat_n_st?dir_id=114368&libid=100820&c=edit&_c=fo

[16] Hence, as at November 1, 2021 out of 746 criminal proceedings registered pursuant to Article 212 CC, only 41 were sent to court (20 with indictment and 21 with a request to release from criminal liability). Moreover, in 2018, a total of 1,099 criminal proceedings were registered, of which only 39 were sent to court with an indictment. In 2019, 852 criminal proceedings under Article 212 of the CC were registered and only 22 were sent to court

After that, things got underway. The GPO issued respective instructions to Kyiv Prosecutor's Office. With the Council's assistance, on December 13, 2018, the CP against the complainant was closed due to the absence of a body of crime.

Case No. 3. Closure of groundless CP launched under Article 212 of the Criminal Code

On August 11, 2020, a company from the city of Dnipro turned to the Council with a complaint to challenge pressure inflicted under the CP, launched on February 6, 2018 under Article 212 of the CC.

The CP was launched in lieu of the findings of the Large Taxpayers Office of the SFS that in 2015-2016 another company associated with the complainant might have infringed tax legislation.

On August 22, 2020, the Council sent a letter to the SFS, where it drew attention, in particular, to the fact that the company was established only on November 15, 2018. In other words, the complainant's legal entity was set up two years after the crime, based on which CP was launched, could have been committed and completed. The Council received a response from the tax police, according to which the CP's pre-trial investigation was ongoing and the pre-trial investigation body was taking measures to establish the truth in the CP.

In its next letter dated October 28, 2020, the Council also drew the tax police's attention to the fact that two searches of the complainant's premises had been carried out within the CP in violation of current legislative requirements. In particular, the investigator seized the complainant's trade proceeds from sales of foodstuffs amounting to UAH 605,540 and UAH 253,750 accordingly; as well as accounting documents (cash books, personal files of employees, etc.) and computer equipment. Despite the fact that, pursuant to the ruling of the investigatory judge of the Shevchenkivskyi District Court of Kyiv, the investigator's subsequent motion seeking arrest of the seized property was denied – the said funds and other seized property weren't nonetheless returned to the complainant.

In September 2020, complaint's materials were submitted for consideration of the Expert Group with the PGO. During the meeting the Council was informed that the materials of the case had been transferred to the Investigatory Department of the SFS in Dnipropetrovsk Oblast. It was also confirmed that the Complainant had nothing to do with circumstances investigated within the CP.

On November 23, 2020, the Council recommended the Investigatory Department of the SFS in Dnipropetrovsk Oblast to ensure an objective and impartial investigation of the CP and its completion within a reasonable term. The Council also recommended ensuring prompt return of the temporarily seized property to the Complainant.

On January 19, 2021, the MD SFS in Dnipropetrovsk Oblast informed the Council that the investigators had returned the seized property, accounting documents and computer equipment; and that in lieu of the pre-trial investigation's outcome CP was closed on January 15, 2021 due to the absence of a body of crime.

The foregoing examples (along with considerable number of other similar complaints) demonstrate that solving the systemic problem of groundless launching of criminal proceedings under Article 212 of the CC had, for the long time, required legislative changes. Noteworthy, 5 years ago in its Previous Report, the Council recommended as follows:

> **1)** To prohibit criminal prosecution of a person for tax evasion until existence of tax liability is finally reconciled.
>
> **2)** To provide the possibility of a transfer of tax audit materials to the ID FI requires prior reconciliation of tax liability in administrative and/or judicial proceeding.
>
> **3)** To increase threshold amount of actual non-receipt of taxes (and other mandatory payments) by to the budget triggering qualification of a particular action as a criminal offence.

Six months after publication of the Previous Report in August 2016, the rule became effective according to which tax officials were supposed to forward tax audit materials to their tax police colleagues only upon reconciliation of the amount of tax debt – i.e. upon completion of administrative and/or judicial appeal procedure.[17] This resulted in actual implementation of one of the foregoing recommendations.

Meanwhile, the Council acknowledges that law enforcement bodies (tax police; and starting from November 25, 2021 – the Bureau of Economic Security of Ukraine) are not stripped of the right to independently detect signs of committed criminal offenses, including tax evasion. Moreover, current legislation does not prohibit investigative bodies from collecting evidence and conducting other procedural actions prior to completion of tax audits and agreeing monetary obligations, to be determined as a result thereof.

For example, there are cases that have repeatedly occurred in the Council's practice, when, in lieu of tax audits findings or as a result of "own identification" of the existence of signs of tax offenses, criminal proceedings were launched and investigated by the SSU (i.e., by invoking Article 212 of the CC) or by the NPU (i.e., by invoking Article 191 of the CC) disregarding the Order No. 633.

In particular, to investigate facts of illegal attempts to obtain VAT refund, law enforcers would typically employ *corpus delicti* provided for in Article 191 of the Criminal Code ("*Appropriation, misappropriation of property or taking it by abuse of office*").

In such cases, in lieu of investigatory jurisdiction, police bodies might register into the URPI and initiate pre-trial investigation, for example, based on allegation of an attempt to commit a crime under Part 5 of Article 191 of the Criminal Code. In this case, a formal ground for doing so might be conclusions contained in tax authority's report issued upon verification of taxpayer's calculation of eligible VAT refund.

Such practice can be well illustrated by the following case, where CP was launched under Article 191 of the CC.

[17] *See* Order of the SFS of Ukraine No. 633, dated July 18, 2016, which amended *Methodological Recommendations governing the transfer of audit materials to the Tax Police* (the **"Order No. 633"**)

Case No. 4. Launching CP based on tax audit's findings

In January 2017, the Council was approached by a large foreign company – one of the international leaders in production and sales of food and agricultural products. The complainant stated that Obolon' Police Department of the Main Police Department in the city of Kyiv had registered criminal proceedings against its' officials based on signs of a criminal offense, envisaged by Part 1 of Article 191 of the CC.

The CP was registered in lieu of the results of unscheduled on-site audit of legality of accrual by the complainant of VAT refund for March, April, May 2016, which was documented in the form of the relevant Audit Report. Based on the conclusions set forth in the said Report, the tax authority issued tax notifications-decisions, which were subsequently contested by the company in the court. Tax liability/debt was thus deemed "non-approved". Accordingly, *corpus delicti* was absent in the complainant's actions.

In view of the above, the complainant, viewing CP registration as nothing more than an instrument of pressure, even contemplated reconsidering its plans to continue investing in Ukraine. At this stage, the Council accepted complaint into its consideration.

On February 24, 2017, the Council, by its letter, requested the Prosecutor of the city of Kyiv to check pre-trial investigation's effectiveness and to consider appropriateness of CP's closure.

On March 7, 2017, the Council, by its letter, also requested leadership of the NPU to check pre-trial investigation's effectiveness within the CP.

On March 10, 2017, the Council, by its letter, also requested the Minister of Finance of Ukraine to instruct the SFS leadership 1) to identify and eliminate violations of obligation to refrain from launching criminal proceedings until taxpayers' tax obligations are deemed "agreed"/"reconciled"; and 2) to prevent officials of the SFS from employing formal approach while interpreting amendments, introduced by the Order No. 633.

Here the Council noted that launching criminal proceeding by transferring audit materials – initially to the SFS's investigatory department and then to the police – was premature; and that, in the Council's view, it constitutes violation of the Order No. 633. The Council also noted that it observes territorial departments of the SFS regularly bypassing requirements of the Order No. 633 by initiating criminal proceedings not through the audit department but by engaging their operational departments or by transferring these materials to divisions of the NPU.

On April 7, 2017, the Council received a letter from the MID NPU, according to which respective police officers were brought to disciplinary liability. As the complainant's request has thus been effectively fulfilled, the Council completed its investigation.

The foregoing example convincingly demonstrates correctness of decision to create single body tasked to investigate economic and tax crimes. Within the last 5 years the Council has repeatedly supported such an approach. Hence, we welcome that at the end of March 2021, the law providing for the establishment of the Bureau of Economic Security (**"BES"**) in Ukraine entered into force[18]. Thus, legislative framework for launching BES as a central executive body tasked to detect, stop, investigate and resolve crimes in economic sphere was put in place.

The Council also concurs that in addition to adoption of the law on its status, all crimes in economic and fiscal spheres shall be subjected to BES's exclusive investigatory jurisdiction. It is thus appealing that the respective idea has been implemented on November 17, 2021, when the Law of Ukraine No. 1888-IX[19] has been adopted vesting BES with an exclusive investigatory jurisdiction with respect to the expanded list of articles of the Criminal Code of Ukraine, namely: Articles 199, 200, 203^2, 204, 205^1, 206, 212, 212^1, 218^1, 219, 220^1, 220^2, 222, 222^1, 223^1, 224, 229, 231, 232, 232^1, 232^2, 233 of the Criminal Code of Ukraine.

Besides, the Law No. 1888-IX also granted BES additional investigatory jurisdiction with regard to criminal offences envisaged in Articles 191 (when merits of the criminal offence comprise budget refund), 206^2, 210, 211 of the CC if pre-trial investigation of such criminal offenses does not fall under the jurisdiction of the State Bureau of Investigation or the National Anti-Corruption Bureau of Ukraine.

It is worth noting that at the end of September 2019[20] another recommendation was implemented when threshold amounts (limits) for bringing persons to liability under Article 212 of the CC were increased. In particular, indicators of significant, large and especially large amounts of funds were increased to the level of 3,000, 5,000 and 7,000 non-taxable minimum incomes respectively.

Nevertheless, the foregoing dynamics and substance of complaints received by the Council, show that introducing amendments to the Order No. 633 and increase of the monetary equivalent of the actual non-receipt of mandatory payments to qualify as action falling under the scope of Article 212 of the CC did not solve the systemic problem of launching groundless criminal proceedings based on allegations of tax evasion. By launching BES, as such, this problem is not resolved either. In our view, in order to do so, the Council's key recommendation in this area should ultimately be implemented.

What we mean is amending Article 212 of the CC by clearly stating that "actual non-receipt of funds by budgets or state earmarked funds" means "failure to pay agreed monetary obligations within terms established by law." Such an approach would not only make it possible to clearly distinguish a tax dispute from a crime, but would also harmonize Article 212 of the CC with both the legal position of the Supreme Court of Ukraine, set out in the SCU Plenum Resolution, dated October 8, 2004 No. 15, and amendments already introduced by the Order No. 633.

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[18] *See* the Law of Ukraine "On the Bureau of Economic Security of Ukraine" No. 1150-IX, dated January 28, 2021 (effective since March 25, 2021)

[19] *See* the Law of Ukraine "*On Introducing Amendments to the Code of Ukraine On Administrative Offices, Criminal and Criminal Procedural Code of Ukraine regarding facilitation of activity of the Bureau of Economic Security and respective improvement of work of selected law enforcement bodies*" No. 1888-IX, dated November 17, 2021 (the "**Law No. 1888-IX**")

[20] *See* the Law of Ukraine "*On Introducing Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine to Reduce Pressure on Business*" No. 101-IX, dated September 18, 2019 (entered into force on September 25, 2019)

COUNCIL'S RECOMMENDATIONS:

To prevent pressure inflicted on taxpayers within framework of investigation of crimes in in tax sphere, the Council recommends as follows:

3. The Ministry of Justice of Ukraine – to develop a draft governmental law, introducing amendments to the CPC of Ukraine, which would define the term "*actual non-receipt of funds to state budgets or state earmarked funds*", set forth in Article 212 of the Criminal Code of Ukraine, as "*failure to pay agreed monetary obligations in a manner and terms prescribed by law*".

3 INEFFICIENCY OF PRE-TRIAL INVESTIGATION

The notion of "inefficiency of pre-trial investigation" is not enshrined in any legal act. Nevertheless, this negative phenomenon is often faced by the Council's complainants, particularly those granted with victim's status in criminal proceedings.

Despite certain subjectivity of this category, the Council observes that ineffectiveness/delay of pre-trial investigation might, for example, be evidenced by the following:

1) lengthy pre-trial investigation without objective reasons thereto[21];

2) unreasonable delays with carrying out investigative actions or not carrying them out at all;

3) incomplete and low-quality evidence collection;

4) investigator's systematic failure to comply with prosecutor's instructions.

It is worth noting that inefficiency/delay of pre-trial investigation holds one of top positions among merits of complaints lodged with the Council against law enforcers.

In particular, this is evidenced by the fact that out of **10,028** complaints received by the Council as at **November 1, 2021**, inefficiency of pre-trial investigation constituted subject of **290** complaints (**18%** of the total number of complaints against law enforcers). Most of these complaints concerned inaction at the part of the National Police – **48%** of the total number of complaints.

Analyzing dynamics of complaints challenging inefficiency/delay in the pre-trial investigation, it should be noted that in 2017 the number of complaints on this topic constituted 21 % of the total number of complaints against law enforcers; in 2018 – 19%; 2019 – 14%; and 21% in 2020. As at October 22, 2021, the Council received 16% of complaints on this issue. Therefore, the one may presume that **in 2021 the number of such complaints would, most likely, end up being less than in 2020 but more than in 2019**. Hence, this issue will, without doubts, remain quite pressing for business in the coming years.

According to the Council's statistics, this issue was raised in complaint predominantly lodged by the local Ukrainian companies. In particular, the share of Ukrainian business among the applicants was **72%**. In addition, most complaints were lodged by small and medium-sized businesses (**62%**) and only **38%** by large companies.

As such, in the chapter 3 we will focus on issues related to ineffectiveness (delay) in the pre-trial investigation and provide recommendations for their resolution.

[21] The European Court of Human Rights, while considering the case of Kosmat and Others v. Ukraine, dated January 15, 2015 (applications No. 10558/11 and No. 28218/11), reiterated that the effectiveness of an investigation implies a requirement of promptness and reasonable expedition. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law (*see* the Judgment dated April 9, 2009, in Šilih v. Slovenia, application No. 71463/01, § 195). In addition, over time, the prospect of any effective investigation diminishes (see, for example, the judgment dated October 17, 2013 in Pozhyvotko v. Ukraine, application No. 42752/08, § 41)

The first thing the Council will focus on is that deadlines limiting criminal investigation's duration do not apply to investigations launched prior to March 15, 2018 (Chapter 3.1). As a result, such criminal proceedings have become a convenient tool for inflicting unreasonable pressure on business. We, therefore, propose that the investigation deadlines, set out in Article 219 of the CPC, shall also apply to investigations of criminal proceedings launched prior to March 15, 2018.

Another issue we touched upon in this chapter is victim's and suspect's access to certain information on the progress of pre-trial investigation (Chapter 3.2). The Council is mindful that in early June 2021 Verkhovna Rada of Ukraine adopted the Law[22] introducing creation of information and telecommunications pre-trial investigation system. Such a system should enable parties to promptly obtain general information about criminal proceedings in electronic form. In addition, it will help reducing the burden on investigators, prosecutors and investigatory judges. Meanwhile, we emphasize that in order to actually launch this system, it is important to promptly adopt the necessary acts of secondary legislation.

Another practical problem that has become the focus of the Council's attention is inability of the defense party, the victim and other parties to criminal proceedings to apply directly to a prosecutor or an investigatory judge for an extension of pre-trial investigation terms (Chapter 3.3). In the Council's view, such an opportunity should be granted to reduce the number of instances when criminal proceedings are closed due to investigator's or prosecutor's failure to observe terms while submitting a motion seeking extension of pre-trial investigation term.

Chapter 3 ends up with the analysis of issues affecting efficiency and transparency of forensic examinations (Chapter 3.4). In particular, the Council has comprehensively examined 1) delays with conducting expert examinations; 2) abuses while formulating and/or amending questions subjected for expert examination; 3) retrieval of additional documents in course of expert examination; 4) victim's procedural rights related to initiation of expert examination; and 5) access to texts of methodologies to be followed while conducting expert examinations.

3.1 Criminal proceedings launched prior to March 15, 2018

In lieu of amendments introduced to Article 219 of the CPC by a well-known "Mask-ShowStop" law[23], the terms of pre-trial investigation may not exceed 12 or 18 months (depending on the gravity of crime). Upon expiration of this period, a notice of suspicion must be furnished in criminal proceedings, otherwise the investigation must be closed. An exception is possible only when an investigatory judge finds the investigator's request to extend the term of the investigation reasonable and issues a respective ruling to extend criminal proceeding's pre-trial investigation term.

[22] The Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine on Introduction of Information and Telecommunication Pre-Trial Investigation System" No. 1498-IX, dated June 1, 2021

[23] *See* the Law of Ukraine "*On Introducing Amendments to Certain Legislative Acts to Ensure Observance of the Rights of Participants to Criminal Proceedings and Other Persons by Law Enforcement Bodies During the Pre-Trial Investigation*" No. 2213-VIII, dated November 16, 2017 (the "**Law No. 2213-VIII**")

Therefore, with the entry of Law No. 2213-VIII into force, despite the possibility to extend the investigation period, a significant number of criminal proceedings are closed due to expiration of a pre-trial investigation term, defined in Article 219 of the CPC.

A legislatively prescribed deadline for the investigation was warmly welcomed by business. After all, on the one hand, law enforcers can no longer bother businesses under the pretext of investigating ever-lasting criminal proceedings. On the other hand, businesses that have become victims of a criminal offense, were granted the right to demand from law enforcers showing investigation results within a clearly defined period of time.

However, despite obviously positive changes introduced by the Law No. 2213-VIII, its adoption did not bring legal certainty while identifying timeframes of all investigations. The thing is that law enforcers began applying provisions of Article 219 of the CPC (in lieu of amendments introduced by the Law No. 2213-VIII) by invoking the principle of no retroactive effect of the law.[24] In view of this, all criminal proceedings launched prior to March 15, 2018 and onward are being investigated without any restrictions of the terms thereof.

Such state of affairs is extremely unfavorable for business, which continues being exposed to law enforcer's excessive scrutiny in Ukraine. By employing criminal proceedings launched prior to March 15, 2018, law enforcement bodies may not furnish anyone with a suspicion notice for a long time. This, in turn, means that a business that is, *de facto*, targeted by law enforcers in a particular criminal proceeding, *de jure*, has no official status thereunder. Consequently, such businesses are unable to access case files to verify the weight of evidence employed by law enforcers to conduct investigative actions (interrogate officials, seize documents, conduct searches) against a particular enterprise. As a result, without notice of suspicion, the person or company under investigation is virtually deprived of effective protection mechanisms against unjustified criminal prosecution. The situation is further complicated by the fact that in such criminal proceedings investigation term is virtually unlimited.

Hence, while reviewing complaints lodged by businesses to challenge actions or inaction of law enforcers, the Council notes that criminal proceedings launched prior to March 15, 2018 are still a problem for business even at the end of 2021.

The existence of the foregoing problem can be illustrated via the following complaint filed with the Council by a private entrepreneur.

[24] Pursuant to Article 58 of the Constitution of Ukraine, laws and other legal acts do not have a retroactive effect, except in cases when they mitigate or cancel a person's liability

Case No. 5. Pressure caused by a lengthy criminal investigation

In July 2020, a private entrepreneur from Kyiv Oblast turned to the Council with a complaint to challenge pressure reportedly inflicted by the Investigative Department of Kyiv-Sviatoshynskyi PD MD NP in Kyiv Oblast within the framework of investigation of CP No. 42015110200000074, dated December 7, 2015, launched in lieu of sings of a criminal offense, foreseen by para. 1 of Article 358 of the CC.

The reason for launching investigation was that in 2014 the complainant purchased a land plot for business purposes. The investigators believed that the complainant had illegally acquired the land plot as back in 2008 the previous owner had allegedly forged city council's order allowing privatization of this land plot.

In 2016, the local prosecutor's office even decided to sue the complainant to cancel state registration of ownership and claim the land plot from the complainant's allegedly illegal possession. However, by the Decision of Kyiv-Sviatoshynskyi District Court of Kyiv Oblast, dated September 26, 2016, in case No. 369/6140/16-ц, the prosecutor's claims were denied in full. The decisions of court of first instance were also upheld by courts of appeal and cassation.

Despite the fact that the court decisions established no violations of any statutory procedure for disputed land plot's acquisition by the Complainant – law enforcement bodies persisted in investigating the case. In particular, in 2017 – i.e., after the court decision in case No.369/6140/16-ц came into force – the prosecutor's office seized land plot management project documentation developed at the complainant's expense and initiated land plot's arrest (it was revoked only in February 2021).

While investigating the matter, the Council repeatedly sent written requests to the prosecutor's office and the pre-trial investigation body asking thereof to check the circumstances of the pre-trial investigation in CP No.42015110200000074, dated December 7, 2015, and to take steps to close criminal proceedings or terminate investigation against the Complainant. In addition, the subject of this complaint was discussed several times during working meetings of the Council's representatives with the PGO's management and the MID NPU. However, law enforcers continued insisting that in order to complete the investigation, it was necessary to conduct a number of investigative actions and wait for expert examination's findings to determine damages amount caused by allegedly illegal alienation of the land plot. The Council's arguments that since no suspicion notice was furnished within five years, it clearly indicates that restriction on the complainant's rights was groundless – were, unfortunately, insufficiently convincing for the investigation.

Only in the summer of 2021 the Council succeeded in convincing the PGO on the need to request the case file No.42015110200000074, dated December 7, 2015 to check the investigation's reasonableness. And only at the end of August 2021 criminal proceeding was finally closed due to the absence of signs of a crime in the complainant's actions. Afterwards the Council closed the case.

Based on the foregoing case, the one can *see* how lack of legally defined terms for investigating crimes can turn criminal proceedings into a universal instrument for impairing legitimate economic activities. After all, even though in 2017 the court finally confirmed legality of the land plot's acquisition by the private entrepreneur – law enforcement agencies continued investigating the case and restricting the owner's rights until mid-2021. We cannot rule out that this might have been happening to achieve objectives that have nothing to do with solving crimes and punishing offenders.

It is obvious that such a long-lasting and groundless prosecution of a person would be impossible if criminal proceedings launched prior to March 15, 2018 were subject to investigation deadlines provided by the current version of the Article 219 of the CPC. In contrast, though, the current situation with investigation of these "outdated" criminal proceedings continues undermining the rule of law and depriving parties to criminal proceedings of the opportunity to predict possible negative consequences that may arise from a criminal investigation.

Meanwhile, the Constitutional Court of Ukraine (**"CCU"**) in the Decision No. 17-рп/2010, dated June 29, 2010 stated: "*One of the elements of the rule of law is the principle of legal certainty, which states that restriction of fundamental human and civil rights and implementation of these restrictions in practice is permissible provided that predictability of application of legal norms established by such restrictions is ensured*" (para. 3 of sub-clause 3.1 of clause 3 of the reasoning part).[25]

As the CPC currently does not provide for any restrictions on the timeframe for investigation of criminal proceedings launched prior to March 15, 2018, it is evident that the current criminal procedure legislation in this part does not meet the requirements of the rule of law. Indeed, a party to criminal proceeding (a suspect or a victim) cannot even approximately predict how long such a criminal proceeding will be investigated and what efforts or resources will have to be spent on such an investigation.

It is worth pointing out that uncertainty with the timeframe of "outdated" criminal proceedings' investigation not only violates the rights of a suspect and a victim, but also irreparably harms the law enforcement system's effectiveness itself. It is implied that these, mostly groundless and doomed criminal proceedings, create an additional burden for investigators who are already overloaded.

In particular, as at November 1, 2021 police investigators alone were reportedly investigating 806.1K criminal offences and 151.3K criminal misconducts.[26] It is difficult to imagine how many criminal proceedings are being investigated by all law enforcement bodies together. However, one can say for sure that now the number of criminal proceedings investigated by law enforcement bodies far exceeds the number they can effectively handle.

The Council believes that setting deadlines for investigation of criminal proceedings launched prior to March 15, 2018 would, inter alia, reduce the burden on investigation authorities. Investigators, having got a simple and effective mechanism for closing "outdated" criminal proceedings, will finally be able to devote the necessary time to investigating really important criminal cases, rather than those launched three or five years ago often without sufficient legal grounds.

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[25] According to Article 69 of the Law of Ukraine "*On the Constitutional Court of Ukraine*", decisions and conclusions of the CCU shall be equally binding

[26] According to information kindly disclosed to the Council by the leadership of the MID NPU during preparation of this report

To ensure objective consideration of this matter, it should be noted that lawyers have made some attempts to set a deadline for investigating criminal proceedings launched prior to March 15, 2018 by resorting to judiciary. However, the Council is aware of only handful of cases, when investigatory judge rendered decision obliging investigator to complete pre-trial investigation within a certain period of time and which survived subsequent appeal.[27]

Unfortunately, in most cases, based on literal interpretation of the CPC, courts denied applicant's motions seeking deadline to complete investigation of criminal proceedings launched prior to March 15, 2018. While doing so courts typically argue that breach of reasonable time for investigation is not specified in the list of actions or inactions of an investigator or a prosecutor, stipulated in Part 1 of Article 303 of the CPC, which may be challenged during course of pre-trial investigation.[28]

In view of the foregoing, judicial control has not become an effective mechanism to combat the problem of delays with pre-trial investigation of criminal proceedings, launched prior to March 15, 2018. Therefore, the Council is convinced that to systemically address this problem, it is necessary to amend the CPC. Hence, to prevent breaching no retroactivity rule, mentioned earlier, the CPC should be expanded with provision stating that investigation deadlines, provided for in Article 219 of the CPC, should apply to investigation of criminal proceedings launched prior to March 15, 2018, from the moment when such changes enter into force.

In practice, it should look like that criminal proceedings launched, let's say, on July 1, 2017 should be completed within 12 or 18 months (depending on gravity of the crime) from the date of the relevant law's amending the CPC entry into force.

[27] The first one among them was the Decision of Shevchenkivskyi District Court of Kyiv, dated July 16, 2018 in case No. 761/20985/18. Mentioned court decision was quite at that time and adopted with the application of European standards in the field of human rights protection and a broad interpretation of the principle of the rule of law in criminal proceedings.

[28] See, for example, the Decision of Donetsk Court of Appeal dated June 14, 2018, in case No. 265/4755/18 and the Decision of Kyiv Court of Appeal dated July 17, 2018, in case No. 753/8597/18

COUNCIL'S RECOMMENDATIONS:

To introduce effective legal remedies protecting rights of participants and parties to criminal proceedings, as well as to ensure legal certainty in the pre-trial investigation of criminal proceedings, the Council recommends as follows:

4. The Ministry of Justice of Ukraine – to develop a draft governmental law introducing amendments to the Criminal Procedure Code of Ukraine (CPC), which would provide that investigation deadlines envisaged under Article 219 of the CPC should apply to investigation of criminal proceedings launched prior to March 15, 2018 starting from the date of relevant amendments' to the CPC entry into force.

3.2 Victim's and suspect's access to certain information about pre-trial investigation

According to the Council's observations, the need to improve functioning of the URPI is not only actively discussed in the expert community[29] but is also acknowledged by law enforcers themselves.[30] Thus, the idea to selectively simplify the procedure for obtaining information on the course of pre-trial investigation contained in the URPI is considered quite appropriate.

In accordance with the Supreme Court's established practice, access of parties to criminal proceedings to information created (obtained) during the pre-trial investigation is provided in the manner prescribed by criminal procedural legislation.[31]

Moreover, under the general rule, access to pre-trial investigation materials may be granted for inspection only upon a motion (request) filed to an investigator or a prosecutor.[32] It means that only a limited number of persons are entitled to get familiar with pre-trial investigation's materials, namely: a defense party, a victim and a legal entity's representative in whose regard proceedings are being conducted.[33]

Meanwhile, in practice parties do not always need to become familiar with the whole scope of pre-trial investigation materials, as it might be enough to access only general information about criminal proceeding. For example, information on the status of criminal proceeding, a pre-trial investigation body, name of an investigator and prosecutor, date and time of the main procedural decisions on: proceeding's registration; lodging of a suspicion notice; change of pre-trial investigation body, etc.

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29 *See* article "Criminal Process Digitalization" by Tetyana Pavliukovets at: https://uz.ligazakon.ua/ua/magazine_article/EA014718)

30 *See* the respective publication at the GPO's official Facebook page at: https://www.facebook.com/watch/?v=330551141744360

31 In particular, decisions of the Administrative Cassation Court/SC, dated November 9, 2020 in case No. 640/5681/19 and dated September 21, 2020 in case No. 805/2113/17-a

32 This rule does not apply to materials on application of security measures to persons involved in criminal proceedings, as well as materials access to which at this stage of criminal proceeding may harm pre-trial investigation (for details, *see* para. 1 of Article 221 of the CPC)

33 *See* the decision of the Grand Chamber of the SC, dated December 18, 2019 in case No. 826/2323/17

Case No. 6. Lack of information about CP's closure

In June 2019 the Council was approached by the Spanish company challenging inefficiency of pre-trial investigation and lack of information on current status of criminal proceeding, whose investigation was carried out based on signs of a criminal offense, envisaged by para. 4 of Article 190 of the CC. Since June, 2018 pre-trial investigation was carried out by Moskovskii PD MD NP in Kharkiv Oblast.

During the case investigation, the Council, by its separate letters, recommended the Prosecutor of Kharkiv Oblast, the Head of the MD NP in Kharkiv Oblast and the Head of Moskovskii PD MD NP in Kharkiv Oblast to check investigation's compliance with "*reasonable term*" principle; to undertake the appropriate procedural decision; and to inform about the CP's current status.

In response law enforcement authorities informed the Council that criminal proceeding had been closed pursuant to para. 2 of Part 1 of Article 284 of the CPC ("*Absence of event of crime*").

However, the complainant informed the Council that he was not aware of closure of criminal proceedings and that even though 3 months has reportedly passed since CP's closure he had not received any procedural decisions to that effect. In fact, the complainant learned about closure of criminal proceeding only from law enforcement authorities' responses to the Council.

The complainant subsequently reported that he was enabled to get familiarized with the decision to close the proceedings. Thereafter the Council completed case investigation.

Currently, an investigator's and a prosecutor's obligation to provide defense party and a victim with access to CP's materials upon receipt of the respective motion is governed precisely by Article 221 of the CPC. Meanwhile, the procedure and terms of consideration of motions in criminal proceeding (including fulfilment of such a procedural action as providing CP's materials for review) is stipulated by Article 220 of the CPC.[34]

It means that, like any other motion lodged within criminal proceeding, a motion seeking access to case materials (including a request for an extract from the URPI) must be considered by an investigator, a prosecutor within 72 hours upon such motion's submission.

However, failure to observe the foregoing deadline would constitute inactivity at the part of an investigator comprising his/her failure to consider the respective motion. In this case, defense party or victim is supposed to challenge such inaction to investigatory judge in accordance with §1 of Chapter 26 of the CPC.

At the same time, analysis of cases, contained in the Unified State Register of Court Decisions (**"USRCD"**), demonstrates that there is a pressing need to ensure ability to challenge inaction of officers of pre-trial investigation body or a prosecutor, comprising failure to disclose CP's materials.

[34] *See* Analysis of the High Specialized Court of Ukraine for Civil and Criminal Cases "*On Practice of Reviewing Complaints against Decisions, Actions or Inaction of Pre-Trial Investigation Bodies or a Prosecutor during the Pre-Trial Investigation*" No. 9-49/0/4-17, dated January 12, 2017

Meanwhile, a successful appeal against such inaction does not, as such, guarantee the possibility of actually getting familiar with the case file. Indeed, investigatory judge, by virtue of rule set forth in para. 3 of Article 26 of the CPC, is entitled to consider only issues submitted by the parties and falling within investigatory judge's powers under the CPC.

Moreover, in accordance with Article 220 of the CPC, rendering decision upon motion's consideration, lies within discretionary powers of an investigator or a prosecutor and is beyond the scope of investigatory judge's competence.

Case No. 7. No opportunity to review CP's materials

In 2018, the Council received a complaint from a Ukrainian agricultural company challenging investigators' failure to properly consider the complainant's motion to review the case file.

In compliance with investigatory judge's ruling, the investigator generally informed the complainant about possibility to get familiar with CP's materials. Nonetheless, the complainant was unable to do so, as materials were first transferred to Mariupol Local Prosecutor's Office No.2 and then to the GPO.

Although the complainant approached the GPO seeking access to the case file, no reply was received.

Thereafter the Council approached Mariupol Local Prosecutor's Office No. 2 and the GPO with the request to duly consider the complainant's request to becoming familiarized CP's materials.

Later the Council received a letter from the GPO, according to which criminal proceedings materials were returned to Mariupol Local Prosecutor's Office No. 2.

Only 3 months after complaint's receipt by the Council and our active subsequent assistance the complainant reported that it successfully familiarized itself with CP's materials in Mariupol Local Prosecutor's Office No. 2. Afterwards, the Council closed its investigation due to successful resolution of complaint's subject-matter.

The procedure for accessing the URPI is set out in the *Regulation on the Unified Register of Pre-trial Investigations, Procedure for Its Formation and Maintenance*, approved by the Prosecutor General's Order No. 298, dated June 30, 2020 (**"Regulation No. 298"**).

Pursuant to the Chapter 4 of the Section I of the Regulation No. 298, information from the Register is provided in the form of an extract in the manner, prescribed by the CPC and in the form set forth in Annex 6 thereto. An extract from the Register is a document generated by the Register's software, which certifies registration of data about CP with the Register, by referring to parameters (search queries), specified in para. 3 of the abovementioned Chapter 4, relevant at the time of its formation.[35]

[35] The extract from the Register comprises the following information: 1) number and date of CP's registration; 2) date of application's receipt; notification and date and time of entering information about the application; notification of a committed criminal offense into the Register; legal qualification of the criminal offense; consequence of the CP's investigation; 3) full name of a victim, applicant (name of the legal entity and its identification code); 4) a summary of circumstances evidencing that a criminal offense was committed; 5) full name and date of birth of a person lodged with suspicion notice; consequences of investigation regarding person and information on course of a special pre-trial investigation regarding him/her; 6) name, USR code, legal address, current account, place and date of state registration of legal entity subject to criminal proceedings, as well as personal data of its representative; 7) a pre-trial investigation body; 8) full name of investigator(-s) of pre-trial investigation bodies and a prosecutor (prosecutors) exercising procedural supervision.

As already mentioned, parties do not always have to familiarize themselves with all CP's materials as quite often it might be sufficient to rely on the general information already contained in the URPI. This point is well illustrated in the following case from the Council's practice.

Case No. 8. The Complainant's lack of information about furnishing persons with suspicion notice

In 2020 the Council considered the complaint lodged by two large domestic agricultural companies challenging ineffectiveness of investigation of crimes, foreseen by para. 2 of Article 28, para. 5 of Article 191, para. 3 of Article 365-2 of the CC allegedly committed by a manager of certain entity and, simultaneously, district council's deputy.

In particular, complainants reported that, despite the evidence gathered in CP, they had no information on furnishing a suspicion notice.

Despite repeated appeals by the Council to the PGO and the MID NPU, the Council was denied the information with reference to Article 222 of the CPC and Article 387 of the CC.

Nonetheless, 5 months after approaching the Council, one of the complainants stated that he had received information that suspicion notice was actually furnished with the district council's deputy. Due to the complainant's receipt of information they sought and investigation's intensification, the Council completed case investigation.

It is worth noting that the Verkhovna Rada of Ukraine took an important step aimed at resolving the problem described in this chapter by adopting the Law No. 1498-IX, which enters into force on December 15, 2021. This document, inter alia, provides for creation of information and telecommunication pre-trial investigation system (**"IT PIS"**) designed to ensure creation, collection, storage, retrieval, processing and transmission of materials and information (data) in criminal proceedings.

However, to ensure proper functioning of the IT PIS the respective Procedure for the functioning of information and telecommunication pre-trial investigation system shall be adopted.[36] The Law No. 1498-IX establishes 6-months term for that – December 15, 2021 (i.e., coinciding with the date of this law's entry into force). Meanwhile, there is a risk that technical possibility to use IT PIS might be ensured with certain delays.

Noteworthy example of such a delay is the launch of the Unified Judicial Information and Telecommunication System – initially introduced with the adoption of the new versions of the Civil, Commercial and Administrative Procedural Codes in 2017.[37] However, as at the end of October 2021, the relevant system is still in "phased implementation" status.

[36] Pursuant to para. 1 of Article 106[1] of the CPC, the Procedure for the functioning of IT PIS is supposed to be governed by the regulation approved jointly by the PGO; state authority, whose composition includes a pre-trial investigation body; and the High Council of Justice (as the body approving the Regulation on the Unified Judicial Information and Telecommunication System)

[37] *See* the Law of Ukraine "*On Introducing Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Proceedings of Ukraine and Other Legal Acts*" No. 2147-VIII, dated October 3, 2017

While working on the Report, the Council had examined the draft Concept for introduction of information and telecommunication pre-trial investigation system common for all pre-trial investigation bodies (the **"Concept"**) developed by the Inter-Departmental Working Group on Electronic Criminal Proceedings.[38]

It is worth noting, though, that the draft Concept contemplates much wider range of measures aimed at introducing electronic criminal proceedings (as well as electronic criminal procedure) than the one provided by the Law No. 1498-IX and the Procedure for functioning of IT PIS.

Overall, the Council welcomes the work done by the Inter-Departmental Working Group and views the Concept as well substantiated roadmap for introducing electronic criminal proceedings. The document does take into account an urgent need to digitalize criminal proceedings and proposes effective ways to address issues the Council focuses on in this section.

Meanwhile, certain provisions of the draft Concept actually confirmed the Council's concerns about existence of the risk of delays with IT PIS's timely creation and implementation. In particular, Section IX of the Concept stipulates that "participants in criminal proceedings" will obtain access to information and telecommunication pre-trial investigation system, common for all pre-trial investigation bodies, only in 2024-2026.

Meanwhile, we emphasize that timely approval of the Procedure for Functioning of the Information and Telecommunication Pre-trial Investigation's System; as well as vesting a defense party, a victim and a legal entity's representative in whose respect proceeding is being conducted with a technical possibility to access the information contained in IT PIS and, accordingly, in the URPI, bears crucial importance for:

1. Introducing modern electronic form enabling parties' access to general information on criminal proceeding.

2. Reducing time and efforts spent by parties to criminal proceeding to obtain such information.

3. Reducing investigator's and prosecutor's burden while considering motions seeking access to case materials as well as investigatory judge's task to adjudicate law enforcer's inactivity.

[38] The Working group was composed of the representatives of all law enforcement bodies, the Ministry of Internal Affairs of Ukraine, the Ministry of Justice of Ukraine, the Ministry of Digital Transformation of Ukraine, the State Service of Special Communications and Information Protection of Ukraine as well as representatives of donor and international organizations. The draft Concept was made available to the Council courtesy of PGO's Criminal Policy and Investment Protection Department

COUNCIL'S RECOMMENDATIONS:

To ensure practical implementation of the Law of Ukraine *"On Amending the Criminal Procedure Code of Ukraine on Introducing Information and Telecommunication Pre-Trial Investigation System"* No. 1498-IX, dated June 1, 2021 aimed at introducing modern electronic type enabling parties' access to information on criminal proceeding contained in the Unified Register of Pre-trial Investigation:

5. The Prosecutor General's Office – jointly with the body within which the pre-trial investigation body functions, as well as with the High Council of Justice – to ensure timely development and approval of the Regulation on the Information and Telecommunication Pre-trial Investigation System.

6. The Prosecutor General's Office – once the Regulation on the Information and Telecommunication Pre-trial Investigation System is approved – to ensure technical possibility of its functioning.

3.3 Lack of opportunity to seek extension of pre-trial investigation's terms

Under the general rule – upon entering information about a criminal offense into the URPI to the date of notifying a person of suspicion of committing a criminal offence – the term of pre-trial investigation is either twelve (in criminal proceedings for a misdemeanor) or eighteen months (in criminal proceedings for a grave or particularly grave offense).[39]

In its turn, expiration of pre-trial investigation term is the ground to close criminal proceeding.[40] In view of this, suspects, accused, their defense as well as other parties to criminal proceedings may abuse their procedural rights to delay pre-trial investigation and subsequent closure of CP due to expiration of their terms.

Meanwhile, Article 294 of the CPC – containing general rules governing extension of pre-trial investigation's term – vests a prosecutor[41] or an investigatory judge with the right to **extend pre-trial investigation term only in response to investigator's or prosecutor's motion**. It means that at present defense, victim and other parties to criminal proceedings are not vested with the right to apply directly to a prosecutor or an investigatory judge with a motion seeking extension of CP's term.

In such circumstances, the foregoing parties to criminal proceeding end up relying solely on timely submission of a motion by an investigator or a prosecutor seeking extension of pre-trial investigation's term as its' completion is approaching. In this case, such a motion must be submitted by an investigator or a prosecutor no later than 5 days before expiration of pre-trial investigation's term.

[39] *See* para. 2 of Article 219 of the CPC

[40] Ibid., para. 1 of Article 284

[41] Namely: the Head of the District Prosecutor's Office, the Head of the Regional Prosecutor's Office or his First Deputies or a Deputy, a Deputy Prosecutor General (*see* para. 3 of Article 294 and Article 295 of the CPC)

The most important thing here is that the expired pre-trial investigation term is not renewable.[42] In addition, the fact that the prosecution missed the deadline to apply to a prosecutor or an investigatory judge is a ground for closing proceedings.[43,44] This important point is illustrated below in the description of the case from the Council's practice.

Case No. 9. Investigator's failure to meet deadline for approaching investigatory judge with a motion to extend investigation's term

In February 2021, LLC Firm "BLOK LTD" approached the Council to challenge ineffectiveness of pre-trial investigation conducted by the Territorial Department of the State Bureau of Investigation in criminal proceedings based on signs of a criminal offense, envisaged by para. 2 of Article 365 of the CC (*"Abuse of powers by an employee of law enforcement body"*).

The complainant reported that in October 2020, prosecutor of Dnipropetrovsk Regional Prosecutor's Office issued Order to close CP due to the absence of a body of crime. On January 21, 2021 the foregoing order was canceled by the Ruling of investigatory judge of Oktyabrs'kyi District Court in Poltava.

Upon complaint's receipt, the Council approached the leadership of Dnipropetrovsk Regional Prosecutor's Office seeking intensification of investigation.

Meanwhile, in March 2021, the Council's investigator discovered in the USRCD existence of the Ruling of investigatory judge of Oktyabrs'kyi District Court of Poltava, which had been published only a month after its adoption, from whose content it could be concluded that the Territorial Department of the State Bureau of Investigation investigators lodged a motion to extended CP's term of investigation.

However, as the respective motion was submitted by the investigator upon expiration of pre-trial investigation's deadline, the investigatory judge denied satisfying the said motion and extending the term. That prompted investigator to issue another Order to close CP.

As the complainant decided to challenge the foregoing investigator's decision with the investigatory judge, the Council had to discontinue consideration of this case.

Hence, a simple motion by an investigator or a prosecutor to extend the investigation's term is insufficient for such a motion to be satisfied. The procedural legislation explicitly requires the respective motion to be legitimate (i.e. submitted in compliance with all requirements, including deadlines) and properly substantiated.[45]

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42 *See* para. 5 of Article 294 of the CPC

43 Ibid., para. 9 of Article 295 and para. 7 of Article 295-1

44 It is noteworthy that a provision of para. 5 of Article 294 of the CPC constituted subject of constitutional complaint. Yet, the CCU declared the complaint inadmissible and refused to launch constitutional proceeding as the applicant had not properly substantiated the violation of his right to judicial protection by the impugned provision of the CPC. *See* the Decision of the Second Panel of Judges of the Second Senate of the Constitutional Court of Ukraine, dated January 14, 2021 No. 7-2 (II)/2021 in case No. 3-226/2020 (545/20); *see* the link: https://ccu.gov.ua/sites/default/files/docs/7_22_2021.pdf

45 *See* para. 4 of Article 295-1

It is noteworthy that deficiencies of investigators' and prosecutors' motions seeking extension of pre-trial investigation's term have not unfrequently drawn the attention of investigatory judges themselves. For example, the investigatory judge of Pryluky City District Court of Chernihiv Oblast emphasizes that:

> *"Appealing to the investigatory judge with a motion to extend the pre-trial investigation term without meeting the deadlines specified in para. 5 of Article 294 of the CPC moreover after the expiration of the pre-trial investigation term,* **indicates that the investigator neglects his/her procedural obligations under** *Article 40 of the CPC* **thus disregarding tasks of criminal proceedings** *enshrined in Article 2 of the CPC."* [46]

When working on this Report, the Council performed its own analysis of similar court decision contained in the USRCD. We ascertained existence (as at mid-October 2021) of at least 87 decisions in which courts refer to investigators neglecting their procedural duties by missing deadline for requesting an extension of the pre-trial investigation's term.[47]

Case No. 10. Complainant's untimely notification about pre-trial investigation's extension

In April 2021, construction company from the city of Kyiv approached the Council to challenge illicit inactivity of investigators of the MID of the State Bureau of Investigation. The complainant argued that due to expiration of the terms of pre-trial investigation, law enforcers should have issued decision to close CP, launched pursuant to para. 2 of Article 212 of the CC, para. 2 of Article 209 of the CC and para. 2 of Article 366 of the CC.

The complainant informed that taking into account provisions of para. 2 of Article 219 of the CPC, the CP's investigation term, information about which was entered into the URPI on May 23, 2019, expired on November 23, 2020. Meanwhile, the USRCD did not contain investigatory judges' decisions on extension of the pre-trial investigation's time limit. In addition, according to the complainant's representative, no one was furnished with a suspicion notice on committed criminal offence.

In May 2021, the Council asked the PGO to check the information on possible violations of reasonable terms and CP's pre-trial investigation term.

In response to the foregoing request, the PGO reported that based on the investigator's motion, by the Ruling of Pechersk District Court of Kyiv, dated December 3, 2020 the pre-trial investigation term was extended for twelve months.

Although pre-trial investigation was extended by investigatory judge, the complainant received the respective information only six months thereafter. Meanwhile, since existence of the instance of business malpractice (failure of investigators of the MID of the State Bureau of Investigation to adopt decision on CP's closure) was not confirmed – in July 2021 the complaint was rejected by the Council as groundless.

[46] *See* the Ruling of investigatory judge of Pryluky City District Court of Chernihiv City, V.M. Bezdidko, dated October 1, 2021 in case No. 742/3443/21

[47] *See* USRCD database by entering a search query (in Ukrainian): "*testifies to neglecting their procedural responsibilities by investigators*"

It should also be noted that carrying out procedural actions in criminal proceeding, whose term expired and was not extended, might jeopardize the entire pre-trial investigation.

In this regard, the Supreme Court emphasizes that sending indictment by a prosecutor upon completion of a pre-trial investigation to a court – if done beyond the terms of the pre-trial investigation in criminal proceedings concerning not serious or especially serious crimes or against life and health – precludes a person from acquiring a procedural status of accused (defendant); and, therefore, makes it impossible to consider criminal proceeding on the merits in court **and shall result in its discontinuation** under para. 10 of Part 1 of Article 284 of the CPC.[48]

It follows that the duty to comply with "reasonable terms"[49] rule directly corresponds to obligation of pre-trial investigation body to apply all measures provided in para. 5 of Article 38 of the CPC to **ensure effectiveness of pre-trial investigation**.

Hence, if law enforcers weren't ensured effective pre-trial investigation within the general timeframe set by Article 219 § 2 of the CPC, there is a risk that this could occur due to prosecution's deliberate failure to submit a motion seeking extension of pre-trial investigation's term in the timely manner.

The foregoing problem might be resolved by granting defense party, victim (as well as their representatives and defenders) with the right to independently approach a prosecutor or investigatory judge with a petition (motion) seeking extension of pre-trial investigation's term.

Granting such right to defense party, victim (as well as their representatives and defenders) will create additional conditions for a prosecutor or an investigatory judge to impartially scrutinize effectiveness of pre-trial investigation; and to establish existence or absence of objective grounds for extending terms thereof.

[48] *See* the decision of the Criminal Court of Cassation of the Supreme Court, dated September 15, 2021 in case No. 711/3111/19

[49] *See* Article 28 of the CPC

COUNCIL'S RECOMMENDATIONS:

To reduce the number of instances when criminal proceeding is closed due to investigator's or prosecutor's failure to meet deadlines for filing a motion with a prosecutor or an investigatory judge seeking extension of pre-trial investigation's terms:

7. The Ministry of Justice of Ukraine – jointly with the Prosecutor General's Office and/or the Ministry of Internal Affairs of Ukraine – to develop a draft governmental law amending the Criminal Procedure Code of Ukraine to grant defense party, victim and their representatives and defenders with the right to independently approach a prosecutor or an investigatory judge with a petition (motion) seeking extension of pre-trial investigation's term.

3.4 Forensic examinations

In criminal proceedings, an examination is a special review carried out by specialists with scientific, technical or other specialized expertise. In essence, such a special review involves obtaining new facts that have not yet been known to examination initiators and cannot be established in any other way.[50]

According to the Council's observations, scheduling of examination during the investigation of criminal proceedings is quite common. In many cases, examination's results play a key role. That's why it is very important to ensure that examination is being carried out fully, effectively and quickly.

While reviewing complaints lodged by entrepreneurs against law enforcers – particularly those challenging inefficiency of pre-trial investigation – the Council observed a number of problems with forensic examinations.

The first thing we would like to draw attention to is a significant delay in conducting respective examinations (Chapter 3.4.1). Even though the terms are established in the legislation, in practice examination can last for years, and sometimes can be used by law enforcers as a tool for inflicting pressure on business or for the legal "freezing" of the investigation. We believe that there are two main reasons for that: 1) lack of transparency in scheduling and conducting an examination; and 2) lack of liability of experts in cases when deadlines for conducting examinations are missed.

Thereafter we note that investigator/prosecutor have a wide discretion both while scheduling examinations (Chapter 3.4.2) as well as while formulating and modifying its questions (Chapter 3.4.3 (a)). Meanwhile, abuse of such discretion leads to a number of negative consequences. Hence, such discretion shall, in our view, be somewhat restricted. In addition, it is necessary to establish proper judicial control in this area.

The Council also focused on problems stemming from the need to obtain additional documents during examination (Chapter 3.4.3 (b)). In particular, the Council is aware

[50] *See* Paladiychuk O. "*Significance of forensic examination for achieving tasks of criminal proceeding*", Scientific Herald of Uzhgorod National University, 2015

of cases when expert purports explaining his/her failure to provide answers to certain examination questions by referring to alleged unavailability of certain documents that actually he/she should have requested but failed to do so. Another aspect of this problem is that investigators and prosecutors might ignore expert requests for additional documents.

Victim's limited procedural right to actually schedule examination constitutes another set of issues we explored (Chapter 3.4.4). In the Council's viewpoint, this situation must be changed by granting victim with procedural right to directly initiate expert examination.

At the end of the chapter, the Council proposes granting access to the texts of methodologies of conducting expert examinations based on requests made by court, party to criminal proceeding and victim (Chapter 3.4.5).

3.4.1 Delays in conducting examinations

Excessive duration (delay) of expert examinations is traditionally one of the most painful problems from which businesses suffers in relations with law enforcers. It is well known that some examinations take years. Complaints investigated by the Council clearly demonstrated negative consequences suffered by complainants when examinations were delayed, namely:

1) law enforcers were detaining complainants' property for a long time under the pretext of conducting an examination;

2) important evidence was lost and chances of bringing guilty persons to liability were reduced;

3) closure of criminal proceedings was postponed until results of respective examinations were obtained;

4) pre-trial investigation terms were used ineffectively.

Delays with conducting expert examinations may occur due to objective or subjective reasons.

Objective reasons comprise as follows:

1) complexity of examinations;

2) need to follow a scientifically substantiated methodology of conducting respective examination, which is time-consuming;

3) significant workload endured by employees of expert institutions;

4) outdated technical and criminalistics tools used by experts to conduct examinations.[51]

As far as first two reasons are concerned, there is no way the one can somehow influence them. With regard to the latter two, of course, the State should focus its efforts on financing relevant activities, increasing the number of experts, improving material and technical facilities, and so on. Although the Council did not specifically address these issues in this chapter, it seems logical that these steps should also be taken.

[51] Ibid

As for subjective reasons, it is quite obvious that examination's time frames can be affected by good faith attitude of both expert and law enforcers tasked to carry out particular investigation. In turn, in order to minimize the probability of such malpractice, the procedure for scheduling and conducting examinations should be as transparent as possible. This aspect is well illustrated through the following case from the Council's practice.

Case No. 11. Delay with returning complainant's property

In June 2020, the Council was approached by a company from Odesa engaged in manufacturing and sales of security seals. The complainant, in particular, complained about delay in conducting forensic examinations scheduled in the framework of the CP by Kyiv Police Department in Odesa of the MD NPU in Odesa Oblast.

In particular, in November 2019, CP was launched based on the alleged fact that company's officials illegally used invention on utility models. During search the complainant's property was seized, including equipment needed to make seals and finished products. Pursuant to the Ruling of the investigatory judge, the respective property was subsequently arrested. The judge, while pointing out that the requirements of Article 28 of the CPC setting forth reasonable time limits for conducting a pre-trial investigation must be complied with, also emphasized on the need to promptly conduct forensic examinations.

In February 2020, a trace examination was scheduled by the investigator's order.

At the time when the complaint was lodged with the Council, the examination had been going on for about four months. The complainant argued that the examination was intentionally delayed, and its purpose was not to establish the circumstances related to the facts of the matter, but only to delay and suspend the complainant's activities by seizing its core equipment.

The Council recommended Kyiv Police Department in Odesa of the MD NPU in Odesa Oblast to take measures to conduct IP examination asap. In September 2020, the Council was able to obtain information about examination's findings. The case was successfully closed.

We observe that persons, whose interests are affected by examination, often do not possess any respective information, namely: when examination was scheduled; what are the respective deadlines, etc.

We are convinced that the following steps would help resolving this problem:

1) to introduce investigator's and prosecutor's duty to inform in writing interested parties about scheduled examination within 3 working days following adoption of the respective decision;

2) to introduce a duty for specialized State-owned institutions tasked to conduct forensic examinations to publish at their respective websites list of examinations received;

3) establish experts' liability for breach of examination's terms.

COUNCIL'S RECOMMENDATIONS:

In order to prevent groundless delays in conducting forensic examinations, the Council recommends as follows:

8. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) aimed at introducing amendments to:

8.1. *The Criminal Procedure Code of Ukraine* – to introduce the duty of an investigator, a prosecutor to notify a victim, a holder of temporarily seized property, a representative of the legal entity in whose respect the proceeding is initiated, other person whose rights or legitimate interests are being restricted in course of pre-trial investigation about examination's scheduling, including reiterative examination. Such notification 1) shall be in writing; 2) shall be issued within 3 working days from the moment when the respective resolution on examination's scheduling has been issued; and 3) must specify, in particular, type of examination; name of the institution tasked to carry out examination; and a list of questions posed to an expert (experts).

8.2. *The Law of Ukraine "On Forensic Examination"* and respective sources of secondary legislation – to oblige specialized State-owned expert institutions tasked to conduct forensic examinations to publish on their website lists of examinations submitted to such institutions, in the order of their receipt. In particular, such publication should be made within 3 working days upon relevant materials' receipt. In such a list, in particular, the following main fields should be provided: ground for conducting examination (document number and date); criminal proceeding's number in whose framework examination is conducted; examination type; period of preliminary study of materials and actual term of material's preliminary study; examination deadlines; actual examination term, etc.

8.3. *The Code of Ukraine on Administrative Offenses* – to provide for liability of experts for breach of deadlines for conducting examinations (in particular, deadlines set for preliminary study of materials and terms of examination in general).

3.4.2 Abuse of right to schedule examination

In addition to delays in conducting examinations, the Council also observes that in some cases law enforcers abuse their discretionary powers while scheduling examinations. These are instances when an examination is scheduled not to achieve criminal proceeding's objectives (such as fast, comprehensive and impartial investigation, as required by Article 2 of the CPC) but rather to inflict pressure on business for "freezing" investigation.

Below is an illustrative case from the Council's practice.

Case No. 12. Scheduling unnecessary expert examination

In December 2019 the Council was approached by Kyiv-based construction company. The complainant challenged 1) failure of Dniprovs'k Police Department of the MD NPU in the city of Kyiv and Kyiv Local Prosecutor's Office No.4 to adhere with reasonable time limits within pre-trial investigation; as well as 2) allegedly illicit refusal to satisfy the complainant's motion seeking prosecutor's issuance of its own motion to the court seeking closure of the respective criminal proceeding. According to an excerpt from the URPI, circumstances containing signs of possible crime comprised the complainant's putting into operation of public complex involving payment of equity stake that did not correspond to the respective contractual terms.

Meanwhile, the Department of Economy and Investments of Kyiv City State Administration (**"KCSA"**) confirmed that it had no claims with respect to the complainant's due fulfilment of the contractual terms or regarding its' payments to the budget due to public complex construction.

Hence, on November 5, 2019 the complainant's representative filed a motion with the Prosecutor's Office requesting the latter to lodge its own motion with the court seeking CP's closure. Yet, the prosecutor refused satisfying the motion in view of the ongoing pre-trial investigation in the said criminal proceeding, which, *inter alia*, includes necessary evidence collection.

In January 2020 (including due to the Council's involvement) the complainant learned that a forensic economic examination was appointed in the CP. The purpose of this examination was to establish the amount of the equity contribution due to be paid and the amount of losses caused to Kyiv City budget in lieu of the alleged failure to pay the respective contribution.

The complainant, however, emphasized that there were convincing evidences in the case file proving absence of violations on his part, namely: payment documents on contribution's payment; expert examination's findings proving absence of violations while paying contribution; the letter of KCSA acknowledging absence of any outstanding payments on the contribution; and absence of any claims against the company. Hence, according to the complainant's view (also supported by the Council) scheduling and conducting of an examination was aimed solely at delaying terms of pre-trial investigation.

In the end, the complaint was successfully resolved, as the respective CP was closed in April 2021.

Meanwhile, it is worth stressing that in the foregoing case the complainant was effectively stripped of the right to challenge the resolution on scheduling expert examination as the law does not envisage such a possibility at all. Among other things, it is due to the fact that Article 303 of the CPC clearly determines exact categories of decisions, actions on inaction of an investigator or a prosecutor that may be challenged during pre-trial investigation. And the opportunity to challenge the decision appointing expert examination is not on such a list.

The Council also infrequently observed abuses by law enforcers while appointing reiterative examinations.

Case No. 13. Unnecessary reiterative examination

On January 10, 2019 the Council was approached by Kyiv-based company challenging allegedly illegal actions of the police and the Prosecutor's Office (i.e., Dniprovs'k Police Department of the MD NPU in Kyiv and Kyiv Local Prosecutor's Office No. 4). In particular, the complainant informed the Council that he had successfully implemented restaurant construction project. Meanwhile, within the framework of pre-trial investigation, the police and the Prosecutor's Office were trying to prove that the complainant's facility was built on land plots without holding necessary permits.

The complainant stated that the investigation must have established (including based on numerous experts' findings) that he had all permits and approval documents required by applicable law to hold the right to start and perform construction works. All these documents were attached to the CP's file. Moreover, construction of the facility had been completed and it had been put into operation in accordance with the law, as proved by the certificate issued by the Department of State Architectural and Construction Supervision of Kyiv City. The mentioned certificate attested compliance of the completed object with design documentation and confirmed its readiness for operation.

Meanwhile, as the complainant reported, despite the evidence proving absence of signs of a crime under Article 356 of the CC, law enforcers continued investigation and undertook various actions impairing its ability to carry out business.

The complainant, however, informed that within pre-trial investigation of the CP expert examination of the land management documentation had already been appointed; and that its' findings confirmed that the City Council had not committed any violations while allocating land to the complainant for construction. Despite this, the re-examination on the same issues, answers to which had already been given by the expert, was ordered by the procedural supervisor. Moreover, this reiterative examination was assigned to the same expert institution and the same expert who conducted the first review.

Finally, in September 2019, the case was successfully resolved by the Council as the respective CP was closed.

In the context of the above case it is appropriate to consider the Resolution of the Supreme Court of Ukraine No. 8, dated May 30, 1997 "On Forensic Examination in Criminal and Civil Cases." In para. 11 the Court points out to the fact that:

> *"Re-examination is scheduled when there are doubts about the correctness of the expert's opinion, related to its lack of validity or that it contradicts other materials of the case; as well as in the presence of significant violations of procedural rules governing the procedure for scheduling and conducting the examination. Re-examination may be entrusted only to another expert."*

The foregoing case from the Council's practice demonstrates that prosecutor's decision to entrust a re-examination to the same expert evidently constituted breach of the principle of lawfulness (legitimacy). Indeed, such an approach, employed by the supervisor of pre-trial proceeding, allows ignoring outcomes of any investigatory action and continue appointing re-examinations until interested party receives desirable conclusions.

We are convinced that the foregoing cases clearly illustrate the need to introduce an opportunity to challenge decision on appointing examination (including re-examination) during pre-trial investigation.

COUNCIL'S RECOMMENDATIONS:

To enable challenging an investigator's, prosecutor's decision on scheduling (appointing) expert examination, including reiterative examination:

9. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) aimed at introducing amendments to Article 303 of the Criminal Procedure Code of Ukraine to enable victim, his representative or a legal representative, or a legal entity representative against which the proceedings are taken, holder of temporarily seized property, other person, whose rights or legitimate interests are being restricted in the course of the pre-trial investigation, to challenge scheduling of examination with investigatory judge:

9.1. in whose regard there are objective reasons to consider that such examination was appointed not to achieve criminal proceeding's objectives, but rather to inflict pressure on business entity or to delay investigation;

9.2. which was re-scheduled on the same issues, answers to which had been already given by the expert and entrusted to the same expert who conducted the first review; or due to existence of other circumstances, giving objective reasons to believe that scheduling of re-examination is not appropriate.

3.4.3 Ineffectiveness of examination

As evidenced by the Council's practice, another critical issue is to ensure that expert examination is conducted in comprehensive and efficient manner. Not every expert examination, though, actually meets such important criteria. Hence, below the Council will focus on such important aspects affecting expert examinations as: a) formulating and modifying examination questions; and b) provision of additional documents during examination.

(a) Formulating and modifying examination questions

The first factor affecting effectiveness and completeness of relevant examination is wording of questions submitted for examination and the possibility to alter them any time while it lasts.

An investigator/a prosecutor are vested with fairly wide discretion on this matter. Unfortunately, such a wide discretion, while formulating and amending questions posed for expert examination, can have negative consequences if, for example, an investigator/prosecutor is not competent enough or has a personal interest in investigation's results (i.e., a corruption component is in place).

Current legislation does not allow persons directly interested in the effective conduct of the examination challenge the wording of examination questions. Such persons, as a rule, learn only afterwards that an investigator, for example, formulated the question incorrectly or changed it so significantly that the examination doesn't make sense at all. In addition, the wording of the examination questions also affects its' duration.

Here are some examples from the Council's practice illustrating the foregoing problems.

Case No. 14. Importance of examination questions' wording

In May 2018, the head and co-founder of a construction company in Dnipropetrovsk Oblast approached the Council to challenge slow and ineffective investigation of a number of CPs at the part of Dnipropetrovsk Oblast Prosecutor's Office and police authorities in Dnipropetrovsk Oblast. These CPs were related to illicit takeover (raidership) of a building owned by the complainant.

The complainant, in particular, alleged that the other party to the conflict forged a number of documents to seize his real estate (in particular, forged documents on assigning postal addresses, as a result of which it became possible to register the same object in the State Register of Proprietary Rights to Immovable Property bearing different addresses several times).

In January 2019, the investigator by his order scheduled a construction and technical examination. Based on the expert institution's response, given the complexity of the relevant examination, its completion was possible only by the end of the fourth quarter of 2022.

Meanwhile, the Council noted that completion of the examination within such a period would result in the investigation lasting without furnishing anyone a suspicion notice for at least 6.5 years (notwithstanding the time necessary for the investigator to complete the pre-trial investigation after receipt of the examination findings).

As it turned out, such lengthy examination can be caused by the number and complexity of questions posed in the investigator's order scheduling examination. Indeed, the investigator posed nine questions including when the facility was built; what its technical condition was; what parts of an object were separated from each other, etc.

In the Council's view, though, within the framework of this examination it would be sufficient to obtain an answer to one basic question to advance with investigation of a possible criminal offense:

> *"Is immovable property owned by the Complainant identical to the property registered at a different address?"*

In January 2019 the Council recommended law enforcers to ensure an effective pre-trial investigation of the relevant CPs.

Meanwhile, in August 2021 the Council terminated monitoring its recommendation as it became irrelevant (respective CPs were closed).

In the foregoing case, the Council emphasized that a non-concerned third party might doubt the need to ask the expert a significant number of questions mentioned in the relevant investigator's decision. Yet, it is noteworthy that the complainant couldn't exercise any legal recourse that would allow challenging the investigator's actions in such a situation.

Besides, in this context no less important is investigator's/prosecutor's discretion to modify examination questions any time while it lasts. Here is a case from the Council's practice clearly demonstrating possible negative implications of such discretion.

Case No. 15. Changing examination questions and consequences thereof

The Council has been approached several times by a large domestic agricultural company from Mykolaiv Oblast. The complainant sought the Council's support, as a number of CPs initiated by the complainant as a victim, were ineffectively investigated by the police and the MD of the SSU in Kyiv and Kyiv Oblast.

A forensic economic examination was conducted under the framework of one of such proceedings, which related to the complainant's counterparty's failure to enforce court decision.

Initially, the question of examination was tentatively formulated as follows:

> *"Is calculation of material damage caused to the complainant as a result of failure to enforce the respective court decision [actually] confirmed by the respective documents?"*

Three months thereafter, the investigator specified the above question by formulating it in a completely different way:

> *"Is the complainant's loss of assets (losses) due to the failure of its' counterparty to fulfill obligations under respective foreign trade contracts confirmed by respective documents?"*

It is obvious that such a significant change to formulating a question had a corresponding impact both on the examination's findings and on the pre-trial investigation's outcome as a whole. In particular, CP was closed in December 2020 based on para. 1 of Article 284 of the CPC due to the absence of crime.

The Council had to discontinue case investigation as the complainant decided to challenge closure of CP in the court.

In the Council's view, in order to avoid such situations, it is necessary to oblige investigator and prosecutor to send draft resolution on scheduling examination to parties concerned by specifying the relevant list of questions. In addition, these parties should be enabled to challenge such questions at pre-trial stage, by clarifying the language of Article 303 of the CPC. Similar provisions should be introduced if examination questions are modified, namely: to oblige investigator sending draft resolution aimed at changing examination questions to parties concerned and ensure the possibility to challenge such a change.

COUNCIL'S RECOMMENDATIONS:

In order to increase effectiveness of examinations in terms of formulating and modifying examination questions:

10. The Ministry of Justice of Ukraine – to develop draft a governmental law(-s), which would amend:

10.1. *The Criminal Procedure Code of Ukraine (CPC)* – to oblige investigator and prosecutor to send draft resolution scheduling (appointing) examination containing list of relevant questions or draft resolution changing examination questions to a victim, a legal entity's representative in whose regard investigation is being carried out, a holder of temporarily seized property, another entity, whose rights or legitimate interests are limited during the pre-trial investigation within 3 working days from the date relevant draft was prepared;

10.2. *Article 303 of the CPC* – to enable certain persons to challenge with investigatory judge list of questions referred to expert in draft resolution on scheduling examination and in the draft resolution changing examination questions. Such right shall be 1) granted to a victim, his/her representative or a legal representative, representative of a legal entity in whose regard proceeding is being carried out, a holder of temporarily seized property owner,

other person whose rights and legitimate interests are being restricted in the course of the pre-trial investigation; and 2) exercised within 10 working days upon receipt of the relevant draft resolution's copy. The respective persons shall notify an investigator/a prosecutor about such challenge. While the latter shall not be entitled to send the resolution to an expert institution until appeal procedure is completed.

(b) Provision of additional documents during examination

(i) Expert's failure to request additional materials

An equally important aspect directly affecting expert examination's effectiveness is providing experts with additional materials and samples. Under the general rule, a forensic expert is entitled to file a request for additional materials if examination is appointed by a court or a pre-trial investigation authority.[52]

Meanwhile, in its practice the Council has encountered cases where for completeness of the review[53] the expert **must have requested** additional documents but failed to do so. In these cases, an external and impartial person had all reasons to believe that due to expert's inactivity examination's quality and fullness were impaired.

In the foregoing Case No.15 we already demonstrated that change in examination's questions could significantly affect examination findings as a whole. That case also clearly demonstrated consequences of the expert's neglect of the right to request additional documents.

Case No. 16. Need to obtain additional documents: right or duty?

In the foregoing Case No. 15 the complainant had to seek the Council's support to challenge inefficiency of several CPs initiated by it as a victim.

A forensic economic examination was conducted in one of these proceedings related to failure to enforce a court decision by the complainant's counterparty.

In the examination report experts, de facto, acknowledged that although additional documents had to be obtained to ensure completeness of review, they were not requested. In particular, one of examination questions was as follows:

"Do the company's financial and economic condition indicators for a certain period have signs of causing bankruptcy?".

[52] *See* para. 1 of Article 13 of the Law of Ukraine "On Forensic Examination" No. 4038-XII, dated February 25, 1994, as amended (*"Law of Ukraine "On forensic examination"*) and para. 3 of Article 69 of the CPC

[53] Pursuant to the Law of Ukraine *"On forensic examination"* and the CPC carrying out a full review is defined as expert's obligation

Meanwhile, within the report itself experts note that:

> *" [...] to substantially determine indicators to detect signs of causing bankruptcy, except for data provided in the examination report forms (form No.1), it is [also] required to have appropriate analytical information and relevant lines indicators of form No.5 "Notes to the annual financial statements", [...] and which are unavailable in the materials at hand. [...] Summarizing the above, within the scope of documents submitted for research, it is impossible to establish whether the company's financial and economic condition for a certain period testify to intentional actions of officials and/or company owners to intentionally make it go bankrupt".*

In December 2020, the relevant CP was closed. The case investigation was discontinued by the Council, as the complainant decided to challenge CP's closure in the court.

The foregoing case demonstrates that lodging motion seeking disclosure of additional materials **must be an expert's duty rather than his/her right**. Indeed, if the expert wasn't requesting such additional documents and they were really needed in a particular case – examination's findings can hardly be considered complete. It is worth noting that the Ministry of Justice of Ukraine has already drawn attention to this problem.[54]

In addition, such a situation should be a direct ground for re-examination.

(ii) Ignoring expert's motions seeking additional documents

It should be noted that the Council is well aware of other malpractices in the context of requests for additional documents during examination. However, such malpractice does not occur on the part of experts but, rather, pre-trial investigation bodies.

Notably, in case of failure to satisfy expert's request to provide additional materials within 45 calendar days after it was sent, – case materials shall be returned to the body (person) who appointed examination (engaged an expert), specifying well-grounded reasons explaining impossibility to conduct it.[55]

Meanwhile, interested party (for instance, a victim) may not even be aware about existence of such an expert's motion for additional documents, if examination was initiated by a pre-trial investigation body/a prosecutor. Moreover, if factor of corruption is present, investigator/prosecutor might even deliberately ignore such motions so that examination is not carried out at all (for example, if investigator/prosecutor is "on the side" of a suspect) and then close CP due to expiration of pre-trial investigation's terms.

[54] *See* the link: https://zakon.rada.gov.ua/laws/show/n0002323-13#Text – Problematic issues pertaining to legal framework governing forensic-expert activities

[55] *See* para. 1.13 of the *Instruction for Scheduling and Conducting Forensic Examinations and Expert Reviews*, approved by the Order Ministry of Justice of Ukraine No. 53/5, dated August 10, 1998 (**"Forensic Examination Instruction"**)

Hence, if a pre-trial investigation body or a prosecutor were to initiate an examination – where expert subsequently sends a motion seeking disclosure of additional documents – the former should be obliged to notify interested parties accordingly. Moreover, often such an interested party may be often in possession of additional documents expert needs.

Besides, investigator/prosecutor shall inform interested parties that, in response to an expert's motion, additional documents has actually been provided. It is needed for acknowledging that a law enforcement body, in response to an expert's motion, has actually disclosed additional documents. If law enforcement body were to ignore such motion and not documents are disclosed – there shall be an opportunity to challenge such an inactivity.

COUNCIL'S RECOMMENDATIONS:

In order to increase examinations effectiveness involving provision of additional documents:

11. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s), which would amend:

11.1. *The Criminal Procedure Code of Ukraine (CPC), the Law of Ukraine "On forensic examination"*, other legislative acts – to provide that filing a motion seeking provision of additional documents in course of examination (if necessary to ensure a full review) shall be an expert's duty, not a right;

11.2. *Article 332 of the CPC* – notwithstanding existence of interested party's motion to this effect – to vest a competent court with independent right to appoint additional expert examination if there are reasonable grounds to view initial examination report as being incomplete due to expert's failure to lodge a motion seeking provision of additional documents;

11.3. *The CPC, the Law of Ukraine "On forensic examination"*, other legislative acts to provide as follows:

1) if examination is conducted based on an investigator's, prosecutor's motion and they receive a request to provide additional documents – within 3 days upon their receipt of such request an investigator, a prosecutor shall notify thereof a victim, a legal entity's representative in whose respect investigation is being carried out, a holder of temporarily seized property, other persons whose rights or legitimate interests are being restricted in the course of the pre-trial investigation;

2) such persons shall have the right to submit to investigator/prosecutor additional documents requested by an expert, if they have them;

3) an investigator/a prosecutor shall notify such persons about date and list of documents sent to expert, to be made within 3 working days therefrom;

11.4. *The CPC, the Law of Ukraine "On forensic examination"*, other sources of secondary legislation – to provide that in case of investigator's or prosecutor's failure to provide additional documents to expert within 15 calendar days (from receipt of such request), a victim, his representative or a legal representative, a representative of a legal entity in whose regard proceeding is being conducted, a holder of temporarily seized property, other persons whose rights or legitimate interests are being restricted in the course of the pre-trial investigation, shall have the right to challenge such inaction with investigatory judge pursuant to Article 303 of the CPC;

11.5. *Article 332 of the CPC* – to provide that, at the request of parties to criminal proceedings or a victim, a competent court shall have the right, by its decision, to schedule an expert examination if case materials were returned to an investigator/a prosecutor due to their failure to satisfy expert's motion seeking provision of additional materials.

3.4.4 Victim's procedural abilities to schedule examination

The current CPC does not allow a victim to initiate scheduling of examination directly. In particular, pursuant to Article 243 of the CPC an expert shall be engaged if there are grounds for conducting an examination in lieu of request made by a **party to criminal proceeding**.

Meanwhile, in lieu of the current legislative definition of the term "party to criminal proceeding", it appears that while a victim could belong to prosecution's side, actually it occurs only in several specific cases established by the CPC.[56] In all remaining instances, a victim has no opportunity to directly initiate an examination. In turn, prosecution may delay scheduling an expert examination.

Why is it so important to ensure that a victim has the opportunity to initiate an examination directly? According to the Council's observations, presently victims are effectively forced to act as follows. By exercising the right provided by Article 220 of the CPC (to file a motion seeking performance of any investigative action) victims approach an investigator/ a prosecutor seeking appointment of expert examination. Certainly, it's great when an investigator or a prosecutor diligently perform their duties and take steps to ensure that investigation is conducted in a full, thorough and prompt manner. However, as evidenced by the Council's practice, as such motions are frequently ignored, it prompts victims to subsequently contest inaction of a prosecutor/an investigator with investigatory judge. The latter, in his/her turn, might issue ruling obliging an investigator/a prosecutor **to consider a respective original motion**.

[56] Pursuant to para. 1 of Article 3 of the CPC the parties to criminal proceeding are as follows: 1) from prosecution's side: an investigator; interrogator; head of pre-trial investigation body; head of the inquiry body; *prosecutor as well as a victim, his representative and a legal representative in cases established by this Code*; 2) for the defense: suspected person, accused (defendant), convicted, acquitted person, a person due to be subjected to compulsory medical or educational measures, etc.

Meanwhile, in this case, the victim will receive not an investigatory judge's ruling scheduling examination but only a decision obliging to consider a respective motion. What happens next? Unfortunately, even after that, there is no guarantee that an investigator/a prosecutor will actually consider such a request and promptly schedule an examination. This convincingly illustrates that in practice victim often has to engage in "fighting" with law enforcement authority and there is no guarantee of successful outcome. At the same time, pre-trial investigation's term continues lasting.

Hence, a victim's lacking the opportunity to directly initiate examination results in substantial misuse of pre-trial investigation's terms.

The Council is, thus convinced, that both victim and parties to criminal proceedings should be able to initiate an examination independently.

Case No. 17. Victim's lack of sufficient rights

Above we (Case No. 14) have already referred to situation, where, among other things, there was a clear need to provide the victim with additional procedural tools in scheduling examinations.

In the foregoing situation, criminal proceeding was initiated in March 2016. During 2016-2018, despite numerous requests from the complainant and its representatives, no construction and technical examination was scheduled in the criminal proceeding.

The Council corresponded extensively with law enforcement bodies regarding this issue, and repeatedly drew attention to the importance of ordering and carrying out an examination as soon as possible.

The relevant examination was eventually scheduled by the investigator only in January 2019.

As already mentioned in the description of Case No. 14, in August 2021 the Council terminated monitoring its recommendation as it became no longer relevant (the respective CP was closed).

Case No. 18. Victim's lack of sufficient rights

The Council (Cases No. 15 and No. 16) also referred to scenario, where motion seeking forensic economic examination was lodged in April 2020.

As the investigator ignored the complainant's motion, the latter had to turn to the investigatory judge. In July 2020, the complainant received a decision from the investigatory judge, according to which the investigator had to consider the respective motion.

Finally, in September 2020, a relevant examination was finally scheduled.

Therefore, in fact, 5 months passed since submission of the motion seeking examination and its actual appointment.

In December 2020, the respective CP, within whose framework examination was conducted, was closed. Hence, the case consideration was terminated by the Council, as the complainant decided to challenge closure of CP in court.

The foregoing cases illustrate the need to grant the victim with additional right to independently initiate scheduling expert examination.

COUNCIL'S RECOMMENDATIONS:

In order to effectively enforce victim's right to schedule expert examination in criminal proceeding:

12. The Ministry of Justice of Ukraine – to develop a draft governmental law on introducing amendments to Articles 242-244 of the Criminal Procedure Code of Ukraine to provide that examination shall be conducted by an expert institution, an expert or experts, who, among others, can be engaged by a victim or an investigatory judge based on a victim's motion.

3.4.5 Accessing texts of expert examination methodologies

The methodology of conducting forensic examination is an approximate scheme of conducting the examination; the list of documents that need to be investigated; objects, methods that need to be applied; as well as facts that might be established in course of examination.[57] Hence, essentially the methodology is a certain algorithm (set) of actions to be followed by an expert within the scope of a particular examination.

It should be noted that introductory part of expert's opinion, among other things, should contain references to methods used during forensic examinations.[58]

At present, there is a special register, where methods of forensic examination certified and recommended for implementation in expert's practice are included. Such a special register is managed and administered by the Ministry of Justice. Presently, the Ministry of Justice website contains information about over 1,300 such methodologies.

[57] *See* the link: http://www.investplan.com.ua/pdf/24_2016/8.pdf

[58] *See* para. 4.12 of Section IV of the Guide for scheduling and conducting forensic examinations and expert reviews

In particular, the following information on methodologies can be found in public sources:[59]

1) methodology registration code;

2) type (sub-type, kind) of examination or field of knowledge;

3) methodology name;

4) name of the state specialized expert institution or the proper name and surname of the forensic expert who is not an employee of the state specialized institution and who developed the methodology;

5) year when the methodology was created;

6) date when decision on methodology's state registration was rendered.

Meanwhile, texts of the relevant methodologies cannot be found in free access. Similarly, the texts of the methodologies are available neither to the court nor to parties of the criminal proceeding or a victim.

To the best of our knowledge, the issue of access to forensic examinations texts has been repeatedly discussed in the expert community.[60] The Ministry of Justice also discussed this issue, including in July 2020.[61]

In the Council's view, the issue of accessing texts of methodologies should be approached carefully. Making texts publicly available is obviously of no vital importance. Meanwhile, access to the text of methodologies would help courts, parties to criminal proceedings and a victim, assess expert opinion's quality, its reasonability and completeness. As far as we know, in practice it is possible to obtain the text of methodology of conducting a forensic examination (for example, by sending advocate's requests to the institution that developed the methodology). However, obtaining the text of the methodology might be time-consuming, which is often critical in a criminal case.

Besides, granting access to methodologies texts would contribute to transparency of examination process and improve expert opinion's quality. Since the Ministry of Justice is the holder of register of methodologies, it would obviously be logical for the latter to have texts of all methodologies in its disposal.

Hence, the Council proposes establishing that the Ministry of Justice should provide access to the text of relevant methodology in electronic form at the written request of the court, parties of the criminal proceeding or a victim to be made within 3 working days upon receipt of such a request. Besides, the need to obtain a text of the methodology should be properly justified in such a request.

[59] In accordance with para. 10 of the *Procedure for Maintaining the Register of Forensic Examination Methodologies*, approved by the Order of the Ministry of Justice of Ukraine, dated October 2, 2008 No. 1666/5

[60] For example, this issue was recently raised in the framework of the 1st All-Ukrainian Forum of Forensic Experts, held by Lviv Research Institute of Forensic Science of the Ministry of Justice of Ukraine on June 10-11, 2021 - *see* the link: https://intelect.org.ua/ndczse-z-pytan-intelektualnoyi-vlasnosti-vzyav-uchast-u-roboti-1-go-vseukrayinskogo-forum-judicial-expert/

[61] *See* the link: https://kise.ua/ministerstvo-iustytsii-rozpochynaie-obhovorennia-pytan-shchodo-provedennia-sudovoi-ekspertyzy/

COUNCIL'S RECOMMENDATIONS:

To ensure maximum transparency of expert examination process:

13. The Ministry of Justice of Ukraine – to develop draft governmental law(-s) introducing amendments to selected articles of the Criminal Procedure Code of Ukraine and other legislative acts to ensure that:

13.1. if necessary, the court, parties to criminal proceeding, victim may send a justified written request to the Ministry of Justice of Ukraine to acquire access to the text of certain forensic examination methodology;

13.2. the Ministry of Justice of Ukraine must provide access to the relevant methodology text in electronic form upon a written request of the court, parties of the criminal proceeding, victim to be made within 3 working days from the date of such request's receipt.

4 ABUSES DURING PRE-TRIAL INVESTIGATION

The current CPC, unlike other procedural codes, lacks acknowledging "*abuse of procedural rights*" as one of principles of criminal proceeding. Similarly, no clear criteria are defined to explain what actions or omissions of a party to criminal proceeding should be considered as falling under "*abuse of procedural rights*" category.

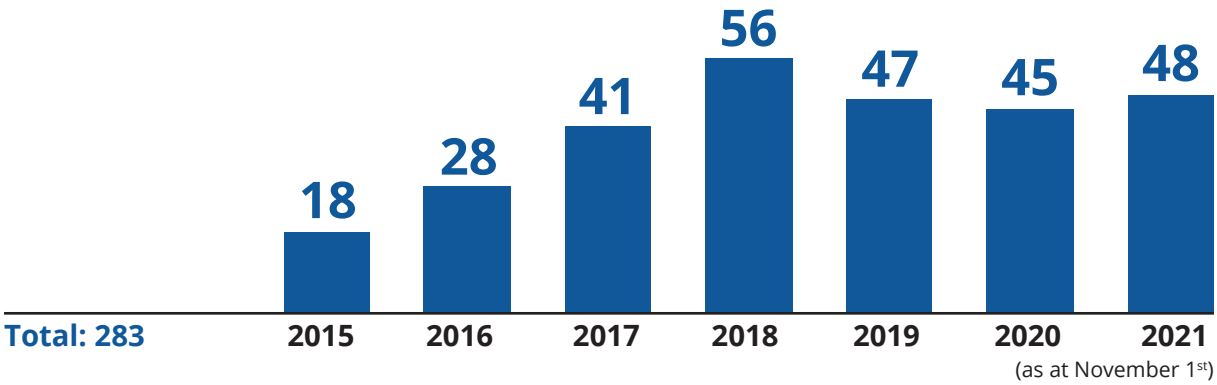
Meanwhile, in 2018 the Supreme Court stated that although the CPC does not contain a general provision prohibiting abuse of procedural rights, it nonetheless is acknowledged as a general legal principle, extending to all fields of law.[62]

Nevertheless, the principle of inadmissibility of abuse of procedural rights has already been successfully enshrined and is operating in civil, commercial and administrative proceedings. Therefore, it would be appropriate to incorporate such a principle to criminal procedure legislation as well. In our opinion, it would constitute a safeguard against abuses at the part of law enforcement authorities and give investigatory judges the opportunity to stop such abuses against businesses.

The relevance of this issue is confirmed by the Council's statistics of complaints lodged to challenge abuses committed by law enforcers during pre-trial investigation of criminal proceedings against business. In particular, as at November 01, 2021 the Council received **283** such complaints.

The Council has completed its investigation of 216 complaints that were accepted into consideration. In 142 cases (65.74%) – with a successful outcome achieved for complainants due to the Council's facilitation; in 15 cases (6.94%) – successful outcome was achieved independently of the Council's involvement; in 42 cases (19.44%) – investigation was completed without reaching a successful outcome; and in 10 cases (4.62%) – the Council found complaints unsubstantiated or largely unsubstantiated, and dismissed them. The dynamics of complaints in this category is more or less stable.

Number of complaints lodged with the Council to challenge abuse of power by law enforcers in course of pre-trial investigation (2015-2021)



Having analyzed statistics of these complaints, the Council identified several systemic problems caused by abuse of powers by law enforcers.

[62] *See* the Decision of the Criminal Cassation Court of the Supreme Court dated May 30, 2018 in the case No. 676/7346/15-k

Therefore, in this chapter we will analyze such problems by referring to the most common procedural abuses of law enforcers we encountered while considering complaints lodged by businesses to challenge actions and inaction of law enforcers during pre-trial investigation of criminal proceedings.

Namely, it is information on abuses comprising 1) groundless retention of arrested property (Chapter 4.1); 2) transfer of criminal proceedings materials from one pre-trial investigation body to another (Chapter 4.2); as well as 3) practice of reiterated arrests (Chapter 4.3).

4.1 Groundless retention of arrested property

In relations between business and law enforcers groundless retention of arrested property can have two major manifestations. The first one is when **seizure of property occurs in an illegal way**. This happens when a law enforcement body seizes entrepreneur's property without getting prior permission (ruling) of an investigatory judge for such seizure; and following such seizure does not succeed in receiving respective investigatory judge's ruling for the arrest of property (in the manner prescribed by Article 171 of the CPC). It might happen due to the fact that the investigator simply did not approach the court with a motion for arrest, or the court refused to satisfy such a motion. According to the Council's observations, this type of abuse by law enforcement officers is well known and is not infrequent.[63] Among other things, this is confirmed by the fact that at least **16%** of all complaints lodged against law enforcers entail this type of misconduct.

The second scenario, in which **the property is groundlessly retained, occurs in the event of violation of a reasonable time limit set for retention of seized property**. In these circumstances, the initial seizure of property, from a formal point of view, is conducted legally provided an investigatory judge has given an investigator permission to seize property, or issued a ruling to arrest such property. According to our observations, this problem is becoming increasingly important for Ukrainian entrepreneurs, as more than 20% of complaints against law enforcers lodged with the Council relate to this type of violation.

In particular, while investigating complaints challenging actions and inaction of law enforcers, the Council has frequently observed situations where seized property has been retained for a long time (a year or more) amid alleged interests of investigation. Meanwhile, during all such time, investigation against the owner of seized property is typically not carried out. The owner is neither furnished with a suspicion notice, nor summoned for questioning or requested to provide documents, etc. In these circumstances, all indications are that the investigation has no evidence that the owner of the seized property is in any way involved in committing a crime.

That is, the property owner has to suffer restriction of his rights despite the apparent inaction of law enforcement bodies that seized the property and in the absence of an obvious adequate purpose behind restriction of the owner's rights.

The reason for this problem is that the current CPC does not set deadlines for arresting property seized within a criminal investigation. As a result, sufficiency of grounds for restricting property owner's right to use and dispose of his property is scrutinized by a court (Article 172 of the CPC) only at the time of consideration of investigator's or pros-

[63] The problem of groundless seizure of property was examined in the Chapter 2.4 of the Previous Report

ecutor's motion for arrest. Thereafter, judicial control over legality of seized property's retention by law enforcement bodies is, *de facto*, not carried out. Under such conditions, owner of seized property remains to be restricted in his/her right to dispose of the property until prosecutor in criminal proceeding decides to return it to the owner (Article 169 of the CPC); or property arrest is lifted at owner's request (Article 174 of the CPC).

An outside observer may think that the right to go to court with a request to lift the arrest is a sufficient and effective tool to protect entrepreneur's rights against illegal retention of property by a law enforcement body. However, in itself, appealing to a court to protect their rights is quite a cumbersome step for many businesses, especially when it comes to the representatives of small and medium-sized businesses. After all, going to court implies legal costs, often being disproportionately high vis-a-vis seized property's value. And the very wording of Article 174 of the CPC (granting property owner with the right to request lifting of arrest) imposes an obligation on the applicant to prove that there is no need for further arrest. In this context, it is worth recalling that owner of seized property often has no status in criminal proceedings in which the property has been seized. It means that such an owner does not have access to criminal proceeding's materials and, accordingly, is unable to properly substantiate the request to lift the arrest. In addition, making a property owner responsible for lifting seizure of his property effectively transfers the burden of proof from a law enforcement body to an individual, which is contrary to general principles of criminal proceeding.

On a separate note, it should also be mentioned that lifting property arrest in court also cannot guarantee return of property to the owner.[64]

The foregoing problems with lengthy groundless retention of property can be illustrated by the following complaint lodged with the Council by a private entrepreneur.

Case No. 19. Lengthy failure to return seized monetary funds

In January 2020 the Council was approached by an individual entrepreneur from Kharkiv complaining that in March 2018 the PGO's employees seized UAH 500k from him, which were arrested by investigatory judge shortly thereafter. Meanwhile, the complainant emphasized that from the moment when funds were seized until January 21, 2020 (the date of lodging complaint with the Council) he had neither been summoned to law enforcement bodies to conduct investigative actions with his participation, nor was he requested to submit documents and had no procedural status in the respective criminal proceeding.

In September 2019, in order to recover seized funds, the complainant applied to Holosiivskyi District Court of Kyiv with a request to lift the arrest. During the period from September to December 2019, 5 court hearings were scheduled by Holosiivskyi District Court of Kyiv as part of the consideration of the motion to lift the arrest in case No. 752/2982/19. However, the prosecutor's office representative neither attended any court hearing nor provided written explanations, motions or objections to the motion to lift the arrest. Therefore, the complainant was convinced that prosecutors were deliberately delaying pre-trial investigation and judicial consideration to continue groundless retention of seized funds.

[64] The issue of failure to enforce investigatory judge's rulings ordering property return is discussed in the Chapter 3.2 of the Council's Systemic Report "*How Business Can Seek Execution of Court Decisions in Ukraine*" (February 2021)

In February 2020, the Council, by its letter, requested the PGO to ensure prosecutor's attendance of court hearing and/or to produce prosecution's official written position for taking into account under the framework of consideration of the complainant's motion to lift the arrest by Holosiivskyi District Court of Kyiv. In its request the Council referred to obvious breach of reasonable time limits while taking procedural actions with seized property and disproportionate nature of actions of investigation against the complainant.

In April 2020, the PGO, by its letter, informed the Council about dismissal of prosecutors who belonged to the group of prosecutors in criminal proceeding and appointing the new group. Meanwhile, the PGO pointed out that adequacy of grounds for retention of property had been verified by the investigatory judge when arrest was being imposed.

In June 2020 the complaint's subject matter was discussed during the Council's working meeting with the leadership of the PGO. However, law enforcers insisted that the complainant's property had been seized legally, while the question of its return would be considered by the competent court. Prosecutors also did not comment on the fact whether evidence of the complainant's involvement in the crime had been collected under criminal proceedings. And, indeed, according to the CPC, such information constitutes secrecy of investigation and can be disclosed only with the permission of the responsible investigator.

On June 16, 2020, Holosiivskyi District Court of Kyiv returned the complainant's motion to lift the arrest without consideration as the latter had failed to appear at the hearing twice. The complainant, for his part, explained the situation by saying that he could no longer pay for a lawyer's participation in court hearings, whose attendance is being continuously ignored by the prosecution.

In July 2020, the Council was forced to discontinue case investigation due to the failure to convince the PGO about the need to return the property whose arrest had not been lifted.

The foregoing case illustrates that the existing legal framework governing terms of arrested property's retention is yet to comply with the principles of reasonable time and proportionality.

It should be noted that the **principle of reasonable time is** directly enshrined in Article 28 of the CPC and requires that during investigation of criminal proceeding, every procedural action or decision must be performed or adopted within reasonable deadlines. Accordingly, requirements of Article 28 of the CPC must also apply to the decision on returning property. Hence, if investigation was unable to prove within reasonable time the guilt of person from whom the property was seized, – such property must be returned to its owner.

However, a notion of "reasonable time" is a discretionary category, which, as practice shows, are known to be employed by law enforcers as a tool for abuses and manipulations.

In our view to stop the practice of such manipulations and to turn the "reasonable time" concept into real and effective remedy protecting businesses and individuals from arbi-

trariness of state bodies – the legislator should specify time limit for keeping property under arrest. Upon expiration of such term, the property shall be returned to the owner or re-arrested, provided that investigation is capable to prove that during period of time, while the property was retained, it managed to collect additional evidence proving owner's involvement in illicit activity.

In the Council's view, the legal basis for such a legislative initiative could be application of the principle of proportionality to the relations between law enforcers and businesses during pre-trial investigation.

The principle of proportionality – general legal principle aimed at ensuring reasonable balance between private and public interests, whereby purposes of restricting rights have to be substantial, while means to achieve them – well-grounded and least burdensome for people whose rights are being restricted. This principle allows achieving reasonable balance between objective of state influence and means employed to achieve them.

Although Article 7 of the CPC does not explicitly recognize proportionality as general principle of criminal proceeding, the CCU defines this principle as one of the elements of the rule of law.[65] Meanwhile, in accordance with Article 8 of the CPC, criminal proceedings are conducted with adherence to the rule of law principle, according to which a person, his rights and freedoms are recognized as the highest values and determine the substance and direction of the state activities.

Hence, it can be reasonably concluded that the legislator, while defining the rule of law as the basic principle of criminal proceedings, also meant that actions and decisions of law enforcement bodies should be proportionate, as required by the rule of law.

While assessing how law enforcers should act for their actions and decisions to meet the requirements of proportionality, it is worth referring to the interpretation of the content of this principle provided by the CCU. In particular, in its judgment dated November 2, 2004 in case No. 1-33/2004, the CCU has stated:

> *"The restriction of constitutional rights of the accused must comply with the principle of proportionality: interests ensuring restriction of rights and freedoms of a person and a citizen, property, public order and safety, etc., legal restriction of rights and freedoms may be justified only provided adequacy to socially conditioned goals."*

Much more detailed criteria for determining adequacy (proportionality) of actions and decisions of law enforcement bodies have been developed by the case law of the European Court of Human Rights.[66]

Based on analysis of the European Court of Human Rights' case law, doctrine employs the following criteria for ascertaining state bodies' actions and decisions compliance with the principle of proportionality: 1) relevance – compliance of remedies/measures to announced authoritative objectives; 2) due substantiation of remedies/measures and their necessity to achieve it; 3) necessity – the use of measures least restricting individual's right.[67]

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[65] *See* the CCU Decision, dated January 25, 2012 in case No. 1-11/2012

[66] *See* ECHR Judgment in CUMPĂNĂ AND MAZĂRE v. ROMANIA (Application No. 33348/96); "Soering v. the United Kingdom" (1989)

[67] *See* "Principles of Proportionality in the Case-Law of the European Court of Human Rights" Monograph by Trykhlib. K, PhD in Law, Yaroslav Mudryi National Law University, 2017

That is, in lieu of proportionality principle, law enforcers should choose behavioral pattern being the least burdensome for the person in a particular situation. Hence, in case of arrested property's retention, an investigator or a prosecutor have to review whether interests of investigation in preserving material evidence can be achieved in a different way, which does not restrict the owner's right to use his or her possessions. If investigation does not have objective information supporting the fact that the owner may interfere with preservation of evidence, then the arrested property must be returned to its owner.

The Council is convinced that for the rule of law to indeed guarantee availability of effective legal remedies to all participants in criminal proceedings – principle of proportionality must become a statutory basis for carrying out criminal proceedings.

COUNCIL'S RECOMMENDATIONS:

In order to introduce effective legal remedies for protecting property rights and ensuring fair balance between public and private interests during pre-trial investigation of criminal proceedings, the Council recommends as follows:

14. The Ministry of Justice of Ukraine – to develop a draft governmental law on introducing amendments to the Criminal Procedure Code, which would:

14.1. Enshrine proportionality as a stand-alone principle of criminal proceeding; and

14.2. Set maximum time limits for keeping property under arrest, upon whose expiration property shall be returned to the owner or re-arrested (provided that an investigator or a prosecutor prove that such arrest is necessary).

4.2 Transfer of materials of criminal proceedings

Amongst complaints lodged with the Council to challenge procedural abuses at the part of law enforcers, a separate category is those related to transfer of criminal proceedings materials from one pre-trial investigation body to another. In these instances, changing investigative jurisdiction is used as a formal ground for sabotaging enforcement of the investigatory judge's ruling and/or delaying course of pre-trial investigation.

Also widespread are instances when all materials of a criminal proceeding are transferred to an expert institution or a higher-ranked department of the NPU or the prosecutor's office, which results in delays with issuance of a procedural decision or performance of certain procedural or investigative actions.

Case No. 20. Transferring CP's materials to expert institution to justify failure to return temporarily seized property

On September 15, 2017, a residential complex developer in Kyiv Oblast approached the Council. The company complained about interference of Kyiv Oblast Prosecutor's Office in the company's activities and pressure from law enforcers, which put further construction under threat.

According to the complainant, the prosecutor's office doubted that he was legally using respective land plot. In particular, the prosecutor's office had questions about compliance of land lease and sublease agreements with current legislation. However, all courts – first instance, appellate and cassation confirmed that the developer's papers were fine. In addition, the court ordered the police to return property, temporarily seized during investigation, to the complainant.

However, law enforcers were in no hurry with enforcement of the court decision. Hence, the company approached the Council.

The Council had been working on the complaint for almost two years. Having utilized all instances, the Council eventually approached the PGO. However, for a long time, law enforcers only replied that land assessment expert examination was in progress. For its part, the Council referred to the current legislation, which does not provide for mandatory transfer of all case materials while expert examination is lasting and insisted that the court ruling shall be enforced.

In May 2019, after many months of delays, the criminal proceeding against the complainant was closed due to the absence of crime and seized documents were returned to the complainant. The Council completed case investigation accordingly.

The foregoing example, as well as many other complaints investigated by the Council, give reasons to conclude that law enforcers quite often use transfer of criminal cases to another body or an expert institution[68] as a formal ground for not taking certain procedural actions and explaining why pre-trial investigation is delayed or investigatory judge's instructions are not followed.

[68] *See* Section 3.4 above for more details

There were also cases in the Council's practice when businesses complained that law enforcers, under the pretext of ensuring investigation effectiveness, changed pre-trial investigation body and, consequently, transferred CP's materials to another region (oblast, city). This, in turn, only increased investigation's duration and delayed taking all necessary procedural actions.

Therefore, given the lack of respective legislative provisions (or any effective legal recourse mechanisms to respond to such abuses at the part of prosecution), the Council recommends the PGO to develop and implement respective Methodological Recommendations for prosecutors. It appears that such document should, *inter alia*, oblige prosecutors – while establishing facts of ineffective pre-trial investigations or failures to comply with prosecutor's instructions – to approach head of a respective investigation authority with request to suspend an investigator from carrying out pre-trial investigation and to appoint another one; as well as to initiate launching of internal investigation against an investigator or head of a pre-trial investigation body.

COUNCIL'S RECOMMENDATIONS:

To prevent procedural abuses at the part of law enforcers comprising transfer of materials of criminal proceedings from one pre-trial investigation body to another the Council recommends as follows:

15. The Prosecutor General's Office – develop and implement Methodological Recommendations for prosecutors, which would, *inter alia*, set out recommended actions for prosecutors to be followed while ascertaining facts of inefficient course of pre-trial investigation or failure to fulfil prosecutor's instructions. In particular, it should envisage the right:

15.1. to approach head of a respective investigation authority with the request to suspend an investigator from carrying out pre-trial investigation and appoint another one; and

15.2. to initiate launching of internal investigation against an investigator or head of a pre-trial investigation body.

4.3 Repeated arrests

One of the common forms of abuse of powers employed by law enforcers during pre-trial investigation is lodging knowingly groundless motions seeking temporary access to things and documents or imposition of arrest over property owned by businesses.

Particular attention should be paid to widespread practice of lodging reiterative motions seeking imposition of arrest over entrepreneurs' property in criminal proceedings, where investigatory judge has already decided to lift property arrest or where pre-trial investigation authority was obliged to return seized property to its owner.

In its practice the Council received complaints in which, despite lack of any change in circumstances, prosecutor asked investigatory judge three times to once again arrest complainant's property whose arrest had already been lifted. In fact, disagreeing with the court's previous ruling to lift the arrest, prosecutor kept approaching the court with identical motions instead of enforcing court's previous decision to lift the arrest.

Case No. 21. Return of property after triple arrest lifting

On August 13, 2019, the Council received complaint from Kyiv-based IT company to challenge inactivity at the part of the MID NPU officers comprising lengthy failure to return temporarily seized property.

In particular, at the end of 2018, under the framework of pre-trial investigation, law enforcers searched office premises rented by the complainant. As a result, HR documentation and computer equipment were seized. As law enforcers did not have permission to seize this property, the GPO later filed a motion seeking imposition of respective arrest.

Although investigatory judge promptly arrested the company's property, two months later the company succeeded in lifting the arrest in court. Just a week later, the investigatory judge once again arrested the same property. By filing an appeal for the second time, in June 2019 the complainant managed to lift it again.

However, the complainant could not return the property – the MID NPU stated that it had not received an appellate court ruling on lifting the arrest. The company challenged inaction of the MID NPU with the investigatory judge, who satisfied the motion and ordered MID NPU investigators to return the property to the company, which was temporarily seized more than six months ago.

Thereafter the complainant filed several motions seeking return of property, but received only refusals from the MID NPU. The reason was alleged non-receipt of either the appellate court ruling on lifting the arrest or the investigatory judge's ruling ordering to return the property. Meanwhile, in response to several advocate's requests lodged by the complainant's representative, the district court was confirming that copies of the rulings had actually been sent to the MID NPU for execution.

At this stage, the company approached the Council seeking help.

Having examined case materials, the Council asked the MID NPU and the GPO in writing to ascertain whether law enforcers had properly enforced court ruling. The GPO replied briefly that there were no legal grounds for return of the property seized from the complainant. The MID NPU, however, again informed that no court rulings were received for execution.

Interestingly enough, upon the Council's involvement, in fall 2019 the complainant learned that its' property had been arrested for the third time a few months before; although existence of such ruling of the investigatory judge was earlier never made public nor was to be found in the USRCD. In any case, following the complainant's motion to the Court of Appeal on the New Year's eve the arrest was lifted for the third time.

Thereafter (in January 2020) the Council brought up this case for consideration of an expert group consisting of the Council's and the MID NPU's representatives. The Council's experts emphasized that property that was not under arrest couldn't be illegally retained by law enforcement authorities and must be immediately returned to the company. As a result, the MID NPU's officials assured that they would enforce court ruling upon complainant's lodging of the respective motion with the investigator.

In February 2020, the PGO reported return of property to the company. However, the story did not end there: the complainant informed the Council that during February 2020, all the money and part of the seized equipment were indeed returned by the MID NPU. This property, however, did not belong to the complainant, but rather to third parties, who were also searched and in respect of whom other procedural actions were being taken in December 2018. The complainant's equipment, according to his advocates, was in the expert institution at that time, and, therefore, the MID NPU had to take additional measures to return it to its owner.

Only in March 2020, the complainant reported that its entire property has been successfully returned. So, thanks to the company's team of lawyers and the Council's experts joint efforts, after almost a year and a half, temporarily seized documents and equipment were returned to their legitimated owner.

Case No. 22. Repeated prosecutor's motion for arrest

On July 18, 2018, the Council was approached by a credit union that lodged complaint to challenge inaction of the GPO. The complainant could not return UAH 1.4 mln. seized by investigators during search.

At the end of February 2018, investigators searched the complainant's office under the framework of criminal proceedings. As a result, UAH 1.4 mln. in cash was seized. Following that, the GPO approached the court seeking arrest of these funds. Even though the court of first instance satisfied prosecutor's motion, the appellate court lifted the arrest. Thereafter the GPO approached the court once again seeking arrest, but the situation repeated itself: the court of first instance imposed the arrest, while the appellate court canceled it.

According to the procedure, law enforcers had to return seized funds to the company. However, return of funds was being delayed by them. At this point, the complainant sought the Council's assistance.

On August 1, 2018, the Council addressed the GPO in writing. The Council emphasized that lifting of the arrest was the ground for terminating temporary seizure of property and called on the prosecutor's office to return funds to the complainant.

The GPO accepted the Council's arguments and returned funds to the company on August 13, 2018. The case was then successfully closed.

Thus, a prosecutor or an investigator by "abusing his/her rights" purport 1) delaying pre-trial investigation of the criminal proceeding; or 2) obtaining formal grounds not to enforce court decision (the investigatory judge's ruling) ordering return of seized property. Meanwhile, the CPC, in its current wording, unfortunately does not contain a list of actions that can be interpreted as abuse of procedural rights, as envisaged in the Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine and the Code of Administrative Proceedings of Ukraine.

As a result, due to the absence of explicit prohibition to lodge reiterative motions by a party to criminal proceeding, augmented by investigatory judge's duty to consider each such motion and render a separate court decision thereunder – the prosecution often uses this "opportunity" to further defer adopting procedural decisions and returning seized property to legitimate owners. The following case demonstrates that it might not only strip the owners of the right to use their accounts but also to dispose of securities they own.

Case No. 23. Systematic arrests of Oil Transportation Institute's securities

The Council was approached by shareholders of the Institute of Oil Transportation – a leading company for the design and maintenance of oil transportation, storage and distribution facilities. The company alleged prosecutor's breach of reasonable time limits of pre-trial investigation. According to the complainant, the criminal case was being deliberately delayed to keep the company's securities under arrest.

Criminal proceeding against the complainant was launched back in 2016, based on application lodged by the company's ex-director. According to the application, six years earlier, a certain group of people fraudulently took over the company's shares. Meanwhile, the complainant stated that ex-director had sold securities voluntarily, as evidenced by contractual documents signed by him. Notably, the ex-director decided to approach law enforcers only upon his dismissal. Then, according to the complainant, ex-director began blocking meetings and decisions aimed at changing the company's top management.

For more than three years, under the CP's framework, the prosecutor's office did not conduct any investigative actions, except for lodging motions seeking arrest of majority shares. Meanwhile, in lieu of regular arrests, the complainant could not dispose of his property. That is why he turned to the Council for help.

The Council sent written appeals to Kyiv Prosecutor's Office and the GPO requesting to take control over investigation. The Council's investigator stressed that the reasonable pre-trial investigation terms had long been violated, and it was important to make a procedural decision in the case as soon as possible.

In its response, the prosecutor's office noted that procedural supervisors did not *see* any delays or violations of reasonable time limits. The Council's work on the complaint lasted for over eighteen months. The complainant's issue was brought up for consideration of the work group with the GPO several times.

In November 2019, the Council signed a Memorandum of Cooperation with the GPO. The complainant's case was handed over to the new GPO/PGO's leadership team.

In less than two weeks, the case against the company, which lasted over three years, was finally closed. Accordingly, the Council successfully completed the case investigation.

In its practice the Council also encountered complaints against law enforcers that initiated seizure of its property and subsequently ignore appellate court hearings held amid application duly lodged by businesses.

Case No. 24. Abuse of powers by prosecutors by delaying appeal of property arrest

On June 23, 2020, the Council received a complaint from a Kyiv-based private entrepreneur, who supplied food to hospitals, Armed Forces military units, boarding schools and other institutions of strategic importance. The businessman complained that law enforcers initiated seizure of his property first, and then ignored appeal court hearing on this matter. It turned out that when investigators suspected the complainant of being linked to fictitious companies, the prosecutor arrested the entrepreneur's bank accounts. To challenge the prosecutor's decision, the complainant turned to Kyiv Court of Appeal. Subsequently, criminal proceedings were closed. Meanwhile, the issue of the complainant's ability to freely use and dispose of his seized property remained unresolved. In particular, prosecutors refused to personally participate in the hearings, which always constituted a reason for postponing court hearings. A copy of the decision to close CP was not being sent either. For two months the complainant's accounts were blocked, thus he was unable to pay salaries to his staff. Such prosecutor's inaction eventually prompted the private entrepreneur to lodge the complaint with the Council.

The Council recommended Kyiv Oblast Prosecutor's Office ensuring appearance of authorized prosecutors at court hearings in the private entrepreneur's case, or sending copies of the decision on closing criminal proceedings to Kyiv Court of Appeal. The Council reminded that the inactivity of pre-tri-

al investigation bodies and their procedural supervisors, especially when it constitutes infringement of property rights, violated the rule of law and could be treated as pressure on business.

In August 2020, the Prosecutor's Office of Kyiv Oblast sent information on closure of criminal proceedings to Kyiv Court of Appeal. Hence, the case was closed successfully for the complainant.

Due to the lack of an effective procedural mechanism to respond to the foregoing abuses of the prosecution, the Council suggests introducing clear criteria and proper definition of "*abuse of procedural rights*" term in the CPC in conjunction with separate provision expressly prohibiting abuse of procedural rights.

To achieve this, it is necessary to vest investigatory judges with the right to acknowledge abuse of procedural rights as being contrary to criminal justice principles; which would include (but not limited to) approaching court with knowingly groundless motions seeking access to property and documents or arrest of property.

COUNCIL'S RECOMMENDATIONS:

In order to protect businesses against common abuses committed by law enforcers during pre-trial investigation, the Council recommends as follows:

16. The Ministry of Justice of Ukraine – to develop a governmental draft law on amending the Criminal Procedure Code of Ukraine (CPC), which would provide for:

16.1. Defining "abuse of procedural rights" term within the framework of pre-trial investigation of criminal proceeding. For example, " *Abuse of procedural rights shall be considered as actions or inactions in exercising by a party to criminal proceedings of its procedural rights without aiming to achieve a legitimate result and contrary to the substance and purpose of these rights and/or aimed at impeding implementation of criminal proceeding's objectives*."

16.2. Amending the CPC to introduce imperative provision banning abuse of procedural rights, as envisaged in the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine and the Code of Administrative Proceedings of Ukraine.

16.3. Vesting an investigatory judge with the right to acknowledge abuse of procedural rights as being contrary to criminal justice principles; which would include (but not limited to) approaching court with knowingly groundless motions seeking access to property and documents or arrest of property.

16.4. Vesting investigatory judge with additional procedural right to leave without consideration motion lodged by a party to criminal proceeding, if the latter abuses his/her procedural rights or powers by lodging reiterative motions seeking imposition of arrest on property in criminal proceedings, where investigatory judge already issued ruling rescinding such arrest and/or obliging pre-trial investigatory body to return seized property to its legitimate holder.

5 DISCIPLINARY LIABILITY OF INVESTIGATORS AND PROSECUTORS

It goes without saying that effectiveness of investigations largely depends on efficiency of investigators and prosecutors. In case of ineffective investigation and existence of procedural violations at the part of law enforcers, it is important to have in place preventive and deterrent mechanisms. Disciplinary liability – is one of such mechanisms.

Comparing disciplinary liability with other types of legal liability, several specific features could be distinguished, namely:[69]

1) the ground for application is a disciplinary misconduct;

2) it is applied by bodies authorized to impose disciplinary sanctions, within the limits established by law;

3) it has an extra-judicial nature;

4) imposition of a disciplinary sanction in the form of restrictions of a personal, property or organizational nature for committing a disciplinary misconduct is envisaged;

5) it is personified – i.e. the severity of the misconduct and the damage caused by it, the circumstances under which it was committed, and the previous work of the employee are taken into account.

Complaints received by the Council concerning disciplinary liability of prosecutors and investigators can be divided into two categories. In particular, the subject of the first category of complaints relates to actual application of disciplinary liability. As for the second category – disciplinary liability, as such, bears a subsidiary nature – i.e., it arises during complaint consideration by the Council (for example, regarding the ineffectiveness of the investigation).

Based on the Council's practice, the most common reasons that prompted the Council's complainants to initiate disciplinary proceedings were as follows:

1) ineffective investigation, failure to meet reasonable terms;

2) failure to enforce investigatory judge's decisions; in particular, those related to return of the complainants' property;

3) disseminating information that is untrue and negatively affects the complainants' business reputation.

Is nowadays mechanism of investigator's and prosecutor's disciplinary liability effective enough? Are disciplinary proceedings always sufficiently transparent, objective and effective? Unfortunately, based on the Council's experience, the answers to these questions are not always affirmative.

In this chapter, the Council is going to focus on problems existing in this area and provide recommendations to help improving the mechanism of disciplinary liability of prosecutors and investigators.

[69] *See "Current issues of disciplinary liability application to prosecutors"* / G.S. Ivanova // Zakon i innovatsii (Law and Innovations) - 2015 - No. 2 - pages 122-126 – *See* the link: http://nbuv.gov.ua/UJRN/apir_2015_2_22

We will first consider the disciplinary liability of prosecutors (Chapter 5.1.).

In particular, we will examine the possibility of challenging the refusal to initiate disciplinary proceedings (Chapter 5.1.1). The Council maintains that complainants should have effective tools for such an appeal.

The Council will then dwell on the legal framework governing refusal to initiate disciplinary proceedings (Chapter 5.1.2) and will propose certain amendments aimed at reducing the number of refusals to initiate disciplinary proceedings.

In addition, the Council proposes to clarify the list of grounds employed for initiating disciplinary proceedings by adding such new ground as failure to enforce court decisions and investigatory judges' rulings (Chapter 5.1.3). The Council observes that this issue is extremely relevant and disciplinary proceedings are often initiated by complainants on this very ground.

Among other things, the Council also proposes expanding the list of disciplinary sanctions for prosecutors (Chapter 5.1.4.). The purpose of such step is to enhance proportionality of application of appropriate disciplinary sanctions, as today such a list is quite limited.

Finally, the Council emphasizes the importance of establishing an effective procedure for challenging disciplinary proceedings results (Chapter 5.1.5.) for those that are lodging complaints. Indeed, currently only prosecutors have the opportunity to challenge the respective results.

Next, we will proceed to disciplinary liability of investigators (Chapter 5.2.). First of all, the Council will focus on liability of the SSU and police investigators – i.e., as the largest number of complaints are lodged vis-à-vis these categories of investigators.

Hence, the Council is confident that it is necessary to adopt a separate Disciplinary Statute for officers and employees of the SSU, which would correspond to specifics and tasks of the SSU (Chapter 5.2.1).

The Council also draws attention to a number of problems existing in the field of disciplinary liability of investigative bodies of the National Police (Chapter 5.2.2.). The first thing the Council would like to point out to here is that disciplinary commissions considering disciplinary proceedings and official investigations of police officers are not permanent bodies (Chapter 5.2.2. (a)). In turn, this creates a number of problems and risks. In our view, though, functions of disciplinary commissions should be delegated to permanent bodies.

Similarly to the situation involving prosecutors, in the Council's view failure to enforce court decisions and rulings of investigatory judges should also be added to the list of grounds for bringing to disciplinary liability of police officers (Chapter 5.2.2 (b)).

We also draw attention to the need to ensure that cases are openly considered by disciplinary bodies (Chapter 5.2.2 (c)).

The Council also explored procedure of adopting decision following consideration of a disciplinary complaint (Chapter 5.2.2 (d)). In our view, the body considering the disciplinary case should be vested with authority to adopt the decision following consideration of report evidencing existence or non-existence of a disciplinary misconduct of a police officer. Meanwhile, at present, the conclusion on official investigation results, is approved by the head who appointed such examination.

Finally, the Council proposes introducing an obligation to inform complainants about results of official investigation. In addition, the Council proposes to explicitly grant complainants with the right to challenge results of official investigation via judicial review mechanism (Chapter 5.2.2 (e)).

5.1 Disciplinary liability of prosecutors

In 2019, the mechanism of disciplinary liability of prosecutors underwent significant changes. In particular, provisions of the Law of Ukraine "On the Prosecutor's Office" determining legal status and powers of the Qualification and Disciplinary Commission of Prosecutors were suspended until September 1, 2021;[70] and powers of this Commission members and its head were prematurely terminated. Thus, the Law of Ukraine "On the Prosecutor's Office" currently contains the term "*the respective body conducting disciplinary proceedings*" instead of the term "*Qualification and Disciplinary Commission of Prosecutors*", which was employed until 2019.

Thereafter, by the Order of the Prosecutor General No. 9, dated January 9, 2020, a personnel commission on consideration of disciplinary complaints against offence committed by a prosecutor and carrying out disciplinary proceedings was established (the "**Personnel Commission**"), which currently operates. Thus, the transition period now lasts, which should result in setting up a new body tasked to carry out disciplinary proceedings.

Meanwhile, there is no doubt that whatever the name of the new body responsible for disciplinary proceedings is, it is very important to ensure that its' activities will be aimed at fair and transparent imposition of disciplinary sanctions on prosecutors.

It is likely that with the creation of a new body a new procedure for reviewing disciplinary proceedings will also be approved. Meanwhile, their basic principles are foreseen in the Law of Ukraine "On the Prosecutor's Office".

In addition, there is currently effective Procedure governing disciplinary liability of prosecutors.[71] Hence, to ensure effective functioning of the mechanism of disciplinary liability of prosecutors, below the Council will provide respective recommendations, taking into account both the provisions of the foregoing regulations and the Personnel Commission's practice.

[70] The Law of Ukraine "*On Introducing Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office*" No. 113-IX, dated September 19, 2019 (the **"Law No. 113-IX"**)

[71] *See* Procedure for the Personnel Commission's consideration of complaints on the prosecutor's disciplinary misconduct, disciplinary proceedings and rendering decision in lieu of results of disciplinary proceedings, approved by the Order of the GPO No. 266, dated November 4, 2019

5.1.1 Denial to initiate disciplinary proceeding and its appeal

The results of the Personnel Commission's work are published at the PGO's official website.[72]

According to them, in 2020 the Personnel Commission received a total of 1,217 disciplinary complaints. Following their review, some 274 disciplinary proceedings were initiated; regarding 917 complaints members of the Personnel Commission decided to refuse initiating disciplinary proceedings.[73] In the first half of 2021, the Personnel Commission received 443 disciplinary complaints. Following their review, 86 disciplinary proceedings were initiated; with regard to 346 complaints members of the Personnel Commission decided to refuse initiating disciplinary proceedings.[74] Based on these statistics, one can conclude that complainants often receive denials to initiate disciplinary proceedings. In particular, for 2020 year, such refusals accounted for 75% of the total number of complaints, and for 2021 – over 78%.

Based on the Council's observations, refusals to initiate disciplinary proceedings are not always reasoned; even though the law requires them to be.[75] Moreover, the complainants are not equipped with any recourse mechanisms to challenge such a refusal.

Therefore, the Council maintains that the legislator should clearly provide for the right of a person filing a disciplinary complaint to appeal subsequent refusal of the body conducting disciplinary proceedings to initiate disciplinary proceedings both administratively and in court.

For instance, it could be envisaged that persons filing a complaint regarding prosecutor's disciplinary misconduct shall be entitled to challenge denial to launch disciplinary proceedings with the High Council of Justice. Indeed, the powers of the High Council of Justice include consideration of complaints against decisions of respective bodies on matters related to prosecutor's disciplinary liability.

Meanwhile, the law envisages such an appeal only by prosecutors. In the Council's view, it would be logical if the High Council of Justice could also consider complaints contesting refusals to launch disciplinary proceedings lodged by persons attempting to challenge prosecutor's alleged misconduct.

Besides, in our view it would be appropriate to adopt provision explicitly allowing interested parties to challenge before administrative court denials to launch disciplinary proceedings. Such need is well illustrated by the following case from the Council's practice.

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72 As required by para. 15 of the Procedure of the Personnel Commission's Work, approved by the Order of the Prosecutor General No. 233, dated October 17, 2019

73 *See* the link: https://www.gp.gov.ua/ua/dvpr?_m=publications&_t=rec&id=287019

74 *See* the link: https://www.gp.gov.ua/ua/dvpr?_m=publications&_t=rec&id=302197

75 *See* para. 2 of Article 46 of the Law of Ukraine "On the Prosecutor's Office" No. 1697-VII, dated October 14, 2014, as amended, (the "**Law of Ukraine "On the Prosecutor's Office**")

Case No. 25. No right to challenge refusal to launch disciplinary proceedings

A large domestic agricultural company from Mykolaiv Oblast several times approached the Council to challenge inefficient investigation of a number of CPs (initiated by it as a victim) by the NPU and the MD of the SSU in Kyiv and Kyiv Oblast.

In November 2020, though, the complainant approached the Council to challenge violation reportedly committed by the Personnel Commission while considering its' complaint against the prosecutor of Kyiv Prosecutor's Office. In particular, the complainant reported that after registration of respective CP neither the pre-trial investigation body nor the prosecutor ensured timely carrying out of investigative actions aimed at establishing actual location and bringing to liability persons who failed to enforce the court decision. The complainant, therefore, repeatedly approached Kyiv Prosecutor's Office with a request to conduct necessary investigative actions (motions lodged on June 26, 2020 and July 2, 2020) and to take the necessary measures to facilitate the CP.

Due to the fact that the prosecutor did not consider motions and complaints of the victim, the Complainant had to challenge the prosecutor's inaction in court. Numerous rulings of the investigatory judge of Pechersk District Court of Kyiv confirmed the prosecutor's inaction and obliged the prosecutor to consider the complainant's motion in accordance with Article 220 of the CPC. However, according to the complainant, the prosecutor ignored the investigatory judge's rulings and did not consider the victim's motions, despite the court's obligation to do so. In an attempt to ensure that the prosecutor properly performed duties of the supervisor of pre-trial proceedings the complainant repeatedly appealed to the Personnel Commission with a complaint to challenge the respective supervisor's inaction.

However, the Personnel Commission twice refused to initiate disciplinary proceedings against the prosecutor as the authorized member of the Personnel Commission concluded that the disciplinary complaint lacked specific information on signs of disciplinary misconduct by the prosecutor. The complainant, in turn, insisted that the Personnel Commission had formally approached his complaint and failed to provide a detailed examination of the facts indicating that the prosecutor had committed a disciplinary misconduct. The Council, for its part, sent respective letters to the Personnel Commission twice in support of the complainant, in which it explicitly stated that the decisions were unreasoned. Unfortunately, despite the Council's support, the Personnel Commission did not change its position on the complainant's situation.

The Council had to discontinue case investigation because it had exhausted all means for resolving the complaint's subject-matter in a pre-trial manner.

COUNCIL'S RECOMMENDATIONS:

In order to provide an opportunity to challenge the decision on refusal to initiate disciplinary proceedings:

17. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s), which would introduce amendments to the *Law of Ukraine "On the Prosecutor's Office"* other legal acts – to grant a person lodging a disciplinary complaint with the right to challenge before administrative court or the High Council of Justice decision of the body conducting disciplinary proceedings on refusal to initiate disciplinary proceedings within 15 days from the date of delivery or receipt of a copy of the respective decision by post.

5.1.2 Expanding grounds for initiating disciplinary proceedings

Existing grounds for refusal to initiate disciplinary proceedings are worth separate attention. They comprise the following circumstances:[76]

1) a disciplinary complaint does not contain specific information containing signs of prosecutor's disciplinary misconduct;

2) a disciplinary complaint is anonymous;

3) a disciplinary complaint is filed on grounds not specified in Article 43 of the Law;

4) legal relations with the prosecutor in respect of whom a disciplinary complaint was received were terminated in cases provided for in Article 51 of the Law;

5) a disciplinary misconduct mentioned in the disciplinary complaint has already been examined and the respective body conducting disciplinary proceedings made a decision, which was not cancelled.

Furthermore, prosecutor's decisions, actions or inactions committed within CP may be challenged only in accordance with the procedure established by the CPC.[77] If, as a result of consideration of a complaint against a decision, action or inaction of a prosecutor, facts of violation of rights of persons or requirements of the law by a prosecutor are established – it might constitute the ground for launching disciplinary proceedings.

In other words, if the complainant wishes to initiate disciplinary proceedings against a prosecutor, he/she must, first of all, use the appeal procedure granted to him/her in accordance with the CPC.

In reality, though, if prosecutor's decision, action or inaction cannot be challenged in course of pre-trial investigation pursuant to the procedure set forth in Article 303 of the CPC, it is very likely that a person's motion that seeks launching of disciplinary proceedings will be denied.

[76] *See* para. 2 of Article 46 of the Law of Ukraine "On the Prosecutor's Office"

[77] Ibid., para. 2 of Article 45

This is also confirmed by the respective decisions of the Personnel Commission pertaining to refusal to initiate disciplinary proceedings.[78]

Hence, in the Council's view, to decrease the number of refusals to initiate disciplinary proceedings, para. 2 of Article 45 of the Law of Ukraine "On the Prosecutor's Office" has to be amended accordingly.

COUNCIL'S RECOMMENDATIONS:

In order to decrease number of refusals to initiate disciplinary proceedings:

18. The Ministry of Justice of Ukraine – to develop a draft governmental law on introducing amendments to sub-para. 2 of para. 1 of Article 45 of *the Law of Ukraine "On the Prosecutor's Office"* to provide that if prosecutor were to adopt any decision/commit action or inaction (i.e., not only those that can be challenged in accordance with procedure set forth in Article 303 of the Criminal Procedure Code of Ukraine) evidencing breach of person's rights or requirements of law – such decision, action or inaction could constitute the ground for initiating disciplinary proceedings against a prosecutor.

5.1.3 Changes to the list of grounds for initiating disciplinary proceedings

At present the law envisages the following grounds for bringing prosecutors to disciplinary liability: failure to perform or improper performance of official duties; unreasonable delay in considering the appeal; disclosure of a secret protected by law, which became known to a prosecutor while performing his/her duties, etc.[79]

Meanwhile, we deem it appropriate to specify the list of grounds for bringing to disciplinary liability by adding thereunder such new ground as failure to enforce court decisions and rulings of investigatory judges. The Council observes that failures to enforce rulings of investigatory judges has lately become a particularly pressing problem for the Ukrainian business.[80]

The Council's practice demonstrates that complainants not infrequently initiate disciplinary proceedings due to investigator's and prosecutor's failures to enforce rulings of investigatory judges. This problem is well illustrated in the following case from the Council's practice.

[78] For example,
https://www.gp.gov.ua/ua/dvpr?_m=publications&_t=rec&id=268115&fp=250,
https://www.gp.gov.ua/ua/dvpr?_m=publications&_t=rec&id=268110&fp=250,
https://www.gp.gov.ua/ua/dvpr?_m=publications&_t=rec&id=273669

[79] *See* para. 1 of Article 43 of the Law of Ukraine "On the Prosecutor's Office"

[80] The Council drew attention to this matter in its previous systemic report, prepared in February 2021

Case No. 26. Failure to enforce investigatory judge's rulings as a ground for disciplinary proceedings

In November 2018, a Zaporizhzhia-based entrepreneur lodged complaint with the Council to challenge allegedly illegal actions of prosecutors in CP. The respective CP was initiated based on information that electricity and information had been stolen at the site where complainant carries out its activities; and that equipment used for "cryptocurrency mining" has been installed there.

On July 25, 2018, a search was conducted, as a result of which 23 computer equipment items were seized from the complainant. On July 26, 2018, by the ruling of the investigatory judge, the seized property was arrested. On July 28, 2018, the Court of Appeal of Zaporizhzhia Oblast by its decision cancelled earlier decision, dated July 26, 2018, left the motion for arrest of the seized property unsatisfied and ordered to return seized property to the complainant. In addition, on September 14, 2018 the investigatory judge's ruling partially upheld the complainant's motion to challenge inactivity of prosecutors comprising failure to return temporarily seized property and ordered prosecutors to take immediate steps to return all seized property to the complainant.

For a long time, the property was not returned to the complainant and the respective investigatory judge's ruling was not enforced by prosecutors. In view of these circumstances, the complainant initiated disciplinary proceedings. Nonetheless, despite the Council's support, the complainant was informed that "*there were no grounds for initiating disciplinary proceedings against prosecutors*".

In September 2019, the Council completed investigation of the complaint due to its successful resolution as the property had been returned to the complainant. Meanwhile, prosecutors were never brought to disciplinary liability for lengthy failure to enforce investigatory judge's rulings.

COUNCIL'S RECOMMENDATIONS:

In order to enhance efficiency of disciplinary proceedings:

19. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) amending *the Law of Ukraine "On the Prosecutor's Office"*, other legal acts – to specify the list of grounds for bringing prosecutors to disciplinary liability, in particular, by adding such ground as failure to enforce court decisions and investigatory judge's rulings.

5.1.4 Expanding disciplinary sanctions list

At present the law[81] envisages the following types of disciplinary sanctions for prosecutors:

1) a reprimand;

2) a ban for a period of up to one year on transfer to a higher-level Prosecutor's Office or on appointment to a higher position in the Prosecutor's Office in which the prosecutor holds his/her position (except for the Prosecutor General);

3) dismissal from the position in prosecutor's bodies.

If we compare the foregoing list of disciplinary sanctions with other categories of public officers, we could conclude that the list of sanctions for prosecutors is actually quite narrow. For example, the law provides for seven types of disciplinary sanctions for police officers.[82]

Meanwhile, the variety of grounds for bringing prosecutors to disciplinary liability suggests that taxonomy of disciplinary sanctions applicable to them should be proportionate as well. The Council is convinced that such a step will contribute to a more effective and fair application of appropriate disciplinary sanctions against prosecutors.

The Council is aware that the idea of expanding the list of disciplinary sanctions for prosecutors was also supported by GRECO experts.[83] In particular, in their report[84] a group of experts notes that the list of disciplinary sanctions for prosecutors is rather limited. They also observed that only the lightest and most severe punishment – a reprimand and dismissal from the Prosecutor's Office – are relevant in practice. The only envisaged medium severity sanction – i.e., ban on transfer to a higher-level Prosecutor's Office or on appointment to a higher position – is used very rarely. Therefore, GRECO has repeatedly stressed on the importance of a fairly wide range of sanctions. Such sanctions could potentially be, for example, reprimands of various degrees, temporary reduction of wages, temporary removal from office, and so on.

Summing up, the Council believes that types of disciplinary sanctions applicable vis-a-vis prosecutors should be expanded.

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81 *See* para. 3 of Article 13 of the Law of Ukraine "On the Disciplinary Statute of the National Police of Ukraine" (the "**Disciplinary Statute of NPU**")

82 GRECO is the Council of Europe anti-corruption monitoring body (Group of States against

83 Corruption (GRECO) - Group of States against Corruption)

84 Report on the 4th evaluation round results of Ukraine "Prevention of Corruption of the People's Deputies, Judges and Prosecutors" (GrecoEval4Rep (2016) 9-P3), approved at the 76th plenary session of GRECO, June 19-23, 2017 [Electronic resource] – *See* the link: https://rm.coe.int/grecoeval4rep-2016-9-p3-76-greco-19-23-2017-/1680737206

COUNCIL'S RECOMMENDATIONS:

To enhance proportionality of disciplinary sanctions applied vis-à-vis prosecutors:

20. The Ministry of Justice of Ukraine to develop a draft governmental law(-s) to amend *the Law of Ukraine "On the Prosecutor's Office"*, other legal acts – to expand list of disciplinary sanctions applicable vis-à-vis prosecutors by including thereunder such sanctions as a severe reprimand, striping of bonus for a period ranging from 1 to 6 months, etc.

5.1.5 Introducing effective appeal procedure

It is worth noting that legislative sources related to disciplinary liability of prosecutors show a certain imbalance between rights of prosecutor in respect of whom disciplinary proceedings is initiated and a person actually initiating it. In particular, such an imbalance is clearly visible in relation to the possibility of challenging disciplinary proceedings' results.

In particular, legislation[85] provides that a prosecutor may challenge decision made as a result of disciplinary proceedings with an administrative court or the High Council of Justice within one month from the date of handing or receiving a copy of such decision by post.

Meanwhile, a person who has filed a disciplinary complaint contesting a prosecutor's alleged disciplinary misconduct is entitled to challenge the decision of the body conducting disciplinary proceedings with the High Council of Justice, provided that such body actually gave its consent to it.[86] Thus, it follows from this rule that in order to appeal disciplinary proceedings' outcome with the High Council of Justice, the complainant must actually get the consent of the body whose decision he/she contemplates challenging.

Thus, the complainant does not have a real opportunity to effectively challenge disciplinary proceedings' results, which, as a consequence, decreases level of trust towards disciplinary liability mechanism as a whole. Therefore, the Council is convinced that it is appropriate to introduce an effective procedure for challenging disciplinary proceedings' results and make it available for complainants.

To achieve this goal, the Council proposes amending the rule which governs appealing disciplinary proceedings' results with the High Council of Justice by removing from there provision obliging to receive prior consent to such an appeal from the body conducting disciplinary proceedings. Besides, to the best of the Council's knowledge, current legislation also does not specify the period within which a complaint can be lodged. Therefore, it appears that this matter should be regulated as well.

In addition, it would be appropriate to provide complainants with the possibility to challenge decision taken as a result of disciplinary proceedings with an administrative court.

[85] *See* Part 1 of Article 50 of the Law of Ukraine "On the Prosecutor's Office"

[85] Ibid., Part 10 of Article 78

COUNCIL'S RECOMMENDATIONS:

To ensure an effective procedure for challenging results of disciplinary proceedings:

21. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) to amend:

21.1. *The Law of Ukraine "On the Prosecutor's Office"*, other legal acts – to vest a person lodging a disciplinary complaint with the right to challenge decision of the body conducting disciplinary proceedings with administrative court or the High Council of Justice (without the need to seek prior consent from the body, conducting disciplinary proceedings) within 30 days from the date of handing or receiving a copy of the respective decision by post.

5.2 Disciplinary liability of investigators

Unlike prosecutors, the law does not single out disciplinary liability of investigators as a separate category. Meanwhile, there are some legal acts regulating disciplinary liability of police officers, Security Service of Ukraine ("**SSU**"), National Anti-Corruption Bureau of Ukraine ("**NABU**") officers, etc.

Given that most of CPs affecting business were mostly investigated by the police and the SSU, in this Chapter we will focus on the mechanism of disciplinary liability of these categories of law enforcers and provide recommendations to help improving its effectiveness.

Hence, this Chapter does not attend to disciplinary liability of NABU and State Bureau of Investigation staff, as the Council received a comparably small number of complaints vis-à-vis these categories of investigators. It is also considered premature to provide any recommendations and comments on the disciplinary liability of officials of the BES – newly established body, which should become the only body tasked to investigate economic crimes.

5.2.1 Disciplinary liability of SSU investigators

The disciplinary liability of SSU military personnel is regulated by the Disciplinary Statute of the Armed Forces of Ukraine. Hence, disciplinary liability of the SSU officers (for instance, as compared to the police) is not regulated by a separate "internal" legal act.

In the Council's view, it is a significant gap in the regulatory framework. First of all, the Disciplinary Statute of the Armed Forces of Ukraine regulates relations related to military service and is largely focused on military discipline. In addition, SSU activities, in comparison with other servicemen, bears its own peculiarities related, *inter alia*, to conducting operational and investigative activities.

From the Council's point of view, it is necessary to adopt a separate Disciplinary Statute for military personnel and employees of the SSU, which would meet the State Security

Service authorities' specifics and tasks. One could take the procedure employed for carrying out disciplinary proceedings against prosecutors and police officers as a model. In the Council's view, such Disciplinary Statute should provide:

(1) the possibility to challenge decision to deny initiating disciplinary proceedings and disciplinary proceedings' outcome as a whole;

(2) grounds for bringing to disciplinary liability, including failure to enforce court decisions, investigatory judge's rulings; and

(3) list of disciplinary sanctions that would be broad enough to apply them as proportionately as possible, in lieu of the particular grounds for bringing to liability.

Adoption of a separate Disciplinary Statute is indeed necessary. Among other things it is evidenced by the fact that the Council has been regularly approached by the complainants attempting to bring SSU investigators to disciplinary liability. The following case from the Council's practice is the good illustration of this premise.

Case No. 27. The need for proper legal framework governing disciplinary liability of SSU officers

In March 2021 the Council was approached by a private university from Kyiv Oblast challenging possible illegal actions of the SSU, the MD NPU in Kyiv Oblast and the Prosecutor's Office of the Solomianskyi District of Kyiv. According to the investigation, an Indian citizen has allegedly organized a criminal scheme of fraudulent embezzlement of funds of foreign students for their admission to higher educational institutions at the territory Ukraine.

The complainant informed the Council of several episodes evidencing violations of its legitimate rights and interests.

In particular, in February 2021, during actual state exam session, a police investigator arrived to the premises of the university being accompanied by at least four SSU authorized operatives. By exercising para. 3 of Article 233 of the CPC a search of premises and a personal search of students without investigatory judge's respective ruling was carried out.

In April 2021, a new search was conducted in the premises with involvement of five SSU authorized field investigators, as a result of which the originals of students' personal files, personal insurance contracts, teachers' personal files, etc. were seized. Subsequently, the prosecutor approached investigatory judge seeking arrest of the seized documents. The investigatory judge issued such an arrest only in respect of certain part of the documents. However, the rest of the items and documents not captured by the investigatory judge's ruling, were not returned to the owner.

In addition, information relating to pre-trial investigation and damaging the institution's reputation (one of the publications, according to the complainant, contained photos that made it easy to identify the educational institution's premises and the document on its letterhead) was periodically published on the SSU's official website.

The Council discussed the matter case with the SSU management and asked to bring guilty persons to disciplinary liability if there were grounds for doing so.

Meanwhile, the Council was informed that there were no grounds for initiating disciplinary proceedings, as internal investigation did not reveal any violations.

Hence, the Council recommended the MID NPU to ensure return of temporarily seized items and documents seized during search that took place in April 2021, except for those arrested. The Council is currently monitoring implementation of this recommendation.

COUNCIL'S RECOMMENDATIONS:

To ensure an effective procedure for challenging results of disciplinary proceedings:

22. The Ministry of Justice of Ukraine – to develop a draft governmental law providing for the adoption of a separate Disciplinary Statute for State Security Service officers based on the example of disciplinary statutes of prosecutors and police officers.

5.2.2 Disciplinary liability of NPU investigators

(a) Bodies considering disciplinary cases

Disciplinary commissions, reviewing disciplinary cases and official investigations concerning police officers, are not permanent bodies. In particular, a disciplinary commission is set up for the duration of an official investigation and consists of at least three persons.[87] It is created based on a written order of the Minister of Internal Affairs of Ukraine, a police official, simultaneously with the decision to schedule an official investigation. Thus, for each disciplinary proceedings the relevant head creates a new disciplinary commission.

Meanwhile, the Council is convinced that conducting of disciplinary proceedings by temporary bodies has certain deficiencies.

First of all, it should be noted that, composition of the commission is determined each time by the head of the body in which the police officer works. Hence, such a commission would consist of employees subordinate to a head. Therefore, it is quite obvious that the head, deciding on the composition of the disciplinary commission has each time a wide discretion as to who will conduct the official investigation regarding a particular police officer.

Secondly, it is questionable how professionally and reasonably official investigations can be carried out by commission members who do not deal with them regularly and may not know all the procedural nuances.

The aspect of including members of the public into the composition[88] of disciplinary commission also deserves separate attention. Indeed, pursuant to the Disciplinary Statute of the NPU, disciplinary commissions may include members of the public having an impeccable reputation, high professional and moral qualities, and public image.

[87] *Regulation on Disciplinary Commissions in the National Police of Ukraine*, approved by the Order of the Ministry of Internal Affairs of Ukraine No. 893, dated November 7, 2018 (the "**Regulation on DC in the NPU**")

[88] *See* Part 3 of Article 15 of the Disciplinary Statute of the NPU

The respective provision related to disciplinary commissions[89] contains a concrete paragraph acknowledging that members of the public may be included in the disciplinary commissions in the event of an official investigation based on information about violations of constitutional rights and freedoms of a person and a citizen by a police officer. Meanwhile, inclusion of members of the public in the disciplinary commission, in any case, depends on the authorized head's decision. Head, however, is not obliged to substantiate his decision regarding non-inclusion of members of the public in the commission in any way.

The Council is convinced that the possible solution of this situation lies in delegating functions of the *ad hoc* disciplinary commissions to already existing police commissions dealing with police personnel issues. It should be preserved, though, that composition of such commissions includes the members of the public.

COUNCIL'S RECOMMENDATIONS:

To enhance efficiency of the disciplinary proceedings procedure:

23. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) amending *the Law of Ukraine "On the National Police"*, *the Disciplinary Statute of the National Police of Ukraine*, other legal acts – to delegate functions of disciplinary commissions, to be set up in lieu of each new official investigation, to already existing police commissions, responsible for ensuring a selection (competition) and promotion of police officers.

(b) Specification of grounds for disciplinary action

The Council has already touched upon the need to specify the grounds for bringing prosecutors to disciplinary liability. In particular, in Chapter 5.1.3 above it was mentioned that failure to enforce court decisions and investigatory judges' rulings should be added to the list of grounds for bringing to disciplinary liability. The Council's practice proves that such failures is really a painful problem for business, often triggering complainants' intention to raise the matter of bringing both investigators and prosecutors to disciplinary liability.

Even though failure to enforce court decisions and investigatory judges' rulings might be viewed as one of the existing grounds for disciplinary liability, the Council suggest spinning it into a separate category. This is connected with a fact that based on the results of the respective official investigations the complainants often receive response that no violations were identified.

In this context, we note that in relation to police officers legislation[90] sets forth the following grounds for disciplinary liability:

1) a disciplinary violation by a police officer;

2) failure to perform or improper performance of police officer duties, or abuse of office;

[89] *See* para. 7 of Section I of the Regulation on DC in the NPU

[90] *See* Article 12 of the Disciplinary Statute of NPU

3) violation of restrictions and prohibitions set by law for police officers; and

4) actions compromising the police authority.

In lieu of the foregoing list, failure to enforce court decisions and investigatory judge's rulings can, theoretically, be viewed as both disciplinary violation by a police officer as well as non-performance/improper performance of police officer duties.

In particular, pursuant to Article 1 of the Law of Ukraine "On the Disciplinary Statute of the National Police of Ukraine", internal discipline (internal code of conduct) is, in particular, observance by the police officer of the Constitution and laws of Ukraine. In turn, in accordance with Article 129-1 of the Constitution of Ukraine, a court decision shall be binding, and the state shall ensure execution of a court decision in the manner prescribed by law.

With regard to failure to perform or improper performance of police officer duties, it should be noted that the main duties/responsibilities of a police officer comprise, *inter alia*, professional performance of his/her duties in accordance with requirement set forth in legal acts, official (functional) duties, management orders, etc.

Besides, the legislation does not specify exact actions that compromise the police authority. In the Council's view, though, failure to enforce court decisions and investigatory judge's rulings may indeed be viewed as belonging to such category.

To summarize the foregoing, the Council finds it necessary to make failure to enforce court decisions and investigative judges' rulings as a separate ground for bringing to disciplinary liability.

The Council received and continues receiving significant number of complaints related to failures to enforce investigatory judge's rulings. This can be illustrated by the following case from the Council's practice.

Case No. 28. Failure to enforce investigatory judges' rulings as a separate ground for disciplinary liability

In March 2021, the Council was approached by a company operating in Volyn' Oblast with complaint against the Investigation Department of the MD NPU in Volyn' Oblast.

According to the complainant, in February 2021 a search on the land plot territory partially owned by the founder and director of the complainant was conducted. During search, the complainant's property comprising over 800 trunks of freshly sawn coniferous wood was seized.

By the ruling of the investigatory judge of Lutsk City District Court of Volyn' Oblast, the motion of investigator of the ID MD NP in Volyn' Oblast to arrest the property seized during the search was denied.

In his decision the investigatory judge also stated that refusal to satisfy or partially satisfy the motion seeking arrest of property should result in immediate return of all or part of the temporarily seized property to the owner. Hence, by virtue of the mentioned ruling the investigator was actually obliged to return the property.

Meanwhile, the investigator was in no hurry to enforce the investigatory judge's ruling.

The Council sent a letter to the police. Among other things, the Council drew attention to the fact that due to the failure to return the property, the complainant's economic activity was actually blocked. Subsequent delays in returning property could result in complete termination of production and dismissal of all employees.

In April 2021, the Council completed complaint investigation due to its successful resolution, as the property was returned to the complainant. Although in the framework of this case the complainant did not raise the issue of disciplinary action against the investigator – apparently there were good grounds for that.

COUNCIL'S RECOMMENDATIONS:

To improve effectiveness of disciplinary proceedings:

24. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) to amend *the Law of Ukraine "On the National Police"*, *the Disciplinary Statute of the National Police of Ukraine*, and other legal acts – to specify the list of grounds for bringing police officers to disciplinary liability by adding such ground as failure to enforce court decisions and investigatory judge's rulings.

(c) Open consideration of cases by disciplinary commission

The format followed by the disciplinary commission while considering cases is another important aspect of this discussion worth separate attention. Presently the legislation[91] envisages that consideration of a case by a disciplinary commission takes place in a written form. Meanwhile, the law provides an opportunity for the respective authorized head to decide on open hearing of the case with the participation of the police officer under investigation and other concerned parties. Therefore, in this situation we once again face the discretion of the head, who is vested with ultimate authority to appoint disciplinary commission members.

If the one were to compare consideration of disciplinary cases against police officers and prosecutors, hearing of the latter category is open. In particular, the conclusion on existence or absence of a disciplinary misconduct of a prosecutor is made at the meeting of a body carrying out disciplinary proceedings. Moreover, a person, who lodged disciplinary complaint, a prosecutor against whom disciplinary proceedings were initiated, their representatives and, if necessary, other persons – are all invited to the meeting.[92]

[91] *See* para. 7 of Section V of Procedure for Conducting Official Investigations in the National Police of Ukraine, approved by the Order of the Ministry of Internal Affairs of Ukraine No. 893, dated November 7, 2018

[92] *See* Part 1 of Article 47 of the Law of Ukraine "On the Prosecutor's Office"

The Council is convinced that an open case consideration would ensure transparency and objectivity of the entire procedure. This format, in particular, will allow the person who filed the complaint to properly communicate his/her position to the disciplinary commission. Therefore, consideration of disciplinary cases should be conducted in an open manner – similarly to consideration of disciplinary cases concerning prosecutors.

This issue is well illustrated in the following case form the Council's practice.

Case No. 29. Call for open hearings of disciplinary cases

In September 2020 the Council was approached by a Kyiv-based provider of financial services challenging allegedly illegal actions of the ID of the MD of the NPU in Kyiv.

The complainant alleged that earlier that month the site of its' activity was searched with a number of procedural violations reportedly committed by pre-trial investigation officers. In particular, video recording of the investigative action was completed at around 1:45 pm, although at 9:00 pm 7 unidentified persons in civilian clothes entered the complainant's premises with the permission and assistance of the investigator. These individuals were not duly introduced. Then they began searching the complainant's documents and, without providing any explanations, began working on computer equipment. The complainant also drew attention to the fact that witnesses were not present during the entire search procedure in violation of the CPC, and its' computer equipment was seized without an objective need for that.

In lieu of these circumstances, the Council sent a letter to the Strategic Investigations Department of the NPU and the MID NPU requesting a full, objective, impartial and timely investigation into the facts reported by the complainant that could testify a number of violations of the CPC provisions committed during the search. In this letter, the Council also asked to consider the possibility of open consideration of the case by the disciplinary commission and inform the Council and the complainant thereof in advance.

In October 2020, the Council received a response, according to which an official investigation was conducted, as a result of which no violations of the law were established during the investigation. Hence, neither the Council nor the complainant were invited to the hearing.

Meanwhile, in February 2021 the Council had to discontinue case investigation due to exhaustion of all means for resolving the complaint's subject-matter in a pre-trial manner.

COUNCIL'S RECOMMENDATIONS:

To enhance disciplinary proceedings transparency:

25. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) amending *the Law of Ukraine "On the National Police"*, *the Disciplinary Statute of the National Police of Ukraine*, other legal acts – to introduce open (public) consideration of disciplinary cases. In particular, to establish that consideration of conclusion on existence or absence of a disciplinary misconduct of a police officer takes place at a respective commission meeting. A police officer against whom disciplinary proceedings were initiated, the person who filed the complaint (if any), as well as other concerned parties shall be invited to the meeting.

(d) Rendering decision upon disciplinary case consideration

Having analyzed legislative provisions determining power of the disciplinary commission in the NPU (currently dealing with disciplinary cases), the one may conclude that its members are vested with competency to ascertain whether a disciplinary misconduct has actually occurred in any given situation. In particular, commission members are entitled to:[93]

1) visit the place of possible disciplinary misconduct;

2) call a police officer under investigation, as well as invite other employees of police bodies (departments), other persons;

3) carry out concurrent interrogation of persons in whose explanations there are significant discrepancies about circumstances of an alleged disciplinary misconduct;

4) receive necessary documents from bodies, institutions, police departments and their subdivisions or from other state authorities and bodies of local self-governance upon request;

5) use databases (banks of information) of the Ministry of Internal Affairs of Ukraine, the NPU and other state authorities in accordance with the established procedure.

In lieu of results of respective disciplinary proceedings, the disciplinary commission prepares a conclusion evidencing presence or absence of a disciplinary misconduct in the police officer's action, type of sanction proposed (if relevant),[94] etc.

Meanwhile, conclusion containing official investigation's results must be approved by the head who originally appointed it. Moreover, such a head will choose the type of sanction to be applied vis-à-vis a police officer. While doing so he would be supposed to take into account the nature of the misconduct, circumstances under which it was committed, the identity of the offender, the degree of his/her guilt, mitigating or aggravating circumstances, etc.

[93] *See* para. 1 of Section III of Regulation on DC in the NPU

[94] *See* para. 8 of Article 19 of the Disciplinary Statute of NPU

It is quite clear that here the "last word" is, in fact, remains after the head who appointed disciplinary commission members to carry out disciplinary proceedings. The role of the commission in this situation is quite nominal.

Meanwhile, in our view, the power to adopt decision – based on review of conclusion evidencing presence or absence of a disciplinary misconduct of a police officer – should belong to the authority of a body that carried out consideration of a disciplinary case.

COUNCIL'S RECOMMENDATIONS:

To enhance efficiency of consideration of disciplinary cases:

26. The Ministry of Justice of Ukraine – to develop a draft governmental laws(-s) amending *the Law of Ukraine "On the National Police"*, *the Disciplinary Statute of the National Police of Ukraine*, other legal acts – to provide that consideration of conclusion evidencing presence or absence of a disciplinary misconduct of a police officer shall take place at a meeting of the respective body handling a disciplinary case. Following review of such conclusion, the disciplinary commission also decides whether there are grounds to apply disciplinary sanction and what kind of it should be applied.

(e) Notification of investigation results. Call for appeal procedure

At present applicable framework does not provide for complainant's notification of the official investigation results. That is, if a complainant lodges a complaint against police investigator, no one is even obliged to inform him or her of such consideration's outcomes. Surely, this approach needs changing.

In addition, similarly as is the case with disciplinary proceedings against prosecutors (as discussed in more detail in Chapter 5.1.5 above) currently legislation does not explicitly grant complainants with the right to challenge results of disciplinary proceedings. Only a police officer himself/herself is granted with the right to challenge the applied disciplinary sanction.[95]

Thus, in cases involving police officers, the complainants are also lacking opportunity of effective appeal. In turn, it decreases level of trust towards such a deterrent mechanism as disciplinary liability.

Hence, it appears appropriate amending legislation to ensure that results of disciplinary case's consideration could be challenged in either administrative or judicial procedure. In lieu of the Council's recommendation set forth in Chapter 5.2.2. (a) above, we consider that such an administrative appeal mechanism could operate under auspices of the police commission at the central body of police management.

[95] Ibid., Article 24

COUNCIL'S RECOMMENDATIONS:

In order to ensure an effective procedure for challenging the results of disciplinary proceedings:

27. The Ministry of Justice of Ukraine – to develop a draft governmental law(-s) amending *the Law of Ukraine "On the National Police"*, *the Disciplinary Statute of the National Police of Ukraine*, other legal acts:

27.1. to ensure that the complainant shall be notified in writing about decision rendered as a result of official investigation, with such notice to be sent within 7 days therefrom;

27.2. to grant the complainant with the right to challenge the decision rendered in lieu of results of internal investigation with the police commission of the central body of police management or with the administrative court – to be exercised by complainant within 30 days from the date of written notification thereof;

27.3. to grant the complainant with the right to challenge with competent administrative court decision of the police commission of the central body of police management adopted following consideration of the respective complaint – to be exercised by complainant within 30 days from the date of written notification thereof.

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