

Monthly anticorruption overview - November 2017

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This monthly anticorruption overview is dedicated to attacks on NABU as they significantly intensified in November. **For the sake of anticorruption reform it is crucially important to preserve NABU.**

We are covering following fronts of attacks: legislative threats; criminal and administrative cases against NABU; auditor selection with no competition; disruption of joint operation of NABU and FBI and revealing of NABU network of secret agents.

Attacks Startpoint

In October NABU announced suspicions in corruption crimes to the son of Arsen Avakov, the Minister of Interior, as well as to the deputy Defense Minister and one of investors from the Trade Commodity Company, allegedly affiliated with Oleksandr Hranovskyi who has close ties to President Poroshenko. After progress with these criminal cases politicians from both largest factions in the parliament (Poroshenko's Block and Narodnyi Front) united efforts in synergetic attacks against NABU.

Limiting NABU powers in criminal procedure

On October 3, the Parliament adopted amendments to the codes of judicial procedure, which included so-called "Lozovy amendment" to the Code of Criminal Procedure of Ukraine. The "Lozovy clause" offers two new tools to block NABU investigations through unreformed local courts. According to the latest available text of the amendment, it gives investigative judges powers to decide whether to prolongue or to terminate NABU investigations beyond established term. Prolongation of investigations is frequently required due to complicated and cross-national nature of corruption crimes. In addition, the clause introduces opportunity to appeal notification of suspicion one month after it was announced.

Undermining ability to investigate illicit enrichment and false statements in e-declarations

On November 17, a new draft law that limits NABU powers to independently initiate criminal cases was registered in the parliament. The draft law #7315 prescribes that criminal case on illicit enrichment or fraud in assets declarations can be initiated only after complete verification of e-declaration by the Agency for Corruption Prevention (NACP). If adopted, this provision will subordinate NABU to NACP in investigations of illicit enrichment and fraud in e-declarations. The draft law violates Ukraine's obligations before the IMF as of February 27, 2015, according to which NABU should be granted powers to ensure the reliability assets disclosures of top-officials at any point in time.

PGO started flooding NABU with thousands of old criminal cases

In accordance with effective Code of the Criminal Procedure, the Prosecutor's General Office have started transferring old corruption-related cases against former officials of Viktor Yanukovych regime to NABU.

With this PGO will block all current NABU investigations against current top-officials and politicians. 200 NABU detectives will not be able to effectively investigate both their almost 300 current cases and announced 15 000 of PGO's old cases. In addition, public responsibility for bringing former officials to justice for corruption will also be shifted on NABU, although many of these cases are left without any perspective after three years of poor investigation in PGO.

The draft law #6232 adopted by the Parliament on October 3, 2017 contained a clause prohibiting transferring old corruption-related investigations to NABU and obliged Prosecutor's General Office to finish them. However, the clause disappeared from the final text of the voted draft law, as was discovered by AntAC in official correspondence between Presidential Administration and the Cabinet of Ministers of Ukraine.

On November 23, the draft law #6232 was finally signed by the President after the significant delay. However, as of now new law is not yet published and it is unknown whether it contains the "disappeared amendment".

In the meantime, NABU confirmed having no grounds to refuse in accepting old criminal cases, which PGO already started transferring to the new agency.

Cutting the list of officials that fall under NABU jurisdiction

Amendments to the law on public service, that came into effect on November 15th, cut the list of officials that fall under NABU jurisdiction. According to this law, heads of local state administrations, including those of regional level, are no longer under NABU exclusive jurisdiction. For example, head of Zaporizhya regional administration Kostyantyn Bryl, who was reported by journalists for hiding his assets is no more under the NABU jurisdiction. From now on, NABU may take cases of these officials only if the amount of harm caused to the state budget starts from UAH 842 thousands.

Administrative case of NACP against NABU Director Artem Sytnyk

On November 13, the NACP filed an administrative case against the Head of NABU for refusal to provide NACP with information on alleged conflict of interests of Artem Sytnyk.

The alleged conflict of interest is in the following: NABU director requested the Head of NABU Legal Department to represent him in administrative court case. The NACP suspected in this case a private interest of Artem Sytnyk, despite the fact that he participated in the court case as an official and that administrative case by definition covers only court claims against public institutions and officials.

In October 2017 NACP requested from NABU Director information about this alleged conflict of interest case, which, however, was officially closed back in July 2017 as there was no conflict of interest identified.

Before providing the information NABU clarified reasons for the request and expressed concern with requesting information for the case that has already been closed. Afterwards, NABU did send to NACP the requested documents. Nevertheless, NACP filed an administrative case against Artem Sytnyk for denial of access to information. Finally, having all required information the NACP did not manage to identify the conflict of interest violation by NABU Director.

Administrative notice of NACP to Artem Sytnyk

On November 3, 2017, the NACP issued a notice to NABU Director to resolve potential conflict of interests of NABU detective Igor Semak, who investigates the case against former MP Mykola Martynenko.

The potential conflict of interests, according to NACP, lies in the fact that Semak served as assistant to the MP Victoria Voitsytskaya prior to becoming a NABU detective. NACP fails to explain the nature of this “potential conflict of interests”; respective MP does not even belong to the same faction as Martynenko did.

Still, the Agency requests NABU director to hold internal investigation, bring guilty officials to liability and resolve the potential conflict of interests. The legislation does not establish administrative liability for failing to report potential conflict of interests. Unjustified case of potential conflict of interest may be used to pressure NABU to suspend detective Igor Semak from the investigation and thus slow the case or to appeal results of investigative activities held by Semak within the case in the court.

Criminal case of PGO against NABU Director

On November 16, PGO triggered criminal investigation against Artem Sytnyk for alleged disclosure of state secrecy. The investigation was officially requested by Narodnyi Front MPs, who refer to the November 13 leaked audio recording in media with voice of Artem Sytnyk talking off the record to the journalists. At this audio voice of the NABU Director is explaining the criminal case on illicit enrichment against military prosecutor Kostyantyn Kulyk and refers to the materials of undercover operations, including wiretapping of Kulyk’s civil wife.

At the anticorruption committee hearing Sytnyk told he sometimes talks to journalists off the record, but reassured he did not violate the law.

According to Ukrainian legislation all materials of undercover operations in criminal proceedings are protected by state secrecy until there is indictment and the case is being heard at court. In the criminal case against Kostyantyn Kulyk the trial is ongoing since October 2016. The leaked conversation happened afterwards – back in summer 2017.

NABU audit

The Speaker of the parliament announced, that starting from December 5 the Parliament will consider candidate for NABU auditor. Since new competition for candidates was not even announced, it is likely that new candidate will be offered without any competition.

The Head of the Parliamentary Anticorruption Committee Yegor Sobolev insists on the need to follow the rules of the procedure. The Committee has already offered to the Rada four candidates, of which the Parliament rejected one and has yet to consider the remaining three, including Marta Boersch and Carlos Castresana. However, the majority factions of the parliament are initiating dismissal of Sobolev from position of the head of the Committee.

Reminder: negative results of NABU external audit is a legal ground for NABU Director dismissal.

Disruption of NABU undercover operation

In April 2017 NABU started an undercover operation to embed the special agent to an organized criminal group consisting of current and former officials of the State Migration Service of Ukraine (SMSU). According to the operational data, upon prior conspiracy, the officials of the SMSU demanded and received funds for providing to foreigners the citizenship of Ukraine, certificates for temporary residence in Ukraine, as well as for speeding the production of biometric passports for Ukrainian citizens.

On November 29, 2017, NABU undercover agent was detained by SBU and PGO officers. Thus, undercover operation conducted by NABU and SAPO, in cooperation with the FBI was disrupted. Moreover, while commenting on this case, Prosecutor General Lutsenko accused Artem Sytnyk in “illegal activity of the U.S. FBI in Ukraine”. Lutsenko claimed that the operation of foreign agency was not authorised.

6 NABU employees were detained for 30 hours and then released without any documents. The one – an undercover agent – was given notice of suspicion. In addition, SBU and PGO conducted searches in two NABU`s conspiratorial apartments and at the houses of 12 NABU employees and their relatives. *Main goal of this disruption was to reveal NABU undercover agents.*

Alleged provocation of bribery of SMSU official was used as a formal reason for detention of NABU agent.

In fact, this undercover operation had failed due to the leak of information. NABU has no authority for independent wiretapping and is forced to conduct it using SBU capacities only. Should NABU not receive the right for autonomous wiretapping, high risks of disruption of the secret operations will remain in the future.