

ANNEX
to the letter from the Committee on Criminal
and Criminal Procedural Law of the
Ukrainian Bar Association

1. The High Anti-Corruption Court finds violations related to disclosure of investigation secrecy by NABU employees

It is worth repeating that the transparency and informing about the results of the activity of the National Bureau are the key to public trust in the NABU and the entire anti-corruption vertical.

At the same time, systematic disclosure of information of pre-trial investigations to media, including regarding participants of criminal proceedings (and persons who do not have any procedural status), forms a negative public opinion about such persons and often violates the presumption of innocence.

This trend has become so systemic that it **required the High Anti-Corruption Court to intervene in the situation.**

Thus, in connection with the disclosure of information in the NABU podcast on 31.10.2023, the High Anti-Corruption Court (hereinafter also referred to as **the HACC**) issued a separate ruling in case No. 991/392/23, by which established a violation of the presumption of innocence stipulated by paragraph 2 of Art. 6 of the European Convention on Human Rights and Art. 17 of the CPC of Ukraine, and decided to send this ruling to the Director of the National Bureau.

In particular, on 13.10.2023, the NABU telegram channel published another episode of the podcast "Secrets of the NABU", where the detective discussed the criminal proceeding, which is currently being considered by the HACC, provided data that made it possible to identify the person in question, claimed the fact of the crime as already proven, reported that the mentioned person was subject to covert control measures, etc.

While stating violations on the part of the detective, the HACC in the above ruling emphasizes that:

"the court concluded to issue a ruling in this case, which does not resolve the case on the merits, but draws the attention of the authorized bodies to the necessity of verifying the facts of possible violation of requirements of the law, which may require appropriate response measures.

*The court agrees with the arguments of the accused, given in his statement, regarding the fact that official public affirmative **comments and statements of the detective of the National Anti-Corruption Bureau of Ukraine have an extremely negative result both for the defense of PERSON_6 and for the authority of the judicial power, given that the detective actually recognized the guilt of such person in committing a crime, despite the absence of a court verdict on this issue**"¹.*

Also, by the ruling of 17.01.2024 in case No. 991/4071/22 within another criminal proceedings, the HACC established a violation of the presumption of innocence against the accused and decided to send the relevant ruling to the Director of the National Bureau.

In the indicated ruling, the court emphasized that:

"Indeed, the public has the right to receive information, but in compliance with the requirements of the current criminal procedure law. During the pre-trial investigation, the procedural institution of non-disclosure of pre-trial investigation information, regulated by Art. 222 of the CPC of Ukraine, applies; during the court proceeding shall apply the principle of publicity and openness of court proceedings, provided for by Art. 27 of the CPC of Ukraine. At the same time, although the information was provided by

¹ <https://reyestr.court.gov.ua/Review/114797457>

the detective after the pre-trial investigation was completed, there was a violation of the legal rights and interests of the person, and the reservation made at the end of the interview that the decision on the guilt or innocence of the member of parliament would be made by the court, in this particular case did not refute the general impression of the characteristics of the actions committed by the member of parliament as a crime.

*The court agrees with the arguments of the accused, provided in his statement, as well as the defense counsel, indicated in the court hearing, regarding the fact that the **NABU has wide support in society, any public statements, categorical statements of its officials, including regarding the guilt of the accused in committing an incriminated criminal offense, are most likely perceived by the listeners as an established fact**, even despite the absence of a guilty verdict of the court that has entered into force."²*

Below are other examples of disclosure of pre-trial investigation information in high-profile criminal proceedings, which chronologically demonstrate the systemic nature of the problem.

2. Disclosure by the NABU management of the details of high-profile cases to the media representatives at the closed meeting in 2017

The problem of "leaks" and non-procedural communication between the National Bureau and media existed almost from the very beginning of the activity of the NABU and, unfortunately, to this day does not receive a proper response from authorized persons.

One of the very first and most well-known cases of disclosure of information on high-profile criminal proceedings is the situation that took place in summer 2017, when the Director of the National Bureau at that time Artem Sytnyk held a closed meeting with journalists.

During the mentioned meeting, the persons present made an audio record of the conversation, which was later published by "Obozrevatel". Thus, as can be seen from the content of the audio records and their text transcription, a person similar in voice to Artem Sytnyk, told journalists off the record the details of criminal proceedings known as the "Martynenko case",³ the "Onyshchenko case",⁴ the "Kulyk case"⁵ and others⁶.

Subsequently, the Prosecutor General's Office of Ukraine initiated criminal proceedings under Part 2 of Art. 163, Part 1 of Art. 182, Part 1 of Art. 328, Part 2 of Art. 387 of the Criminal Code of Ukraine (hereinafter referred to as the **CC of Ukraine**) on the relevant facts. There is no information on the results of the investigation in open sources.

It is noteworthy that the consideration of the "Martynenko case" continues to this day, the guilty verdict in the "Onyshchenko case" was issued only on 05.04.2024, and the "Kulyk case" was

² <https://reyestr.court.gov.ua/Review/116419129>

³ It is the criminal proceeding on the charge of the former member of parliament Mykola Martynenko in the possible organization of a scheme to embezzle funds of the state-owned enterprises "ShidGZK" and "Enerhoatom", as a result of which, according to the position of the prosecution, the state could have suffered material damage in the amount of UAH 700 million.

⁴ The High Anti-Corruption Court in the verdict dated 05.04.2024 in the case No. 757/7845/19-k found guilty the former member of parliament Oleksandr Onyshchenko of committing a number of criminal offenses (the verdict did not enter into force due to an appeal). Mr. Onyshchenko is accused of embezzlement of public funds in the amount of more than UAH 740 million during the production and sale of natural gas under business agreements with JSC "UkrGasvydobuvannya".

⁵ The High Anti-Corruption Court considered the indictment against former prosecutor Kostiantyn Kulyk on the possible fact of illegal enrichment: according to the NABU, during 2011-2015 while serving in the prosecutor's office Mr. Kulyk received a profit of more than UAH 1.6 million, during the same period his expenses exceeded his income by UAH 2.6 million and amounted to about UAH 3.4 million.

⁶ <http://surl.li/pbuub>

closed by the High Anti-Corruption Court under paragraph 4 of Part 1 of Art. 284 of the CPC of Ukraine on 02.04.2020.

3. Statement by the Specialized Anti-Corruption Prosecutor's Office of the facts of systematic disclosure of the secrecy of the investigation by NABU detectives in 2018

On 31.07.2018 the Specialized Anti-Corruption Prosecutor's Office (hereinafter referred to as **the SAPO**) published an official statement, in which it expressed concern about the systematic disclosure of information constituting the secrecy of the pre-trial investigation in the criminal proceedings being investigated by the NABU⁷.

The SAPO established **"frequent facts of transfer of information, including official documents, by employees of the NABU to third parties"** and noted the following:

- one of the members of parliament systematically received information about the pre-trial investigation in one of the criminal proceedings, disseminated this information in the media and social networks in a distorted form and confirmed his own knowledge of the official documents of the NABU;
- information was published about persons and business entities that may be involved in a number of crimes and are currently being checked by investigative (search) actions and international legal assistance, as well as other information that constitutes the secrecy of the pre-trial investigation and is not subject to disclosure.

The SAPO emphasized that "similar situations are systematic and relate to a number of the pre-trial investigations of the NABU". As can be seen, with the expiration of six years, the situation has not changed for the better.

4. Publication of video of covert investigative (search) actions in the "case of the National Guard" in 2020

The detectives of the National Bureau conduct pre-trial investigation in a number of criminal proceedings on various circumstances, in which suspicion was served and in some cases an indictment was submitted to court against former member of parliament Maksym Mykytas, whom the media call the "record holder" for the number of suspicions by the NABU.

It is noteworthy that as of the date of addressing the Commission with this letter, the court has not adopted any guilty verdict against Mr. Mykytas, at the same time, the above-mentioned criminal proceedings are in the focus of the media and information on the course of their investigation, conducted procedural actions, persons involved and other data covered by secrecy of the investigation were regularly shared with journalists.

For example, on 03.12.2020, the Prosecutor General's Office highlighted the facts of misunderstanding with NABU in one of such criminal proceedings, known as the "case of the National Guard"⁸, emphasizing that the detectives of the National Bureau allowed the disclosure of information of the pre-trial investigation.

⁷ <http://surl.li/obdpg>

⁸ It is the criminal proceedings on the charge, in particular, of former member of parliament Maksym Mykytas in misappropriation of funds of the National Guard of Ukraine in the amount of more than UAH 81 million as a result of the implementation of an alleged scheme for the exchange of apartments unprofitable for the state.

According to the press service of the Prosecutor General's Office, "NABU detectives, instead of providing all available materials to the Prosecutor General for their study, in violation of the requirements of the current legislation, disclosed a video of covert investigative search actions"⁹.

5. Share of detailed information on public investigative (search) actions in the "case of the National Guard" with media

On 04.12.2020, the journalist Yurii Butusov on his Facebook page published information about the conducted public investigative (search) actions in the above-mentioned "case of the National Guard" including names of persons involved, in particular, the journalist informed about the fact of a search at the house of the former top official. According to the journalist, Maksym Mykytas provided the NABU and SAPO with his phone, documents, and also provided certain information about the Deputy Head of the Office of the President, the Head of the Expert Center of the Ministry of Internal Affairs of Ukraine and "a number of other persons from the former and current government, who are under investigation by the detectives":

"On December 1-2, the National Anti-Corruption Bureau conducted searches in the case of bribery of the company "Ukrbud" in the structures of Volodymyr Groysman, the former Prime Minister of Ukraine.

Maksym Mykytas, the owner of the construction company "Ukrbud", which received profitable construction contracts from the government in 2017-18, gave testimony against Groysman. Mykytas provided his phone, the documents to the NABU and the SAPO and testified about state employees to whom he handed bribes. Mykytas testified against the Deputy Head of the Office of the President Oleh Tatarov, Deputy Head of the Expert Center of the Ministry of Internal Affairs Kostiantyn Dubonos and against former Prime Minister Volodymyr Groysman, and immediate investigative actions have been initiated against these persons. According to Censor.Net, testimonies were also given on a number of other persons from the former and current government, who are under investigation by the detectives. [...]

Censor.Net sources in the NABU and the SAPO confirm the fact of the relevant court decision and conducted searches"¹⁰.

In this publication, the journalist directly points out the presence of "sources" in the National Bureau and the SAPO that disclose information about the relevant pre-trial investigation.

6. Typical disclosures of information on searches in high-profile cases in 2021-2022

The above example of disclosure of information of the pre-trial investigation on searches in cases of public interest is only one of dozens of similar cases. Below are some other similar situations.

Thus, on 28.09.2021, "Radio Svoboda (Schemy)" published information about conduction of searches by NABU detectives within the criminal proceedings initiated on the basis of investigation by "Radio Svoboda (Schemy)" journalists, involving the member of parliament:

*"The National Anti-Corruption Bureau and the Specialized Anti-Corruption Prosecutor's Office are conducting searches in the case related to the member of parliament from the "Servant of the People" Oleksandr Kunytskyi. **This was confirmed to "Schemy" by two sources in the NABU**, as well as the assistant of the member of parliament and the head of the "Autoenterprise" group of companies. [...] **According to the sources of "Schemy" in the NABU**, searches are taking place in Kharkiv at the*

⁹ <http://surl.li/pbwah>

¹⁰ <http://surl.li/pdzra>

address of the office of "Autoenterprise", group of companies that import electric cars from abroad and manufacture and install charging stations for them"¹¹.

According to open data, after more than three years from the date of publication, the indicated member of parliament was not notified of suspicion, there is no information about any results of the investigation.

In another case, NABU not only informed the media representative about the pre-trial investigation, but also "**provided supporting documents**", as noted by "Fakty" in the publication dated 08.10.2021:

*"On October 7, detectives of the National Anti-Corruption Bureau of Ukraine conducted searches in the house and workplace of the head of the 1st department of the ARMA Asset Management Department, Yehor Sihariov. This **was reported to "Fakty" by sources in the NABU, providing supporting documents.**"*

As can be seen from the relevant publication of "Fakty", this refers to criminal proceedings No. 420200000002497, where former top officials of the National Agency of Ukraine for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes (ARMA) are suspected of committing a criminal offense under Part 5 of Art. 191 of the CC of Ukraine¹².

The publication of "ZN.UA" dated 18.09.2022 titled "*Kolomoiskyi was searched in the case of "Ukrnafta"*" is also worthy to be noted. Similarly, this publication reports on the fact of conducting an investigative action at the place of residence of one of the persons in the relevant criminal proceedings on the fact of misappropriation of property of PJSC "Ukrnafta".

Commenting about the situation, which "ZN.UA" learned about from eyewitnesses who were present at the place of the search at the "Bukovel" resort, the publication also refers to **sources in the NABU** and notes the following:

"The sources of ZN.UA in the NABU confirmed the fact of the search. At the same time, they emphasized that this was probably the first search in their memory, when no one was warned about in advance"¹³.

7. Disclosures in high-profile cases in 2023-2024

It is also worth mentioning several examples of disclosures that took place recently and directly affect the pre-trial investigation of current high-profile criminal proceedings.

7.1. The case of the former chairman of the Supreme Court

Thus, during the pre-trial investigation in criminal proceedings on possible bribery of judges of the Supreme Court, NABU detectives conducted a number of searches, including in the office of the Chairman of the Supreme Court at the time. During the search, among other things, detectives revealed a handwritten list of candidates for the positions of members of the High Qualification Commission of Judges of Ukraine with some marks.

Later, apparently, the official who participated in the search shared the photos of the specified list to an unauthorized person and the mentioned photos were published on social networks and the media.

On this fact, the SAPO initiated criminal proceedings under Part 3 of Art. 387 of the CC of Ukraine, the pre-trial investigation was assigned to the detectives of the NABU Internal Control

¹¹ <http://surl.li/pdzzr>

¹² <http://surl.li/peamz>

¹³ <http://surl.li/pebbg>

Department. The SAPO once again emphasized in the press release that *"Disclosure of information protected by law is illegal and may cause irreparable damage to the interests of the state"*¹⁴.

In addition, according to open sources, phones were seized during the above searches, the circumstances of the subsequent "hacking" of which, as well as the circumstances of the internal problems of the SAPO, became known to the public due to the *"sources in the NABU"*.

On 12.07.2023, "Censor.Net" published an article in which was demonstrated deep knowledge not only of the course of the investigation, but also of personal relations within the team of SAPO prosecutors:

"As far as "Censor.NET" knows from sources in the NABU, there were two concepts of "hacking" [the phone]: to hack in Ukraine without a guarantee of success or in Poland. However, some people were in favor of hacking in Ukraine. In that case, the data would most likely have been lost. So far, the phone has been successfully hacked in Poland and returned to the NABU.

But, as it turned out, this success led to a scandal that could be very expensive for the reputation of the SAPO leadership.

On June 21, the head of the SAPO, Klymenko, summoned Omelchenko [the SAPO prosecutor] and asked: "Where is Kniazev's phone?" The prosecutor replied that, as far as he knew from recent communication, the phone was in the NABU premises.

*In response, Klymenko said that he was aware that the phone was outside the NABU"*¹⁵.

7.2. The case of "Boryspil Airport"

On 14.09.2023, the attorney reported on his Facebook page that NABU employees use his client's personal information in the public space without permission when recording podcasts in the Radio NV project¹⁶.

The attorney noted that in NABU podcasts on Radio NV, the name and other personal data of his client are systematically voiced, violating Part 4 of Art. 296 of the Civil Code of Ukraine, which provides that the name of an individual who is detained, suspected or accused of committing a criminal offense, or a person who has committed an administrative offense, can be used (disclosed) only if a court verdict of conviction against him/her comes into force or a ruling on an administrative offense is issued and in other cases provided for by law.

7.3. The case of the "Great Construction"

During the pre-trial investigation in the criminal proceeding known as the "Great Construction Case", a large number of procedural actions were reported in the media.

In the relevant publications, journalists directly refer to *"sources in law enforcement bodies"*, *"interlocutors in law enforcement bodies"*, *"sources in the NABU"*, *"our sources in the NABU"*, etc. For example, the media published information about a number of searches conducted by NABU detectives in December 2022 and May 2023¹⁷. On 03.11.2022, the publication of "Radio Svoboda (Schemy)" revealed information on the dates and directions of crossing the state border by some individuals¹⁸.

¹⁴ <http://surl.li/obfhp>

¹⁵ <http://surl.li/vxrfmq>

¹⁶ <http://surl.li/nyzqs>

¹⁷ <https://www.pravda.com.ua/news/2022/12/26/7382408/>, <https://www.radiosvoboda.org/a/news-skhemy-nabu-holyk-obshuky/32194243.html>

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