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STUDY SUMMARY AND  
INFOGRAPHICS



# THE ROLE OF THE PROSECUTOR OF THE SPECIALIZED ANTI-CORRUPTION PROSECUTOR'S OFFICE AT THE PRE-TRIAL STAGE

The study was conducted by the  
**Expert Center for Human Rights**  
upon the initiative and with the organizational and  
financial support of the Human Rights and Justice  
Program Initiative of the  
**International Renaissance Foundation**

Kyiv  
2018

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## Report summary

# KEY FINDINGS AND RECOMMENDATIONS

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## Key research findings:

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### General principles of the activities of the Specialized Anti-Corruption Prosecutor's Office

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1. Current legislation provides for increased guarantees of independence of the SAPO, which is reflected in procedures for selection, appointment and dismissal of prosecutors, funding and institutional separation from the Prosecutor General's Office (PGO). However, the SAPO is not entirely independent from the PGO's structure in institutional terms because the structural units of the latter assist the SAPO with personnel, logistics, analytical and legal support, coordination of international legal activities, protection of state secrets, and public and media relations. As a result, it is possible that the PGO may create certain obstacles, or information leaks take place during document processing at the PGO or submission of requests for international legal assistance, etc.
2. The legislation outlines a clear jurisdiction of criminal proceedings at the NABU and, accordingly, the SAPO. At the same time, despite the prohibition provided by the Criminal Procedure Code (hereinafter – the CPC) on entrusting pre-trial investigation of a criminal offense under NABU jurisdiction to any other body, this practice exists in the PGO leading to the return of indictments on the grounds of violations concerning investigative jurisdiction. In addition, there are cases when the Head of the SAPO assigns investigative jurisdiction to another (not NABU) pre-trial investigation body.
3. The existing structural inconsistency between the SAPO and the NABU creates obstacles to cooperation between the procedural supervisor and the detective in criminal proceedings. In particular, complex multi-level internal structure of the NABU causes significant loss of detective's time due to the need for various approvals from numerous supervisors.

4. Due to the inconsistency of the CPC with the Constitution of Ukraine regarding the definition of the subject responsible for the organization of pre-trial investigation, there is evident overlap of powers of the procedural supervisor and the head of the pre-trial investigation body.
5. The SAPO and the NABU signed a Memorandum of Cooperation regulating the specifics of cooperation in the field of external communication, as well as in criminal proceedings. This is a positive approach to arranging the daily practice of interaction between the pre-trial investigation body and the Prosecutor's Office. At the same time, the legal nature of this document and its coordination with the current criminal procedure legislation should be clarified.

### Procedural guidance in the SAPO

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1. Unlike the prosecutors of regular prosecutor's offices, the vast majority of the SAPO prosecutors perceive the function of a procedural supervisor as that of an actual organizer of pre-trial investigation process.
2. Despite the subjective perception of being more independent than prosecutors of regular prosecutor's offices are, the SAPO prosecutors quite often informally coordinate the main procedural decisions with their supervisors. On the one hand, this practice may indicate that the SAPO management provides support to a prosecutor in individual criminal proceedings. On the other hand, this practice does not exclude the possibility of interference in the procedural independence of procedural supervisors.
3. The current practice of a formal appointment of group leaders exclusively from among the heads of departments poses a threat of administrative interference in criminal proceedings.
4. The practice of bonus reduction is not common in the SAPO, unlike in the regular prosecutor's offices. However, the possibility of using this tool of administrative pressure against a procedural supervisor remains.
5. The study showed that the introduced system of statistics does not affect the substantive activities of the SAPO procedural supervisor, unlike in the regular prosecutor's offices. Prosecutors of the SAPO, in particular, pointed out the absence of the practice of «manual adjustment» of the indicators measuring the number of proceedings closed, a number of proceedings referred to courts monthly etc.
6. There are no negative consequences for the prosecutor on the part of the SAPO management for lawful actions in the interests of a suspect (for example, closing criminal proceedings and releasing a detainee without a notice of suspicion, etc.). In the framework of the study, it appeared that the SAPO prosecutors, in their opinion, do not face the risk of unconditional

punishment for acquittals in criminal proceedings, in contrast to the practices of the regular prosecutor's offices.

7. In conditions of a rapidly increasing caseload for prosecutors conducting procedural guidance, the SAPO has not developed clear criteria for justifying their required staffing.

## **Exercise of procedural guidance at different stages of pre-trial investigation**

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### **The role of the SAPO prosecutor at the stage of apprehension and notification of suspicion**

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1. The CPC provides the NABU detectives and the SAPO prosecutors with additional grounds for apprehending a person (Article 208(1) (3)). The study showed a prevalence of apprehensions by the NABU detectives long after the crime has been committed based on this provision. At the same time, according to some participants of the process and experts, this practice is contrary to the provisions of the Constitution of Ukraine.
2. In the work of the NABU detectives and the SAPO prosecutors, the practice of failing to register apprehension, common in the work of investigative and operational police units, was not found.
3. In many cases, two or even three grounds for apprehension under Article 208 of the CPC are listed in the report on apprehension. First, it is impossible to identify the main reason for apprehension in these circumstances. Moreover, such grounds are sometimes mutually exclusive. This practice may indicate an inadequate justification of apprehension.
4. Prosecutors and detectives do not always take into account the existence of risks of possible escape as a necessary condition for apprehension under Article 208(1) (3) of the CPC.
5. There are varying practices of recording the time of actual apprehension in the case of a search. The SAPO detectives and prosecutors in some cases record the time of apprehension starting with the beginning of the search (when an individual was actually deprived of the ability to leave the search area), and in other cases - after the search is completed.
6. According to the study, the detectives and prosecutors of the SAPO are trying to collect as much evidence as possible before giving the notice of a suspicion. Prosecutors explained their reasoning for this tactic by the lack of interest from detectives in active investigation after the notice of a suspicion is served, as well as by high chances of destruction of evidence by

suspects. At the same time, such practice, under certain conditions, may constitute a violation of defense rights of an actual suspect due to the lack of a clearly defined procedural status. Consequently, this problem requires further elaboration, establishing criteria for finding the optimum balance between the interests of investigation and defense rights of a de facto suspect.

7. The notice of a suspicion is mainly composed by a detective and, as a rule, finalized by the prosecutor. However, unlike in the local and regional prosecutor's offices, the SAPO prosecutors quite often prepare this document personally. Notification of suspicion is mainly delegated to the detective and carried out without the prosecutor.

### **The role of the SAPO Prosecutor in the implementation of measures to ensure criminal proceedings**

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1. According to other participants of criminal proceedings, the SAPO prosecutors generally carry out a better and more thorough preparation of motions and their justification in court, in comparison with the prosecutors of regular prosecutor's offices.
2. At the same time, the SAPO prosecutors often submit motions requesting custodial measures of restraint, which may indicate a lack of awareness of the exceptional nature of this measure of restraint by the SAPO prosecutors.
3. The study showed that prosecutors and detectives do not always support the motion for restraint measures with the necessary materials confirming the facts and circumstances.
4. In most cases, the SAPO prosecutors support the motion in court in person. At the same time, there are cases when the NABU detectives are involved in this process. This practice on the application of measures of restraint may constitute a violation of the CPC since the legislation does not define the role of the detective in supporting these types of motions.
5. The SAPO prosecutors do not always support the motion to seize property with evidence of the circumstances referred within (in terms of proving the need for such measures).
6. It is common to initiate consideration of motions to seize property in the absence of the owner. The SAPO employees explain such actions by the specifics of crimes and the possibility of the destruction of property. However, in some situations, such practices may result in significant restrictions and sometimes even disproportionate interference with right to property.
7. The study showed that the SAPO prosecutors do not always take appropriate measures to protect the property rights in cases of a non-return of seized property, as well as seizure of a property not indicated in the ruling issued by the investigating judge.

## **The role of the prosecutor in the collection of evidence**

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1. The main burden of evidence collection falls on detectives. At the same time, the SAPO prosecutors, unlike prosecutors of regular prosecutor's offices, are more involved in this process. In particular, they are involved in planning and defining the investigation strategy.
2. The real participation of the SAPO prosecutor in the investigative actions or conducting such actions personally is an exception. As a rule, the latter participate in suspect interrogation, witness interrogation, search, and inspection.
3. Usually, the SAPO prosecutors use instructions as a tool to influence a detective in case the latter is not working properly or avoids following a certain way of evidence gathering defined by a prosecutor. At the same time, unlike the common practice among prosecutors of regular prosecutor's offices, they do not provide guidance to ensure a certain level of statistical indicators.

## **The role of the prosecutor at the stage of completion of the investigation**

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- The SAPO prosecutors are not afraid to make decisions to close criminal proceedings after serving a notice of a suspicion and they are confident that they will not be punished for a lawful decision. Such approach in the activities of the SAPO differs significantly from the practice of regular prosecutor's office where all (even lawful) instances of closing criminal proceedings after the notice of suspicion is served is automatically classified in the category of «professional» violations and followed by a punishment of procedural supervisors. This practice may indicate both, a change in the perception of the notice of suspicion by the prosecutors, and the absence of practices of unconditional punishment for such decisions in the work of the SAPO.

## **The role of the prosecutor in ensuring of rights and freedoms of a suspect**

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1. The SAPO prosecutors are generally more aware of the need to ensure the rights of suspects than prosecutors of the regular prosecutor's offices are. According to prosecutors, they are encouraged to pay attention to the rights of persons for the following reasons: the need to ensure admissibility of evidence; preventing prosecutions of innocent people; preventing situations where a prosecutor is held liable in connection with the violation of the rights of a

- suspect. Another contributing factor is the more qualified work of the NABU detectives, who are familiar with the requirements of the current criminal procedure legislation.
2. At the same time, activities of the SAPO and the NABU included cases when detention was used as a tool to persuade a suspect to cooperate or as a punishment for refusing to cooperate. Such an approach, taking into account the ECtHR case law, is a violation of the right of a suspect to liberty.
  3. The study found cases when the SAPO prosecutors involved lawyers through the free legal aid system to participate in separate investigative or procedural actions in cases when a suspect had his/her own lawyer. In the absence of an urgent need for investigative and procedural actions, this practice is an attempt to eliminate a lawyer who has an active position in the protection of his/her client; it is a clear violation of the right to defense.
  4. The study found no evidence of torture or other forms of ill-treatment of a suspect by the NABU detectives or the SAPO prosecutors. At the same time, some participants of focus groups reported untimely provision of medical care to suspects, which under certain circumstances (the state of health of the victim, age, etc.) can be considered as ill-treatment.
  5. The SAPO prosecutors have the authority to carry out procedural guidance on the facts of abuse of power by the NABU detectives, including cases of violence (Art. 365(2) of the Criminal Code). This legislative provision does not comply with international standards of effective investigation, in particular those defined in the ECtHR case law, since the SAPO prosecutors carry out procedural guidance in the proceedings of the NABU detectives suspected of committing such a violation.

## KEY RECOMMENDATIONS OF THE STUDY

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### **On the SAPO structure, jurisdiction and specifics of interaction with the NABU**

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1. To ensure cooperation and coordination between the law enforcement bodies to avoid the conduct of pre-trial investigation by other bodies in criminal proceedings under exclusive jurisdiction of the NABU and the SAPO.
2. To harmonize internal structures of the SAPO and the NABU, providing for the possibility of specific units taking responsibility for specific areas of work. To provide for an effective mechanism of mutual coordination of structures.
3. To strengthen the safeguards for institutional independence of the SAPO from the PGO, in particular in terms of personnel, logistics and financial support, as well as in the field of international legal cooperation.
4. To separate the functions of the head of a pre-trial investigation body and the procedural supervisor in the organization of pre-trial investigation. To define their roles and powers in criminal proceedings.
5. To properly regulate the existing mechanism of interaction between the NABU and the SAPO in criminal proceedings enshrined in the Order on interaction, cooperation and coordination of actions during pre-trial investigation and oversight over compliance with the law during pre-trial investigation (the so-called «Memorandum»). To disseminate positive practice of joint development and implementation of detailed algorithms of interaction between the bodies of pre-trial investigation and the prosecutor's offices.
6. To consider the possibility of replacing supervisory proceedings with the prosecutor's electronic record and further integration of the record into the system of electronic criminal proceedings in the future.

### **On development of safeguards for the observance of fundamental principles of procedural guidance**

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7. To strengthen guarantees for the independence procedural supervisors in criminal proceedings by:

- appointment of procedural supervisors who will actually perform the functions (not only the heads of departments) of a prosecution group leader in criminal proceedings;
  - reducing the practice of coordination of procedural decisions with the management to the minimum.
8. To develop and implement an effective system to assess performance of the procedural supervisor in criminal proceedings based on the positive experience of the SAPO, which abandoned the use of statistical indicators as the main criterion for the evaluation.
  9. To define clear criteria for calculating the optimal workload for procedural supervisors, which will justify the required staffing of the SAPO.

### **On substantive qualified work of the procedural supervisor**

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10. To develop and implement a single procedure and standards for apprehension on a suspicion of commission of a criminal offence.
11. To strengthen SAPO oversight over the legality of detention, in particular in the part of:
  - clear indication of specific grounds for apprehension in the report on apprehension by the NABU detectives;
  - proper indication of the time and place of actual apprehension of a person in the event of a search;
  - proper justification of the possible escape risks as a necessary condition for apprehension under Article 208(1)(3) of the CPC.
12. To develop the practice of requesting custodial measures only in exceptional cases.
13. To improve the quality of substantiation of motions for measures of restraint, including the provision of necessary documents to prove the stated facts and circumstances.
14. To ensure that only a prosecutor supports the motion for a measure of restraint before a court.
15. To strengthen the role of the prosecutor in the protection of property rights when the seizure of property took place:
  - to ensure adequate explanation regarding the grounds for application;
  - to initiate consideration of such motions in the absence of property owners only in exceptional cases;
  - to take effective measures for the timely return of seized property.
16. To take measures regarding:

- the use involvement of a free legal aid system lawyer (when a client has his/her own counsel) by a prosecutor or investigator for participation in certain investigative or other procedural actions only in exceptional cases;
- timely provision of medical care for detainees;
- notifying persons of suspicion within reasonable time for the proper exercise of the right to defense.

17. To exclude the possibility the exercise of procedural guidance by the SAPO prosecutors in criminal offenses Article 365(2) of the Criminal Code of Ukraine committed by employees of the NABU. Attribute investigation of these offences to the jurisdiction of the State Bureau of Investigation.

# STUDY OBJECTIVES AND METHODOLOGY

## Areas of research



structure, functions, jurisdiction and specifics of ensuring institutional independence



principles of exercising procedural guidance



the role at the stage of apprehension of a suspect, notification of suspicion, selection of measures of restraint and measures to ensure proceeding



activities at the stage of evidence collection and finalization of pre-trial investigation



the role in ensuring the rights and freedoms of a suspect

## Stages of research



desk research



field research



interviews

- 1 with an investigating judge
- 2 with the senior management of the SAPO



focus groups

- 1 with SAPO prosecutors
- 1 with the heads of SAPO offices and departments
- 2 with lawyers
- 1 with the NABU detectives



content analysis

- 102 supervisory proceedings of the SAPO prosecutors completed in 2016-2017



analysis of statistics

official PGO data and other sources



expert survey

- 32 SAPO prosecutors who carry out procedural guidance in criminal proceedings

# GENERAL PRINCIPLES OF THE SAPO ACTIVITIES

Current legislation provides for increased guarantees of independence of the SAPO, which is reflected in procedures for selection, appointment and dismissal of prosecutors, funding and institutional separation from the Prosecutor General's Office (PGO). However, the SAPO is not entirely independent from the PGO's structure in institutional terms because the structural units of the latter assist the SAPO with personnel, logistics, analytical and legal support, coordination of international legal activities, protection of state secrets, and public and media relations. As a result, it is possible that the PGO may create certain obstacles, or information leaks take place during document processing at the PGO or submission of requests for international legal assistance, etc.

The legislation outlines a clear jurisdiction of criminal proceedings at the NABU and, accordingly, the SAPO. At the same time, despite the prohibition provided by the Criminal Procedure Code (hereinafter – the CPC) on entrusting pre-trial investigation of a criminal offense under NABU jurisdiction to any other body, this practice exists in the PGO leading to the return of indictments on the grounds of violations concerning investigative jurisdiction. In addition, there are cases when the Head of the SAPO assigns investigative jurisdiction to another (not NABU) pre-trial investigation body.



1. The Head of the SAPO is subordinate directly to the Prosecutor General
2. The Prosecutor General, his First Deputy and Deputies cannot provide instructions to the SAPO prosecutors and take other action directly related to the exercise of their powers by the SAPO prosecutors
3. The head of the SAPO, his/her first Deputy and Deputy cannot be transferred to another PGO unit or other regional or local prosecutor's office without their consent within the period for which they were appointed

## SPECIFICS OF INTERACTION BETWEEN THE SAPO AND THE NABU

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The existing structural inconsistency between the SAPO and the NABU creates obstacles to cooperation between the procedural supervisor and the detective in criminal proceedings. In particular, complex multi-level internal structure of the NABU causes significant loss of detective's time due to the need for various approvals from numerous supervisors.

The SAPO and the NABU signed a Memorandum of Cooperation regulating the specifics of cooperation in the field of external communication, as well as in criminal proceedings. This is a positive approach to arranging the daily practice of interaction between the pre-trial investigation body and the Prosecutor's Office. At the same time, the legal nature of this document and its coordination with the current criminal procedure legislation should be clarified.

### Detectives:

*«When the Bureau was only at the stage of creation, the structure of the SAPO was determined and consisted of six departments. And it was planned that there would also be six departments in the Bureau. I think that it was planned that relevant departments of SAPO would be assigned to the departments of the Bureau...».*

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*«Initially, the Bureau had units. «Unit», in brackets»(division)». Actually, there were heads of units who are now heads of divisions. The structure was changed, they were reformed into divisions. Then, there is the main division. Over time, this structure has grown. It corresponds to the actual structure of the central apparatus of other law enforcement bodies. In my personal opinion, it is less effective».*

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*«In fact, this is a very important document for us and for them; it organizes a lot of things. Personally, my opinion is that it is a necessary and correct tool for cooperation».*

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*«But when the prosecutor says that there are no grounds for suspicion, for detention and so on, and we insist that there are grounds, and then we draft a suspicion, send it to the prosecutor. He has to arrange a meeting after reading it. We should exchange views on why we believe that there are grounds, why he believes that there are no grounds, and give us instructions. Therefore, the Memorandum is used, as a rule, when we have a conflict. When everything is good, there is no need for us to refer to it».*

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## PROCEDURAL SUPERVISORS' PERCEPTION OF THEIR ROLE

Unlike prosecutors at the regular prosecutor's offices, the vast majority of the SAPO prosecutors perceive the procedural supervisor as the actual organizer of a pre-trial investigation.

### Prosecutor:

«...The prosecutor is the main, central actor, and the body of a pre-trial investigation is his tool».

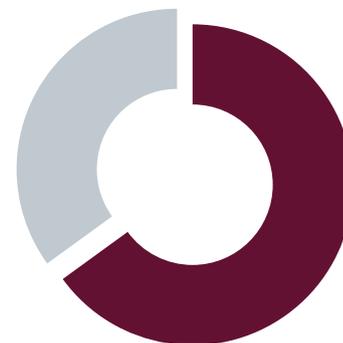
### Detective:

«... It is nice to see when a prosecutor is interested in a pre-trial investigation, and both of you engage into the essence of a pre-trial investigation, and he tries to understand a case at the initial stage. Then you feel that he is always there, and a pre-trial investigation goes smoothly. Another situation is when you conduct a pre-trial investigation for a year and a half, it is very complicated, and then you have only two weeks to put all this information into the prosecutor's head, on what happened, how much you know: what transactions were conducted, and what it all means. He just can't do it, even physically».



19%

of surveyed SAPO prosecutor think that the current role of the prosecutor is the same as the previous one



65%

of prosecutors did not agree that the prosecutor often engages in the details of investigation at the stage of preparation of an indictment

## PRINCIPLES OF PROCEDURAL GUIDANCE

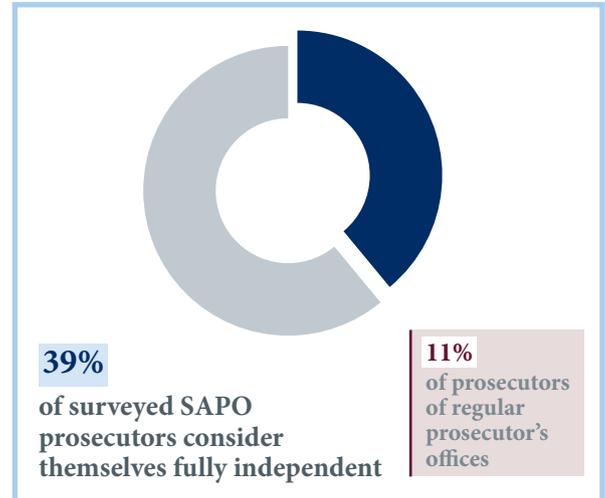
### INDEPENDENCE

Despite the subjective perception of being more independent than prosecutors of regular prosecutor's offices are, the SAPO prosecutors quite often informally coordinate the main procedural decisions with their supervisors. On the one hand, this practice may indicate that the SAPO management provides support to a prosecutor in individual criminal proceedings. On the other hand, this practice does not exclude the possibility of interference in the procedural independence of procedural supervisors.

The current practice of a formal appointment of group leaders exclusively from among the heads of departments poses a threat of administrative interference in criminal proceedings.

The study showed that the introduced system of statistics does not affect the substantive activities of the SAPO procedural supervisor, unlike in the regular prosecutor's offices. Prosecutors of the SAPO, in particular, pointed out the absence of the practice of «manual adjustment» of the indicators measuring the number of proceedings closed, a number of proceedings referred to courts monthly etc.

There are no negative consequences for the prosecutor on the part of the SAPO management for lawful actions in the interests of a suspect (for example, closing criminal proceedings and releasing a detainee without a notice of suspicion, etc.). In the framework of the study, it appeared that the SAPO prosecutors, in their opinion, do not face the risk of unconditional punishment for acquittals in criminal proceedings, in contrast to the practices of the regular prosecutor's offices.



#### Prosecutor:

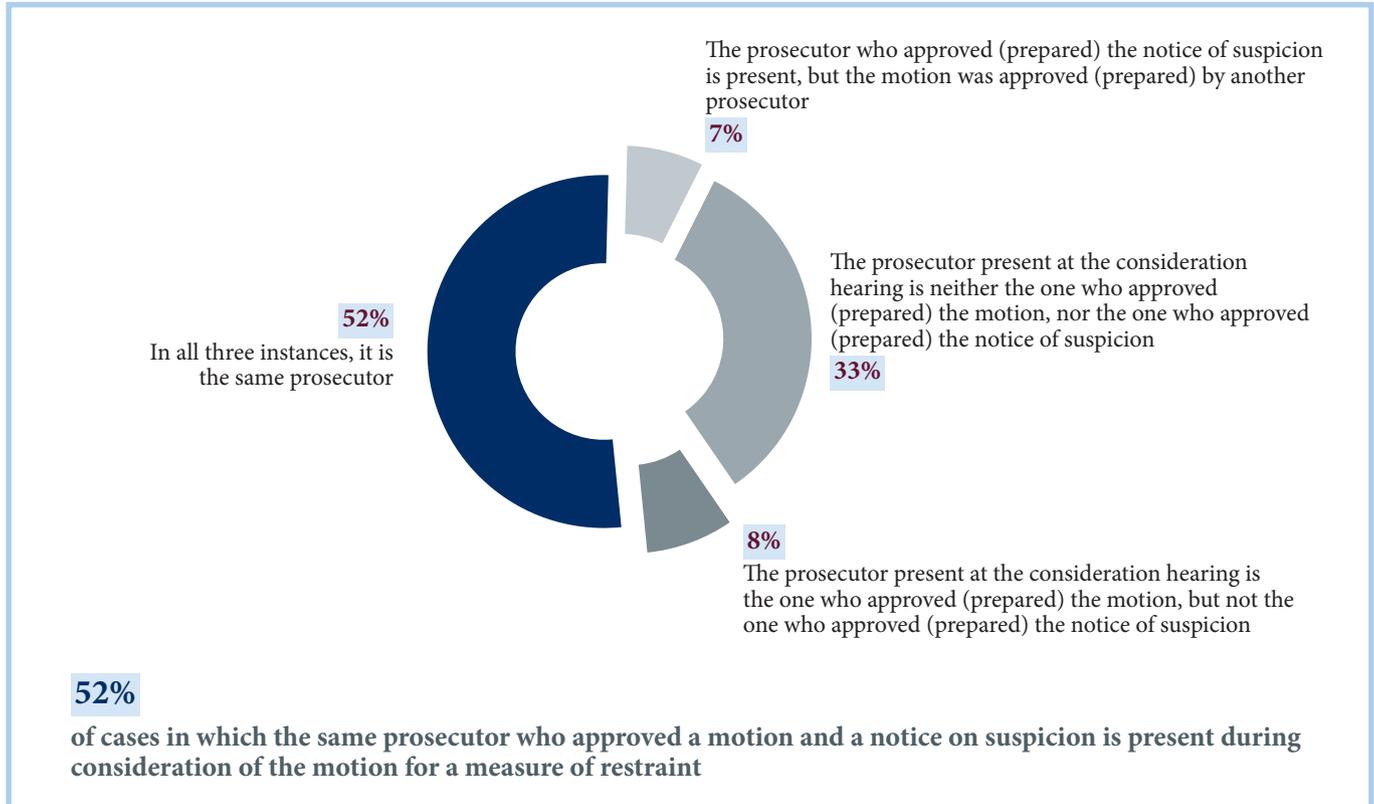
*«...We are responsible for the results of the case. Not for getting an acquittal. In our circumstances, with our complex cases, it is very likely. If we were afraid of them, then difficult cases would never go to court. So we moved the emphasis. And now we are responsible from the beginning until the end».*

#### Lawyer:

*«What I notice during the process: they ask for a break – make a call and receive some instructions, or postpone the hearing when it is unclear where the case is moving. Then, having received instructions, they come back to trial».*

# PRINCIPLES OF PROCEDURAL GUIDANCE

## UNCHANGABILITY



### Prosecutor:

«... As a rule, there is a unit and all prosecutors of the unit are included in all proceedings, as well as the Deputy Head or the Head of the SAPO, depending on the case category. Where there are special subjects that demand permissions of the Deputy Prosecutor General for measures to ensure criminal proceedings, the Head of the SAPO joins. If there is no need, and it is an ordinary case, it will be limited to participation of the Deputy Head or the head of the department».

## PRINCIPLES OF PROCEDURAL GUIDANCE

### IMPARTIALITY AND OBJECTIVITY

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#### **Prosecutor:**

*«... All conditions have been created for us to be procedural prosecutors in its purest sense. This is the idea enshrined in the CPC. The number of criminal proceedings allows us to comprehensively and fully delve into each criminal proceedings and ensure its effectiveness and legality».*

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#### **Lawyer:**

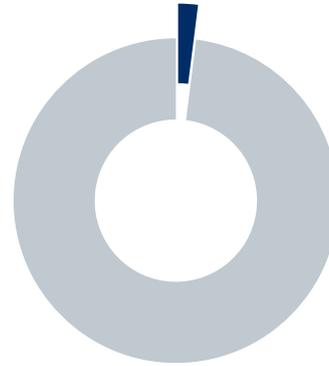
*«I have had two occasions when I was going to the prosecutor, which means that he knew the case, I was told that the conditions were following: the suspect pays a certain amount to the budget (implying that the client caused damages), and we would ask for a non-custodial measure of restraint. «Well, if you do not pay – as you wish. If you pay the damages, we will talk». They directly say that their purpose is to fill the budget and get compensation for damages».*

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# THE SYSTEM OF RECORD-KEEPING AND WORKLOAD EVALUATION

## Prosecutor of a regular prosecutor's office:

«Bonus reduction happens every month. Two, three, five people out of 27 staff prosecutors have their bonuses reduced. If the head does not reduce the bonuses, then his bonus is reduced. The same happens every month. This is the practice. We have already forgotten what bonus payments look like».



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out of 31 surveyed prosecutors responded that they had been deprived of their bonus once

## Prosecutor:

«If we go back and compare, you will be asked about each number, including secret investigative actions, what and why was here. These questions always arose in the prosecutor's office. Since I have been here, there were no questions about some numbers. And I have a self-awareness that it is necessary to enter my results. Once I have entered results, I do not have to think about it».

42  
2016

47  
2017

57  
2018

Number of proceedings sent to court with an indictment

## THE ROLE OF THE SAPO PROSECUTOR AT THE STAGE OF APPREHENSION

The CPC provides the NABU detectives and the SAPO prosecutors with additional grounds for apprehending a person (Article 208(1) (3)). The study showed a prevalence of apprehensions by the NABU detectives long after the crime has been committed based on this provision. At the same time, according to some participants of the process and experts, this practice is contrary to the provisions of the Constitution of Ukraine.

In the work of the NABU detectives and the SAPO prosecutors, the practice of failing to register apprehension, common in the work of investigative and operational police units, was not found.

In many cases, two or even three grounds for apprehension under Article 208 of the CPC are listed in the report on apprehension. First, it is impossible to identify the main reason for apprehension in these circumstances. Moreover, such grounds are sometimes mutually exclusive. This practice may indicate an inadequate justification of apprehension.

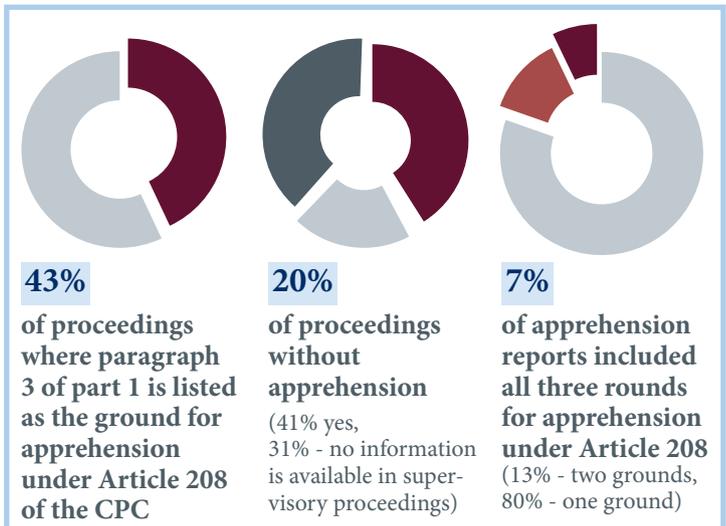
Prosecutors and detectives do not always take into account the existence of risks of possible escape as a necessary condition for apprehension under Article 208(1) (3) of the CPC.

### Lawyer:

«... The policy of detectives and prosecutors is that all suspects must be detained...».

### Prosecutor:

«... I do not always approve apprehension in our category of crimes. It is rather in cases concerning murderers, rapists, and drug dealers. I think that it is more needed in that category of cases, than here. In our cases, it is about service-related offences. Generally, we have the entire evidence base in the form of documents. Any money transactions leave a mark somewhere. And to state that a person will run away, if he has something to lose on the territory of Ukraine, it is to assume that he will run abroad and live there, despite the difficulties for his families here... I wouldn't apprehend».



# THE ROLE OF THE SAPO PROSECUTOR AT THE STAGE OF NOTIFICATION OF SUSPICION

According to the study, the detectives and prosecutors of the SAPO are trying to collect as much evidence as possible before giving the notice of a suspicion. Prosecutors explained their reasoning for this tactic by the lack of interest from detectives in active investigation after the notice of a suspicion is served, as well as by high chances of destruction of evidence by suspects. At the same time, such practice, under certain conditions, may constitute a violation of defense rights of an actual suspect due to the lack of a clearly defined procedural status. Consequently, this problem requires further elaboration, establishing criteria for finding the optimum balance between the interests of investigation and defense rights of a de facto suspect.

The notice of a suspicion is mainly composed by a detective and, as a rule, finalized by the prosecutor. However, unlike in the local and regional prosecutor's offices, the SAPO prosecutors quite often prepare this document personally. Notification of suspicion is mainly delegated to the detective and carried out without the prosecutor.

## Prosecutor:

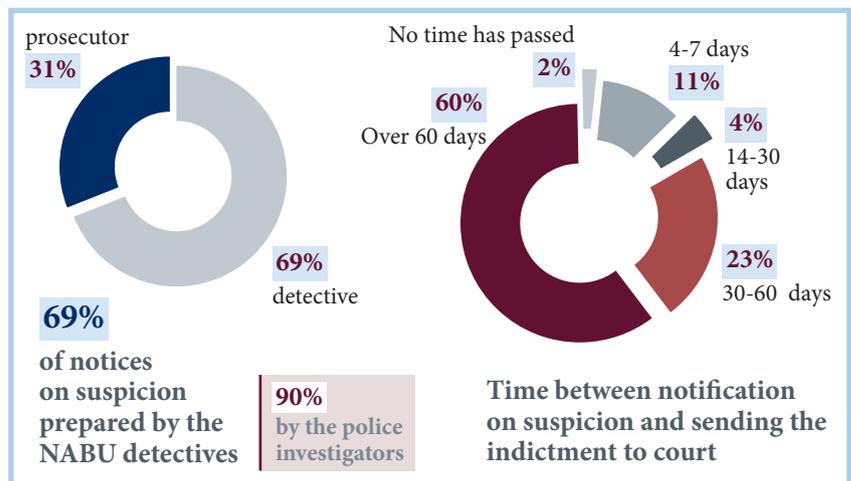
«...Prior to the notice of suspicion, we usually collect 50-60% of the evidence we need. Because we understand that after a person has already acquired the status of a suspect, his/her behavior will be directed towards destruction of any possible additional evidence that we can get. This is from the tactical point».

## Lawyer:

«In my cases, clients understood that they were suspects, but they turned to a lawyer only after apprehension, and before that they were going for questioning for two years, provided documents, etc...».

## Detective:

«Sometimes a document can be very different from the first draft, but the basis is prepared by us...».



## THE SAPO PROSECUTOR'S ROLE AT THE STAGE OF APPLICATION OF THE MEASURES OF RESTRAINT

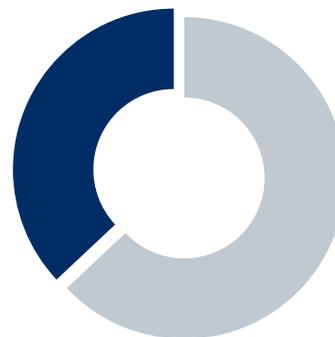
According to other participants of criminal proceedings, the SAPO prosecutors generally carry out a better and more thorough preparation of motions and their justification in court, in comparison with the prosecutors of regular prosecutor's offices.

At the same time, the SAPO prosecutors often submit motions requesting custodial measures of restraint, which may indicate a lack of awareness of the exceptional nature of this measure of restraint by the SAPO prosecutors.

The study showed that prosecutors and detectives do not always support the motion for restraint measures with the necessary materials confirming the facts and circumstances.

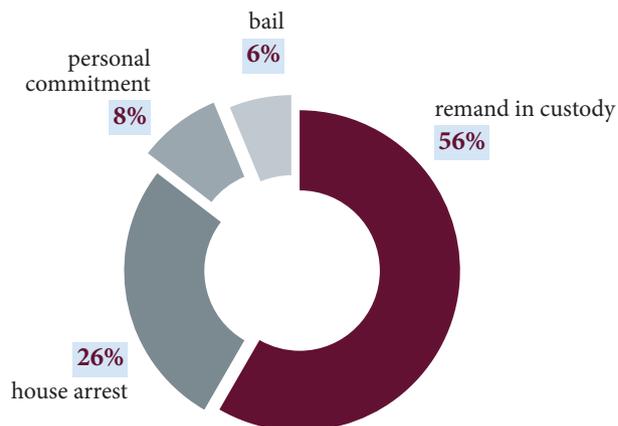
### Judge:

«Of course, the SAPO prosecutors are more professional. They prepare for the case better, they present case better not only from the point of view of speaking skills, but also from the point of view of directing the court's focus and justification of suspicion based on the evidence and risks».



37%

of analyzed supervisory proceedings in which the motion for a measure of restraint was prepared by the prosecutor



56%

of analyzed supervisory proceedings in which the motion for a measure of restraint refers to remand in custody

## DETECTIVE'S PRESENCE DURING THE CONSIDERATION OF A MOTION FOR A MEASURE OF RESTRAINT

In most cases, the SAPO prosecutors support the motion in court in person. At the same time, there are cases when the NABU detectives are involved in this process. This practice on the application of measures of restraint may constitute a violation of the CPC since the legislation does not define the role of the detective in supporting these types of motions.

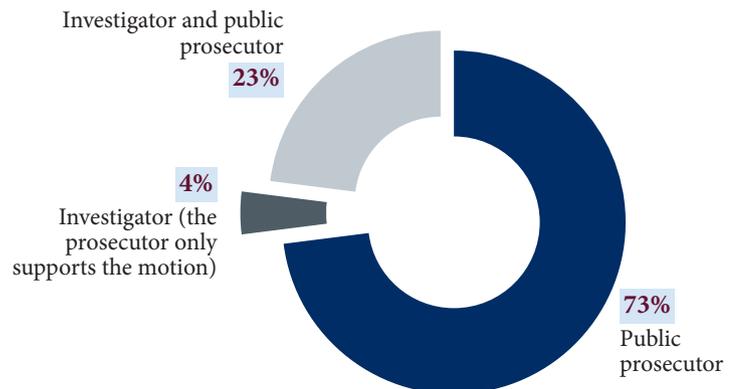
### Detective:

«We are present at hearings. Why? Because, for example, a prosecutor expressed his view on the motion. The judge listens to the defense. The defense is starting to prove a variety of arguments. Detective investigator always knows the case best. Therefore, there is no need for a prosecutor to stand and blush because he does not know something. He turns to me and asks about all these points, I explain to him, and he knows what to say next».



37%

of analyzed supervisory proceedings in which the detective was present during a hearing on the motion of restraint



73%

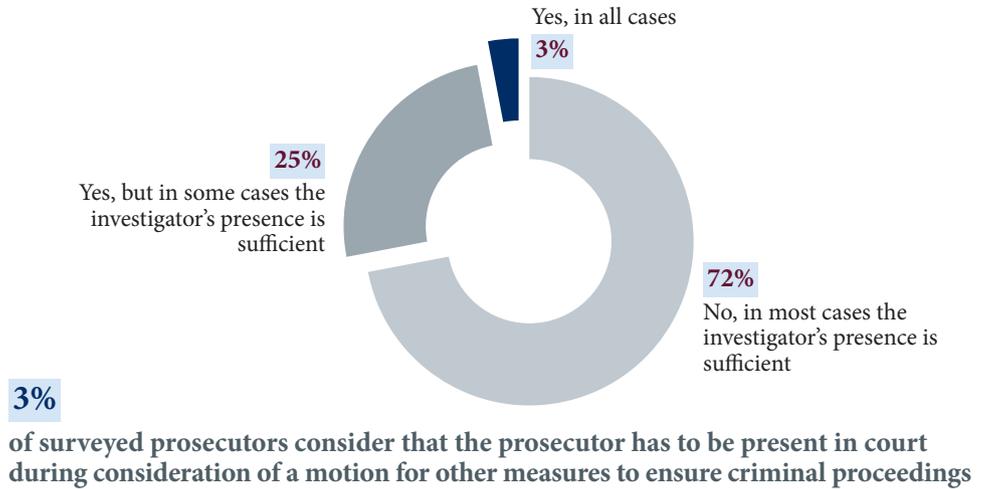
of analyzed supervisory proceedings in which the prosecutor provides arguments in favor of the measure of restraint before the investigating judge independently

40%

of prosecutors of regular prosecutor's offices

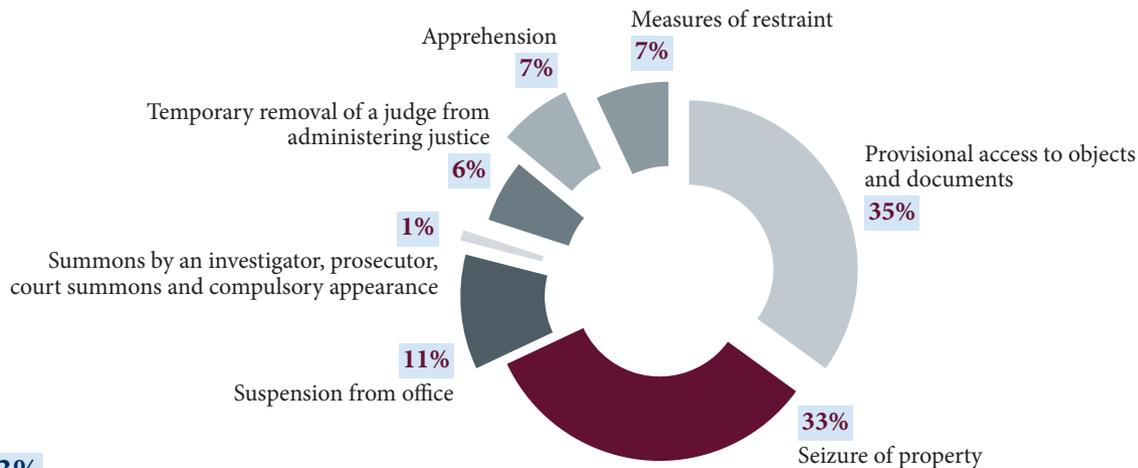
## THE SAPO PROSECUTOR'S ROLE AT THE STAGE OF THE SEIZURE OF PROPERTY

The SAPO prosecutors do not always support the motion to seize property with evidence of the circumstances referred within (in terms of proving the need for such measures).



33%

of analyzed supervisory proceedings in which seizure of property was used as a measure to ensure criminal proceedings



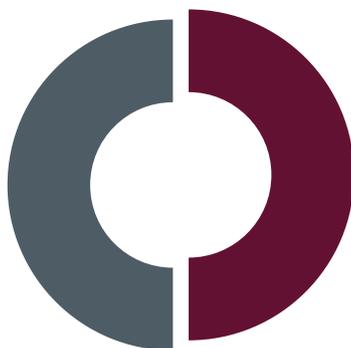
## THE SAPO PROSECUTOR'S ROLE IN DEFENDING PROPERTY RIGHTS DURING THE ATTACHMENT OF PROPERTY

It is common to initiate consideration of motions to seize property in the absence of the owner. The SAPO employees explain such actions by the specifics of crimes and the possibility of the destruction of property. However, in some situations, such practices may result in significant restrictions and sometimes even disproportionate interference with right to property.

The study showed that the SAPO prosecutors do not always take appropriate measures to protect the property rights in cases of a non-return of seized property, as well as seizure of a property not indicated in the ruling issued by the investigating judge.

yes, it is feasible in certain cases

50%



50%

of surveyed prosecutors think that motions for the seizure of property should be considered without informing the owner

### Detectives:

«We usually write if there is such a need, for example, that the property is with the person, and it can be destroyed... we proceed from the risk that there are some funds in the bank accounts, and if we call a person to be at the preliminary hearing, there is a risk that these funds will not be there at the time of the ruling».

«...In other cases, if the property is seized in the manner prescribed by law, we usually do not ask for consideration of a motion in the absence of an owner».

### Judge:

«... Recognized the failure to return as illegal and obliged them to return the property seized during the search without an authorization of the seizure... Yesterday we issued the ruling, returned the property, issued effectively. Today we have not yet prepared the full text, a person already ran to get his property from the NABU. And what do you think, today the SAPO is filing a new motion for the seizure with another judge. They do not say that yesterday there was a ruling to return, and the court imposes the seizure. They manipulate, it exists».

## THE ROLE OF THE SAPO PROSECUTOR AT THE STAGE OF EVIDENCE COLLECTION

The main burden of evidence collection falls on detectives.

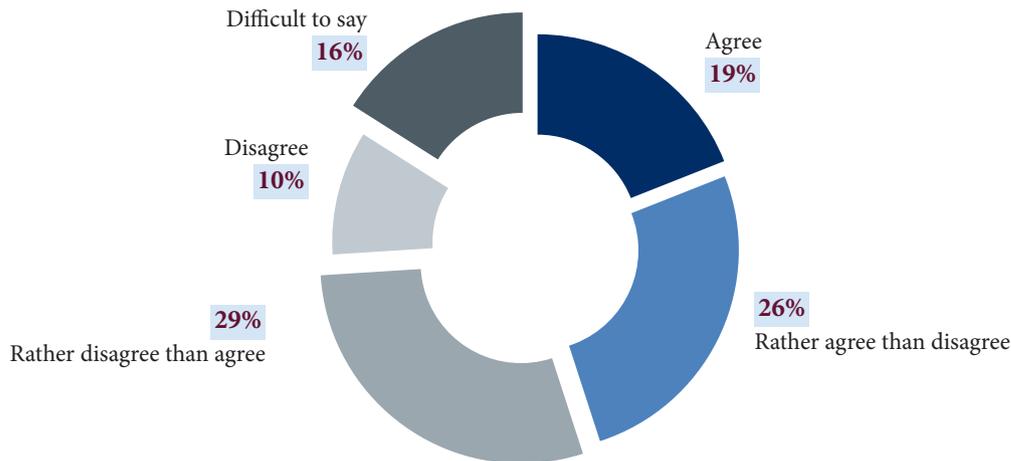
At the same time, the SAPO prosecutors, unlike prosecutors of regular prosecutor's offices, are more involved in this process.

In particular, they are involved in planning and defining the investigation strategy.

### Prosecutors:

*«I am the person who will operate with the evidence that I have received. I have the authority to control the whole process, to take part in it and to determine the direction of investigation».*

*«...You can collect a room of evidence that will not be proper. Even if they it is admissible, but not appropriate, it will not confirm the guilt of a person committing the crime... Without solid procedural guidance, they will have everything except for what is necessary...».*



45%

of surveyed prosecutors agreed that the main burden of evidence collection falls on the detective, and the prosecutor controls the legality of his actions and approves the main procedural documents

## THE SAPO PROSECUTOR'S PARTICIPATION IN INVESTIGATIVE ACTIONS AND COOPERATION WITH THE DETECTIVE

The real participation of the SAPO prosecutor in the investigative actions or conducting such actions personally is an exception. As a rule, the latter participate in suspect interrogation, witness interrogation, search, and inspection.

Usually, the SAPO prosecutors use instructions as a tool to influence a detective in case the latter is not working properly or avoids following a certain way of evidence gathering defined by a prosecutor. At the same time, unlike the common practice among prosecutors of regular prosecutor's offices, they do not provide guidance to ensure a certain level of statistical indicators.



of surveyed materials of supervisory proceedings did not contain written instructions of the prosecutor

### Lawyer:

«You see a prosecutor only when a certain measure of restraint is chosen, you write a motion to a prosecutor».

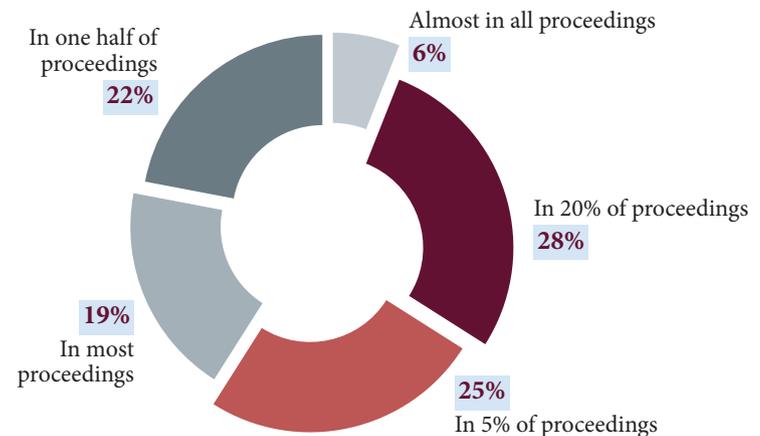
### Detective:

«If there is a verbal disagreement about further investigative actions, then a prosecutor writes instructions, and we must fulfill them as much as possible».

### Prosecutors:

«While I was working before [in a regular prosecutor's office], it was like this: «How many instructions did I give last year for this month?! – This much. Five more is needed...»».

«Instructions are not a mandatory element in the proceedings... Instruction is a way of exercising the powers of a prosecutor when a detective does not want to do anything for whatever reasons».



53%

of surveyed prosecutors participated in investigative actions not more than in every fifth case

## THE ROLE OF THE SAPO PROSECUTOR AT THE STAGE OF COMPLETION OF THE INVESTIGATION

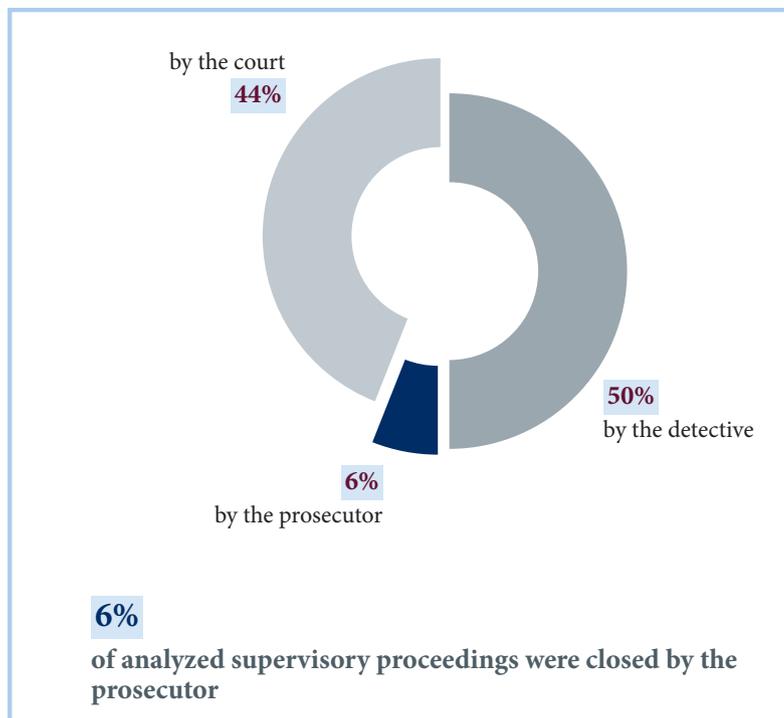
The SAPO prosecutors are not afraid to make decisions to close criminal proceedings after serving a notice of a suspicion and they are confident that they will not be punished for a lawful decision.

Such approach in the activities of the SAPO differs significantly from the practice of regular prosecutor's office where all (even lawful) instances of closing criminal proceedings after the notice of suspicion is served is automatically classified in the category of «professional» violations and followed by a punishment of procedural supervisors.

This practice may indicate both, a change in the perception of the notice of suspicion by the prosecutors, and the absence of practices of unconditional punishment for such decisions in the work of the SAPO.

### Detective:

«...In our practice, there were cases when prosecutors closed cases. There were even cases when prosecutors closed the case against a person with a suspicion. But ... in our cases, in my practice, the decision to close was taken at a high level – at the level of the Deputy Head of the SAPO».



## THE IMPACT OF STATISTICAL INDICATORS ON THE PROCEDURAL POWERS OF THE SAPO PROSECUTORS

### Detective:

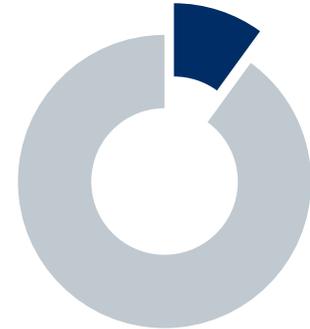
«No. It does not happen here. I have not heard such thing that there is some kind of indicator for the amount of closed proceedings...».

### Prosecutor:

«In the past [while working at a regular prosecutor's office- ed.], for example, it was like this: if in the past year there were many crime investigations sent to the court, as a result there were many penalties, and a certain amount of money was paid to the state for the damages, therefore this year these numbers cannot be lower. There must be a higher number, not lower, or a half of employees will be fired. We do not have this burden on us».



**100%**  
of surveyed prosecutors responded that statistical indicators do not influence the procedural supervisor's decisions to close criminal proceedings

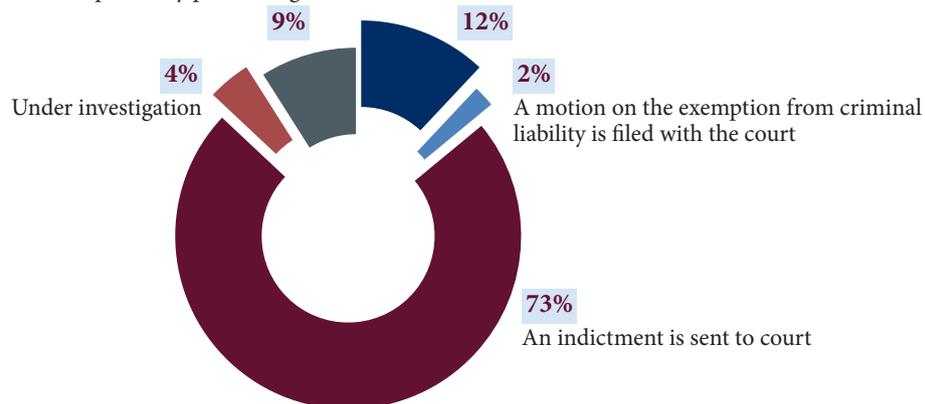


**10%**  
of surveyed prosecutors said they tried to keep statistical indicators at a certain level

**71%**  
of prosecutors of regular prosecutor's offices

Information is not available in supervisory proceedings

Closed



Status of criminal proceedings

## THE SAPO PROSECUTOR'S ROLE IN ENSURING THE RIGHTS AND FREEDOMS OF A SUSPECT

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The SAPO prosecutors are generally more aware of the need to ensure the rights of suspects than prosecutors of the regular prosecutor's offices. According to prosecutors, they are encouraged to pay attention to the rights of persons for the following reasons: the need to ensure admissibility of evidence; preventing prosecutions of innocent people; preventing situations where a prosecutor is held liable in connection with the violation of the rights of a suspect. Another contributing factor is the more qualified work of the NABU detectives, who are familiar with the requirements of the current criminal procedure legislation.

At the same time, activities of the SAPO and the NABU included cases when detention was used as a tool to persuade a suspect to cooperate or as a punishment for refusing to cooperate. Such an approach, taking into account the ECtHR case law, is a violation of the right of a suspect to liberty.

The study found cases when the SAPO prosecutors involved lawyers through the free legal aid system to participate in separate investigative or procedural actions in cases when a suspect had his/her own lawyer. In the absence of an urgent need for investigative and procedural actions, this practice is an attempt to eliminate a lawyer who has an active position in the protection of his/her client; it is a clear violation of the right to defense.

The study found no evidence of torture or other forms of ill-treatment of a suspect by the NABU detectives or the SAPO prosecutors. At the same time, some participants of focus groups reported untimely provision of medical care to suspects, which under certain circumstances (the state of health of the victim, age, etc.) can be considered as ill-treatment.

**MAIN REASONS,** which, in the opinion of prosecutors, encourage them to pay attention to the state of ensuring the rights of suspects:

1. Ensuring admissibility of evidence
2. Preventing prosecution of innocent individuals
3. Preventing prosecutor's from sanctions resulting from violations of the rights of a suspect

### **Judge:**

*«Given the category of suspects with whom the SAPO works, they [suspects – ed.] have every opportunity to take advantage of their position and say that they were treated inappropriately or treatment was improper, but still in most cases they do not complain. They [the defense – ed.] talk about risks, about guaranteed suspicions, but at this aspect there were no complaints about the SAPO and the NABU».*

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## THE RIGHT TO LIBERTY

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### Prosecutor:

*«One has to be detained, so he can recover and say something, or agreed to some deal and said something. And the other one we keep and know that he will not say anything, and we must immediately file a motion to the court».*

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### Lawyer:

*«Explain, if you work with someone and the evidence is present, and a notice on suspicion is ready, why delay? – Only to break a person, this is the only purpose...».*

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### Judge:

*«Very often suspects complain that during the time of a detention and until the moment when they are being brought for the hearing on extension of custody detectives do not interrogate him or talk to him at all. They just sit there».*

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## PROTECTION FROM ILL-TREATMENT

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### Lawyer:

*«If comparing to district departments where I have been going for many years, it is night and day. If in a district department you can see a person beaten up, and he tells you that he was beaten, I write the statement and as a response to that statement they can just formally provide a note that states that it does not happen here».*

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## THE RIGHT TO DEFENSE

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### Lawyer:

*«I want to say a few words about a separate procedural action. For a long time, I was going to separate procedural actions, and then stopped. I believe that this is a violation of the defendant's rights. Because he has a lawyer or lawyers who have their own legal position, which is agreed with their client. And here we are, bursting from the Center to a separate procedural action. "Hello". Without documents, without evidence, without anything».*

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### Prosecutor:

*«We have six suspects in one case, and they all have one lawyer. One lawyer who accompanied all these economic transactions when they were conducted, and now he defends all of them. Respectively, these people are detained approximately at the same time. A three-day period starts at the same time. It is possible to consider measures of restraint in court, where there are several investigating judges, in parallel. The lawyer says, "No, I'm their lawyer, I'll be defending him first, then him, and then him". Accordingly, time may run out for those who are at the end».*

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**THE ROLE OF THE PROSECUTOR  
OF THE SPECIALIZED ANTI-CORRUPTION  
PROSECUTOR'S OFFICE  
AT THE PRE-TRIAL STAGE**

2018