# PUBLIC PROSECUTOR

SUPERVISES?

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DIRECTS?

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

Expert Center for Human Rights

INTERNATIONAL RENAISSANCE FOUNDATION

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

**STUDY REPORT**

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 of the
**International Renaissance Foundation**

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# LIST OF ABBREVIATIONS AND ACRONYMS

**CC**

Criminal Code of Ukraine

**CPC**

Criminal Procedure Code of Ukraine

**ECtHR**

European Court of Human Rights

**GRECO**

Group of States against Corruption

**NABU**

National Anti-Corruption Bureau of Ukraine

**NACP**

National Agency on Corruption Prevention

**OECD**

Organization for Economic Co-operation and Development

**SAPO**

Specialized Anti-Corruption Prosecutor's Office

**SBI**

State Bureau of Investigation

**Study**

2017 study of the role of the prosecutor of a regular prosecutor's office exercising procedural guidance[1]

**URPI**

Unified Register of Pre-trial Investigations

[1] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 –268 p.

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**Summary**

# KEY FINDINGS AND RECOMMENDATIONS

The study «The role of the Prosecutor of the Specialized Anti-Corruption Prosecutor's Office as a procedural supervisor at the pre-trial stage of criminal procedure» was conducted in 2017-2018.

The study was conducted by an initiative research team of the Human Rights and Justice Program Initiative of the International Renaissance Foundation with the support of the Specialized Anti-Corruption Prosecutor's Office (SAPO).

The initial concept and methodology of the study was developed by the research team of the Expert Centre for Human Rights in cooperation with the Human Rights and Justice Program Initiative of the International Renaissance Foundation.

The main goal of the study is a comprehensive assessment of procedural guidance in pre-trial investigation as one of the main functions of the prosecutor of the Specialized Anti-Corruption Prosecutor's Office. The study focused on different aspects of the work of prosecutors of the Specialized Anti-Corruption Prosecutor's Office in their capacity as procedural supervisors, as well as factors influencing their decisions and actions at pre-trial investigation in general and its individual stages.

The study included analysis of the following aspects:

- structure, functions, jurisdiction and specifics of ensuring institutional independence of prosecutors of the Specialized Anti-Corruption Prosecutor's Office;
- principles of exercising procedural guidance in the Specialized Anti-Corruption Prosecutor's Office;
- the role of the public prosecutor at the stage of apprehension of a suspect, notification of suspicion, selection of measures of restraint and measures to ensure criminal proceedings;
- activities of the public prosecutor at the stage of evidence collection and finalization of pre-trial investigation;
- the role of the public prosecutor in ensuring the rights and freedoms of a suspect.

The study was comprised of two key phases:

a) desk
b) field research.

Desk research was conducted with the purpose of analyzing national legislation on the exercise of procedural guidance by prosecutors at the pre-trial stage of criminal proceedings in this sphere.

In the framework of field research, a set of qualitative and quantitative methods of data collection was used, namely: interviews, focus groups, content analysis, analysis of statistics, and expert surveys.

The field study included 3 interviews and 5 focus groups with various participants of the criminal justice system:

1 focus group with the group of the SAPO prosecutors who conduct procedural guidance;

1 focus group with the heads of SAPO offices and departments;
2 focus groups with lawyers;
1 focus group with detectives of the National Anti-Corruption Bureau of Ukraine (NABU).

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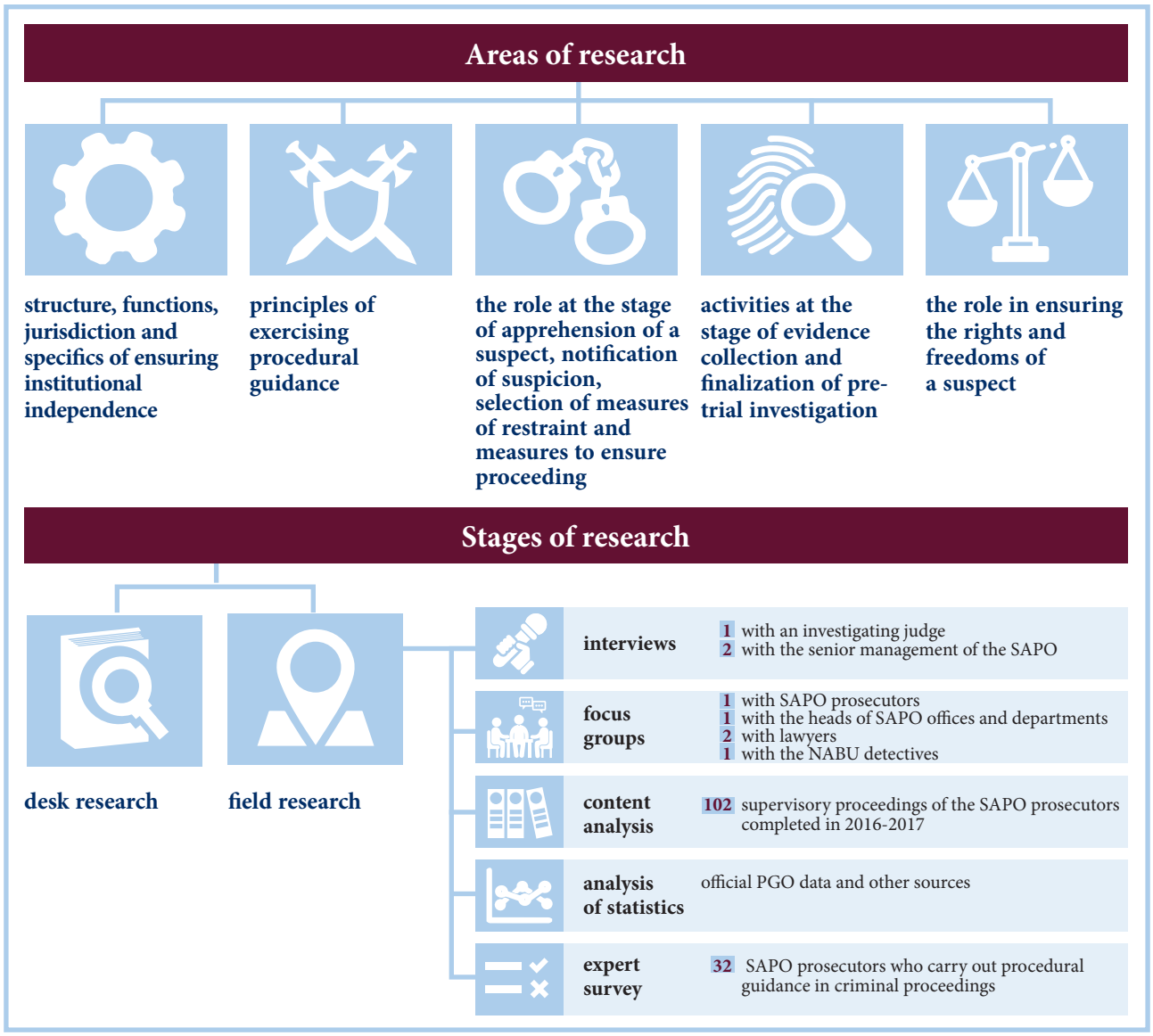
1 interview with an investigating judge;
2 interviews with the senior management of the SAPO.

Field researchers applied content analysis to the following information:

102 supervisory proceedings of the SAPO prosecutors selected from those sent to the court with an indictment and closed in 2016-2017 (37% of the total number of proceedings in this category).

An expert survey of 32 SAPO prosecutors who carry out procedural guidance in criminal proceedings (89% of the total number of the SAPO procedural supervisors) was conducted during the study to maximize understanding of the procedural supervisors' opinion.



# Key findings of the study:

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

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

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

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

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

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

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

- 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

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

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

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

7. To strengthen guarantees for the independence procedural supervisors in criminal proceedings by:
    a. appointment of procedural supervisors who will actually perform the functions (not only the heads of departments) of a prosecution group leader in criminal proceedings;
    b. 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

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:
    a. clear indication of specific grounds for apprehension in the report on apprehension by the NABU detectives;
    b. proper indication of the time and place of actual apprehension of a person in the event of a search;
    c. 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 justification of a motion for the implementation of measures of restraint, including supporting the facts and circumstances with necessary materials.
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:
    a. to ensure adequate explanation regarding the grounds for application;
    b. to initiate consideration of such motions in the absence of property owners only in exceptional cases;
    c. to take effective measures for the timely return of seized property.
16. To take measures regarding:
    a. 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;
    b. timely provision of medical care for detainees;
    c. 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.

# INTRODUCTION

Over the past few years, the Expert Centre for Human Rights in cooperation with the International Renaissance Foundation and their financial support has conducted a number of studies on the observance of human rights in criminal justice system in Ukraine. One of these studies concerned the role of the prosecutor as a procedural supervisor in a pre-trial investigation. During this study, a number of systemic problems characteristic for local and regional prosecutor's offices were identified. In addition, a decision was made to conduct research into specifics of the role of the prosecutor of the Specialized Anti-Corruption Prosecutor's Office (SAPO) during pre-trial investigation. After all, the practical work of prosecutors within the entirely new unit could provide new interesting practices that could be multiplied in all prosecutor's offices.

The SAPO along with the National Anti-Corruption Bureau (NABU) and the National Agency on Corruption Prevention (NACP) now form a circle of key institutions designed to fight corruption in Ukraine.

At the same time, the SAPO is an independent entity within the system of prosecutor's offices in Ukraine tasked with ensuring efficiency and legality of investigations carried out by detectives of the NABU, and further implementation of results of these investigations in courts. Existence of this body was one of the key requirements of the European Union and other partners in the West. The issue of providing additional assistance to Ukraine and the visa-free regime for Ukrainians to travel to the EU directly depended on successfully establishing this entity.

The SAPO was created in a challenging environment, and has been operating for a relatively small time. However, we can already observe its specific practices and differences from the operations of the regular prosecutor's offices at different levels.

Considering the functions assigned to the SAPO, we propose to focus on the implementation of the most important powers assigned to its officials. First, we are interested in a comprehensive research on the role of the SAPO prosecutors acting as procedural supervisors in pre-trial investigations of criminal offenses.

This analytical report is a logical continuation of the study[2] completed in 2017 on the role of the prosecutor of the regular prosecutor's office exercising procedural guidance. While the previous study has already described international standards and provisions of the current legislation governing the prosecutor's performance as a procedural supervisor regardless of his/her specialization, in this report we mainly focus on the features relating specifically to prosecutors of the SAPO exercising procedural guidance.

[2] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p.

Chapter 1

# GENERAL PRINCIPLES OF THE ACTIVITIES OF THE SPECIALIZED ANTI-CORRUPTION PROSECUTOR'S OFFICE

## 1.1

## Objectives, functions and jurisdiction

The prerequisites for the establishment of the SAPO are inextricably linked to the high level of corruption in Ukraine. According to *Transparency International*, in 2012 and 2013, Ukraine ranked 144 out of 176 (177 in 2013) countries covered by the study of the corruption level[3]. The law «On the Principles of Anti-Corruption Policy in Ukraine (Anti-Corruption strategy) for 2014-2017», adopted in 2014, emphasizes the fact that «corruption is one of the reasons that led to mass protests in Ukraine in late 2013-early 2014».

During that period, one of the most widely discussed ways to improve the effectiveness of the fight against corruption by law enforcement was the institutional reform of bodies carrying out pre-trial investigation and prosecution of corruption crimes.

The importance of effective specialization of law enforcement bodies in the fight against corruption and standards for operation of such specialized institutions is emphasized by international treaties (Article 36 of the UN Convention against Corruption and Article 20 of the Council of Europe's Criminal Law Convention on Corruption) and recommendations provided to Ukraine by international organizations (the Istanbul Anti-Corruption Action Plan of the OECD and GRECO).

According to the assessment of the situation in 2014 in the *Principles of the state anti-corruption policy in Ukraine*, most of the GRECO recommendations, based on the first and second rounds of evaluation, had not been implemented. Only a small part of the anti-corruption recommendations of the Visa Liberalization Action Plan with the European Union (EU) had been implemented, in particular criminalizing corruption. Key recommendations of GRECO and the EU on the establishment of anti-corruption institutions, reforming

[3] Corruption Perception Index rating CPI-2013 // Transparency International Ukraine website. Available at: https://ti-ukraine.org/research/indeks-koruptsiji-cpi-2013/ИНДЕКС Corruption Perception Index rating CPI -2012 // Transparency International Ukraine website. Available at: https://ti-ukraine.org/research/indeks-koruptsiji-cpi-2012/

the prosecutor's office, public service, establishing oversight systems to prevent conflict of interest and ensure integrity of the officials' assets, required urgent implementation.

According to the 2014 assessment findings, *Transparency International Ukraine* has called on the Government, the Parliament and the President to take five immediate steps to achieve perceptible anti-corruption changes. The first step included proper launch of operations of the new anti-corruption bodies provided with the necessary resources for the establishment of institutions and the selection of qualified personnel[4].

The International Monetary Fund insisted on this step. Establishment of specialized anti-corruption bodies was one of the prerequisites for the visa-free regime with the EU countries, as well as financial aid.

As a result of the adoption of a package of anti-corruption legislative acts on 14 October 2014, including the Law of Ukraine On Preventing Corruption, On the Public Prosecutor's Office, On the National Anti-corruption Bureau of Ukraine and a number of other laws, a regulatory framework for the operations of the NACP, the NABU and SAPO was created.

The new legislative framework allowed the launch of the operations of the SAPO established by the PGO order of 22 September 2015.

Functionally, the SAPO was one of the elements system of system of public prosecutor's offices along with regional, local and military prosecutor's offices[5]. At the same time, the SAPO established within the Prosecutor General's Office acquired the status of an independent structural unit[6].

The main functions of the SAPO, as well as of the Prosecutor's office in general, are defined by Article 131-1 of the Constitution [7] of Ukraine and include the following:

1. *Supporting public prosecution in the court;*
2. *Organizing and procedurally directing during pre-trial investigation, deciding other matters in criminal proceeding in accordance with the law, supervising undercover and other investigative and search activities of law enforcement agencies;*
3. *Representing interests of the State in the court in exceptional cases and under procedure prescribed by law.*

The law of Ukraine *On the Public Prosecutor's Office*, in turn, determines specifics of implementation of each of the functions mentioned above by the SAPO. Thus, in particular, the issues of *supervision and procedural guidance for the SAPO relate only to operational and investigative activities and pre-trial investigation conducted by the NABU. Public prosecution is carried out only in proceedings in which operational and investigative activities and pre-trial investigation were carried out by the NABU. Representation of the interests the citizens or the state in court is limited to cases provided by Law and refers to corruption or corruption-related offenses*[8].

On April 12, 2016, the Prosecutor General approved the *Regulation on the Specialized Anti-Corruption Prosecutor's Office, which defines the* ***main tasks of the SAPO***:

- compliance with the law during the reception, registration, consideration and resolution of applications and reports of criminal offenses, timely entry of information into the Unified register of pre-trial investigations;

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4 Corruption Perception Index rating CPI-2014 // Transparency International Ukraine website. Available at: https://ti-ukraine.org/research/indeks-koruptsiji-cpi-2014/

5 Article 8 of the Law of Ukraine "On the Public Prosecutor's Office", 2015

6 Article 8(5) of the Law of Ukraine "On the Public Prosecutor's Office", 2015

7 On Amendments to the Constitution of Ukraine (regarding justice): the Law of Ukraine no. 1401-VII, 2 June 2016. Available at: http://zakon2.rada.gov.ua/laws/show/1401-19/ print1470816136775720

8 P.5, Art. 8 of the Law of Ukraine «On the Public Prosecutor's Office" , 2015

- ensuring the prompt, full and impartial investigation of criminal offences by the NABU and the appeal of illegal court decisions at the pre-trial and trial stages;
- provision of compensation for damages caused by criminal offenses within its competence;
- ensuring due legal process to each participant in criminal proceedings;
- international cooperation in the framework of the SAPO functions[9].

As of today, the SAPO has tasks and functions clearly defined in legal regulations. They do not differ from the main tasks and functions of the Prosecutor's office as a whole, but have features related to the main field of activity of the institution, which indicates a certain functional autonomy of this entity.

## Jurisdiction in criminal proceedings

As we have already noted, the SAPO exercises procedural guidance in pre-trial investigation, as well as representation in court in proceedings investigated by the NABU. Accordingly, the jurisdiction of the NABU in fact defines the sphere of application of these SAPOs' functions.

The jurisdiction over investigations of the NABU detectives is specified in Article 216(5) of the CPC. These include crimes under the following *articles of the Criminal Code*:

| | | | |
|---|---|---|---|
| **Art. 191** | Misappropriation, embezzlement or conversion or property by malversation | **Art. 366-1** | Declaration of false information |
| **Art. 206-2** | Illegal acquisition of the property of an enterprise, institution, organization | **Art. 368** | Acceptance of an offer, promise or receipt of an improper benefit by an official |
| **Art. 209** | Legalization (laundering) of criminally obtained funds | **Art. 368-2** | Illegal enrichment |
| **Art. 210** | Misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budgetary purposes or exceeding such allocations | **Art. 369** | Offer, promise or provision of undue advantage to an official |
| **Art. 211** | Adopting legislation reducing budget revenues or increasing budget expenses contrary to the law | **Art. 369-2** | Malversation |
| **Art. 354** in respect to employees of legal entities under public law | Bribery of an employee of an enterprise, institution or organization | **Art. 410** | Abduction, appropriation, extortion by a military serviceman of weapons, military supplies, explosives or other military substances, means of transportation, military and special equipment or other military property, as well as their seizure by fraud or abuse by office |
| **Ст. 364** | Abuse of authority or office | | |

At least one of three conditions must be evident:

[9] Order of the Prosecutor General of Ukraine № 149 as of April 12th, 2016

## Conditions of investigation of criminal proceedings that fall under the control of the SAPO

Individuals falling under the NABU jurisdiction

**Art. 219(5)(1) of the CPC of Ukraine**

The object of the crime, or harm caused > 500 subsistence allowances

**> 850 thousand hryvnia**

Crimes under Article 369-2(1) of the CPC of Ukraine committed against an official, defined in Article 18(4) of the CPC of Ukraine or in p.1 of this section

Consider the main categories of individuals that fall under the jurisdiction of the NABU:

## Individuals that fall under the jurisdiction of the NABU

**High-level elected officials**

The President of Ukraine, whose powers have been terminated, the People's Deputy of Ukraine, the Deputy of the Verkhovna Rada of the Autonomous Republic of Crimea, the Deputy of the regional Council, the city Council of Kyiv and Sevastopol, the local government official holding a position of the first or second category

**Senior managment of executive authorities**

The Prime Minister of Ukraine, member of the Cabinet of Ministers of Ukraine, the first Deputy and Deputy Minister, the Chairman of the State Committee for Television and Radio-broadcasting of Ukraine, the Anti-Monopoly Committee of Ukraine, the Chairman of the State Property Fund of Ukraine, his/her first Deputy and Deputy

**Management and members of high-level state bodies**

Chairman of the National Bank of Ukraine, first Deputy and Deputy, member of the Central Election Committee, member of the NBU Council, the Secretary of the National Security and Defense Council of Ukraine, his/her first Deputy and Deputy, member of the National Council of TV and Radio Broadcasting of Ukraine, National Commission carrying out state regulation in the sphere of financial services markets, the National Commission on securities and stock market, Permanent representative of the President of Ukraine in Crimea, his/her first Deputy and Deputy

**Higher management of the prosecutor's offcie and law enforcement authorities**

prosecutors of the prosecution bodies, referred to in pp. 1-4, 5-11 of Article 15(1) of the Law of Ukraine On the Public Prosecutor's Office, a person of the highest command of the state criminal-executive service, civil defense bodies and units, high level officials of the National Police, a customs officer holding a special rank of a 3rd rank (or higher) state tax and customs adviser, State Tax Service official holding a special rank of a 3rd rank (or higher) state tax and customs adviser, senior military personnel of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the State Special Transport Service, the National Guard of Ukraine and other military formations created in accordance with the laws of Ukraine

**Judges and senior positions of the judiciary**

judge, judge of the Constitutional Court of Ukraine, juror (when exercising his/her duties in court), Chairman, Vice-Chairman, member, inspector of the High Council of Justice, Chairman, Vice-Chairman, member, inspector of the High Qualification Commission of Judges of Ukraine

**The highest positions in the public service**

public servant in category "A" position

**Heads of large public enterprises**

heads of large business entities with at least 50 percent share of a state or municipal property in the authorized capital

**Patronage service of the highest officials of the state**

Advisor or assistant to the President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine, the Prime Minister of Ukraine

As you can see, first, NABU and SAPO are investigating the most socially dangerous service crimes committed by high-level officials.

## Transfer of PGO investigations to the SAPO

Several changes in the legislation on jurisdiction gave rise to problems related to the large number of proceedings investigated by the PGO that had to be transferred to the SAPO and the NABU for completion. In fact, according to the Transitional provisions of the previous version of the CPC, these cases should have been transferred to the SAPO starting from 30 November 2017. However, even the sheer number of these cases could have physically blocked the operations of the SAPO and the NABU. Yet, the disaster was avoided with the amendments to the CPC that entered into force on 15 December 2017. These changes provided for the completion of investigations conducted by the PGO until the NABU was established. As a result, the previous legislative provisions were effective only between 30 November and 15 December 2017. During these two weeks, a number of investigations falling under this category were sent to the SAPO. Some of them were completed by the NABU under the guidance of the SAPO prosecutors, while others were returned to the relevant units of the PGO.

## Possibilities for expanding the boundaries of investigative jurisdiction

Even in the absence of the abovementioned conditions of jurisdiction, the prosecutor of the SAPO can assign the jurisdiction to the NABU. Prerequisites for such procedural decision are: 1) commission of a crime listed under Article 216(5)(1) of the Criminal Procedure Code; 2) the crime caused or could have caused serious consequences to legitimate freedoms and interests of a natural or legal person, as well as the state or public interests.

**Prosecutor:**

*«...There were cases when we determined the jurisdiction ...There were criminal proceedings that were investigated by the SSU investigators for more than a year, and the NABU detectives have been completing the investigation.»*

It is foreseen that the NABU detectives also can investigate crimes falling under the investigative jurisdiction of other bodies with the purpose of prevention, detection, termination and disclosure of crimes referred to its jurisdiction according to this Article, based on the decision of the Director of the NABU, and in agreement with the SAPO Prosecutor[10].

In addition, there is a common possibility for all procedural supervisors to change the jurisdiction independently. Thus, according to Article 216(10) of the CPC, in case of discovering other crimes committed by a person under investigation, or if another person commits crimes connected to the crimes of the person under investigation, which are not under jurisdiction of the pre-trial investigation body conducting criminal investigation, the prosecutor supervising the pre-trial investigation shall determine jurisdiction over these crimes by his/her order if it is not possible to initiate separate proceedings pursuant to these case files[11].

According to the SAPO prosecutors interviewed in a focus group, such cases occur from time to time.

**Prosecutor:**

*«If there is theft under the article 191, which is our jurisdiction, but with the use of fictitious firms [Art. 205 of the criminal code – ed.]. According to art. 205, it is not our jurisdiction, but*

[10] Article 216(5) of the CPC.
[11] P.10 Art.216 CPC.

*we determine this case to be a responsibility of a detective, as long as it is a crime related to theft, because funds were withdrawn through the company. Private entrepreneurs who have committed a crime based on the Art.205, they are a small chain in that big round. But in order to prove the guilt of a main defendant, we will need to use their testimony».*

## Competition over jurisdiction with other investigative units

Despite the possibility of change of jurisdiction by the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies according to Article 36(5) of the CPC, the CPC expressly prohibits transferring pre-trial investigation under the NABU jurisdiction another pre-trial investigation body. Disputes over jurisdiction in criminal proceedings, which may fall under the jurisdiction of the NABU, are decided by the Prosecutor General or his/her Deputy[12].

During focus groups, the SAPO prosecutors drew attention to cases of return of indictments and other problems encountered during the trial phase in cases where other bodies investigated proceedings within the competence of the NABU and the SAPO and procedural guidance was provided by other Prosecutor's offices.

**Prosecutor:**

*«... We see that the court can recognize evidence in such proceedings as inadequately collected. There are instances when the Prosecutor's office completed proceedings, where the subject was the NABU, sent indictment to the court, and the court returned, and wrote that this is not the body responsible for the investigation. These are rare cases. But I know that in the territorial bodies of the prosecutor's office it is not unusual».*

In order to avoid such cases, joint groups consisting of representatives of various law enforcement agencies, detectives, investigators and prosecutors, have been created.

**Prosecutor:**

*«The NABU has jurisdiction in these proceedings but the group of detectives includes either an investigator from the region, or a prosecutor from the region is included in the group of prosecutors. However, in general, it is assumed that the proceedings were conducted by the NABU detectives».*

The general rule is that pre-trial investigation of crimes under Article 209 of the Criminal Code is carried out by the investigator of the body that initiated the pre-trial investigation or holds jurisdiction over the socially dangerous illegal act, which preceded the legalization (laundering) of the income gained in a criminal way. However, this rule does not apply in cases when crimes fall under the jurisdiction of the NABU[13].

This indicates that the legislation provides for a clear jurisdiction in criminal proceedings of the NABU and the SAPO accordingly. At the same time, despite the prohibition provided by the CPC to entrust pre-trial investigation under the NABU jurisdiction to another pre-trial investigation body, such cases exist in practice and result in the return of indictments on the grounds of violation of investigative jurisdiction.

[12] P. 5. Art. 218 CPC.
[13] Article 216(9) of the CPC.

## 1.2

# Institutional and legal grounds of the SAPO's work

An important condition for the proper functioning of the SAPO is its institutional independence. This body should be as autonomous as possible from the general system of prosecutor's offices and other state bodies with the maximum restriction of the possibility of external influence on the entire entity or individual employees by the PGO officials or any other state institutions. In fact, a number of tools, ranging from institutional structure, functional direction and staffing mechanism to finance and logistics, should safeguard institutional independence of the SAPO.

Thus, in particular, a specific safeguard against influence on high-level officials of the SAPO is provided by article $8^1(6)$ of the Law of Ukraine *On the Public Prosecutor's Office* from 2015, whereby 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.

According to provisions of Art. 8-1(3) of the Law of Ukraine *On the Public Prosecutor's Office* from 2015, the SAPO should be located in the office premises of the NABU or the PGO (regional or local prosecutor's office) that are separate from other office premises of the PGO (regional or local prosecutor's office). Currently, these premises are separate from other divisions of the prosecutor's office and from the NABU, which physically separates prosecutors of the SAPO from the PGO and objectively reduces the possibility of influence on its structure as a whole.

However, the SAPO is not entirely independent from the PGO's structure in organizational terms, because the structural units of the latter assist the SAPO in terms of personnel, logistics, analytical and legal support, coordination of international legal activities, protection of state secrets, public and media relations etc.

Although the SAPO's funding is separate from the funding of the PGO and is provided for by the law on the state budget, certain pressure or obstruction of the SAPO activities remains possible, for example, delays in payments under certain lines of expenditure, delayed logistics, etc.

There are also some questions about the possible information leaks during registration and mailing of incoming and outgoing SAPO correspondence, because all documents pass through the office of the PGO.

A certain organizational dependence of the SAPO from the PGO is also evident in terms of international legal assistance. In particular, requests for international legal assistance in the SAPO cases also have to be sent through the PGO Department of international legal cooperation. It also creates an additional threat of possible leaks of extremely important information on cases. We will cover other important tools for ensuring institutional independence of this body in the description of certain aspects of the organizational and legal grounds of the SAPO's activities herein.

### 1.2.1 The structure of the SAPO

We will refer to the official structure of the SAPO established by the PGO order of 22 September. In accordance with the requirements of Article 7(1) of the Law of Ukraine On the Public Prosecutor's Office, the structure is approved by the Director of the NABU.

The SAPO structure includes the Department of procedural guidance, support for state prosecution and representation in court, and two units: analysis and statistics, and documentary support.

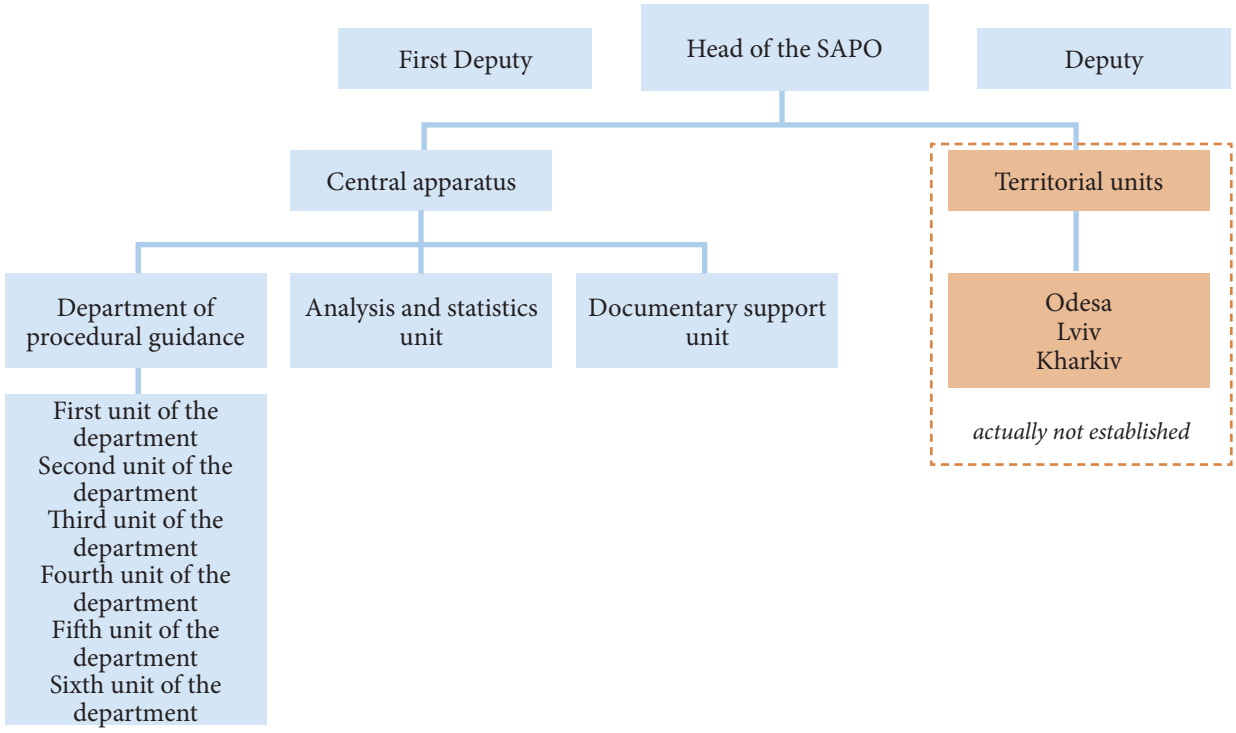
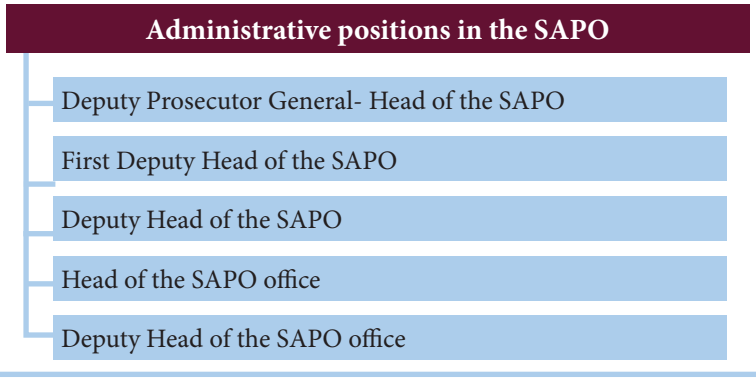



**Fig. 1.1** **Official structure of the SAPO[13]**

The general structure of the SAPO should include the central apparatus, as well as territorial units in the same cities where territorial departments of the NABU are located[15].

The work of employees of the SAPO offices is organized according to the subject-matter principle and distribution of functional powers, carried out by the heads of departments and approved by the head of the SAPO.

In general, a number of administrative positions are provided in order to ensure effective work of the SAPO[16].




[14] Regulation on the Specialized Anti-Corruption Prosecutor's Office of the Prosecutor General approved by the order of the PGO no. 149, 12 April 2016

[15] Art. 8-1(4) of the Law of Ukraine «On the Public Prosecutor's Office " 2015

[16] Art. 39 (3) of the Law of Ukraine «On the Public Prosecutor's Office " 2015

The law provides that the Head of the SAPO reports directly to the Prosecutor General. For the heads of departments, units and their deputies, and prosecutors of the SAPO the head of the SAPO, his first deputy and deputy are higher-level prosecutors, and the Head of the SAPO is the higher level prosecutor for the deputy and the first deputy[17].

Deputy of the Prosecutor General, the **head of the SAPO**[18], has both external-representative and general institutional powers regarding personnel, analytical and statistical, as well as other support of the SAPO activities, as well as certain procedural powers. In particular, s/he assigns a prosecutor (or a group of prosecutors and one prosecutor to lead this group) after the launch of pre-trial investigation.

Based on the assignment of the Head of the SAPO, his/her first Deputy and Deputy, these SAPO departments can carry out procedural guidance and public prosecution in other criminal proceedings investigated by the NABU detectives, as well as representation of interests of citizens or the state in a court, which occurs before the beginning of the activities of all divisions (units) of the detectives of the Main Division of the NABU detectives.

**Analysis and statistics unit** performs a number of tasks, logically derived from its name, as well as looks into the issues of timeliness, completeness and reliability of entering data into the Unified register of pre-trial investigations, and ensures compilation of consolidated reporting based on the results of work of prosecutors and pre-trial investigation bodies, etc.

**The documentary support unit** deals with the issues of document circulation (including documents with the restricted access marked «For official use»).

Structural units also perform other functions arising from their tasks and instructions of the SAPO management.

The SAPO regulation states the following:

- the Deputy of the Prosecutor General – the head of the SAPO is responsible for the proper organization of work to accomplish the tasks assigned to the SAPO;
- the first Deputy and the Deputy Head of the SAPO, the heads of department sand units are responsible for a proper exercise of official duties by subordinated employees;
- prosecutors of units and senior experts are responsible for the proper execution of functional responsibilities, timely and adequate execution of orders issued by the management of the SAPO, the department and units.

Analysis of the **practical arrangement of the SAPO organizational structure** showed certain inconsistencies with the regulatory provisions:

- First, territorial units prescribed by the SAPO Regulation have not been established. In practice, procedural guidance in proceedings carried out by the NABU in the regions can be entrusted to the procedural supervisor of any of the divisions of the department of procedural guidance state prosecution and representation in court;
- Second, the structure of the SAPO, prescribed by the relevant order and approved by the Director of NABU, remained uncoordinated as a result of later amendments to the structure of the NABU. In particular, according to the legal framework regulating the SAPO, the first-sixth units of the department of procedural guidance, public prosecution and representation in court provide procedural guidance and state prosecution in criminal proceedings investigated by detectives of the first-sixth divisions (units) of detectives of the

[17] P. 5. Art. 8-1 of the Law of Ukraine «On the Public Prosecutor's Office» 2015.
[18] P. 8. Art. 8-1 of the Law of Ukraine «On the Public Prosecutor's Office» 2015.

Main Division of detectives of the NABU[19]. However, in practice, the idea of subordination of each unit of the NABU detectives to a specific unit of the SAPO is not implemented. The structure of the NABU is built in a slightly different way than previously planned. It has four main units, one of which has regional offices in Odesa, Kharkiv and Lviv regions. In reality, a case of a detective of any unit can be assigned to any procedural supervisor of any unit of the procedural guidance department of the SAPO if the latter has less workload at a particular moment.

For more detailed analysis of structural coherence between the SAPO and the NABU, please see Section 1.3.

### 1.2.2 Selection, appointment and a dismissal procedure

According to the data published at the beginning of the study, the Specialized Anti-Corruption Prosecutor's Office during that period had 45 employees, including 38 prosecutors, 36 of whom carried out procedural guidance[20]. Also this study of professional training needs of the SAPO employees notes that the average age of the SAPO Prosecutor was 33 years, and working experience – over 8 years of prosecutorial work. Almost no SAPO prosecutors, with one exception, had interrupted the prosecutor's service record before the appointment[21].

According to the legislation, an individual with a higher legal education, with at least five years of legal experience and proficiency in the state language may be appointed as the SAPO prosecutor[22]. These requirements are similar to those for the prosecutors of the Prosecutor General's Office, while for prosecutors of the regional and local prosecutor's offices, the experience requirements are lower (3 and 2 years, respectively).

At the same time, there are **specific selection criteria** for the SAPO employees. So, in particular, persons who within five years prior to the date of the entry into force of this Law worked (served), irrespective of duration, in specially authorized anti-corruption divisions of the prosecutor's office, the Ministry of Internal Affairs, tax militia, Security Service, the Law Enforcement Military Service in the Armed Forces and customs authorities, cannot be accepted to the SAPO[23].

In addition, unlike the general rules on the appointment to administrative positions in the PGO, the law provides for a five-year cap on the duration of appointment of the prosecutor to an administrative position at the SAPO[24]. Similar restrictions on administrative positions are provided only for the heads of regional and local prosecutor's offices.

While Article 3 of the 2015 Law *On the Public Prosecutor's Office* added transparency to the list of basic principles of prosecutor's office activities, which inter alia includes an open and competitive selection of prosecutors, there is still legal uncertainty regarding the selection procedure for prosecutors of the PGO and the regional prosecutor's offices (the procedure was not specified in the Law).

The procedure for selection of the SAPO prosecutors is outlined in Article 8-1 Of the 2015 Law of Ukraine *On the Public Prosecutor's Office* and described in detail in the Procedure for an open competition for the selection

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19 Regulation on the Specialized Anti-Corruption Prosecutor's Office of the Prosecutor General, approved by PGO order no. 149. 12 April 2016.

20 Professional training needs of the Specialized Anti-Corruption Prosecutor's office [Expert opinion]/ A.Halay, S.Derkach – Kyiv: European Union Anti-Corruption Initiative in Ukraine, 2017. – 64 p, p.18.

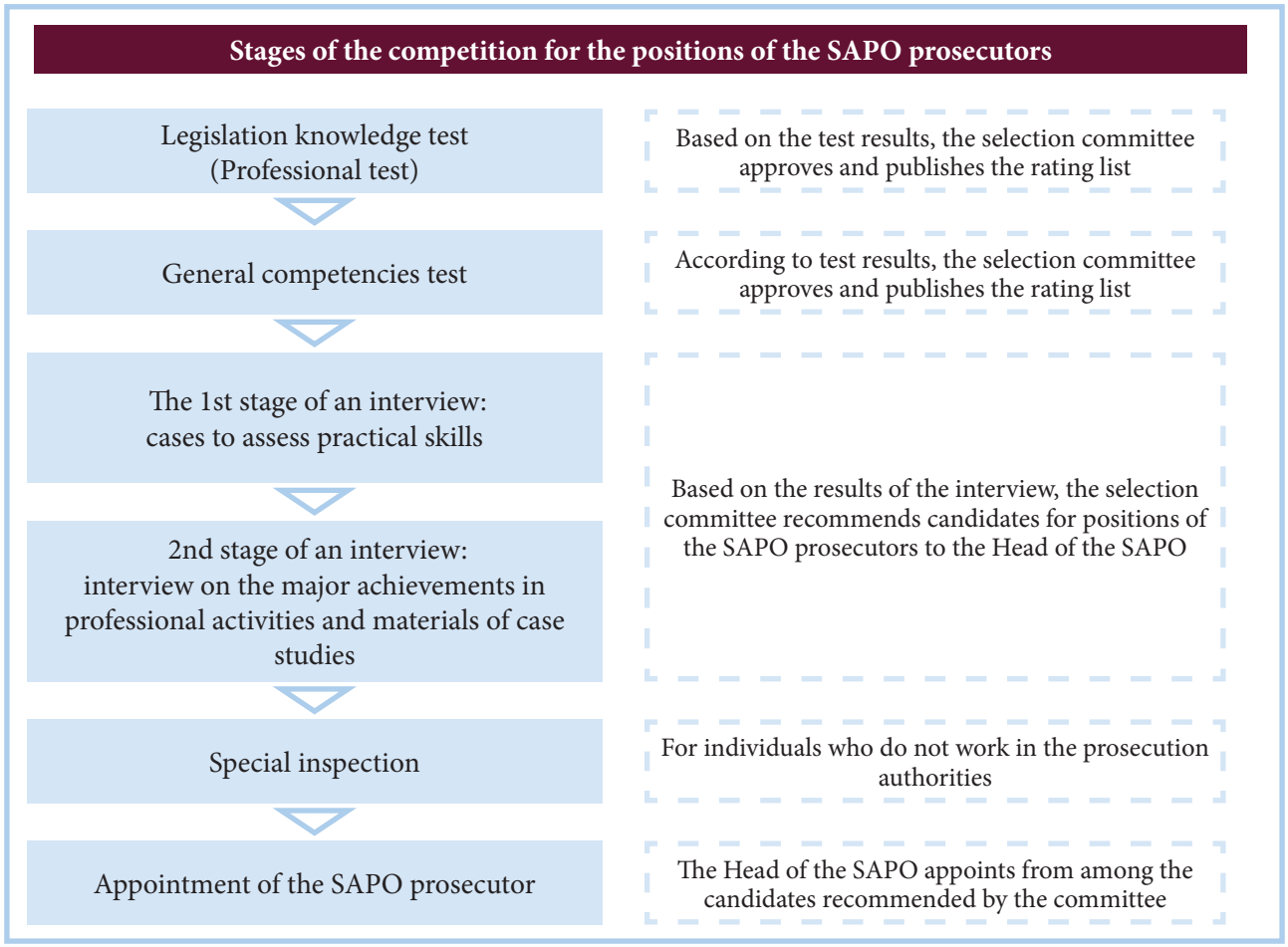
21 Professional training needs of the Specialized Anti-Corruption Prosecutor's office [Expert opinion]/ A.Halay, S.Derkach – Kyiv: European Union Anti-Corruption Initiative in Ukraine, 2017. – 64 p, p.19.

22 Article 27 (5) of the Law of Ukraine «On the Public Prosecutor's Office», 2015.

23 Paragraph 3-1 of the transitional provisions of the Law of Ukraine «On the Public Prosecutor's Office».

24 Article 39(4) of the Law of Ukraine «On the Public Prosecutor's Office", 2015

of candidates for the positions of the SAPO prosecutors (approved by the Deputy Prosecutor General – Head of the SAPO on 11 August 2016). According to the procedure, competition for the positions of the SAPO prosecutors consists of tests on legislation (professional test), general competencies test and an interview. According to the results of the competition, after a special inspection, the Deputy Prosecutor General – Head of the SAPO appoints prosecutors of this prosecutor's office from among the candidates recommended by the selection committee.




This procedure for a competition for the positions of prosecutors at the SAPO can be compared only to similar procedures for the appointment of prosecutors of local prosecutor's offices, since the procedure for selection of candidates and their appointment to positions at regional prosecutor's offices and the PGO is not defined by law.

There are two key distinguishing factors in the procedure for the appointment of SAPO prosecutors in comparison to the appointment of prosecutors of the local prosecutor's offices:

1) candidates are not required to undergo special training at the National Academy of the Prosecutor's Office of Ukraine;

2) candidates are required to undergo an interview about the main achievements in professional activity and the process of solving case studies (practical written tasks) for the purpose of clarification of practical skills.

In addition, tests on legal knowledge for the SAPO prosecutors differ from the tests used to recruit prosecutors in local prosecutor's offices in terms of thematic focus and complex structure.

The competition for common positions of the SAPO prosecutors was first held in late 2015 – early 2016, the second competition took place in 2016, the third one – in 2017. It was held at the National Academy of the Prosecutor's Office of Ukraine.

**Competition for common positions of the SAPO prosecutor**

| | 2015 | 2016 | 2017 |
|---|---|---|---|
| Submitted documents | 349 individuals | 391 individuals | 383 individuals |
| Successfully reached the 80-point threshold and advanced to the next stage based on the results of legislative test | 149 individuals | 174 individuals | 133 individuals |
| Invited for an interview based on the results of general skills test | 75 individuals | 86 individuals | 63 individuals |
| Recommended for appointment to the position of a SAPO prosecutor based on interview results | 12 individuals | 15 individuals | 49 individuals |

The competitive selection for positions of common staff members was preceded by procedures for the appointment to administrative positions in the SAPO.

According to Article $8^1$ of the 2015 Law of Ukraine On the Public Prosecutor's Office, appointments to administrative positions in the SAPO are carried out based on the results of an open competition.

Deputy Prosecutor General – Head of the SAPO, First Deputy Head of the SAPO and the Deputy Head of the SAPO are appointed by the Prosecutor General, and the head of the SAPO unit and the deputy head of unit are appointed by the Head of the SAPO. Persons who meet the general requirements for candidates for the position of a prosecutor in the Article 27 of the 2015 Law of Ukraine On the Public Prosecutor's Office can take part in the competition.

The law provides that the organization and conduct of the competition be carried out by the selection committee consisting of: 1) four persons appointed by the Council of Prosecutors of Ukraine; 2) seven persons appointed by the Parliament of Ukraine.

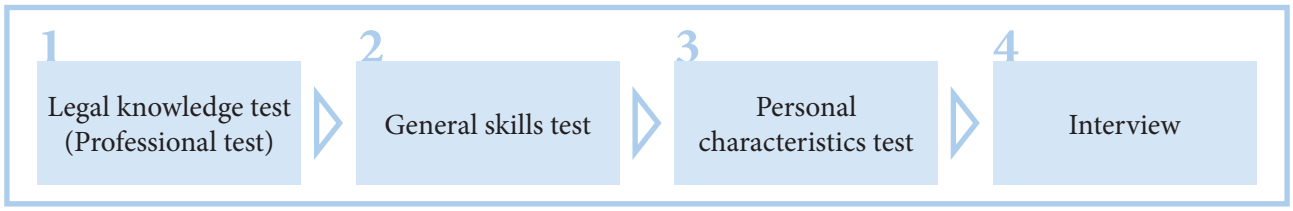
However, at the time of the first competition, Transitional provisions were in force instead of the said provisions. According to paragraph 5-1, appointments to administrative positions in the SAPO were carried out by the Prosecutor General based on the results of an open competition in the manner prescribed by Article 8-1 of this Law, conducted by the selection committee, which included: a) four persons appointed by the Prosecutor General (not by the Council of Prosecutors of Ukraine); b) seven persons appointed by the Parliament of Ukraine.

The first competition for the selection of candidates for administrative positions in the SAPO was launched on 7 October 2015.

The following positions were announced to be filled:

- Deputy Prosecutor General – Head of the SAPO;
- First Deputy Head of the SAPO;
- Deputy Head of the SAPO;
- Head of the Department of procedural guidance, public prosecution and representation in court;
- Heads of units in the Department of procedural guidance, public prosecution and representation in court (6 vacant positions);
- Head of the Unit of Analysis and Statistics;
- Head of the Documentary Support Unit.

Selection for administrative positions in the SAPO consisted of four stages[25]:




282 candidates[26], were admitted in the competition, including 232 who at that time were or earlier had been employees of the prosecutor's office[27]. These people met the requirements specified in part 1 (on citizenship of Ukraine, higher legal education and knowledge of the state language) and part 3 of Article 27 of the Law of Ukraine *On the Public Prosecutor's Office*.

Persons who, according to part 31 of section XIII of the Law of Ukraine On the Public Prosecutor's Office who within five years prior to the date of the entry into force of the Law On the Public Prosecutor's Office no. 1697 (14 October 2014) worked (served), irrespective of duration, in specially authorized anti-corruption divisions of the prosecutor's office, the Ministry of Internal Affairs, tax militia, Security Service, the Law Enforcement Military Service in the Armed Forces and customs authorities, cannot be accepted to the SAPO were not allowed to participate in the competition. Furthermore, persons were not allowed to participate if there was information about the existence of certain restrictions on their appointment to positions of prosecutors pursuant to Article 27(5) of the Law of Ukraine On the Public Prosecutor's Office, as well as laws of Ukraine On Purification of Government and On prevention of corruption.

After the tests, 128 candidates were selected for an interview, including 24 applicants the position of the anti-corruption prosecutor[28]. On 27 November, the committee selected seven candidates for the highest position[29]. On the same day, the committee determined by vote the two contestants recommended to the Prosecutor General. The media noted that the work of the committee took place in the atmosphere of

[25] The website of the Prosecutor General of Ukraine // Available at: https://archive.is/ky3CL.

[26] The website of the Prosecutor General of Ukraine // Available at: https://archive.is/AQEqx.

[27] Do konkursu v antykoruptsiinu prokuraturu dopustyly 280 kandydativ [280 candidates admitted to the competition at the anti-corruption prosecutor's office]. Ukrainska pravda, 29 October 2015. Available at: http://www.pravda.com.ua/news/2015/10/29/7086857/.

[28] Antykoruptsiinym prokurorom khochut staty 24 liudyny [24 people want to become the anti-corruption prosecutor] // Ukrainska pravda. – November 12th – 2015 // Available at: http://www.pravda.com.ua/news/2015/11/12/7088481/.

[29] Zalyshylosia sim pretendentiv na posadu antykoruptsiinoho prokurora: Biohrafiia ta maino kandydativ [There are seven candidates for the post of the anti-corruption Prosecutor: Biography and property of candidates] / / Tyzhden.ua. – 27 Nov. – 2015. // Available at: http://tyzhden.ua/News/152592.

pressure and scandals[30]. After the interview on 30 November 2015, the Prosecutor General appointed the head of the SAPO[31]. According to the results of the competition, after interviews in December 2015, all vacant administrative positions in the SAPO were filled.

## Dismissal of the SAPO employees

Dismissal of the SAPO prosecutors takes place in accordance with the general regulations under Article 51 of the Law of Ukraine «On the Public Prosecutor's Office». Namely, the SAPO prosecutor can be dismissed under the following circumstances.

According to this Article, the Prosecutor shall be dismissed from office or administrative position in the case of:

1) inability to exercise powers due to health reasons;
2) violation of the requirements of incompatibility under Article 18 of this Law;
3) entry into force of a court decision on holding the Prosecutor administratively liable for a corruption offence related to restrictions under the Law of Ukraine On the principles of preventing and combating corruption;
4) impossibility of transfer to another position or lack of agreement in connection with direct subordination to a relative;
5) entry into legal force of a conviction;
6) termination of citizenship of Ukraine or acquisition of citizenship of another state;
7) submission of voluntary resignation;
8) impossibility of further stay at a temporarily vacant position;
9) liquidation or reorganization of the prosecutor's office, in which the Prosecutor holds the position, or in the case the number of prosecutors of the Prosecutor's office is reduced.

The Head of the SAPO make decisions on dismissing the SAPO prosecutor[32].

At the same time, the SAPO prosecutor can also be dismissed pursuant to sanctions imposed for a disciplinary violation[33]. The grounds for imposing disciplinary action against a prosecutor within disciplinary proceedings include:

1. failure to perform or improper performance of official duties
2. unreasonable delay in consideration of an application
3. disclosure of secrets protected by law, which became known to the prosecutor while exercising his/her powers
4. violation of the legal procedures for submission of the declaration of assets, income, expenses and financial liabilities
5. actions, which discredit the public prosecutor and may raise doubts on his/her objectivity, impartiality and independence and on integrity and incorruptibility of public prosecutor's offices

[30] Komisiia vybrala Shokinu dvokh kandydativ na antykoruptsiinoho prokurora [The Commission chose two candidates for Shokin for the position of the anti-corruption Prosecutor] / / Ukrainska Pravda. – 27 Nov. – 2015. // Available at: http://www.pravda.com.ua/news/2015/11/12/7088481/.

[31] Viktor Shokin pryznachyv kerivnyka SAP [Victor Shokin appointed the head of the SAPO] / Department of public and media relations of the PGO, 30.11.2015 / / Available at: http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=166100.

[32] Article 51(2)(1-1) of the Law of Ukraine «On the Public Prosecutor's Office» 2015.

[33] Article 49(1), the Law of Ukraine "On the Public Prosecutor's Office"

6. systematic (two or more times within one year) or one-off gross violation of prosecutorial ethics
7. violation of internal service regulations
8. an intervention or any other influence of a public prosecutor in cases or the manner other than established by the law related to the work of another prosecutor, staff members, officials or judges, including through public statements about their decisions, actions or inaction in the absence of signs of an administrative or criminal offense
9. public statement violating the presumption of innocence[34].

As a result of disciplinary proceedings, the Qualifications and Disciplinary Commission of Public Prosecutors may decide that the public prosecutor (except for the Prosecutor General of Ukraine) can no longer hold the office if:

1) the disciplinary offense committed by the prosecutor has the nature of a gross violation;
2) the public prosecutor committed a disciplinary offense acting in the capacity of a public prosecutor while having a record of disciplinary liability[35].

At the same time, the legislation provides additional safeguards for the SAPO prosecutors in administrative positions. For instance, unlike their colleagues in administrative positions in other prosecutor's offices, the SAPO prosecutors cannot be dismissed for a disciplinary violation. Dismissal of the SAPO prosecutors in administrative positions is possible only on the grounds listed in Article 51(1) of the Law of Ukraine "On the Public Prosecutor's Office"[36], listed above.

As an example, we can look at the decision of the Qualifications and Disciplinary Commission of Public Prosecutors of 22 June 2018, which established grounds for disciplinary sanctions against the SAPO Head Nazar Holodnytskyi under parts 1, 3, 5, 6 and 8 of Article 43(1) of this Law.

However, the Commission concluded that it was not possible to dismiss the Head of the SAPO since the general grounds for dismissal of the prosecutor from office under Article 51(1) of the Law of Ukraine *On the Public Prosecutor's Office* did not include any of the grounds under which he was found liable (paragraphs 1, 3, 5, 6 and 8 of Article 43(1)). The Commission, therefore, decided to impose a disciplinary sanction of reprimand on the Head of the SAPO[37].

Considering the fact that a dismissal from administrative positions at the SAPO takes place only pursuant to Article 51(1) of the 2015 Law of Ukraine On the Public Prosecutor's Office, grounds provided in paragraphs 2-3 of Article 41(1) of this Law whereby prosecutors can be dismissed from administrative positions in connection with a transfer to another prosecutor's office or inadequate performance of duties by the prosecutor in an administrative position, the mentioned provisions do not extend to the prosecutors holding administrative positions in the SAPO.

In addition to the general provisions that apply to all prosecutors, paragraph 6 of Article 8-1 of the 2015 Law of Ukraine On the Public Prosecutor's Office provides that the Head of the SAPO, his/her first Deputy and Deputy within the period for which they were appointed cannot be transferred to another unit of the PGO or regional or local prosecutor's office without their consent. It is yet another safeguard for the institutional independence of the SAPO.

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34 Article 43, the Law of Ukraine "On the Public Prosecutor's Office"

35 Article 49, the Law of Ukraine "On the Public Prosecutor's Office"

36 Article 41(1), the Law of Ukraine "On the Public Prosecutor's Office"

37 Conclusion of the Qualification and Disciplinary Commission of Prosecutors «On the finding of a disciplinary offense in the actions of Nazar Kholodnytsky, Deputy Prosecutor General – Head of the Specialized Anti-Corruption Prosecutor's Office of the Prosecutor General's Office of Ukraine» dated June 22, 2018.

Other issues of promotion and dismissal of the SAPO prosecutors are not defined separately in the regulations. They are regulated by the general provisions of the Law of Ukraine On the Public Prosecutor's Office and are thoroughly described in the study published in 2017 on the role of the prosecutor at the pre-trial stage of criminal proceedings[38].

In in its report in 2017, GRECO highlighted the lack of legal provisions for appealing decisions regarding prosecutors' career advancement. GRECO recommends introducing detailed regulations on promotion/ career advancement of prosecutors to ensure uniform, transparent procedures based on clear and objective criteria, including previous achievements of the candidate, and to ensure that any decisions regarding career advancement are justified and can be appealed[39]. These issues are relevant for the entire system of the Prosecutor's office and, in particular, for the SAPO.

The mentioned above shows that the procedure for selection, appointment and dismissal of the SAPO prosecutors has a number of features that are clearly defined by law. For instance, a specific characteristic of selection and appointment of SAPO prosecutors is the absence of requirement to undergo special training at the National Academy of the Prosecutor's Office. However, an interview is mandatory while it is not used in the process of selection and appointment of prosecutors of local Prosecutor's offices. The law provides for a special procedure for dismissal and transfer to another unit of the PGO or to regional/local prosecutor's offices of persons holding administrative positions in the SAPO, which is an additional safeguard for the institutional independence of the SAPO.

### 1.2.3 Training

Training of the SAPO prosecutors is carried out on the grounds common for all prosecutors. At the same time, as already noted, candidates for the SAPO prosecutor position do not undergo mandatory special training at the National Academy of the Prosecutor's Office before appointment.

The authority to organize educational activities and activities to improve the operational and professional skills of the SAPO employees is assigned to the First Deputy Head of the SAPO. Decisions regarding professional development are also within the competence of the heads of SAPO departments. In practice, unlike prosecutors at all other levels, the SAPO prosecutors do not currently undergo training at the National Academy of Prosecutor's Office. The SAPO leadership and different stakeholders (IDLO, OCID, EUAM, IRZ, EUACI) organize measures to improve operational and professional skills of the SAPO employees with the view to significant (minimum 5 years) experience of the SAPO prosecutors.

Procedural supervisors regularly participate in specialized practical trainings conducted by international and domestic experts (mainly practitioners). They work on issues related to procedural guidance in investigations of various types of crime. There are also frequent study visits abroad (Latvia, USA, Hungary, Czech Republic, Netherlands and other countries) where the SAPO prosecutors learn about best practice of foreign entities similar to the SAPO.

A special study conducted with the support of European Union Anti-Corruption Initiative in Ukraine[40] assessed the current training needs of the SAPO prosecutors. Study authors concluded that the modern SAPO

[38] Belousov et. al. "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p.

[39] Prevention of corruption among people's deputies, judges and prosecutors. Report on the evaluation of Ukraine, 23 June. Adopted at the 76th plenary meeting of GRECO (Strasbourg, 19-23 June 2017) // Available at: ftp://91.142.175.4/2017/%D0%BC%D1%96%D0%B6%D0%BD%D0%B0%D1%80%D0%BE%D0%B4%D0%BD%D1%96%20%D0%BF%D1%80%D0%BE%D0%B3%D1%80%D0%B0%D0%BC%D0%B8/GrecoEval4Rep(2016)9-P3-en-Ukraine_ukr.pdf.3

[40] Professional training needs of the Specialized Anti-Corruption Prosecutor's office [Expert opinion]/ A.Halay, S.Derkach – Kyiv: European Union Anti-Corruption Initiative in Ukraine, 2017. – 64 p.

*«requires a targeted set of training activities based on methods of non-formal education for adult professionals»*. They identified a number of topics in which the SAPO prosecutors had training needs, as well as the need to periodically update their values and competencies. They also highlighted a number of topics that should be developed in cooperation with representatives of related institutions or other anti-corruption bodies (NABU, NACP, and the Agency for Asset Search and Management, judges or investigating judges who review anti-corruption criminal proceedings). These topics include: shaping the values among the personnel on combatting corruption crimes; classification of corruption crimes; activities during pre-trial investigation and the use of its materials in the trial; identification and return of corruption assets; the use of international legal instruments, etc.[41]

## 1.3

# Specifics of interaction between the SAPO and the NABU

As we have already noted, the current legislation of Ukraine defines a special scope of activities for the SAPO, which determines the specifics of implementing its functions in close cooperation with the NABU.

In fact, these two state institutions should form a single integrated system to carry out proper investigation of corruption crimes in Ukraine. The effectiveness of this system depends on coordinated action of the SAPO and the NABU as its main structural elements, which in a turn implies the existence of stable links and channels of communication between them, as well as a common vision of the prospects and features of crime investigation.

In this section, we will analyze the individual institutional features of interaction between the SAPO and the NABU, while specific problems arising from interaction between a prosecutor and a detective will be discussed in more detail in Chapters 2 and 3 of this report.

### 1.3.1 The structural coherence of the SAPO and the NABU

The current legislation contains a number of provisions requiring the harmonization of structures and shared location of the SAPO and the NABU. Thus, in particular, the Law of Ukraine *On the Public Prosecutor's Office* stipulates that the SAPO can be located in the premises of the NABU (now the SAPO is located in a separate building – ed.) and its territorial units should be located in the same cities as the territorial offices of the NABU[42]. In addition, the definition of the structure and personnel of the SAPO has to be agreed with the Director of the NABU[43], despite the fact that the head of the SAPO does not have the authority to approve the structure of the NABU[44].

41 Ibid, p. 47.

42 Article 8(3),(4) of the Law of Ukraine «On Public Prosecutor's Office», 2015.

43 Article 7(3) of the Law of Ukraine «On Public Prosecutor's Office», 2015.

44 The possibility to eliminate this provision is inserted in the draft Law «On amendments to Article 7 of the law of Ukraine «On Public Prosecutor's Office» (on ensuring the activities of the Specialized Anti-Corruption Prosecutor's Office), No. 7271, 9 November 2017, which was actively supported by the head of the SAPO.

In turn, the Regulation on the SAPO prescribes the structural harmonization of this institution with the NABU: according to this regulation, the first-sixth departments of the Department of procedural guidance, public prosecution and representation in court of the SAPO provide procedural guidance and public prosecution in criminal proceeding investigated by detectives of the first – sixth detective division (unit) Main Division of the NABU detectives[45].

During the focus group, NABU detectives noted that at the beginning of the formation of both anti-corruption bodies, certain SAPO departments were meant to be correlated with the relevant departments of the NABU to ensure effective interaction between these institutions during pre-trial investigation.

**Detective:**

*«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...».*

According to some detectives, the structure of the NABU was simpler at the beginning, but it was transformed and turned into a complex multi-level institution, which decreased its effectiveness.

**Detective:**

*«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».*

In the expert analysis of the NABU conducted in 2018 by a group of specialists from Ukraine, the European Union and the United States, the shortcomings of the organizational structure of this body was also highlighted,

*«… a detective working in a unit of one of the four Divisions of the Main Division of Detectives may have up to five supervisors: department head or his deputy, detective division head or his Deputy, Main Division Head, the first Deputy Director of the NABU, and the Director of the NABU. A unit of detectives has an average of 15 detectives. The number of leaders in the structural units of detectives raises questions about the effective organization of work as such leaders usually supervise the work of detectives and perform administrative functions»*[46].

The SAPO prosecutors directly note that the multilevel structure of the NABU creates unnecessary obstacles to investigation since detectives need receive approval of decisions from their superiors.

**Prosecutors:**

*«The best organization of the NABU, in my opinion, was at the very beginning. They employed 70 detectives, one resigned immediately, 69 remained. They were divided into 10 groups. The Head of the group was chosen based on his experience. It was not a "formal" head of the group. They also*

[45] Paragraph 5 of the Regulation on the Specialized Anti-corruption Prosecutor's Office of the Prosecutor General's Office of Ukraine approved by the PGO order no. 149. 12 April 2016.

[46] Expert analysis of the activities of the National Anti-corruption Bureau of Ukraine (March 2018) // Available at: https://nabu.gov.ua/sites/default/files/page_uploads/25.04/nabu_assessment_report_ukr.pdf.

*took into account the result of interviews with potential candidates. They were given a group of detectives to lead. There was no other leadership. A very short way to resolve any issue, domestic, administrative and procedural. It was a very short way for a detective».*

*«What is the current structure? What should the poor detective do? The information flow and management decisions, how does it happen? Title: Detective of the National Bureau of the Second Unit of Detectives of the Second Division of Detectives of the Main Division of Detectives. According to the same title, the structure: deputy head of unit, head of unit, deputy head of division, head of division, deputy head of the Main Division, head of the Main Division, the Deputy Head and the Head of the NABU. Eight executives. This is the way».*

*«Detective provides a memo on his current proceedings. The memo is submitted to the deputy head of unit. The deputy head of unit takes that detective to the head of unit. Then they go to the deputy head of the division. And they might even go to the Head of the NABU, or it might not come to that. They come for hearing to the unit, for example, and deal with a prosecutor or with the Deputy Head of the SAPO. And this whole bureaucratic process takes a lot of effort, a lot of time, and is ineffective».*

*«Despite this bureaucratic monster, detectives investigate, with a huge layer of leadership. HPD (the Main Division of the NABU Detectives) – there are 242 staff. There are almost 40 supervisors who are not involved in investigation. But they do not sit in a vacuum, they take detectives' time, talk to someone all the time. They take forty person-days of work of the NABU per day. Only 160 detectives remain free from communication with the management.*

*The most effective investigation is when the NABU leadership is not aware of these proceedings, they have forgotten about it. We had proceedings in one case, it was almost closed, but there was a detective in it (by the way, without experience), and he began to collect, to gather evidence. And it became clear that this case would go to court with very good evidence. So until recently we have not talked about the fact that this case moved from the closing stage to the active stage. Because there are going to ask for 500 memos, 500 reports!!! We perform best when a procedural supervisor works directly with a detective».*

In addition, prosecutors noted that the presence of a large number of administrative positions actually leads to a decrease in the proportion of operational workers who are directly involved in investigation.

**Prosecutor:**

*«It is all about time. Poor detectives are loaded with this administrative work. They are not only focused on the investigation, they are investigating contrary to this bureaucratic monster, which, unfortunately, was created. HPD (the Main Division of the NABU Detectives) – there are 242 staff. There are almost 40 supervisors who are not involved in investigation».*

At the same time, other NABU detectives, on the contrary, support the existence of such a structure; they do not see the problems in receiving approvals for documents, and claim lower-level mangers (heads of units) have enough authority in making a significant number of procedural decisions.

**Detectives:**

*«In our division, the unit head makes the decision: who will be the group leader and in which direction to move. There is a Head of Department. There are four units. He is in contact with*

*the four heads of units who report to him on the status and he makes key decisions. We are not working like the Specialized Anti-Corruption Prosecutor's Office where the head has to approve each move, and without his knowledge, nothing happens. Indeed, we agree on key points. I believe that such structure is appropriate. In a team of 60 people, there still should be one chief executive».*

*«The unit has an average of 12-15 people. There is the unit head and his deputy. Two people managing 15 people – this is the management team. They are the heads of a pre-trial investigation body with all the powers».*

Therefore, it can be argued that in practice the idea of assigning each unit of the NABU detectives to a specific unit of the SAPO (quite promising in case each divisions is assigned a specialization), has not been implemented. In reality, a case of a detective of any unit can be assigned to any procedural supervisor of any unit of the procedural guidance department of the SAPO if the latter has less workload at a particular moment. This practice, in our opinion, can create obstacles to specialization of prosecutors and establishing cooperation between prosecutors and detectives during pre-trial investigation.

### 1.3.2 SAPO interaction with regional offices of the NABU

As we have already mentioned, the structure of the SAPO in accordance with the approved regulation, in addition to the central office, also includes territorial units. The latter should be established in the same cities as the territorial offices of the NABU. The NABU currently has local offices in three regions of Ukraine – Lviv, Odesa and Kharkiv. Local offices of the SAPO have not been established yet.

Within this study, we tried to analyze the opinion of both prosecutors and detectives on the specifics of their work in the regions, as well as the interaction between themselves in this category of criminal proceedings.

According to the current structure of the NABU, its territorial offices are included as separate units in the fourth division of detectives[47].

**Detective:**

*«Among the four Divisions there is one division [fourth – ed.], which has local offices. These are Odesa, Kharkiv, and Lviv offices. Their jurisdiction extends to the surrounding 4-5 regions. And other divisions – all detectives are deployed in the city of Kyiv».*

During focus groups, the NABU detectives mentioned certain problems faced by their colleagues working in the regions, due to the lack of regional SAPO offices. These problems, first, stem from the difficulties in coordination of procedural documents, the prosecutors examining criminal case files etc.

To solve these problems, in the fourth Division has detectives who are located in the city of Kyiv. The main task of these detectives is to ensure proper interaction with prosecutors and the court in proceedings carried out in the regions.

[47] Available at: https://nabu.gov.ua/sites/default/files/page_uploads/19.04/struktura_nacionalnogo_antykorupciynogo_byuro_ukrayiny.pdf.

**Detective:**

*«In our fourth division there are five detectives who are also located in the city of Kyiv. And we have the main responsibility – connection between them [regional detectives – ed.] and the SAPO».*

*«Specifics of our division is that the vast majority of detectives are in the field. And when information is registered in certain criminal proceedings, they need to include me because I am in the central office and there is a possibility of operational cooperation with the SAPO, since they are not present in the regions, the appellate court».*

*«Those people who bring proceedings [regional detectives-ed.], they can be senior and make the necessary investigative actions. And this interaction with the prosecutor and court is facilitated by detectives and divisions placed in Kyiv».*

At the same time, in case of a need for some methodological assistance or advice, or logistics, regional detectives come to Kyiv.

**Detective:**

*«Sometimes you travel to Kyiv to deal with organizational issues or pre-trial investigation. And at this stage we study all these materials, make necessary copies, etc.*

**Prosecutor:**

*«The NABU leaders are in Kyiv, they arranged the work in such a way that detectives work at the regional level, but if they need some methodological work, advice on something, they come here to the NABU, and the main processes occur in the NABU. Accordingly, we need communication, work meetings where we can get together. Mostly, we discuss everything in the SAPO».*

In addition, according to detectives, their regional colleagues often perform various kinds of investigations or procedural actions in proceedings investigated by detectives of the Central office of the NABU.

**Detectives:**

*«They are also responsible for: searches, information gathering».*

*«Operational work. And they can follow our instructions. For example, if there is a need to interrogate. And they can interrogate, they can obtain temporary access. Some actions that do not require knowledge about the materials of the case».*

Prosecutors expressed similar opinion. At the same time, they pointed out that regional detectives do not actually conduct independent proceedings but work as operational workers who collect materials necessary to indict. After that, they transfer all case files to the Central office of the NABU.

**Prosecutor:**

*«Those detectives who are in the field, their main function is a prompt obtainment of information. They are like operational workers in the field. And even those proceedings where they are the main actors in the investigation, and senior detective is from Kharkiv or Lviv, they transfer their proceeding to the Central office before and after [the notice of suspicion]».*

### 1.3.3 Specifics of regional interaction of the SAPO and the NABU in the context of the establishment of the Anti-Corruption Court

During the focus groups, the SAPO prosecutors expressed the opinion that the issue of creation of regional offices directly depends on establishing the Anti-Corruption Court.

In this context, it is important to clarify that in the period before the establishment of the Anti-Corruption Court, powers of investigating judges in pre-trial investigations of the NABU proceedings are vested solely with the investigating judges of Solomyanskyi District Court in Kyiv (where the NABU is located). At the same time, hearings on merits take place in courts within jurisdiction where the crime was committed[48].

The Criminal Procedure Code contains exceptions to this rule concerning the NABU. In particular, it refers to cases where the offense was committed within the territorial jurisdiction of a court at the location of the relevant territorial administration of the NABU, which carried out pre-trial investigation in the case. In such cases, criminal proceedings are conducted by the court of another territorial unit, the one that is the closest to the court at the location of the relevant regional office of the NABU[49].

Therefore, in practice, the SAPO prosecutors participate in court sessions at the pre-trial stage exclusively in the city of Kyiv, but travel to other regions of Ukraine for court proceedings.

According to prosecutors themselves, this situation is not yet critical for them, although it creates certain logistical difficulties. At the same time, taking into account the gradual increase in the number of criminal cases sent to court, as well as a large volume of criminal proceedings, the burden on prosecutors in this area will be constantly increasing.

**Prosecutors:**

*«Currently, the number of proceedings in court in the regions is not critical. So far, this is an inconvenience, but we go from Kyiv to any region for one or two days to support the prosecution. If a number of cases from a region increases, it will become complicated».*

*«Solomyanskyi court hears cases only at the stage of pre-trial investigation, i.e. regarding the measure of restraint and permission for temporary access or search. Cases are adjudicated on merits at the area of the crime scene. And the crime scene is, for example, in the city of Svatovo. A person leaves on Tuesday afternoon, returns on Thursday afternoon. When we got there, the defender did not show up. The whole trip took two days. It was an inconvenient time, it was impossible to get back from Svatovo, and we had to travel through Kharkiv. State funds were wasted. And when we arrived, the hearing was postponed because the defender got sick or someone else did not appear, and we went back. Three weeks later, the hearing was scheduled again».*

At the same time, prosecutors do not believe that the creation of regional offices of the SAPO will solve the problem. The only solution, in their opinion, is to establish a separate Anti-Corruption Court located in the city of Kyiv. Prosecutors gave arguments in favor of their opinion and pointed out not only towards the independence of the court from external pressure, but also its specialization in the proceedings under the investigation by the NABU, requiring deep knowledge by judges on the specifics of economic crimes.

[48] Article 32(1) of the CPC.
[49] Article 32(3) of the CPC.

**Prosecutor:**

*«About the specifics. A court, for example, in Zaporizhzhia, in which judges were considering the following cases for their whole life: theft, drugs, weapons, bribes on the local level. And here comes the case on the embezzlement of billions of hryvnias at the enterprise, for example, «Zaporizhstal", through fake companies, using offshore companies with international links, etc. These three judges look at this case. What is their first reaction? «Let's just wait, maybe due to the inefficiency this case will be taken to the other court. We do no need this».*

Besides, prosecutors also focused attention on the fact that proceedings of their category must be heard by a panel of judges. However, due to the understaffing of local judges, as well as their workload with the review of criminal offenses of other categories, there are significant delays in anti-corruption cases.

**Prosecutors:**

*«It is often said in the media that the court blocks our cases. In fact, it is my personal belief that a court does not block the case. The judicial system is just so collapsed that our cases are considered by panels in courts. There are three judges who have five years of legal experience. Because of the adoption of the pension reform, all judges with experienced have simply retired. If a person can receive a larger pension, he will retire».*

*«It turns out that there is understaffing in courts, and even if it is fully staffed, there is one three-judge panel. However, in addition to the cases of the NABU, panels also review other cases on general crimes. It includes theft, domestic crimes, crimes related to the attempts against life, etc. In principle, an ordinary citizen is interested in his domestic issues: will a person who robbed his apartment go to jail. And the fact that we have such a situation with the court, it is not the fault of any particular court; it is a systemic problem, which in fact is not solved. And in order to bring up the judge who has necessary experience, you need a long time. This is the reality of our legal system that the court can hear a NABU case once a month, maximum».*

We can therefore conclude that, according to prosecutors, establishment of an Anti-Corruption Court will significantly improve the efficiency of the investigation of anti-corruption crimes in general, due to its specialization in economic crimes, sufficient number of judges and additional safeguards against external pressures. At the same time, according to them, there will be no need to create regional offices of the SAPO, because all proceedings, both pre-trial matters and court proceedings, will be dealt with by a single court located in Kyiv.

### 1.3.4 Mechanisms of cooperation

During joint activities, the SAPO and the NABU came to the need to regulate their cooperation through certain rules enshrined in the Memorandum. This document establishes mutual commitments of the parties within criminal proceedings, which are not reflected in the CPC.

**Detective:**

*«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».*

An example of the regularized cooperation can be seen in the process of agreement between the parties on the notice of a suspicion. The current CPC provides that if the investigator prepares a notice, s/he must receive approval on the text from a prosecutor[50]. However, the Code does not contain any guidance on the form and procedure for approval, deadlines, etc.

These rules, according to detectives, help avoiding certain abuses by a prosecutor in cases where s/he refuses to approve the notice of suspicion without providing any arguments.

**Detectives:**

*«We analyze how it should be and how it is in practice. First, the code does not regulate this point. Accordingly, we settled it with the Memorandum. If we clearly follow the Memorandum, then we give you the draft, for example, it will be a hard copy, with the case files. If you do not agree, you write to us, describe what you disagree with, and then return the draft. You have three days to review this notice».*

*«In the process of cooperation between a pre-trial investigation body and a prosecutor, there is always a danger that since a prosecutor has suppressing powers in comparison with the investigator, these powers can be abused. Therefore, this Memorandum is a way to formalize these relations. For example, if we do not have this Memorandum and provide a prosecutor with a notice of a suspicion, following the code, he can simply forget about the notice and never give us an answer, whether he agrees or not».*

Detectives also focused on the fact that they actually refer to the Memorandum in cases of difference of opinions with a prosecutor, specifically on the features of the investigation of a particular case. Accordingly, detectives use it as a tool for the settlement of their interaction.

**Detectives:**

*«I will tell you from my experience. For us the Memorandum is probably more important when there is a disagreement with the prosecutor. Because when we have one vision of the development of a case, there are no problems: «I will edit. No need to bring me ten volumes, bring me one, two, three, the most important ones, with interrogations". No problem.*

*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».*

*«The course of our action is prescribed. We send the file; the letter is the proof. They give us the answer in a written form and record it as well. If any questions arise, all these written facts can be reviewed in six months to clarify who did what to ensure that it is reflected at some stage».*

The SAPO prosecutors, in turn, also stressed the importance of the Memorandum as a tool to facilitate cooperation between the two structures. In particular, they noted that according to the Memorandum there is an obligation to inform each other about the planned investigative and procedural actions in order to avoid all sorts of misunderstandings.

[50] Article 277 of the CPC.

**Prosecutor:**

*«Why do we need a Memorandum? To be informed. Each of us has many cases. According to the Memorandum, they report on carrying out investigative actions, on the planned searches and interrogations, on need for the prosecutor to take part in investigative actions. In order to keep everyone updated, to avoid situations like this: they went to conduct a search, and we sit and have no idea that they are conducting a search. They violated something, conducted an illegal search. They did not have a permission or anything. And then they come to you, the procedural supervisor (they come not to us directly, but to the leadership of the SAPO), and say, «And what is in that case»? And we sit and have no idea that the search was carried out».*

In addition, according to prosecutors, the Memorandum is an important tool for harmonization and external communication of the NABU and the SAPO with the media.

**Prosecutor:**

*«The Memorandum is more for an interaction and communication, not to improve some efficiency. It is more to regulate the procedure for media relations, to have a unified communication strategy, to avoid misunderstandings and have the same position, to express this position in a uniform manner, and to make sure this position is perceived exactly as we perceive it. So we can avoid the situation where one person says one thing, and another one – other things and the media portrays it like a war between the SAPO and the NABU».*

### 1.3.5 Overlapping powers of the head of a pre-trial investigation body and the SAPO prosecutor

Current legislation includes collision regarding the powers of the prosecutor's office and the pre-trial investigation bodies in the organization of pre-trial investigation. According to the 2016 amendments to the Constitution, organization of a pre-trial investigation falls under the responsibility of the prosecutor's office[51]. However, such changes have not been incorporated into the current CPC, which still places the organization of pre-trial investigation with the head of a pre-trial investigation body[52]. The latter has considerable powers, including the right to examine case files, give instructions to the investigator, coordinate the conduct of investigative actions, etc.

In the second and third chapters of the report, we will focus in detail on the role of the procedural supervisor in the pre-trial investigation, as well as specific features of interaction between a detective and a prosecutor in specific criminal proceedings. In this chapter, we consider only the common problems arising in the process of interaction between the two institutions in the field of pre-trial investigation.

As a result of the overlap, in practice, there are quite serious confrontations between the prosecutor's office and the pre-trial investigation body, in particular regarding the view on the prospects of investigation, planning certain investigative and procedural actions, coordination of procedural decisions, etc.

**Prosecutors:**

*«..They work like this: "This case has potential, we will investigate it, and this case has no potential, we will not investigate it». You give them instructions, they say, «It was impossible to follow the instructions».*

[51] Article 131-1 of the Constitution of Ukraine.

[52] Article 39 of the CPC.

*«These proceedings entered into the URPI by the SAPO are not very interesting, because we, the NABU, entered 33 proceedings that are more interesting, and this case of the SAPO management has no potential».*

*«Usually, the detective does not determine prospects. The head determines the prospects and prioritizes cases. And since there are many heads, there is no efficiency. They can't decide between each other what has potential, and what does not, what we shall investigate, and what shall not investigate».*

Analysis supervisory proceedings confirms the existence of such conflicts. In some places, they can rise to higher and higher levels and reach the level of Heads of the NABU and the SAPO, as evidenced by the official correspondence between them.

Similar to ordinary police investigators, detectives must coordinate their actions in evidence collection not only with the procedural supervisor, but also with the head of the unit (who, as already noted, has many supervisors above him/her). The lack of clear deterrent mechanisms of influence on such officials causes problems associated with the two directions of subordination for the detective.

Moreover, research data shows includes cases when the head of the pre-trial investigation body actually completely takes over the powers meant for the procedural supervisor in terms of the organization and planning of the investigation in a particular criminal case.

**Detective:**

*«... First, we [the NABU – ed.] make a plan of a pre-trial investigation, which our unit deems acceptable. As the head of unit, I appoint a senior investigator; we meet and determine the date of a court hearing and investigative actions that have to be carried out. After that a senior investigator takes this plan, goes to the prosecutor, shows him our version, the prosecutor provides his recommendations. Then we agree and sign the plan from both sides».*

This example clearly demonstrates that, in this case, the head of the pre-trial investigation body actually performs the role of the actual supervisor of the investigation process, even determining the dates of the court session, as well as the necessary investigative actions.

As it can be seen from the example, the investigation plan still has to receive approval from the prosecutor, who provides his suggestions. However, in our opinion, the role of the prosecutor should be more proactive.

Significant powers of the head of a pre-trial investigation body in relation to their subordinates, including regarding their actions in criminal proceedings, often predetermines that detectives listen to instructions of their immediate supervisor, rather than the prosecutor, regarding implementation of certain procedural and investigative actions.

**Detective:**

*«… If there is such a conflict [between the prosecutor and the head of a pre-trial investigation body - ed.], most detectives will probably listen to the head of the unit».*

In fact, it can be concluded that the procedural relationship between the prosecutor and the detective only reflects certain institutional conflicts between the two institutions, which in turn is due to the lack of clear distinction between their powers at the stage of pre-trial investigation.

## Chapter 1 findings

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 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 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.

3. 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.

4. 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.

Chapter 2

# PROCEDURAL GUIDANCE IN THE SPECIALIZED ANTI-CORRUPTION PROSECUTOR'S OFFICE



## 2.1

## Peculiarities of perception by the SAPO prosecutors of the role of the procedural supervisor

One of the main functions of the Prosecutor's Office according to Article 131-1 of the Constitution of Ukraine is defined as "organization and procedural guidance of pre-trial investigation and dealing with other issues during criminal proceedings in accordance with the law, supervision of covert and other investigative and search activities of law enforcement bodies". This wording clearly demonstrates the role of the prosecutor in the capacity of procedural supervisor as an active central figure in the investigation of criminal proceedings.

In fact, now the purpose of the procedural supervisor is the organization and procedural guidance of all pre-trial investigations, and the task is guiding the detective, making decisions in criminal proceedings, prioritization of investigation of criminal proceedings, etc.

During the study, we attempted to find out how procedural supervisors of the SAPO see their own role in criminal proceedings. Turns out, more than 70% of respondents did not agree with the statement that a procedural supervisor now performs the same functions as the supervising prosecutor according to the previous version of the CPC. Only 19% of the SAPO prosecutors still consider the current role of the prosecutor identical to the previous one (Fig. 2.1).

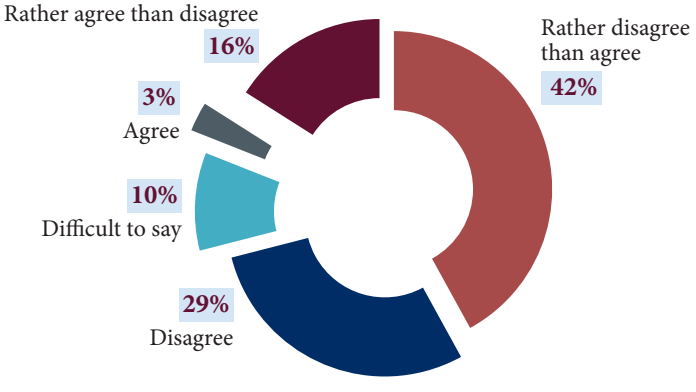


**Fig. 2.1** **To what extent do you agree with the statement: «Procedural supervisor performs the same functions as the supervising prosecutor according to the previous version of the CPC»?**

It is also has to be noted that about 80% of respondents denied the statement that a prosecutor engages in the details of investigation during preparation of an indictment (Fig. 2.2). Thus, prosecutors of the SAPO argue that they often do not wait for a finished result of the investigation from a detective and act proactively.

For a comparison, it should be noted that more than half (51%) of prosecutors of the regular prosecutor's offices interviewed in the previous preliminary study, on the contrary, confirmed the statement that the prosecutor engages in the details of investigation at the stage of preparation of an indictment[53].

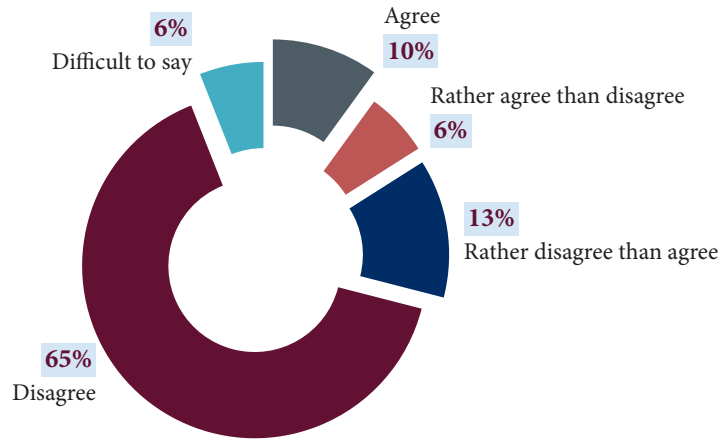


**Fig. 2.2** **To what extent do you agree with the statement: «Often the prosecutor engages in the details of investigation at the stage of indictment preparation»**

On the other hand, detectives believe that cases when a prosecutor is detached from an investigation until its completion also occur.

**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».*

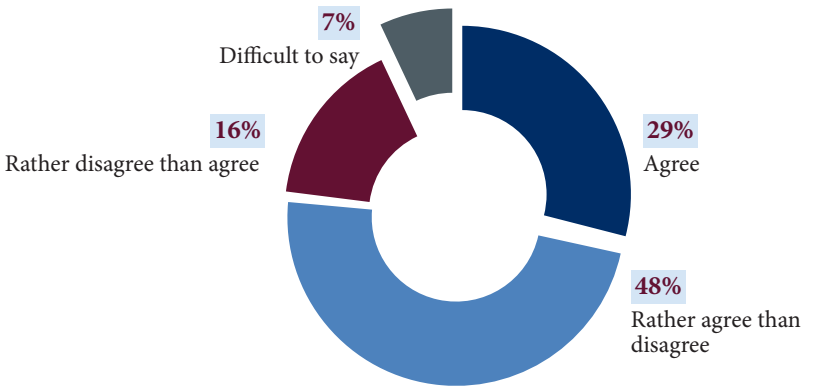


**Fig. 2.3** **To what extent do you agree with the statement: «Prosecutor, together with an investigator, coordinates the investigation plan and all necessary procedural decisions»?**

At the same time, almost 80% of respondents to some degree supported the statement that a prosecutor, together with an investigator, coordinates the investigation plan and all necessary procedural decisions (Fig. 2.3).

Statements of procedural supervisors of the SAPO during focus groups were also illustrative regarding their role in the investigation as the central one.

[53] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 –p.65

**Prosecutors:**

*«...The prosecutor is a «think tank», a person who determines the directions: where to go, how to move; and a person who, in its essence, must ensure the rule of law to prevent any illegal actions..».*

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

At the same time, the procedural supervisor of the SAPO, unlike a prosecutor of a local or regional prosecutor's office, is more likely to complete the mission of the «think tank», taking into account a slightly different nature of his workload.

**Prosecutor:**

*«We have this opportunity here, because we do not have that many cases. Yes, these cases are bigger, have more defendants, but every motion that goes to an investigating judge of the local court, to an investigating judge of the court of appeal, each motion passes through the procedural supervisor».*

At the same time, evaluation and correction of detective's procedural decisions remains an important component of the prosecutor's activities.

**Prosecutor:**

*«...The Prosecutor in this process is a pre-judicial assessor deciding on the application of measures of restraint when there are evident grounds, on apprehension of a person, and, accordingly, approving other investigative actions, because based on the results of consideration of a criminal case, they will be asking the prosecutor in a court».*

In general, according to the SAPO prosecutors themselves, they have better conditions for the practical implementation of their procedural powers than prosecutors of the regular prosecutor's offices do.

**Prosecutor:**

*«When we were hired, we were told that there is no need for us to come to work at nine and leave at nine. "We need the results from you. It is your concern how you will achieve these results. If you need help, we will help you. If you need organizational help with detectives, hearings, releasing a person – we will help you. But you are required to do quality work". Everyone is interested in the prosecution of offenders and sending cases to court. Absolutely everyone…».*

The stated above indicates that the implementation of the updated prosecutor's role of a procedural supervisor in pre-trial investigation with powers of the central figure in the investigation of criminal cases, occurs somewhat faster in the SAPO than in 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 whereas most prosecutors of regular prosecutor's offices do not share that opinion.

## 2.2

# Principles and safeguards relating to procedural guidance

### 2.2.1 Independence

General guarantees of the prosecutor's independence are provided by Article 16 Of the Law On the Public Prosecutor's Office and are ensured via: 1) special procedures for appointment to, and dismissal from, the position, and disciplinary sanctions; 2) procedures of exercise of powers stipulated in procedural and other laws; prohibition of illegal influence, pressure and interference with the exercise of public prosecutor's powers; 4) statutory procedures for financing and organizational support for the public prosecutor's' offices; 5) established financial, social and pension support for public prosecutors; 6) functioning of the prosecutorial self-governance institutions; 7) statutory personal security arrangements for public prosecutors, members of their families, their property, as well as other legal safeguards.

According to Article $8^1$(5) of the Law of Ukraine On the Public Prosecutor's Office, the Prosecutor General, his first Deputy and Deputies shall not give instructions to prosecutors of the SAPO or undertake any actions, which directly concern the exercise of powers by the SAPO prosecutors. Written orders of administrative nature relating to the organization of the SAPO activities are issued with the mandatory approval of the SAPO Head.

This provision increases the safeguards for independence and impartiality of the SAPO procedural supervisors. In fact, it neutralizes the possibility of interference with the exercise of their procedural powers in criminal proceedings by the Prosecutor General, the Head of the regional Prosecutor's Office, the Head of the local Prosecutor's offices, their First Deputies and Deputies that exists for procedural supervisors (except the SAPO prosecutors) in accordance with Article 36(6) of the Criminal Procedure Code

Also, according to Article 480 of the CPC, the prosecutor of the SAPO belongs to a category of persons to whom a special procedure for criminal proceedings applies. Article 481 stipulates that written notice of suspicion for this category of persons shall be served exclusively by the Prosecutor General (acting Prosecutor General).

As part of the study, we analyzed the views of the SAPO prosecutors, as well as other participants of criminal proceedings regarding their perception of the implementation of the principle of independence in the practice of prosecutors.

As seen in the chart (Fig. 2.4), in general, about 86% of surveyed SAPO prosecutors consider themselves independent to a certain degree (47% are independent rather than dependent, and 39% are completely independent). Another 14% of the SAPO prosecutors found it difficult to answer. In a similar survey, 41% of prosecutors of the regular prosecutor's offices considered themselves to be dependent and only 37% thought they were independent to some extent[54].

[54] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – p.72

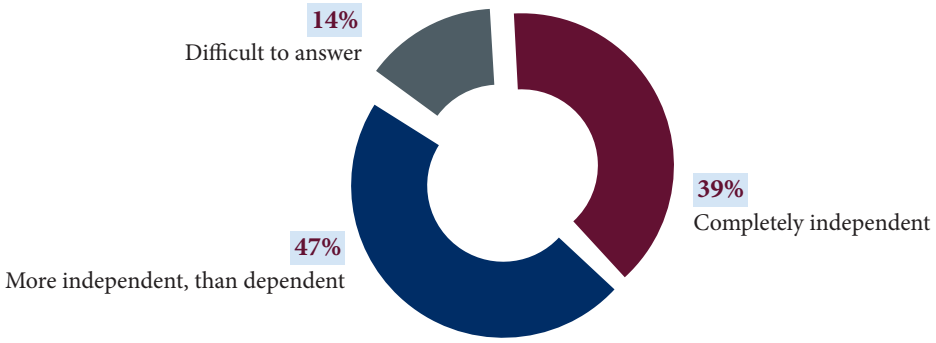


**Fig. 2.4** **To what extent do you consider yourself independent from any external influence when acting as a procedural supervisor?**

During the survey, the SAPO prosecutors noted that the Head of the SAPO, his deputies, the head of the unit and the head of the department have certain levers of influence on the decisions of procedural supervisors (Fig. 2.5). However, almost all interviewed prosecutors stressed that the leadership of the PGO does not have any means of influence.

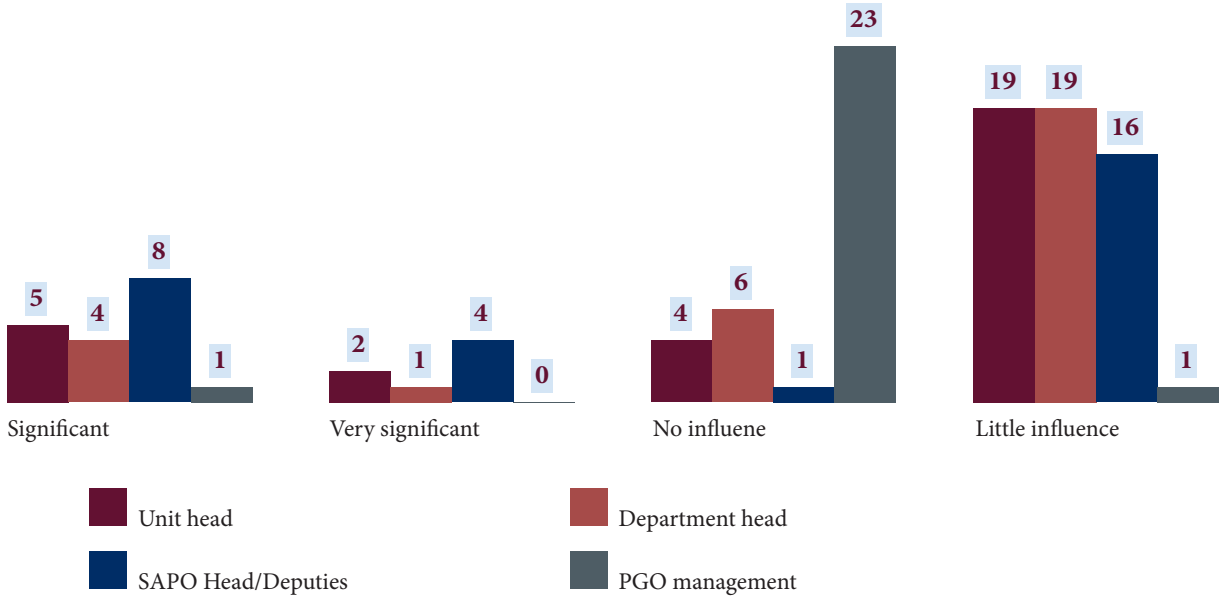


**Fig. 2.5** **How significant are channels of influence on your decisions or actions as a procedural supervisor?**

During the focus group, the SAPO prosecutors noted about a significantly lower level of dependence from supervisors (than is the case for prosecutors of the regular prosecutor's offices), but confirmed that they also seek approval for key decisions from supervisors.

**Prosecutors:**

*«...There is cardinal difference between the regional branches, local prosecutor's offices and the SAPO. Because here, the availability of the leadership is quite high, considering both the relevance of criminal proceedings, and the corresponding category of persons to be held accountable, the*

*majority of which demand the corresponding coordination at the level of the Deputy Prosecutor General according to Chapter 37 of the Criminal Procedure Code of Ukraine and the Law On the Public Prosecutor's office».*

*«...The hierarchy of administrative positions of the regional prosecutor's office is much more extensive, and before you reach the top leadership level, your personal independent opinion may change not even because you are risking your independence, but because of the pluralism of opinions. When you actually have 10 opinions of your supervisors, your independent position is blurred...».*

The chart shows (Fig. 2.6) that most prosecutors noted that always or almost always they seek approval from the SAPO leadership for their decisions and actions on a plea agreement, apprehension and notification on suspicion. Less often (though also quite often), they seek approval for decisions and actions on closing criminal proceedings, application for (replacement) of a measure of restraint, and sending indictment to court. Only decisions on other measures to ensure criminal proceedings are often not coordinated or sometimes coordinated.

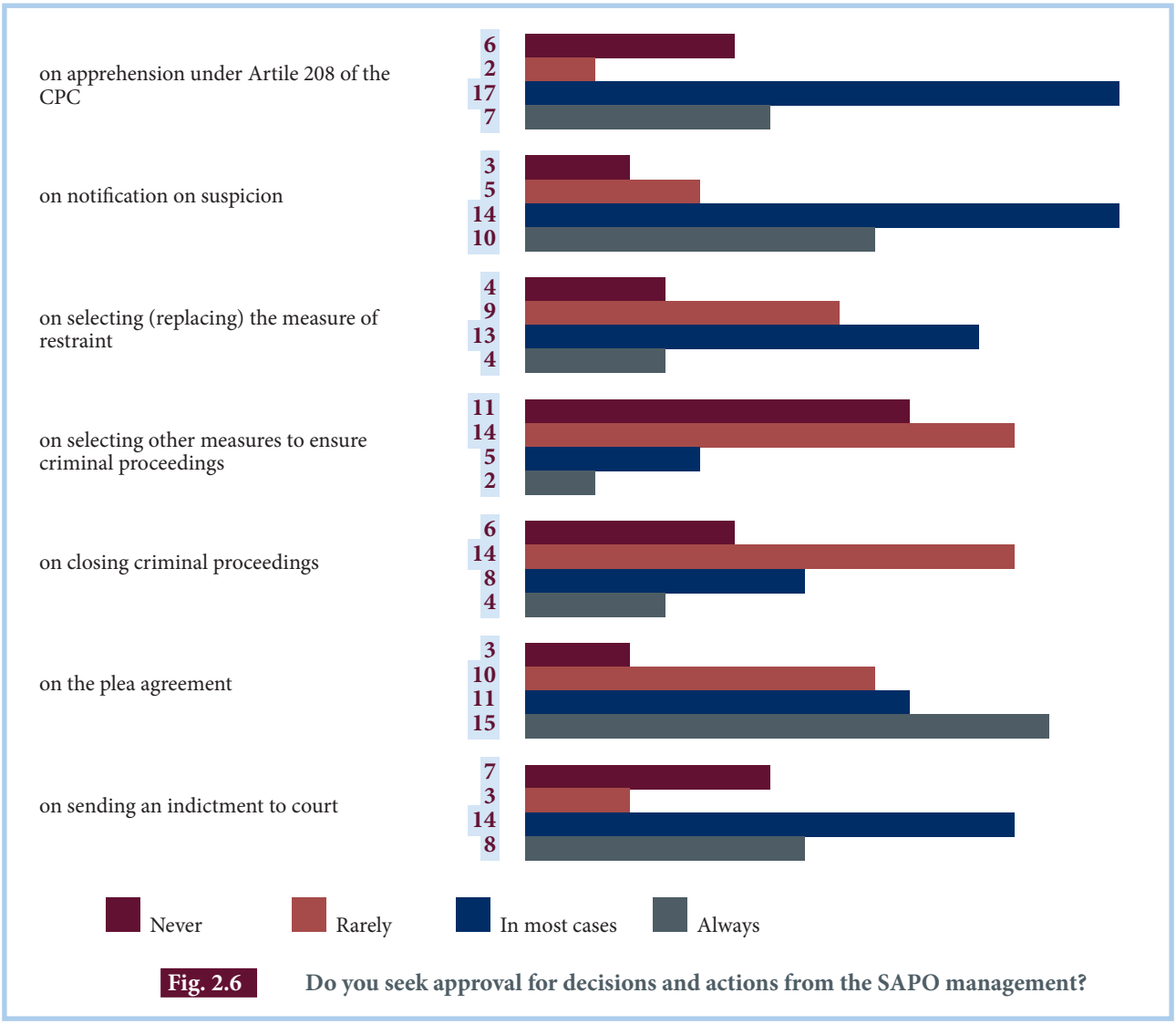


**Fig. 2.6** **Do you seek approval for decisions and actions from the SAPO management?**

The SAPO prosecutors describe the coordination of their decisions with their supervisors rather as a voluntary request for advice.



**Prosecutors:**

*«No approvals. There has never been any prohibition on a notice of a suspicion or its absence. You have to be confident in your abilities, confident in your evidence –and you go. If you are sure, but you want to get some more support, just to be safe, get some psychological support: «Here, look, I gathered up this and this, and in my opinion it proves this, and this». Sorted it out. They say, «So what's here to look at? Of course, we must go to court with an indictment». And you're like, «All right».*

*«If you saw the last hearing on one of the most resonant cases. All of us gathered, and the leadership of the SAPO says, "Have you received new evidence, established the guilt? Well, then go to court.» That is it. Only one minute for such an important case?! «What else do you want? I have seen the notice of suspicion. That's it».*

*«You are not told, "Sign the notice of suspicion immediately, because I decided so". And there was not a single case when someone took a proceeding away from the prosecutor and said, «If you don't sign it, I'll take the responsibility and will sign it". It does not happen».*

Prosecutors of the SAPO do not have a fear of acquittal observed among the prosecutors in the local and regional prosecutors' 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».*

We should note that in the regular prosecutor's office, there is a common practice of bonus deprivation, which is unusual for the SAPO. Two out of thirty-one interviewed prosecutors noted that they had been deprived of bonuses (Fig. 2.7).

During focus groups, other participants of criminal proceedings questioned the implementation of the principle of the prosecutor's independence in practice and provided examples when prosecutors avoided independent decision-making.

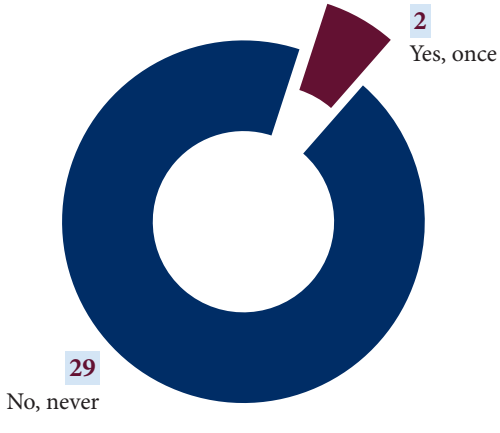


**Fig. 2.7** **Have you been deprived of bonus?**

**Lawyers:**

*«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».*

*«I am sure that key decisions in proceedings are made by the SAPO management».*

**Detectives:**

*«In respect of cases, when proceedings are closed, they do not make this decision without the leadership».*

*«...There are other proceedings, such as illegal enrichment of high officials, heads of central state authorities, where the decision even on a temporary access is made by the Deputy Head of the SAPO».*

A certain proof of control mechanisms available to the Head of the SAPO over procedural actions and decisions of prosecutors is the use of a practice common for all regular prosecutor's offices. The practice entails sending motions to a court only with the official seal, which is stored with the Head and used only by him personally. This practice is described in the conclusion of the Qualification and Disciplinary Commission of Prosecutors «On the finding of a disciplinary offense in the actions of Nazar Kholodnytsky, Deputy Prosecutor General – Head of the Specialized Anti-Corruption Prosecutor's Office of the Prosecutor General's Office of Ukraine» of 22 June 2018.

Therefore, despite the subjective perception of the SAPO prosecutors as more independent than prosecutors of the regular prosecutor's offices, it is quite common for the SAPO prosecutors to informally seek approval for key procedural decisions from their supervisors. On the one hand, such practice may indicate a certain level of support to a prosecutor from the SAPO leadership, in a particular criminal proceeding, and on the other hand, this mechanism does not exclude the possibility of interference with the procedural independence of procedural supervisors.

### 2.2.2 Unchangeability

Provisions of Article 37(2) of the CPC of Ukraine, namely that "the prosecutor will perform the duties of prosecutor in a specific criminal proceeding from its commencement to the very completion", also apply to the SAPO prosecutors.

It should be noted that in general, ordinary prosecutors of the SAPO have a positive attitude towards the principle of unchangeability. They highlight the obvious advantages of abandoning the separation of prosecutors into those exercising supervision and those supporting prosecution in court, as was provided for in the previous legislation.

**Prosecutors:**

*«... Before there was no responsible person. One prosecutor supervised, another supported, the third – reclassified in court, and the fourth one appealed. The court released from criminal liability. And justice has been served...».*

*«Now it is assigned to one person, and we are not just watching from somewhere, now all the responsibility for this case falls on a particular prosecutor».*



In practice, a number of exceptions limits the principle of unchangeability. In criminal proceedings of the SAPO, there are common cases when instead of assigning a specific procedural supervisor to specific proceedings, the written notice of a suspicion to a number of suspects shall be served by the Head of the SAPO as the Deputy Prosecutor General under Article 481 of CPC[55].

However, the highest number of exceptions in the implementation of unchangeability principle is associated with the teams of prosecutors. In criminal proceedings of the SAPO, according to Article 8-1(8) of the 2015 Law On the Public Prosecutor's Office, after the launch of a pre-trial investigation, the Deputy Prosecutor General – Head of the SAPO appoints a prosecutor to exercise the powers of a prosecutor in a particular criminal case. At the same time, the Head of SAPO can establish a group of prosecutors exercising the powers of prosecutors in a complex criminal case, as well as a prosecutor to lead such a group.

In practice, the unit head is usually the senior prosecutor in the team. The group includes all prosecutors of this unit. Interestingly, the unit head does not deal with the case even being formally assigned to all proceedings of the unit; rather the responsibility falls on a prosecutor in this group who is informally assigned to this case.

Unit heads carry out procedural guidance only in some proceedings that are assigned to them.

**Prosecutor:**

*«... All heads are just like us, they can be senior supervisors in the groups, and so they sign a notice of suspicion, indictments, motions for restraint measures, and take responsibility just like us. They do not hide».*

In addition, the group may include department head and the Deputy Heads of the SAPO. When required by the CPC, the Head of the SAPO also participates in cases.

**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».*

The creation of a group of prosecutors is indeed justified in case of a number of simultaneous procedural actions, such as searches. After all, given the need to prevent the leaks of information, it is preferred that searches in one proceeding are carried out in parallel – simultaneously in several places. If it is necessary to have a prosecutor at each of them, it is impossible to do without a group. Analyzing materials of proceedings, we repeatedly met cases with several parallel interrogations and searches.

Moreover, according to prosecutors themselves, such a need may arise in cases where several accomplices are detained and thus, sanctions should be received at the same time.

[55] To a lawyer, people's deputy of a local council, people's deputy of the Verkhovna Rada of the Autonomous Republic of Crimea, village or city head.

**Prosecutor:**

*«... When a lot of people are detained, many sanctions, many complaints, the group of prosecutors is necessary in order to ensure participation in all courts».*

The analysis of criminal case files shows that only in 52% of cases the same prosecutor who approved a motion and a notice on suspicion is present during consideration of the motion for a measure of restraint. In 33% of cases the prosecutor present did not approve (or prepare) the motion or the notice of suspicion. In another 15% cases, another prosecutor took part in at least one of these stages (7% at the stage of notification on suspicion, and 8% – at the stage of agreement (preparation) of a motion).

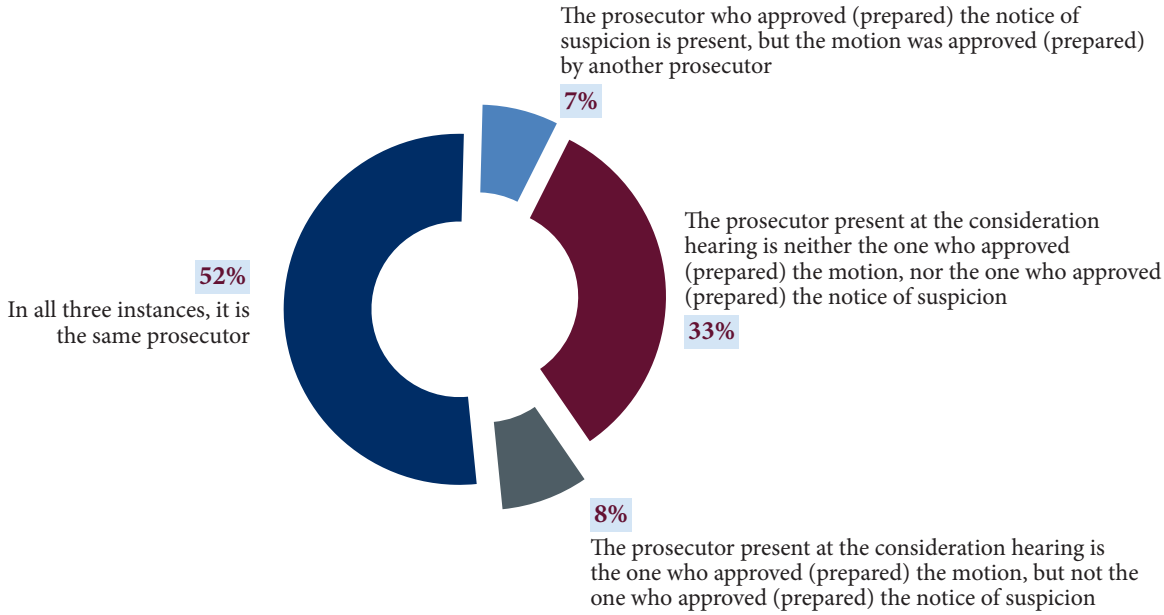


**Fig. 2.8** **Does the name of the prosecutor present at the consideration of a motion for a restraint measure match the name of the prosecutor who approved the motion and the notice of suspicion?**

The stated above shows that compliance with the principle of unchangeability in the practice of the SAPO has a number of exceptions, primarily related to the need to participate in certain proceedings of the Head of the SAPO and the practice of creating groups of prosecutors in all criminal proceedings.

Taking into account the complexity of the SAPO investigations, for most of them, there is an objective need to create a group of prosecutors. However, it is unclear how feasible the practice of formally appointing heads of units as senior group prosecutors in all proceedings of the unit is considering the fact that other unit members act as a senior prosecutor in these proceedings. This practice, in our opinion, does not contribute to the willingness of prosecutors to take full responsibility for decisions and actions in proceedings where they are not in a senior position in the group.

In addition, such approach effectively gives the prosecutor in administrative position (in this case, the unit head) an opportunity to intervene in any proceedings of his subordinates, which threatens their independence.

## 2.2.3 Impartiality and objectivity



Impartiality and objectivity are defined by the basic principles of the prosecutor's office work[56]. After all, a prosecutor, in accordance with Article 9(2) of the CPC, shall be required to examine comprehensively, fully and impartially the circumstances of criminal proceedings, find circumstances both of incriminating and exculpatory nature in respect of the suspect, the accused, as well as the circumstances mitigating and aggravating their punishment; make adequate legal evaluation thereof and ensure the adoption of lawful and impartial procedural decisions.

Objectivity in the context of criminal proceedings characterizes full and comprehensive investigation, the use of all forms and methods of proof provided by the law. Impartiality refers to the lack of stereotypes and prejudice of the prosecutor in relation to participants of criminal proceedings and the investigation in general. Impartiality means that a prosecutor in criminal proceedings has to discover both the circumstances that prove guilt of the accused/defendant, as well as exculpatory and the mitigating or aggravating circumstances[57]. Based on this understanding, we shall discuss the specific of implementation of these principles by the SAPO prosecutors.

First, it should be noted that the SAPO prosecutors compared to prosecutors of regional or local prosecutor's offices have much more resources for an objective investigation and note it themselves.

**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».*

During our research of regular prosecutor's offices, we found that factors that can negatively affect the impartiality and objectivity of a procedural supervisor included the practice of an automatic punishment of prosecutors for actions in the interests of a suspect (for example, closing criminal proceedings, releasing the apprehended person or failing to serve a notice of suspicion, initiating the change of a restraint measure for a softer one etc.,), as well as for an acquittal in criminal proceedings[58]. However, according to the SAPO prosecutors, their current working conditions are quite different and do not provide penalties for such decisions. They indicate that they have no fear of making legal decisions in favor of a suspect.

**Prosecutor:**

*«...This year I made the decision to close proceedings due to the lack of evidence, it was at the stage when we opened case files to the defense party, and the defense party provided me with their files. I was very surprised that during their investigation, the pre-trial investigation body failed to collect such documents after a notice of suspicion, and these documents were on the surface and clearly showed that the person performed a purely technical function. We based the suspicion for his two signatures. The defense was able to convince me that it was his job; that he couldn't help but sign it...».*

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56 Article 3 of the Law of Ukraine "On the Public Prosecutor's Office", 2015.

57 *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 268, p.85.

58 *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 268, p.87.

In addition, a survey of the SAPO prosecutors showed that they are not forced to work for certain statistical indicators. 42% of the surveyed prosecutors noted achieving performance indicators did not matter to them, and another 45% – that they look at statistics rarely, out of their own interest (Fig. 2.9).

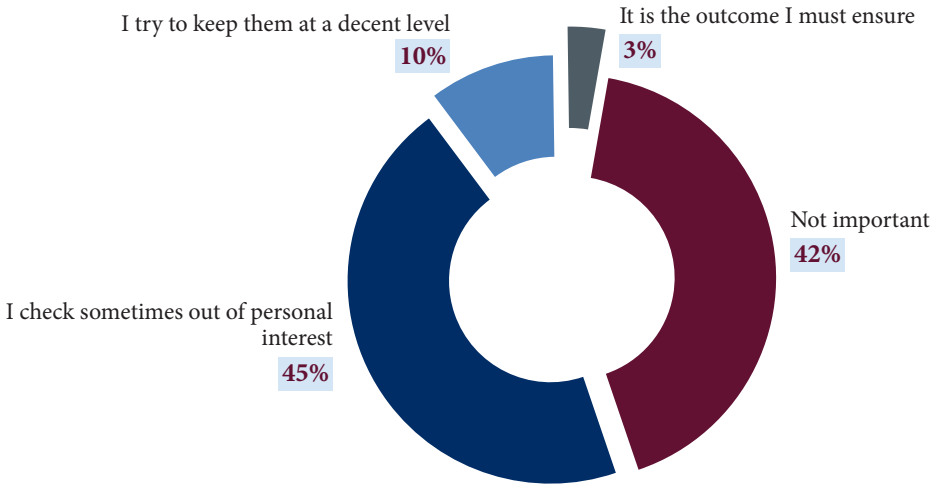


**Fig. 2.9** **How important for you is to achieve certain statistical performance indicators**

**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 investigations of official crimes sent to court, there was a certain number of sanctions and amount of money returned to the state, these numbers cannot be lower this year. There must be a higher number, not lower, or a half of employees will be fired. We do not have this burden on us».*

The study also shows that the SAPO prosecutors pay considerable attention to the ensuring that the evidence is proper and admissible. They do not refuse to analyze and use mitigating evidence as indicated in the section 3.5 of this study. This to some extent shows the level of their objectivity and impartiality in the implementation of such procedures.

Prosecutor's interest in compensation of the harm caused to the state by the criminal offence and conviction of the offender should not be excluded. Such interest may be present, but within reasonable limits. However, this should not affect the objectivity of a prosecutor's decision-making process. Lawyers insist that such situations exist.

**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».*

In addition, Chapter 4 describes cases of bias or partiality of the SAPO procedural supervisors identified in the study, involving the use of apprehension and detention to induce a suspect to cooperate or as a punishment for refusing to do so.

According to the SAPO prosecutors, an important factor that reduces the risks of their bias and partial attitude is a clear awareness of the fact that their actions are always subject to closer attention and evaluation.

**Prosecutor:**

*«...The category of our cases – officials, political officials, and everyone is well aware that the political situation will change...And everyone is well aware that the assessment will be given to what you sign. Everyone understands that if you make some illegal decision... I think that no one will sign without the grounds because it will be assessed. If at the district level 99.9 out of 100 proceedings will not be assessed, in this case, ten out of ten will».*



After all, on the one hand, the lack of statistical pressure and responsibility for legal actions conducted in favor of a suspect create conditions for the SAPO prosecutors to be objective and impartial. However, the study identified other practices that threaten objectivity and impartiality. These are cases of excessive focus on compensation to the state for the damage caused, as well as inducement of a suspect to cooperate.

They are not threatened with punishment for certain legal procedural decisions in favor of a person, they are not "pressured" by statistical indicators.

## 2.3

# The system of record-keeping and workload evaluation in the work of a procedural supervisor of the SAPO

The analysis and statistics unit ensures the primary record-keeping and statistical reporting on the results of prosecutorial and investigative activities of the SAPO[59].

At the same time, heads of units at the department of procedural guidance, state prosecution and representation in court ensure timely, comprehensive and objective entry of information on the results the units' work into the information and analysis system "Record-keeping and statistics of the prosecutor's offices" of the Unified Register of Pre-trial Investigations[60]. Deputy Prosecutor General, the Head of the SAPO, supervises the maintenance and analysis of statistics, organizes the review and generalization of the practice of implementing the law, as well as provides information and analytical support to subordinate prosecutors in order to improve the quality of their functions[61].

There are no specifics in the record keeping and statistics for the SAPO provided in the regulations. These issues are settled in a similar way to that of other divisions of the PGO and the prosecutor's offices in general.

[59] Paragraph 5.2 of the Regulations on the Specialized Anti-Corruption Prosecutor's office of the Prosecutor General's Office of Ukraine, approved by Order of the PGO no.149, 12 April 2016.

[60] Paragraph 6.5.1 of the Regulations on the Specialized Anti-Corruption Prosecutor's office of the Prosecutor General's Office of Ukraine, approved by Order of the PGO no.149, 12 April 2016.

[61] Paragraph 6.1 of the Regulations on the Specialized Anti-Corruption Prosecutor's office of the Prosecutor General's Office of Ukraine, approved by Order of the PGO no.149, 12 April 2016.

A thorough system of accounting record keeping and statistics in the activities of the prosecutor's office is described in the study published in 2017 on the role of the public prosecutor at the pre-trial stage of criminal proceedings[62].

Instead, the prosecutors note a completely different attitude of the SAPO leadership to statistical indicators.

**Prosecutors:**

*«The same recording of our work is taking place. Just the attitude towards the "P" Form has changed. While previously it was the ESS electronic system, now it is the OSO [accounting and statistics] system, it is automatic. 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».*

*«How it was before: the machine is closing... The data should be entered, he rushes with those cards to the region; in the region, he gives bribes in order to enter the cards, if there is not enough, he buys it from his neighbor with fish, cutlets, "I will buy you cognac", buys it, enters the remaining information, goes to the general in the region, reports on his results. Comes back – he was not fired, let's continue working. And I say, "And what is going to happen next month?" – «Well, we'll figure it out". And we do nothing for a month».*

*«End of the month, today is the deadline for the report. As you can see, no one is in a hurry».*

Unlike prosecutors in regular prosecutor's offices[63], prosecutors of the SAPO do not try to ensure compliance with the statistical indicators of previous periods or keep the load at a certain level (Fig. 2.10).

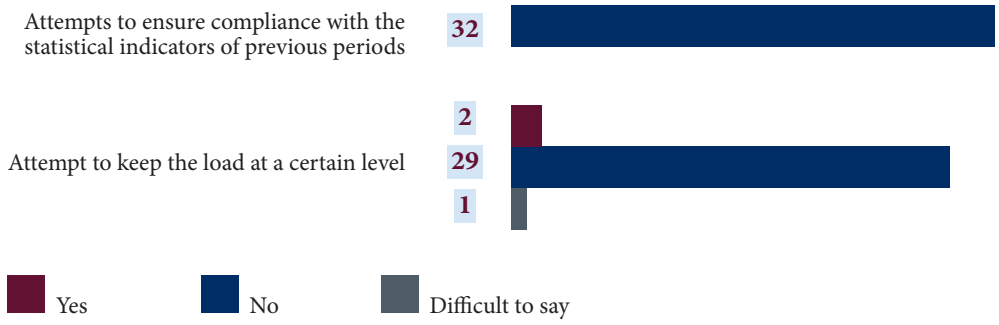


**Fig. 2.10** **In your opinion, to what extent do the following factors affect the decision of the Head of the SAPO regarding closing (opening) criminal proceedings?**

It is worth noting that the statistical information on the SAPO is not publicly available. It is not published on the website of the PGO. Part of this information can be found in generalized form on the official website

[62] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 268, p.444-54.

[63] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 268, p.214.

of the PGO in the section Statistical information on prevalence of crime and the results of prosecutorial and investigative activities in the part relating to the activities of the NABU[64].

Instead, some information regarding the SAPO is posted on its Facebook page.



## The workload of procedural supervisors at the SAPO

The workload of procedural supervisors of the SAPO has been gradually increasing. At the beginning of 2017, the detectives of the National Anti-Corruption Bureau of Ukraine with the procedural guidance of prosecutors of the Specialized Anti-Corruption Prosecutor's Office investigated 277 criminal proceedings (73 of them were closed during the year).

By the end of the year (as of 1 November 2017), this figure increased to 530 proceedings (107 of which were closed during the year). Procedural guidance in this period was conducted by 36 procedural supervisors of the SAPO. Along with the procedural guidance of pre-trial investigations, they still had to support the prosecution in proceedings transferred to court (at that time, 96 proceedings were already transferred to court).

According to statistics, in 2017, on average, there were up to 14 proceedings led by each procedural supervisor. At the same time, if we exclude 237 proceedings transferred to other entities for investigation during the year, the workload will be at an average of 8 proceedings.

The SAPO prosecutors consider it necessary to increase the number of staff to ensure proper investigation, given the volume and complexity of proceedings under investigation.

**Prosecutor:**

*«Let's talk about what we have. Now we plan to increase the number of prosecutors to 70. These 70 will be here [in Kyiv – ed.], and it is still not sufficient for the number of cases already in processing. If there is an Anti-Corruption court, it will be easier because it will be in Kyiv and there will be no need for regional departments. But there still will be a need for the number».*

This issue is raised in the draft law no. 7271 On Amendments to Article 7 of the Law of Ukraine on the Public Prosecutor's office (on ensuring the activities of the Specialized Anti-Corruption Prosecutor's Office) which proposes to increase and fix the staff number at the SAPO at 70 prosecutors. However, the Explanatory note to the draft law does not contain any criteria for justifying this number of procedural supervisors. The main expert office of the Verkhovna Rada of Ukraine in its conclusion regarding the draft law focused their attention on the inappropriate mentioning of a specific number of prosecutors, as it would complicate the possibility of promptly determining the a number of prosecutors of the SAPO based on the workload.

In this context, it is important to note that by this time the SAPO has not developed clear criteria for justification of the optimal burden on a procedural supervisor and corresponding amount of staff required.

[64] https://www.gp.gov.ua/ua/statinfo.html

## Chapter 2 findings

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, 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.

Chapter 3

# EXERCISE OF PROCEDURAL GUIDANCE AT DIFFERENT STAGES OF PRE-TRIAL INVESTIGATION



## 3.1 The role of the SAPO Prosecutor at the stage of apprehension

### 3.1.1 Legal provisions on apprehension

In general, the role of the SAPO procedural supervisor in apprehension is regulated by the same regulations as for other prosecutors. These questions are described in detail in the study published in 2017[65]. The difference here is that Article 208 of the CPC provide additional grounds for apprehension in criminal proceedings under the NABU jurisdiction.

Thus, Article 208(1)(3) provides that a competent official has the right to apprehend person who is suspected of having committed a crime punishable by imprisonment without the order of the investigative judge or a court if the said official has reasonable grounds to assume that a suspect in a grave or particularly grave corruption crime under the jurisdiction of the NABU can abscond to avoid criminal liability.

The other two grounds under this provision apply regardless of jurisdiction and could also be used by the SAPO prosecutors. These include instances when: 1) the person was caught while committing a crime or

[65] Belousov et. al. "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p., pp.91-94.

making an attempt to commit it; 2) if immediately after the commission of the crime, an eyewitness, including the victim, or totality of obvious signs on the body, clothes or the scene indicates that this individual has just committed the crime.

### 3.1.2 Issues related to compliance of the special grounds for apprehension with the Constitution of Ukraine

According to lawyers, there are doubts related to compliance of Article 208(1)(3) of the CPC with Article 29 of the Constitution of Ukraine.

**Lawyer:**

*«Article 29 of the Constitution provides only two situations of apprehension without the order from an investigator or a judge: when a person is apprehended at the crime scene or immediately after the pursuit».*

Article 29 of the Constitution of Ukraine states that detention of an individual without court decision is an exceptional measure in case of the need to 1) prevent a crime; 2) stop the commission of a crime, which is covered by paragraphs 1 and 2 of Article 208(1) of the Criminal Procedure Code. The Constitution of Ukraine does not include any other grounds for extrajudicial detention. Therefore, in fact, our basic law does not allow detention in cases when a time has passed after a commission of crime and there is no possibility to stop it or at least to follow a person «in hot pursuit». Despite such requirements of the Constitution, the grounds in paragraph 3 of Article 208(1) of the Criminal Procedure Code allow apprehension after a considerable time has elapsed since the commission of the crime, and it is often used in such conditions in practice.

Analysis of supervisory proceedings of the SAPO prosecutors shows only 48% of individuals were apprehended during the commission or attempt to commit a crime under the investigation by the NABU. In another 6% of cases, a person was apprehended immediately or within 6 hours from the commission of the crime. However, in the remaining 45% of cases a person was detained without «hot pursuit» (2% – from 7 to 14 days; 23% – from 1 to 3 months; 7% – from 6 to 12 months; 13% – after more than a year).

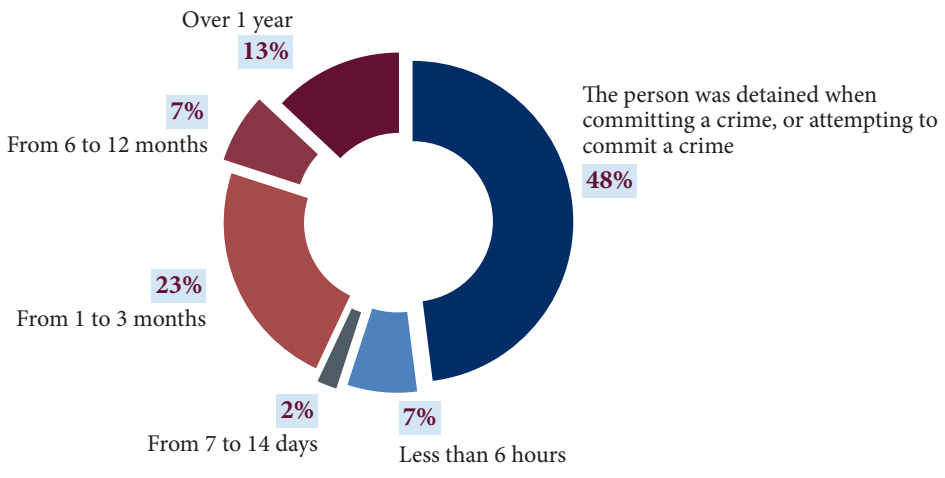


**Fig. 3.1** **How much time has passed between the commission of a crime and the actual apprehension of a person stated in the report under Article 208 of the CPC?**

**Lawyer:**

*«A person is not always detained immediately after a commission of a crime. For example, the case is being considered for three years. The acts were committed a long time ago, and a person was detained under the Article 208…».*



The prevalence of such practice has led to the submission to the Constitutional Court of Ukraine on behalf of the Ukrainian Parliament Commissioner for Human Rights On the conformity with the Constitution of Ukraine (constitutionality) of provisions of paragraph four of part one of Article 208 of the Criminal Procedure Code of Ukraine. According to the official information posted on the website of the Constitutional Court of Ukraine[66], based on the decision of the Panel, the constitutional proceedings in the case was opened; the case is being prepared for consideration at the plenary session of the Grand Chamber.

## 3.1.3 References to special and general grounds for apprehension in the report

Analysis of supervisory proceedings showed that during apprehension, the NABU detectives and prosecutors of the SAPO referenced Article 208(1)(3) of the CPC in 43% of protocols, Article 208(1)(2) – in 34% of protocols, and Article 208(1)(1) – in 23% of the protocols (Fig. 3.2)

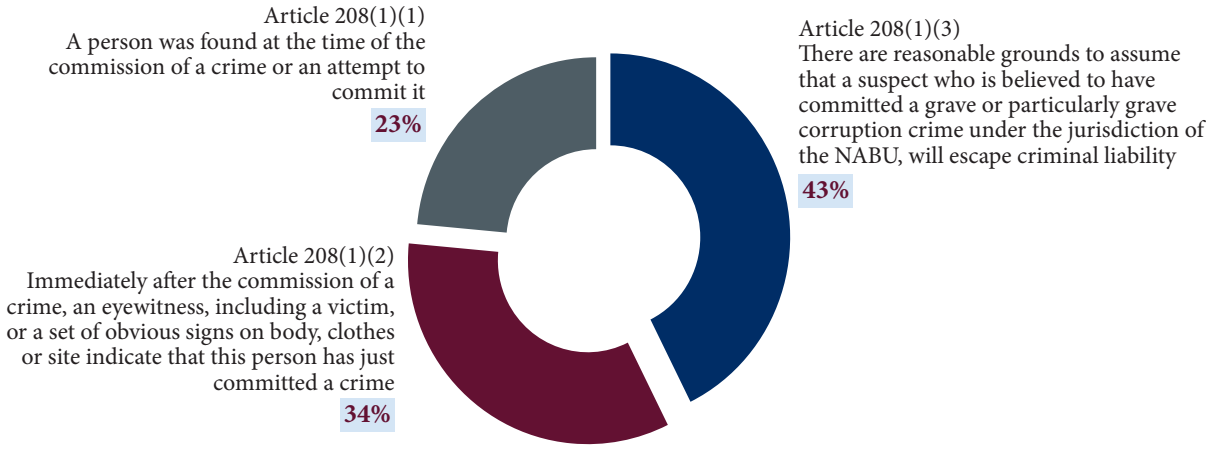


Fig. 3.2 **The grounds for apprehension under Article 208 included**

Among other things, the analysis of proceedings found multiple cases when two or even all three grounds for apprehension were listed in the report on apprehension (Fig. 3.3). It happens, primarily, in proceedings involving the receipt of an undue advantage when the person is detained immediately after receiving the funds. This practice evidently demonstrates an attempt to point out others grounds «just in case», without focusing on justification of one clearly dominant ground and sometimes reaches the point of absurdity. For example, in one of the analyzed criminal proceedings all three grounds were provided while the person had committed a crime more than a year before the date of apprehension, which clearly eliminates the possibility of first two grounds stipulated in Article 208(1) of the CPC.

[66] Official website of the Constitutional Court of Ukraine. Available at: http://www.ccu.gov.ua/novyna/konstytuciyni-podannya-za-stanom-na-15-chervnya-2018-roku.

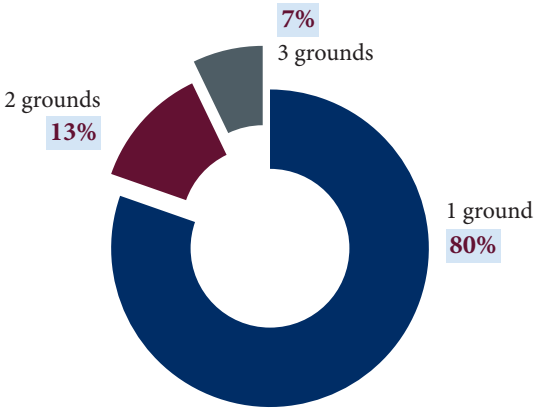


Fig. 3.3 **Number of grounds specified in the report on apprehension according to Artile 208**

### 3.1.4 Position of prosecutors on using special grounds for apprehension and obtaining court order for apprehension

Prosecutors of the SAPO during focus groups insisted on the legitimacy of apprehension based on grounds provided by Article 208(1)(3) of the Criminal Procedure Code, as well as on the importance to have this opportunity to detain a person for tactical reasons. They emphasize that, if they do it differently, a person will have time to destroy evidence or escape, since the procedure for obtaining an order of an investigating judge must take place only after a notice of suspicion was served, which takes considerable time.

**Prosecutors:**

*«...To invite a person three days in advance for a certain procedural action, that is, the serving of a notice of suspicion. Three days later, the person will not be in Ukraine! The person should come and receive the notice of suspicion. Then we serve the motion and ensure that the person has reviewed it, the defense has reviewed it, and only then send it to court and hope that the person will appear in court voluntarily, without our control, and the court will select a measure of restraint».*

*«If the person knows this three days in advance, and we are at the stage of serving a notice of suspicion and do not have all the evidence, the person will simply destroy it. We will never find this evidence. Honestly, I have not seen such a bona fide suspect, who would have showed up for a suspect interview. He'll get sick, he'll disappear...».*

*«If there are grounds for detention, we withdraw the risks that an evidence will be destroyed. For example, if there was complicity. In fact, detention has a certain effect of surprise. There is no time to discuss and develop a strategy. As a rule, evidence or testimony obtained at the early stages is the most truthful. Because when a person is already out of custody or after detention, there is time to think, to develop a strategy, what has to be taken into account, what should be destroyed, what evidence to manufacture».*

Prosecutors describe the procedure of obtaining a court order on apprehension as unreasonably complicated, prolonged and almost inapplicable[67].

**Prosecutor:**

*«We can apply for apprehension when a person does not show up for investigative actions. Something like when I call him, «I have to serve you a notice of suspicion», and he does not come. He does not come once, twice. For the third time, I have the right to place him on the wanted list. I send the notice of suspicion by post to his last location known to me, and de jure, he becomes a suspect. And only when he becomes a suspect, I ask the court, «Dear court, he does not appear, give permission to apprehend him in order to select a measure of restraint. Due to the evasion. That's six days, minimum».*



According to prosecutors, many of suspects want to abscond justice given the severity of sanctions for corruption crimes.

**Prosecutors:**

*«There is specifics of sanctions applied to crimes under the investigation of the NABU. This is a real sanction, without the possibility of applying a sanction below the limit. It is possible in cases of murder, other crimes. As for corruption, it is impossible. If they understand it, understand that we have evidence against them, and they understand the situation, who will come voluntarily? And even more, if the amount of stolen funds is such that you can leave the country and live for 10-15 years until the statute of limitations applies».*

*«Being the head of the enterprise, the person in three days prepares the order for a business trip until 25 December to one of countries, delegates all property, gifts, sells, does what he can and leaves».*

The opposite position on the feasibility of special grounds and apprehension in general is given further in the analysis of the prevalence and justification of apprehensions.

### 3.1.5 Prevalence and justification of apprehensions

In criminal proceedings under the investigation of the SAPO, apprehension is used quite often. In particular, in supervisory materials of criminal proceedings, we saw proof that apprehension took place in at least 41% of cases. In another 39% of the materials, we have not found any information regarding whether apprehension took place or not. Finally, only in 20% of cases we saw there was no apprehension.

**Lawyer:**

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

*«Why do lawyers prove that 72 hours have expired – to avoid apprehension? Because otherwise there are higher chances for a custodial measure of restraint. If there is no apprehension, then a judge, in my view, is psychologically more inclined to choose a non-custodial measure of restraint.*

[67] During the analysis of criminal case files, we found a case of apprehension based on a ruling of an investigating judge granting permission for apprehension. However, it was only one case.

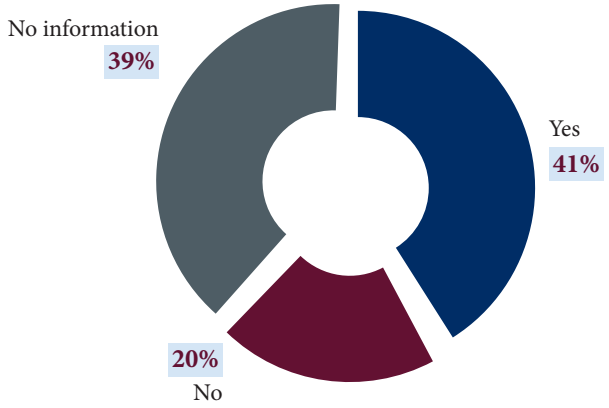


Fig. 3.4 **Did an apprehension take place?**

It is interesting that even among the SAPO prosecutors there were those who said there was no need for the widespread use of apprehension of persons under their investigation.

**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».*

According to defense lawyers, the widespread use of apprehension is often due to neglect of the requirement to justify such decision. As mentioned above, Article 208(1)(3) entails that law enforcement officials must have reasonable grounds to believe that the escape is possible for the purpose of avoiding criminal liability.

**Lawyers:**

*«...There must be factual circumstances that a person intended to escape after committing a corruption crime. However, the prosecution does not prove or verify this».*

*«They come with a search and immediately believe that you can use paragraph 3 of part 1 of Article 208 – and they have information that a person would abscond. The person has never been able to understand what kind of information prosecutors have and who provided them with this information. And the prosecutors must have justification. They must reasonably believe that a person would go into hiding…».*

### 3.1.6 The use of apprehension for tactical purposes in investigation

Lawyers state that apprehension can be used to force a suspect to show the law enforcement officials with his rash actions the direction where they can collect certain evidence crime committed.

**Lawyer:**

*«...A person was stirred up and they began to observe, where this person is going, whom he calls, he can destroy documents, etc. This is often the practice of covert investigative actions after a person has is apprehended…».*

In addition, the study found that the widespread use of apprehension, among other things, was due to not only prevent the risks of absconding or the cessation of criminal activities, but also to induce cooperation (see Chapter 4 for more details).



### 3.1.7 Prosecutor's awareness of apprehension and coordination of the decision with the prosecutor

Usually, apprehension is coordinated with a procedural supervisor in advance. At the same time, such communication is key in the relationship between a procedural supervisor and a detective and actually determines the success of the entire investigation.

**Detectives:**

*«A prosecutor at the stage of apprehension already knows the criminal case. And he knows in advance that a person will be apprehended».*

*«… Usually we present an evidence that we have at an operational meeting, the sufficiency of this evidence for apprehension and a notice of suspicion».*

Exemptions from this rule, in practice, have no prospects, because, in case the prosecutor does not approve the notice of suspicion, apprehension is meaningless. This is clearly illustrated by the following quotes from focus groups.

**Prosecutor:**

*«... The detective came, brought materials, and we told him, "You work from A to Z, then materials, and we will make a decision, but we have no crime elements at this point». When I was dining, I began to read the news that one official of A category was apprehended, and heads of local offices were being apprehended in the regions. I lost my appetite... This case was later closed; there was a decision to close…».*

**Detective:**

*«... If you do not report to a procedural supervisor and apprehend a person, prosecutors will not sign a motion, and you will have to release this person. This means that the media and the public will say, "The NABU was unproductive again».*

Another reason for early coordination of apprehension with a prosecutor is the need to have time for a preliminary agreement with a prosecutor on the notice of suspicion and a motion for the selection of a restraint measure.

**Detective:**

*«... In an economic crime, a report on suspicion does not consist of three pages; it is a lot of work. A notice of suspicion is signed by a prosecutor, which means that he will read and edit all the information. Therefore, you can have a typical situation: you detained a person, you have time, but during this time, you do not manage to prepare a notice of suspicion, to write it correctly and serve, to file a motion for a measure of restraint... Therefore, we have only this way of work, when all such actions are agreed upon».*

### 3.1.8 Determining the moment of actual apprehension of a person during a search

A common practice is the sequence of actions when detectives together with prosecutors plan to conduct a search of a person, apprehend him/her, serve a notice of suspicion and bring to a court with a motion for the selection of a custodial measure of restraint.

**Prosecutor:**

*«After the search, a person is either being notified on suspicion and detained afterwards, or notified on suspicion and detained at the same time, depending on the situation. As a rule, it is a planned implementation, search and detention after a search».*

With such a combination of measures, law enforcement officials believe that, in addition to the time allowed by the CPC for apprehending and bringing an individual before a court, they have an opportunity to work with a person also during the search.

The defenders criticize such practices and believe that detectives should indicate the beginning of apprehension at the onset of a search, not after it is completed, since the person is unable to leave the place of a search from the start. Instead, prosecutors invoke the right of an investigator or a prosecutor to prohibit any person to leave the scene of a search before its end under Article 236(3) of the CPC. They insist that such prohibition cannot be regarded as detention.

**Prosecutors:**

*«For example, I use the path when during the search a suspect obeys the instructions of an investigator or a prosecutor. Once the search is over, that person no longer obeys because the search is complete. And he is apprehended immediately».*

*«... Lawyers often ask how it is possible that an individual person was apprehended during a search at 13.00, and the search ended at 22.00 and look when the report was made. They actually miss the moment that there was an instruction to all those present not to leave the premises because there is a risk of destruction of property and, respectively, concealment of property».*

However, during one of the focus groups, a detective supported the position of the lawyers on the need to consider the person apprehended since the beginning of the search.

**Detective:**

*«... The moment the search began, he has no right to leave the room according to my instructions. So he is apprehended… We prepare a report afterwards, but the time of detention is already indicated from the beginning of the search».*



In general, according to lawyers, in many cases, when there is an incorrect indication of the date of apprehension, detectives agree to fix this date.

**Lawyers:**

*«When you ask a client, "Tell me, please, where and when you were apprehended?' he tells the time, and you say, "You recorded it wrong» – they do not make a scene».*

*«You ask, "When you were detained?" The detainee says, "At 15: 20". I say, "Write 15: 20 then". There were not scenes. I will not say it is systemic. Perhaps, they technically do not pay attention to it».*

*«I also had two cases when everything was corrected in front of me. Just clarified, very politely, as described in the report, how the apprehension happened, and everything was correct».*

## The stated above suggests that:

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 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.

## 3.2

# The role of the SAPO prosecutor at the stage of notification of suspicion

### 3.2.1 Promptness and validity of a notice of suspicion

Analysis of materials of supervisory proceedings indicates that individuals were indicted in 13% of cases investigated by the SAPO prosecutors immediately or a few days after the notice of suspicion was served (in 2% of cases, there was no time interval, and in 11%, 4-7 days had elapsed). In 4% of cases this period was 14-30 days, in 20% – 30-60 days, and in 60% – 60 days or more.

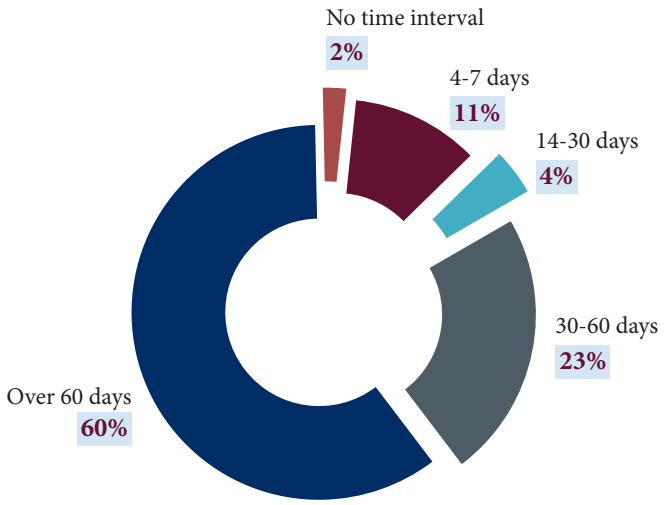


Fig. 3.5 **What is the time interval between notification on suspicion and the indictment?**

According to the SAPO prosecutors themselves, they are more cautious about postponing and serving the notice of suspicion as shortly as possible before the indictment is developed and sent to court. They see the purpose of this procedure in a different way: a notice of suspicion provides an opportunity to learn the position and arguments of a suspect; it is possible even to refuse further criminal prosecution of a person.

**Prosecutor:**

*«... After the notice, you can still get a suspect's version of the case and then even close proceedings if a person has provided justification, for example».*

At the same time, there are cases of a long-lasting collection of evidence in criminal proceedings and postponement of a notice of suspicion. Detectives explain the use of this approach by specifics of crimes under investigation.

**Detectives:**

*«...The specifics of our work is that prior to serving a notice of suspicion we can investigate a case for six or nine months, because economic crimes they are very voluminous. Sometimes we collect 30-40 volumes before serving the notice of suspicion».*

*«...Until the moment of apprehension, we have to collect such evidence that when we give it to a judge, s/he can understand that this person is really guilty».*



However, prosecutors themselves are not always in a hurry to serve a notice of suspicion, believing that it is not advantageous for tactical reasons. They claim that after a notice of suspicion is served, the other party will destroy any evidence prosecutors might have obtained.

**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».*

The presence of sufficiently large time intervals from the moment of entering information into the URPI until notification on suspicion was supported by the analysis of materials of supervisory proceedings. In particular, in 18% of cases the investigation lasted from 2 to 4 months, in 21% of cases – from 4 to 6 months, and in 32% of cases – for more than 6 months. Only in 29% of cases, these time limits were 1-2 months (7% – up to 1 month and 22% – from 1 to 2 months).

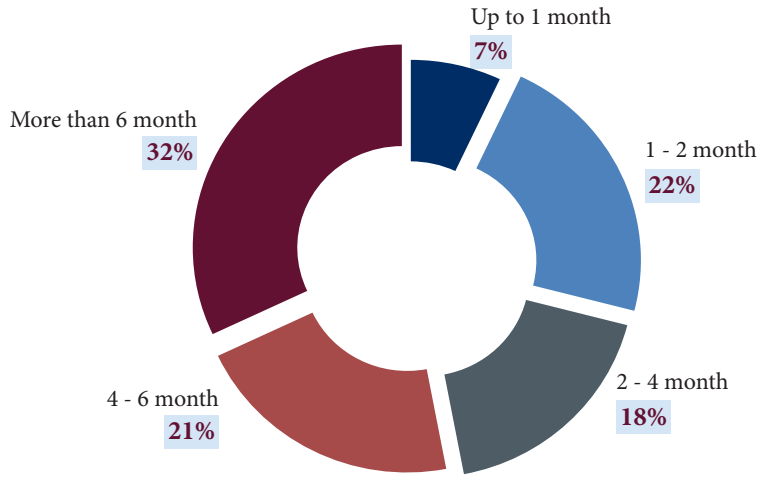


Fig. 3.6 **If aperson has not been apprehended, how much time passed between entering data on the criminal offense to the URPI and serving the notice of suspicion?**

Another reason for choosing such approach, according to prosecutors, is the significant decrease in the activity of detectives after the notification on suspicion. They argue that the approval of a notice of suspicion significantly reduces their influence on detectives who are difficult to encourage for further evidence collection.

**Prosecutors:**

*«...They believe that the moment of serving the notice of suspicion is the end.*

*«Personally, I am inclined to sign the suspicion, prepare, coordinate, while recognizing that if even after the suspicion we don't receive any evidence, I am already ready for the court with the evidence I already have...».*

Lawyers argue that sometimes their clients do not receive the notice of suspicion for years, while all this time they understand they are suspected of committing a criminal offense and detectives collect evidence referring to their involvement.

**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...».*

Such postponement of serving the notice of suspicion may somewhat impede the exercise of a person's right to defense. After all, due to the lack of procedural status of a suspect, a person does not have the opportunity to defend oneself fully. S/he, for example, cannot access the case files, submit motions, collect evidence, etc.

In such cases, only the restrictions imposed by the CPC on the possibility of applying certain measures of restraint to a suspect encourage law enforcement officers to «open up» and stop delaying the notification of suspicion.

**Detective:**

*«The status of a suspect gives us additional opportunities to implement certain security measures, in particular, the seizure of a property».*

The scope of the investigation conducted prior to the notice of suspicion may depend on the category of crime under investigation.

**Detective:**

*«As a rule, we have two large categories. One category is the receipt of unlawful benefit in the form of cash. And another big category is investigation of some financial schemes on the embezzlement of public funds or abuse of power, or something related».*

In the case of an obtainment of unlawful benefit, a person is being detained at the crime scene and, accordingly, receives the notice of suspicion within 24 hours. In complex economic crimes, however, the decision to serve the notice of suspicion takes place closer to the moment when all mechanisms and measures available without declaring the person a suspect have been exhausted.

Detectives state that they do not have the opportunity to treat the notice of suspicion purely as a reasonable assumption of a person committing a crime. They proceed from the fact that at the time of notification on suspicion they must be confident (and have evidence to convince a prosecutor) of being able to prove guilt. The final decision on serving the notice of suspicion is made by prosecutor.

**Prosecutor:**

*«... Prosecutor makes key decisions: for example, when he has enough evidence to serve a notice of suspicion».*

Often, having weak evidence, prosecutors and detectives conduct a key investigative action, the search, hoping to confirm the already prepared suspicion by the evidence obtained during the search.



**Prosecutors:**

*«Sometimes there might not enough evidence to serve a notice of suspicion to a person. But during a search of this person, the documents or items that obviously link this person to a crime can be found. We have suspected, but there was no direct evidence. You conducted a search, and after a search at his house, or in the office, or somewhere else in the cache, we found documents that are relevant, signed by other persons, or seals, or money, or statutory documents of enterprises or groups of enterprises. He is being detained, and afterwards a suspicion is served».*

*«... The search and implementation give a lot of evidence: confiscating and unlocking the phone, obtaining reports, for example, the message history is restored from messengers. And it becomes clear that he coordinated all these actions and was the organizer, and moved money somewhere. What, are we going to let him go?! Immediately after his apprehension, we serve the notice of suspicion».*

Prosecutors pay considerable attention to the validity of suspicion and the evidence at the time of communicating the evidence.

**Lawyer:**

*«… From the point of view of the preparation to justify the notice of suspicion, they do it at "B-" or "B+" level in comparison to others, they do. Therefore, there is an argument, which is difficult to refute at that stage. I had that. I cannot say that a suspicion was not sufficiently justified…».*

At the same time, even high probability of escape does not weaken the requirements in this direction.

**Detective:**

*«... For them, in this case, the sufficiency of collected evidence is in the first place, rather than the possibility of escape. And we had such cases in our practice; too, when we report that the possibility of escape of the person is high, but because, in their opinion, the evidence is not enough, the person was running away and hiding abroad. In fact, we knew that they would not agree on the suspicion, so we did not launch the apprehension».*

This approach is due to the attempt of prosecutors to protect themselves from situations where a notice of suspicion is not confirmed by evidence and the proceedings against the person have to be closed.

**Detective:**

*«...For prosecutors to close proceedings with a suspicion is similar to brining of an innocent person to criminal liability. They consider it as a negative thing, as a criminal offense».*

Therefore, cases of closing of proceedings after serving a notice of suspicion to a person are extremely rare.

**Detective:**

*«...When even in our practice it happened, the decision to close was made at a high level – at the level of the Deputy Head of the SAPO, who was part of the group of prosecutors. But prosecutors of the Specialized Prosecutor's office, who are not in an administrative position, they are really afraid of closing proceedings».*

To make a decision on a notice of suspicion, a prosecutor must thoroughly check the materials collected and prepared by a detective.

**Prosecutor:**

*«If a detective writes that losses in criminal proceedings are confirmed by an expert statement, as a prosecutor, you have the duty to open this expert statement and look what is used to support the conclusion and how it is justified. Because what is written in the expert statement may contain a number of exceptions, which is confirmed "on the condition of", or confirmed if this evidence is obtained».*

Research of regular prosecutor's offices identified a common practice of a maximum delay by prosecutors in serving the notice of suspicion and sending the indictment to court immediately after the notification. Under certain conditions, such a practice may result in violations of the person's right to defense. In particular, without the procedural status of the suspect, the person has no opportunity to realize procedural rights to full extent.

### 3.2.2 Preparing and serving the notice of suspicion

Experience shows that prosecutors generally work with drafts of a notice of suspicion prepared by detectives. According to prosecutors, to prepare a draft, detectives have a more complete array of data and documents and are more familiar with the details of the crime. Instead, the prosecutors themselves, being much more aware of the court requirements for this document, are finalizing its content accordingly.

**Prosecutors:**

*«He can prepare the text of a notice. He brings it to us or sends via e-mail. And here we make adjustments and edit, because, as a rule, the motive is not specified, or purpose, or place, or time of the crime, intentional side of the crime is not disclosed or such procedural subtleties that courts require and that detectives do not always remember...».*

*«At this stage, the role of a prosecutor is very important, because everything that a detective has summarized, a prosecutor brings to the finish line».*

**Detective:**

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

Based on the notice of suspicion finalized by a prosecutor, detectives prepare a motion for measures to ensure criminal proceedings and supplement them with the necessary evidence.

Cases of preparation of a notice of suspicion by a prosecutor are less common.

**Prosecutor:**

*«There are cases when a detective cannot do this, then, the prosecutor has to».*



**Detective:**

*«There were cases when a prosecutor himself prepared the text of a suspicion, but it is rare».*

Analysis of materials of supervisory proceedings confirms that the basis of a notice of suspicion is prepared mainly by detectives (they did so in 69% of the analyzed notices of suspicion), but in a relatively large number of cases (31%) a notice of suspicion was prepared by prosecutors themselves.

In practice, if there is proper communication, a prosecutor receives a draft of a notice in electronic form in advance with the necessary case files, which can be referred to him both in paper and in electronic form (for example, in a scanned format). He finalizes this document either by himself or via phone or e-mail and notifies the detective of the need to make certain changes.

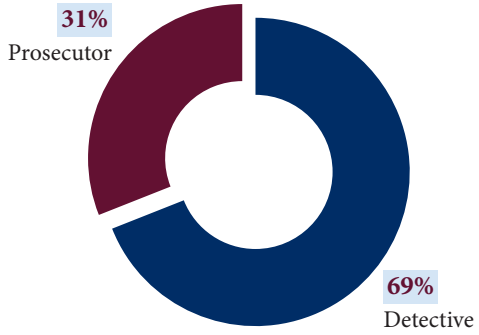


**Fig. 3.7** **Who prepared a notice of suspicion?**

At the stage of making a decision regarding the notice of suspicion, there can be misunderstandings, different visions, disagreements and conflict situations between a detective and a prosecutor. According to detectives, they sometimes refer to the Memorandum of cooperation between the SAPO and the NABU.

**Detective:**

*«… When the prosecutor says that there are no grounds for suspicion, for detention and so on, and we insist that there are grounds, 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».*

*«For example, if we do not have this Memorandum and provide a prosecutor with a notice of a suspicion, following the code, he can simply forget about the notice and never give us an answer, whether he agrees or not».*

After approving the notice of suspicion, a prosecutor, as a rule, instructs a detective to serve the notice. However, according to Article 278 of the CPC, his participation in this process is not mandatory.

**Lawyers:**

*«I have never seen a prosecutor serve a notice of suspicion or being present. Never».*

*«I had cases when the prosecutor was with the detective. But usually it is just the detective».*

**The stated above suggests that:**

1. 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.

2. 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.

## 3.3

# The SAPO prosecutor's role in the assignment/ extension and termination of the measures of restraint

The law prescribes the following measures of restraint (art. 176(1), CPC of Ukraine): personal commitment; personal warranty; bail; house arrest; remand in custody.

The current legislation of Ukraine does not provide for a separate legal regulation of activities of the SAPO prosecutors at the stage of application of a measure of restraint, but there are certain specifics. Quite often, it is due to objective specifics of criminal proceedings under the SAPO jurisdiction.

The general matters of the prosecutor acting as a procedural supervisor in the assignment/extension/ cancellation of measures are thoroughly analyzed in the Study of the role of the prosecutor at the pre-trial stage of criminal proceedings published in 2017[68].

The Study showed that in the practice of the prosecutor's office in general, and in the SAPO in particular, detention was the most common measure of restraint provided by the CPC (see Fig. 3.8).

[68] *Belousov et. a*l. "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p..pp.168-208

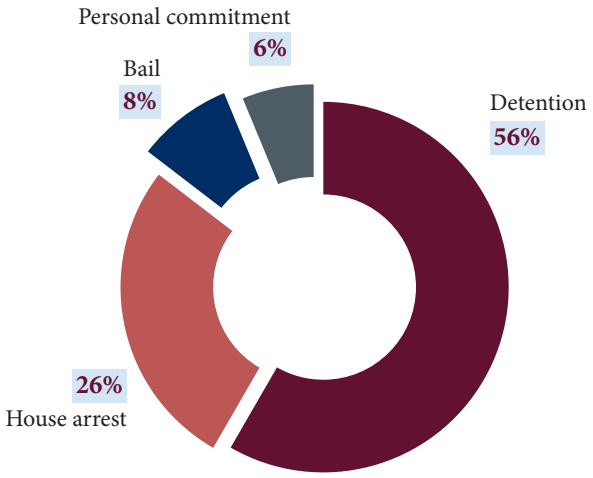


**Fig. 3.8** **Which measure of restraint is indicated in the motion?**



### 3.3.1 The role of the SAPO prosecutor at the stage of initiation of motions for the election of measures of restraint

According to Article 176(4) of the CPC, measures of restraint are applied: during pre-trial investigation, by investigating judge upon motion of investigator approved by public prosecutor, or upon motion of public prosecutor; and during trial, by court upon motion of public prosecutor.

The SAPO Prosecutor, as a rule, independently makes the final decision on filing a motion for a measure of restraint with the court.

At the same time, during focus groups, the NABU detectives noted that the active role of a detective remains, because he s/makes suggestions on the feasibility of a measure, determining its specific type, preparing a text of the motion, etc.

**Detective:**

*«... Measures of restraint we define with him... we also talk it out with them. In most cases, we find consensus, and they support the position. Sometimes they do not. We do not have much influence here – they apply for the measure of restraint, which they consider necessary».*

The text of a motion for measures of restraint is usually prepared by detectives taking into account their previous practice of cooperation with prosecutors. Accordingly, they are already aware of the requirements of the SAPO prosecutors regarding the quality and content of these documents. They enter a pre-agreed with prosecutors wording of suspicion in a motion template and justify in more detail the risks that have already been developed and proposed by a detective.

**Detective:**

*«...We usually prepare the motion. We also suggest the risks».*

This practice is generally confirmed by the statistics found in the framework of this study (Fig. 3.9). In most (63 %) analyzed criminal proceedings, the motion for a measure of restraint was prepared by a detective.

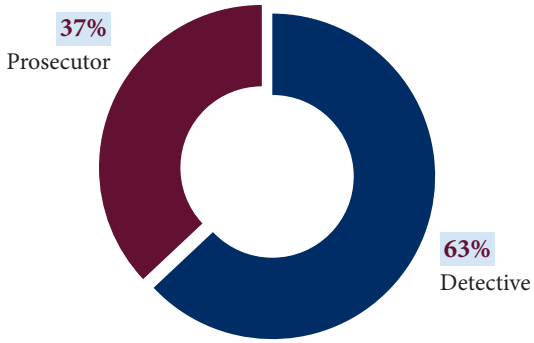


**Fig. 3.9** **Who prepared a motion for a measure of restraint?**

SAPO prosecutors also confirm the prevalence of this practice of preparing of motions for measures of restraint. Thus, during the relevant focus group, it was indicated that issues of registration and compliance with the basic requirements for the content have been developed and, as a rule, they are unchangeable.

**Prosecutor:**

*«All motions are developed and approved. They have been prepared since the beginning of work. And in fact, the remaining part is the justification…».*

Thus, in practice, draft motions to enforce a measure of restraint are prepared mainly by detectives. They also write the first version of the justification of the existing risks provided by Article 177 of the CPC.

### 3.3.2 Supporting the motion with specific evidence

Taking into account the need for a very thorough justification of the suspicion and risks in a motion to enforce a measure of restraint, Article 177(2) of the CPC contains a clear prohibition of initiating the use of a measure of restraint without the proper legal grounds. Accordingly, it is critical to confirm the grounds for the measure of restraint with appropriate materials and evidence.

As noted during focus groups by prosecutors of the SAPO, investigating judges who consider motions on measures of restraint, demand confirmation of the suspicion and risks mentioned in the motion with concrete evidence.

This study included an analysis of supervisory proceedings on this aspect. However, there is still no systematic understanding as to what evidence is usually provided, since the analyzed texts of motions noted only that materials of proceedings are attached, but in practice, these could have been any files.

At the same time, as shown in Fig. 3.10, most of the analyzed motions include references to materials confirming the circumstances specified in a motion and that are important for the investigating judge's decision.

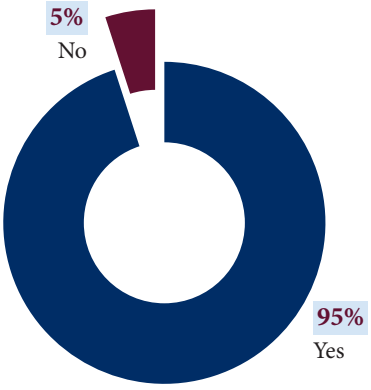


**Fig. 3.10** **Does the motion to enforce a measure of restraint contain references to materials confirming these circumstances?**

When presenting evidence, as noted by the SAPO prosecutors during focus groups, it is essential to maintain the necessary proportion in the disclosure of all available evidence in criminal proceedings.

**Prosecutor:**

*«We provide all the documents that justify the risks. We try to give the minimum documents that support our suspicion».*



Thus, prosecutors themselves admit that they provide all available evidence in support of the existing risks (see section 3.3.3), but do not disclose all evidence in support of suspicion. The prosecution has to disclose its main evidence for the future prosecution, and prosecutors try to avoid this as much as possible to ensure the effectiveness of further pre-trial investigation.

Lawyers give an example of such a situation during the focus group. In particular, prosecutors often support the motion with unsubstantiated materials, for example, obtained via covert investigative actions.

**Lawyer:**

*«When we look through the motion and annexed documents and say in court, "Sorry, a suspicion is not justified, because such facts are not confirmed". The representative of the SAPO or a detective rises and says, «And we still have covert investigative actions that prove that a person is guilty». Yes. «Why didn't you name them?» – They are not declassified yet. That is their catchphrase. What is in those covert investigative actions? Very often, that during the conduct of covert investigative actions, a suspicion and guilt of a person is not confirmed. But this catchphrase that «we still have covert investigative actions», makes an impact on the judge».*

Thus, motions for the application of a measure of restraint by prosecutors of the SAPO are justified mainly with references to materials confirming the existence of reasonable suspicion in commission of a criminal offense by a person.

At the same time, although much less often than in the practice of prosecutors of the regular prosecutor's offices, but also in the work of the SAPO, there are cases when materials (evidence) are incomplete. As a result, an investigating judge in some situations takes for granted the presence of certain evidence and actually takes it into account when considering a motion for the application of a measure of restraint.

### 3.3.3 Substantiation of risks

Application of measures of restraint, in accordance with the CPC, is possible only if there is reasonable suspicion that the person has committed a criminal offense, as well as existence of risks giving sufficient grounds to an investigating judge and a court to consider that a suspect, accused, or convicted person can carry out actions mentioned in part 1 of Article 177 of the CPC.

Taking into account these legislative requirements, the justification of risks of non-compliance by a suspect, accused with the procedural duties assigned to him or prevention of interference with criminal proceedings should be particularly careful and reasoned. Prosecutors carry the main responsibility for such justification.

With regard to this aspect of activities of the SAPO prosecutors, certain positive characteristics of the work should be noted. In particular, during focus groups, the NABU detectives praised the quality of the work of the SAPO prosecutors regarding the "elaboration of risks» in the application of measures of restraint.

**Detective:**

*«He [SAPO prosecutor – ed.] very carefully reviews all the risks. Sometimes we might discuss it, get additional certificates, materials in order to use them in the hearing for the measure of restraint. We discuss it very thoroughly with him, because it is very important».*

At the same time, lawyers during focus groups gave examples of comments on the quality of substantiation of relevant risks. In particular, there was a statement about the use of evidence artificially created by detectives in the justification of risks and the motion in general.

For example, lawyers noted that NABU detectives often create and the SAPO prosecutors "accept" analytical notes, which can be interpreted incorrectly without thorough examination.

It includes, first, limiting the suspect's ability to travel abroad, when the suspect's possible escape is justified by him/her having an international passport and history of previous trips, or even the history of his/her relatives' trips.

**Lawyer:**

*«... The classic justification of the risk of absconding is the existence of an international passport and the number of trips abroad. At the same time, there is an analytical note of the NABU, which is called «On existence of risks», in which there is information about a passport and a printed table of flights. One of my clients had a look at this note and said that there is information about other people as well. He asked who all these people were, and it turned out that they were his relatives, who also once flew somewhere, and they collected all this data. Even distant relatives that he did not even know. The table also shows the number of departures and returns and the fact that they match, and no one cares that it was a year before the notice of suspicion was served. And the conclusion is that this is the reason to believe that a person will escape».*

Another example noted by lawyers is the provision of somewhat distorted information about the property status of a suspect in order to demonstrate material conditions or, for example, to set a higher bail. Such "distortion" may happen, for instance, if a person gave (sold) the property, by submitting an extract from the register of real estate valid at the time when this person was still the owner.

**Lawyer:**

*«... I had a case when I was given a justification of the amount of bail, there were certificates stating that my client had real estate, in particular, owned a house. He had divorced two years before that, and the house was given to his wife. But they take the register at the moment in time they need, so they formed it within the period when he was the owner of this real estate, and annexed it to the motion.*

*I had exactly the same situation with cars– I open the extract and see that my client has three Porsche Cayenne, four Touaregs and five Smarts. All cars are the same and of the same colors, I start checking the license plates and it turns out that these are all cars he ever had. And the extract is made at the time of purchase. All the other "duplicates" meant that third parties resold the cars. But all these 12 cars are recorded as his property. That is, it is a deliberate falsification of facts».*

It should be noted that during the analysis of materials of supervisory proceedings provided by the SAPO in the framework of this study, the researchers found analytical notes on real estate or crossing of the state border of Ukraine. However, notes with repetitions and other visible distortions were not found. At the same time, the credibility of data in these analytical notes was not and could not be the subject of this academic research.

Prosecutors deny the fact of manipulation, but believe that they have all legal grounds to make a reasonable assumption about the presence of risks based on the evidence of regular travels abroad or the availability of sufficient resources to leave and abscond.

**Prosecutors:**

*«...There is a separate problem here, because it is difficult to prove documents confirming the risk. The risk itself is the assumption that a person can act in such a way, that the person can escape. What other document can indicate that a person might possibly hide if not a printout from the electronic database about numerous border crossings? In my opinion, this is a confirmation that he can go abroad. The lawyer says, «This is proof that he crosses the border, but it does not in any way indicate that he intends to escape». I understand that this printout will not say anywhere that the purpose of his departure may be related to absconding. But we see that he has the opportunity. For a person who does not often go abroad, this may include fears, «What will I do there, and where will I go there?» And for someone who often goes abroad, there is no problem...».*

*«...He can secure long-term residence in a particular territory. We also add such documents, and lawyers say: these are not documents».*

On the need to record changes in the place of actual residents, the arguments made by the SAPO prosecutors are generally appropriate and should be evaluated in each specific situation. However, in some cases, prosecutors perceive even an official change of place of residence as a significant risk.

**Lawyer:**

*«There is a risk, when a person changes the place of residence and officially registered it. If a person lived in Lviv, and then moved to Kyiv and registered the place of residence, they believe that this person had been absconding before».*

The problem of an inadequate justification of risks to some extent can be explained by the perception still held by prosecutors and detectives that remand in custody is like serving a sentence.

**Investigating judge:**

*«Every time we ask them to understand. Either they don't understand, or they pretend that they don't understand because it is seen from their statements in court, that suspicion is when you are a suspect, and the measure of restraint is not a punishment».*

From this point of view, bail as a measure of restraint also deserves attention. During the focus groups, lawyers commented on the prosecutors' justification of excessively high bail. In such cases, the bail can be seen as an instrument to induce (due to the person's inability to pay) the application of stricter measures (e.g. detention) by the investigating judge, or even as an element of a potential penalty. However, «justifications» are not always properly implemented.

During the focus group, lawyers gave an example where even a reference to the case law of the European Court of Human Rights was included in the motion for bail to justify the high bail amount. However, such a reference was incorrect and actually distorted the content of the Court's legal argument.

**Lawyer:**

*«... The amount of bail payment is always excessive. Moreover, in all my cases they justify the inadequate amount of bail by the case law of the European Court of Human Rights. They say*

*directly that in the opinion of the European Court, it is absolutely justified to determine bail in the amount that cannot be paid by a person. They all use the same decision Mangouras v. Spain, in which the European Court did not find a violation because they asked for bail, which was excessive for the applicant, but there was a letter of guarantee from the employer that he was willing to pay such bail. Given, the existence of a guarantee letter, the court found setting the excessive bail justified. They remove the first part of the case, leaving only the second and, of course, nobody reads the case in full. That is, prosecutors even do not know it – someone gave a flash drive and told them to use it. And all decisions on the application of measures of restraint are the same, only names change».*

Moreover, lawyers noted that, for some time, the court practice was not to use custodial measures against persons suspected of "economic crimes". However, the common practice of setting excessive bail in the motions has stimulated the courts to return to the more frequent use of detention.

**Lawyer:**

*«With struggle, in 2014-2015, there were almost no cases when people ended up in a remand prison for economic crimes. And the positive practice was destroyed by the NABU and the SAPO. Then the prosecutor's office started using the same practice, and then everyone said– if the NABU and the SAPO ask for 300-400 million, then why can't we ask for the same amount?».*

This logic regarding the use of excessively high bail rates was confirmed during the focus group with the judges. The amount of bail payment is not always justified and sometimes may not be based on the actual circumstances of the case or the real property status of a suspect. In such situations, the proposed amount of bail payment actually becomes uncontested.

**Investigating judge:**

*«This is even evident from the first motion for the application, what alternative measure they are asking to apply. Here, too, certain numbers are sky-high. And this is also a problem though the bail payment does not have to amount to damages, but in most cases they are equal... how do they determine bail for each individual…*

*They take the damages, in their opinion, collected from each individual. Then they divide it proportionally, and ask the same amount to be used as bail payment. And when they begin to procedurally ascertain it, whether a person can pay, in fact, it turns out that if set bail this high, it will be an uncontested sanction. There is no alternative. You can't pay bail».*

Thus, it can be argued that despite the rather careful attitude of the SAPO prosecutors to the justification of risks in the preparation of motions, it is also common when such justification is not always objective and appropriate in specific situations.

### 3.3.4 Presenting the motion in court

According to the practice already mentioned in the previous study[69], detectives (in other criminal proceedings – investigators), together with a prosecutor, participate in court hearings, including when investigating judges

[69] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p.,pp.168-208.

consider motions for measures of restraint. At the same time, it should be re-emphasized that participation of detectives in a trial is not provided for by the current CPC.

At the same time, based on the analysis of criminal proceedings for this research, the SAPO prosecutors are much more active than their colleagues from the regular prosecutor's offices are. In fact, Figure 3.11 clearly demonstrates that detectives are significantly less likely to be present with the SAPO prosecutor during the judicial consideration of motions to enforce the measures of restraint than investigators with prosecutors in other (general) criminal proceedings.



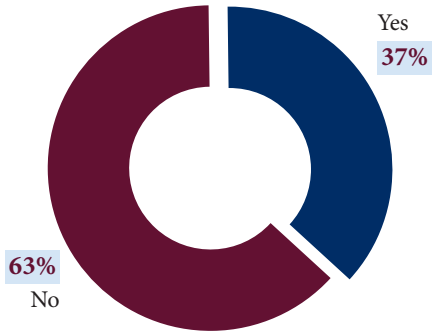


**Fig. 3.11** **Is the detetive is present when a motion for a measure of restraint is considered in court?**

The reason for such presence, as noted by detectives, is a simple practical need to promptly provide information about certain circumstances of criminal proceedings, which the prosecutor may not know or not able to use effectively. Accordingly, during focus groups, detectives generally confirmed this conclusion.

**Detective:**

*«We are present at trials. 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».*

From this point of view, detectives believe that their presence in practice sometimes might be even necessary. However, as already noted, in accordance with the CPC, a detective has no authority at the time of defending the motion for a measure of restraint in court and, in fact, is so to speak «a free listener» and an informal consultant of a prosecutor on the specific criminal proceedings. Despite this, detectives note that prosecutors can sometimes even insist on their (detective's) presence at the hearing.

**Detective:**

*«Prosecutors can insist on the presence of a detective. They explain it by the fact that the provision on the application of a measure of restraint says, «If an investigator, a prosecutor is unable to prove the existence of risks". They justify it with the fact that in court session not only a prosecutor proves guilt, but also an investigator… Therefore, when they say that it is necessary, we also go with them to a court. We do not say "no" to them in this case».*

Naturally, defense should draw attention to cases of participation of a detective in the hearing without proper grounds. Normally, a defense attorney does not leave a detective's presence unmentioned. During focus groups, prosecutors of the SAPO brought vivid examples of such situations.

**Prosecutors:**

*«As a rule, at the hearing we sit with the detective on the prosecution side. The defense immediately states to the court that it is necessary to remove the detective. The court instructs the detective to take another seat in the courtroom. The defense sees it as a great psychological victory...».*

*«As a rule, a detective is not sitting on the side of the prosecution. He is sitting in the room. If necessary, we say, if the defense allows, we tell the court that even the detective is present, and he can confirm certain facts. And he stands up and says, «Yes, I can confirm». But this is more a psychological than a legal move».*

It should be emphasized that even when detectives are present along with the SAPO prosecutor during the judicial review of a motion to enforce a measure of restraint, their activity is extremely low. That is, the key person presenting the motion is still the SAPO prosecutor.

**Detective:**

*«... Judges usually talk to prosecutors only. There have been isolated cases when the judge, mistakenly, asked a detective about his opinion, but usually the position in a court is defended by a prosecutor himself».*

This situation is also confirmed by the analysis of criminal proceedings conducted within the framework of this study. Fig 3.12 unambiguously confirms the conclusion that the SAPO prosecutors are much more likely to defend the motion before the investigating judge compared to prosecutors in other (regular) criminal proceedings.

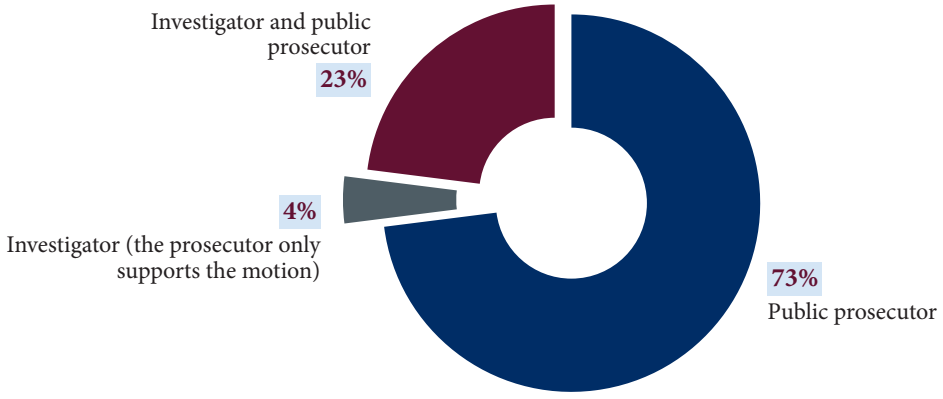


**Fig. 3.12** **Who provided arguments in favour of the measure of restaint before the investigating judge?**

Reaction of the defense not only to the presence of a detective, but also to his active participation (presentation) in providing arguments (justification) of a motion for a measure of restraint, is usually sharp and critical. During the focus groups, the SAPO prosecutors gave various examples from practice.

**Prosecutors:**

*«The defense may draw attention to the fact that the detective is not a party that can file a motion for the application of a measure of restraint. Therefore, there is no legitimate reason to give him the floor...».*

*«... The lawyer says, "Dear court, let us determine the legal grounds to listen to the testimony of this person. We have no reason to listen to him. If we want to question him as a witness, please...».*

Investigating judges also confirmed these arguments during the respective focus groups. They noted that detectives do not have the proper procedural status for active participation in the consideration of a motion to enforce a measure of restraint. As an exception, there are situations when the issue or problem is directly related to a particular decision or action of a detective.



**Investigating judge:**

*«Detectives in cases where there is a procedural supervisor of the SAPO, even if they are present at the meeting, they are not allowed at all, because the SAPO fully covers the function of the prosecution during the consideration of motions.*

*The only moment when detectives are allowed to intervene, is when a complaint relates directly to a decision of the detective, then – yes, the detective is present, he is an active participant and he justifies his position».*

Regarding the position of the SAPO prosecutors on this issue, in addition to other things, they engage detectives to participate in court also to ensure that they (detectives) can clearly see the result of their activities and have a clear idea of problems associated with the documentary preparation of a motion and the further prospect of organizing a pre-trial investigation in a specific criminal case.

**Prosecutor:**

*«It is useful for him to be in court, so that he can see what is happening there, what is being asked, what is being demanded. It is useful for him to see, so a prosecutor will not be blushing when a detective does not enclose all supporting documents to a motion, or makes an unreadable copy, or only some part of the interrogation report is present and another one is missing, then the evaluation of these documents begins, and half of these documents are irrelevant. It is useful for them to be there, to see how to be in the shoes of a prosecutor».*

Moreover, during interviews (questionnaires), the SAPO prosecutors themselves took a controversial position regarding the presence of a detective during the consideration of motions for the application of a measure of restraint by court. Figure 3.13 clearly demonstrates that interviewed prosecutors of the SAPO mostly support the idea of detective's presence.


**Fig. 3.13** **Do you think that the detective has to be present when a motion for a measure of restraint is considered in court?**

From this point of view, answers of the SAPO prosecutors to the questionnaire on the detective's role during consideration of the motion by court, provided the detective is present, are even more eloquent (Fig. 3.14). Half of the prosecutors interviewed noted that a detective, if necessary, provides the court with an explanation of the circumstances of the case. A little less – 23% of respondents believe that the detective helps the prosecutor justify the motion. At the same time, only 11% of respondents noted that the detective justifies the need for a measure of restraint, and a prosecutor supports a detective's position. As a result, it can be noted, that there is a trend for a greater activity of the SAPO prosecutors in court during consideration of motions to enforce a measure of restraint in court. After all, the indicators of this type in the Study relating to the prosecutors of regular prosecutor's offices are somewhat different and illustrate a more significant role of the investigator in comparison with the prosecutor.

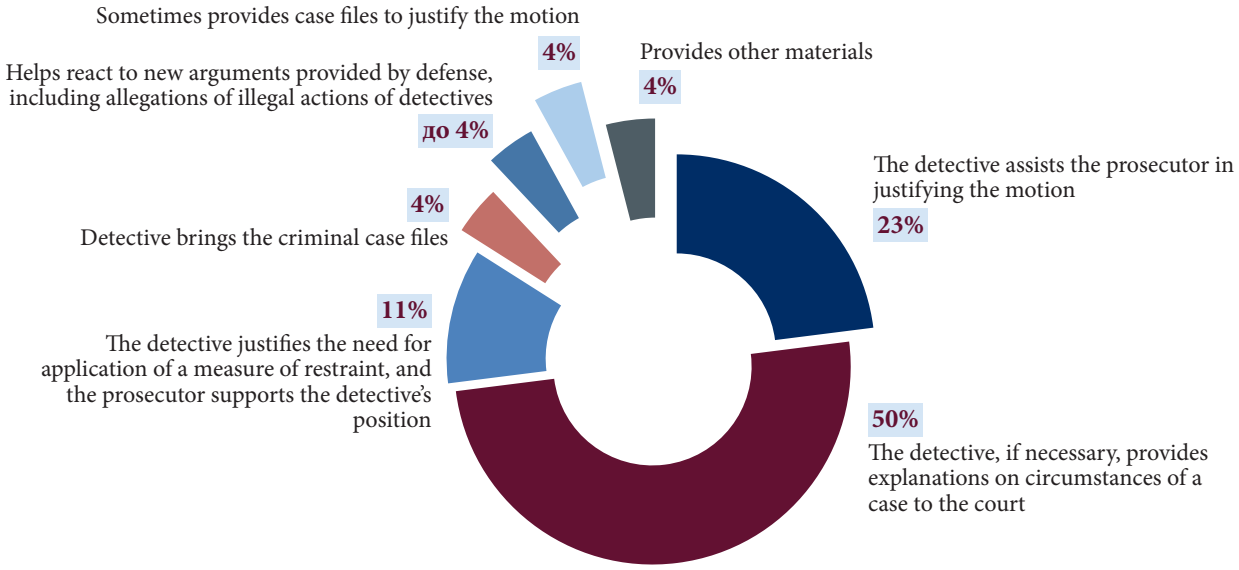


**Fig. 3.14** **What is the role of a detective during consideration f a motion for a measure of restraint in court?**

Special attention should be paid to the general characteristics of the work of the SAPO prosecutors by investigating judges who have considered their motions for measures of restraint. Judges note higher level of professional training, diligence and activity of the SAPO prosecutors when compared with the prosecutors of the regular prosecutor's offices.

**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.*

*When they approve the motion, everything is reflected point by point. Another question is that we may not agree with decisions on certain risks, but when compared with other prosecutors, for example, district prosecutors, in this case, the SAPO prosecutors are more professional, they pay more attention to complying with the law and keeping their speech based on the motion during a speech. It has never happened, that prosecutor stood up and simply said, "I support the motion".*

Thus, in the activities of the SAPO prosecutors at the stage of defending the motion to ensure measures of restraint in court, there is still the practice of involving detectives. Moreover, in some cases, detectives are

also involved in justifying the motion before the investigating judge, which is not provided for by the current procedural legislation. At the same time, such cases are less likely than in the work of the prosecutor's offices in general, at least the study suggests so.

### 3.3.5 Specifics of applying house arrest



House arrest, as was already noted, is a rather common measure of restraint. Of course, it is not as frequent as remand in custody, but it is still significantly more common than other measures. As seen in Fig. 3.15, almost a third of criminal proceedings analyzed during this study, 27% of cases, involved house arrest, which demonstrates the significant prevalence of this measure over others (except detention, of course).

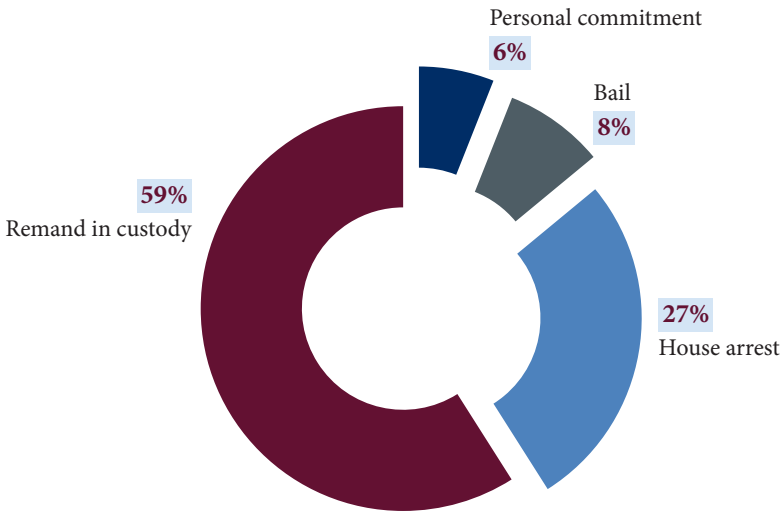


**Fig. 3.15** **Which measures of restraint are mentioned in the motion?**

During focus groups, the SAPO prosecutors also expressed the view that they were taking measures to change the existing practice of a significant quantitative prevalence of remand in custody over other restraint measures. In such situations, as a rule, they resort to the use of house arrest.

**Detective:**

*«We have 50 /50. House arrest is at the same level as detention. We do understand that there is no need to apply for a detention ...».*

Moreover, in some cases, the proposal to use house arrest as opposed to detention is presented to suspects as a «bonus» for cooperation with the investigation.

**Lawyer:**

*«They just say, «You testify – you get a house arrest…*
*... And if there is no cooperation, a person will be detained».*

Despite the prevalence of this measure, there are problems with its implementation. In particular, Article 195 of the CPC provides for the use of electronic means of control based on a decision of an investigating judge or a court to apply a non-custodial measure of restraint with the corresponding duty imposed on the suspect. The use of electronic means of control entails attaching a device to the body of a suspect/accused in order to track and record the person's location.

Despite the fact that Article 195(4) of the CPC prohibits the use of electronic means of control that significantly interfere with person's regular way of life, cause significant inconvenience in wearing, the lawyers mention serious problems a suspect is facing when using these means.

For example, the most common problems with "bracelet" means of control mentioned during focus groups included: malfunction, frequent repairs even during the application of measures or restraint, unclear or unreliable signals coming from this device etc.

**Lawyer:**

*«...The functioning of these bracelets unpredictable, they fall apart or do not switch on – it's a madhouse...» They are not available and a person can be brought in three-four times to put a device on, technicians have to come day after day to fix it, because it gives signals all the time. It is like putting a person in a cell at night turn the lights on from time to time. It is the same with this bracelet if you take a closer look. But no one can figure out how the bracelet works. It is a mockery».*

One lawyer noted that the biggest problem are the dysfunctional bracelets that send false signals of regime violations. This leads not only to the constant stress for the suspect, but also to a lot of extra organizational work for the law enforcement officials.

**Lawyer:**

*«Yes, it [electronic means of control – ed.] breaks all the time, gives false signals – in most cases it is a signal of a violation of the regime».*

Another important issue is taking into account all life circumstances of a person when applying a measure of a restraint in the form of house arrest. After all, even this relatively easy way to restrict the freedom of movement can significantly affect the realization of vital needs.

Thus, during focus groups, prosecutors of the SAPO gave an example when a suspect's situation was taken into account and the rigid measure of restraint, even in the form of house arrest, was not supported though proposed by detectives. Moreover, other suspects in this case were subjected to remand in custody.

**Prosecutor:**

*«... The suspect in the same case is the person who has an international passport, but she did not leave anywhere, lives in a dormitory, has two children... She won't leave the children, she has nothing to go with... we called her according to the prescribed manner, conducted a search, invited her, served a notice of suspicion the way we planned... everything went fine».*

In another example given by the SAPO prosecutors, personal circumstances were also taken into account, in particular, a milder form of a restraint was chosen because the suspect had children – house arrest during the night rather than round-the-clock.

**Prosecutor:**

*«... I had the same story. I referred to the existing circumstances... we wrote about a house arrest during the night only because we referred to the fact that there were children».*

Thus, the initiation of the use of a house arrest as a measure of restraint by the SAPO prosecutors actually becomes an alternative to the use of a more severe restraint in the form of detention. At the same time, the quantitative indicators of its application still differ significantly from the other types of measures, such as a personal commitment or guarantee. Detectives and prosecutors, taking into account the nature of house arrest as a restriction of the freedom of movement, try to consider the personal circumstances of a suspect in each particular situation.



### 3.3.6 Changing and extending a measure of restraint

According to Article 200(1) of the Criminal Procedure Code, public prosecutor, investigator upon approval of public prosecutor may apply to the investigating judge, court for changing a measure of restraint.

This tool of the criminal process is intended to provide an opportunity for an investigating (detective) prosecutor to respond promptly to the circumstances of the particular criminal case. In general, the law allows for both the application of stricter measures and the easing of restrictions on a suspect. In this study, criminal case files mostly included motions to apply a more lenient measure of restraint (Fig. 3.16).


**Fig. 3.16** **The motion concerns the need to replace of a measure of restraint**

The issue was also discussed during focus groups with the SAPO prosecutors, detectives and lawyers. There were no real examples of initiating a change to a more lenient measure of restraint, but they did not deny the existence of such practice in general. Participants also noted other cases of the actual «easing» of a measure of restraint.

**Prosecutor:**

*«In our experience, the prosecutors did not apply for it. But there were cases when we simply did not extend the measure of restraint. All the possible risks were exhausted. We were just leaving the person. We saw that he was cooperating with the investigation. Thus, there is no need for a measure of restraint».*

From this point of view, it is important to look at the extension of the most severe measure of restraint, i.e. remand in custody. According to Article 199(3) of the CPC, in addition to information necessary for an initial request for a restraint measure, a motion to extend custody shall include description of circumstances which show that the stated risk has not decreased or that new risks have emerged, which justify committing to custody; as well as description of circumstances which obstruct completion of the pretrial investigation before expiry of the previous ruling to commit to custody.

The entity initiating the change or extension of a measure of restraint should take into account all these requirements when preparing the text of the motion. Figures 3.17 and 3.18 provide a clear illustration of the key role of the SAPO prosecutors at this stage, as well as in the preparation of the «primary» text of the motion. However, there are cases when detectives prepare such motions. This proves that most of the problems, referred to in the previous chapters on the preparation of the "initial" motion to enforce a measure of restraint remain relevant at this stage, although there are certain specifics.

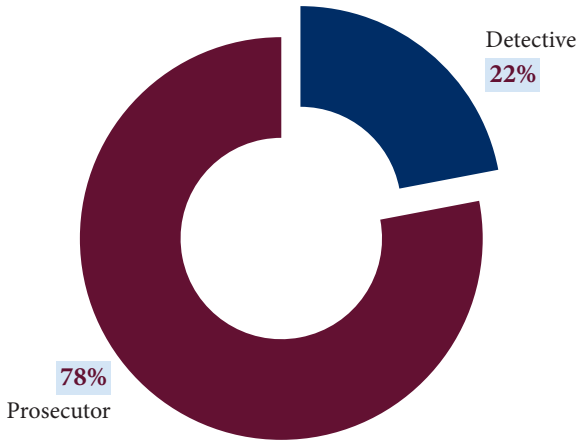


**Fig. 3.17** **Who prepared the motion for the extension of a measure of restraint?**

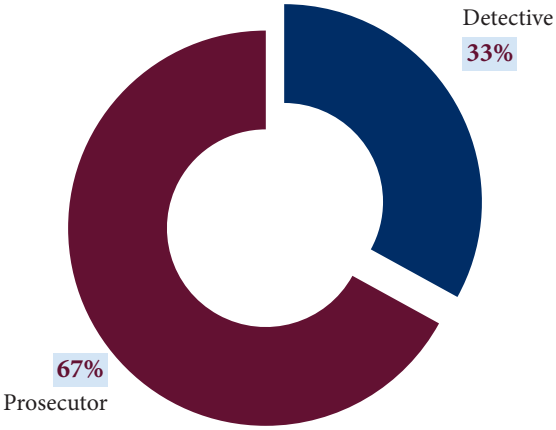


**Fig. 3.18** **Who prepared the motion to replace the measure of restraint?**

These specifics include the absence in some cases of a proper justification of circumstances indicating that the claimed risk has not decreased or there are new risks that justify the person's detention, as well as the presentation of circumstances that prevent the completion of a pre-trial investigation before the end of the previous detention order. As shown in Fig. 3.19, when applying to the court with an extension of measure of restraint, prosecutors do not always have a new justification for risks. Mainly, this motion repeats the text of the original motion to enforce a measure of restraint.

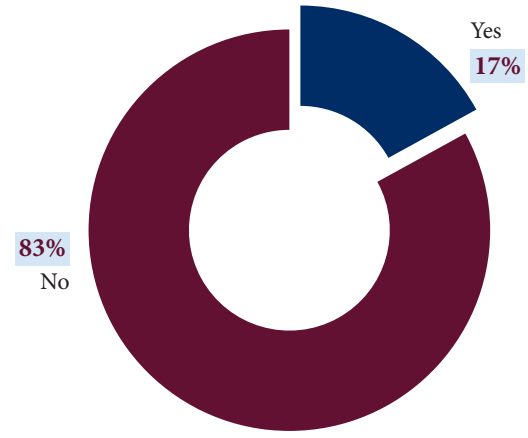


**Fig. 3.19** **Does the motion to extend the custodial measure of restraint contain explanation of circumstances indicating new risks justifying detention of a person?**

Lawyers also confirmed existence of these examples in practice during focus groups.

**Lawyer:**

*«...New risks are not justified. Just repeating the same thing they said before. And extending it automatically. This is from my practice.*



Such situations were also identified during focus groups with judges. For example, it was noted that there is a lower quality of motions to extend measures of restrain, which can be explained by objective factors, because a person is already subjected to a certain measure, and it is difficult to prove (substantiate) the existence of new additional risks entailed by the Article 177 of the CPC. It is also difficult to justify the continuing threat (relevance) of previously substantiated risks adequately.

**Judges:**

*«Extension of the measure of restraint is troubled. And there are more problems with each extension, not the first, not the second, with each subsequent extension.*

*While justification of suspicion can be added to this motion from the evidence, the risks, in theory, are lower because the person is in custody, and not all witnesses have been questioned».*

At the same time, the study also recorded cases where insufficiently justified motions were not granted/fully granted by investigating judges. During a focus group, the lawyers gave an example when the investigating judge did not grant the relevant motion of a prosecutor and applied a more lenient measure of restraint.

**Lawyer:**

*«...The courts do not always extend. I had cases when the SAPO came with a custodial measure of restraint … Based on inquiries to the police at the location of this person, I received the characteristic: whether violations were recorded, whether the person properly fulfilled duties.... And based on these grounds, the court changed the measure of restraint to a softer one».*

Thus, changes and extensions of the measure of restraint are characterized by generally the same problems as the "original" motions to enforce such measures. However, it should be noted that the level of justification of such motions is somewhat lower, which may be due to certain situations and objective circumstances.

## The stated above suggests that:

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.

## 3.4

# The SAPO prosecutor's role in application of other measures to ensure criminal proceedings

### 3.4.1 Specifics of the measures to ensure criminal proceedings in relation to corruption offences

As with measures of restraint, it should be noted that, in general, the role of the SAPO prosecutor in ensuring criminal proceedings is identical to that of prosecutors of regular prosecutor's offices in the exercise of procedural guidance in relation to this procedural action. These issues are described in detail in the Study published in 2017[70].

To demonstrate the common aspects and relevance of the main findings for this study, we should demonstrate, perhaps, the most relevant problem at the stage of the application of measures to ensure criminal proceedings– preparation and justification of the motion. In the framework of this study, the SAPO prosecutors also filled out a questionnaire, which also included questions on the frequency of independent preparation of motions on application of measures to ensure criminal proceedings that are different from measures of restraint.

As Fig. 3.40 clearly demonstrates, the overwhelming majority of the respondents noted that they prepare such motions in some cases. Only 9% of the respondents indicated that they prepare such motions on their own in most cases. Taking into account the volume and specificity of the work of the SAPO prosecutors, as well as their total number, it is possible conclude that this indicator correlates with the same indictor characterizing the work of all prosecutors exercising procedural guidance in regular cases.

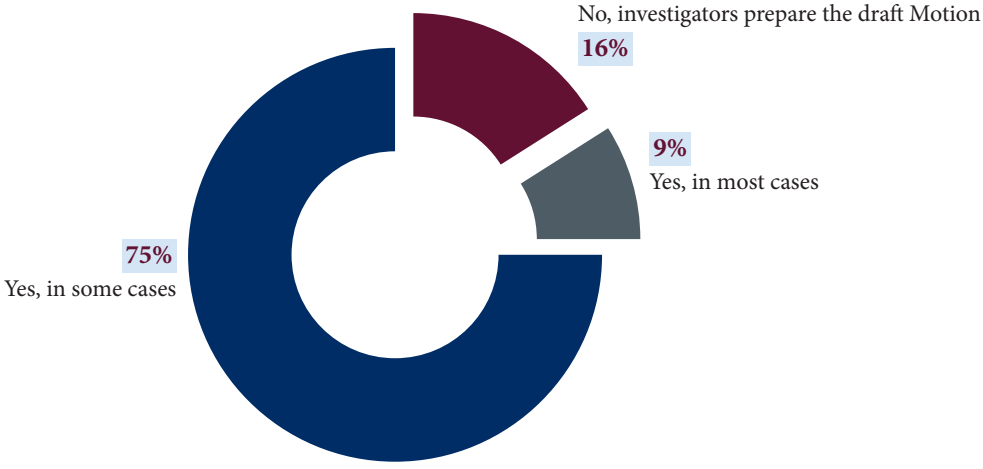


**Fig. 3.20** **Do you personally prepare motions for measures to ensure criminal proceedings?**

[70] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p., pp.168-208

Another, quite clear confirmation of commonalities with the general Study findings is the attitude to prosecutor's participation in hearings on the motion to enforce measures to ensure criminal proceedings. For instance, Fig. 3.21 shows the tendency revealed in the previous study, when prosecutors often believe that detective's presence in court is sufficient, and the presence of a prosecutor is not so important.

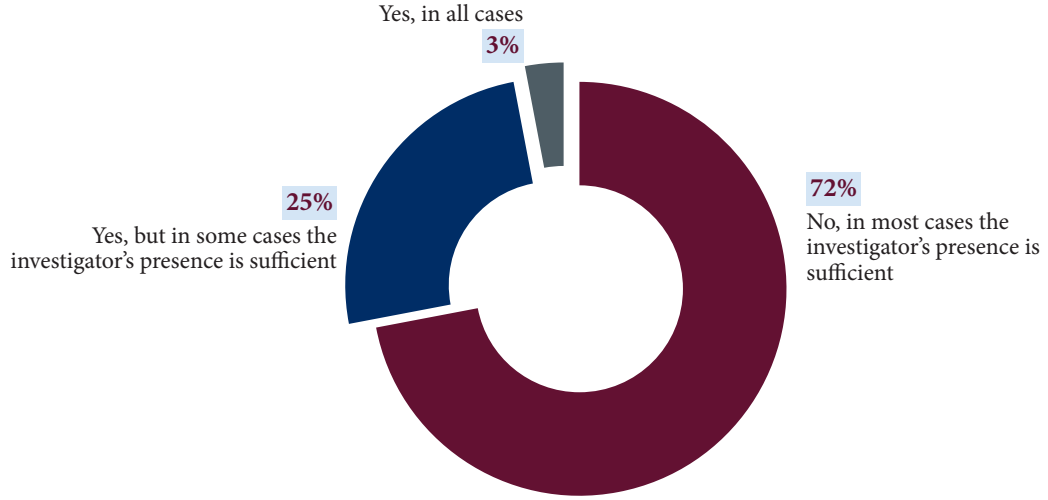


**Fig. 3.21** **Do you think that the prosecutor has to be present in court during consideration of a motion for other measures to ensure criminal proceedings?**

Given the nature of crimes, in criminal proceedings conducted by the SAPO prosecutors, attention should be paid to a particular measure to ensure criminal proceedings, i.e. seizure of property.

Within this research, the analysis of materials of criminal proceedings from which it is visible (Fig. 3.22) that the seizure of a property is also a common measure to ensure criminal proceedings. It seems that this measure most clearly demonstrates the effectiveness of the SAPO prosecutors as procedural supervisors at this stage of criminal proceedings.

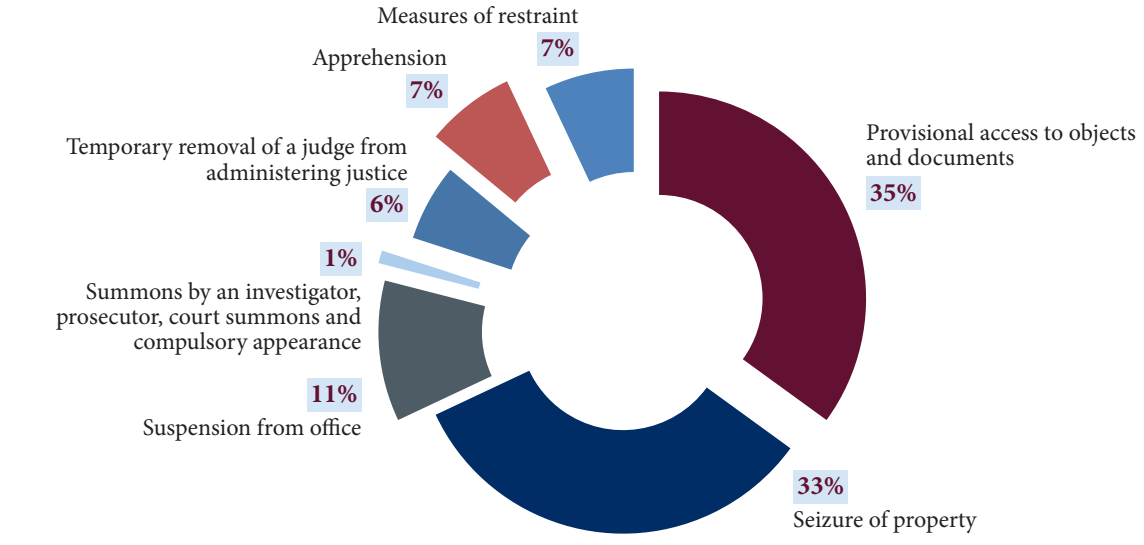


**Fig. 3.22** **Which measures listed below were applied?**

At the same time, it is necessary to take into account the specific procedure for a seizure of property prescribed by the law. According to Article 170(9) of the CPC, in urgent cases and solely for the purpose of preserving material evidence or ensuring the possible confiscation or special confiscation of property in criminal proceedings concerning grave or particularly grave crime, based on the decision of the Director of the NABU (or his/her Deputy) approved by a prosecutor, a preliminary seizure may be imposed on the property or funds in the accounts of individuals or legal entities in financial institutions. Such measures are applied for up to 48 hours. Immediately after such a decision, but no later than within 24 hours, a prosecutor shall apply to an investigating judge with a request to seize the property.

According to the SAPO prosecutors, in criminal proceedings, this procedure is extremely important to prevent withdrawal of assets that are subject to confiscation. That is why they confirm the use of this procedure and its effectiveness.

**Prosecutor:**

*«... Two criminal proceedings were recently sent to court, where we actively used this feature of the CPC and imposed seizure pursuant to an order of the Director of the NABU approved by the prosecutor. And this seizure had been valid until the motions to seize certain assets were submitted. And it gave the results as from the moment of a search, apprehension of a person, notification of suspicion and application of a measure of restraint, the law provides a three-day term».*

At the same time, it should be noted that case files analyzed in the framework of this study revealed an extremely small number of cases when provisional seizure of property under Article 170(9) of the CPC was applied (Fig. 3.23).

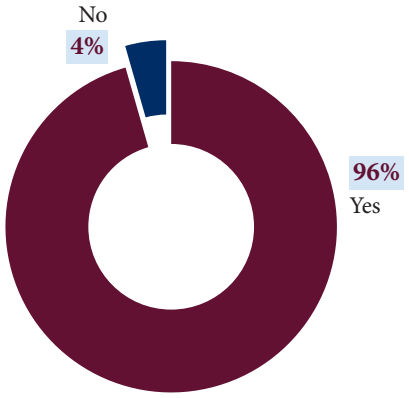


**Fig. 3.23** **In cases of the seizure of property, was preliminary seizure under Article 170(9) of the CPC applied?**

Participants of focus groups provided examples where the fate of the property to subject to seizure must be decided within hours or even minutes. For example, during discussion, the SAPO prosecutors mentioned the seizure of property stored in a safe deposit box. The inability to respond quickly and conduct seizure in such situations usually results in losing the chance to seize the property.

**Prosecutor:**

*«... We were unable to deliver the ruling physically to one of the addresses. It was one ruling regarding the bank account, another one – regarding real estate, and another one – on the deposit box. We had information that a person had a safety deposit box. We arrived to the bank at the end of the working day, and the bank was already closed. The next day we went to the bank again, but not in the morning. And in the morning someone came there and emptied the deposit box».*

Procedure under Article 170(9) of the Code of Criminal Procedure is also relevant because judicial procedure may cause delays in the consideration of a motion and the decision of the investigating judge. In addition, the delay is possible if the ruling is appealed.

**Prosecutor:**

*«We seized [the property] according to the ruling of the Head of the NABU. Next, we applied to seize the property on the basis of a decision of an investigating judge. And the ruling of the investigating judge was appealed. And appellate court revoked the ruling and returned the case for re-trail on formal ground … We informed the press that there was preliminary seizure, and that asset was not alienated. It was a trick, and it worked. And if there was no order, the ruling would be revoked and the arrest would not be imposed».*



Regarding the application of measures of provision of criminal proceedings in the work of the SAPO prosecutors, the procedure for preliminary seizure of property is very important. At the same time, as it was revealed in the framework of this study, it is not very common.

### 3.4.2 Substantiation and content of motions for the seizure of property

According to the CPC, seizure of property is measure to ensure criminal proceedings aimed at preventing the possibility of disappearance, loss of or damage, conversion or alienation of the property concerned. Seizure of property means temporary deprivation of the possibility to dispose of certain property by a ruling of the investigating judge or court, until revocation of such attachment of property, according to the procedure established by this Code.

According to Article 171(1) of the CPC, public prosecutor or investigator upon approval of the public prosecutor and, with a view to securing a civil action, also a civil plaintiff may file a motion for the seizure of property with investigating judge or court.

At the same time, the practice of the NABU detectives and the SAPO prosecutors proves that detectives who initiate regular motions for the seizure of property usually support them in court. Prosecutors enter the process, as a rule, in cases where they anticipate serious opposition from the defense in court, cases of appeal and during consideration of defense applications to revoke the seizure.

**Prosecutor:**

*«The seizure of property is mostly conducted by detectives…*

*If the seizure is problematic, then we come in... If there are appeals of decisions regarding the seizure, then prosecutors deal with it... Or revocation of seizure, a motion…*

*In both the appellate court and in case of the motion to revoke the seizure, when the party has already lost the appeal, it is again about the revocation. He thinks that once again he will go and revoke the seizure, a prosecutor goes and defends this position, that it is lawful and correct».*

The problem at this stage of criminal proceedings is the possibility to consider the issue of the seizure of property in the absence of the owner. It is interesting what the prosecutors think about imposing the seizure of property to ensure criminal proceedings in the absence of the owner.

During the survey of the SAPO prosecutors within the framework of this study (Fig. 3.24), the answers were split equally. Half of prosecutors of the SAPO noted in questionnaires that it is definitely better to consider

motions for the seizure of property is without informing the owner, but the other half is convinced that this is advisable only in certain cases. It is important that, in general, the majority of the SAPO prosecutors support the effectiveness of this method of the application of the seizure of property as a measure to ensure criminal proceedings.

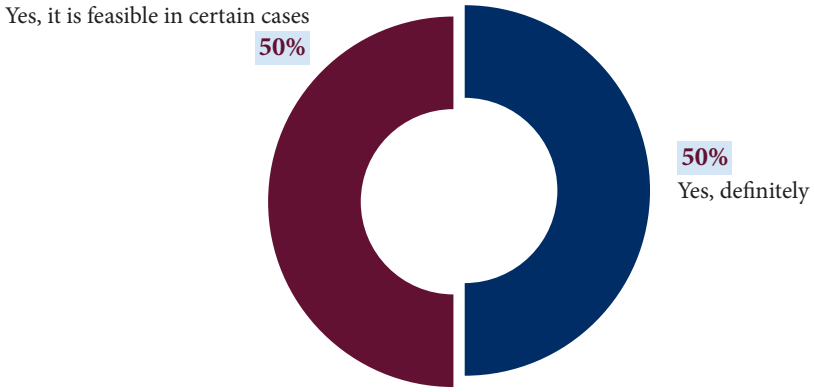


**Fig. 3.24** **Do you think that it is better to consider the motion for property seizure without notifying the owner??**

At the same time, the motions quite often justify the feasibility of imposing the seizure of property in the absence of the owner. As shown in Fig. 3.25, the feasibility of considering the motion in the absence of the owner was justified only in 18 out of 55 analyzed cases where the seizure of property was applied.

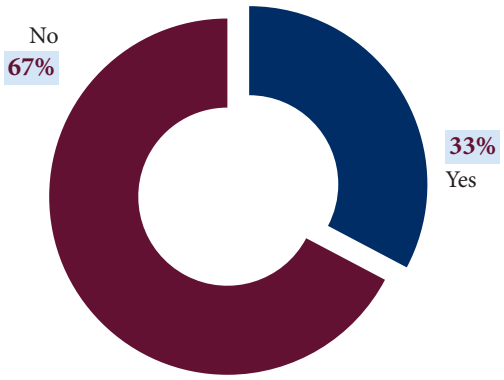


**Fig. 3.25** **Was the feasibility of considering the motion in the absence of an owner explained in case the seizure of property was applied?**

The NABU detectives who took part in focus groups within the framework of this study shared a similar opinion. As the main argument in favor of imposing the seizure of property in the absence of an owner, they generally identify the need to preserve the property, i.e. protect it from destruction by the owner, withdrawal of funds from the account, etc.

**Detective:**

*«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».*

After all, such an approach, on the one hand, allows prosecutors and investigators to prevent destruction of property, and, on the other hand, deprives the owner of the opportunity to monitor the observance of their own rights at this stage. Responding to this remark about the restrictions and possible violations of human rights, detectives in focus groups noted that they try to use this tool only in exceptional cases.

**Detective:**

*«...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».*



However, according to lawyers, the seizure of property, as well as a detention, is often used by detectives and prosecutors as a tool of coercion to cooperate.

**Lawyer:**

*«It is easy to seize. Try to get it back. «If you cooperate with us, maybe you'll get it back».*

There is also an element of surprise, resulting from the fact that the motion for the seizure of property is often considered almost immediately after the application of the measure of restraint. This limits, for example, the ability to prove that part of the seized property does not belong to the suspect or vice versa – belongs to other persons and has no relation to a suspect. This aspect was highlighted by lawyers, who, among other things, gave certain objective prerequisites for the consideration of relevant motions in the absence of an owner.

**Lawyer:**

*«...Often the next trial is on the same day, in 30 minutes or an hour – the seizure of property. So little time that it is not always possible to summon the same owner or even identify [in the cases where the seized property does not belong to a suspect – ed.]... if the property is seized from the house where the family or several generations live, and the property belongs to the mother, daughter, grandmother, etc., and not always there are supporting documents to show who the owner is. And if the person lives in Lviv region, Rivne region or Luhansk region, it is simply impossible to summon them. Thus, seizure is automatically imposed, and that is it.*

Thus, the application of measures to ensure criminal proceedings in the form of the seizure of property in the activities of prosecutors of the SAPO is often accompanied by their insistence on the consideration of relevant motions in the absence of the owner. Such practice in some situations may entail significant restrictions and possible disproportionate violations of property rights. At the same time, in some cases, this method of seizure of property can be objectively justified, given the specifics of crimes investigated by the NABU detectives and the SAPO prosecutors.

### 3.4.3 Disproportionate restrictions and abuse of property rights

The most problematic aspect of application of measures to ensure criminal proceedings is the possible abuse by law enforcement officials in the initiation and application of such measures. Such problems were also identified in the previous study on the activities of prosecutors of the regular prosecutor's offices exercising procedural guidance.

A vivid illustration of the abuse of procedural powers is found in concrete cases where the seizure of property was used as an instrument of abuse by detectives and prosecutors of the SAPO.

Here, the most important issues include the actual rather than legal seizure of property. These are cases where the property has not been subject to official seizure as required by circumstances of criminal proceedings, but it remains effectively seized. For example, these are cases when other property, in addition to that indicated in the ruling of an investigating judge, is seized without an authorization of the seizure.

During the focus group, judges mentioned cases where the property seized during the search was not returned to the person while no formal seizure was initiated.

**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 problem of returning the already seized property is even more complicated. Lawyers mention that even with a ruling of the judge to return the seized property, it is extremely difficult to enforce this ruling.

**Lawyer:**

*«Even if there is a ruling of an investigating judge to return the property, it is very difficult to take the property back... Judges do not prescribe the deadline execution, the Code does not provide when they have to fulfill it... Even if there is a court ruling... They say, «Let's carry out some investigative actions, reenactments, something else – the leadership told them not to return". Therefore, they blackmail the defense party».*

In the previous study on the role of the prosecutors of regular prosecutor's offices, special attention was paid to the problem of the failure to return the seized property and the passive role (and in some cases even inaction) of prosecutors with respect to such cases of violation of property rights.

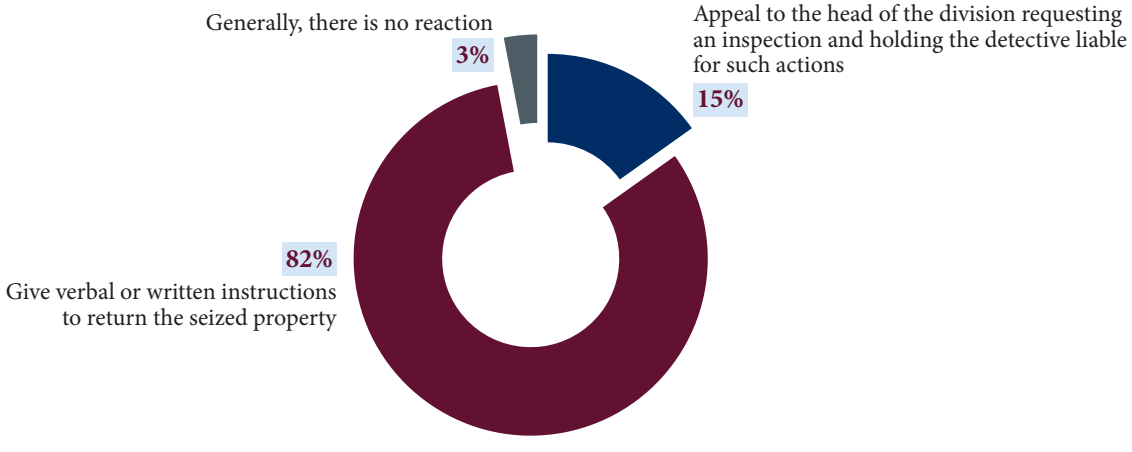


**Fig. 3.26** **How do procedural supervisors react to the detective's failure to return the property after the seizure of property has been revoked?**

As for the SAPO prosecutors, they, in general, without denying the existence of relevant facts, claim that they use the necessary procedural measures to remedy such situations.

Fig. 3.26 shows a clear picture, when 27 of the 32 SAPO prosecutors interviewed provide verbal or written instructions to return the property if the detective failed to do so after the revocation of the seizure of property. At the same time, only 5 answers mentioned addressing the head of the division asking to conduct an inspection and hold the detective responsible for such actions (inaction).



Another important issue is the prevalence and frequency of the practice of seizing property (belongings) which is not indicated in the ruling on property seizure. For example, the SAPO prosecutors responded to a survey question about the prevalence of such practice in the following manner: 9% noted that it is quite common, and 66 % said it was very common (Fig. 3.27).

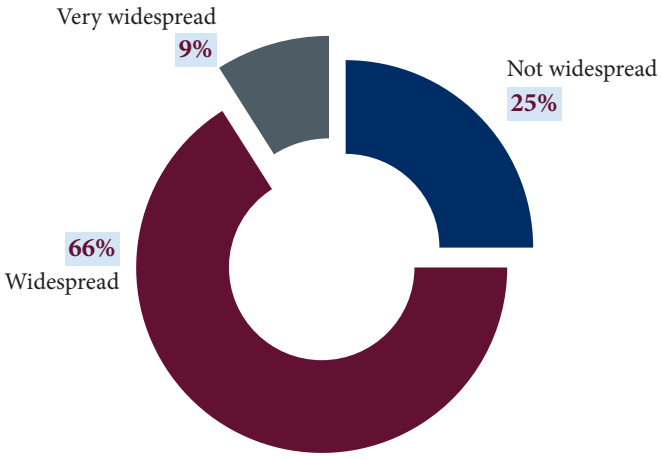


**Fig. 3.27** **How common is the practice of seizing property (belongings) which is not indicated in the ruling on property seizure?**

Thus, we found excessive use of procedural powers of the SAPO prosecutors in the application of the seizure of property and an actual attachment of property. At the same time, the cases of failure to take prompt and appropriate measures to remedy the situation and protect the property rights of a person are critical.

## The stated above suggests that:

1. 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).
2. 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.
3. 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.

## 3.5

# The role of the SAPO prosecutor in collection of evidence

### 3.5.1 Perception of the prosecutor's role at the stage of evidence collection

Taking into account the transformation of the role of a prosecutor in a pre-trial investigation described in Chapter 2, new approaches to the role of a prosecutor in the evidence collection process are relevant today.

Prosecutors of the SAPO during discussion in focus groups positioned themselves as the organizers focused on the application of proactive approaches in the collection of evidence, ready to direct the work of a detective and make key decisions in criminal proceedings.

**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».*

*«In the SAPO, we are very scrupulous about evidence obtainment and commitment of detectives, so as not to do extra work, but to do specific work and collect the evidence that can be used in a court».*

*«...The main role of a prosecutor is to authorize actions of the NABU detectives, and directly control the evidence collection».*

Lawyers during the focus groups noted that, as a rule, a prosecutor does not take part in the collection of evidence directly. However, they noted that the role of the prosecutor as a supervisor is evident.

**Lawyers:**

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

*«In one of the cases, the prosecutor really took an active part. She participated in investigative actions, and in interrogations. She controlled the quality of evidence collection, including how the detective conducts his work … From my experience, it would probably be more correct to call it an exception, because in other cases communication with a prosecutor was actually curtailed».*

*«He is certainly present, his spirit is present. I cannot say the prosecutor does not work. Of course, he works. It depends on many factors, his character and temperament. One can give instructions over the phone. In most cases, they coordinate all their procedural actions. Personally, he might participate in a trial due to the fact that a detective is not qualified yet».*

At the same time, during the survey of prosecutors, there was no uniformity in relation to the statement about «the main burden of evidence collection falling on the detective, and the prosecutor controlling the legality of his actions and approving the main procedural documents» (Fig. 3.28). Here, only 45% fully or partially agreed with this statement, while 39% fully or partially disagreed with it.

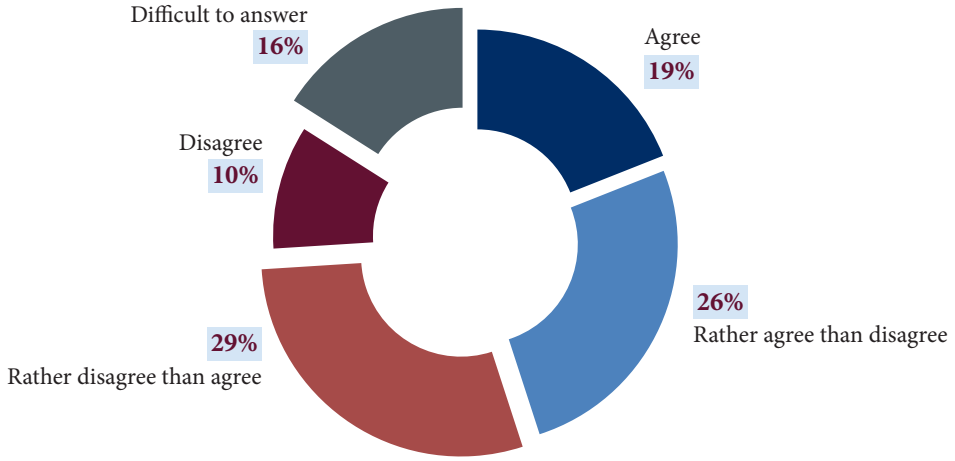


**Fig. 3.28** **To what extent do you agree with the statement: «The main burden of evidence collection falls on the detective while the prosecutor controls the legality of his actions and approves the main procedural documents»?**

Analysis of available supervisory proceedings showed that, in practice, prosecutors, in cooperation with detectives, use the following tools to organize the process of evidence collection: preparation of investigation plans, instructions, operational meetings and recording of their decisions in the protocols, preparation of various charts (for example, communication between accomplices, movement of funds, etc.), development of interrogation plans, etc.

## 3.5.2 Planning the evidence collection process

The analysis of supervisory proceedings showed that the plans are fulfilled only in a small part of investigations (only 8%), which is clearly seen from the diagram (Fig. 3.29).

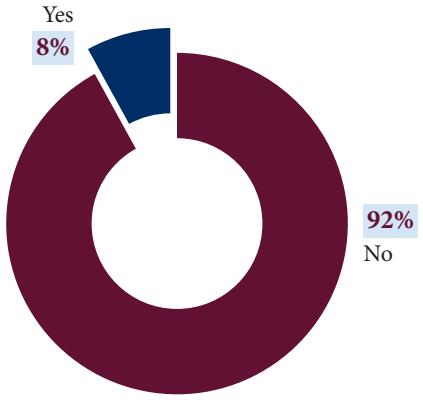


**Fig. 3.29** **Availability of an investigation plan in supervisory proceedings**

During focus groups, detectives confirmed that, in the beginning, common plans were not prepared or approved in all proceedings. However, in recent years, in their opinion, the situation has changed for the better, and detectives with prosecutors practice joint planning more widely.

**Detectives:**

*«...Previously, we faced this in almost every production: we see the direction of a pre-trial investigation, check the version of investigation, and work on it. Then, we go to a prosecutor, and he says, «I see nothing here, nothing will be here. Goodbye". We continue to work on it, bring new developments and receive the same response. Therefore, we realized that it was necessary to get together and plan how we would conduct pre-trial investigation to involve the prosecutor at the earliest possible stage, at the initial stage of pre-trial investigation».*

*«Otherwise, at the stage of serving the notice of suspicion, the prosecutor can say, "Guys, what did you do there, I do not know, we did not have a plan of joint investigative actions, so I do not see...».*

The planning process, in fact, begins with detectives developing a list of everything they have to do in the proceedings. Analyzing the materials of criminal proceedings, we saw investigation plans prepared by detectives. The prosecutor's role is rather in the adjustment, prioritization and consolidation for the complex necessary actions of specific actors and deadlines, as well as in the subsequent control of the execution of this plan.

**Prosecutor:**

*«It is necessary to have a plan, and it is necessary to follow some specific deadlines. Let them agree to these deadlines, even define themselves, for example, we will say «two days», and they will say «a week», but then it can be controlled. But this is only in large, complex proceedings … The investigation plan is very effective with a specific distribution: that this detective is engaged in this work, this one is engaged in this...».*

Prosecutors do not consider it mandatory to have a plan in every criminal investigation and argue that such duty in practice can lead to a disorganization and a waste of time.

**Prosecutors:**

*«The main thing is that it should not turn into a formality and a bureaucratic plane; that it has to be no matter what. Because as soon as it becomes mandatory, it immediately creates problems. It is just like the instruction. For example, if it is, let us say, embezzlement of state funds by the Chairman of a regional state administration, it is enough to appoint three people, to make an audit and to appoint and carry out an examination, why do we need a plan? And it is possible to bureaucratize everything: to make a plan, it has to be approved by the head of the unit, approved by the prosecutor, then the prosecutor has to give instructions. It can take two days of good work, and a lot of documents…»*

*«I don't need a plan – the detective needs it. He needs an action plan, a vector of where to go and what to do to achieve it».*

*«... The plan itself, as such, is not necessary in terms of commitment. We need a plan-scheme, where the detective and the prosecutor will see the overall picture of the crime, and in what*

*direction they move, and what needs more attention, what persons are there and whom to assign to covert investigative actions, and whom it is better not to assign».*

In the files of supervisory proceedings, we saw charts on links between various persons prepared by detectives, which clearly were aimed at understanding the nature and degree of guilt of different accomplices in a crime and see the direction of evidence collection.



Prosecutors consider planning mandatory in case of doubts about the integrity of specific detectives in a certain case. If such detective fails to implement the plan, the prosecutor is able to take concrete action and apply appropriate sanctions against a detective.

**Prosecutor:**

*«There are such detectives, thank God, they will do everything as you have told them and there are others. There is a plan, the case may be under a control, it is a relevant case. They were told to do something– did not do it. And this is at least some sort of confirmation of non-fulfillment of investigative actions of a plan, for example, when filing a complaint to the Public oversight council, as a material proof, you can say, "Look, the case is being delayed, not investigated».*

When planning, prosecutors consider that their task is, first of all, to direct efforts of detectives in collecting evidence, which is key to further proof of the person's guilt in court. The fact that the SAPO prosecutors guide detectives during planning is clearly illustrated by the personal experience of the procedural supervisors.

**Prosecutor:**

*«About planning of the investigation, I tell everyone, "You have a person; you suspect him – write a notice of suspicion and see what you need.» «There is this person» – we find out what facts are necessary to establish about the person..., «He was authorized to do this»« – need his job description, the order on appointment, etc.… «Committed"... – committed what? "What led to what?»- To damages. How can the damages be confirmed? – Expert assessment. I tell them, they sit down, write, and they know what they need to find».*

Detectives recognize the importance of prosecutor's involvement in the planning and the fact that he can actually direct the investigation toward the right path.

**Detective:**

*«If he has practical experience in the investigation of certain crimes, or state prosecution in criminal proceedings, he can suggest some interesting things. Also on the tactics, what has to be done earlier, what has to be done later?».*

When planning an investigation, procedural supervisors take into account the fact that the most active obtainment of evidence occurs before the moment of serving the notice of suspicion. The SAPO prosecutors believe that, in practice, after this stage, the evidence collection is already ineffective.

**Prosecutor:**

*«This is the last evidence that we will get. Further evidence will be based on what we have now. If you did not get anything in the first place, no one is going to tell us anything. The evidence that we have not found will be destroyed».*

## 3.5.3 Prosecutor's instructions and orders for the investigator

Almost one quarter of surveyed materials of supervisory proceedings contained instructions in criminal proceedings provided by the SAPO prosecutors.

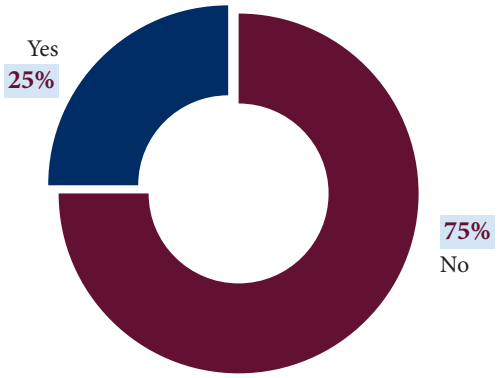


**Fig. 3.30** **Written instructions given by prosecutors in criminal**

At the same time, the SAPO prosecutors, according to their insistent statements during focus groups, unlike prosecutors of the regular prosecutor's offices, are not involved in the pursuit of indicators at all and mainly use instructions for their intended purpose. First, they are a tool of influence on detectives in cases where s/he does not perform well or avoids a certain line of evidence collection identified by a prosecutor.

**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».*

*«In order to avoid the situation when detective is saying: «Oh, a prosecutor did not tell us anything». The prosecutor says, "The prosecutor does not have to tell you what to do. You are a detective, you have to investigate, you have a legal duty to investigate within a reasonable time, to make the quickest decision either to close or to refer to a court. That is it».*

In addition, instructions can be used in case of differences in opinions between a prosecutor and a detective regarding further course of an investigation.

**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».*

In general, the majority of interviewed prosecutors consider instructions an effective tool of procedural guidance. Figure 3.31 illustrates that 19% of respondents believe that it is impossible to implement procedural guidance without instructions and another 41% believe that instructions help significantly. Only 6% consider them a mere formality, and 34% think that verbal instructions are enough.

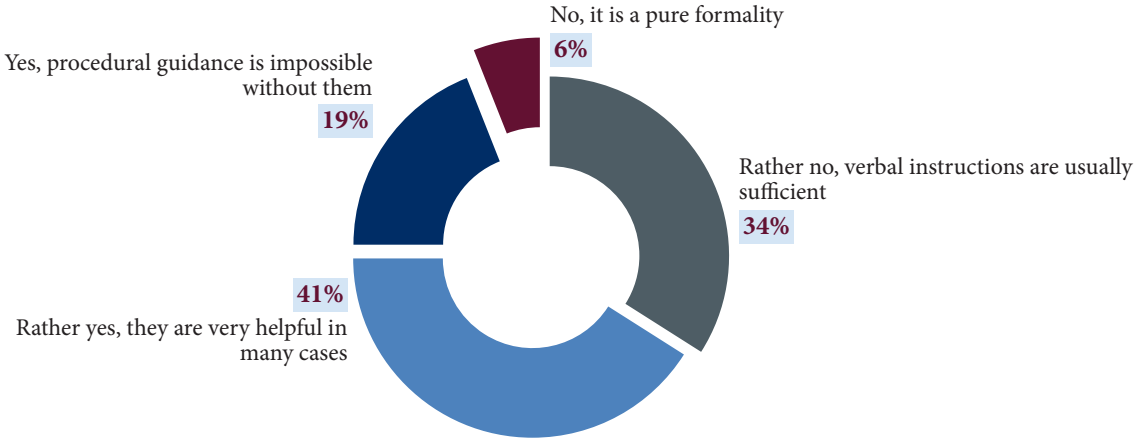


**Fig. 3.31** **Do you consider written instructions to the investigator an effective instrument of procedural guidance?**

If instructions are provided, their timely implementation should be monitored. In case of failure, appropriate actions are taken to take appropriate response measures against a detective by the competent authorities.

**Prosecutor:**

*«... They are put under control, a deadline is set and the result of the implementation of these instructions is reported. Materials confirming that they have complied with these instructions or have not complied with them are provided. They note the reason why they did not comply. If it is objective: I was on vacation for a month, a particularly serious crime was documented and I did not come out of the underground – this is one question. And when I have one case and I did nothing on it, the letter to the Council of public control, to the Director of the Anti-Corruption Bureau is being prepared, where all shortcomings are listed. And this is at the discretion of the leadership of the NABU and the Council of public control, what measures of influence to take towards a detective and towards detective's supervisors. That does not depend on us».*

11% of the surveyed materials of supervisory proceedings, contained responses of detectives on the implementation of prosecutors' instructions. In fact, such documents were kept in almost half of those proceedings in which instructions were given (11 of 25).

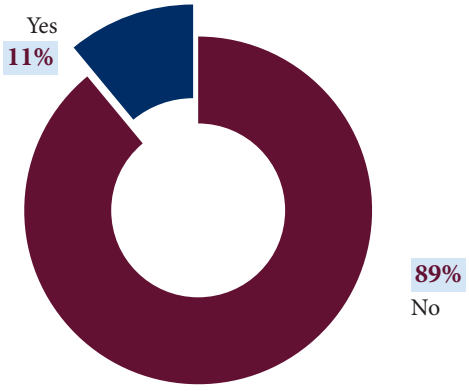


**Fig. 3.32** **Documents proving compliance with prosecutor's instructions are available in the materials of supervisory proceedings**

## 3.5.4 Specifics of the public prosecutor's direct involvement in investigative actions

Based on the results of a survey of the SAPO prosecutors (see Fig. 3.33) respondents noted that they participate in investigative actions in 5% (25% of respondents), 20% (28% of respondents), half (22% of respondents) or the majority (19% of respondents) of criminal proceedings.

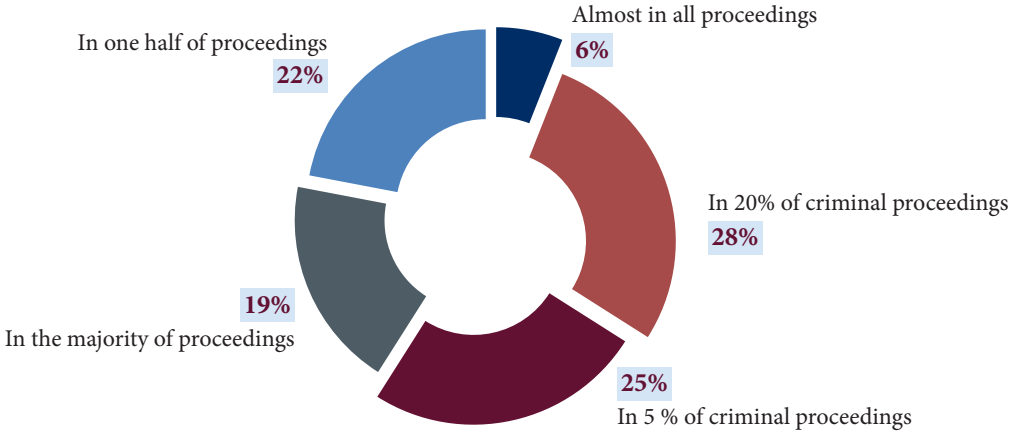


**Fig. 3.33** **Do you personally take part in investigative actions?**

The charts based on the analysis of criminal case files show that detectives carry out the majority of investigative actions independently. Only in some cases, the prosecutor participates or conducts such investigative actions as interrogation of a suspect, interrogation of a witness, search and inspection.

The data above was confirmed during the focus groups with lawyers.

**Lawyers:**

*«In one of the cases, the prosecutor really took an active part. She participated in investigative actions, and in interrogations. Controlled the quality of evidence collection, including how the detective does his job… But in most cases we only see detectives».*

*«You feel that there is influence. Sometimes, you hear detectives saying, "It is necessary to coordinate with a prosecutor, it is necessary to talk to a prosecutor"… They do not work on their own, it is for sure. If a prosecutor is not here, it does not mean that he is absent at all».*

Prosecutors, in turn, reported that quite often there are cases when they independently carry out investigative actions, sometimes even without the detective.

**Prosecutor:**

*«If there is a set of investigative actions, we can say that actually he conducts pre-trial investigation without the participation of a detective. For various reasons: either because there may be a leak of information, or because the detective is incompetent, or because the NABU has no interest in the investigation or when there is physically not enough time».*

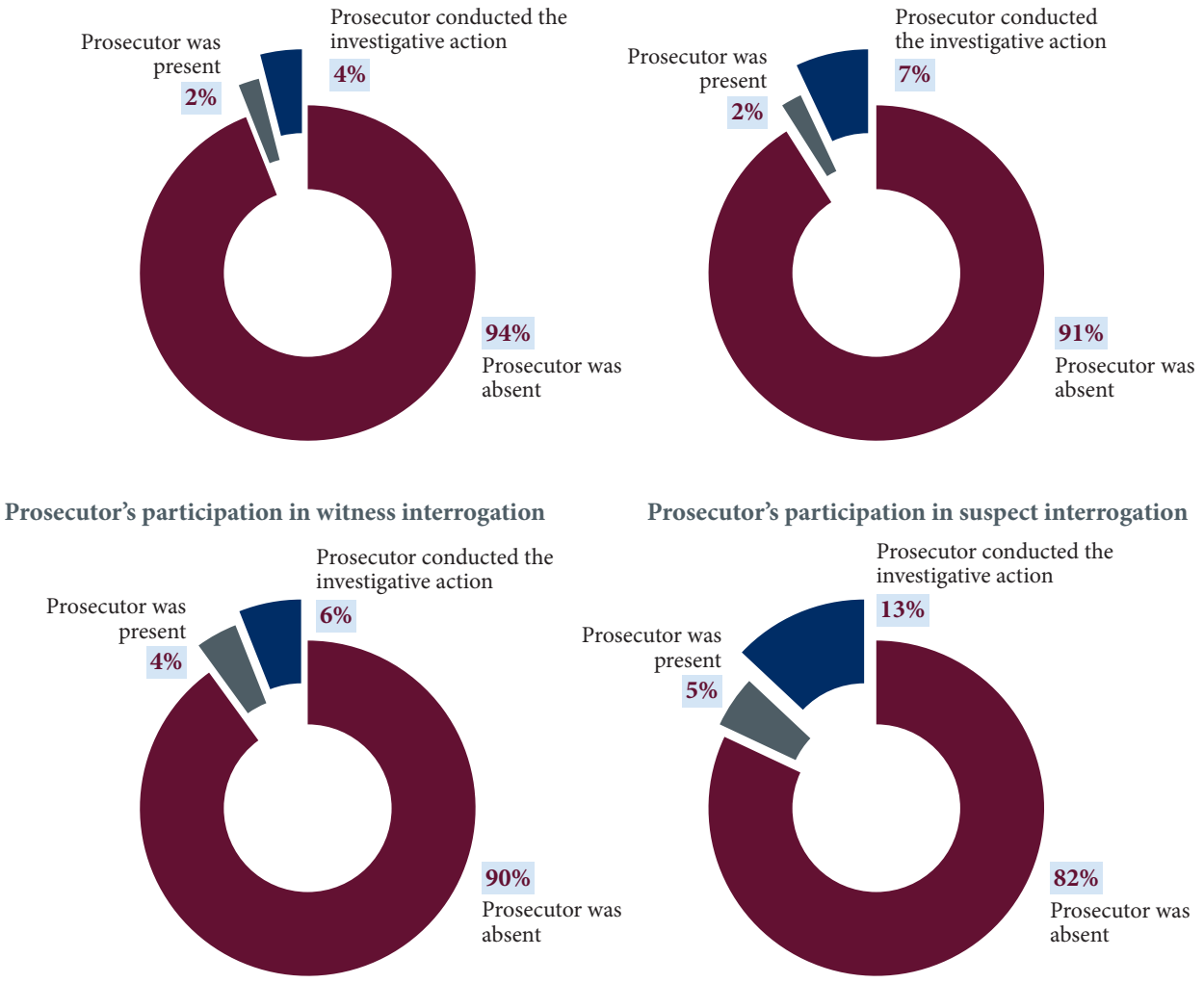


**Fig. 3.34** **Prosecutor's participation in investigative actions**

As we can see, the real participation of the prosecutor in investigative actions or independent conduct of investigative actions, in fact, is an exception to the general rule. Such situations mainly indicate either doubts of a prosecutor in the integrity of detectives, or the need to better control the situation during the further public prosecution in court.

## 3.5.5 Ensuring propriety and admissibility of the evidence. Collecting exculpatory evidence or evidence that mitigates the defendant's guilt

Materials of focus groups conducted with procedural supervisors of the SAPO suggest that they understand the importance of ensuring the admissibility of the collected evidence and try to ensure the legality of its collection.

**Prosecutor:**

*«The Prosecutor will be responsible for the final decision in court. That is, the role of a prosecutor is not only to carry out certain investigative or procedural actions, or to coordinate them. This is the person who is actually responsible for the legality of the collection of evidence».*

Based on the experience of supporting public prosecution in court, prosecutors see the prospect of substantiating the evidence base.

**Prosecutor:**

*«... No one will attack the content of the evidence, they will attack the way this evidence was obtained».*

Prosecutors and detectives provide specific examples to illustrate how and why there is «rejection» of inadmissible evidence by the SAPO prosecutors.

**Prosecutor:**

*«...Many believe that, for example, money was given and that is it. This is a documented concrete evidence, and we do not need anything else. And when we take the report with the mark of money that was handed over, and there is a witness who wasn't present. According to the telephone surveillance, he was elsewhere when the report was prepared. Such evidence is inadmissible. And the process of giving this money is then recognized by the court as invalid. And the detention, and all subsequent actions along the chain are recognized as unacceptable».*

**Detectives:**

*«We conducted a search. During the search, we did not remove the notebook. There were very valuable notes in the notebook… The report was closed already. The witnesses have already gone to drink tea; it is all good. He says, "Guys, you can take this notebook, but I am not going to write officially that I gave it to you and where you took it, because I'm afraid for my life". We come to the prosecutor. The prosecutor says, "It's great that you have this notebook, but where did you get it? How to prove that you seized it from this person? And it is reported improperly?» We begin to think. After that, the prosecutor says, «Either you find a way to register it in accordance with the current legislation, or we will not take it into account during a pre-trial investigation.» That's all"*

*«...For example, copies of documents were seized, and the prosecutor demanded the original, since a court can later recognize this evidence, even a duly certified copy of the document, as unacceptable».*

The SAPO prosecutors pay attention to the issues of propriety of the collected evidence. After all, the experience of prosecution in court gives prosecutors a clear vision of prospects of using the evidence obtained to prove the guilt of a person.

**Prosecutors:**

*«...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...».*

*«Even if detective wants to make a list of 100 pieces of evidence and say that it proves guilt, he cannot do that and usually writes, "Proved by the following: one, two, three, four, five...», up to 500 pieces, and the prosecutor in court should specify:» this evidence proves intent. But this evidence proves the objective side. And this proof proves the motive, the goal».*

During the study, we did not find evidence that the SAPO prosecutors refuse to collect exculpatory or mitigating evidence. At the same time, the SAPO prosecutors themselves insist on their good faith in this matter.



**Prosecutor:**

*«Of course, there are tasks of the Criminal Procedure Code, which envisage holding guilty persons accountable. But there are other tasks that provide that a prosecutor».*

### 3.5.6 The prosecutor's participation in the conclusion of an agreement

SAPO prosecutors together with detectives actively use the agreement in criminal proceedings. The use of this tool in practice allows, first of all, to significantly reduce the resource costs for the collection of evidence and to involve persons who have agreed to enter into the agreements in bringing other accomplices to criminal liability.

As shown in Fig. 3.35, 24 criminal proceedings (19%) of 102 analyzed materials included agreements.

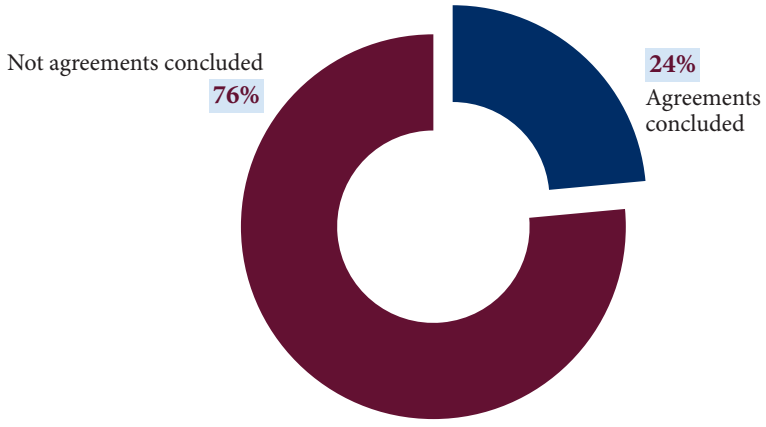


**Fig. 3.35** **Agreements in the analyzed proceedings**

**Detective:**

*«We had cases when it was necessary, when we saw that there was incriminating evidence against others, higher-level participants, prosecutors were proposing to make an agreement and have entered into agreements with suspects».*

Prosecutors note that, in practice, the procedure for approving a plea agreement in court remains complex and can take a very long time.

**Prosecutor:**

*«... As an example. I had an agreement, a man pleading guilty, asking, "Please convict me». We arrive to the court; hearing was scheduled for 26 September. There is no judge. Recused herself, postponed until November. We came in November, and the judge is in another case, says, «Postponed till February.» That suspect says, "Good people, let me be punished already. I still have to go to work, earn money, I have three children» – «You see, three judges for February». Thus, from September to February, the case was not actually considered. And everyone was ready for this trial. All parties: the lawyer, the accused, the prosecutor, everyone wanted a trial- and there was none».*

**The stated above suggests that:**

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.

## 3.6

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

According to the Study of the work of prosecutors of regular prosecutor's offices, considerable attention should be paid to two essential points relating to the final stage of criminal investigation: specifics of closing criminal proceedings and sending the indictment to a court.

Within the framework of this study, a separate analysis was carried out to determine the specifics of finalizing criminal proceedings in the activities of SAPO prosecutors. As the Fig. 3.36 clearly demonstrates, the priority of the two mentioned forms of finalizing of criminal proceedings observed here.

A detailed study of various aspects of the implementation of each of these forms of completion of criminal proceedings (closing criminal proceedings and sending indictment to court) revealed both the aspects similar to those of the work of regular prosecutor's offices, as well as certain specifics. The specifics that deserve a special attention will be demonstrated further.

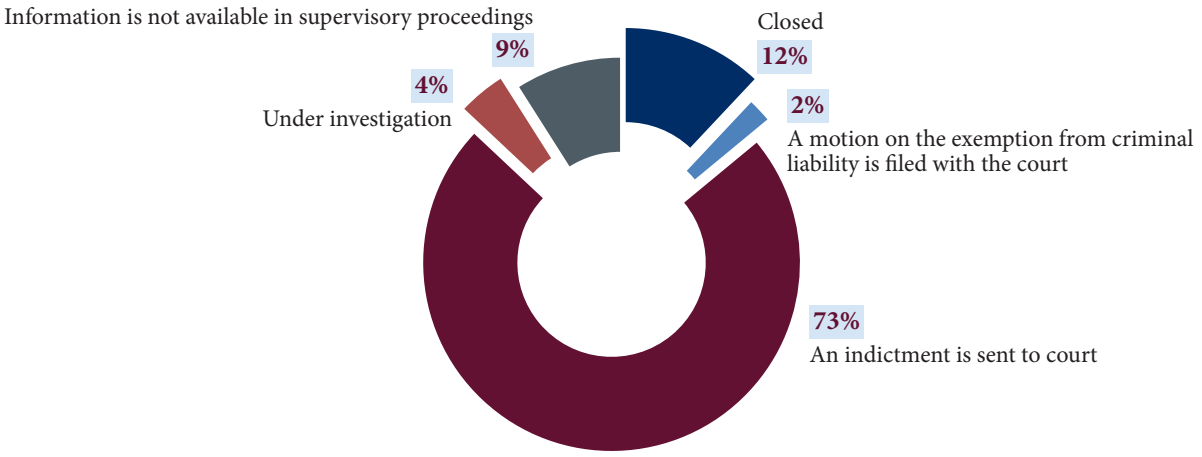


**Fig. 3.36** **Status of a criminal proceeding**



## 3.6.1 Closing criminal proceedings

Regarding the closure of criminal proceedings, the preliminary study demonstrated a relatively strong annual trend towards a decrease in the monthly number of registered criminal proceedings from January until December and, on the contrary, an increase in the numbers of closed proceedings towards the end of the year[71].

The previous general study revealed a clear pattern – every third month, especially in December, there is a significant increase in the number of closed criminal proceedings. The authors of the study suggested that the reasons for such periodic "peaks" are connected with submission of quarterly reports by the prosecutors and investigators. These are the months when they submit these reports. In addition, the six-month and annual reports are submitted in June and December accordingly.

Official statistics on the state of a pre-trial investigation of criminal proceedings under the SAPO jurisdiction can be obtained only partially, at least from the content of section 7 "Criminal offenses under investigation of the National Anti-Corruption Bureau of Ukraine" of the report «On registered criminal offenses and the results of pre-trial investigation" of the PGO.

Based on these statistics, it is impossible to draw objective conclusions about whether or not the number of closed proceedings depends on different periods of the calendar year (end of quarter, half-year or year). The main reason is that the number of criminal proceedings investigated by the NABU in 2017 was relatively small. Accordingly, this study uses other information to illustrate this issue.

In this regard, questionnaire answers of the SAPO prosecutors on closing/not closing criminal proceedings are particularly interesting (Fig. 3.37).

When asked about whether the attempts of procedural supervisor of the SAPO to match the statistical indicators with the indicators of the previous periods influence decisions to close/not close criminal proceedings, all 32 participants of the questionnaire clearly said «No.» A slightly smaller number, but also significant (29 of 32 respondents) believe that the decision to close/not to close criminal proceedings is not affected by the attempts to maintain workload at a certain level.

[71] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p.,pp.168-208

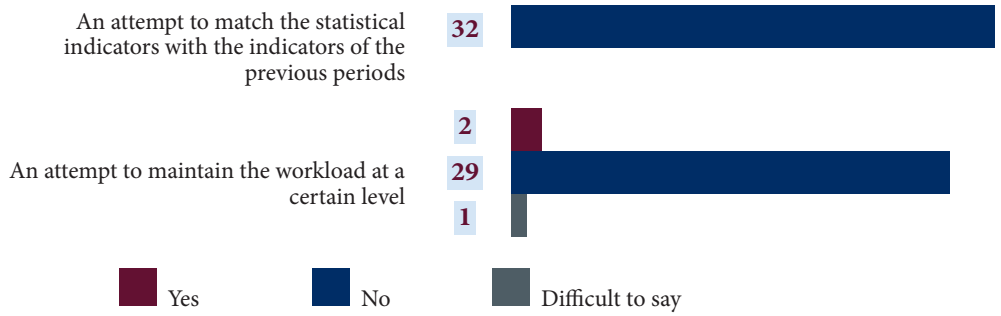


**Fig. 3.37** **To what extent is the to close/not close the criminal proceedings by the procedural supervisor of the SAPO is influenced by the following factors?**

This fact was also confirmed during focus groups with the NABU detectives. Actually, answering the question about the impact of statistics or indicators on the content of procedural powers or on the state and time of closing criminal proceedings, the NABU detectives noted that there was no such influence.

**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...».*

The SAPO prosecutors note that the absence of a "statistical burden" makes their work easier, especially when compared with the work of other law enforcement bodies.

**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».*

The influence of statistical data, of course, should be taken into account with the consideration of the subject making the decision to close proceedings. At least, the analysis of criminal proceedings within the framework of this study proves that formally the SAPO prosecutor takes direct part at this stage only in 44% of cases (Fig. 3.38).

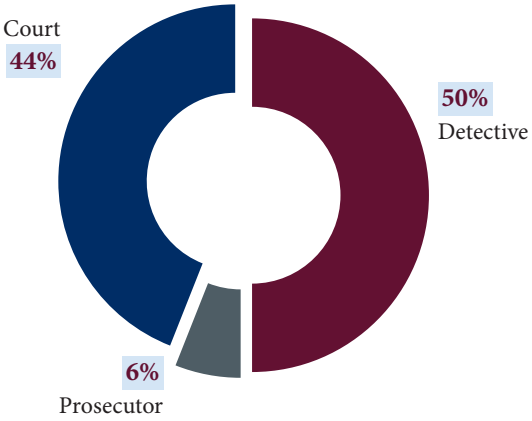


**Fig. 3.38** **Who made the decision to close criminal proceedings?**

At the same time, there is no denying the role of the SAPO prosecutor as a procedural supervisor in all other criminal proceedings.

As a result, we can draw a rather optimistic conclusion that the statistical indicators in general do not have a decisive influence on the time (moment) of the decision to close criminal proceedings in the activities of the SAPO prosecutors.



Special attention should be paid to the issue of a closure of a criminal proceeding after serving of the notice of suspicion.

During focus groups, the SAPO prosecutors expressed that the notice of suspicion is often perceived the statement of a suspect's guilt, which, in fact, prevents prosecutors in regular prosecutor's offices from taking (approving) the decision to close criminal proceedings after this notice is served.

**Prosecutor:**

*«... Previous experience... of that activity indicates that after the beginning of criminal proceedings and certain procedural actions, such as apprehension, notification, «you will not be able to roll back, it automatically leads to punishment... ».*

**Detective:**

*«New Criminal Procedure Code... the goal was to reduce the number of proceedings. They said, "… do not be afraid, closing proceedings with a suspicion is not a problem". Some people are still afraid. And for them to close the proceedings with a suspicion it's like to give a notice to a known-innocent individual for a criminal prosecution. That is, they consider it as a negative, as a criminal offense».*

The reason for such perception of closing of criminal proceedings at later stages was the threat of an almost automatic punishment of a prosecutor for such actions.

**Detective:**

*«Earlier, just three years ago in case of closing criminal proceedings it was the basis for reprimand or some other means of disciplinary punishment. Therefore it is considered as a negative thing».*

The study identified cases when proceedings were closed after the notice of suspicion had been served. At the same time, there were also examples where the SAPO prosecutors were still cautious about closing criminal proceedings.

**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».*

Regarding the position of the SAPO prosecutors, in the focus group, they also quite positively assessed the notion of suspicion and the lack of its influence on the possibility of making the decision to close criminal proceedings.

**Prosecutors:**

*«One of the achievements of this Code of Criminal Procedure is the notion of a notice of suspicion, when it is possible to get a suspect's version and then close the proceeding against this person, because he proved his innocence, for example. At this stage, a prosecutor still has influence. It was not like this earlier. In this CPC, this influence is at the stage of notification on suspicion».*

*«There are people who closed cases, and they did not face any consequences».*

Thus, based on the analysis of the practice of closing criminal proceedings during pre-trial investigation, we can draw a rather general conclusion that prosecutors of the SAPO are not dependent on statistical indicators in their work.

At the same time, the research revealed changes in the attitude to decisions to close criminal proceedings after serving the notice of suspicion. After all, in the regular prosecutor's offices, the decision to close criminal proceedings after serving the notice of suspicion is automatically perceived as a manifestation of «unprofessionalism» and should lead to certain liability.

This generally indicates that at least two problems that are extremely relevant for prosecutors in regular prosecutor's offices, are absent in the activities of the SAPO prosecutors.

### 3.6.2 Preparation of the indictment

The effectiveness of the SAPO prosecutor exercising procedural guidance during preparation and substantiation of the indictment should be considered primarily on the basis of the quality of the indictment.

Actually, during focus groups, prosecutors of the SAPO noted there were no extraordinary procedural specifics in their work in comparison to other prosecutors.

In general, the work is organized in the same way, including some not very positive examples. During the focus group, the SAPO prosecutors quite clearly noticed that there were also quite formal approaches to preparing the indictment.

**Prosecutor:**

*«... Same thing, roughly. There is evidence available, and there is prosecution. Just to follow the procedural order, serve the indictment, measures of to ensure, direction. If you have already agreed on a suspicion, preparation of an indictment is much easier. Just copy the suspicion and make some changes, factual circumstances, prepare wording of the charges. You state who the accused is, who the victim is, specific information, aggravating, mitigating, expert assessment, forensic costs, etc. Everything has been developed, there is a template and it just changes in terms of a particular person, specifics of a crime. No rocket science to it».*

A separate issue is the existence of certain specifies of the deadline for indictment. Investigation of cases, in which the SAPO prosecutors exercise procedural guidance, continues for quite a long time. For complex economic crimes, it can last for 1-1. 5 years. Detectives state that the main reasons for this duration include, first, the duration of coordination and authorization of key decisions and long periods for forensic assessment. During focus groups, detectives of the NABU pointed out the specifics of such proceedings.

**Detective:**

*«All our economic crimes are crimes with material component. That is, there should be damages. Position of the prosecutor's office is that there has to be an expert assessment to confirm damages. That is, what is the minimum period of a pre-trial investigation? To extract the primary document, we get provisional access. It all takes 1-1. 5 months on average. Approval of the motion -three days, submission to court – three days, consideration – three days. Getting a ruling is a week or two, or more. That is a month at least. You seized the primary documents and you need two weeks of work to understand what is there. After processing, you need to assign an economic expert assessment. This is at least a month, because the specialist also needs to provide documents... And here you need to schedule an assessment, and our state apparatus tells us, «The Ministry of Justice, Kyiv National Research Institute» or Expert Service of the Ministry of Internal Affairs of Ukraine". You come to them, and they say, «In a year. All right, six months from now, all right, four months". You are asking why it takes so long. Because nobody is engaged in reforming the expert assessment system at all. The simplest economic proceedings are at least eight months.*

With regard to this aspect, during focus groups, the NABU detectives pointed to the fact that, for example, in cases of the embezzlement of funds, the amount of work is quite large, and in some cases the time gap between the serving of a notice of suspicion and preparation of the indictment may be from six to nine months.

**Detective:**

*«As we have already said, we have two types of crime we investigate. If this refers to obtaining benefit, it does not take long from the moment of serving the notice of suspicion until the indictment. And in case of embezzlement of funds, there could be six months and nine months between the suspicion and the indictment. Because for such crimes, no matter how much you have collected, always something else has to be collected. The amount of work is large...».*

With regard to the approximate determination of the time required for the actual completion of the active part of pre-trial investigation, this study included an analysis of criminal case files to determine the time interval between the notice of suspicion and an issuance of indictment. Fig. 3.39 shows that in 60% of the analyzed proceedings such period of time was more than 60 days.

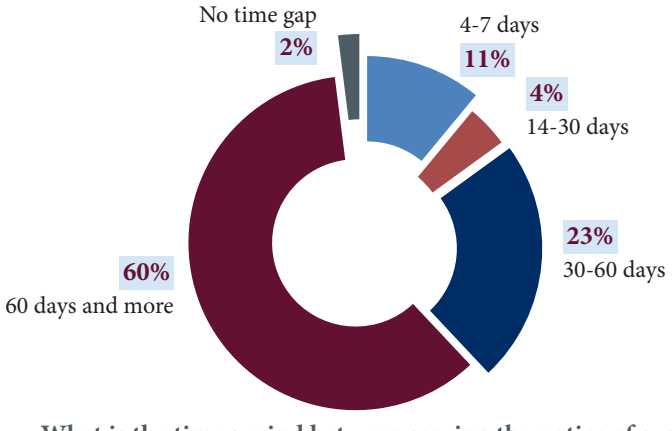


**Fig. 3.39** **What is the time period between serving the notice of suspicion and issuance of an indictment?**

Thus, the specificity of crimes within the competence of the SAPO prosecutors naturally leads to longer criminal proceedings in comparison to others. This, in turn, affects the quality of the preparation of an indictment and materials for the trial as a whole.

Special attention has to be paid to who actually prepares the indictment. After all, Article 110(4) of the Criminal Procedure Code clearly defines that an indictment shall be a procedural decision whereby public prosecutor brings charges of the commission of criminal offence and pre-trial proceedings are terminated.

In the criminal case files analyzed during this study, the indictment was a prepared predominantly by a NABU detective, not the SAPO prosecutor (Fig. 3.40).

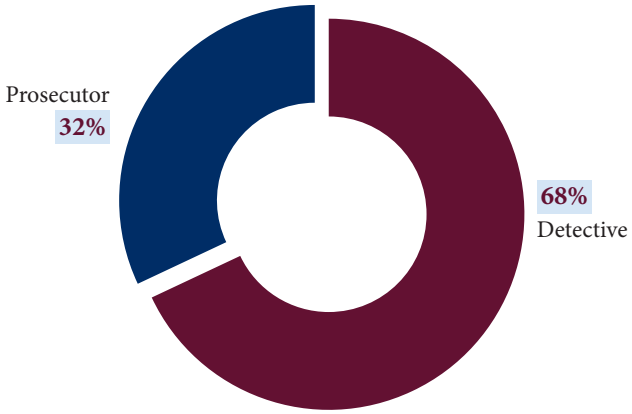


**Fig. 3.40** **Who prepared the indictment?**

A similar situation was observed during focus groups with the NABU detectives. It was noted that detectives usually prepare the first draft by themselves. Only then, in the official order, they coordinate the text with a prosecutor of the SAPO.

**Detective:**

*«We usually send it by email... Prepare it by ourselves as we see it. Send it to the prosecutor. The prosecutor, according to the way he sees the case files and how he wants it to be written, makes his comments, sends it back. We are editing in the final version. Then, we send it to the prosecutor's office. Of course, there are cases when the indictment is not approved. But it have not happened to us. In principle, it is all approved during the working process. There's no problem with that».*

At the same time, from the position of the defense, detectives have more workload. During focus groups, lawyers expressed the position that almost all the work is done by a detective, and a prosecutor only gives appropriate instructions and monitors their implementation.

**Lawyer:**

*«The detective does everything...Then refers to a prosecutor, he reads, and makes corrections. The detective does all the work. The prosecutor's office gives instructions to conduct some procedural actions during pre-trial investigation. And ensures that all instructions have been followed. That is, they do not perform such menial work. All procedural documents are prepared by a detective».*

This logic of the practical development of criminal proceedings as a whole fits into the provision of Article 291(1) of the Criminal Procedure Code, which provides that an indictment is prepared by an investigator, and then approved by a prosecutor. An indictment can be prepared by a prosecutor, especially if he does not agree with the indictment suggested by an investigator.

In fact, we are talking about joint work and joint results. This is what detectives noted during focus groups, highlighting the comparison of an indictment with preparing the notice of suspicion. Actually, if there is

an understanding that an indictment objectively has grounds – the question of its preparation is solved technically.

**Detective:**

*«Similarly to the suspicion. That is, when it comes to an indictment, at this stage everyone already understands that it will be prepared. If we discuss with a prosecutor, there are fewer contradictions, because we are closer to the very end of pre-trial investigation. We already communicate normally. And they have the same deadlines, that is, they understand».*



Taking this into account, based on materials collected in the framework of this study, the very fact of the existence of working mechanisms for the SAPO prosecutor's approval of indictments prepared by detectives proves to be effective. This contributes to the formation of joint awareness of responsibility for the quality of the prepared document and its future judicial prospects.

Based on the above, we can conclude that 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.

## Chapter 3 findings

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.
8. 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.
9. 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.
10. 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.

11. 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).

12. 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



13. The study showed that the SAPO prosecutors do not always respond appropriately 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.

14. 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.

15. 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.

16. 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.

17. 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.

Chapter 4

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

## 4.1

## The opinion of participants of criminal proceedings on the prosecutor's role in ensuring the rights of suspects

During the study, we tried to analyze the opinion of different participants of the process on the prevalence of human rights violations at a pre-trial stage, as well as the role of the prosecutor in ensuring the specific rights of suspects.

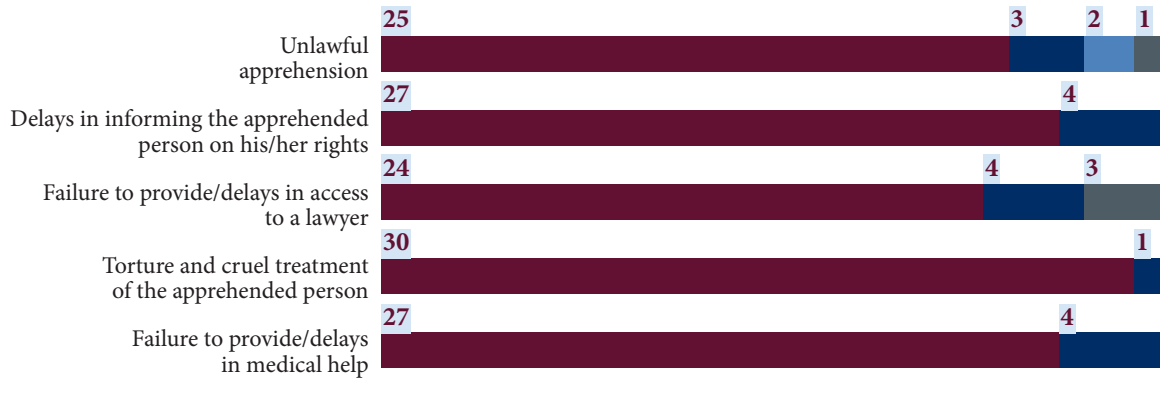


**Fig. 4.1** **Please assess the prevalence of these violations at the stage of pre-trial investigation**

As you can see from Fig. 4.1, the vast majority of prosecutors believes that violations of the rights of detainees are almost non-existent in proceedings, in which the SAPO performs procedural guidance. Some respondents

(12.5 per cent) noted that sometimes there are violations such as delays in informing the apprehended person of his/her rights, failure to provide/delaying access to a lawyer, and failure to provide timely medical care. 9% of respondents indicated that sometimes there are cases of illegal arrests; another 6% said that such cases occurred quite often.

About 60 % of respondents fully agree with the statement that most suspects complain about violations of their rights to avoid responsibility for the offense. The remaining 40% agree with this statement rather than disagree.



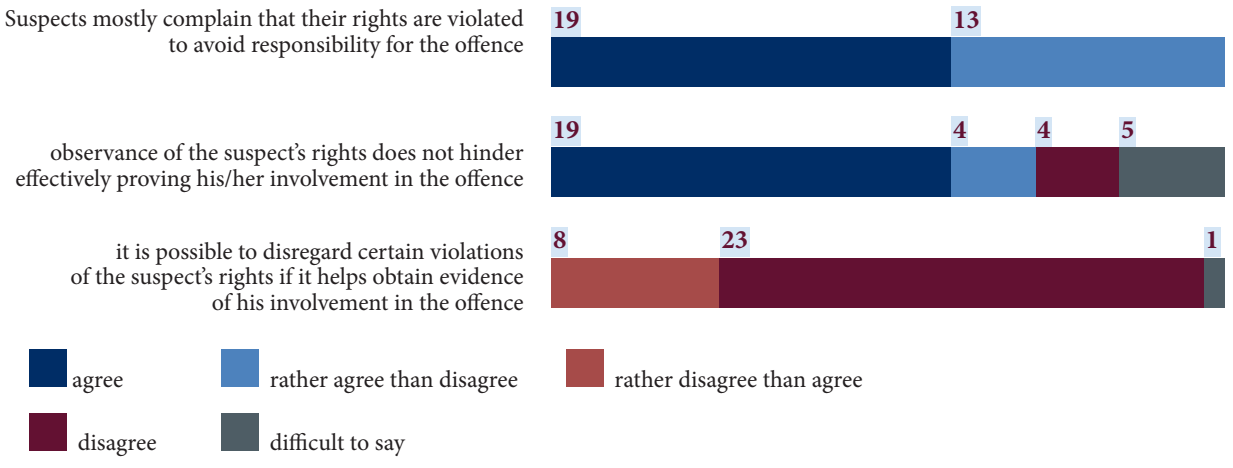


**Fig. 4.2** **Please provide your opinion on the following statements**

Almost 72 % of interviewed prosecutors agreed with the statement that observance of the suspect's rights does not hinder proving his/her guilt in court. At the same time, 12.5% categorically disagreed with the statement, and 15.6% of respondents could not answer this question.

Another interesting set of prosecutor's answers concerned the question about the statement that all evidence collected through gross violations of the suspect's rights must be declared inadmissible. 44% of respondents fully agreed with this statement, 25% rather agreed than disagreed. However, almost every fourth of respondent had a different opinion: 16% rather disagreed than agreed with this statement, and 6% disagreed with this statement completely. Another 9 % found it difficult to answer this question.

In assessing their role in ensuring the rights of a suspect, the vast majority of the interviewed prosecutors agreed on the need to do so in all criminal proceedings (see Fig. 4.3).

Thus, in particular, more than 84 % of the interviewed prosecutors pointed to the need to verify the following in all criminal proceedings:

- Whether the time and place of actual apprehension was reflected in the report on apprehension (87.5 % of respondents);
- Whether the apprehended person was promptly informed about his/her rights, including the right to refuse to testify before interrogation (87.5 % of respondents);
- Whether the apprehended person was provided with an opportunity to speak with a lawyer before the first interrogation (84 % of respondents);
- Whether violence was used against the apprehended person to obtain testimony (90.6 %).

At the same time, a much smaller percentage of prosecutors (65,6 %) consider it their duty to check whether the person is in need of medical care in each case.

The analysis of prosecutor's answers in focus groups suggest three main reasons, which, in the opinion of prosecutors, encourage them to pay attention to the state of ensuring the rights of suspects:

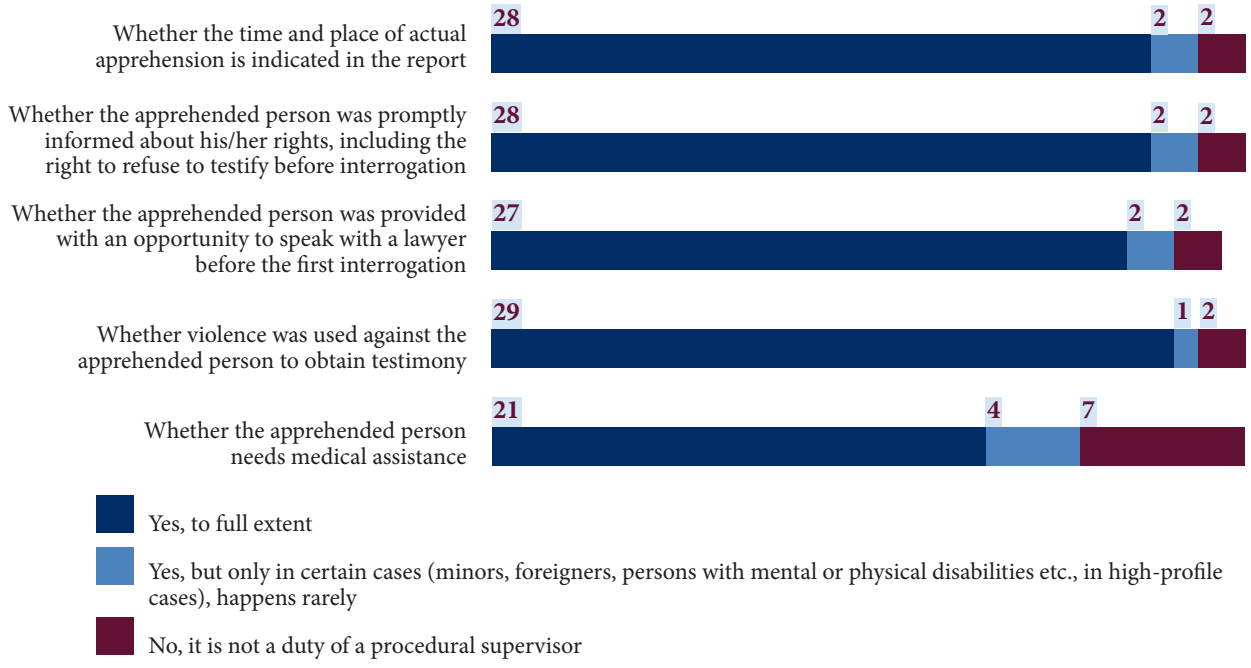


**Fig. 4.3** **To what extent does the procedural supervisor of the SAPO have to verify the following circumstances in all proceedings?**

## 1. Ensuring admissibility of evidence

**Prosecutors:**

*«Our organizational role is to prevent human rights violations, so that it [evidence – ed.] is recognized admissible».*

*«We need to ensure the responsibility of the person before the law. That each committed crime is followed by responsibility established by the law. If we violate his rights, who will bring him to justice? If the person escapes criminal punishment for a crime through our fault, because we have not ensured his rights, then who will feel better – the victim?».*

## 2. Preventing prosecution of innocent individuals

**Prosecutors:**

*«And who measures the evidence according to the CPC? Not only the investigating judge analyzes to avoid inadmissible evidence. Prosecutor also assesses evidence: its sufficiency, relevance and admissibility. It is his role to ensure the right to protection from arbitrary criminal prosecution».*

*«Therefore, the calling of the prosecutor is to ensure the objectivity and comprehensiveness of pre-trial investigation. And to find this balance between the restrictions of person's rights and some*

*imaginary benefit from the fact that we restrict this person. Therefore, it is necessary to find this balance and take this case to court, so the court assesses whether he goes to jail, or he is free, or else».*

### 3. Preventing prosecutor's from sanctions resulting from violations of the rights of a suspect

**Prosecutors:**

*«If we talk about the observance of human rights, of course there are high goals, which we all say that are necessary to ensure, such as the right to defense, it is necessary to protect human rights. But if we talk about "down-to-earth" goals, we are responsible persons. The law has made each of us, as an individual, responsible for ensuring that the rights of all participants of criminal proceedings at the stage of pre-trial investigation are observed. The prosecutor and the investigating judge. If we allow a clear violation of constitutional rights, we must understand that the moment will come: «they will come for us».*

*«The majority of prosecutors on the regional level has never faced with that «moment of blow»: you violated, you didn't stop, you didn't do – and responsibility finds you. When this responsibility has come, not even to you, but to someone else, «I'm not going to do the same». First, it is the observance of human rights as such. Second, they comply because there is responsibility. And you are the responsible person, you will bear it, you have to ensure it. That's all».*

Analysis of the opinion of other participants in the process, in particular judges, leads to the conclusion that in general, the SAPO prosecutors pay more attention to the protection of the rights of suspects, compared with colleagues from other structural units of the PGO, which is reflected in the actual absence of complaints about their actions in terms of possible violations.

**Judges:**

*«If we compare the SAPO and the district prosecutor's office, and the Prosecutor General's Office and the State Fiscal Service, I would still say that they observe. And I say this based on what suspects say along with the defenders».*

*«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».*

Individual lawyers expressed a similar position during focus groups, focusing on different approaches to human rights by the SAPO prosecutors and the NABU detectives compared to other law enforcement bodies.

**Lawyers:**

*«My personal opinion is that, maybe, in the SAPO such cases are at a minimum. First, they have certain requirements. Second, there is effective public control over them. Third, the level of wages that they receive, around 40 thousand, makes it possible to minimize these risks, because any detective, and even more, a prosecutor, understands that if such facts are established, they will be fired. I think they value their work more than any other prosecutor».*

*«I think what also has effect is subjects of the crime and potential suspects. Because everyone understands that, in most cases, everyone has a certain resource, communication with the media. And the NABU and the SAPO, perhaps, value their reputation».*

At the same time, other lawyers have in fact expressed the opposite view, arguing that the SAPO prosecutors commit the same violations as their colleagues from other units of the prosecutor's office, and often do not respond to human rights violations by employees of the pre-trial investigation body.

**Lawyers:**

*«There was a situation when I appealed to the prosecutor regarding inadequate actions of detectives, but I was told that in case of any action by a prosecutor at that stage, he will be accused of «selling the case". It was better then to let the detectives do what they do. Because of their own conflict, they are taking parallel courses and do not react to offences. And before they do something, they coordinate their actions with the leadership».*

*«The SAPO prosecutors conduct the same offenses, but with pathos. I cannot speak for everyone, but most of them are the same prosecutors. And how can they be different if they were recruited from among those prosecutors who worked before in regional prosecutor's offices, in the Prosecutor General's Office».*

In the following sections, we will focus in more detail on the role of the SAPO prosecutors in ensuring the specific rights of a detainee, in particular the right to liberty, the right to defense and proper treatment.

## 4.2

# The prosecutor's role in examining possible violations of the suspect's right to liberty

The role of the prosecutor at the stage of apprehension, as well as the specifics of legal provisions for the procedure and grounds for apprehension on suspicion of committing corruption and related crimes are thoroughly analyzed in section 3.2 of the study. At the same time, taking into account the fact that the majority of human rights violations occurs at the stage of apprehension, we consider it appropriate to focus on certain aspects of the prosecutor's activities within this section as well.

The study entitled «Human Rights behind Closed Doors»[72] which we conducted in 2015 revealed typical human rights violations conducted by police officers during apprehension:

- holding persons in police custody without registering the fact of apprehension;
- failure to indicate the time and place of actual apprehension in the report;

[72] *Belousov Y., Sivak T., Suchchenko V., Tokariev, H., Shvets, S.* Human rights behind closed doors: «Procedural Safeguards for Apprehended Persons»: study report, K.: 2015, 208 p.

- apprehension of a suspect without an order of the investigating judge or a court long after the crime had been committed;
- conducting of operational interrogations of an apprehended person without any recording (report) of such action;
- witness interrogation (interview) of a suspect.

Prosecutors exercising procedural guidance of pre-trial investigation in the proceedings of investigators of the National Police, as a rule, do not notice such violations, as evidenced by the official statistics of the PGO. The statistics shows no proceedings initiated by prosecution authorities regarding violations under Article 371 of the CPC (knowingly unlawful apprehension, taking into custody, arrest or detention).



This is confirmed by the *Study on the role of procedural supervisors at the stage of pre-trial investigation*[73], according to which prosecutors still differentiate actual and procedural apprehension, and often do not consider it necessary to respond to obvious violations of human rights. In their opinion, it may adversely affect the progress of investigation of the alleged criminal offense.

Analyzing the activities of the SAPO prosecutors, we can make conclusions on certain specifics of their role at the stage of apprehension in comparison with the procedural supervisors of other structural units of the PGO. In many ways, these specifics are caused by different approaches and legal framework for activities of the NABU.

Thus, in particular, the main difference is that the current legislation provides for an additional basis for apprehending persons suspected of committing corruption crimes – long after the commission of a crime, although it introduces certain restrictions for the law enforcement. For instance, there should be justified reasons to assume that a suspect who allegedly committed a grave or particularly grave corruption crime under the jurisdiction of the NABU will abscond to escape criminal liability[74].

In fact, the legislator made an exception for the NABU officials granting them the right to apprehend suspects without a court ruling long after the commission of a crime. The Constitutional Court of Ukraine is now examining the question of compliance of this provision with Article 29 of the Constitution of Ukraine; however, the provision is still active. Therefore, unlike, for example, police officers, the NABU detectives can, from a formal point of view, legitimately apprehend a suspect not at the time of and not immediately after the commission of a crime (see Section 3.2).

Consequently, according to the study, the practice of hidden apprehensions (keeping a person in the premises of law enforcement bodies without registering the fact of apprehension), as well as conduct of various kinds of operational interrogations of a detainee without any records (report), which are common in the activities of the police, are not used by the NABU and the SAPO.

Violations related to recording the time and place of actual apprehension are also not common. For possible exceptions, we can look at searches in the premises of suspects with their participation without registering the time of detention from the moment when a suspect is forced by the order of a police officer not to leave the place of a search.

The results of the study showed that law enforcement officers (the NABU and the SAPO) have different views on the specifics of recording the time of actual apprehension in similar situations – some law enforcement officials believe that apprehension should begin immediately after the end of the search, whereas others believe actual moment of apprehension is when the search begins and the suspect is forced to remain in a certain place (see section 3.2).

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[73] *Belousov et. al.* "PUBLIC PROSECUTOR: Directs? Coordinates? Supervises? Investigates?" Study report "The role of the public prosecutor at the pre-trial stage of criminal proceedings" / Belousov, Yu. (ed.), Mitko, V., Orlean, A., Sushchenko, V., Venher, V., Yavorska, V. – K.: ST-Druk, 2017 – 252 p.

[74] Article 208(1)(3) of the CPC.

It should be noted that this interpretation of the time of an actual detention in the context of prohibition to leave premises during the search might be partly due to the lack of clear definition of this aspect in the current CPC. Indeed, on the one hand, Article 236(3) of the CPC clearly indicates that, "the investigator or public prosecutor may prohibit any person from leaving the searched place until the search is completed and from taking any action which impede conducting search. Failure to follow these requests entails liability established by law". On the other hand, according to Article 209 the CPC, which defines actual apprehension, an individual is considered to be apprehended if he/she, with the use of force or through obedience to the order, has to stay next to the competent official or in premises prescribed by the competent official[75]. The current version of this article does not contain any exceptions; accordingly, its provisions should also apply to cases of search.

At the same time, according to judges, such differences in the interpretation of the time of actual apprehension are not of fundamental importance, because they, for example, do not affect the results of consideration of motions to ensure measures of restraint. Judges also reported that, as a rule, the SAPO prosecutors and the NABU detectives try to bring a person to a court before the expiration of terms provided by the CPC, and even in cases of discrepancies in the time of actual apprehension, the final period for holding the person in custody without a court decision is not violated.

**Judges:**

*«I find out directly from a person in the status of a suspect, when s/he was actually detained. If s/he says, for example, that they broke into the household and forbid from leaving it, conducted a search, then made a report on apprehension and indicated the time of completion of a search as the time of apprehension – I believe that the beginning of apprehension is the beginning of this search. Then in this case we agree and write in ruling that the report on apprehension contains this date, but time of an actual apprehension corresponds to this date».*

*«Of course, we find out from a detective whether the time corresponds, whether the person was allowed, not allowed to leave the room. And, in this case, it is not a problem to note and, even if time passes, the search was long, and was brought to us later, the expiration of this time does not affect the final decision on consideration of a motion. In a motion, we can prescribe that rights were violated and that the deadline for this has expired. And even if it comes up during trial– the person will be released and will be present in the court room, without being detained, will be present at the hearing».*

*«Let's just say, this does not affect our decision, for most colleagues. When we find out the actual time, we indicate it. I will tell you that if they even indicate the end of the search, they still, though some actually record like this, they are still trying to bring to us this time, so it does not expire».*

*«With the SAPO, it never happened. I, for example, cannot remember. With district departments, yes, this happened, when I was asking, the person was released. She was just in the courtroom. With the SAPO and the NABU, it has not happened. They try, nevertheless, to be on time, and avoid the appeal for this time, and they do not appeal on these grounds».*

At the same time, the study recorded cases where apprehension was actually carried out for a different purpose than that provided by the current legislation. In particular, it refers to cases of apprehension for tactical reasons, such as inducing a suspect to cooperate or certain psychological impact on a judge in order to ensure the application of a custodial measure of restraint.

[75] P.1 Art.209 of the CPC.

**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».*

**Lawyers:**

*«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...».*

*«Why do lawyers fight to prove that 72 hours have passed, so there will be no apprehension? Because otherwise there are more chances for detention to be chosen as a measure for a restraint. If there is no detention, then a judge, as for me, is psychologically more inclined to choose a measure of restraint not related to a detention».*



The study also revealed information on the prevalence of the use of a custodial measure of restraint in order to force the suspect to cooperate.

**Lawyer:**

*«They say it directly, «You testify – get a house arrest" … Even some judges provoke with such questions, «I can let you go, but you do not admit your guilt…».*

In addition, according to lawyers, there are cases when the SAPO prosecutors use detention as a tool to coerce the suspect to pay certain amounts to the budget as compensation for damages of the alleged actions.

**Lawyers:**

*«I have had two occasions when I was going to the prosecutor, and I was told that the conditions were the 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. It was once about 34 million, and another time – about 90 million. 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».*

*«The approach is like this: they are looking for someone who really has money, not someone who is the ultimate beneficiary. For example, there are 15 people, they are looking for someone who has the best financial condition and start to «harass».*

Judges confirmed the presence of such practice during interviews, pointing to the prevalence of cases of the use of a detention as a tool to persuade the suspect to cooperate, or as a punishment for a refusing to cooperate.

**Judges:**

*«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».*

*«This is an attempt of pressure. If a person doesn't admit guilt, holds the position common with the lawyer, this leads to punishment: if you act like this, you will be jailed».*

*«I noticed that when during a hearing on the extension of a measure of restraint, taking into account risks, the decision is to replace it with house arrest, the prosecutor's office does not like it. There is such a view that if a person does not recognize his/her guilt, s/he must go to jail. It also happens».*

Lawyers, in turn, also noted that this practice has the opposite effect and, conversely, prevents cooperation between the suspect and the prosecution.

**Lawyer:**

*«Behavior of the SAPO suggests that, in case of cooperation, they would take it into account when applying a measure of restraint. But after the arrest, people do not want to cooperate. People say, «This is some strange invitation for a cooperation". Head down to the asphalt and, "let's talk.» The desire to speak after such approach abruptly disappears».*

In this context, it should be noted that such tactics, taking into account the ECtHR case law could amount to a violation of Article 5 of the Convention on Human Rights and Fundamental Freedoms. In its decisions, the Court has repeatedly emphasized that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness[76]. First, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities; both the order to detain and the execution of the detention do not genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1; there is no relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention, and there is no relationship of proportionality between the ground of detention relied upon and the detention in question[77].

At the same time, other SAPO prosecutors denied the existence of this practice in their work, noting that apprehension is not the aim, and in each case, they assess all circumstances when deciding to apprehend a person. At the same time, they focused on the existence of such approaches among individual representatives of a pre-trial investigation body.

**Prosecutors:**

*«Such tactics of investigation that we should detain everyone is not used in our work; it is the mentality of the Soviet law enforcement system which was aimed at breaking of a person so s/he would confess. Detention is not our goal. If we talk about pre-trial investigation bodies, they have this moment, "The more we detain, the better the testimony, the more we will prove». As a colleague said, we assess every situation, the need for detention».*

*«We don't have a one size fits all: everyone goes to prison, everyone put in custody. Sometimes detention can break a person groundlessly. Maybe a person could behave normally; maybe some house arrest will be enough, given that there might be questions of health or something else. With groundless application of a certain measure of restraint it is possible to cause harm to a person».*

[76] Witold Litwa v. Poland, application no. 26629/95, ECtHR

[77] James, Wells and Lee v the United Kingdom, application nos. 25119/09, 57715/09 and 57877/09, ECtHR; Saadi v the United Kingdom»,

Prosecutors pointed to a direct link between the decision to apprehend and the existence of risks of escape to avoid criminal responsibility provided Article 208(3) of the CPC. At the same time, the views of prosecutors, lawyers and judges on the existence and validity of these risks vary widely (see section 3.2 for more details).

## 4.3

# The role of a prosecutor in ensuring the right to defense



During focus groups, lawyers mentioned cases from their practice when the centers for the provision of free secondary legal aid were notified about apprehension after the initial investigative and procedural actions. In fact, such actions were carried out without the lawyer.

**Lawyer:**

*«When a person is brought, it is necessary that s/he talks to a defender, and then a decision on his/her referral to a remand prison is taking place. And there was a situation that she signed the report on apprehension without the defender, the notice of suspicion was served without the defender. I made a request to the Regional center asking when she was reported to have been apprehended. First, all investigative actions were carried out, and only then, it was reported to the center that the person was apprehended and needed a counsel. But then two persons were detained and they made an appointment for two persons. I managed to communicate to one of the persons because they did not have time to get her away. And the other person has already been taken to the temporary detention facility».*

The lawyer drew attention to the ignorance of the SAPO prosecutor to her complaints about the violation of the client's rights to defense.

**Lawyer:**

*«I filed a complaint to the Prosecutor's Office [the SAPO-ed.]. It was said that, first, the investigating judge did not have a ruling on apprehension. Second, the person was taken to the temporary detention facility before the defender arrived. I received an answer that everything was normal, everything was legal – «You anyway went and communicated with the person". But it was my initiative».*

Lawyers also drew attention to the fact that the attitude of detectives and prosecutors largely depends on whether their client is willing to cooperate with the investigation, or not.

**Lawyer:**

*«The first question is when the defender comes, and sometimes he is put on the spot and being told, "The person will cooperate with us". I say, «Wait, before cooperating with you, we need to communicate with him/her». And when you say that there will be no cooperation as long as there are no elements of crime in the person's actions, hindrances occur: they do not provide documents; provide answer to any complaints with difficulty. Even the motion for the application of a measure of restraint is provided to the suspect. Very often, the defense counsel does not receive it».*

During the study, lawyers reported cases where the NABU detectives and the SAPO prosecutors actually tried to remove them from the case, involving lawyers of the free legal aid system to participate in certain procedural actions. In this case, such attempts, according to lawyers, can be considered as an attempt to weaken a position of the suspect's defense, because the free legal aid lawyer, who is appointed to participate in a separate procedural action, is much less familiar with the client's case than a lawyer handling it on a permanent basis.

**Lawyers:**

*«There is also a problem – calling lawyer to procedural actions. Lawyers are already engaged in defense and they [the detectives – ed.] contact the Center for free legal aid asking a lawyer to arrive and conduct a separate procedural action. That is, one defender receives a motion for the application of a measure of restraint, and another detective wants to conduct interrogations immediately. They began to say that the case is already in court, the judge has already been appointed, and the case is scheduled. The detective is late for a trial, and at the same time, they call a lawyer for a separate procedural action, knowing that a lawyer is preparing and is in court, they call lawyers and say, «Come, we want to conduct an urgent procedural action, for example, the interrogation of your client. It is clear that those lawyers have their own position».*

*«This is a mechanical way of eliminating those defenders who know materials of the case and are well-aware. A normal defender, if defense does not testify, may also want to ask questions to ensure that all this is not one-sided».*

*«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».*

In turn, the SAPO prosecutors noted that they do not see a violation of the right to defense in involving another lawyer in a separate investigative or procedural action, in particular if there is certain formal action.

**Prosecutor:**

*«There are cases of involvement of lawyers to participate in one procedural action. It happens that these investigative actions are often formal. If that lawyer is not going to be there, the violation of the right to defense will not take place. For example, to hand over some document. The lawyer says, «I can't because I'll be in a different region at the time of a trial». Since this is not an interrogation, since this is not some other study, but a simple handing of the document, then these investigative actions can be attended by a lawyer who will generally check whether the report was prepared correctly, and that there was no cruel treatment».*

Prosecutors also pointed out that often the call of another lawyer is a necessary measure to comply with procedural deadlines.

**Prosecutors:**

*«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».*

*«Now, regarding the replacement of one lawyer by another. We have deadlines when we submit motions for the extension of a measure of restraint. Within a certain period of time, we must provide the defense with a motion, so they can express their views on this motion. We want to do it, but this lawyer is not present. We know that if he does not do this today, we are violating procedural deadlines. We only need a lawyer to protect suspect's safeguards. Not because he will not write something, or see something. That's why we take other lawyers».*



Moreover, such a situation can be associated with the use of the tactics of delaying a case by defense, and lawyers recognize such facts themselves.

**Lawyer:**

*«There are many different reasons... Either these lawyers are busy somewhere or this is a tactic to delay the case...».*

Prosecutors, participants of focus groups also focused on the fact that the observance of the suspect's right to defense is a necessary condition for ensuring the admissibility of the collected evidence, and accordingly strengthening the prosecutor's position at the hearing.

**Prosecutor:**

*«The status is granted, and when a person has the right to defense, has full arsenal of his rights, then a pre-trial investigation goes on as usual, and we have every right to say that we observed his right to defense and took all procedural actions, even if there were no investigative actions with him. We have carried out all procedural actions in accordance with the law and we fully summarize that everything was done in accordance with the requirements of the CPC, and all of it is admissible. The person is familiar with the case files, he was given the opportunity to examine both before the end and at the end of the notification on completion of pre-trial investigation, that he received the notice of suspicion and understands what the nature of suspicion.*

*The sole aim here is to ensure the person's right to defense and the opportunity to exercise fully the person's rights. Because if we don't ensure it, we will have problems in court.*

## 4.4

# The role of the SAPO prosecutor in preventing ill-treatment of apprehended persons

The study did not show any evidence of the use of physical or psychological violence by the NABU detectives or the SAPO prosecutors against suspects in order to obtain testimony or other information, their punishment for actions they have (allegedly) committed.

**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».*

At the same time, opinions of lawyers on the timeliness of provision of medical care to detainees were divided. Thus, part of lawyers reported that they had not encountered any problems in this area.

**Lawyer:**

*«I called, he was taken and provided with help. They called an ambulance, and doctors worked with him. I have no comment on their actions with regard to the health of the detainee. I was surprised. They did not made me any comments, and we have not even talked, I came, looked at him and went out into the corridor, called an ambulance, they arrived. They ask, «Who called an ambulance?" "I called". They let doctors in. They say, «We haven't signed the report yet». I said, «Sorry». The ambulance crew said, «We're taking him». «We didn't sign it». «That's your issue». They took him. Then, detective and me, together went there with the report, he signed the report there. On the second day, he received a notice of suspicion. He never refused. On the third day, he was brought before a court. All their actions were, I would say, exemplary in comparison with the police, because there would be some scandal, they would try to put some hurdles and so on. It wasn't like that here».*

Other lawyers reported cases of delayed medical assistance to detainees, including the use of their medical condition to force them to testify in the case.

**Lawyers:**

*«If we take widely, in my experience, the NABU detectives as well as the SAPO prosecutors are absolutely not independent, that is, on all issues they are running to consult the leadership. I had a case where due to the excessive use of force during apprehension the person had a traumatic brain injury. I arrive, and the person faints three hours after apprehension, in handcuffs. I ask why he is in handcuffs, and they all shrug: «We will remove». The man gets sick, I call an ambulance, but the detective says he will not let me take him. I address the prosecutor of the SAPO and say that in front of his eyes the detective does not allow the person to get medical care. The prosecutor leaves to make a phone call, and for 20 minutes they talk on the phone and agree on it. Only 20 minutes later, we were allowed to take him to the hospital. First, they wanted to take him in the NABU car, but doctors refused to go in their car. Later, the NABU said that they were taking him from the hospital under their responsibility, and they didn't care that I filmed everything».*

*«There was a case when a person was detained illegally: events took place in 2013, he was detained in 2017. The question is that he was after a serious accident and was in poor condition. He refuses to testify and hears that he will be released only after he testifies. He refuses, and the situation comes to the point that his bone begins to rot right in jail and he develops a disability. Only after everyone starts saying they are not ready to be responsible for him, he is sent for a 24-hour house arrest. The prosecutor also complained, but there was no reaction. That is, as it often happens, the use of measure of restraint with their own purposes. In this case – obtainment of testimony».*

In this context, it is important to note that according to the practice of the ECHR, the refusal to provide adequate medical care to persons deprived of their liberty may, under certain circumstances, be characterized as violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms [prohibition of torture – ed.][78]. If the failure to provide assistance resulted in a life-threatening condition or otherwise caused the victim severe and prolonged suffering, it may amount to the inhuman treatment and thus violate Article 3[79].



## 4.5

# Challenges in investigating crimes connected with possible human rights violations in the work of the NABU

As a general rule, crimes committed by employees of the NABU should be investigated by investigators of the SBI. Exceptions include a number of crimes for which liability is provided by articles 354, 364-370 of the Criminal Code. The investigation of crimes committed by officials of the NABU (except the Director, his/her first Deputy and Deputy) according to the legislation shall be conducted by the detectives of the Internal Oversight Division of the NABU[80].

Consequently, if a NABU employee commits human rights violations that constitute crimes under Article 371 (knowingly unlawful apprehension, taking into custody, arrest or detention), 373 (compelling to testify), 374 (violation of the right to defense), the investigation falls under the jurisdiction of the SBI.

If a NABU official commits a crime associated with the excess of authority or official powers accompanied with violence or threat of violence, use of weapons or special gear, or actions that caused pain or were derogatory to the victim's personal dignity in the absence of signs of torture (Article 365(2) of the Criminal Code), such actions shall be investigated by investigators of the Internal Oversight Division of the NABU.

Accordingly, there is an overlap of investigative jurisdiction of the two law enforcement bodies regarding investigation of possible human rights violations by the NABU employees. In particular, the overlap exists in relation to facts of improper treatment of a suspect – the element of crimes under Article 373 and Article 365(2) are similar but assigned to investigation by different bodies. In addition, it is not clear which body has to investigate the acts of torture under Article 127 of the Criminal Code because the jurisdiction of the Internal Oversight Division of the NABU is clearly limited to the list of mentioned crimes, and does not cover Article 127.

The analysis of case law in this area shows that courts use the explanations provided by the Plenum of the Supreme Court of Ukraine back in 2003, namely in the decision «On court practice in cases of abuse of power or official authority». The court's position on the qualification of these crimes was the following:

> *«Violence in cases of excess of power or authority can be both physical and mental. If physical violence consists of unlawful deprivation of liberty, beatings or blows, infliction of minor or*

[78] Hurtado v Switzerland, application 17549/90, ECtHR; Ilhan v Turkey, application no. 22277/93, ECtHR.
[79] McGlinchey and others v the United Kingdom"
[80] Article 216(5)(3) of the CPC.

*medium-gravity bodily harm, and tormenting; and mental violence includes real threat of physical violence against the victim or his/her relatives, the actions of the perpetrator should be qualified under Article 365(2) of the CC.*

*It is necessary to consider the action that cause particular physical pain or moral suffering as painful and insulting the victim's dignity (Article 365(2) of the CC). They may consist in the illegal use of special means (handcuffs, rubber batons, poisonous gases, water cannons, etc.), prolonged deprivation of food, water, heat, leaving the person in harmful conditions, the use of fire, electric current, acid, alkalis, radioactive substances, poison, as well as humiliation of honor, dignity, causing emotional distress, mockery, etc.*

*If physical violence committed in the excess of power constituted torture criminalized under Article 127(1), these acts are included under Article 365(2) of this Code. If torture had signs of acts under Article 127(2) of the Criminal Code, actions of the official shall be qualified as crimes in conjunction – under Article 127(2) and 365(2) of the CC»*[81].

Thus, it can be concluded that torture, if committed by an employee of the NABU, must be qualified simultaneously under Articles 127 and 365(2) of the Criminal Code. However, as we have already mentioned, these two crimes are under the jurisdiction of different bodies – the SBI and the Internal Oversight Unit of the NABU. Such discrepancy could lead, in practice, to significant problems that could damage the effective investigation of such a disgraceful violation of human rights as torture.

In resolving this conflict, one should take into account the ECtHR case law on Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms in determining the standards for the effective investigation of the facts of ill-treatment.

The key aspect of the effective investigation and maintaining of the credibility with the claimant and the public is the independence of investigation. For an investigation to be effective, those responsible for and carrying out the investigation must be independent and impartial, in law and in practice. This means not only a lack of hierarchical or institutional connection with those implicated in the events but also a practical independence. The duty to ensure independence may apply to any person making decisions during investigation, for example, the person conducting an investigation, forensic medical experts, prosecutors, and specialized bodies. Officials involved in investigations and decision-makers should be independent from those implicated in the events under investigation[82].

The ECHR in its decisions against Ukraine under the Article 3 of the Convention established the following violations of the criterion of independence:

- review of allegations of ill-treatment by the police officers working In the same office as the alleged perpetrators, or by a prosecutor's office located in the same place as the police office;
- the use by the police or the prosecutor's office of the findings of an internal investigation or explanation from persons accused of ill-treatment;
- carrying out inspections of complaints in the framework of the main criminal proceeding against a person who filed the complaint etc.

Taking into account the above-mentioned ECtHR standards, the legislative attribution of the crime under Article 365(2) of the CPC (excess of authority or official powers accompanied with violence or threat of violence, use of weapons or special gear, or actions that caused pain or were derogatory to the victim's personal dignity in the absence of signs of torture) to the jurisdiction of the Internal Oversight Unit of the NABU jeopardizes the principle of independence of the investigation. After all, in fact, the NABU employees

[81] http://zakon3.rada.gov.ua/laws/show/v0015700-03.

[82] Savitskyy v. Ukraine, Vitkovskiy v. Ukraine, Kirpichenko v. Ukraine.

should investigate the legality of their colleagues' actions, which, in our opinion, does not meet the criterion of institutional independence of investigation, and therefore casts doubts on its effectiveness as a whole.

In addition, there is a question of compliance with the effective investigation standards in the exercise of procedural guidance by the SAPO prosecutors in the proceedings of the NABU Internal Oversight Division in this category of crimes. The SAPO prosecutors provide procedural guidance in proceedings of the NABU detectives, within which there may be human rights violations investigated by the Internal Oversight Division.

In our opinion, violations of human rights by the NABU officials, including crimes Article 365(2) of the Criminal Code, should fall under the jurisdiction of a body with operational independence from the NABU, currently – the SBI. Accordingly, the PGO units, independent of the SAPO, should carry out procedural guidance in this category of proceedings.

## Chapter 4 findings

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. 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.

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**STUDY REPORT**

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