MUTUAL LEGAL ASSISTANCE WITHIN THE INVESTIGATION OF CRIMINAL CORRUPTION OFFENCES

*Anna Dzhavaha**

I. SPECIFIC CORRUPTION OFFENCES

Nowadays, the problem of corruption has become time-sensitive and inevitable. Such negative phenomenon as corruption destroys sustainability of the State by raising the lack of confidence of the society in the state authorities, reducing public activity in political and social life, and leads to diminishing of the rule of law and the law in general.

Therefore, detection and demolishing of corruption crimes are issues of a great importance. However, corruption crimes are relatively close to economy and finance, which makes them quite complicated. Also, one of the difficulties is that corruption is not bound by the boundaries of only one country. It actually has its own space and spreads far abroad. As a result, in high-profile corruption cases it is nearly impossible to gather evidence without using the tools of mutual legal assistance. That is why the detectives of the National Anti-Corruption Bureau of Ukraine (hereinafter — the NABU) often have to seek assistance and advice from foreign colleagues.

For example, in order to find out circumstances of crimes the NABU needs information about the final beneficiaries of foreign companies involved in corruption schemes, the use of money on accounts of foreign business entities and the facts of possible money laundering. Sometimes investigations require conducting procedural actions with citizens of other states. All this is achieved through the mechanism of international legal assistance.

At the same time, it is a well-known fact that mutual legal assistance is a cooperation process of a long duration, but for proper and accurate investigation we should be as quick as possible, sometimes even faster.

In such a manner I am going to cover some problematic issues frequently arising within mutual legal assistance and provide some examples of successful and fruitful international cooperation.

A. High-Profile Investigations

The NABU's investigations turned out to be a series of resonant events — detentions, notices of suspicion, large-scale corruption schemes exposing and unusual court hearings. And now we are going to talk about two of the biggest corruption cases which were under investigation of the NABU.

1. The Martynenko Case

At the beginning of December 2015, the investigation into embezzlement of funds of the state enterprise in the energy complex named «Energoatom» worth EUR 6.4 million was launched. Within the case NABU's detectives were examining the facts of acceptance by officials of the Energoatom of an improper advantage during public procurement procedures. The investigation revealed that the state enterprise suffered losses of more than 6.4 million EUR for overpayment for the equipment purchased from the Czech joint-stock company "Škoda JS". However, to prove this by appropriate evidence and seek all persons alleged for the commitment of crime it was crucial to gain the registration documents of Škoda JS, commercial documents regarding the purchase of the equipment, information that showed the money flows and contained the bank secrecy etc. But all mentioned documents and information were in possession of foreign companies and authorities. As a result, it was important to carry out the procedural actions in the territory of a foreign country, so the first MLA request was drafted and sent to the competent authorities of the United Kingdom.

* Chief Specialist-Legal Counsel, International Law Division/Legal Department, National Anti-Corruption Bureau, Ukraine.

Lately the bank information was received and it became clear that money had been transferred to several other accounts in different banks in different countries. Also, received information showed the other foreign companies which were involved in the corrupt scheme, so new MLA requests were sent to the competent authorities of the Republic of Latvia, Switzerland and Czech Republic.

Due to the MLA requests NABU got information that after receiving the funds according to agreements with the SE «NNEGC» «Energoatom», Škoda JS transferred 6.4 million EUR to the account of BRADCREST INVESTMENT S.A. (Panama Republic), owned by the former MP. Therefore, the other MLA request was sent and consequently the funds in the amount of 86.4 million UAH (3.2 million Swiss francs) were seized at the account of the abovementioned company at a Swiss bank.

(i) Parallel Investigation

Moreover, under the international cooperation it turned out that law enforcement authorities of Switzerland and Czech Republic conducted the pre-trial investigations in related matters. When it was discovered, on the initiative of a Czech representative at Eurojust that a decision was made to organize several meetings at Eurojust with representatives of Swiss, Czech and Ukrainian law enforcement agencies which were conducting relative investigations. During the meetings investigators shared information, made a plan about further investigative actions in their parallel investigations and outlined what information they could share with each other on the basis of MLA requests to get all necessary, appropriate and admissible evidence.

Furthermore, the pre-trial investigation into the facts of 17.28 million USD embezzlement of the SE Eastern Mining and Processing Plant was started in December 2015. In this case several MLA requests were sent to the foreign competent authorities as well. And when some of them were satisfied and NABU got the execution materials in late April 2017, the detectives of the NABU under the procedural guidance of the anti-corruption prosecutors gave a notice of suspicion to the former MP for allegedly committing crimes under Part 1 Article 255 (Creation of a criminal organization), Part 5 Article 191 (Misappropriation, embezzlement or conversion of property by abuse of official post) of the Criminal Code of Ukraine.

In November 2017, the prosecutor of the Specialized Anti-Corruption Prosecutor's Office (hereinafter — the SAPO) decided to join two criminal proceedings. In terms of the unified proceeding 11 persons were given notices of suspicion, 5 of them were put on the wanted list.

On January 9, 2018, according to the order of the prosecutor of the SAPO the detectives of the NABU provided the former Member of Parliament (also known as the Former Head of the Verkhovna Rada Committee on Fuel and Energy Complex) and his defence with access to the documents of the pre-trial investigation of the criminal proceeding as of the facts of funds embezzlement of the State Enterprise (SE) Eastern Mining and Processing Plant and the SE «National Nuclear Energy Generating Company «Energoatom».

The former Member of Parliament is suspected of committing crimes qualified under:

- *Part 3 Article 27, Part 5 Article 191* of the Criminal Code of Ukraine (CCU) (Organization of embezzlement of property by abuse of official post committed in especially gross amount);
- *Part 1 Article 255* of CCU (Creation of a criminal organization for the purpose of committing a grave or special grave offense, and also leadership or participation in such organization, or participation of offenses committed by such organization);
- *Part 3 Article 27, Part 4 Article 28, Part 5 Article 191* of the CCU (Organization of embezzlement of property by abuse of official post committed in especially gross amount);
- *Part 3 Article 27, Part 4 Article 28, Part 3 Article 209* of the CCU (Organization of legalization (laundering) proceeds of crime).

In addition, among other suspects there are executives of the SE Eastern Mining and Processing Plant, State Concern Nuclear Fuel, National Joint Stock Company Naftogaz of Ukraine, Public Joint-Stock Company United Mining and Chemical Company and structural unit of the SE NNEGC «Energoatom».

Finally, after 5 months of becoming acquainted with the suspects and the defence with the documents of the pre-trial investigation, the detectives of the NABU completed investigation of the embezzlement of the

funds of the (SE) Eastern Mining and Processing Plant and the «National Nuclear Energy Generating Company «Energoatom». As a result, they handed over the indictment to the former Member of Parliament and other suspects. On May 22, 2018, the prosecutors of the SAPO sent the indictment to court.

To summarize the abovementioned during the preliminary investigation of the case 54 MLA requests were sent to more than 10 foreign competent authorities (United Kingdom, Switzerland, Austria, Latvia, Lithuania, Czech Republic, Cyprus, Kazakhstan, Italy, Greece, Panama and even Singapore). It is the biggest corruption case where so many MLA requests were sent and so many foreign jurisdictions were involved.

2. The Amber Case

In early 2016, the NABU conducted a study to determine the most "corrupt spheres" of the economy. One of such spheres appeared to be the illegal amber business in the Rivnenska, Zhytomyrska and Volynska regions. Based on the gathered information, acting in accordance with the Law of Ukraine "On Operational and Investigative Activity", in November 2016 the NABU started a special operation undercover. The "amber case" became the first one in Ukrainian history in the set of anti-corruption special operations of this level.

(i) Undercover operation

The NABU detectives prepared an undercover operation in cooperation with the Federal Bureau of Investigation of the United States, which has many years of experience in conducting such actions. In the fall of 2016, a special agent of the NABU, under the pretense of a representative of a foreign company interested in investing in the organization of extraction and export of amber, began to establish contacts with some stakeholders. According to rumor, the company was ready to invest in Ukraine, but demanded the changes in the legal regulation of the extraction and export of amber. Further the agent-entrepreneur received corresponding offers along with the "price list" for services: a total of 15,000 USD. The agent passed these funds to MP Maksym Poliakov's assistant and the security guard of the MP Boryslav Rosenblat. Both MPs initiated the changes to the Tax and Customs Codes of Ukraine regarding the taxation of amber extraction activities and the import of digging equipment. According to the investigation when it became clear that the adoption of changes "are stuck", the MP Boryslav Rosenblat offered, on his own initiative, plan "B": to establish a company in Ukraine to extract amber in the territory of Zhytomyrska region through PJSC "State Joint-Stock Company Ukrainian Polymetals" (a subsidiary of Ukrburshtyn State Enterprise). Implementation of this plan would require a number of approvals by officials of the State Geological Cadastre, the State Service of Geology and Subsoil of Ukraine, the State Forestry Agency, local authorities, the prosecutor's office and the court. In general it touched the abolition of special permits for the use of subsoil, issued to a number of private companies that have already worked on the areas that, according to the MP, should have been transferred to a foreign company he promoted. Having no idea of the special operation, the MP even sent a letter to the NABU with a request to find out how private companies have got permits for the use of subsoil. In six months it turned out that the plan could not be realized and Boryslav Rosenblat suggested another option — to buy a 30 hectares land plot for digging amber in the Zhytomyrska region. As before, the MP promised to solve all bureaucratic issues. He appraised this as a "turnkey" project at 200-250 thousand USD. In parallel, a person affiliated with Rosenblat offered an agent to export about 100 kg of amber, which has already been extracted in an illegal manner. Subsequently, the detectives seized this "trial" lot during searches.

In general, within the operation the undercover agent met with the suspects in the case more than 60 times and made over 50 phone calls. The NABU detectives have obtained over 50 court permissions for undercover investigative actions within the proceeding. According to the disclosed materials of investigation, the positive solving of the issues required financial incentives, as the MP informed the agent during meetings. According to him, the agent should always have about 100,000 USD at hand It is important to note that the agent have never offered any "encouragement" — in all cases it was the initiative of the MPs.

On June 19, 2017, at a meeting in a restaurant the security guard of Boryslav Rosenblat was detained at the time when the NABU agent handed him 200,000 USD. On the same day, the assistant of the MP Poliakov was detained (she, according to the detectives' investigation also played the intermediary role in the funds transfer to her boss, and to several other persons). As of now the investigation has established eight persons' involvement in committing a crime. On June 20, six of them were given a notice of suspicion. They are two guards, two MP's assistants, a lawyer and a representative of the parliament association "Parliamentary Control". Two suspects were placed under house arrest. Another two have been released on insignificant bail.

The most controversial issue was the abolition of parliamentary immunity of key figures — the MPs Maksym Poliakov and Boryslav Rosenblat. On June 21, 2017, the Prosecutor General of Ukraine submitted to the Verkhovna Rada an appeal for permission to prosecute, detain and arrest "key figures" of the amber case. On July 6-7, at the meeting of the Verkhovna Rada' Rules Committee, the MPs and the public watched a documentary film, made of videos recorded by the undercover agent during the investigative actions.

On July 11, the Verkhovna Rada voted for bringing Maksym Poliakov and Boryslav Rosenblat to justice, but did not consent to their arrest and detention. On July 12, the Prosecutor General of Ukraine gave notices of suspicion to Boryslav Rosenblat for allegedly committing a crime under Part 4 of Art. 368 of the Criminal Code of Ukraine («Accepting an offer, promise or receiving an illegal advantage by an official»), Part 2 of Art. 369-2 ("Trading in influence"), and to Maksym Poliakov for allegedly obtaining illegal advantages (Part 4 of Ar. 368 of the Criminal Code of Ukraine). On July 18, Solomyansky District Court of Kyiv chose a preventive measure in the form of 7 million UAH bail for Boryslav Rosenblat and imposed on him an obligation to wear an electronic monitoring device. On July 21, the court chose a preventive measure in the form of 304,000 UAH for the MP Maksym Poliakov and imposed on him an obligation to wear an electronic monitoring device and surrender his foreign passports. The detectives of the NABU under the procedural guidance of the prosecutors of the SAPO completed a pre-trial investigation of the criminal proceeding as to the facts of receiving an improper advantage for the assistance to a foreign company in the realization of amber mining in Ukraine (the so-called «amber case»). On February 15, 2018, 6 suspects (including 2 Members of Parliament) and the defence had been granted access to the documents of the pre-trial investigation.

As we see from the abovementioned examples in NABU's high-profile investigations international cooperation are frequently used. In spite of the effectiveness of international cooperation there are still some issues which arise during preparation and execution of MLA requests.

II. ISSUES CONCERNING MUTUAL LEGAL ASSISTANCE

A. Temporary Access to Objects and Documents

1. Bank Secrecy

As it has been noted earlier, during the implementation of corruption schemes monetary funds and/or other proceeds of crime with the purpose of laundering are transferred abroad. In this connection, at the stage of pre-trial investigation it is necessary to conduct investigative actions in foreign countries where banking institutions attending relevant companies or public officials of state authorities are located.

The only basis for obtaining confidential banking information (cash flow on accounts, banking materials, etc.) is the existence of court permission (court ruling). So, while addressing the competent authorities of foreign countries in the framework of pre-trial investigation with request for mutual legal assistance in criminal matters related to execution of the temporary access to objects and documents, it is also necessary to obtain court permission (investigating judge's ruling).

Meanwhile, in practice, there is a question regarding the procedure of implementation of such investigative actions as temporary access to objects and documents in the context of international cooperation because the said question is regulated by the national legislation of Ukraine without taking into account peculiarities of the investigation in the framework of international cooperation. Thus, in Part 2 of Article 562 of the CPC of Ukraine it is indicated that it is required to obtain a Ukrainian court's permission for temporary access in foreign countries but neither the procedure for obtaining such permission nor its validity are set by the act. Thus, the order of obtaining court permission and the term of its validity are equally stipulated by the current CPC of Ukraine either for implementation of the mentioned action on the territory of Ukraine, or for its implementation abroad in the course of international cooperation.

In particular, when engaging in international cooperation in criminal matters, namely when temporary access to objects and documents constituting bank secrecy is required, the detective in accordance with the Criminal Procedural Code of Ukraine applies to the court with an appropriate request in which he indicates that the mentioned actions are requested in the framework of mutual legal assistance and refers to relevant international treaties.

In case of a positive decision and granting the appropriate request, the investigating judge issues a ruling

obligatorily indicating, among others, the term of validity, which may not exceed one month from the date of issuance.

As it has been mentioned, by the provision of the CPC of Ukraine it is stipulated that the term of validity of the ruling may not exceed one month. However, according to specialized regulations of the criminal procedural law in the sphere of international cooperation, there are no exceptions to this rule. In practice there are few cases when problems arise when it comes to implementation of temporary access to objects and documents constituting bank secrecy in foreign states.

For example, during the pre-trial investigation of the criminal proceedings for use of authority by officials of the central executive authorities with application of corruption schemes during open tender procurement for purchase of goods, it has become necessary to obtain access to information from banks located outside Ukraine. In this case, the detective of the NABU prepares a request to the competent authority of the State to provide international legal assistance in criminal proceedings. Along with the request, a full package of documents is prepared including the duly attached certified copy of the investigating judge's ruling on permission to conduct temporary access to objects and documents containing confidential banking information. Preparing a request for mutual legal assistance and a package of documents takes time. In addition, the request and the documents attached to it must be translated. Moreover, it is not always done in the official languages of the UN, which also requires more time.

Thus, while the request for international legal assistance is prepared, the validity of the investigating judge's ruling expires. Moreover, after preparation of the request and the documents in accordance with the national legislation of Ukraine, international documents are sent by international post which also takes time. Therefore, at the moment when the request for mutual legal assistance is directed to the executor, the ruling's validity often expires.

As far as for the majority of foreign states, the availability of a court ruling is a mandatory basis for such investigative actions as temporary access to objects and documents, the investigating judge's ruling with expired term of validity makes it impossible to conduct the investigative action in a foreign state. In addition, in case of getting temporary access after the expiry of the ruling's, validity, there is a question as to the admissibility of evidence obtained as a result of the temporary access to objects and documents during international cooperation.

So by Article 86 of the CPC of Ukraine it is stipulated that evidence is admissible if it is received in the manner stipulated by this Code. Illegal evidence cannot be used by a court to take procedural decisions; the court cannot refer to it in a court order.

Thus, in case the evidence has been obtained as a result of procedural infringement stipulated by the CPC of Ukraine, such evidence at the request of the parties of the criminal proceedings may be declared inadmissible, which in turn can completely destroy the public prosecution in court.

Currently, the NABU is drafting a law on introduction of amendments into legislative acts in the sphere of criminal justice including the Criminal Procedural Code of Ukraine with the purpose of putting the current legislation into compliance with international agreements and solving problematic issues which arise in practical application of these standards during pre-trial investigation.

Prior to implementation of appropriate amendments into the current legislation, the central authorities in the sphere of international cooperation during pre-trial investigation (by the National Bureau and the General Prosecutor's Office of Ukraine) agreed their position that the mentioned court permissions may be used as collateral estoppel within the international legal assistance. Thus, the availability of the investigating judge's ruling shows that the appropriate judicial permission confirming the validity and necessity of the specified investigative action was received by the pre-trial investigation authorities of Ukraine.

Also, the NABU established cooperation with the competent authorities of certain foreign countries on the issues of additionally sending new rulings. As a consequence, when the request for international legal assistance has been filed to the foreign competent authority, in case of expiry of the term of the ruling, the competent authority in due course[1] sends a notice to the NABU on the need of provision of several rulings,

the validity of which has not expired yet.

In such a manner, the NABU ensures compliance with the requirements of criminal procedure law during the execution of investigative acts in the territory of foreign countries, which ensures formation of a strong evidence base, where the issue of the evidence admissibility will not be one more disputable issue between the parties of the criminal proceedings, which in its turn will reduce the time of the criminal proceedings and allow completion as soon as possible.

2. Freezing Assets

In spite of the temporary access to objects and documents during the pre-trial investigation of criminal corruption offences, often there is a need to freeze assets to ensure their availability during the criminal proceedings. For example, during the preliminary investigation of the criminal proceedings for use of power by the officials of the central executive authorities by application of corruption schemes during the open tenders for purchases of goods, information on bank accounts of these officers and related companies was received within mutual legal assistance. In order to ensure indemnification of damages to the State caused by the criminal corruption offences, the detective who conducts the pre-trial investigation should contact the competent authority of the foreign country in which the relevant banking institution is located to request the freezing of bank accounts of the offender and/or related companies.

Despite the fact that in the majority of international multilateral agreements on mutual legal assistance in criminal matters it is noted that the member countries of such agreements shall afford to each other the widest assistance in investigations, prosecutions and judicial proceedings regarding offences covered by such treaties[2] in practice, while application to foreign countries with requests to freeze assets through international legal assistance, a range of practical application issues of certain procedural regulations is raised.

(i) The difference between the status of a suspect / accused in Ukrainian legislation and legislation of foreign countries

Thus, part 1 Art.170 of the CPC of Ukraine establishes that the asset freeze is temporary, up to the moment of abolition by this Code, deprivation on the basis of ruling of the investigating judge or court of a right on alienation, disposal and / or use of property, to which there is a set of reasonable grounds or suspicion to believe that it is evidence of a crime, subject to special confiscation from the suspect, accused, convict, third parties, confiscation from the legal entity to secure a civil claim, recovery from the legal entity of undue benefits received, possible confiscation of property. Asset freezes are cancelled as prescribed by this Code.

The said provision of the CPC of Ukraine corresponds to the criminal procedure legislation of the majority of the foreign countries in relation to obtaining court permission and the requirement of criminal offence status of the suspect or accused person. However, there are some differences in the context of understanding and grounds to become suspected or accused under the national laws of Ukraine and criminal procedure law of foreign countries.

In many countries the status of a suspected person is acquired if there is a reasonable suspicion of having committed a criminal corruption offence by the person and / or involvement of such person in the commission. In addition, in some countries, the subject of the crime can be either an individual or legal entity.

Under the criminal law of Ukraine, the offender, pursuant to Article 18 of the Criminal Code of Ukraine, may be only an individual, but measures for legal entities are stipulated. Such measures may be applied only in case of certain grounds exhaustively listed in Article 96-3 of the Criminal Code of Ukraine, but the use of these measures does not create a basis for legal entities becoming suspected or accused.

Thus, in accordance to part 1, article 42 of the CPC of Ukraine, the suspect is the person who, in the

[1] In such case it is meant the notification sent by e-mail to the address of the International Legal Department of the Anti-Corruption Bureau of Ukraine indicated in the cover letter to the request.
[2] Part 1 of Article 46 of the UN Convention against Corruption dd. 2003, General Assembly Resolution 58/4 of n31 October, 2003, part 1, article 1 of the European Convention on Mutual Assistance in Criminal Matters dd. 1959 (ETS 30).

manner prescribed by Articles 276-279 hereof, was reported on the suspicion, the person detained on suspicion of a criminal offence or a person in relation to whom there was a notice of suspicion but it has not been served because of non-identification of his/her location, but the relevant steps for service have been taken as stipulated by the current Code for the notifications service.

By part 2, Article 42 it is established that the accused (defendant) is the person against whom the indictment was submitted to the court in the manner provided by Article 291 of the Code.

(ii) Delay in the pre-trial investigation

Thus, when a detective is applying to freeze bank accounts to the competent authority of a foreign state, often there are cases when the requested state sends a letter to provide clarification on the acquisition by a person in respect of which the preliminary investigation in the territory of Ukraine is conducted, the status of the suspect or the accused, which in turn leads to delay in the request for international legal assistance and slows the progress of pre-trial investigation.

Meanwhile, the delay in freezing of bank accounts increases the probability of withdrawal of funds or transferring them to other accounts, which leads to loss of material evidence and makes it impossible to provide compensation for losses to the State.

III. CONCLUSION

At present, corruption in Ukraine is a quite widespread, negative phenomenon which disturbs people's confidence in government, leads to delayed development of the State and decline in the economy. Consequently, preventing and combating corruption is one of the main vectors of state policy.

Taking into account the specificity of criminal corruption offences, their complexity and permanent development of corruption schemes, formation of strong evidence by the detectives of the NABU under pre-trial investigation is an important instrument in fighting against corruption.

Collection of evidence during pre-trial investigation of high-profile corruption cases is hardly possible without use of international cooperation instruments. Often in corrupt schemes companies incorporated under the legislation of foreign countries are involved, and cash received from crime are transferred abroad for further laundering. However, the tools of mutual legal assistance are very useful and could be fruitful. Moreover, establishing of contacts between anti-corruption agencies, foreign law enforcement authorities and related authorities, strengthening of cooperation between them are quite essential issues for pre-trial investigation of such cases.

So, today Ukraine faces the task to improve legal framework taking into account the experience and positive practice of foreign states in the sphere of combating corruption and to develop broad links with international anti-corruption and other competent authorities. As a result of these actions, Ukraine will form a positive practice in the sphere of fighting corruption and will develop new effective methods of preventing and combating corruption.