



ACN

Anti-Corruption Network for Eastern Europe and Central Asia

Anti-Corruption Division
Directorate for Financial and Enterprise Affairs
Organisation for Economic Co-operation and Development (OECD)
2, rue André-Pascal, 75775 Paris Cedex 16, France
Phone: +33(0)1 45249964, Fax: +33(0)1 44306307
E-mail: anti-corruption.contact@oecd.org
Website: www.oecd.org/corruption/acn

OECD Anti-Corruption Network for Eastern Europe and Central Asia

Istanbul Anti-Corruption Action Plan

Second Round of Monitoring

Ukraine

Monitoring Report

Adopted at the 9th Monitoring Meeting of the Anti-Corruption Network for Eastern Europe and Central Asia Istanbul Anti-Corruption Action Plan on 8 December 2010 at the OECD Headquarters in Paris.

Contents

Executive Summary.....	3
Second Round of Monitoring	6
Country Background Information	8
1. Anti-Corruption Policy	10
1.1–1.2–1.3 Political will to fight corruption, anti-corruption policy documents and corruption surveys	10
1.4-1.5 Public participation in anti-corruption policy work, raising awareness and public education.....	14
1.6 Specialised anti-corruption policy and coordination institution	16
1.7 International anti-corruption conventions.....	19
2. Criminalisation of Corruption	21
2.1-2.2 Offences and Elements of Offence.....	21
2.3 Definition of Public Official.....	29
2.4-2.5–2.6 Sanctions, Confiscation, Immunities and Statute of Limitations	33
2.7 International cooperation and mutual legal assistance	38
2.8 Application, Interpretation and Procedure.....	39
2.9 Specialised Anti-Corruption Law-Enforcement Bodies	43
3. Prevention of corruption.....	46
3.1 Corruption Prevention Institutions	46
3.2 Integrity of Public Service	46
3.3 Promoting transparency and reducing discretion in public administration	54
3.4 Public Financial Control and Audit	56
3.5 Public Procurement	59
3.6 Access to Information.....	61
3.7 Political corruption	63
3.8 Integrity in Judiciary.....	65
3.9 Integrity in the private sector.....	69
Summary Table	71

Executive Summary

This report analyzes progress made in Ukraine in developing anti-corruption reforms and implementing recommendations received under the Istanbul Anti-Corruption Action Plan since the first monitoring round in 2006. The report also provides new recommendations in three areas: anti-corruption policies; criminalisation of corruption; and prevention of corruption.

Anti-Corruption Policy

The debate about corruption has occupied a prominent position in public and political life of Ukraine for several years. Key political figures repeatedly declare their resolve to fight corruption. These political declarations have not yet translated into real results. The adoption of the so called "anti-corruption package", which consists of several anti-corruption laws, is a vivid example. The package was proposed for adoption of Parliament in 2006; it was finally adopted in June 2009, but its entry into force was postponed twice and is currently expected in January 2011. When many other countries in transition have reformed their legal frameworks several years ago, and came to face enforcement challenges, Ukraine has yet to make the first step and to adopt relevant laws.

The Concept of Overcoming Corruption "Towards Integrity", adopted in 2006 by the previous government, continues to provide anti-corruption strategy of the country. However, it does not provide a monitoring mechanism and little effort was made to assess its implementation. In any case, the new government does not have a strong ownership of this policy document. The Ukrainian authorities indicated that a new strategy is being developed. While many corruption surveys were conducted in Ukraine, the government has played little role in commissioning and designing such studies, and their findings are yet to be used for the development and monitoring of the new strategy.

In February 2010, the newly elected President established the National Anti-Corruption Committee, which is an advisory high level body. To date the Committee did not provide important contribution to the anti-corruption activities in practice. In June 2008, the Cabinet of Ministers of Ukraine established the office of the Government Agent on Anti-Corruption Policy; it became operational in April 2009. The work of the Agent is supported by a Bureau on Anti-Corruption Policy, which was established in June 2010 and has 15 staff members. While the Agent has a broad corruption prevention mandate, it is not a member of the National Anti-Corruption Committee. The establishment of the Agency and the Bureau are important steps in the right direction, but their capacity need to be strengthened, and proper coordination with other bodies responsible for the prevention of corruption in the Government, in the Parliament and in the Presidential Administration need to be ensured.

Criminalisation of Corruption

Despite significant efforts, to date Ukraine has not made substantive progress in reforming anti-corruption criminal legislation. The anti-corruption package noted above would address some of the recommendations when it enters into force; however a number of shortcomings remain in the package. Further legal reforms are needed to ensure that offering, promising and requesting a bribe are criminalised according to international standards; trading in influence, bribery through and for the benefit

of third person should be criminalised as well. Clear definition of bribe should be provided in criminal law and explicitly include non-pecuniary undue advantages. Attempt to criminalise illicit enrichment is welcome but the definition of this crime should be brought in line with the UNCAC. Corruption offences involving foreign and international public officials should be criminalised. The draft Law "On Amendments to the Criminal and Criminal-Procedure Codes on Improving the Procedure for Carrying out of Confiscation" aims to bring Ukrainian legislation in compliance with international standards in the area of confiscation; however, it is not clear when this law may be adopted and enter into force. To date, no measures were taken to limit the immunity of some categories of high level public officials from investigation and prosecution for corruption offences; effective and transparent procedures for lifting such immunities should also be ensured.

The Law of Ukraine on the Liability of Legal Persons for Corruption Offences, which is a part of the anti-corruption package, makes an effort to bring Ukrainian legislation in compliance with international requirements. However, it contains several shortcomings. In particular, it does not include all corruption related offences, it does not specify what constitutes a legal entity within the scope of the law, and it allows starting proceedings against a legal person only after the proceedings against the natural person were completed.

The debate on creation of separate anti-corruption law enforcement agency has been going for a very long time in Ukraine. In the 2008, the Concept of the Criminal Justice System Reform stipulated establishment of a specialised investigative anti-corruption body along with specialised anti-corruption prosecutors. Draft Law on the National Bureau of Anti-Corruption Investigations, which in general complies with relevant international standards, was submitted to the Parliament in July 2009. However, to date no tangible results have been achieved in the reform of institutions responsible for combating corruption through law-enforcement.

Prevention of Corruption

As in the case of criminal law reforms, there were multiple attempts to reform legislation related to integrity in public service. Despite these efforts, current Law on Civil Service, which dates back to 1993, fails to establish modern principles of public administration, including delineation between political and professional civil servants, as well as provide definition of conflict of interest and related prohibitions. Draft Law on Integrity in Civil Service was rejected by Parliament in 2009; several draft laws on conflict of interests were prepared, but never adopted. The Law on the Principles of Prevention and Countering Corruption, which is a part of the anti-corruption package, contains provisions on integrity and prevention of conflict of interests. However this law does not have a mechanism for its implementation, and requires further improvements. Several legislative efforts were made to improve the existing system of asset declarations, however they were not introduced in practice; as in the past there is no mechanism to verify the declarations, or to publish them.

Economic reforms and development are the priorities of the new Government of Ukraine. In this context, the Government recognises the need to pursue regulatory reform in order to simplify procedures related to licences and permits. Ukraine still does not have a Code of Administrative Procedure. The new Tax Code was adopted in a very fast procedure during the development of this report, its anti-corruption provisions were not examined during this round of monitoring due to lack of sufficient time needed for such analysis.

In the area of public financial control and audit, no major reforms were carried out since the first round of monitoring. The new recommendation focuses at the short-term goal to improve the effectiveness of the Financial Inspection of the Ministry of Finance by focusing on important cases, developing intelligence function and improving relations with the law-enforcement bodies. In the long term, Ukraine should

develop external and internal audit functions to signal corruption cases to the management and law-enforcement bodies.

Public procurement is the area where the compliance rating for Ukraine was upgraded due to the adoption of the new Law on Public Procurement in June 2010. The new law is an acceptable short-term solution and an improvement compared to the past, especially concerning the institutional set-up: the Tender Chamber was removed, Ministry of Economy was determined as the main responsible body, and a new complaints mechanism was provided by the Anti-Monopoly Committee. At the same time, the law does not provide for any measures to prevent conflict of interests or corruption; it does not provide for e-procurement or for an operational system of debarment for persons convicted for corruption.

In the area of access to information, the new recommendation reiterated the original recommendation which called on Ukraine to create an office of Information Commissioner, and to adopt a Law on Public Participation which would provide citizens with an opportunity to use information to affect government decisions. The new recommendation urges Ukraine to adopt new law on access to public information. It further recommends to review rules and practice for classification of information and to provide information in corruption-prone areas proactively.

Analysis of legal and institutional framework for public control of political party financing revealed a number of serious shortcomings in Ukraine. The recommendation suggests establishing effective restrictions on contributions to parties and sanctions for violations of party financing rules. It further points the need to establish an effective mechanism to control party financing and to ensure their transparency.

In the area of judiciary Ukraine achieved some progress in improving legal framework to guarantee independence and impartiality of the judiciary by adopting a new Law on the Judiciary and the Status of Judges in July 2010. There are still a number of deficiencies that require correction, in particular through constitutional amendments to change the procedure for appointment and dismissal of judges and the role and composition of the High Council of Justice. Judicial independence in practice is seriously affected by the insufficient state funding and lack of adequate resources. Use of private contributions and assistance from local self-governance to finance the judiciary undermines its integrity and fosters corruption.

General lack of legal certainty is the fundamental challenge for doing business in Ukraine. One of the business representatives interviewed during the on-site visit stated that companies in Ukraine had to accept corruption, or they were out of business. Business representatives further noted that reporting bribery is risky and counterproductive in Ukraine. While business regulations exist, including accounting and audit regulations, laws of Ukraine do not require companies to establish internal controls and compliance programmes. The government did not make any efforts so far to promote internal company controls. In this context, the recommendation focuses at the need to establish a dialogue between the government and the private sector to raise awareness about risks of corruption and solutions for private sector.

Second Round of Monitoring

The Istanbul Anti-Corruption Action Plan is a sub-regional initiative of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN). It targets Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyz Republic, Tajikistan, Ukraine and Uzbekistan; other ACN countries participate in its implementation. Its implementation involves review and monitoring of legal and institutional framework to fight corruption.

The review of Ukraine was carried out in January 2004; 24 recommendations were endorsed. The first round of monitoring assessed the implementation of recommendations and established compliance ratings of Ukraine; the report was adopted in December 2006: 3 recommendations were largely implemented, 9 were partly implemented and 12 were not implemented. Ukraine provided regular updates about steps taken to implement the recommendations at ACN plenary meetings.

The Government of Ukraine provided answers to the questionnaire in May 2010. The country visit took place on 5-9 July 2010, and involved eleven thematic sessions with state institutions, including: Government Anti-Corruption Representative, Anti-Corruption Bureau, Ministry of Justice, Parliament, Prosecutor General's Office, Ministry of Interior, Security Service, Institute of Applied Humanitarian Studies, Supreme Court, Supreme Administrative Court, Supreme Council of Justice, Council of Judges, Judicial Academy, State Judicial Administration, State Committee on Entrepreneurship, Financial Inspection of the Ministry of Finance, Ministry of Economy, Main Civil Service Department, Academy of Public Administration, Traffic Police, State Tax Administration, State Customs Service, Ministry of Health Protection, Ministry of Education and Science, Ministry of Economy, State Property Fund, Accounting Chamber, Ministry of Finance, Ministry of Transport, Ministry of Regional Development, Anti-Monopoly Committee, Ministry of Defense, State Committee on Municipal Services. The special session with civil society was organized in cooperation with TORO Creative Union/TI Ukraine; special session with businesses representatives was organized in cooperation with the Property and Freedom Institute; both sessions were hosted by the Renaissance Foundation. A session for international organizations and bilateral donors was organized in cooperation with the Delegation of the European Union in Ukraine.

Ms. Oksana Markeeva, Head of the Anti-Corruption Division, Department for Law-Enforcement Agencies, National Council for Security and Defence of Ukraine, provided coordination on behalf of Ukraine in her capacity of the National Coordinator¹, in cooperation with the Ministry of Justice, Government Anti-Corruption Agent and the Anti-Corruption Bureau. Ms. Olga Savran and Ms. Inese Gaika provided coordination on behalf of the OECD/ACN Secretariat. The monitoring team was led by Mr. Goran Klemencic (Slovenia), and included Mr. Alvis Vilks (Latvia), Mr. Julio Nabais (OECD/SIGMA), Mr. Eli Richardson (USA), Mr. Giorgi Jokhadze (Georgia) and Ms. Aizhan Berikbolova (Kazakhstan). Mr. Dmytro Kotliar (OECD/ACN), Mr. Joop Vrolijk and Mr. Peder Blomberg (OECD/SIGMA) provided valuable contribution to the monitoring report.

The report was adopted at the ACN/Istanbul Action Plan plenary meeting on 8 December 2010. It includes updated compliance ratings: **1 recommendation is fully implemented, 4 recommendations are largely implemented, 7 are partly implemented and 12 are not implemented.** In total, out of 24 recommendations, three ratings were upgraded since the first round of monitoring. The report also

¹ Since 15 July 2010 Mr. Ruslan Riaboshapka, the Director of the Bureau on Anti-Corruption Policy, was nominated the National Coordinator.

includes **18 new or updated recommendations**. The report is published at <http://www.oecd.org/corruption/acn>. To support the implementation of the new recommendations the ACN Secretariat will undertake a return mission to Ukraine to present the report to the public institutions, civil society, business and international community. The Government of Ukraine will be invited to provide regular updates about steps taken to implement the recommendations at the plenary meetings of the OECD/ACN Istanbul Anti-Corruption Action Plan.

Country Background Information

Economic and Social Situation

Ukraine covers an area of 603.000 square kilometres and has a population of 45.5 million; the population has been on significant decline over the last decade due to low life expectancy and low birth rate. The GDP (2010 estimate) is 136.6 billion USD (USD 3,003 per capita). After several years of steady growth Ukrainian economy plummeted during the crisis, with real GDP decreasing 15% in 2009. Economy started to recover only recently with expected growth in 2010 of 3.7%.²

Formerly an important industrial and agricultural region of the Soviet Union, Ukraine now depends on Russia for most energy supplies, especially natural gas, although lately it has been trying to diversify its sources. The lack of significant structural reform has made the Ukrainian economy vulnerable to external shocks. Ukraine has pledged to reduce the number of government agencies, streamline the regulatory process, create a legal environment to encourage entrepreneurs, and enact a comprehensive tax overhaul. The initiated reforms have not yet resulted in significant changes in practice. Reforms in the more politically sensitive areas of structural reform and land privatisation are still lagging. Outside institutions—particularly the IMF—have encouraged Ukraine to quicken the pace and scope of reforms and have threatened to withdraw financial support.

Political structure

Ukraine is a republic under a semi-presidential system with separate legislative, executive, and judicial branches. The President of Ukraine is elected by popular vote and is the head of state. Last elections took place in 2010 and were found by international observers to be generally in line with international standards. Following the controversial constitutional reform of 2004, the powers of the President were significantly reduced in favour of the Parliament. However, in October 2010 the Constitutional Court of Ukraine quashed the constitutional amendments, thus effectively reinstating the 1996 Constitution. This decision further consolidated power in the hands of the President who is now responsible for appointment and dismissal of the Government.

Verkhovna Rada (Parliament) consists of one chamber with 450 seats. The Parliament gives assent to appointment of the Prime Minister who then proposes the Cabinet for appointment by the President. The heads of regional and district administrations are appointed by the President, but the Prime Minister's counter-signature is required for the appointments to take force.

Parliamentary elections are based on the proportional system according to the closed lists of candidates proposed by political parties. Ukraine has a large number of political parties, many of which have tiny memberships and are unknown to the general public. Small parties often join in multi-party coalitions (electoral blocks) for the purpose of participating in parliamentary elections. Ukraine held parliamentary and local elections in September 2007. International observers noted that conduct of the election was in line with international standards for democratic elections, making this the most free and fair in the region. The Party of Regions and the bloc of former Prime Minister Tymoshenko finished ahead of other three

² <http://www.gfmag.com/gdp-data-country-reports/154-ukraine-gdp-country-report.html>.

parties (blocs) which cleared the 3% threshold (Our Ukraine, Bloc of Lytvyn and Party of Communists). In December 2007 the new Government was formed with Yulia Tymoshenko as Prime Minister. It was dismissed in March 2010 when the Government of Mykola Azarov was formed.

Local self-government is officially guaranteed. Local councils and city mayors are popularly elected and exercise control over local budgets.

European and Euro-Atlantic integration were declared by the President Viktor Yushchenko as official priorities of the Ukrainian foreign policy. After election of the new President in 2010 Parliament introduced amendments in the law on national security declaring Ukraine a “state not aligned with any bloc”, effectively refusing the policy of joining NATO. Ukraine conducts negotiations with the EU on free trade agreement and visa cancellation. Relations with Russia are an important factor in determining foreign and economic strategies for Ukraine. Ukraine is a member of the United Nations, the Organization for Security and Cooperation in Europe (OSCE), NATO's Partnership for Peace, the Euro-Atlantic Partnership, the World Health Organization, the European Bank for Reconstruction and Development, the Council of Europe, the Community of Democracies, the International Monetary Fund, and the World Bank.

Trends in corruption

Corruption in Ukraine has been a significant obstacle to doing business and investment since the country gained independence. The main areas where corruption is noted as frequent are: business licences; tax collection; customs; and public procurement. Ukraine’s Transparency International CPI score stayed in the range of 2 during last years – in 2010 at the level of 2.4 on a scale from 1 to 10 where 1 means the most corrupt and 10 the least (2.3 in 2003; 2.2 in 2004; 2.6 in 2005; 2.8 in 2006; 2.7 in 2007; 2.5 in 2008; 2.2 in 2009). Ukraine ranks 134th out of 178 countries. According to 2010 Global Corruption Barometer by TI 59% of Ukrainians assess government’s actions in the fight against corruption as ineffective and only 16% as effective. Ukraine scores in the bottom of various ratings on the ease of doing business (see table below), which is explained by the unfavourable business environment and endemic corruption.

Rating, organisation	Ukraine’s rank	Total number of ranked countries
Doing Business 2011, World Bank	145	183
Economic Freedom Index 2010, Heritage Foundation	162	183
Global Competitiveness Index 2010-2011, World Economic Forum		
- Burden of Government Regulation	125	139
- Property Rights Protection	135	139
- Intellectual Property Rights Protection	113	139
International Property Rights Index Ukraine	97	125

1. Anti-Corruption Policy

1.1–1.2–1.3 Political will to fight corruption, anti-corruption policy documents and corruption surveys

Political Will to Fight Corruption

The debate on the problem of corruption in the country has occupied a prominent position in media, public and political life for several years now. It is therefore not surprising that key political figures repeatedly underline their resolve to curb this phenomenon. For example, struggle against corruption has been part of the inauguration speech of the President of Ukraine and this topic has been raised by him and other leading politicians on several other occasions. Fight against corruption is also mentioned as one of the policy objectives in the parliamentary coalition agreement of the new Government. Furthermore, the State Programme on Social and Economic Development, adopted on 20 May 2010, contained a section on anti-corruption. It is not doubted that the political elite recognize the pressing need to address the corruption problem in the country. The real political will to fight corruption - in contrast with political declarations and media statements - however, remains to be tested. For the moment, the demonstrated political will has yet to translate into sustainable progress and observable results.

The adoption of the so called “anti-corruption package”, which consists of several laws containing important reforms, is the vivid example. The package was first proposed for the adoption by Parliament in 2006; it was finally adopted in June 2009, but its entry into force has been postponed twice, and is currently expected in January 2011. While in the past, the delays with the adoption and enactment of the package may have been justified by parliamentary deadlocks, currently the government is supported by the parliamentary majority and there are no valid reasons for further delay. There are many other concerns, such as deficient sectoral regulations which contain many loopholes open for abuses. While the establishment of the Government Anti-corruption Agent and the supporting Bureau on Anti-corruption Policy has been a visible step in the right direction, many other pressing reforms in this area remain pending, under discussion and - it seems - hostage of politics and special interest. The long debated - but never adopted or implemented - reform of the Criminal Procedure Code and establishment of the Specialised Anti-Corruption Law Enforcement Agency are examples of such lack of true political will.

Continued failure of the leadership to support anti-corruption declarations with practical actions can lead to the loss of credibility of public policy and inactivity of the society, which can create additional problems when the government eventually provides necessary resources and other support to the fight against corruption and launches the implementation of real actions.

International partners have also confirmed that several large anti-corruption programmes supported by donors and international organizations during several past years, did not produce many practical results; donors are therefore looking for the confirmation of political will of the Ukrainian leadership to fight corruption in order to consider any further support.

As a conclusion, although Ukraine has made some formal steps in the right direction, it is worrying that generally it has failed in sustaining progress in strengthening its institutional and legal framework against corruption. In contrast with many other countries in transition, where legal frameworks were reformed

several years ago, and where countries came to face enforcement challenges, Ukraine has yet to make the first step and to adopt relevant laws.

Anti-Corruption Policy Documents

Previous Recommendation 1

On the basis of the analysis of the implementation of “the Anti-corruption Concept for 1998-2005” update the national anti-corruption strategy, which will take into account the extent of corruption in the society and its patterns in specific institutions, such as the police, judiciary, public procurement, tax and custom services, the education and health systems. The strategy should focus at the implementation of priority pilot projects with preventive and repressive aspects in selected public institutions with a high risk of corruption, including the elaboration of anti-corruption action plans. The strategy should envisage effective monitoring and reporting mechanisms.

In December 2006 Ukraine was considered **partially compliant** with this recommendation.

As it was reflected in the report on the first round of monitoring, the Concept of Overcoming Corruption in Ukraine “Towards Integrity” was approved by Ukrainian Presidential Decree on 11 September 2006. The plan for implementation of the Concept and the state anti-corruption policy until 2011 was approved by Order of the Ukrainian Cabinet of Ministers on 15 August 2007. The Concept and the Plan for Implementation provide the national anti-corruption strategy and action plan; their adoption has been an important step forward in the anti-corruption policy planning and implementation in Ukraine.

As discussed in the report on the first round of monitoring, the Concept identifies the main risks of corruption, as well as objectives of fight against corruption. The Concept includes main areas to be targeted by anti-corruption policy, such as public service institution, administrative procedures, public procurement procedures and the judicial system. It further provides a long list of tasks, but does not clearly identify the priorities, which makes implementation difficult. For example, the Concept does not define which type of corruption – high-level or administrative – is more dangerous and therefore requires more resources; high-level or political corruption is only addressed in a sub-section on the risks in the area of activities of elected institutions. Further, the Concept does not contain specific reference to the state budget; instead, every state institution submits their budget proposals taking into account necessary resources for implementation of particular tasks mentioned in the strategy and action plan. There is no other mechanism to ensure coordination of budget allocations or implementation. Finally, the section on “Concept Implementation Mechanism” contains a reference to the action plan and general principles of formulation of anti-corruption policy, but does not expressly identify responsible institutions and mechanisms for coordination, monitoring and reporting about implementation. According to the Ukrainian authorities, the Ministry of Justice carried out the monitoring; the recently established Government Anti-Corruption Agent has taken over the function.

The action plan is the main instrument to support the implementation of anti-corruption policy. It reflects the above mentioned problems regarding Concept, including poor prioritization and lack of dedicated budget, and includes additional flaws. For instance, the plan provides description of tasks, responsible institutions, time limits, and expected results, but it fails to describe the results precisely to ensure that involved institutions have a common understanding of such results. The lack of clear description of expected results also may cause problems with the assessment of implementation. For example, the task to decrease the number of contacts between private persons and state officials foresees the implementation of electronic documentation and electronic signature, but it is not clear if other activities can be implemented by various institutions to achieve the result; besides, time limits for particular institutions for concrete actions are not provided. Some of the tasks established in the action plan do not

appear adequate; for instance the very first task requires ensuring follow-up of various legal drafts in the legislative process in parliament, while it is a self-evident and constant work of the government. It is not clear why this list of drafts included the draft Law on Creation of Public TV and Radio in Ukraine and with which risks of corruption it is connected. The same uncertainty remains in relation to deadlines of the implementation, as often the action plan states that the tasks are implemented “permanently”. The Concept contains very big number of different risks of corruption; however the list of tasks in the action plan seems to be narrower, which leaves many risks unattended.

The Concept and the action plans were adopted by the previous government; it appears that the new government, which took office in March 2010, does not have a strong ownership of these policy documents. Indeed, the new government intends to develop a new anti-corruption policy, a relevant provision is provided by the State Programme for Social and Economic Development in 2010. It will be important to ensure continuity of the anti-corruption efforts, and good quality of the new policy, taking into account the above analysis. At the same time, the development of the new anti-corruption strategy should not become a goal in itself, as it tend to happen in many transition economies, but should provide a useful policy framework for action.

To support the implementation of the national strategy through local and sectoral action plans, the Ministry of Justice with the assistance of the Millennium Challenge Corporation (MCC), developed a model action plan. The Ukrainian authorities provided information that various ministries and public institutions, as well as local authorities have developed their own anti-corruption action plans, however little is known about the contents of these plans and level of their implementation. The recently established Government Agent on Anti-Corruption Issues is responsible to receive reports about the implementation of such action plans; the Agent can analyze these reports and can propose disciplinary measures against the managers who fail to implement anti-corruption measures. In 2010, one case of service inquiry initiated by the Government Agent resulted in dismissal of the Head of the State Committee of Consumer Standards for the introduction of ungrounded paid services; while this case presents a good development, it does not involve discipline for failing to implement anti-corruption measures.³

Ukraine remains **partially compliant** with this recommendation.

New recommendation 1.1-1.2

Implement the declared resolve to fight corruption through practical steps, such as necessary legal reform without delay, empowering the institutions such as the Agent on Anti-corruption Issues and the Bureau on Anti-corruption Policy, as well as strengthening of law-enforcement anti-corruption efforts.

Ensure that national anti-corruption policy is based on evidence provided by surveys and statistics; that it clearly establishes main priorities, that a link is established between the activities foreseen in the strategy and action plans and state budget, that the coordination mechanism for implementation of the strategy and the action plan is precisely defined, and that reports on implementation are made public.

³ On May 31st 2010, the Government Agent has initiated service inquiry (internal investigation) in regards to the head of the State Committee on Consumers Standards, who allegedly created a corruption scheme to introduce ungrounded additional paid-for services. The head of the State Committee on Consumers Standards has been held disciplinary liable and was dismissed from his position as result of this inquiry, and the scheme was eliminated.

Corruption Surveys

Ukrainian authorities reported a large number of surveys on corruption issues, ranging from sector-specific studies in corruption-prone areas to nationwide corruption assessments. Many of these surveys were supported and carried out by independent institutions and international partners. National surveys, conducted from 2007 to 2009 under the Promoting Active Citizen Engagement (ACTION) in Combating Corruption in Ukraine Project (funded by the USAID and the Millennium Challenge Corporation), have touched upon the issues of the general corruption situation (2007), system of higher education (2008), regulatory policy with regard to customs procedures and permits for construction/land operations (2008), judiciary (2008) and others. Transparency International surveys that are widely used as a global indicator of corruption perception were reported as well. In 2008, the Council of Europe project "Support to Good Governance: Anti-Corruption Project for Ukraine" (UPAC), produced several analytical studies about corruption, including on lobbying, conflict of interest, political party financing and immunities. In the framework of the cooperation between Ukraine and the OSCE, a draft methodology on measuring corruption levels in the country is being developed; it is expected that this methodology will be applied on an annual basis to measure the levels of corruption within the country.

It appears, however, that up to date no regular surveys were commissioned by the government in order to provide the basis for the development of national anti-corruption policy and for the monitoring of its implementation. The Ukrainian authorities noted that studies carried out by the Institute of Applied Humanitarian Studies provided the basis for the current anti-corruption Concept; however the Concept itself did not contain any references to these studies. The Ukrainian authorities further noted that a new study covering 22 regions of Ukraine was currently being conducted by the Institute, in the framework of the Ukrainian-Canadian Project "Combating corruption in Ukraine", and that it would be used for the development of the new strategy. However, the government so far has played a limited role in commissioning or designing such studies, and their findings are yet to be used for the development and monitoring of the new strategy.

It appears that no surveys with a focus on public trust of public institutions were undertaken on a regular basis. Although not always a precise approximation of corruption climate in the country context, measuring public trust is one of the ways to demonstrate that the work of the government in combating corruption is paying off. Such studies could be also used to demonstrate trends and changes over time, as well as to single out priority areas for response.

Since April 2009, the Government Agent for Anti-Corruption Policy Issues is an agency in charge of anti-corruption research. So far, there is no information about any research or studies performed or commissioned by the Agent, and there is no dedicated budget for study and research.

New recommendation 1.3

Conduct regular corruption surveys, both nationwide and sector-specific, with focus on public trust and perception of corruption, to demonstrate long-term developments. Such surveys should be commissioned by the government, through an open and competitive tender. Independent findings from such surveys should become the basis for drafting, amending and monitoring the implementation of anti-corruption policies. The Government Agent for Anti-Corruption Policy Issues should take an active part in coordinating such research.

1.4-1.5 Public participation in anti-corruption policy work, raising awareness and public education

Previous Recommendation 21

Enhance cooperation with civil society in addressing the corruption phenomena, including working more closely with university programs and a wide range of NGOs and the business community on anti-corruption and ethics, both to enhance monitoring in civil society, and to encourage training and research resources in the field.

Ukraine was considered **partially compliant** with this recommendation.

Raising Awareness and Public Education

A number of education and awareness raising activities were provided to the public administration and state officials. Anti-corruption awareness raising and training programmes are performed according to the Public Service Development Programme for 2005–2010 approved by Decree of the Cabinet of Ministers of Ukraine on 8 June 2004 and in line with Decree of the Cabinet of Ministers of Ukraine of 2 June 2003 on Measures for Upgrading the Qualifications of Public Officials and Local Self-Government Officials in Anti-Corruption Issues. The Main Department of Civil Service carries out a variety of activities, for example, conferences for prosecutors and judges, seminars for public officials and events under the Twinning Project⁴.

Reportedly, some activities also engaged the general public and NGOs. Ukrainian authorities have provided information that the Ministry of Education developed courses and guidelines for secondary schools and universities, the Ministry of Justice provided legal aid, public addresses on anti-corruption legislation and training for young lawyers, and the Anti-Corruption Bureau was involved in about 20 trainings delivered at the regional universities with the support of the MCC. Furthermore, the Anti-Corruption Bureau reportedly published 1,320 articles in mass-media and Internet TV and organized a number radio interviews; the Government Agent organised the social advertisement “Say NO to corruption” on all state-owned TV channels; 13 articles were published in the mass media, 60 press releases have been issued, 6 briefing sessions and 3 press conferences have been organized for mass media with direct involvement of the Government Agent, The Government Agent also operates its Anti-Corruption portal, and a bookmark on anti-corruption policy has been created at the Governmental Portal.

Although Ukrainian authorities reported general awareness raising activities - and those have, notably, been intensified in the recent period - the possible positive impact of those remains to be seen. Also targeted awareness raising and education for school pupils and university students, NGOs, media, business associations and private companies remain very limited and insufficient to influence the opinion of society and its attitude to corruption.

⁴ More information about anti-corruption training for public officials is provided under section on integrity in public service 3.2.

Public Participation

According to the Ukrainian authorities, there are several mechanisms for public participation, including public consultations of various draft documents, rounds tables, and analysis of reports from the public, including complaints received through hot lines. In November 2010, the Cabinet of Ministers adopted a Procedure for consultations with the public on development and implementation of the state policy, which stipulates the list of instances for obligatory public consultations. The Ministry of Justice organised NGO consultations on the anti-corruption strategy and other anti-corruption drafts, such as legislative amendments regulating corruption involving immaterial benefits. A number of ministries involve NGOs through public councils. A public council composed of 36 NGO representatives has been created by the Government Agent. However, participation of non-governmental organizations in anti-corruption activities has been limited and there is no conclusive evidence to suggest that NGOs have influence over the anti-corruption policy decisions.

One of the reasons for limited public participation, according to the Ukrainian authorities, is the absence of strong anti-corruption NGOs. Indeed, TI contact point has restarted its activities in Ukraine in only 2010 after a long break. However, reportedly, there are some 2800 registered NGOs which deal with anti-corruption issues, mostly these are sector specific groups active in such sectors as energy, access to information, law enforcement, public health, consumer rights, and others. There are also many business associations and individual companies interested in anti-corruption issues, which remained largely outside any governmental efforts to promote public participation.

Representatives of NGOs noted that there were no clear criteria for selecting NGOs for consultations, and – more importantly – no criteria for taking NGO's proposals into account in the official decision-making process. Even when official mechanisms exist for public participation public officials do not always use them. The following examples were quoted by the representatives of NGOs: attempts of one NGO to participate in the tender committee on procurement of drugs was difficult because public officials provided wrong information about the timing of the meetings; the leadership of the Ministry of Interior recently refused to meet with the public council established under this institution; the Law on gas sector was adopted in the first reading without public consultations. However, representatives of NGOs have also acknowledged some positive examples, e.g. the draft law on access to information, which has been under development over the past 7 years, with active participation of NGOs, was passed in the first reading during the on-site visit.

The media continuously report on cases and allegations of different corruption-related scandals and is according to the NGOs, an important factor in forming public awareness and public opinion on this topic. While it is impossible to ascertain the quality and the political (un)bias of many of such reports there seems, however, little follow up and few reports on official actions taken in relation to such allegations. This (many reported scandals with few "closures" through criminal justice system) in turn strengthens the apathy and cynical public attitudes in regard to the political will and capacity of institutions to limit corruption. Furthermore, concerns of re-emerging political pressure on media were expressed by the resolution of the Parliamentary Assembly of the Council of Europe adopted in October 2010

Experience of other states suggests that NGO capacity and expertise, including that of civil society groups which specialise in the fight against corruption, as well as in sector specific projects, business groups, professional associations, journalists and others, is extremely valuable in defining priorities for anti-corruption policy, implementing specific activities and in monitoring of the implementation of anti-corruption policy. Experience further suggests that governments should provide a meaningful framework

for public participation in the anti-corruption policy work, and avoid overly formalistic procedures. Besides, governments should demonstrate that they are serious about public participation by ensuring that existing public participation mechanisms and procedures are properly used by individual ministries and public institutions, that views and suggestions of the civil society groups are taken into account in the official decisions, and that the law-enforcement bodies provide regular and meaningful reaction to media allegations.

Ukraine is **partially compliant** with this recommendation.

New recommendation 1.4-1.5

Enhance cooperation with civil society in addressing the corruption phenomena, including working more closely with a wide range of NGOs, the business community and academia on anti-corruption and good governance. Step up efforts to promote active and meaningful involvement of civil society in defining, implementing and monitoring anti-corruption strategy and action plan, including sector-specific programmes and regulations. Establish clear policy as well as transparent and not formalistic procedures for involving civil society representatives in the decision-making process.

1.6 Specialised anti-corruption policy and coordination institution

Previous Recommendation 3

Strengthen the Anti-corruption Coordination Committee by ensuring high moral and ethical standards of its members, who should include representatives of relevant executive bodies (administrative, financial, law enforcement, prosecution), as well as from the Parliament and Civil Society (e.g. NGOs, academia, respected professionals etc.). Strengthen the independent status of the Committee, ensure a more appropriate frequency of the Committee's meetings (currently it meets twice a year), strengthen its staff to carry out analytical tasks, and ensure sufficient resources. Upgrade statistical monitoring and reporting of corruption and corruption-related offences in all spheres of the Civil Service, the Police, the Public Prosecutor's Offices, and the Courts, which would enable comparisons among institutions – by introducing strict reporting mechanisms on the basis of a harmonised methodology to the Committee. Encourage stronger links, cooperation and exchange of information between the Committee and the Parliamentary Committee.

As it was already noted in the report for the first round of monitoring, the Anti-Corruption Coordination Committee was dissolved. The coordination function was taken over by an inter-departmental commission, which was created in 2005 under the auspices of the National Security and Defense Council. Anti-corruption division at the Department on activity of law-enforcement bodies of the Council acted as the secretariat to the Committee. However this function was not a high priority for the Council, insufficient number of staff was allocated for this work. The Ministry of Justice and the Main Civil Service Department contributed to the anti-corruption coordination function. Overall, Ukraine was considered **non compliant** with this recommendation.

In February 2010, by one of his first decrees the newly elected President of Ukraine established the National Anti-Corruption Committee as a consultative and coordination body under the President. The role of the Committee is limited to providing advice, making recommendations and suggesting draft legal acts to the President. The President is chairing the Committee and appoints its members. Currently the Committee consists of the highest public officials, including Chairman of Parliament, Prime Minister, Chairman of the Supreme Court, Minister of Justice, Chairman of the High Council of Justice, Head of the Security Service and Prosecutor General. There is one NGO representative sitting on the Committee and a few representatives of the academia and universities. The Committee does not have a dedicated Secretariat; its functions are performed by the Presidential Administration and the Ministry of Justice. The

National Anti-Corruption Committee is, therefore, a high-level forum for endorsing draft decisions to be promulgated by the President, but it is not called to play the role of a permanent anti-corruption agency. The Committee was created in February 2010, as of 15 November 2010 it convened twice. At its second meeting on 20 October 2010, the Committee considered and approved three draft laws and draft new national anti-corruption strategy.⁵ No information is available about other results of Committee's activity. While it is premature to assess the operations of this Committee, it appears that up to date it did not provide important contribution to the anti-corruption activities in Ukraine to date.

On 4 June 2008 the Cabinet of Ministers of Ukraine adopted the Decree "On some matters of implementation of the state anti-corruption policy", which established the office of the Government Agent on Anti-Corruption Policy. However, it became operational only in April 2009 when the Cabinet of Ministers appointed the first Government Agent and approved Regulations on the Agent. According to the Regulations, the Government Agent has a wide range of functions in the area of prevention of corruption, including development of the state anti-corruption policy and coordination of its implementation, undertaking anti-corruption analysis and research, education of society, cooperation with other agencies and other functions.

In December 2009 the Government Agent was given a number of control responsibilities with regard to the units for prevention and combating corruption that should be created in all ministries and regional state administrations. These powers include:

- making proposals on the appointment and dismissal of the heads of such units;
- endorsing decisions on appointment and dismissal of deputy heads of the units;
- approving structure, number of staff and action plans of the units;
- giving instructions to the heads of the units to conduct verification of compliance with anti-corruption legislation or carry out internal investigation into misconduct;
- inspection of activity of the mentioned corruption-prevention and combating units, conducting internal investigation with regard to the staff of such units;
- submitting proposals to the Government on disciplinary measures and on temporary removal from office of ministers and heads of other central executive bodies during the internal investigation conducted regarding such officials.

The Government Agent has a status of a deputy Minister of the Cabinet of Ministers, and has the right to attend meetings of the Cabinet of Ministers of Ukraine. The current Government Agent is in fact *ex officio* Deputy Minister of the Cabinet of Ministers of Ukraine and thus has in the scope of his responsibilities several Departments in the Government's Secretariat and is subordinated to the Minister of the Cabinet of Ministers of Ukraine.⁶ There are no provisions on competitive selection of the Agent. His appointment

⁵ Draft Law on Introducing amendments into legislative acts due to adoption of the Law on the Principles for Prevention and Combating Corruption; Draft Law on Introducing amendments into legislative acts to improve the principles for prevention and counteraction of corruption; Draft Law on Introducing changes into the Criminal and Criminal Procedure Code of Ukraine to improve the confiscation procedures; Draft National Anti-Corruption Strategy through 2014 developed by the Ministry of Justice of Ukraine.

⁶ According to the Order of the Minister of the Cabinet of Ministers of Ukraine from 17 June 2010 On division of the functional responsibilities of the first deputy Minister and deputy Ministers of the Cabinet of Ministers' Minister, the Government Agent as a deputy Minister of the Cabinet of Ministers leads, controls and coordinates the work in the area of justice, more specifically, that of the Bureau on anti-corruption policies, of the Legal Department (in regards to selected governmental instructions), of the Department on Policy in the law enforcement and law implementation area, of the Department on the Defence policy, Department on the work with the public complaints, of the Apparatus (Secretariat) of the Permanent representative of the Cabinet of Ministers in the Constitutional Court of Ukraine.

and dismissal are in the political discretion of the Government and the Prime Minister. The new Government replaced the Government Agent in March 2010. The Agent does not have a separate budget and is funded from the allocations to the Government's Secretariat. The work of the Government Agent is supported by a Bureau on Anti-Corruption Policy. It is important to note that the Government Agent is not a member of the National Anti-corruption Commission under the President.

On 7 June 2010, the Cabinet of Ministers approved a new structure of the Government Secretariat, which included a Bureau on Anti-Corruption Policy. The Bureau is effectively the Secretariat of the Government Representative. The functions of the Bureau include: development and implementation of the anti-corruption policy, development of the national anti-corruption strategy, coordination and control of authorities in charge of implementing anti-corruption policy, anti-corruption analysis or screening of legal acts. The Bureau is headed by its Director and has 14 staff members. Reportedly, the Bureau enjoyed the possibility to hire some of the best anti-corruption experts in Ukraine; however, as a structural part of the Government Secretariat, the Bureau does not have its own budget or staff selection procedures which could support its independence (staff selection procedures of the Bureau are stipulated by the General Procedure for Admittance into the Civil Service).

While Ukraine is not compliant with the precise wording of the previous recommendation 3, it follows the spirit of this recommendation. By creating the institution of the Government Agent and the Bureau Ukraine took a significant step forward towards establishing a specialized anti-corruption policy and coordination body. However, the current institutional set-up is very young, it is crucial to strengthen the capacity and to ensure the stability of the newly created institutes, in order to ensure their real impact on anti-corruption activities. It will be important to assess this impact over time. The Government has also to clarify the scope of authority of the Government Agent, which goes beyond its initial mandate of policy coordination and now includes significant control functions. The status and resources available to the Government Agent should be commensurate with his remit.

As a conclusion it should be stated that the establishment of the Agent and the Bureau could be considered as a step in the right direction of creating and empowering the visible central authority for coordination of anti-corruption policy. It remains to be seen, however, if the Agent and the Bureau will be given the real powers, support and capacity to design a new action plan to coordinate and monitor it effectively.

Ukraine is **partially compliant** with the previous recommendation 3.

New recommendation 1.6

Strengthen the capacity and ensure stability of the recently established anti-corruption policy coordination bodies, including the Agent on Anti-corruption Issues and the Bureau on Anti-corruption Policy, clarify their functions and ensure adequate resources for their work.
Ensure effective coordination and cooperation among various bodies working on anti-corruption policy such as the Agent, the Bureau, Ministry of Justice, relevant committee of the Parliament and the Presidential Administration. Ensure that the public council provides a useful mechanism of public participation in the anti-corruption policy. Consider transforming position of the Government Agent into an autonomous institution, separate from the Government's Secretariat with necessary level of independence and sufficient resources (budget, personnel, etc.) to effectively perform its functions to meet the requirements/in accordance with Article 6 of the UNCAC.

1.7 International anti-corruption conventions

Ukraine signed the UNCAC in 2003, and ratified it in 2006. The ratification law, however, entered into force only in June 2009 and Ukraine became a Party to the UNCAC in April 2010. Ukraine signed the Council of Europe Criminal Law Convention against Corruption in 1999, and ratified this Convention in 2006; the ratification law became effective in June 2009 and Convention came into force for Ukraine in March 2010. The Council of Europe Civil Law Convention against Corruption was signed in 1999, ratified in 2005 and entered into force in 2006. Ukraine has also expressed its interest to participate in the work of the OECD Working Group on Bribery with a view to future adherence to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Ukraine is a Party to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. In 2005 it has also signed the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198); the Law on ratification of the Convention was adopted by Parliament on 17 November 2010. Ukraine has neither signed, nor ratified the Council of Europe Convention on Access to Official Documents (CETS No. 205) that was adopted in 2009.

To bring its national legislation in compliance with the UN and Council of Europe standards, Ukraine developed the so called anti-corruption package. It was proposed for adoption by Parliament in 2006. On 11 June 2009, Parliament of Ukraine adopted the package, which included the framework Law on the prevention and combating corruption, Law on amendments to certain legal acts of Ukraine concerning liability for corruption offences, and the Law on liability of legal persons for corruption offences. This action was sufficient to allow Ukraine to become a party to the international conventions.

However, it was foreseen that these laws should be enacted later, to allow for necessary time to all parties to study these new legal acts and to prepare for their implementation. The enactment was originally foreseen for 1 January 2010. However, on 23 December 2009, Parliament postponed the enactment till 1 April 2010. On 10 March 2010 Parliament further delayed the enactment till 1 January 2011. To eliminate the gaps in the original package in March 2010 the Parliament adopted in the first reading draft law (No. 6130) proposed by the members of the parliament. At the same time the monitoring team was informed that the Ministry of Justice has prepared its own version of amendments to the anti-corruption package which was sent for comments by the Council of Europe. Apparently, after the revision of the draft amendments to take into account recommendations by the Council of Europe expert the Government intends to submit these amendments to the parliament. On 23 September 2010 the parliament failed to adopt the draft law No. 6130 in the final reading, which is explained by the expectation of the governing coalition that a similar draft law be submitted by the President or the Government. Draft law No. 6130 has therefore ceased to exist. This further delays the adoption of the corrections in the anti-corruption package. At the meeting of the National Anti-Corruption Committee held on 20 October 2010, the following draft laws have been considered and approved: Draft Law on Introducing amendments into legislative acts due to adoption of the Law on Principles for Prevention and Combating Corruption; Draft Law on Introducing amendments into legislative acts to improve the principles for prevention and counteraction of corruption; Draft Law on Introducing changes into the Criminal and Criminal Procedure Code of Ukraine to improve the confiscation procedures. It was decided at the meeting that these draft laws shall be submitted to the Parliament. However, at the time of consideration of this report the draft laws have not yet been submitted to the Parliament.

As a result, it appears that, despite significant efforts, Ukraine has not made any substantive progress in reforming anti-corruption legislation since the first round of monitoring in 2006. Continued delays of entry of this package into force invite legitimate questions about the real will of Ukraine to meet the requirements of these international standards.

2. Criminalisation of Corruption

As noted above, despite significant efforts, to date Ukraine has not made any substantive progress in reforming anti-corruption criminal legislation. Some of the steps urged by recommendations in the field of criminalisation of corruption would be taken at least partially by the Law of Ukraine on Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences and by the Law on Liability of Legal Persons for Corruption Offences, which are both part of the anti-corruption package. The package was passed in 2009, but its effective date has been pushed back on multiple occasions, and is currently set for 1 January 2011. In sum, in the area of criminalisation of corruption and corruption related offences in line with international standards, Ukraine has failed to make visible progress since its joining the Istanbul Action Plan.

Previous recommendation 6

Amend the incriminations of active and passive bribery in the Criminal Code to correspond to international standards. In particular, clarify elements of bribery through a third person; delineation of offences between an offer/solicitation and extortion, criminalise trading in influence. Consider increasing the punishments for active and passive bribery as well as the statute of limitations for corrupt offences.

During the first round of monitoring in 2006, Ukraine was considered **non compliant** with this recommendation.

2.1-2.2 Offences and Elements of Offence

Offering and promising, requesting and soliciting

Whereas previously the law criminalized only actually giving a bribe, the Law Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences amends Article 369 to criminalize offering a bribe regardless of whether the bribe is ever paid. Unfortunately, the law contains no corresponding change to Article 368 that would criminalize agreeing to accept a bribe regardless of whether the bribe is ever accepted. This omission should be rectified, for several reasons; for example investigators and prosecutors should not have to wait until a corrupt official actually enjoys possession of the bribe he/she has agreed to accept before taking measures - such as charging and arresting the corrupt official - to halt the corrupt scheme before its completion. Besides, the Criminal Code, even if amended by the mentioned Law, does not cover as complete offences the promising of a bribe (Article 369) and requesting or soliciting a bribe (Article 368) as required by international standards. Ukrainian authorities noted that a promise or a solicitation of a bribe could be prosecuted as attempted bribery or attempted bribe-taking, respectively.⁷ However, as highlighted in a number of international legal instruments on

⁷ According to paragraph 10 of the Resolution of the Supreme Court's Plenary Assembly 'On Court Practice in Bribery Cases', crimes mentioned in Articles 368, 369 CC are considered complete from the moment when the official accepts at least a part of the bribe. In cases when the official refused to accept the proposed money, valuables, service, the actions of the persons who tried to give a bribe should be qualified as an attempted bribe-giving. If the official took certain actions aimed at receiving the bribe, but did not receive it because of the reasons which were beyond his control, such actions should be qualified as an attempted bribe-taking. According to Article 15 of the Criminal Code of Ukraine, an attempted commission of a crime is defined as a wilful commission by the person of an act (action or inaction), provided for in the relevant article of the Special Part of the Code, if the crime was not completed due to a reason which did not depend on the person's will. Attempt to commit a crime is considered

corruption and consistently supported by recommendations of different anti-corruption monitoring bodies, the nature and problems associated with the successful prosecution of bribery offences require that offering, promising, requesting and soliciting of a bribe is treated as completed offences, rather than through attempt provisions.

Trading in influence

The Ukrainian authorities stated in their replies to the monitoring questionnaire that current Art. 368(1) of the Criminal Code, addressing acceptance of bribes, could be interpreted to criminalize trading in influence under certain circumstances – namely, when one public official accepts a bribe to exert influence over another public official. This interpretation, however, is problematic. By its terms, Art. 368(1) could cover the situation of one bribed official exerting influence over another public official only if the exertion of influence is “by means of authority or official powers entrusted in this [bribed] official.” In many cases, influence is exerted by other than authority or official powers *per se*.

The Law on Amendments to Certain Laws Concerning Responsibility for Corruption Offenses contains a new Article, 369-1 "Undue influence", which explicitly and adequately criminalizes trading in influence. Paragraph 1 of the Article proscribes providing, or proposing to provide, a benefit to a person who agrees to accept a benefit in return for exerting influence on the decision making by certain public officials – namely, the officials listed in paragraphs 1 and 2 of the Law on the Principles of Prevention and Countering of Corruption. Paragraph 2 of Article 369-1 proscribes: (a) receiving an improper benefit in return for influencing decision making by such public officials; and (b) offering to exert such influence in return for the provision of such benefit. Paragraph 3 also addresses the receipt of an improper benefit in return for influencing decision making by such public officials, but does so in the specific case of extortion; specifically, it increases the penalty beyond that provided by Paragraph 2 when the receipt of the improper benefit is “combined with extortion” of the benefit.

Bribery through and for the benefit of third person

Unfortunately, the anti-corruption package does not clarify elements of bribery through a third person, i.e., where the payment or promise of the bribe was made to a third person who then gave it to the official to be bribed, or where the bribe was paid or promised to be paid not to the official but rather directly to a third person designated by the official, including cases when the third person is not aware of the crime. During the on-site visit, Ukrainian representatives stated that the Ministry of Justice's legislation department had opined that criminal liability already existed in each of these cases, not only as to the bribe payer or bribe recipient, but also as to the third person. In addition, Ukrainian representatives opined prior to the on-site visit that the third person would be liable under Criminal Code Article 29's provisions for criminal liability for aiders and accomplices.⁸ Although these opinions ultimately may be

complete, if the person took all actions, which he deemed necessary to complete the crime, but the crime was not completed because of the reason not depending on person's will.

⁸ According to paragraph 11 of the Resolution of the Supreme Court's Plenary Assembly 'On Court Practice in Bribery Cases', actions of the person who aided and abetted in commission of the active or passive bribery, or who organised this crime, or incited its commission, should be qualified as complicity in active or passive bribery. Qualification of actions of the accomplice should be decided taking into account the direction of his intent based on the following: in whose interests, on whose side or on whose initiative (of the person who gave or of the person who received the bribe) he acted. Besides, paragraph 12 of the mentioned Resolution provides that the offence under Article 369 CC takes place also when the official recommended to his subordinate to seek benefits or advantages in the interests of this person. Therefore, liability for giving a bribe will be on the employee who, by executing such recommendations, gave or received in interests of the official an undue payment. Actions of the official in this case will be qualified as incitement of active bribery.

valid, the existence of criminal liability in the case of bribery through a third party, let alone the elements of such liability, has not been legislatively clarified as urged by Recommendation 6. It is important to reiterate that Recommendation 6 seeks clarification in the Criminal Code of liability of the third persons for bribery, as well as the liability for bribery through a third person who was not aware of the crime.

Definition of a bribe

Articles 368 and 369 criminalize receiving a bribe, and offering or giving a bribe, respectively. However, the key term “bribe” is not defined either in law currently in effect or in the Law Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences. The definition should be clarified to eliminate defence arguments that although something was received, or offered or given, it was not a “bribe.”

The definition of a bribe should be brought in line with international standards, in which the bribe is defined as an undue advantage, tangible or intangible, pecuniary or not. While the current Criminal Code does not specify whether the non-pecuniary advantages are covered, the court case-law, as summarised by the Supreme Court of Ukraine⁹, clearly limits bribe to objects of pecuniary character. This not only falls short of the international standards, but is in itself a most serious obstacle to tackle high level corruption through criminal investigation and prosecution.

It should also be noted that the Law Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences introduces several new offences (trading in influence, illicit enrichment, corruption-related offences in the private sector), which incorporate the term “undue advantage”. Definition given in the Note to the new Article 235-1 provides that “undue advantage” comprises money, other assets, advantages, discounts, material or immaterial services. Similarly the term “undue advantage” is used in the new chapter on administrative corruption offences incorporated in the Code of Administrative Offences. This definition could be extended to bribes.

Illicit enrichment

Ukraine has followed the recommendation from the UNCAC and has introduced the offence of illicit enrichment in the anti-corruption package, providing a potentially very effective means to curb high level corruption through criminal law. However, the proposed wording of this offence falls short of complying with the UNCAC definition and can hardly be implemented in practice. It should be brought in line with Article 20 of UNCAC.

During the on-site visit, Ukrainian representatives acknowledged that nothing beyond the passage of the Law on Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences has been done to address Recommendation 6. The passage of this law, however, has not effectively addressed Recommendation 6, because the law has not been implemented and in any event does not take all steps urged by this recommendation that are still necessary.

Ukraine remains **non compliant** with this recommendation.

⁹ Resolution of the Plenary Assembly of the Supreme Court of Ukraine on Court Practice in Bribery Cases, No. 5 of 26 April 2002.

New Recommendation 2.1-2.2

Undertake urgent steps to amend the significant and long overdue loopholes in the criminalisation of bribery and corruption related offences:

- ***Ensure that the anti-corruption package adopted in June 2009 enters into force as soon as possible. Review the provisions of the package, and of other relevant legislation to identify gaps of Ukrainian legislation against the international anti-corruption standards, and remove these gaps through appropriate legislative and institutional measures. Any revision of the package should not cause additional delay in its enactment. Ensure the implementation of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) and sign and ratify the Council of Europe Convention on Access to Official Documents (CETS No. 205).***
- ***Implement provisions of the Law Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruptive Offences that would criminalize trading in influence and the offering of a bribe.***
- ***Align offences of active and passive bribery with international standards by criminalising promising, requesting or soliciting a bribe, accepting a proposal or a promise of the bribe as complete offences and by ensuring that the legislation expressly criminalizes, for both principals and third persons, various specified forms of bribery through a third person or for the benefit of a third person.***
- ***Implement legislation increasing maximum punishments for active and passive bribery, and consider whether to increase the limitations period for some corruption offenses.***
- ***Enact a statutory definition of "bribe" which should include non-pecuniary undue advantages.***
- ***Consider reviewing the offence of illicit enrichment to bring it in line with Article 20 of the UNCAC.***

Responsibility of legal persons

Previous recommendation 12

Recognising that the responsibility of legal persons for corruption offences is an international standard included in all international legal instruments on corruption Ukraine should with the assistance of organisations that have experience in implementing the concept of liability of legal persons (such as the OECD and the Council of Europe) consider how to introduce into its legal system efficient and effective liability of legal persons for corruption.

During the first round of monitoring, Ukraine was considered **non compliant** with this recommendation.

Under Ukrainian law currently in effect, there is no liability of legal entities for corruption offenses. However, consistent with Recommendation 12, Ukraine clearly has considered imposing such liability and in fact has passed a law to that effect: the Law of Ukraine on the Liability of Legal Persons for Corruption Offences. This law was passed in June 2009, as a part of the anti-corruption package.¹⁰ However, its effective date has been pushed back on multiple occasions, and is currently set for 1 January 2011.

The law is not entirely clear as to whether the legal entity's liability is considered criminal or administrative, or perhaps either depending on the particular case. Any of those possibilities would be consistent with international standards; some international instruments, such as the United Nations

¹⁰ According to Article 2 of the Law on the Liability of Legal Persons for Corruption Offences, a legal person can be held liable under this law for commission, on its behalf and in its interests, by the head of such legal person, its founder, participant or other authorised person separately or collectively of any of the crimes mentioned in Article 209, in paragraphs 1 or 2 of Articles 235-4 and 235-5, in Articles 258-5, 364, 365, 368, 369 and 376 of the Criminal Code of Ukraine. As a sanction legal persons can be subject to confiscation of assets. According to Article 6, paragraph 2, of this Law if it is impossible to confiscate assets, proceeds mentioned in paragraph 1 of Article 6, the court orders confiscation of an equivalent amount of money.

Convention against Corruption, that require legal entities' liability for natural persons' criminal corruption offenses state that such liability can be civil, administrative or criminal. However the issue is resolved, though, clarifying it obviously is crucial to identifying both the societal stigma to be attached to such liability and the procedure to be used in asserting and adjudicating such liability.

Although not entirely clear in all respects, the terms of the law appear generally compliant with international standards in some respects but not others. A few examples are instructive.

Under this law, the basis of the legal entity's liability for corruption offenses is appropriately grounded on acts of the legal entity's authorized agent that were undertaken on the legal entity's behalf and in its interest. However, in order to comply with Article 18, paragraph 2 of the Council of Europe's Criminal Law Convention on Corruption, an additional basis for liability should be included: where lack of supervision or control by a person in a leading position within the legal entity made possible the commission of one of the specified criminal offences for the benefit of that legal person by a natural person – whether or not in a leading person within the legal entity - under the legal person's authority.

Under this law, an appropriate array of sanctions - including fines, confiscation of property, prohibitions to engage in certain activity, and the termination of the legal entity - is available to a sentencing court. The law appears to suggest that the confiscation envisioned is unique, a separate type of confiscation different from confiscation available under other statutes.¹¹ Ukrainian authorities should consider whether legal entities instead should be subject to confiscation under the draft law "On amendments to the Criminal and Criminal-Procedural Codes on Improving the Procedures for Carrying Out of Confiscation" or a similar law providing for specific confiscation of property specifically tied to criminal activity. If so, this could help harmonise legal practice and standards regarding confiscation.

The Law on Liability of Legal Persons for Corruption Offenses provides for adequate general procedures for trials of legal entities, including the presence of a three-person adjudicative panel and a representative of the legal entity, and array of trial rights available to the legal entity. Likewise, the law sets forth a right to appeal the trial ruling to a three-judge panel, and provides some detail concerning both appeals and execution of judgments against a legal entity.

At least three other features of the law appear less than ideal and worth reconsidering. First, under the law, legal entities are subject to criminal liability only for money laundering and certain specified corruption-related offenses. Although some crucial corruption offenses are on the list - including giving bribes and receiving bribes - others are not. Several significant corruption offenses are not on the list and therefore not available against legal entities;¹² this gap will further increase if certain offenses are implemented pursuant to new legislation such as the Law on Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences. Moreover, the rationale for including on the list some rather than all corruption offenses is not apparent. Accordingly, it is recommended that the Law on the

¹¹ The Law on the Liability of Legal Persons is not connected with the institute of confiscation, provided for in Article 59 of the Criminal Code. In this Law the asset confiscation is defined in Article 6 that says that the confiscation should apply to all incomes, received by legal person from the criminal activity, or their equivalent in a sum of money.

¹² While UNCAC's view should not necessarily limit the scope of this law, if UNCAC is the standard, the law still will be deficient because it will not encompass embezzlement by the public official (Art. 17 of UNCAC and Art 191 of the CC) or trading in influence (Art. 18 of UNCAC and prospective Art. 399-1 of the CC). Abuse of functions (Art. 19 of UNCAC) is not entirely covered because the law does not include CC Art. 423 or 424. Also, in the pre-visit questionnaire, Ukrainian officials identified offenses generally considered "corruption" offenses by Ukrainian practitioners, and this list included two offenses (CC Articles 210 and 211) not covered by the law.

Liability of Legal Persons for Corruption Offenses be amended to make it generally applicable to a broader array of corruption crimes, including newly-codified corruption crimes.

Second, contrary to prevailing practice elsewhere, under the Ukraine law, prosecution of natural persons and the associated legal entity cannot proceed at the same time; the prosecution of natural person(s) must be declined or concluded before the legal entity is prosecuted. Ukrainian representatives noted that an investigation can essentially proceed simultaneously against one or more natural persons and the legal entity with which they are associated; specifically, an investigator evaluating the culpability of natural person(s) simultaneously can evaluate whether the legal entity should be subject to criminal liability, resulting in manifest investigative efficiency. However, Article 10 of the Law clearly provides that before proceedings can be launched against the legal person there should first be a final court decision finding a natural person guilty of the relevant crime or a decision to close or refuse to initiate the criminal case against the natural person. Ukraine should consider whether similar efficiency would result from permitting simultaneous prosecutions - including joint trials where appropriate - of the legal entity and the natural person(s).

Third, the law does not specify what constitutes a "legal entity" within the scope of the law. The law does specify that it does not apply to certain "legal persons of public law" and international organizations, but does not address the antecedent question of what constitutes a legal entity in the first place. While there is a general definition of legal persons in the Civil Code, there is no reason to automatically assume that the Civil Law's definition would or should apply under this law. This law should therefore incorporate or refer to the Civil Law's definition.

Many of these observations were also made in expert opinions provided by the Council of Europe on draft versions of the law. Two of these expert opinions, dated December 7, 2006, dealt with an early draft of the law; a more recent one, dated June 2008, dealt with a version very similar to the law as passed. These expert opinions expressed not only most of the observations set forth above, but also additional concerns and suggestions regarding the draft laws reviewed. To the extent that the law as passed does not account for these concerns and suggestions, the monitoring team urges Ukrainian authorities to consider them.

During the on-site visit, Ukrainian representatives mentioned the assistance they had received on this topic from international organizations, as contemplated by Recommendation 12. Specifically, they cited assistance from the Council of Europe in the drafting of law – presumably referring to the above-referenced expert opinions provided by the Council of Europe. Ukrainian representatives also mentioned assistance in the form of trainings and conferences: in Budapest at an event sponsored by the United States Agency for International Development; in Moscow at an event sponsored by GRECO; in Ukraine at a conference of the International Association of Prosecutors. Although only a limited number of Ukrainian prosecutors and officials were able thereby to increase their understanding regarding criminal liability of legal entities, the practice of beginning to access international expertise in this area is an encouraging development. If and when the Law of Ukraine on the Liability of Legal Persons for Corruption Offenses becomes effective, these and other international partners could help with the important task of training prosecutors and judges to actually employ the law in specific cases.

In summary, much consideration has been given to the issue of liability of legal entities for corruption-related offenses. However, additional consideration, and implementation of chosen principles pursuant to effective legislation, remains to be undertaken.

Ukraine is **fully compliant** with this recommendation (it is important to note that the rating is based on the recommendation 'to consider' and acknowledges that a relevant law was passed; however, the law is not yet enacted, and some of its provisions require further review).

Money laundering

Previous recommendation 23

In the sphere of money laundering, pursue the implementation of the FATF recommendations and MONEYVAL.

During the first round of monitoring, Ukraine was considered **partially compliant** with this recommendation.

During the evaluation period, Ukraine took some measures to help implement the 40 anti-money laundering recommendations of the Financial Action Task Force (FATF). Perhaps most significantly, it addressed FATF's Recommendation 1, *i.e.*, to apply money-laundering laws to "all serious offenses," meaning crimes punishable by a maximum term of imprisonment of at least one year. Ukraine's criminal provision for money laundering, Article 209 of the Criminal Code, previously had covered predicate offences only with a maximum imprisonment term of 3 years or more. This fell short of the international standard and it did not cover some corruption-related offences, such as bribe giving without aggravated circumstances. The monitoring team was advised that in May 2010, Parliament passed a law which lowered the threshold to one year; Article 209 now criminalizes money laundering of the proceeds of all crimes having a maximum term of imprisonment of one year or more. This meets international standards and will make a far larger number of corruption-related crimes predicate offenses for money laundering. The monitoring team was unable to assess the state of implementation of the new law, however.

During the on-site visit, Ukrainian representatives expressed their belief that Ukraine's Financial Intelligence Unit, the State Committee for Financial Monitoring, was cooperating very well with law enforcement. To the extent that this is accurate, this would constitute progress in implementing FATF's Recommendation 31, which calls for just such cooperation.

A variety of other key FATF recommendations have been addressed but not yet satisfied. For example, FATF's Recommendation 2 calls for liability – preferably criminal but alternatively civil or administrative – for legal entities for money laundering. As noted above, the Law of Ukraine on the Liability of Legal Persons for Corruption Offenses specifically renders legal entities subject to some form (perhaps administrative or perhaps criminal) of liability for natural persons' money laundering in violation of Criminal Code Section 209. However, as noted above, that law is not slated to become effective until January 2011. Likewise, with respect to FATF's Recommendation 3, *i.e.*, to confiscate property laundered, proceeds from money laundering or predicate offences, instrumentalities used in or intended for use in the commission of these offences, or property of corresponding value, without prejudicing the rights of bona fide third parties, as noted above comprehensive confiscation legislation has been drafted but not yet enacted into law.

As another example, Ukraine remains noncompliant with the FATF's Recommendation 35, *i.e.* to fully implement a variety of relevant international conventions which it has ratified, including the Vienna (anti-drug trafficking) and Palermo (transnational crime) conventions.¹³ On 18 May 2010, the parliament of Ukraine adopted a new wording of the Law on Money Laundering, which aims to implement relevant provisions of the UN Convention on Transnational Organised Crime (Articles 6 and 7). However, Ukraine has failed to clearly and unambiguously define a key element of money laundering as required by those conventions: "the conversion or transfer of property". Instead contrary to those conventions and

¹³ Ukraine ratified the Vienna Convention in 1998 and the Palermo Convention in 2004.

Moneyval's recommendation, Article 209 criminalises only a narrower category of conduct, "conducting a financial transaction or concluding a deal". Legislation should be enacted to broaden this language to encompass any conversion or transfer of property, not just "financial transactions" and "deals". Also, Ukraine has failed to implement the Palermo Convention's requirement for effectively and appropriately implementing the concept of liability for legal entities for participation in organised crime offences.

These examples, as well as MONEYVAL's recent country reports for Ukraine, demonstrate that although Ukraine is not ignoring FATF's recommendations, it has not made sufficient progress. As FATF stated in its June 2010 review of high-risk jurisdictions:

"In February 2010, Ukraine made a high-level political commitment to work with the FATF and MONEYVAL to address its strategic AML/CFT deficiencies. Since that time, Ukraine has demonstrated progress in improving its AML/CFT regime, including by enacting a new AML/CFT law. However, the FATF has determined that certain strategic AML/CFT deficiencies remain. Ukraine should continue to work on implementing its action plan to address these deficiencies, including by: (1) addressing remaining issues regarding criminalisation of money laundering and terrorist financing (Recommendation 1 and Special Recommendation II); and (2) improving and implementing an adequate legal framework for identifying and freezing terrorist assets (Special Recommendation III). The FATF encourages Ukraine to address its remaining deficiencies and continue the process of implementing its action plan."

On 1 October 2010 MONEYVAL adopted its progress report on Ukraine. On 22 October 2010 FATF issued a public statement that named Ukraine as a "jurisdiction which has strategic AML/CFT deficiencies": "In February 2010, Ukraine made a high-level political commitment to work with the FATF and MONEYVAL to address its strategic AML/CFT deficiencies. Since June, Ukraine has taken steps towards improving its AML/CFT regime, including by bringing a new AML/CFT law into force. However, the FATF has determined that certain strategic AML/CFT deficiencies remain. Ukraine should continue to work on implementing its action plan to address these deficiencies, including by: (1) addressing remaining issues regarding criminalisation of money laundering (Recommendation 1); and (2) improving and implementing an adequate legal framework for identifying and freezing terrorist assets (Special Recommendation III). The FATF encourages Ukraine to address its remaining deficiencies and continue the process of implementing its action plan."

Besides the State Financial Monitoring Committee is drafting a law on identification and freezing of terrorist assets.

In May 2010 President of Ukraine signed the Law of 21.05.2010 No. 2258-VI "On Amendments in the Law of Ukraine On Preventing and Counteracting Legalisation (Laundering) of Proceeds from Crime". This Law introduces main international standards in this area: 40 and 9 Special Recommendations by FATF; UN Convention on Combating Financing of Terrorism; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism; Directive 2005/60/EC of the European Parliament and of the Council On the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing. While this law may provide positive developments, it fails to address all FATF recommendations, as noted in above, especially regarding FATF's Recommendation 35.

Ukraine is **largely compliant** with this recommendation.

New Recommendation 2.1-2.2 bis

Bring the law on corporate liability for corruption offences in compliance with international standards and recommendations. Ensure that the Law of Ukraine on the Liability of Legal Persons for Corruption Offenses or similar legislation becomes effective. With the assistance of qualified international organizations where possible, plan, create and provide trainings and written guidelines and other advice on the law, and how to employ it in specific cases, for at least prosecutors and judges.

In the sphere of money laundering, continue to pursue the implementation of the FATF and MONEYVAL recommendations.

2.3 Definition of Public Official

Definition of national public officials

Previous recommendation 7

Harmonise the concept of an "official" from the Criminal Code and the Law on the Fight against Corruption, ensuring that the definition encompasses all public officials or persons performing official duties in all bodies of the executive, legislative and judicial branch of the State, including local self-government and officials representing the state interests in commercial joint ventures or on board of companies.

Ukraine was considered **non compliant** with this recommendation during the first round of monitoring in 2006.

Two main pieces of legislation, the Law of Ukraine on Fight Against Corruption and the Criminal Code of Ukraine, address the combat of corruption, the first via non-criminal regulations and sanctions, the second via criminal prohibitions and sanctions. For the purposes of the law on the Fight Against Corruption, public officials, the Prime Minister of Ukraine, First Vice-Prime Minister, Vice-Prime Ministers, ministers, people's deputies of Ukraine, deputies of the Supreme Council of the Autonomous Republic of Crimea, deputies of rural, village, municipal, city precinct, and regional councils; local self-government officials; military officials of the Ukrainian Armed Forces and other military formations (except active military servicemen) can be held responsible for corruption through administrative and disciplinary procedures. Accordingly, persons occupying those positions are "officials" for the purposes of that law.

The Criminal Code of Ukraine has its own definition of "official" which makes no reference to the Law of Ukraine on the Fight Against Corruption. Specifically, the Note to Article 364 of the Criminal Code of Ukraine provides a two-part definition of "official." Paragraph 1 of the Note states that officials "are persons permanently or temporarily performing the functions of authority, as well as permanently or temporarily occupying positions at enterprises, institutions or organisations, irrespective of their forms of ownership, connected with performance of organisational or administrative functions, or specially authorised to perform such functions." Paragraph 2 of the Note states that officials "shall also mean foreigners or stateless persons who perform the functions described in paragraph 1 of this Note." These definitions of "official", set forth only in Article 364, apparently have been applied to all articles (Articles 364-370) set forth in Chapter 17 of the Criminal Code, entitled, "Criminal Offences in Office."

The Note to Article 368 sets forth a definition of a narrower category of officials, that is, "officials who occupy responsible positions" and thus are subject to greater punishment than are other officials pursuant to Article 368(1) & (2); these are "officials" within the meaning of the Note to Article 364 referenced above "whose positions are referred by article 25 of the Law of Ukraine on Public Service to the third, fourth, fifth, and sixth categories, as well as judges, prosecutors and investigators, heads and

deputy heads of bodies of public authority and administration, local self-government, their structural divisions and units. The same Note also sets forth a definition of an even narrower category of officials, that is, "officials who occupy especially important positions"; this definition apparently is applicable not to Article 368 but only to Article 382. These are "persons stipulated by Article 9 § 1 of the Law of Ukraine on Public Service, and persons whose positions are referred by Article 25 of this Law to the first and second categories." In summary, the Criminal Code contains one two-part definition of "officials" of implied, but not express, applicability throughout the Criminal Code, as well as definitions of two different categories of elevated officials, each of which is applicable only to a single Article of the Criminal Code.

The Draft Law of Ukraine on the Amendments to Some Legal Acts Concerning the Responsibility for Corruptive Offences would change the definition of "officials" in paragraph 1 to the Note to Article 364; officials would be persons who "permanently, temporarily or on the basis of special powers exercise functions of representatives of the government or local-self governance; or hold, permanently or temporarily, in public agencies, local-self governance bodies, at public or communal unitary enterprises, institutions or organizations, positions associated with the exercise of organizational-managerial or administrative economic functions or exercise such functions on the basis of special powers as mandated by an authorized body of the government, local self-governance, a central public administration body with a special status, an authorized body or an authorized public official of a corporation, institution, organization, the court of law, or by law." In addition, this law would change the definition of paragraph 2; "officials" also would mean public officials of foreign states (individuals who hold positions in a legislative, executive, administrative or judicial body of a foreign state, as well as other individuals who exercise functions for a foreign state, particularly for a public agency or a public corporation), as well as officials of international organizations (employees with an international organization or other individuals authorized by such an international organization to act on its behalf).

These definitions would constitute an improvement over the Criminal Code's existing definitions, which lacked some clarity regarding what constituted a domestic "official" and omitted any reference to foreign "officials." However, although Ukrainian representatives have asserted otherwise, these new definitions would do nothing to harmonize the Criminal Code's concept of "official" vis-à-vis the Law on Fight against Corruption.

Article 2 of the Law on Principles of Prevention and Countering of Corruption is currently slated to become effective on January 1, 2011 and thereby replace the Law on Fight against Corruption. It implies a definition of "official" by imposing responsibility for commission of corruptive acts on a lengthy list of persons and entities, namely **(1)** persons authorised to perform state or local self-government functions, specifically: (a) the President of Ukraine, Head of the Supreme Council of Ukraine and his/her deputies, the Prime Minister of Ukraine, other members of the Ukrainian Cabinet of Ministers, Prosecutor General of Ukraine, Head of the Ukrainian National Bank, Head of the Chamber of Audit, the Authorised Human Rights Representative of the Ukrainian Supreme Council, Head of the Supreme Council of the Autonomous Republic of Crimea; Head of the Council of Ministers of the Autonomous Republic of Crimea ; (b) people's deputies of Ukraine, deputies of the Supreme Council of the Autonomous Republic of Crimea, and deputies of local councils; (c) civil servants; (d) local self-government; (e) military officers of the Ukrainian Armed Forces and other military formations; (f) judges of the Constitutional Court of Ukraine, professional judges, lay judges and jurors; and (g) rank-and-file and command representatives of the interior forces, tax militia, state criminal service, bodies and divisions of civil defence, the State service for special communication and information protection of Ukraine; (h) public officials and personnel of prosecution agencies, diplomatic service, customs service, the state tax service; and (i) public officials and representatives of other bodies of public administrative bodies; and **(2)** persons who for the purposes of the present Act are equalled to persons authorized to exercise public functions or self-governance bodies, namely: (a) officials of certain legal entities of the public law; (b) members of the county/territorial and

local electoral commissions; (c) heads of public organizations that are partly financed out of the state or a local budget; (d) assistants-consultants to the people's deputies of Ukraine and other elected persons who are not public servants but receive their wages at the expense of the government or a local budget; (e) persons who are not public servants, officials of local self-governance bodies, but render public services (auditors, notaries, experts, appraisers, bankruptcy commissioners, independent intermediaries or members of the labour arbitration bodies during consideration of collective labour disputes, awarders, and other persons, as per law); (f) officials of foreign states (persons who hold office in the legislative, executive, administrative or judicial body of a foreign state, as well as other persons who exercise public functions for a foreign state, particularly for a government agency or a public corporation); (g) officials of international organizations (personnel of international organizations or any other individuals authorized by such an organization to act on its behalf); and **(3)** persons, permanently or temporarily holding positions related to organizational executive, or administrative and executive responsibilities, or persons specifically authorized to perform such duties at legal entities, as well as entrepreneurs; and **(4)** officials of legal entities in cases in which they grant unlawful benefits to certain officials specified in Article 2; and **(5)** legal entities, in cases as prescribed by law.

Ukrainian representatives have asserted that with this implied definition of "official," the Law on Principles of Prevention and Countering of Corruption would harmonize the definition of "official" with that of the Criminal Code. In fact, however, this law would fail to rectify the lack of harmony with the Criminal Code as to the officials subject to sanctions for corruptive acts. This law contains a long list of officials subject to the law, which includes sub-list of persons authorised to perform public or local self-government functions; foreign officials, and officials of international organisations. It is these parts of the list from the law – and not the parts referring to persons associated with legal entities and to legal entities themselves – that can and should be included in the Criminal Code List. By contrast, in both its current form and under proposed changes under the Draft Law of Ukraine on the Amendments to Some Legal Acts Concerning the Responsibility for Corruptive Offences, the Criminal Code contains no such list, but rather only relatively short definitions of "officials" who are subject to certain criminal statutes.

During the on-site visit, Ukrainian representatives acknowledged that nothing beyond the passage of the Law on the Principles of Prevention and Countering of Corruption and the Amendments to Some Legal Acts Concerning the Responsibility for Corruptive Offences has been done to address Recommendation 7. The passage of these laws, however, has not effectively addressed this recommendation, because the laws have not been implemented and in any event do not cure the problems underlying this recommendation.

Ukraine is **non compliant** with this recommendation

Definition of foreign and international public officials

Previous recommendation 8

Ensure the criminalisation of bribery of foreign or international public officials, either through expanding the definition of an "official" or by introducing separate criminal offences in the Criminal Code.

Ukraine was **non compliant** with this recommendation during the first round of monitoring.

Current Ukrainian legislation does not specifically criminalize corrupt acts of foreign and/or international public officials; there is no criminal statute that expressly identifies foreign and/or international public officials as within the scope of the statute. Current legislation likewise does not include foreign and/or international public officials within the scope of defined "officials" subject to criminal statutes.

Paragraph 2 to the Note to Article 364 of the Ukrainian Criminal Code provides that “officials” means foreigners or persons without citizenship permanently or temporarily performing the functions of authority, as well as permanently or temporarily occupying positions connected with the performance of organisational or administrative functions, or performing such functions on special authorisation, at enterprises, institutions and organisations, irrespective of their forms of ownership. This apparently is not a reference to public officials of foreign governments or international institutions, however, but rather to foreigners or stateless persons holding positions or authority at Ukrainian institutions.

The Law of Ukraine on the Amendments to Some Legal Acts Concerning the Responsibility for Corruptive Offences, currently slated to become effective January 1, 2011, would change the definition of officials set forth in paragraph 2 to the Note to Article 364; thereby, “officials” also would mean public officials of foreign states (individuals who hold positions in a legislative, executive, administrative or judicial body of a foreign state, as well as other individuals who exercise functions for a foreign state, particularly for a public agency or a public corporation), as well as officials of international organizations (employees with an international organization or other individuals authorized by such an international organization to act on its behalf). This change would make foreign and international public officials effectively subject to every criminal statute – including the anti-bribery statutes, Article 368 and 369 - that applies to domestic “officials” within the meaning of the Note to Article 364. Thus, this change in definition would be fully responsive to Recommendation 8.

During the on-site visit, Ukrainian representatives acknowledged that nothing beyond the passage of the Draft Law of Ukraine on the Amendments to Some Legal Acts Concerning the Responsibility for Corruptive has been done to address Recommendation 8. The passage of this law, however, has not effectively addressed Recommendation 8, because the law has not been implemented.

Ukraine is **non compliant** with this recommendation.

New Recommendation 2.3

Ensure that the concept of "officials" subject to the Ukrainian criminal legislation is fully compliant with international standards, including the criminalisation of bribery of foreign or international public officials.

Clarify the applicability of Article 364 Note's definition of "official" and Article 368 Note's definition of "officials holding responsible position" or "officials holding especially responsible position" by expressly identifying the Criminal Code Articles to which they apply.

Previous recommendation 10

Introduce a proposal to criminalise non-reporting of instances of possible corruption of public officials, if as a result of the investigation it can be shown that corruption in fact existed, and that those who failed to report it can be shown to have been fully aware of it.

Ukraine was **non compliant** with this recommendation during the first round of monitoring.

Current Ukrainian legislation does not specifically criminalise non-reporting of corruption-related crimes. Moreover, there currently is no contemplated legislation that would do so.

Article 396 of the Ukrainian Criminal Code does criminalise (except as to family members of the perpetrator of the crime) actions involving concealment of a grave or especially grave crime. Thus, only concealment of those corruption related crimes that belong to the category of grave and especially grave crimes – meaning crimes punishable by more than five years imprisonment - constitutes a crime. Several

corruption offenses, including taking bribes and giving bribes, fit this category when certain statutorily defined aggravating circumstances are present. During the on-site visit, Ukrainian representatives told the monitoring team that other provisions of Ukrainian law serve to criminalize conduct in the nature of non-reporting of corruption-related offenses. For example, they noted that under Criminal Code Article 385, groundless refusal by a witness to testify in a corruption case would constitute a crime.

These alternatives partially address the concerns raised in Recommendation 10. However, the monitoring team believes that these alternatives collectively are not adequate to address all concerns. The team realizes that criminalization of non-reporting need not be overly broad. At a minimum, however, criminalization of non-reporting may be appropriate where the non-reporter was fully aware of actual criminal acts of corruption, intentionally failed to report it, and had an express or implied duty to report it by virtue of, for example, the non-reporter's occupation, position, or authority.

In addition, increased emphasis on the duty of public employees to report instances of criminal or non-criminal acts of corruption would be appropriate. In particular, public agencies should consider fully training their employees on this duty, and emphasizing periodically within their agencies both this duty and the possibility of criminal or at least administrative sanctions for employees' failure to report.

Ukraine remains **non compliant** with this recommendation.

2.4-2.5–2.6 Sanctions, Confiscation, Immunities and Statute of Limitations

Sanctions and Statute of Limitation

The Law of Ukraine on Amending Some Legislative Acts of Ukraine Concerning Responsibility for Corruption Offences, which was passed in June 2009, as a part of the anti-corruption package, and originally slated, by its terms, to become effective on January 1, 2010, contains a number of provisions, which aim to implement many elements of recommendation 6 related to the criminalisation of corruption, as discussed above. However, it does not address all aspects of Recommendation 6. The law does not amend the punishments for active or passive bribery, or the limitations period for corruption offenses. While the maximum prison sentence of five years for general (non-aggravated) active and passive bribery can be considered proper, the punishment for aggravated or repeated bribery remains comparatively low to the basic offence.¹⁴ The limitations period for some corruption offenses - five years for general active and passive bribery, for example, and as low as two years – remains arguably too short.

Confiscation

Previous recommendation 9

Introduce a proposal to amend the Criminal Code ensuring that the 'confiscation of proceeds' measure applies mandatory to all corruption and corruption-related offences. Ensure that confiscation regime allows for confiscation of proceeds of corruption, or property the value of which corresponds to that of such proceeds or monetary sanctions of comparable effect. Review the provisional measures to make the procedure for identification and seizure of proceeds from corruption in the criminal investigation and prosecution phases efficient and operational.

Ukraine was **non compliant** with this recommendation during the first round of monitoring.

¹⁴ Article 369 of the CC establishes that active bribery has a maximum sentence of up to 8 years, and even then only for 'repeated' bribery. Passive bribery has a maximum of 10 years, if it involves a 'gross amount'. Articles 364 and 365 of the CC provide maximum sentences less than 8 years, absent significant aggravating circumstances.

Current Ukrainian law prescribes two mechanisms in the nature of forfeiture or confiscation. First, Article 59 of the Criminal Code provides in pertinent part: “The punishment of forfeiture consists in forceful seizure of all, or a part of, property of a convicted person without compensation in favour of the State.” However, it is unclear that how broad the key term “property” is to be interpreted.¹⁵ Article 59 also states that such forfeiture “shall be imposed for grave and utmost grave crimes and shall only be applied in cases specifically provided for in the Special Part of this Code.” Bribery committed in aggravating circumstances, criminalized under Article 368 §2 and 3 of the Criminal Code of Ukraine, is the only corruption-related crime that specifically provides for confiscation of property as contemplated by Article 59. Unfortunately, no statistics exist regarding confiscation of property under Article 59. Confiscation under Article 59 is not limited to proceeds of crime, and in that sense is potentially very broad. However, Article 59 does not permit confiscation of proceeds that are no longer in the possession or ownership of the convicted person; in this sense, Article 59 is too narrow to constitute a fully effective avenue to confiscate proceeds of crime.

Second, Article 81 of the Criminal Procedure Code provides the possibility for government authorities to eventually confiscate or similarly obtain “material evidence,” which is defined in Article 78 of the CPC as objects which were instruments of crime, retained traces of crime or were a target for criminal actions, money, valuables, and other proceeds from crime, as well as all other objects which can help in resolving a crime and identifying those guilty or denying charges or mitigating liability. Material evidence is disposed of in accordance with Article 81 of the CPC by a sentence, ruling or verdict by the court of law, or by resolution by the investigative agency, investigator, or a prosecutor on closing the case. The rules of disposal set forth in Article 81 provide for several forms of disposition that are in the nature of confiscation: (a) instruments of crime belonging to the accused are confiscated; (b) objects taken out of circulation are transferred to the appropriate institutions or destroyed; (c) money, valuables, and other proceeds of crime are assigned in public revenue; and (d) money, valuables, and other proceeds which were targets of criminal acts are returned to their lawful owners and, when such owners are not established, this money, valuables and other proceeds are recycled into the public domain. Thus, Article 81 essentially makes possible forfeiture of proceeds of crime, but only those proceeds that are “material evidence” in a case. Thus, Article 81 does not authorize any value-based confiscation, such as confiscation of property into which original criminal proceeds had been converted.

During the onsite visit, Ukrainian officials were able to point to two instances of confiscation of substantial assets in a corruption case under one of these two mechanisms. In one case, which involves allegations against a judge and was then on appeal, more than 1 million UAH were seized. In the other case, three bribery subjects were caught *in flagrante delicto*, and a large sum of cash was seized.

Both of the above-described mechanisms are limited and do not provide for the possibility of confiscation of proceeds of all corruption and corruption-related offences. Such possibility is, however, contemplated in a draft law, “On amendments to the Criminal and Criminal-Procedural Codes on Improving the Procedures for Carrying out of Confiscation”, which was sent to Council of Europe for an opinion at the

¹⁵ According to Article 190 of the Civil Code of Ukraine, property as a specific object shall be considered a separate thing, a set of things, as well as property rights and obligations. Article 139 of the Economic Code of Ukraine defines property as integrity of things and other valuables (including intangible assets) that have terms of value, are produced or used for activities of business entities, and reflected in their balance sheets or taken into consideration in other forms of property accounting of these entities as established by the law. Criminal legislation of Ukraine, taking into account the Law of 18 May 2010, provides for criminal liability for crimes connected with money laundering (Article 209 CC) and for financing of terrorism (Article 258-5 CC). In addition to main sanction (imprisonment of certain duration) for money laundering offences and for financing of terrorism an additional sanction of confiscation of proceeds or other assets received from crime is provided.

time of the onsite visit. This progress is noteworthy, with a reservation that - as seen before in Ukraine in relation to the anti-corruption package and the reform of the Criminal Code and the Criminal Procedure Code - the future of this draft law, the timeframe for its adoption, its final form and contents, let alone the implementation, remain uncertain.

The draft law would add a new Article, 96-1, to the Criminal Code. Article 96-1 would authorize "special confiscation" in cases where money or other property (1) was obtained as a result of crime or constitute revenues of property obtained as a result of crime; (2) was intended for financing and material support of crime; (3) was the object of the crime; or (4) was used as the means or instrumentality of crime. The draft law does not limit the kinds of crimes as to which special confiscation is available; special confiscation would be available generally with respect to any crime, including corruption crimes. Significantly, with respect to property obtained as a result of crime or constituting revenues of property obtained as a result of crime, to the extent that such property is then converted into other property, the other property then would be subject to special confiscation.

The draft law also provides that a person could be subject to confiscation even if he or she was not subject to, or was discharged from, criminal liability or punishment. The law contemplates one situation in which this might occur: property which was transferred by the accused or convicted person to another person shall be subject to special confiscation, where the other person was or should have been aware that it was acquired as a result of criminal actions; in this situation, the other person is subject to special confiscation whether or not subject to criminal liability or punishment. However, the draft law unfortunately does not indicate whether there are other circumstances in which a person might suffer special confiscation despite not being criminally liable and, if so, how confiscation would proceed under such circumstances.

The draft law also appropriately attempts to harmonize this special confiscation with the provisions for disposal of material evidence under Article 81 of the CPC. It also appropriately protects lawful owners or possessors of property, or crime victims or others with valid claims to property, from confiscation of such property.

During the on-site visit, Ministry of Interior representatives told the monitoring team that it was committed to identifying assets subject to seizure and had the capability to do so; the Ministry has created a special unit for investigating financial crimes and tracking proceeds of crime. The representatives acknowledged room for improvement, however, and discussed plans for advanced training on financial investigations for qualified personnel.

Preparations have been ongoing to actually utilize the Law on Amendments to the Criminal and Criminal-Procedural Codes on Improving the Procedures for Carrying out of Confiscation. During the on-site visit, Ukrainian representatives explained that the Ministry of Justice had sponsored regional workshops for judges, prosecutors and relevant agencies which addressed the letter of this draft law, as well as practical aspects of its implementation. They explained, moreover, that the Council of Europe had held workshops for prosecutors on this. They also explained that the Ministry of Justice had drafted three secondary laws intended to help implement the draft law. These draft laws reportedly remain pending.

The representatives also opined that the Ministry of Justice's Enforcement Service, which currently handles enforcement of court judgments, would be responsible for managing assets confiscated under the new law. They also noted that the Ministry of Justice has an office that sells assets such as real estate and cars at auctions and special stores, and expressed confidence that this expertise would help the Ministry to competently sell confiscated assets when appropriate. The representatives were not aware, however, of plans to expand the capacity of the Enforcement Service to enable it to handle the far greater volume of assets that could ensue from implementation of the new law.

During the on-site visit, Ukrainian representatives acknowledged that beyond the draft law, no other steps have been done to address Recommendation 9. The drafting of this law, however, has not effectively addressed Recommendation 9, because the law has not been passed or implemented.

Ukraine is **non compliant** with this recommendation.

Immunity

Previous recommendation 11

Ensure that the immunity granted by the Constitution to certain categories of public officials does not prevent the investigation and prosecution of acts of bribery. Specify procedures for the lifting of immunity for criminal proceedings and consider abolishing the requirement of authorisation on lifting the immunity in cases when a person is caught in flagrante delicto.

Ukraine was **non compliant** with this recommendation during the first round.

The President, Members of the Parliament (People's Deputies of Ukraine) and judges enjoy immunity, to varying degrees, from criminal prosecution and even investigation. For each, the immunity is limited in terms of scope and/or duration but nevertheless significant. All such immunity is non-functional, *i.e.* not limited to circumstances involving performance of official functions but instead exists regardless of the circumstances under which alleged criminal activity occurred.

The immunity of the Ukrainian President is considered an integral part of his/her constitutional status, to ensure effective and unimpeded execution of his/her official powers. The Presidential immunity is absolute during his or her term of office, and it cannot be cancelled, suspended or restricted. No criminal proceedings, or even any investigative actions pursuant to the CPC, can be initiated against the President while still in office. Under Article 111 of the Constitution of Ukraine, the President may be removed from office by a decision of Parliament of Ukraine through impeachment procedures, if he or she commits state treason or another offence. As noted above, ordinary criminal investigation under the CPC cannot be conducted against the president while in office to enable an investigation in contemplation of impeachment; instead, under Article 111 Parliament of Ukraine establishes a special temporary investigatory commission whose composition includes a special Prosecutor and special investigators. Once the President leaves office, whether by impeachment or otherwise, he or she apparently does not enjoy any immunity from criminal investigation or prosecution, even for acts that occurred while in office.

The immunity of people's deputies is of a different nature. Under Article 80 §3 of the Constitution of Ukraine, people's deputies cannot be brought to criminal responsibility, detained or arrested without the consent of Parliament of Ukraine. The term "brought to criminal responsibility," according to a 1999 decision of the Ukrainian Constitutional Court, means "charged with a crime." Moreover, under Article 27 of the Law on the Status of People's Deputies of Ukraine, certain valuable criminal investigative techniques – such as office searches and wiretaps – cannot be undertaken against a people's deputy without prior consent of Parliament. Accordingly, arrest and prosecution, as well as many aspects of investigation, require Parliament's approval.

The immunity of judges differs from that possessed by the President and people's deputies. Under Article 126 of the Constitution, a judge cannot be arrested or detained before the issuance of a court sentence without the consent of Parliament of Ukraine. Indeed, in the last 15 years there is only a handful of cases where judges had been arrested for bribery or corruption-related offences. This prevalence of judicial immunity is a concern. Although valid reasons support judges' immunity in many cases, more frequent

lifting of such immunity seems warranted because the perceived and actual lack of accountability of Ukrainian judges for corruption is perhaps the greatest corruption problem for Ukraine.

In addition to the provisions of Article 126, guarantees in the nature of immunity can also be granted to judges by laws, and in fact they have been, under both prior laws and the new Law of the Ukraine on the Judiciary and Status of Judges, adopted on 7 July 2010. The monitoring team reviewed the new Law of the Ukraine on the Judiciary and Status of Judges, which became effective only after the onsite visit. From the review, the law appears to make no substantial changes to prior law on substantive or procedural matters relating to judicial immunity. Under Article 48 of the new law, a judge detained on suspicion of commission of a crime or an administrative offence must be released immediately after his or her identity is established. The new law retains the old principle that regardless of and without impairing the immunity, investigation can be started by the nation's Prosecutor General or his deputy. Accordingly, investigative actions can be taken against judges, although, appropriately, certain intrusive investigative actions can be conducted only based upon a court order.

Although the legislation does not preclude the possibility of lifting the immunity of a People's Deputy of Ukraine and/or a judge, there is no clear and precise statutory procedure for lifting the immunity. According to Ukrainian authorities, Chapter 35 of the Law of Ukraine "On the Rules of Procedure of the Parliament of Ukraine" establishes the procedure for consideration of the issue of giving permission to bringing to criminal liability, apprehension or arrest of the member of parliament, apprehension or arrest of a judge. Chapter 35 sets forth a variety of helpful procedural rules regarding the lifting of immunity for People's Deputies and judges. However, additional rules would be helpful, including for example rules regarding the standard of proof required to lift immunity and rules regarding evidence and disclosure of information between the parties in proceedings to lift immunity.

During the on-site visit, Ukrainian representatives acknowledged a lack of clarity in the procedures for lifting immunity. They also stated that there were pending draft laws that address the manner in which immunity could be lifted under certain circumstances. They also opined that the new CPC currently being drafted would address this topic. The monitoring team was unable to review these drafts laws or proposed new CPC provisions, however. Assuming that they are being drafted and considered, that indicates that Ukrainian officials acknowledge that additional clarification is needed but are working to provide such clarification.

There were no cases of lifting immunity of members of parliament for prosecution of corruption cases during the evaluation period. In addition, no measures have been taken to abolish the requirement that Parliament of Ukraine consent to the lifting the immunity in cases when a person is caught *in flagrante delicto*.

During the on-site visit, Ukrainian representatives acknowledged that beyond the above-referenced draft laws, nothing has been done to address Recommendation 11. These drafts, however, have not effectively addressed Recommendation 11 as they have not been passed or implemented.

Ukraine is **non compliant** with this recommendation.

New Recommendation 2.4-2.5-2.6

Amend the Criminal Code to ensure that the ‘confiscation of proceeds’ measure applies mandatorily to all corruption and corruption-related offences. Ensure that confiscation regime allows for confiscation of proceeds of corruption, or property the value of which corresponds to that of such proceeds or monetary sanctions of comparable effect. Review measures to make the procedure for identification and seizure of proceeds from corruption in the criminal investigation and prosecution phases efficient and operational.

As a matter of priority, review the effectiveness of legislation and regulation on immunities of judges and parliamentarians in order to ensure that the procedures for lifting of immunities are transparent, efficient, based on objective criteria, and not subject to misuse.

Limit immunity for judges and parliamentarians to a certain extent, e.g., by introducing functional immunity and allowing arrest in cases of in flagrante delicto.

Clarify the extent to which some or all criminal investigative measures can be employed against a subject even though the subject at the time possesses immunity from arrest and/or prosecution.

2.7 International cooperation and mutual legal assistance

Previous Recommendation 13

Contribute to ensuring effective international mutual legal assistance in investigation and prosecution of corruption cases.

Ukraine was considered **largely compliant** with this recommendation during the first round of monitoring.

Under Ukrainian law, dual criminality is a general requirement for mutual legal assistance and is generally applicable to any criminal offences that are extraditable. However, there is no requirement for dual criminality in cases of requests concerning collection of evidence.

As to the reciprocity, Ukraine applies reciprocity in mutual legal assistance on a case-by-case basis and there is no set rule for its application. It was indicated that reciprocity is usually a part of extradition arrangements.

Ukrainian law does not provide for definitions of political offences and, similar to reciprocity provisions, such cases are decided on a case-by-case basis. There is a general understanding that commission of especially grave crimes (e.g. crime against life) would not be considered a political offence.

Ad hoc cooperation without treaty basis is possible under Ukrainian law. Such cooperation is handled exclusively by the International Unit of the Prosecutor General’s Office.

Ukraine has not ratified the Second Protocol to Council of Europe Convention on Mutual Legal Assistance in Criminal Matters and is therefore not ready to make full use of all special measures required by the protocol, such as joint investigation groups or video conferencing, since no specific clauses are provided in the law. Ukraine should also consider the possibility of receiving similar requests for use of special measures as a part of implementation of the United Nations Convention against Corruption.

There is no consolidated statistical data in Ukraine about MLA requests related to corruption as the responsibility for collecting such data is split between two bodies. However, Ukrainian authorities

confirmed that they received very few requests for MLA related to corruption. They did not receive any requests of MLA related to confiscation over the past three years.

Ukraine remains **largely compliant** with this recommendation.

New recommendation 2.7

Contribute to ensuring effective international mutual legal assistance in investigation and prosecution of corruption cases. Consider ratifying the Second Protocol to Council of Europe Convention on Mutual Legal Assistance in Criminal Matters and amend legislation to accommodate special measures required by the Protocol and, in the longer perspective, by the United Nations Convention against Corruption.

2.8 Application, Interpretation and Procedure

Previous recommendation 5

Harmonise and clarify the relationship between violations of the Criminal Code and the Law on the Fight against Corruption.

Ukraine was **non compliant** with this recommendation during the first round of monitoring.

Ukrainian law prohibits specified corruptive actions in two different places: the Criminal Code and the Law of Ukraine on Fight with Corruption. The Law on Fight against Corruption provides for administrative and disciplinary responsibility while noting that criminal or civil liability for corruptive acts is to be addressed by other legislation. Criminal liability in fact is prescribed by the Criminal Code.

The Criminal Code does not set forth a definition of corruption or a list of corruption offenses. Ukrainian authorities advised the monitoring team of a number of specific offenses that Ukrainian lawyers identify as corruption offenses; however, this list is not set forth in law or otherwise authoritative, and leaves off a number of crimes that the monitoring team considers corruption offenses, such as Criminal Code Articles 369 (giving a bribe) and 354 (receiving of illegal benefits by an employee of a state institution).

By contrast, Article 1 of the Law on Fight with Corruption defines corruption as the actions of persons authorized to act on behalf of the government, that are intended for illegal use of the powers they are invested with for acquiring material values, services, privileges or other benefits. The law then identifies corruptive actions as the illegal acquisition of material benefits by exercising official authority, or the receipt of loans or credits or securities via use of illegal preference, by a person authorized to act on behalf of the government.

Article 7 of the law provides for imposition of administrative and disciplinary, instead of criminal, sanctions. This is problematic, because a temptation can arise to take the less just and effective path of addressing criminal conduct solely with administrative or disciplinary sanctions even when more serious criminal sanctions are warranted.

In addition, the Law on Fight with Corruption is not harmonious with the Criminal Code as to which officials are subject to sanctions for corruptive behaviour. The law states that civil service officers and people's deputies are, while the Criminal Code contains an entirely different definition of officials subject to criminal sanctions for corruption. Even if ultimately both for the most part cover the same officials, that fact is not immediately apparent because the definitions facially appear so different.

Ukrainian authorities believe that the problem identified in this recommendation would be addressed by the Law of Ukraine on the Principles of Prevention and Countering of Corruption. This law was passed in June 2009, as a part of the anti-corruption package. However, its effective date has been pushed back on

multiple occasions, and is currently set for January 1, 2011. There are pending amendments to this law, which the monitoring team also reviewed.

If and when this law on the Principles of Prevention and Countering of Corruption becomes effective (with or without the pending amendments), it would only partially satisfy previous recommendation 5 and in some ways even exacerbate the problem. First, it does not eliminate the tension between administrative and criminal sanctions or the temptation to inappropriately invoke the former rather than the latter. This law defines "corruption offense" to include acts subject to criminal liability, and states that officials subject to the law are punishable by criminal action, administrative, civil or disciplinary action. It therefore appears, like the old law, to invite the use of alternative, non-criminal sanctions even in cases where criminal sanctions would be more effective; thus, the temptation may exist to take the simpler route of administrative or disciplinary proceedings rather than the more challenging - but more effective - criminal prosecution. Indeed, during the on-site visit, Ukrainian representatives acknowledged that this is in fact occurs regularly: often criminal liability is eschewed in favour of, and due to the availability of, alternative sanctions even for actions that in fact warranted criminal sanctions. It is imperative to change the perception that in Ukraine, corrupt public officials can easily avoid criminal prosecution due to the alternative of administrative or disciplinary sanctions.

For this reason, a significant question is whether the regime of "administrative" corruption offences should exist at all. Abolishing such a regime arguably is appropriate in light of the overuse of administrative sanctions to the detriment of criminal sanctions and in light of the fact that such a regime is arguably contrary to international treaties which require criminalisation of corruption. On the other hand, administrative sanctions arguably can be appropriate in some cases of wrongful conduct that fall short of criminality but are worthy of some form of punishment.

In addition, the law on Principles of Prevention and Countering of Corruption fails to rectify the lack of harmony with the Criminal Code as to the officials subject to sanctions for corruptive acts. The law contains a long list of persons who under various circumstances can be subject to anti-corruption restrictions and can be brought to liability – disciplinary, administrative or criminal. By contrast, in both its current form and under proposed changes, the Criminal Code contains no such list, but rather only relatively short definitions of domestic and foreign officials subject to criminal statutes. This dichotomy fosters inconsistency and confusion. The confusion is increased by the Law's statement that officials on its list "are punishable for corruption offences by criminal sanction". This statement incorrectly defines the scope of persons subject to criminal liability, because the Criminal Code has its own definition, and because an official subject to the Law on Principles of Prevention and Countering of Corruption is not automatically subject to criminal statutes, but only to the extent that the Criminal Code so provides.

Neither the Law on Fight with Corruption, nor the Law on Principles of Prevention and Countering of Corruption (or its proposed amendments), address a key component of the relationship between criminal violations and administrative/disciplinary violations: the procedure and criteria whereby governmental authorities decide which kind or kinds of violation to assert. The existence of such procedures and criteria would prove invaluable in cases in which both kinds of violations potentially could be established. Criteria could provide crucial substantive guidance to officials making these determinations, and procedures could help ensure a fair and efficient manner of applying those criteria. The use of specified criteria and following specified procedures in good faith, would result in the decreased likelihood of arbitrary or biased decisions as to which violations to seek to establish. It would also protect the officials themselves from incorrect claims that their decisions in fact were biased, arbitrary or otherwise an abuse of discretion.

Articles 94, 97 and 98 of the Criminal Procedure Code, construed together, indicate that prosecutors must initiate criminal proceedings and pursue criminal liability whenever they are made aware of grounds to believe a crime has been committed. This would seem to ensure that authorities would treat as criminal matters all alleged acts of corruption that might be within the scope of criminal statutes. As indicated above, however, Ukrainian officials have acknowledged that often criminal acts of corruption are dealt with only via administrative sanctions.

Rather than require prosecutors pursue criminal liability for corruption in every possible case, only to quietly ignore this requirement, which leads to unauthorized, uncontrolled, non-transparent, and often disingenuous use of discretion to use administrative rather than criminal sanctions, Ukraine may wish to consider an approach that realistically allows officials to use transparent, controlled discretion to decide whether to pursue particular kinds of enforcement mechanisms – criminal, administrative, civil or disciplinary – in light of all relevant circumstances. Such an approach could help ensure that the most appropriate kinds of sanctions are imposed in particular cases, and that limited criminal enforcement and administrative enforcement resources are directed where they are needed most. To this end, the Ukrainian authorities may consider adopting guidelines for use of transparent, controlled discretion to decide whether to pursue particular kinds of enforcement mechanisms. The guidelines may follow the principle of Article 9 cited further; under that principle it can be recommended to pursue criminal liability, if it can be imposed, and to pursue administrative liability, if criminal liability cannot be imposed. Alternatively, the guidelines may recommend to weigh the following factors to determine whether on balance they weigh in favour of more serious (criminal) or less serious (administrative) sanctions, in a particular case: (1) Ukrainian crime-fighting priorities, (2) the nature and seriousness of the offense, (3) the likely deterrent effect of a criminal prosecution, (4) the person's own culpability as to the offense, (5) the extent of the person's history of criminal and administrative violations, (6) the person's willingness to cooperate with the authorities, (7) the likely seriousness of any criminal sentence imposed, (8) effect on others of a criminal prosecution.

The anti-corruption package tried to separate criminal and administrative offences by the amount of undue advantage. The administrative corruption offences which were directly incorporated in the Code on Administrative Offences provide that they concern offences with undue advantage of not more than 5 untaxable incomes. At the same time the Criminal Code, as amended by the package, didn't provide that an offence (e.g. of receiving a bribe/undue advantage) becomes criminal when the bribe is more than 5 untaxed incomes. Therefore there is a loophole and amendments to the package prepared by the Ministry of Justice are supposed to eliminate it.

The delineation of criminal and administrative offences by the amount of advantage is flawed, because the advantage can be immaterial, non-pecuniary (which follows from the definition of the undue advantage in the Administrative Offences Code).

Moreover, Article 11 § 2 of the Criminal Code allows not to prosecute insignificant offences (“Although an act or omission may have, technically, any elements of an act under this Code, it is not a crime if, due to its insignificance, it does not pose a social danger, i.e. it neither did nor could cause considerable harm to any natural or legal person, society or the state.”). Article 9 of the Code of Administrative Offences states that administrative liability is applied when, due to its nature, the offence does not trigger criminal liability. During the on-site visit representative of the Ukrainian law-enforcement indicated that in practice administrative liability was used even in cases when criminal liability should exist. While current criminal legislation has no delineation between minor and grave criminal offences (like misdemeanours and felonies), in fact “administrative offences” to some extent replace the misdemeanours, but in a wrong way (many administrative offences are not administrative in nature, provide sanctions which are criminal in nature, e.g. arrest, do not have effective procedures for investigations and fair trial guarantees). Overall

administrative legislation dates back to Soviet times (1980s). Therefore it may be premature to eliminate administrative corruption offences, as it would not be advisable to replace them by crimes according to the current criminal law which does not allow differentiation of criminal liability. The latter may have very severe consequences, such as imprisonment and criminal record, and it could be wrong and disproportionate to criminally sanction minor misconduct. In 2008 the President of Ukraine adopted a strategy of criminal justice system reform which includes revision of the Administrative Offences Code by deleting all non-administrative offences, splitting criminal offences into misdemeanours and crimes or felonies, and softer sanctions for criminal misdemeanours. This could be viewed as a mid-term reform, meanwhile administrative and criminal offences should be delineated in a better way than they are now.

The monitoring team recognises that the discretion to choose between administrative and criminal proceeding involves the paradigm shift in the overall theoretical and practical relationship between criminal and administrative liability which by no means is only an issue of corruption, but also many other spheres of official regulations. In spite of that, one cannot over-emphasise the real and practical problems such dichotomy creates for the efficient investigation and prosecution of corruption offences.

In addition to the lack of clear criteria and procedures for the selection between criminal, administrative or other liability related to corruption, there are certain shortcomings in the sphere of sanctioning of administrative violations.

According to the Article 4 of the Law on Fight with Corruption bodies empowered to control corruption are Ministry of Interior of Ukraine, Tax Militia, Security Service of Ukraine and other bodies and divisions created with the purpose to tackle corruption. Neither this legal act, nor others contain more detailed separation of competences of these institutions in the application of administrative sanctions. It was confirmed by Ukrainian authorities during the visit that there is no specific separation of competences, in practice sanctions are applied by the institution which receives materials, information or complaint about the violation of law.

In practice, the existence of unwritten separation of competencies derives from the basic or other functions and competencies of particular institutions. Taking into consideration the size of country, number of population and size of state administration it can be assumed that such a large number of institutions and unclear separation of competencies in some aspects is understandable.

On the other hand unclear separation of competencies can lead to the misunderstanding in the cooperation between institutions, duplication of functions and activities and in the worst situation – to the non-fulfillment of the tasks. Especially, at the moment it is not clear which institution is in charge of investigation of cases of administrative violations committed by high level state officials, such as members of parliament, ministers, heads of institutions, and others. Experience shows that clear separation of tasks, responsibilities and functions allows saving of the resources, specializing and raising the qualification of the staff and to make the administration of the process more effective. Clear separation of functions is also friendlier to the citizens who consider submitting the complaints on corruption cases.

Another problem is a too short statute of limitation for administrative liability. According to Article 38 of the Code of Administrative Offences in cases of offences in which administrative sanctions are applied by courts the statute of limitations is three months after commission of an offence. Such restriction undermines effective administrative liability for corruption.

During the on-site visit, Ukrainian representatives acknowledged that nothing beyond the passage of the Law on the Principles of Prevention and Countering of Corruption has been done to address Recommendation 5. The passage of this law, however, has not effectively addressed Recommendation 5,

both because the law has not been implemented and in any event does not cure the problems underlying this recommendation.

Ukraine is **non compliant** with this recommendation.

New recommendation 2.8

Pursue reform of the relationship between administrative and criminal law and ensure that notwithstanding administrative liability bribery and related offenses are rigorously investigated, prosecuted and punished under criminal law. Additionally, consider the necessity of reduction of number of the institutions empowered to apply the administrative sanctions and clearly separate their competence in this regard.

2.9 Specialised Anti-Corruption Law-Enforcement Bodies

Previous recommendation 4

Concentrate law enforcement capacities in the specific area in the fight against corruption, which are currently fragmented, and develop operational specialised anti-corruption prosecution units, consider establishing a national specialised Anti-corruption Unit, specialised and empowered to detect, investigate and prosecute corruption offences. Such a Unit could be an integrated, but structurally independent, or separate unit of an existing law-enforcement agency and/or the Prosecution Service. Apart from working on actual important corruption cases, one of the main tasks of such a Unit would be to enhance inter-agency cooperation between a number of law enforcement, security and financial control bodies in corruption investigations (e.g. by adopting clear guidelines for reporting and exchange of information, introducing a team-work approach in complex investigations etc.). Ensure that sub-national (oblast and local) levels of law enforcement agencies are properly integrated.

Ukraine was considered **non compliant** with this recommendation during the first round of monitoring.

No reforms of law-enforcement bodies responsible for combating corruption have been implemented in practice since the first round of monitoring. As during the first round of monitoring, there are several agencies which are involved in the fight against corruption, and which are responsible for detection, investigation and prosecution of corruption offences. These include Prosecution office, Ministry of Interior, Security Service, Tax police and Military Service of Order of the Armed Forces.

In the Ministry of Interior there are in total 840 operational officers who specialize in detection, investigation and prosecution of corruption crimes. Besides, an Anti-Corruption Bureau was established in the Main Department on Combating Organized Crime of the Ministry of Interior. There is a Main Department for Combating Corruption and Organised Crime in the Security Service. These departments are responsible for detection of corruption related crimes; they receive, verify and register information about committed corruption acts, and decide to suppress these acts by issuing administrative protocols (charges) or to send materials to the prosecutor's office empowered to start criminal proceedings.

According to Criminal Procedure Code, the prosecution office has the main role of supervision over pre-trial investigation and conducting of investigation. Currently, the Prosecution office is regulated by the Law on Prosecution which dates back to 1991; the Law does not provide for prosecutorial specialization in anti-corruption. The prosecution service has on its staff both prosecutors and investigators, who can also investigate corruption cases. Besides, the Security Service, and other law-enforcement bodies can undertake criminal investigations of certain corruption offences on their own, if they were detected during on-going investigations already launched by them. Article 117 of the Criminal Procedure Code establishes order to resolve arguments about jurisdiction of offences. Additionally, each law enforcement

agency has special internal intelligence units which have the right to prevent, detect and investigate corruption inside of their own institution.

Taking into account the size of the country, and the historical background, it may be reasonable to have a system of several law enforcement agencies involved in the fight against corruption. However, the existing model is hindered by a duplication and fragmentation of functions, especially in the field of operational or intelligence work which is sometimes difficult to supervise and coordinate. This model also lacks a clearly identify a leading agency or coordinating body in combating corruption. As a result, it does not allow covering all types of corruption related offences and all categories of state officials, creates a risk of overlapping and duplicated efforts, and cannot plan and prioritize law-enforcement efforts to focus at the most dangerous forms of corruption, for instance at the high level or corruption. Available law-enforcement statistical data confirm the absence of such high level cases. This also raises the question on independence of law enforcement agencies.

The debate on creation of separate anti-corruption law enforcement agency has been going for a very long time. In the 2008 Concept of the Criminal Justice System Reform, adopted by the Presidential decree, stipulated establishment of a specialized investigative anti-corruption body, along with specialised anti-corruption prosecutors. Draft Law on the National Bureau of Anti-corruption Investigations of Ukraine was submitted to the Ukrainian parliament in July 2009 by a group of parliamentarians. This draft proposes to set up a new stand-alone institution with functions of detection and investigation of high-level corruption. The draft law in general provides a viable model of a specialized anti-corruption law enforcement agency in line with relevant international standards. The parliament's Committee on Combating Organised Crime and Corruption recommended in April 2010 to adopt the draft law in the first reading. However, no progress was achieved in passing the law.

Ukraine remains **non compliant** with this recommendation.

Previous recommendation 24

Ensure that competent authorities conducting investigation and prosecution of corruption offences have relevant financial expertise at their disposal (either by employing financial and auditing experts or by ensuring full cooperation of relevant experts in other state institutions).

During the first round of monitoring Ukraine was considered **partially compliant** with this recommendation.

No new developments were reported in relation to the financial expertise since the first round of monitoring. According to the Ukrainian authorities, law-enforcement bodies have access to financial expertise in a number of ways: some staff members have financial and/or economic education and experience, they can employ financial experts in specific cases as required, and they can also request assistance or cooperation from other public agencies that may possess such expertise, e.g. financial inspections and audit units.

Little is known about the actual capacity of the law-enforcement bodies to carry out complex financial and economic investigations, to trace money trails, including complex financial and economic transactions in Ukraine and abroad, which are commonly used in corruption cases. Reportedly, courts do not accept indirect evidence in corruption cases, and continue relying heavily on seized cash as main form of evidence; therefore there may be little use of relevant financial investigations.

In the time during the visit representatives from law enforcement agencies pointed the necessity of proper resources for carrying out their tasks. The Security Service reported that only about 50% of the

operational needs were funded. Additionally, the information which was received regarding the salaries of employees of law enforcement agencies raises serious doubts whether by existing level of remuneration it is possible to recruit staff, motivate employees and raise their professional capacity. It also creates a risk of corruption.

Ukraine is **not compliant** with this Recommendation.

New recommendation 2.9

Ensure without further delay effective anti-corruption specialization in the law enforcement system by creating by law and setting up an autonomous specialized anti-corruption investigative agency, structurally independent from the existing law enforcement and security agencies, to target high-level corruption and empowered with adequate guarantees of independence, authorities and resources in line with international standards and best practices.

3. Prevention of corruption

3.1 Corruption Prevention Institutions

The issue of corruption prevention institutions is covered by Section 1.6 of the report on “Specialized anti-corruption policy and coordination of institutions”.

3.2 Integrity of Public Service

The Law on Civil Service which is now in force, dates back to 1993, and is largely outdated. The new draft law was prepared by the Main Civil Service Department in 2007, but was never adopted. There were multiple attempts to reform various elements of legislation related to integrity of public service: draft law on Integrity in Civil Service was rejected by Parliament in 2009; several draft laws and rules on conflict of interest were also prepared, but were not adopted. The Law on the Principles of prevention and countering of corruption adopted in June 2009, whose enactment is expected in January 2011, contains provisions on integrity and prevention of conflict of interest of public officials. This law maintains deficiencies of the former legislation, and does not provide implementation mechanism. In a sum, it appears that despite multiple efforts, which confirm the importance of this issue, Ukraine has not made any substantive progress in improving integrity framework for public service since the first round of monitoring.

Previous recommendation 14

Support further actions by the Main Civil Service Department to conduct general training on anti-corruption for public officials; in particular, develop and implement specific anti-corruption and ethics trainings, in particular for those public officials who work in corruption-risk areas. The in-service training should focus on operational and procedural issues, rather than on academic degrees, i.e. every day job-related duties, including ethical standards.

During the first round of monitoring, Ukraine is **partially compliant** with this recommendation.

As noted in section 1.4.-1.5. on awareness raising and public education, a number of awareness raising and training activities were provided to the state officials according to the Public Service Development Programme for 2005–2010 approved by Decree of the Cabinet of Ministers of Ukraine on 8 June 2004 and in line with Decree of the Cabinet of Ministers of Ukraine of 2 June 2003 on Measures for Upgrading the Qualifications of Public Officials and Local Self-Government Officials in Anti-Corruption Issues. The Main Department of Civil Service (MDCS) carries out a variety of activities, including conferences and seminars for public officials: in 2009 approximately 500 public officials responsible for corruption prevention participated in training; in 2010 – approximately 1500 high officials and specialists were trained. Little is known about the substance of these trainings. It was mentioned that every trained official is supposed to promote integrity in their units and to deliver training on this topic as well. The MDCS is not performing any follow-up related to this activity. Therefore it is not possible to assess the impact of these trainings. No information was provided on specific and practical training programmes, which were developed and delivered for the officials who work in corruption-risk areas, or about continued in-service training with a focus on anti-corruption aspects of operation procedures and job-related duties.

The National Academy of Public Administration organizes courses and workshops on ethics. 11 276 graduates were trained in the Academy over the past 5 years, all received training on ethics, including 300 academic hours, about mission of service, legal requirements, staff relations and codes. The institute of advanced training provides training on ethics for active officials every year, e.g. in 2009, 80 persons were trained and 1 lecture for 500 persons was delivered. Senior management have an exercise on ethics as a part of training for them – they have to write a code of ethics for their institution. However, it seems that such courses are mainly theoretical, partly due to the lack of clear and comprehensive legal framework on ethics and integrity in Ukraine. The Academy is now working on the guidelines based on OECD integrity framework.

A number of printed materials have been issued, e.g. 7000 copies of the brochure “New anti-Corruption Legislation”, 7000 copies of the booklet “Responsibility for Corruptive Actions”, 100 copies of the brochure “New Law on Public Service: Five Questions on Creating a Capable State”. While the number of copies is not the key indicator of the effectiveness of educational activities, provided numbers do not appear significant enough to support effective education of state officials in Ukraine. Besides, most of the information provided in brochures is either about draft laws, such as the anti-corruption package, or laws that Ukraine expects to change, thus having little practical relevance for the public officials.

It was reported that since the creation of the Government Agent and the Bureau on Anti-Corruption Policy, members of the Bureau and its head have participated in training and awareness raising events. According to the Ukrainian authorities, during July-October 2010 more than 4,000 seminars, roundtable discussions, lectures on anti-corruption issues were organised, in which about 26,000 officials have participated. More than 550 meetings of collegiums (collective advisory bodies at the executive bodies) and thematic internal meetings were held during this time period. While the number of activities is impressive, no information is available about the substance, quality and the results of these activities.

Overall, it remains unclear if awareness raising and education activities for the public officials are effective and deliver expected results. Ukraine should continue and extend the education of public officials and take constant, comprehensive and effective measures for raising their awareness about risks of corruption, ethics and conflict of interest, duties and responsibilities of public officials to prevent and combat corruption, measures to prevent corruption adopted in their institutions, reporting of corruption, and sanctions for failure to comply with anti-corruption provisions.

Ukraine remains **partially compliant** with this recommendation.

Previous recommendation 16

Update and disseminate a Code of Conduct or other similar rules for public officials. Prepare and widely disseminate comprehensive practical guides for public officials on corruption, conflicts of interest, ethical standards, sanctions and reporting of corruption.

During the first round of monitoring, Ukraine is **partially compliant** with this recommendation.

General rules of conduct of public officials which were in force during the on-site visit dated back to 2000. On 4 August 2010, Main Civil Service Department together with representatives of the Government Agent developed and approved new wording of the General Rules of Conduct for Civil Servants. According to the Ukrainian authorities, these Rules contain provisions on how a civil servant should act when in a conflict of interest situation. Draft Law on integrity of persons authorised to execute state functions and local authorities was prepared, but rejected by Parliament in 2009. No information was provided by Ukraine about any practical guides on conflict of interest, ethical standards and reporting of corruption that were developed and disseminated. No information was provided on update and dissemination of codes of

ethics in individual public institutions. Only some roundtables for further discussions and keeping the topic on the agenda for reforms were held.

Ukraine remains **partially compliant** with the recommendation.

Previous recommendation 15

Improve the mandatory asset disclosure system for higher ranking public officials in all branches of government (executive, legislative and judicial), as well as the legislation on conflicts of interest which would include members of the Parliament and would be open for public. Ensure that enforcement of these rules is entrusted to an independent agency, possibly subordinated to the Anti-corruption Committee. In parallel, review and specify the provisions of the “Law on the Fight against Corruption” regarding the acceptance of gifts.

During the first round of monitoring, Ukraine is **non compliant** with this recommendation.

Draft law on conflict of interests of public officials was developed based on Presidential Decree of 2006. The draft contained positive elements, such as attempt to define conflict of interest and to improve the existing asset declaration system; however it suffered from multiple shortcomings and was never adopted. In 2009 two more draft laws, which were developed with the support of donors, were submitted in the parliament, including draft laws on Conflict of Interests and on Financial Control; in 2010 anti-corruption committee of parliament recommended their adoption. It appears that there were several other draft laws on conflict of interest; however none of them were adopted. The Law on the principles of prevention and countering of corruption, adopted in June 2009 as a part of the anti-corruption package, is expected to be enacted in January 2011. This law contains a number of provisions related to conflict of interest. However, as noted above this law it maintains a number of shortcomings, which need to be addressed: (i) it contains regulations related to different types of officials having different functions, responsibilities and that are exposed to different risks of corruption (e.g.: politicians and civil servants); (ii) it deals with matters that could be included in different pieces of legislation (e.g.: civil service law, code of administrative procedures, law on access to public information, law on conflict of interests, etc.); (iii) some provisions are policy statements in nature and should not be part of the law; (iv) and it does not contain any implementation mechanism.

There has been no change of the asset disclosure system since the first round of monitoring. As in the past, the Law on Civil Service of 1993 requires all civil servants, including MPs, civil servants, local authorities, judges, prosecutors, investigators and military to declare their financial and other assets. Civil servants of 2-7 categories provide declarations about the financial situation of their family; civil servants of 1-2 categories also have to provide information about real estate, other property, bank accounts and stocks. There is no central body dealing with asset declarations; these declarations are submitted to the employer and are kept in the personnel files of the employee. Declared information is not verified on a systematic basis; it can only be verified by the tax authorities and law-enforcement bodies in a framework of general inspections of implementation of the law on civil service and law on the fight against corruption. Failure to declare or declaration of incomplete/false information can provide grounds for fines or dismissal of the officials. There is no public disclosure, except for senior officials (President, Prime Minister and members of Cabinet, Speaker of Parliament and MPs, Chairman of Supreme and Constitutional Courts, Prosecutor General, and their relatives), which is required by Art 6 of the Law on the Fight Against Corruption; it is not known how this provision is implemented in practice.

The Law on Principles, adopted in June 2009 and expected to be enacted in January 2011, establishes additional requirements to the existing asset declaration system, such as requirement to certain

categories of public officials to disclose information about bank accounts abroad. Besides, there is another draft law, which deals specifically with asset declarations - Law on State Financial Control over Declaring of Incomes and Expenses by Public Officials - which is pending in the parliament. In 2008, a total number of 367 016 officials at the central executive bodies submitted their declarations; one official was fired for failure to submit his declaration; data for local officials is not available. The practical use of the asset declaration system is limited, and its credibility is questionable.

Special mandatory check-ups (100 in 2009 and 700 in 2010) regarding tax declarations, incompatibilities, bank accounts and incomes were made by the MDCS before the appointment of high officials (those that are appointed by the President and by the Cabinet of Ministers). Several factual irregularities were reported but the MDCS does not have information if the reports were followed by the appointing entity.

The Law on principles of prevention and combating corruption forbids civil servants to accept gifts, apart from personal gifts of generally accepted nature, of value not more than 302,5 HRYVNIA (37 USD). Official gifts received in performance of official duties should be returned to the state, according to the rules established by the Cabinet of Ministers in January 2009. There are no sanctions for failure to comply with these rules, no body responsible to supervise their implementation. No information is available about actual practice of returning of official gifts, or acceptance of personal gifts of established value.

Ukraine remains **non compliant** with this recommendation.

Previous recommendation 17

Adopt measures for the protection of employees in state institutions and other legal entities against disciplinary action and harassment when they report legitimate suspicious practices within the institutions to law enforcement authorities or prosecutors, by adopting legislation or regulations on the protection of "whistleblowers" and launch a public (or internal) campaign to raise the awareness of these measures among civil servants.

During the first round of monitoring, Ukraine is **non compliant** with this recommendation.

Article 17 of the Law on the Principles of Prevention and Countering of Corruption, expected to be enacted in January 2011, establishes that persons who provide assistance in prevention and combating of corruption, are protected by the state. The state should provide protection by law-enforcement bodies to such persons and their relatives, according to the Law of Ukraine on Protection of persons participating in the criminal procedures. Draft Law On Amendments in Some Laws of Ukraine to Improve Principles of Prevention and Counteraction to Corruption, which was approved by the National Anti-Corruption Committee under the President on 20 October 2010, but was not adopted by the Parliament yet, introduces the following changes in Article 17 of the Law On Principles of Prevention and Counteraction to Corruption: (1) persons who assist in countering corruption are placed under state protection; and (2) persons who notify of a violation of this Law cannot be dismissed or brought to disciplinary liability. It is expected that protection of such persons would be carried out according to the Law of Ukraine On State Protection of Persons who Participate in Criminal Proceedings and Persons who Assist in Countering Corruption. No further measures were adopted to protect whistleblowers in the public sector, including measures to protect employees of state institutions and other legal entities who report suspicious practices inside their institutions from disciplinary actions, harassment and other retaliation. No awareness raising campaign was organised.

Ukraine remains **non compliant** with this recommendation.

Previous recommendation 18

Improve the system of internal investigations in cases of suspected or reported corruption offences. A separate, independent investigatory and reporting entity should be established, possibly within the general civil service, to receive and investigate complaints on corruption. Disciplinary proceedings should be conducted in line with international standards and afford the accused the possibility to defend him/herself; sanctions coming from a process that is perceived as fair and not politically motivated will be more effective in deterring corruption.

During the first round of monitoring, Ukraine was **largely compliant** with this recommendation.

It was noted in section 2.9 on specialised anti-corruption law-enforcement bodies, there is no separate independent body to investigate complaints about corruption. At the same time many – but not all – public institutions have established internal services to detect and investigate violations among their staff. The previous government adopted Resolution of 8 December 2009, which instructed all ministries, other central executive bodies and regional state administration to set up by January 2010 units for preventing and countering corruption and adopt regulations on such units. By the same resolution the Government approved model regulations on such units, which should be followed by the central and regional executive bodies when adopting their internal rules on the anti-corruption units. According to the Government Agent on Anti-Corruption Policy such units have been established in 78 central and local bodies of the executive power, i.e. 90% of the overall number of such bodies. As noted above, during July-October 2010, these units have conducted more than 4,000 seminars, and organised an impressive number of other activities. The Government Agent has introduced a practice of monthly trainings and seminars for representatives of these units. So far 5 such seminars have been held and covered topics of anti-corruption screening of legal acts, public procurement, and interaction with the mass media, civil society, and international organisations. With participation of the units more than 190 corruption offences were stopped; as a result of inspections and internal investigations 546 materials were sent to the law enforcement authorities; 116 civil servants were dismissed; 1,130 persons were brought to disciplinary responsibility. During anti-corruption screening of draft legal acts in 159 cases corruption-prone provisions have been detected and eliminated. Despite impressive statistics, it is premature to assess the effectiveness of these units in a longer term.

Such anti-corruption units are tasked, among others, with providing advice to the staff of the relevant institutions on anti-corruption legislation, detecting and resolving conflicts of interests of public servants, verification of asset declarations, conducting internal investigations, examines complaints and allegations on corruption offences committed by officials of the executive body and informs of such facts relevant law enforcement agencies. This scope of functions of the anti-corruption units appears to be quite broad and their effective implementation requires proper internal autonomy and resources. It is too early to assess the effectiveness of the anti-corruption units.

There is department of internal security in Tax Administration which is responsible for corruption prevention and has law-enforcement attributes. While Tax Administration has 60,000 tax inspectors in Ukraine, the internal security has 434 staff and deal with both criminal cases (about 240 criminal cases per year) and administrative cases (e.g. 156 cases in 2009, and 79 in 5 months of 2010), and have the right to apply disciplinary sanctions (600-700 cases per year, including some 100 cases when officials are dismissed from their jobs). In addition to the internal security, the Tax Administration also has an internal audit unit (more information is provided in the section on financial control).

The Customs Administration had a department of internal investigations in the past, however its activities did not lead to any reduction of the level of corruption, and it was transformed into the current

department of corruption prevention at the Human Resources, which does not have law-enforcement attributes and does not detect corruption offences, but can apply disciplinary sanctions. There are 18,000 customs officials in Ukraine, including 1,500 directly involved in corruption-prone sectors. Concerning corruption related offences, in 2010, 62 criminal and 43 administrative cases were investigated (usually about 20% of investigations receive court verdict) and 318 disciplinary cases.

There is an anti-corruption division in the Ministry of Health. The total staff of the ministry 320 person, besides, there is a large number of staff in the institutions in the health care sector; the anti-corruption division has 5 staff. Based on work of this division, in 2009, 2 staff members of the ministry were fired, in 6 months of 2010, 1 staff person was fired, and administrative protocols were issued for 2 staff persons. In the sector institutions, 7 cases were detected during check-ups, and 8 managers were fired during 2009-2010. It is worth noting that doctors are not considered public officials, and are not subject to corruption prevention law; however, 360 doctors were prosecuted recently for corruption offences established in the Criminal Code. Managers dealing with public procurement are at high risk, 47 billion UAH are used in public procurement in health sector, out of this only 1,5% through the ministry, the rest through the institutions in this sector. At the same time, average salary of doctors in Ukraine is around 1200 UAH.

The Traffic Police is aware that their staffs is facing multiple risks – fines, registration, technical control, permits to construct along the roads. However, there is no internal security department in the traffic police. Some measures were introduced to reduce corruption risks, e.g. cameras/photos are being installed to issue fines and to avoid personal contact between the traffic police and drivers; 50-60 mobile teams daily check the work of traffic police. 133 cases are currently in court/prosecution again traffic police for corruption related offences, 26 administrative protocols in 2010. It is worth noting that average salaries in traffic police are around 2.500 UAH.

There is no anti-corruption department in the State property fund. But there is a financial inspection department with some 40 staff in the central office, in total 140 across the country. There are multiple risks in this sector related to rent, corporate rights, sales and privatisation of state property. At the same time, there is no law on state property fund, no privatisation programme is adopted in 2010, 2000-2002 law on privatisation is currently in force. The central office of the State property fund was not aware of any cases or sanctions for corruption in their office.

Internal control/investigation unit in the Ministry of Transport has 18 staff, in total there are 31 control staff in the sector, which control a broad range of sub-sectors, such as water transport, communication, air, automobile and special transport. The head of the internal control has double subordination, to the Minister and to the Cabinet. Recently, the unit carried out 39 inspections, 22 reports were sent to the law-enforcement bodies; 7 of them provided grounds for criminal investigation. It is important to note that the employees of various transport enterprises are not considered public officials and are not covered by the internal control unit of the Ministry.

Internal control department was recently established in the ministry of Regional Development, with 6 staff. In 2009 they did not issue any protocols, while in the past there were 6 cases of violations detected by the KRU (*Kontrolno-revizijne upravlinnia* – Control and Inspection Department).

There is no central body responsible for coordination and harmonisation of rules for internal investigations, and disciplinary proceedings are not yet in line with international standards. No information was provided about the rules for the internal investigative bodies, e.g. procedures/practice for reporting on possible criminal offences to law-enforcement bodies; statistics on number of internal investigations and disciplinary proceedings and sanctions. It is also not clear how various departments and units, including internal investigation, corruption prevention, audit and financial control, bodies or staff

responsible for codes of conduct, conflict of interest and asset declarations, cooperate together and provide a meaningful anti-corruption tool to the managers of these public institutions as well as a reliable partner to law-enforcement bodies.

Ukraine remains **largely compliant** with this recommendation.

Delineation of political and professional servants

In the current Law on Civil Service there is no delineation between political and professional civil servants. The Law on The Cabinet of Ministers provides that members of the Government hold political posts and therefore are not civil servants; this being the only provision on delineation of political and administrative posts. There is a tendency to regulate different branches and levels of public officials by the same legislation, e.g. elected and appointed, senior and middle/junior. As noted in the 2006/2007 SIGMA Governance Assessment of Ukraine, there are no legal principles nor other measures in place to ensure professionalism of civil service in Ukraine and to protect it from politisation.

Recruitment and promotion

The current Law on Civil Service establishes equal right of all citizens to enter civil service, lower level positions (bearing the rank of categories 3-7) of civil service are open for competitive recruitment; in 2002 the Cabinet of Ministers adopted rules for such competitions. According to these rules, vacancy should be published, the manager of the public institution should establish a commission for selection of candidates, and the manager makes the final decision on selection and recruitment. Recruiting high civil servants can be made through competition or other procedure established by the Cabinet of Ministers. If there is competition, the candidate that gets the higher score and therefore is recommended by the competition commission may not be the one who is appointed. There are no further guidelines, such as criteria and procedures for assessment of the candidates. There are no specific rules concerning promotion, Article 27 of the current Law on Civil Service states that those officials who have reached the best results in their work, should be promoted; however, there are no further guidelines, such as criteria and procedures, for the assessment of performance.

Remuneration System

The current Law on Civil Service establishes the principles of remuneration. The total pay of civil servants consists of the basic salary, bonuses, additional pay for the rank/seniority and years of service and other additional pays, such as pay for good performance and execution of particularly important tasks, for good work and for special achievements. Civil servants are also entitled to material assistance on social grounds. The flexible part of the total pay represents an important share. Ukrainian authorities noted that the share of the flexible part has recently went down to 15% on average, which represents a positive evolution since 2006 when it could be up to 80%; but it still can be high in specific cases which is contrary to international standards. Furthermore, the allocation of the flexible part is in full discretion of the manager.

Legality and Impartiality

Restrictions: prohibitions of being employed by the state established by the current Law on Civil Service are limited to employment of close relationship in the same public institution, employment of persons who were convicted for commitment of crimes, and persons not capable to deliver necessary services. Art 4 of the Law on Principles for Prevention and Combating Corruption, which is expected to be enacted in

January 2011, establishes a more developed system of prohibition, which includes, for instance, a prohibition to sit on the board of a state owned enterprise, or to have an outside profitable business.

Post-office employment: Article 7 of the Law on principles establishes that restrictions which are applicable according to this and other laws for civil servants during their service remain valid during 2 years after they leave the office, in case if the new functions in the private sector is directly linked to the functions in the civil service. However, there are no implementation mechanisms which could support the enforcement of this provision; there are no sanctions for the violation of this provision.

New recommendation 3.2

Legal framework for integrity in civil service. Reform the legislation on Civil Service in order to introduce clear delineation of political and professional civil servants, principles of legality and impartiality, of merit based competitive appointment and promotion and other framework requirements applicable to all civil servants, in line with good European and international practice. Review and reform rules for recruitment, promotion, discipline and dismissal of civil servants and develop clear guidelines and criteria for these processes, in order to limit discretion and arbitrary decisions of managers, to ensure professionalism of civil service and protect it from politisation. Review and reform remuneration schemes in order to ensure that flexible share of the salary does not represent a dominant part and is provided in transparent and objective manner based on clearly established criteria. Ensure decent salaries. Establish a clear and well balanced set of rights and duties for civil servants.

Conflict of interest regulation. Introduce modern Conflict of interest legislation without further delay. This legislation should contain definition of conflict of interest in line with good international practice, and should provide for clear and effective set of restrictions, as well as an effective and credible implementation mechanism. Consider developing special conflict of interest regulations for different categories of officials, in different branches and at different levels of seniority. Ensure that there is an effective institutional mechanism for the management and control of implementation of conflict of interests regulation. Consider introducing responsibility for the managers to prevent conflict of interests in their institutions and providing sanctions for failure to comply. When the legal framework is in place, develop guidelines on conflict of interests and provide training to public officials.

Asset declarations. Review the current system of asset declarations and ensure focus at high level officials/specialise by sector/branch/risk areas; improve the list of requested information; provide some verification and publication; ensure effective sanctions for not filing or filing knowingly false or incomplete information; introduce system of exchange of information with law enforcement and consider accepting asset declaration as evidence in illicit enrichment proceedings.

Code of ethics. Develop and adopt a modern general code of ethics applicable for all civil servants, promote its dissemination and application. Develop specific codes for various branches and sectors, especially in risk areas. Provide training and practical guides for their dissemination and application.

Reporting and whistleblower. Introduce requirement for civil servants to report suspicions of corruption as well as sanctions for failure to report. Introduce a system of protection of whistle blowers from harassment and persecution. Disseminate information about these systems and provide relevant training.

Internal units for disciplinary measures and conflict of interest. Ensure the existence and operation of internal units, responsible for disciplinary proceedings, management of conflict of interest issues (provide advice on how to avoid, recommendations on how to eliminate) and possibly asset declarations

(advice, help in compiling, primary unit for collecting etc), or a clear assignment of these responsibilities to other units.

3.3 Promoting transparency and reducing discretion in public administration

Previous Recommendation 2

On a conceptual level, more attention should be devoted to the prevention of corruption and to identifying and eliminating systemic regulative or organisational gaps that create corruption-prone environments. Preventive actions should not only focus on codes of ethics and similar preventive devices, but also reforming regulatory frameworks to reduce discretionary powers of civil servants, "open government" measures such as increased transparency of decision-making procedures, access to information and public participation.

Ukraine was considered **partially compliant** with this recommendation during the first round of monitoring.

Several public institutions and local governments developed their **own anti-corruption action plans**, in order to support the implementation of the national strategy and plan of government. These include ministry of education and science, health, customs and tax, and others. However, no copies of these action plans were provided, no information is available on the contents of these plans, including the link between these action plans and the national strategy and action plan of the government, or about their implementation. It is not known if these anti-corruption action plans identify and provide measures to eliminate systemic regulatory and organisational gaps that create possibilities for corruption.

Ukraine has introduced regulation for **anti-corruption screening** of proposed legislation and other acts in September 2009 by a resolution of the government, and adopted methodology for such screening in December 2009. It is also foreseen by Art 13 of the Law on the Principles, but this is not yet enacted. The Agent on Anti-Corruption Policy is responsible for the screening, the screening is mandatory for acts of the Cabinet of Ministers, and can be carried out for draft laws, draft decrees of the president and other acts on the request of the respective institution. Results of the screening should be taken into account during the adoption of the acts. From January to November 2010, the Anti-Corruption Policy Bureau has conducted 301 examinations (screening) of draft legal acts and detected corruption-prone provisions in 84 draft acts. According to the Anti-Corruption Policy Bureau, since the introduction of the anti-corruption examination a number of legal acts which contain provisions fostering corruption have significantly decreased. However, such important documents as Code of Administrative Procedure, Tax Code and Law on Local Elections were not screened. It is premature to judge whether there is sufficient capacity necessary for the screening of large amount of legislation currently developed in Ukraine.

Concerning the **regulatory reform**, the State Committee on Regulator Policy and Entrepreneurship noted that Ukraine ranked 145 among 180 countries according to the Doing Business report, due to complicated procedures related to licenses, registration and administrative services. A concept of administrative reform was recently adopted by the government in order to outline reforms to simplify and streamline the bureaucracy. A draft law on licenses was prepared by the government and is currently under the review by the parliament committee. The draft foresees the reduction of 31% of current licenses (78 types of activities are currently subject to licensing) and the establishment of a new mechanism to review complaints related to licenses. Concerning administrative services, the executive branch and its bodies (state enterprises) currently provide approximately 2,000 paid services in 49 areas of business, which are often proliferated by various agencies through their internal acts on services; for instance the Ministry of Education has outsourced the issuance of diplomas to a commercial company, however the rules concerning the fees and quality standards were not well-clarified, leaving space for abuses. In order to

streamline administrative services the Cabinet of Ministers adopted general rules on provision of such services, including Methodology for determining the cost value of paid administrative services (Government's Resolution No. 66 of 27 Jan 2010); Regulations on the Register of state and administrative services (Government's Resolution No. 532 of 27 May 2010); Recommendations for preparation of administrative services standards (Ministry of Economy order No. 219 of 12 July 2007). Besides, on 11 October 2010 the Cabinet of Ministers adopted resolution No. 915 «Some Issues regarding Provision of Administrative Services», which clarifies various regulatory aspects related to administrative services.

The system of permits is the area where government receives a lot of complaints from businesses; currently there are 227 types of permits, new regulations propose to remove 49 of them. At a recent Cabinet meeting, the government agreed to address this issue to and to reduce the number of services; there is an intention to establish an e-register of services, which will allow providing such services through one-stop-shop in the future. Many municipalities already issue various permits and services through single window. There is also a plan to review special administrative procedures which exist currently.

The draft **Code of Administrative Procedure** was prepared by the Ministry of Justice in 2008, and included such principles as rule of law, legality, integrity, fair treatment, openness, reasonable time and others. However, this draft was recalled from Parliament after the change of government. The Programme of social and economic development adopted in 2010 requires adoption of the Code of Administrative Procedure. Accordingly, a new draft Code together with a draft Law on administrative services were prepared and sent out for consultations inside the government in July 2010. Besides, the practical introduction of the Code will require the review of some 60-80 other laws. Specialised administrative courts started their operations in 2005.

Review of public complaints, review and nullification of legal or executive acts. Since there is no Code of Administrative Procedure, it is the law on enquiries of citizens dating back to 1997 that regulates the review of public complaints. Administrative courts (Article 17 of the Code of Administrative Adjudication) have the right to review the legality of resolutions of Parliament, president, cabinet and ministries, on the basis of the complaint from an individual directly affected by the act, and can nullify such acts.

Ukraine remains **partially compliant** with this recommendation.

Previous recommendation 20

Review the regulatory framework for taxation to reduce incentives for tax evasion and to limit the discretionary powers of tax officials. Ensure that the powers which are required for effective tax and customs administration are well balanced with respect for citizens' rights and are not abused.

Ukraine was considered **non compliant** with this recommendation during the first round of monitoring.

The Current Tax Legislation, which consists of separate laws on VAT, personal income tax, corporate income tax, local taxes and others, is largely outdated. According to 2008 survey of firms by the EBRD, 26% of firms stated that bribery is frequent in dealing with tax authorities (increase from 18% in 2005).¹⁶ Some of the regulations, like on the VAT reimbursement, are often noted as specially designed to provide opportunities for bribes. New Tax Code was adopted by parliament in the first reading in June 2010. It was widely criticised by the business community, and was recalled by the government. The government announced that it will soon present the new draft. According to the Ukrainian authorities, the parliament

¹⁶ The EBRD-World Bank, *Business Environment and Enterprise Performance Survey (BEEPS) 2008*, http://siteresources.worldbank.org/INTECAREGTOPANTCOR/Resources/704589-1267561320871/Ukraine_2010.pdf [accessed 4 August 2010].

adopted the revised draft Tax Code on 17 November 2010. It is premature to analyse any proposed systemic reforms. As noted above, the Tax Administration was among public institutions which have reportedly developed their own anti-corruption action plans. However, no copies or any other information was provided.

According to the Ukrainian authorities, the Customs Administration has also developed its anti-corruption action plan, but there is no information about its contents or level of implementation. It is not known if the action plan contains any measures to address systemic gaps which provide possibilities for corruption. Reportedly, a new Customs Code is currently developed, which may introduce systemic reform and address the risk of corruption.

Ukraine remains **non compliant** with this recommendation.¹⁷

New recommendation 3.3

Develop and adopt Code of Administrative Procedures without delay, based on best international practice. Take further steps in ensuring transparency and discretion in public administration, for example, by encouraging participation of the public and implementing screening of legislation also in the course of drafting legislation in the parliament. Step up efforts to improve transparency and discretion in risk areas, including tax and customs, and other sectors.

3.4 Public Financial Control and Audit

No previous recommendation

Allegations about serious cases of embezzlement and misuse of public funds, corruption schemes established to siphon off public money are almost a routine in Ukrainian media. As it is often the case in transition economies, such scandals became particularly numerous after the change of government. Financial control is a serious challenge in Ukraine, with its 60 ministries, hundreds of programmes, about 100 000 institutions and off-balance funds, which do not correspond to good international practice and can be used for embezzlement of public funds. There is an urgent need to improve the administrative and financial management and control systems in Ukraine to strengthen transparency and governance, to remove major opportunities for corruption, and to confirm to the public the political will of the leadership to fight corruption in the country. However, there has been no significant progress in the area of financial control in Ukraine over the past several years.

External Audit

The Accounting chamber was established by the Law of Ukraine on "Accounting Chamber" as an independent supreme audit institution in 1996. The Chairman of the Chamber is appointed by Parliament; the current Chairman has been in his position since 1996. The Chamber has its own budget line in the State Budget. In 2009 it has a total number of 543 staff, including 361 auditors. The mandate of the Accounting Chamber is to control the use of budget funds. The Accounting Chamber carries out financial audits, audit of implementation of programmes, and audit of management; it does not undertake corruption or fraud audits (which is also not the task of a Supreme Audit institution). No information was provided as to the amount of uncovered irregularities. The Chamber plans its own audits; audits can be also requested by Parliament: in 2007, 4% of all audits were on request of Parliament, in 2008 – 5%, and

¹⁷ The monitoring group acknowledges that the Tax Code was adopted several days before the final review meeting. The monitoring group was unable to review its content and to take it into consideration.

in 2009 – 11%, which however takes around 80% of the available resources; twice a year Parliament Committee listens to the report by the Chamber about audits conducted on its request.

The Chamber has its audit manual, adopted in 2004, which focuses at financial inspections based on transactions and does not cover corruption or fraud issues. During its audits, the Chamber examines the activities of the internal control (i.e. financial inspection) units of the public institution; it does not consider the activities of internal control units sufficiently transparent or credible as these internal control units are subordinate to the managers of the institutions. The Chamber reports to Parliament once a year; Parliament assesses the activities of the Chamber. Some of the reports provided by the Chamber to Parliament provided grounds for follow-up decisions by Parliament, President or Cabinet: e.g. proposal on the border crossing procedures, proposal on unified IT automated systems, proposal on the procedures to impose fines – which had a technical focus, but failed short of identification of systemic problems and introducing systemic reforms to prevent wide spread corruption. The Chamber and the Office of the Prosecutor General have adopted a procedure for cooperation; during the past 3 years the Chamber sent 57 reports to the prosecution; on this basis 14 investigations were launched; no information on the final court decisions on these cases was provided.

Public Financial Management and Control

The Ministry of Finance of Ukraine is the central body responsible for public financial management and control (FMC). In 2005 the Cabinet of Ministers adopted a Concept of development of the PFMC for the period till 2017; this concept was updated in 2009, it is supported by the implementation action plan. Various documents were developed for the implementation of the Concept, including standards and manuals, and tertiary legislation, with the assistance of a EU twinning project with Sweden and bilateral support by the Netherlands; however none of these materials were formally adopted. In the anticipation of the eventual introduction of the FMC, training was provided, including training on internal audit was provided for 50 agencies and 35 managers, 9 pilot projects on internal audit were implemented (5 of them were finished, including in Dnepropetrovsk region, department of execution of punishment/prisons, public administration academy and ministry of economy). No further information was provided concerning the level of implementation of the Concept of the Action Plan and further actions foreseen for the introduction of the FMC.

Internal audit

Article 26 of the Budget Code states that the managers of budget institution are responsible for ensuring effective internal financial control in their institutions. However, as pointed out in the SIGMA draft Public Finance assessment report of April 2010, the proper management structures are yet to be developed, and the managers are yet to take the responsibility for effective running of public institutions under their leadership, including the introduction of FMC, which should include ex-ante, ongoing, and ex-post controls. There is still a lot of misunderstanding between the role of internal audit, which should analyse systems and procedures and assist the manager in removing conditions for violations, and that of financial inspections, which should detect and punish individual violations. In 1998 the system of internal control (i.e. financial inspection) was decentralised in all 60 ministries and committees of Ukraine. The internal control bodies in these ministries are currently under double subordination, and they report both to the manager of the public institution and to the Main Control and Revision Department of the Ministry of Finance (KRU). The number of staff in these internal control units vary from 2-3 up to 100 staff, in total there are about 2000 staff in internal control units in Ukraine. The Government's resolution on Internal Control was adopted on 6 January 2010 to clarify the function of internal control: it describes the internal control functions, rights and duties of internal control bodies, and elaborates on the institutional set up of

these bodies inside the ministries. The Ukrainian authorities acknowledged that the current system of internal control should be eventually replaced by a proper internal audit function.

Inspection

The Main Control and Revision Department (KRU), established under the Ministry of Finance, is the main executive body in the field of financial inspection. The new Cabinet of Ministers resolution "On procedure for internal control and revision activities in central executive bodies" adopted on 06 January .2010 provides the basis for KRU's activities. According to this resolution, control and revision departments will be established in all ministries and central executive bodies as separate and independent entities. As noted above, these internal control bodies have a double subordination – to the manager and KRU.

Currently, the system of KRU has 490 staff in the central office and 8 390 in the local offices; 2009 budget allocated 54,818,000 USD to finance KRU. Currently KRU carries out inspections of the use of budget funds; it inspects the validity of financial plans, their implementation, and bookkeeping. The KRU provided statistics concerning the number of detected violations and number of reports transferred to law-enforcement bodies: in 2010 KRU carried out 7047 inspections; on the basis of reports transmitted to law-enforcement authorities, 562 criminal cases were launched; 88 of them were sent to court, and 29 verdicts were pronounced. However no information was provided about the level of sentences; reportedly, actual sanctions involved mainly small fines and did not involve imprisonment. In addition, 36 administrative protocols on corruption were issued on the basis of reports from KRU by law-enforcement bodies.

More generally, KRU detects violations which have already been committed; in order to improve their effectiveness a reform of the inspection function is indispensable. To improve the effectiveness and to focus its activities on important violations, in 2006-2007 KRU decided to base their inspections on risks. Initially, the KRU aimed to study main flows of assets and funds by examining data from treasury and property fund. Currently, with the assistance from the World Bank, KRU is developing a databank based on various registers, which will allow them to develop the risk based approach further. However, it is worth reminding that the bulk of current work is done on request of the Government, thus leaving little scope for a risk based approach.

Besides, to improve cooperation with the other bodies, KRU and law-enforcement bodies issue a joint decision on exchange of information. In March 2010, they had a joint meeting to discuss further ways to improve cooperation, and decided to develop a new methodology for identification of losses, which will allow better prosecution of corruption related offences. Upon the completion of inspections, KRU has a mandatory obligation to issue recommendations how to remove systemic reasons which allowed for detected violations. For instance, recently upon the completion of inspection in treasury, they recommended developing a new methodology for the use of temporarily unallocated funds; however, it appears that a methodology may not be sufficient in this case, and a mandatory rule may be required. KRU also made proposals to various legal acts aiming to strengthen financial discipline, e.g. through increasing fines for violations; while higher fines can indeed be a strong deterrent in some cases, more attention has to be paid to the development of proposals aiming to remove loopholes in the laws, which may be necessary to strengthen the discipline.

New recommendation 3.4

Clarify the main directions of reforms in the area of public financial control, in order to effectively delineate key functions such as external and internal audit and financial inspections. As a long-term goal, develop the external and internal audit functions to signal corruption and fraud cases to the KRU or to law-enforcement bodies.

As a short-term goal, improve the effectiveness of KRU by focusing on financial inspections as its one and only task. Ensure that the inspection service focuses on investigating important cases; develop an intelligence function/unit, which maps the areas of high risk of corruption as a basis of the planning of inspections. Improve KRU's relations with law enforcement bodies, by collecting information about what happened with the material they have provided to the bodies; by using this information to analyse why the KRU's material is not taken into account by the law enforcement bodies; by starting a dialogue with the bodies how to improve the KRU material; and by drafting new guidelines for their inspectors based on the wishes of the law enforcement bodies. Develop the capacity and task of KRU to analyse their findings in terms of where and how preventive measures should be developed: i.e. ensure that KRU reporting should include recommendations for the managers of public institutions to take measures to improve the systems to prevent the type of violations of laws and regulations which were detected.

3.5 Public Procurement

Public procurement was one of the areas where Ukraine was heavily criticised over the past several years by the international community for a continuous failure to remove major and obvious opportunities for corruption. On 1 June 2010, Parliament adopted a new Law on Public Procurement; the Law entered into force on 30 July 2010. The new Law appears to be an acceptable short term solution and an improvement compared to the past, especially concerning the institutional set up: the Tender Chamber is removed; Ministry of Economy is determined as the main responsible body, and the new complaints mechanism is provided in the structure of the Anti-Monopoly Committee.

Previous recommendation 19

Analyse and introduce improvements in the existing public procurement regulations to reasonably limit the discretion of procurement officials in the selection process. Ensure that the eligibility criteria for bidding in the public procurement and privatisation processes include the absence of a conviction for corruption. Under the condition of legal protection of fair competition, consider establishing and maintaining a database of companies that have been convicted for corrupt practices in Ukraine or abroad to support such limiting eligibility criteria.

Under the first round of monitoring, Ukraine was considered **non compliant** with this recommendation.

The adoption of the new law on public procurement is an important first step in the right direction. The law introduced important improvement, especially concerning the institutional setting. The law provides that the Ministry of Economy will act as **authorised body** and will implement the overall supervision of the implementation of the Law. A department on public procurement with 40 staff will carry out these functions. The department will have 7 divisions: on expertise of non-tender purchases, legal support, complaints, control, and others.

The Anti-Monopoly Committee will act as a **review body** and will review complaints. The AMC has investigative powers such as powers to carry out search and seizure of electronic files in companies. The AMC has requested the government to authorise the establishment of a new unit to deal with this task, in 2009 they requested 35 posts for this division, but the decision has not yet been made. The ACM believes that there will be an increase of complaints (from 3,500 in 2009) as the law allows for a wider range of

subjects to file complaints against procurement decisions, while the Ministry of Economy believes that the number of complaints will go down as the new law requires the subjects to pay fees for complaints (the level of fees will be established by the Cabinet). It is worth noting that the level of fees may provide an obstacle for subjects to use their right of appeal. Another issue related to the capacity of the ACM to effectively review complaints is related to the fact that it does not have local offices, which reduced the possibility for companies based outside the capital to use their right of appeal.

The Law also provides improvements concerning **publishing requirements**: announcements about tenders, information about all decisions related to the tender, including its results, are published on the web site of the authorised body and in the public procurement bulletin free of charge.

The new Law establishes the **criteria for denial to participate in the tender**; however some of these rules are not clear. For instance, entities which offer, promise or give undue benefits to the public official with the purpose to influence his/her decision, convicted for corruption offences in the area of public procurement in Ukraine or abroad, for offences related to public procurement rules or other offences involving undue benefits, or entities related to other participants of the procurement procedure should be excluded. The law establishes that companies will be excluded from tender in case of collusion between companies; however, this practice is not common in Ukraine.

The new law does not regulate the purchase of small goods, works and services, the value of which is below a level established by the government. The line ministries can regulate this issue through internal procedures. It is important that this authority is not abused and that proper guidance and supervision of the line ministries is ensured.

The Law does not provide for e-procurement. It would be important to explore this option in the future.

Article 1, para 22 of the new Law introduces the definition of related persons, including legal and physical persons, public official and his/her relatives, whose involvement in the procurement process may lead to the conflict of interest. This definition of conflict of interest is not sufficiently clear in relation to public procurement. Besides, the Law does not establish an effective mechanism for its prevention and detection; tender documentation does not require conflict of interests declarations, and potential conflicts can only be revealed by looking at the names of beneficiary owners. Members of tender committees are not obliged to declare their conflicts of interests either. The Ministry of Economy did not have any plans to further elaborate on conflict of interest, to provide any guidelines or training on this matter, thus leaving this crucial risk unattended.

The new law on public procurement does not provide for **black listing** of companies convicted for corruption. However, Art 8 of the Law on Principles for Prevention and Combating Corruption establishes restrictions for legal entities liable on conviction for committing a corruption offence. This Article stipulates that no public funds can be provided to such legal entities and that these legal entities cannot act on behalf of the state or perform any public services on contractual basis, within 5 years after the court decision has come into force. It further provides that the Cabinet of Ministers shall establish a list of such companies. This provision has not become operational yet.

The **practical implementation** of the new law will require important efforts to ensure necessary independence, powers and human capacity at the Ministry of Economy and at the Anti-Monopoly Committee. The implementation of the regulation will be the responsibility of the procurement agencies. Practical and continued training, including on risks of corruption at all stages of public procurement, therefore should be provided to them. It is also important to ensure a strong role of KRU, External Audit (Accounting Chamber) and Treasury in the monitoring and controlling of public procurement; indeed

planning of joint activities has started. Besides, law-enforcement bodies need to be further trained to be able to detect, investigate and prosecute corruption offences specifically in the sector of public procurement.

Article 164-14 of the Code of Administrative Violations foresees administrative responsibility for breaching the law on performing of procurement of goods, performance of work and services for state means. This article contains a list of violations, including corruption related as well as other procedural violations; but it does not specify which category of persons are liable for these violations. Ukrainian authorities clarified that this provision is not applied to the state officials; it is applied to the responsible persons who hold positions in institutions financed by the state but are not recognized as state officials. This practice leaves a loophole which allows public officials to escape administrative sanctions for violations in the area of public procurement.

Despite remaining shortcomings, the new Law is an important step in the right direction. Ukraine is therefore **largely compliant** with the previous recommendation.

New recommendation 3.5

Further develop the control and review system in the area of public procurement, develop internal and external audit and inspections to detect and prevent corruption in public procurement.

Further develop conflict of interest provisions in the Public Procurement Law and in other relevant legislation. Establish a mechanism to prevent and detect conflict of interest in public procurement.

Ensure that the debarment system is fully operational. Introduce requirements of anti-corruption statements and codes of ethics as a part of tender documents. Develop e-procurement. Raise the capacity of the Anti-monopoly Committee. Provide continuous training on integrity in public procurement, especially to the officials of purchasing organisations, private sector and law-enforcement.

Assess the practice of application of the new law on public procurement, including the effect of the fee on the lodging of complaints.

Review the practice of application of sanctions established by Article 164-14 of the Code of Administrative Violations for breaching provisions related to public procurement, and ensure that state officials are subject to this provision.

3.6 Access to Information

Previous recommendation 22

In the area of access to information and open government, consider creating an independent office of an Information Commissioner to receive appeals under the "Law on Information", conduct investigations, and make reports and recommendations. Consider adopting a Public Participation Law that provides citizens with an opportunity to use information to affect government decisions. Consider revising libel and defamation laws to grant greater scope for journalistic reporting.

Under the first round of monitoring, Ukraine was considered **partially compliant** with this recommendation.

Access of the public to information produced by and held by the state bodies continues to be a problem in Ukraine. According to the NGOs interviewed during the on-site visit, about 70% of state information is

protected by the status of "for official use", "nor for publication", which can be applied by the governmental bodies at their own discretion and which are not based on any law but on internal regulations. For instance, general plans of development of cities are not public, results of the state environmental expertise is not public, despite legal prohibition to hide environmental information. Approximately 35 % of requests for information were satisfied. There is no practice of proactive disclosure of information by the state authorities, even in cases where this information is of great importance for the citizens. For instance, local authorities do not announce their meetings in advance when decisions related to land privatisations should be made, and information about investment projects at the local level are not published.

Ukraine is yet to undertake steps necessary to establish an independent information commissioner/ombudsman; such mandate is currently vested with the Public Defender as a part of an overall agenda of human rights protection. As a part of Public Defender's freedom of information mandate, he/she may request declassification of secret information, but has no separate power to decide its declassification or release. The Public Participation Law has not been initiated.

Law on Protection of Personal Data was adopted in June 2009 and comes into effect in January 2011. The law has an impact on access to information provisions, especially with regard to information related to public officials and their proceeds. In particular, the Law provides that personal data of public officials is confidential information, except for candidates for elected posts and civil servants of the first category (e.g. heads of government agencies who are not members of the Cabinet of Ministers of Ukraine). Thus the Law, for example, excludes the Prime Minister of Ukraine and ministers from this exemption and restricts access to personal information on them. A number of other provisions of the new law seem to establish a restrictive regime of access to personal data not in line with European standards.¹⁸

At the time of reporting, draft Law on Access to Public Information has been in the second reading; the work on the draft was ongoing for 7 years with active participation of the NGOs. Generally, non-governmental organizations sustain a favourable view of the draft Law, if adopted. There are still a number of shortcomings in both current law and practice that need to be addressed. In particular, the Law of Ukraine on Information stipulates the time-limit for provision of information per request; however, there is no time limit set for rendering decision where refusal to release information is appealed (review mechanism). If information is to be collected from several state agencies, persons seeking information need to apply to all institutions separately. In many cases, information is being classified as "for service use only" to prevent its release, which contradicts both the Law on Information and Law on State Secrets. There are no separate positions for information access officers (in charge of releasing public information) in the government agencies of Ukraine.

Generally, there are no legal regulations for proactive disclosure of public information, although publication of legal and normative acts, live broadcasts of some public hearings, as well as environment-related information has been practiced since 2002. Nevertheless, no legal regulation is available for proactive disclosure of public information of significant interest, especially in corruption-risk areas. Such provisions would provide a cost-effective and quick solution for releasing a large part of publicly accessible information without the need to address individual petitions.

Ukraine remains **partially compliant**.

New Recommendation 3.6

¹⁸ <http://helsinki.org.ua/index.php?id=1277472776>

In the area of access to information and open government, consider creating an independent office of an Information Commissioner to receive appeals under the access to information law, conduct investigations, and make reports and recommendations. Adopt new law on access to public information. Consider adopting a Public Participation Law that provides citizens with an opportunity to use information to affect government decisions. Consider adopting provisions that provide for proactive disclosure of information in corruption-prone areas. Revise the rules and practice for classification of information and address the practice of classifying information on grounds that are not provided by the law. Take practical steps to appoint Information Officers at all government agencies. Align the newly adopted Law on the Protection of Personal Data with European standards by reviewing provisions hindering access to information on public officials.

3.7 Political corruption

No previous recommendation on this issue.

Political corruption is a serious challenge in Ukraine. The Concept of Overcoming Corruption in Ukraine "Towards Integrity" contains the list of risks and planned activities regarding elected officials. However, the section on political parties was taken out from the anti-corruption package before the recent elections.

The principles of political party finance in Ukraine are established by the Law on Civil Associations of 1992, the Law on Corporate Profit Taxation of 1994 and the Law on Individual Income Tax of 2003. The principles of electoral campaign funding are set by the Law on Parliamentary Elections of 2004 (amended in 2009), the Law on Presidential Elections of 1999 amended in 2010), the Law on Local Elections of 2004 (amended in July 2010 before the local elections expected in autumn 2010) and the Law on the National and Local Referenda of 1991. According to the Council of Europe: "The laws that establish the above funding principles were passed in different times and on different conceptual bases, therefore their provisions are often rather inconsistent. The election legislation lacks a unified approach to the regulation of funding of various types of elections."¹⁹

Sources of financing of political parties

The Law on Political Parties defines political parties as non-profit organizations, and they are not allowed to receive incomes from shares and other securities, to found companies, to do business or perform any other commercial activities, with few exceptions. Sources that can be used to fund political parties are not clearly defined by law, and are limited only to those which are not prohibited by law. More specifically, political parties cannot be funded by public authorities and state-owned companies; foreign states, citizens, companies and organisations; anonymous persons; charity and religious associations and some other entities. The current legislation does not establish any restrictions on the amounts of funds received by political parties.

According to the Law on Political Parties, state funding is provided to political parties in two forms: funding of the charter activities of political parties not related to elections and reimbursement of the expenses related to participation in election campaigns; reimbursement is provided to those parties who overcome the 3% election threshold. However, the provision on state financing of political parties was

¹⁹ Support to Good Governance: Project against Corruption in Ukraine (UPAC), "Funding of political parties and electoral campaigns in Ukraine: proposals for further reforms, June 2008".

never implemented as no funds were allocated in the State Budgets. In December 2007 relevant provisions on state financing of political parties were abrogated.

Financing of electorate campaigns

To participate in presidential and parliamentary elections, candidates are obliged to establish electoral funds; such funds are not mandatory for local elections. There are limits for the presidential election funds (50,000 minimal salaries for the first round and 15,000 minimal salaries for the second round); there are no limits on election funds for parliamentary and local elections. There are rules for the financing of electoral funds, e.g. during presidential elections, funds of the political parties can be financed from the funds of the party, personal funds of the candidates and donations, while cash donations are not allowed; donations from legal persons and foreign persons are not allowed. There are no limits on the amount of donations, apart from donations from private individuals (25 minimal salaries for presidential elections, 400 minimal wages for parliamentary elections and 3 minimal salaries for local elections). The election laws are not very clear about the purposes for which money from the election funds can be used.

The election laws foresees state funding to finance participation of political parties in elections: publication of information on the opening of the election fund and of election programmes in newspapers; production of established number of information posters, payment for TV time allocated for campaigning and for TV debates between the presidential candidates; and payment for the use of passenger transport by presidential candidates.

The regulation of political parties in Ukraine establishes a definition of election campaigning, however it does not contain a definition of regulation of the so-called "third persons" (independent subjects in election campaigning which are not connected with political parties), nor a restriction on intermediation in donation.

Transparency and control of party financing

The Law on Political Parties establishes that the Ministry of Justice and the Central Election Commission are the main bodies responsible for state control of political parties, including their regular activities and participation in elections. The role of the Ministry of Justice is not clear; the Law require that political parties provide "the necessary documents and explanations" to the Ministry of Justice. It also establishes that Accounting Chamber and the KRU are responsible for the control of the use of state funds by political parties; however, this role is limited by the fact that no direct state funding is provided to political parties.

The Law on Political Parties obliges parties to submit their incomes and expenses statement; property statement; and statement on the use of state financing for regular activities, and to publish this information on annual basis in a national mass media. The Law, however, does not establish requirements as to the form and content of such statements, and it does not require that political parties notify the Ministry of Justice of the fact that they have published the above statements. In addition, as non-profit organisations political parties have to prepare quarterly statements to the local tax authorities. However, the main purpose of this statement is to calculate tax liabilities, and not to ensure the transparency of financial information. The Law on Civil Associations provides for a special parliamentary committee which should consider the financial records of political parties and report their findings at a plenary session of the parliament; no such commission has been set up so far.

The Central Electoral Commission is the main body responsible for the control of election campaign expenditures of political parties, but it does not have investigatory powers. All election laws require that

parties submit financial statements on the receipt and use of election funds to the Central Election Commission or the relevant territorial commission. The Commission collects data from other state institutions, such as the information system of the Central Bank, and focuses on the arithmetical check-ups, but not on the real in-depth control of sources and expenditures of political parties. The Commission may also receive complaints about irregularities from participants of the elections. If the Commission establishes that some of the donations are not in compliance with the requirements of the law, it informs the Ministry of Justice, and the candidates, who should refuse to accept illegal donations.

The Law on Political Parties Law establishes the sanctions for the violation of legislation by political parties, including the warning and prohibition of a political party. The state funding of a political party may be terminated or suspended. The laws on parliamentary elections and the presidential elections do not require annulling of registration of candidates for violation of rules for election funding; only the law on local elections provides for a possibility of such sanction. The law does not establish sanctions in cases when candidates refuse to comply with the recommendation provided in the warning from the authorities, and there are no effective means to force them to observe the law.

From the discussions with officials it appeared that it is not clear how to apply the sanctions and which is a responsible institution for that. Taking this into account, it can be concluded that there is no application of sanctions in practice and the existing range of sanctions does not cover all possible violations of law regarding party funding.

The existing legal and institutional system of control of party funding does not ensure a protection against illegal funding of political parties. This creates a risk of political corruption and can influence all elements of democratic society.

New recommendation 3.7

Review existing regulation of political party financing with the aim to properly regulate the financing of political parties, including during election campaigning, in line with Council of Europe standards. Ensure effective restrictions on contributions and improve existing system of sanctions. Create effective control mechanism which includes an institution with adequate powers and resources. Ensure transparency of political party financing through reporting and disclosure requirement. Consider re-introducing state financing mechanism.

3.8 Integrity in Judiciary

A new Law on the Court System and Status of Judges of Ukraine was adopted in July 2010. The Law sets up Higher Specialised Court for Criminal and Civil Cases, which along with the Higher Administrative Court and Higher Economic Court functions as a cassation court. The law introduces a new procedure for selection of judges based on competition and transparency principle. This procedure includes special training, qualification exam (anonymous testing), rating of candidates and recommendation for appointment as judge based on the rating. The law cancels special benefits for judges, but establishes adequate remuneration. The law introduces new approaches in financing of courts to ensure independency of the judiciary. Budgetary expenses on courts should be provided in the state budget law separately for each local, appellate and higher specialised court. Important amendments in the Law on the High Council of Justice were enacted in May 2010. The below evaluation is based on the new legal provisions.

Judicial Independence

Judicial independence is a matter of concern in Ukraine. Both the legal framework and its implementation do not provide for sufficient guarantees of independence. During the onsite visit several aspects that support this statement were mentioned: insufficient funding and as a consequence courts have no proper conditions for administering justice (in 2009 only 22% of required judiciary budget were funded, while in previous several years not more than 50% of the needs were funded); problems with salaries (timely payment of salaries of judges and court staff is not fully ensured; conflict with the political power due to a decision of freezing salaries leading to a decision of the judges to sue the State; lack of housing and equipment); the role of the parliament in dismissing judges. Insufficient state funding is often compensated by private contributions and assistance from the local self-government authorities. This undermines the integrity and independence of the judiciary and fosters corruption.

The new Law has substantially improved provisions on financial independence of the judiciary, in particular by: setting directly in the law the salary rates for judges and gradually increasing the level of remuneration; eliminating bonuses which constituted a significant part of the judicial remuneration and served as an instrument of influencing judges by the court presidents; and subordinating State Court Administration to the judiciary.

The independence of the judiciary is affected by the significant role of political institutions (the Parliament and the President) in the appointment and dismissal of judges. It is also undermined by the existence of the so called first appointment as a judge for 5-year term by the President of Ukraine and insufficient guarantees in the process of appointment of judges for the life tenure. These problems need to be addressed through amendments in the Constitution of Ukraine. Also the new Law on the Court System and the Status of Judges does not include a list of grounds on which the High Qualification Commission of Judges could not to recommend a judge for life tenure.²⁰

Another problem lies in the constitutional provisions on the formation of the High Council of Judges and its current composition. The High Council of Justice is the main body in charge of the selection, appointment, dismissal and disciplining of judges. According to the Constitution it consists of 20 members: Parliament of Ukraine, President of Ukraine, Congress of Judges of Ukraine, Congress of Attorneys of Ukraine, Congress of legal universities and academic institutions each appoint three members of the Council, while National Conference of Prosecutors appoints two members. Supreme Court's President, Minister of Justice and the Prosecutor General are members of the HCJ *ex officio*. Such arrangement is not in line with the European standard requiring the majority of members of the Council for the Judiciary to be judges elected by their peers.²¹ According to the Law on the High Council of Justice, as amended in July 2010, some members appointed by the mentioned bodies should be judges. This solution, however, still falls foul of the European standards, as the judicial members of the HCJ have to be chosen by their peers.

In the current composition of the HCJ only 6 members are judges. Among other members, in addition to the Prosecutor General there are also three Deputy Prosecutors General and the head of the Security Service of Ukraine. Appointment of the latter in the composition of the HCJ is a controversial decision, since the Security Service in Ukraine runs criminal investigations, in particular against judges, and

²⁰ It is important to have criteria for negative recommendation. Ideally, confirmation for permanent post should be automatic, unless there are grounds to refuse the confirmation. These grounds should be specified. In this case existence of the probationary period (first 5 year appointment) could be acceptable.

²¹ European Charter on the statute for judges, §1.3; Consultative Council of European Judges, Opinion No. 10, The Council for the Judiciary at the Service of Society.

therefore the role of the Security Service's head as a member of the HCJ in the dismissal and disciplining of judges may result in conflict of interests and also has a chilling effect on the judicial independence.

This is all the more worrisome since recent legislative changes have increased the powers of the HCJ, in particular with regard to the appointment of court presidents and disciplining of judges. The HCJ is also given a power to receive from courts copies of unfinished court cases, this may undermine the judicial independence by allowing direct influence/pressure on judges and court decisions in specific cases.

Presidents and vice-presidents of courts were for a long time appointed by the President of Ukraine. However, in May 2007 the Constitutional Court ruled such system unconstitutional and recommended the Parliament to approve new procedure for appointment and dismissal of court presidents. The Parliament has legislated on the issue only in July 2010 when it adopted the new Law on the Court System and Status of Judges, whereby giving the power to appoint and dismiss court presidents to the High Council of Justice. This new arrangement appears also problematic from the point of view of the Constitution of Ukraine, as no such authority of the HCJ is provided for in the Constitution. The legal vacuum and controversy around appointment of court presidents, who possessed significant powers within the court system, were just one of many examples of the problems faced by the judiciary, along with the political pressure on courts, dubious dismissals of judges and other issues seriously affecting integrity of the judiciary.

Distribution of cases among judges, recusal

It was reported that the distribution of cases among judges is a problem in Ukraine. Until recently cases could be distributed arbitrarily by court presidents. In 2009 an automated case management and random case distribution were introduced by law in administrative courts. But it has not been yet implemented due to the lack of funding. The July 2010 Law on Judicial System and Status of Judges provides for mandatory automated random case distribution in all jurisdictions. However, it remains to be seen when and how this provision will be implemented.

Provisions on the recusal of judges require revision. According to the procedural codes, a judge should be recused if his impartiality is questioned (*e.g.* due to previous participation in the case consideration, direct interest in the case outcome, being a relative of the party or participant of the litigation). Parties to the case or the judge himself can propose the recusal. However, procedure for deciding on such proposal does not guarantee its impartial consideration. The judge himself decides on the motion requesting a recusal. There is no possibility for an appeal against the refusal to grant the requested recusal, it can be challenged only together with the judgement on merits of the case.

Professional ethics of judges

There is a Code of Judges' Professional Ethics which was adopted by Congress of Judges in 2002 as a way to improve impartiality and independence. The code is considered as a guide for judges' behaviour and until recently had no legal effect (no disciplinary action could be taken based on infringement of the code of ethics). The new Law on the Court System and Status of Judges introduced a provision whereby a systematic or one-time gross violation of ethics rules can trigger disciplinary responsibility. In February 2009 a code of conduct was also approved for non-judicial court staff.

The Judicial Academy is also promoting ethics and professionalism among the judges by conducting relevant trainings. However, there is a problem with lack of funds which, for the time being, is being solved through funding coming from different external donors.

Disciplinary liability and dismissal of judges

According to the new Law on the Court System and the Status of Judges, everyone has a right to lodge a complaint concerning the judicial behaviour directly with the relevant disciplinary body. This is a positive development, as the previous procedure required such complaints to be addressed to specified state institutions which were authorised to initiate disciplinary proceedings. The High Qualification Commission of Judges (HQCJ) conducts disciplinary proceedings against judges of local and appellate courts, the High Council of Justice – against judges of higher specialised courts and Supreme Court justices. As a result of the disciplinary proceedings, if a violation is established, the judge can be reprimanded or a recommendation can be made to the HCJ to dismiss the judge if relevant grounds are present. Disciplinary punishment should be announced on the official judicial web-portal. The judge can appeal against the disciplinary sanction with the HCJ or an administrative court. The Law creates position of special officers - disciplinary inspectors who acting on instruction of the HQCJ member will analyse and review complaints against judge's behaviour, prepare draft decisions related to disciplinary proceedings. The system where a member of the HQCJ is in charge of the disciplinary inquiry and presentation of the case to the full panel of the HQCJ affects impartiality of the proceedings, as the same person will perform the roles of a 'prosecutor' and a 'judge'.²²

While the new law on the Court System and the Status of Judges contains detailed provisions on disciplinary proceedings carried out by HQCJ, disciplinary proceedings in the HCJ are regulated by the relevant law that lacks sufficient guarantees of the impartiality of such proceedings and protection of judge's rights.

The May 2010 amendments to the Law on the HCJ defined acts that constitute a breach of the judge's oath, which is one of the constitutional grounds for dismissal of a judge. This amendment could have been seen as aimed at ensuring legal certainty in disciplinary procedures against judges by providing definition of the breach of the oath. However, the formulation of the relevant provisions lacks clarity (e.g. "commission of actions that degrade the title of judge", "violation of moral and ethical principles of judge's conduct"), thus failing to provide a clear definition of what constitutes the breach of judge's oath and leaving possibilities for abuse.

Training on judicial integrity and role of judges in anti-corruption efforts

As mentioned, promoting integrity of judges is one of the main objectives of the training activity performed by the Judicial Academy. However, no evidence was provided regarding the number of trainings delivered, the content of training and the number of trainees. In any case, it is recognized that further efforts are necessary in order to improve the situation within the judiciary and, at the same time, to better prepare the judges for fighting corruption. Increasing sophistication of corruption requires well trained people for fighting the phenomenon that is endemic and widespread in Ukraine.

It was also mentioned that a manual is being prepared under a cooperation project aiming at improving the capacities of judges.

²² Disciplinary inspectors act as assistants to the member of the HQCJ in charge of the disciplinary case. Disciplinary inspectors have no autonomy, they prepare materials and draft conclusions which have to be endorsed by the HQCJ member and presented at the HQCJ meeting. Therefore, it is important that the person who perform "prosecution" are not at the same time part of the decision-making. Same reservation is included in the October 2010 Venice Commission opinion on the new Law.

New recommendation 3.8

Initiate a constitutional reform to bring provisions on the judiciary in line with European standards and recommendations of the Venice Commission, in particular with regard to appointment and dismissal of judges, life tenure, and composition of the High Council of Justice. Ensure sufficient and transparent funding of the judiciary and exclude possibility of financing of the judiciary by private donations and local self-government. Implement provisions on the financial disclosure of judges. Review legal provisions on the disciplinary proceedings, dismissal and recusal of judges to guarantee their impartiality and protection of judicial independence.

3.9 Integrity in the private sector

General lack of legal certainty is the fundamental challenge for doing business in Ukraine. Ukraine scores near the bottom of various ratings on the ease of doing business, for example, it is 142nd out of 183 countries in 2010 World Bank's Doing Business ranking.

One of the business representatives interviewed during the on-site visit stated that companies in Ukraine had to accept corruption, or they were out of business. Corruption is wide spread in all forms of interaction between the business and the public sectors, and inside the business as well. According to 2008 survey of firms by the EBRD, corruption was not a problem for only 16% of companies. 27% of firms indicated that unofficial payments are frequent; 26% of firms stated that bribery is frequent in dealing with tax authorities (increase from 18% in 2005), 13% that bribery is frequent in dealing with customs and 16% with courts. Among firms who reported bribery, the "bribe tax" amounted to 3.2% of annual sales.²³ Complex administrative procedures in tax, financial regulations, customs, licensing, permits and public procurement represent areas prone to arbitrary decisions. Small, medium and large enterprises, both domestic and foreign, face major problems related to irregularity of court and administrative practice of protecting property rights. Several large multinational companies failed to enter Ukrainian market mostly due to corruption problems.

The business players agree that reporting bribery is not only a risky undertaking, but also not cost-effective due to unpredictability of response. So far, there was no effective dialogue between the government and the business on ways to address wide spread corruption. The state can do much in the way of promoting common practice that is both non-intrusive into private affairs and transparent for all market players.

Accounting and Auditing in the Private Sector

The laws of Ukraine provide extensive regulations as to business accounting and auditing standards. The Economic Code of Ukraine (adopted in 2003) establishes that financial control is carried out by state tax authorities and by an auditor of the economic entity. The Law on Bookkeeping and Financial Reporting (in force since 2000) establishes accounting standards mandatory for all economic entities. There is no explicit prohibition of double bookkeeping, off-the-book accounts or recording of non-existent expenditures. However, the accounting rules and related sanctions are sufficiently strict in Ukraine, and, where loopholes may exist, a broad interpretation of criminal law provisions related to financial fraud may be used to address such cases. From a law enforcement perspective, flexibility in interpretation is a good tool to address complex financial/economic crime, if not used arbitrarily; however, such discretion may

²³ The EBRD-World Bank, *Business Environment and Enterprise Performance Survey (BEEPS) 2008*, http://siteresources.worldbank.org/INTECAREGTOPANTCOR/Resources/704589-1267561320871/Ukraine_2010.pdf [accessed 4 August 2010].

lead to additional legal uncertainty and opportunities for corruption. All economic entities have to provide their quarterly and annual financial reports to the bodies which are responsible for the management of the respective sector of economy, to the employees on their demand, and to the owners/founders. Open stock companies are obliged to publish their annual financial reports. The Law on Auditing, adopted in 1993, establishes regulations for auditing in the private sector. It establishes that the Audit Chamber is responsible for setting standards, mandatory for private auditors, and authorises auditors. It establishes the list of companies for which audit is mandatory: open stock companies, banks and financial intermediaries. The Law further establishes that the economic entity has the free right to choose its auditor; all information provided by the company to the auditor is confidential and cannot be disclosed without the agreement of the company. Finally, the Law establishes conflict of interest and independence rules for auditors: auditors cannot audit companies where their relatives occupy management positions, or where the auditor has personal economic interests.

Internal company controls

It appears that Ukrainian laws do not require establishment of independent audit committees in companies; there are no efforts by the government to promote such actions. There are no special regulations or provisions related to an obligation to report instances of corruption, especially in the process of internal or external audit. No information is available about annual reports of companies and if such reports contain information about internal control mechanisms.

Awareness Raising and Corporate Ethics

Most of the regulations concerning liability of legal entities for corruption offences and rules of corporate ethics, including protection of whistleblowers, are provided by the draft Law on the Principles for Countering of Corruption. *Inter alia*, Article 11 of the Law provides that 'state provides support to establishment of ethical professional norms ... in enterprises'. Although adoption of the draft Law will bring resolution to many common legal issues surrounding private sector integrity, more has to be done in order to ensure responsible conduct of private companies through non-binding instruments. Initiatives for creating a common Code of Conduct and Business Action Plan against Corruption have been brought forward by the European Business Association; some companies, especially large enterprises, have internal codes of conduct. However, state involvement is necessary to ensure uniform agreement in the private sector as to the rules of confronting corruption. No information was provided concerning training and awareness raising programmes about risks of corruption and practical solutions by the government to the private companies, which indicates that the government has not engaged itself yet in such activity.

New recommendation 3.9

Establish a dialogue with business to raise awareness about risks of corruption and solutions for private sector, to solicit inputs for the review of the relevant legislation (Economic Code, Accounting and Audit rules, Tax Code, Public Procurement law, and other legal acts relevant for private sector) with the view to reduce possibilities for corruption. Together with private sector organisations, promote the development of self-regulation within the private sector (code of conduct, internal control and compliance programmes, and whistleblower protection). Promote uniform court and administrative practice in property disputes, licensing, customs regulation and other corruption prone areas. Adopt and promote legal obligation and clear rules for reporting of corruption by internal and external auditors.

Summary Table

Pillar I. Anti-Corruption Policy						
	New Recommendations		Updated rating for previous recommendations			
			fully	largely	partially	not
1.1-1.2. Expressed political will and a-c policy document	✓	1. Strategy, action plan			+	
1.3. Corruption surveys	✓					
1.4 -1.5 Public participation, awareness, public education	✓	21. Co-operation with civil society			+	
1.6. Policy/coordination institutions	✓	3. Co-ordination body			+	
1.7. international conventions						
Pillar II. Criminalisation of corruption						
2.1-2.2 Offences and elements of offence	✓	6. Offences and elements				+
		12. Legal persons	+			
		23. Money laundering		+		
2.3. Definition of public official	✓	7. Public official				+
		8. Foreign official				+
2.4. Sanctions	✓					
2.5. Confiscation		9. Confiscation				+
2.6. Immunity, statute of limitation		11. Immunity				+
2.7. International cooperation, MLA	✓	13. MLA		+		
2.8. Application, procedure	✓	5. Harmonisation				+
2.9. Specialised law-enforcement bodies	✓	4. Specialised a-c unit				+
		24. Financial investigations				+
2.10. Statistics						
		10. Non-reporting				+
Pillar III. Prevention of corruption						
3.1. Prevention body						
3.2. Integrity of public service	✓	14. Ethics training			+	
		16. Code of conduct			+	
		15. Asset declarations				+
		17. Whistleblowers				+
		18. Internal investigations		+		
3.3. Administrative discretion	✓	2. Regulatory reform, open gov.			+	
		20. Taxes and customs				+
3.4. Financial control	✓					
3.5. Public procurement	✓	19. Public procurement		+		
3.6. Access to information	✓	22. Access to information			+	
3.7. Political corruption	✓					
3.8. Judiciary	✓					
3.9. Private sector	✓					