

Fighting Corruption in Eastern Europe and Central Asia

# Anti-corruption reforms in Ukraine

4<sup>th</sup> round of monitoring of the Istanbul Anti-Corruption Action Plan

# **Anti-Corruption Reforms in**

# **UKRAINE**

**Fourth Round of Monitoring of the  
Istanbul Anti-Corruption Action Plan**

**2017**



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## ACRONYMS

<b>ACN</b>	<b>Anti-Corruption Network for Eastern Europe and Central Asia</b>
<b>AMC</b>	Anti-Monopoly Committee of Ukraine
<b>AntAC</b>	NGO Anti-Corruption Action Center
<b>ARMA</b>	Asset Recovery and Management Agency
<b>AUCP</b>	All Ukrainian Conference of Prosecutors
<b>BOC</b>	Business Ombudsman Council of Ukraine
<b>CC</b>	Criminal Code
<b>CMU</b>	Cabinet of Ministers of Ukraine
<b>CoE</b>	Council of Europe
<b>CoST</b>	Construction Sector Transparency Initiative
<b>CPC</b>	Criminal Procedure Code
<b>CPI</b>	Corruption Perception Index
<b>CPL</b>	Law on Prevention of Corruption of Ukraine
<b>CSL</b>	Law on Civil Service of Ukraine
<b>EBRD</b>	European Bank of Reconstruction and Development
<b>EITI</b>	Extractive Industries Transparency Initiative
<b>EU</b>	European Union
<b>FATF</b>	Financial Action Task Force
<b>FMS</b>	Financial Monitoring Service
<b>FIU</b>	Financial Monitoring Unit
<b>FOI</b>	Freedom of information
<b>GCB</b>	Global Corruption Barometer of Transparency International
<b>GPA</b>	Agreement on Government Procurement
<b>GPO</b>	General Prosecutor's Office of Ukraine
<b>GRECO</b>	Group of States against Corruption
<b>HCJ</b>	High Council of Justice
<b>HQCJ</b>	High Qualifications Commission of Judges
<b>HRMIS</b>	Human Resources Management Information System
<b>HRM</b>	Human Resources Management
<b>IAP</b>	Istanbul Anti-Corruption Action Plan
<b>IMF</b>	International Monetary Fund
<b>IRM</b>	Independent Reporting Mechanism of the OGP
<b>IT</b>	Information technologies
<b>LAP</b>	Law on Administrative Procedures
<b>MEDT</b>	Ministry of Economic Development and Trade of Ukraine
<b>MLA</b>	Mutual Legal Assistance
<b>MOJ</b>	Ministry of Justice of Ukraine
<b>MoU</b>	Memorandum of understanding
<b>MP</b>	Member of Parliament
<b>NABU</b>	National Anti-Corruption Bureau of Ukraine
<b>NACP</b>	National Agency on Prevention of Corruption of Ukraine
<b>NACS</b>	National Agency of Ukraine on Civil Service
<b>NATO</b>	The North Atlantic Treaty Organization

<b>NGO</b>	Non-governmental organisation
<b>NIS</b>	National Integrity System
<b>OGP</b>	Open Government Partnership
<b>OSCE</b>	Organisation for Security and Co-operation in Europe
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PG</b>	Prosecutor General of Ukraine
<b>PPL</b>	Law on Public Procurement
<b>QDC</b>	Qualifications and Disciplinary Commission
<b>RPR</b>	NGO Coalition of Ukraine, Reanimation Package of Reforms
<b>RTI</b>	Global Right to Information Rating
<b>SAPO</b>	Specialized Anti-Corruption Prosecutor's Office
<b>SFS</b>	State Fiscal Service of Ukraine
<b>SIGMA</b>	Support for Improvement in Governance and Management, OECD/EU joint initiative
<b>State Programme</b>	2015-2017 State Programme for the implementation of the Anti-Corruption Strategy
<b>SOE</b>	State-owned enterprise
<b>TI</b>	Transparency International
<b>UAH</b>	Ukrainian Hryvnia
<b>Ukravtodor</b>	
<b>Ukrenergo</b>	
<b>UNIC</b>	Ukrainian Network of Integrity and Compliance
<b>UNODC</b>	United National Office on Drugs and Crime
<b>USAID</b>	United States Agency for International Development
<b>USR</b>	United State Register of Legal Entities and Individual Entrepreneurs of Ukraine
<b>Verkhovna Rada</b>	The Parliament of Ukraine
<b>WEF</b>	World Economic Forum
<b>WTO</b>	World Trade Organisation

## EXECUTIVE SUMMARY

This report analyses progress made by Ukraine in carrying out anti-corruption reforms and implementing recommendations of the IAP since the adoption of the Third Monitoring Round report in March 2015. The report focuses on three areas: anti-corruption policy, prevention of corruption, enforcement of criminal responsibility for corruption. The in-depth review of the sector will be conducted separately through a bis-procedure and is not part of the adopted report.

This report comes in a very volatile time for Ukraine, which still has a long way to go in terms of establishing functioning democratic anti-corruption institutions and actions and there are serious signs that it is in danger of backsliding into the kleptocracy that it was despite many substantial positive steps since the Revolution of Dignity. The report attempts to do both: point out the achievements and areas of potential risk of regress.

## ANTI-CORRUPTION POLICY

### *Anti-corruption reforms*

After the Revolution of Dignity largely instigated by endemic corruption, Ukraine adopted a comprehensive anti-corruption package of laws and established new specialised institutions: NABU, SAPO, NACP and ARMA. Ukraine also achieved unprecedented level of transparency, *inter alia*, by introducing the electronic asset disclosure, e-procurement, opening up the public registries and making a number of datasets publicly available in open data format. Civil society continues to play a significant role in pushing the reforms forward and the international community supports Ukraine's anti-corruption fight. The formation of the legislative, policy and institutional foundations for fighting and preventing corruption and putting in place various transparency initiatives are the main accomplishments in Ukraine since the last monitoring round.

Despite the achievements, the level of corruption remains very high. Anti-corruption enforcement, particularly against the high-level officials, is stalling and meets enormous resistance and the public trust to the Government has further decreased in recent years. Yet, the most pressing challenge for Ukraine now is ensuring the sustainability of the institutional framework and boosting anti-corruption efforts, that are being constantly undermined by the governing elite. The recent measures aimed at discouraging the anti-corruption activism are alarming and must be stopped urgently. Enabling environment for open and full participation of civil society in anti-corruption policy development and monitoring must be ensured.

Ukraine has not yet firmly established itself on its path of steady anti-corruption reforms, but is certainly on a right trail. However, the political will of the Government to genuinely fight corruption is seriously questioned. Resilience, persistency and full determination of the anti-corruption fight of the Ukrainian society at large will be critical in the coming years. Time has long come for Ukraine to take decisive steps to root-out pervasive corruption.

### *Anti-corruption policy*

The State Programme for implementation of the anti-corruption strategy adopted with CSO participation is a sound policy document. It does not have a separate budget, but the anti-corruption institutions have substantial budgetary allocations and the donor assistance supports the implementation as well. The reports on implementation of the State Programme and the Strategy have been adopted recently, however the progress of implementation is not systematically monitored by the Government or the Parliament in accordance with the law. The two thirds of the measures of the State Programme have been implemented,

with the unimplemented measures mainly related to anti-corruption awareness raising. The implementation has been most challenging when it came to the interests of the President and the governing elite. The Public Council of the NACP was recently set up, however, its operation and efficiency has yet to be tested. NGOs carried out alternative monitoring and published shadow reports. Ukraine is encouraged to finalize the implementation of the measures that are still pending and develop a new anti-corruption strategy with a broad and meaningful participation of stakeholders based on the analysis of implementation of the previous policy documents, available surveys and assessments of the corruption situation in the country. The standardized corruption survey methodology and the first survey conducted on its basis are welcome development. Ukraine is encouraged to regularly conduct the survey, use and publish its results. The corruption risk assessments and sectoral anti-corruption programmes in the state agencies are a good practice that should be developed and strengthened further.

Anti-corruption *awareness-raising* and education are part of the anti-corruption policy documents however the implementation is lacking. The NACP recently adopted its communication strategy. Ukraine must proceed swiftly with the implementation, target awareness raising activities to the sectors most vulnerable to corruption, allocate sufficient resources, measure the results and plan the next cycle of activities accordingly.

### ***Corruption prevention and coordination institutions***

With some delays, Ukraine has launched its anti-corruption policy coordination and prevention body the National Agency on Corruption Prevention (NACP). Having a broad mandate, substantial budget and staff capacity, the NACP is an important institution that can play an instrumental role in the anti-corruption infrastructure of Ukraine. However, at present it is facing serious challenges ranging from the attempts to manipulate selection of its members, to rejecting the secondary legislation necessary for its operation, to political interference in its enforcement mandate. The establishment and resourcing the NACP in a short period of time and making it operational in most of its functions is a significant achievement. Ukraine is urged to secure independent functioning of the NACP as a matter of priority, including by taking legislative measures if necessary, to free it from outside interference, allow it to build the capacity, experience and authority and establish itself as a strong corruption prevention agency of Ukraine. The vacant positions of the NACP should be filled in by experienced and highly professional candidates with good reputation recruited through an open, transparent, objective and credible competition. The NACP should be provided with the access to all databases held by public agencies and resources necessary to perform its functions, including at the regional level. The coordination role and visibility of the NACP should be substantially enhanced as well. Further measures are needed to strengthen the anti-corruption units/officers, their role and ensure their effective coordination, assistance and methodological guidance by the NACP.

A high-level supervisory body, the National Council for Anti-Corruption Policy was launched and held several meetings. However, it lacks secretariat support and remains passive. The mandate of the Council *vis-a-vis* the NACP should be clarified and coordination and closer interaction established in practice. The Parliament of Ukraine has an important role in anti-corruption policy and its Anti-corruption Committee has reportedly been active. To acquire necessary experience, capacity and confidence the new institutional framework must be strengthened and nurtured, and not confronted and undermined, but this is more often than not against the interests of powerful oligarchs and the well-rooted corrupt high-officials in the government of Ukraine.

## **PREVENTION OF CORRUPTION**

### ***Integrity in the civil service***

Ukraine has taken major steps to advance the civil service reform in line with the European standards: the new Civil Service Law (CSL), the secondary legislation, the comprehensive public administration reform strategy and its implementation plan were adopted. Ukraine introduced the position of state secretaries and in contrast with the past bad practices recruited a substantial number of civil servants, including at the senior level, through open and transparent *merit-based competitions*. Ukraine is encouraged to address the



existing challenges, such as low qualification of selection commission members, political interference in their work and difficulties in assessing various competencies of candidates and ensure that the recruitment in the civil service is open, transparent, free from political interference and based on merit allowing to recruit the best candidates in the civil service positions.

The new regulations on salaries represent a step forward to a transparent and fair *remuneration* system in Ukraine. Gradual increase of salaries in civil service is also a positive development that should be continued. However, the important part of the new provisions on bonuses will only enter into force in 2019, the allocation of a large part of bonuses (monthly/quarterly bonuses constituting up to 30% of an annual salary) is not linked to the performance appraisal process and is left at the discretion of heads of state bodies. Furthermore, there is no established cap for annual bonuses. Ukraine is encouraged to link the priority in promotion, increase in salary and bonuses to the results of evaluation and implement the newly adopted *performance appraisal* regulation in practice. Report further recommends to clarify the grounds for disciplinary proceedings and ensure that they are objective, the dismissals are based on the legal grounds and are not politically motivated.

The progress achieved by Ukraine in the area of *conflict of interest* management is apparent. The NACP has issued various methodological guidance, carried out information campaign and training of staff and started enforcement. This is commendable and must be continued. Nevertheless, the questions as to the independent functioning of the NACP free from political interference and bias must be addressed in order the implementation of the conflict of interest rules, as well as other parts of its mandate to be assessed as efficient and seen as politically neutral.

*Electronic declaration* system is one of the most important anti-corruption measures Ukraine has implemented in recent years. Over 1 271,000 declarations including of top level officials are now publicly accessible. The law enforcement has started criminal proceedings based on its data. The turmoil around the system and various setbacks demonstrates the magnitude of opposition any initiative aimed at uncovering and fighting corruption faces in Ukraine. Civil society, international community and public at large have been mobilised to defend the system from multiple interferences. Now, as the system is showing its first results in practice, it is critical to ensure its full and uninterrupted functioning: adopt necessary bylaws, launch automated verification software, connect the system with the relevant databases to perform this function, allow the NACP to exercise its verification mandate fully and independently and ensure full access by the NABU to its database as envisaged by the law. It is recommended to focus the verification efforts on the high-level officials. The latest amendments to the CPL extending the scope of the declarants to anti-corruption activists depart from the purpose of the asset declaration system and can serve as a tool to discourage and intimidate anti-corruption activism in Ukraine. These amendments should be abolished.

The CPL provides regulations for protecting *whistle-blowers* disclosing corruption. Introducing clear reporting channels and online anonymous reporting by the NACP is a welcome development. The number of reports received so far represents a good start showing the willingness of the citizens to report and cooperate. However, challenges can be noted in ensuring whistle-blower protection in practice. The report recommends Ukraine to set fourth clear procedures, further train the responsible staff, raise public awareness to incentivize reporting and consider adoption of a stand-alone law with all necessary guarantees. the whistleblowing practices to increase, the NACP should be seen as an objective and reliable ally to provide information to and receive protection from.

### ***Integrity of political public officials***

*Integrity of MPs and other political officials* is a concern in Ukraine. There is a strong public perception of high level of corruption among the politicians. The CPL applies to political officials including at the high level. The supervision and control is entrusted to the NACP, but there is a distrust to this body as to the impartiality and unbiased implementation of its mandate. A separate ethics code for parliamentarians is needed with the necessary training and guidance for its application. It is also important to clarify the oversight mandate of the NACP vis-a-vis the Parliamentary Committee of Rules and Procedure and how the awareness, training consultations and guidance are provided to the MPs. Moreover, it is crucial that the

NACP exercises its enforcement powers related to the conflict of interest and asset declarations fully and objectively in relation to the political officials at the highest level.

### ***Integrity in the judiciary and public prosecution service***

***Integrity of judiciary*** has remained one of the main challenges in the development of democratic governance and the rule of law in Ukraine. Finding a right balance between independence and accountability of judges is a difficult task and Ukraine is still struggling with it. The entire legislative framework of the judiciary was revised through constitutional amendments and a package of laws regulating the judicial system. New legislation simplified the court system and helped address most recommendations given to Ukraine under IAP monitoring, including appointment and dismissal of judges on recommendation of the High Council of Justice instead of the Parliament, abolishment of the five-year probation period for junior judges, changes into the composition of the High Council of Justice to include the majority of judges. It introduced changes into the system of judicial self-governance and disciplining of judges. This being said, the implementation of these laws will be the actual test of the introduced changes, and this is the most challenging task ahead of Ukraine in ensuring integrity of the judiciary.

In addition to legislative changes some other improvements took place. Namely, funding of the judiciary has significantly increased and remuneration of judges has been adequately adjusted to commensurate to their role and reduces corruption risks. All court decisions, including interim ones are now being published and can easily be accessed via Internet. Such steps are welcomed and will likely help ensure transparency of the court proceedings and ultimately will have effect on building up of the positive image of the judiciary in Ukraine.

Despite these positive changes the judiciary continues to be perceived as a weak branch, often lacking independence and suffering from corruption. Multiple factors including the situation with pending ‘re-appointment’ of judges whose 5 years’ probation term lapsed after the judicial reform, absence of safety measures for judges and protection in courts, continued pressure through the use of Criminal Code Article 375 “on delivery of the knowingly unfair sentence, judgement, ruling or order by a judge” - undermine judicial independence, making judges vulnerable to various types of outside improper pressure. This report also raises concerns over the number of judicial resignations and the situation with Ukrainian courts simply lacking the judges necessary for panels to hear the cases.

The Ukrainian ***prosecution service*** has been undergoing major reforms, and just like the judiciary, was also affected by the constitutional amendments. Reforms included abolishment of the general supervision function of the prosecution service, for which Ukraine has been criticised for years. New legislation also provides for guarantees of the independence of the prosecutors, identifies more specific criteria and procedures for appointment and disciplining of prosecutors, and establishes the system of self-governance of the prosecution service. All of these are positive developments and should be continued, and any attempts at rollback should be circumvented.

Nevertheless, the prosecution service, along with courts, continues to be one of the least-trusted public administration institutions and remains to be a powerful body with direct links to the President of Ukraine. While the reform of the prosecution service was intended to reduce the General Prosecutor’s Office control on many issues involving hiring, advancement and discipline, there is abundant evidence that the highest levels of the General Prosecutor’s Office, if not the Prosecutor General himself still exercise inordinate power over such decisions.

The position of the Prosecutor General has been highly volatile and surrounded by much controversy and public discontent. At the moment the General Prosecutor’s Office is headed by political appointee, who is a close political ally of the President. This report therefore recommends that process for appointment and dismissal of the Prosecutor General is made more insulated from undue political influence and more oriented towards objective criteria on the merit of the candidate. The reform of the system of prosecutorial self-governance has been launched with some set-backs, it is important now for Ukraine to ensure that the self-governance bodies function independently and proactively represent the interests of all prosecutors. Disciplining proceedings should be further improved with grounds for liability clearly defined but also ensuring that the complaints are diligently investigated, and that statute of limitations, as well as the bodies

responsible for this are adequate. And finally constant underfunding of the prosecution services, as well as the low salaries of prosecutors, with the exception of those in SAPO, require urgent action.

### ***Integrity in public procurement***

Ukraine has taken many steps towards ensuring ***integrity of the public procurement***. The introduction of the e-procurement system “Prozorro” enhanced the level of transparency in public procurement and made it less susceptible to corruption. This is a notable and important step in the fight against corruption in Ukraine, which can also serve as an example for other countries in the region and beyond. It is of utmost importance that this achievement will not be reversed and the progress made is maintained. The large amount of relevant information related to procurement that is published in Ukraine is also impressive. This creates the possibility for public scrutiny of the Government’s spending through procurement. Anti-corruption measures introduced under the anti-corruption legislation of 2014 have also helped build mechanisms to prevent corruption, including internal anti-corruption programmes and debarment system. Now they should be put in practice and made fully functional.

The report also points out to some actions, tools, policies and practices missing or unsatisfactory. It recommends in particular continuing reform of the public procurement system in minimising the application of non-competitive procedures, to ensure that state owned enterprises use competitive and transparent procurement rules, to extend e-procurement system to cover all public procurement at all levels and stages, to provide sufficient resources to procuring entities, including training for members of tender evaluation committees. And finally it calls for regular training for private sector participants and procuring entities on integrity in public procurement at central and local level and training for law enforcement and state controlled organisations on public procurement procedures and prevention of corruption.

### ***Accountability and transparency in the public sector***

Ukraine introduced the obligation of state agencies to publishing data in open format and launched the open data portal now containing around 20 000 datasets. Furthermore, the information on beneficial ownership and various public registries became public. These are significant achievements. Some progress could be observed in relation to the anti-corruption screening of legislation: the NACP approved the related procedure and methodology and the Anti-Corruption Committee made some attempts towards streamlining this function. No tangible progress could be noted in relation to the recommendations on the Law on Administrative Procedure and access to information (oversight body). Parts of the recommendations 3.3 and 3.6 could not be evaluated due to the insufficient information received from the Government.

### ***Business integrity***

Ukraine implemented several important measures to simplify business regulations and improve business climate. Moreover, creation of the Business Ombudsman Council (BOC) provided the business with a powerful tool to report corruption cases without fear of prosecution or other unfavourable consequences, to receive protection of legitimate rights, as well as possibility to tackle most common problems in a systematic manner. However, most actions foreseen by the Section 6 of the Anti-corruption Strategy were delayed and remain unimplemented. Therefore for Ukraine it is crucial to include business integrity section to the new National Anticorruption Strategy and ensures active participation of business in the monitoring of the Strategy. In addition, Ukraine should focus on business integrity of SOEs and further promote and implement drafted model compliance programme for SOEs.

Further improvements of the Prozorro e-procurement system to addresses all procurement process and insure transparency of the bidding process remain important. Additional efforts are needed to improve disclosure requirements for companies and adoption of the law on lobbying.

Ukraine should insure further strengthening and development of the BOC, as well as support initiated by local business collective action for compliance and integrity, the UNIC. Greater involvement of other state bodies, such as the Ministry of Economy and Trade and National Agency for Corruption Prevention, in the

business integrity would be important for the sustainability of this work. Moreover, the fundamental challenge of freeing the Ukrainian economy from the control of oligarchs is still to be tackled.

## **ENFORCEMENT OF CRIMINAL RESPONSIBILITY FOR CORRUPTION**

Most of the international requirements on *criminalization of corruption* have been introduced in Ukraine shortly before the adoption of the previous report and the new recommendations pointed out to the shortcomings in the statute of limitations and in the legislation on corporate liability, which unfortunately remained unaddressed since then. The new recommendations heavily focused on increasing the enforcement of the newly introduced offences through adequate training and allocation of resources to the investigators and prosecutors. This has been done through the establishment and appropriate staffing of the NABU and SAPO and their continuous training. Both agencies are very well resourced and fare well compared to other state bodies in the criminal justice system of Ukraine. They subsequently have shown good results in terms of actual enforcement of the new offences. Only investigations in cases on offer and promise of unlawful benefit, or those involving the definition of unlawful benefit which would include intangible and non-pecuniary benefits remain to be a challenge.

Quasi-criminal *corporate liability for corruption offences* was introduced in Ukraine at the time of the 3<sup>rd</sup> round of IAP monitoring and regrettably since then no changes have been made to ensure its autonomous nature, as was recommended. Corporate liability also remains to be almost entirely unenforced in Ukraine. The novelty of this legal concept is understandable, however, in order for the practice to form the report calls for a concerted push for pursuing of such liability and proposes that it be done both in terms of policy messages and in practical terms of providing training specifically focused on liability of legal persons for corruption offences.

In regards to *confiscation* Ukraine has made considerable progress since the 3<sup>rd</sup> round of monitoring in enacting legislation and establishing necessary institutions to implement an effective confiscation program to deprive criminals of access to the profits of crime and to recover assets of Ukraine that have been misappropriated. The Asset Recovery and Management Agency of Ukraine (ARMA), which is entrusted with the functions of identification, investigation, evaluation, management and confiscation of criminal assets, was established. It will be important now that ARMA has adequate resources to meet its legislative objectives and that its role and available resources are communicated to the law enforcement and prosecutorial bodies. The report also encourages Ukraine to now step up its efforts to confiscate corruption proceeds from family members, friends or nominees and to continue making progress in the effective use of the newly enacted confiscation authorities. The authorities are also urged to reinforce their action so that concrete and measurable results in terms of *asset recovery* could be shown.

**Immunities of judges** have been limited from absolute to functional with constitutional reform, this is undeniably a positive development. However practice will become the ultimate test of these changes. It is also recommended to analyse practical application of the judicial reform in order to ensure that it is not subject to misuse and that the functional immunity contributes to effective law enforcement. Regrettably constitutional reform did not address the same concern in regards to the **immunities of the MPs**. Ukraine is urged to review its legislation and ensure that the procedures for lifting immunities of MPs are transparent, efficient, based on objective criteria and not subject to misuse and to revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.

The issue of *detection* was for the first time addressed by the IAP monitoring and results of the newly created institutions have been highlighted throughout the enforcement sections of the report. NABU became the first law enforcement agency in the modern history of Ukraine that, to such a wide extent, began taking proactive measures in detecting corruption cases. Because many of the investigative techniques require court approval obtained by the SAPO, SAPO also is credited for these achievements. The number of detected cases by NABU is impressive, especially if compared to limited enforcement efforts on high-profile corruption cases before their establishment. The scale of these cases is also a

novelty in Ukraine's enforcement efforts: the cases involve top level officials, many of whom were or remain in the office; use elaborate schemes and structures; and deal with big amounts of funds. NABU and SAPO work, as well as work of other law enforcement bodies has been actively supported by the FIU, and there is hope that newly created ARMA staff will be also effectively contributing to these efforts. Cooperation between law enforcement and other non-law enforcement bodies, such as FIU, ARMA, tax, customs, etc. to ensure detection and swift investigation of corruption should be maintained and further increased through joint trainings. More should be done to ensure swift access to bank, financial and commercial records. To this end Ukraine is recommended to establish a centralised register of bank accounts of legal and natural persons, including information about beneficial owners of accounts, making it accessible for authorised bodies, including NABU, NACP and ARMA, without court order to swiftly identify bank accounts in the course of financial investigations and verification.

This report notes significant work performed by some of the responsible law enforcement and prosecutorial bodies to address **high level corruption**. The publicly filed cases by SAPO working with NABU appear to reflect aggressive and effective investigations and prosecution decisions. But such progress does not seem to be true across all of the responsible bodies. Although there appears to be more commitment by the current Prosecutor General in some areas, the report notes stalling of very serious cases brought by the former office of the general inspectorate against senior and experienced prosecutors. And finally of paramount concern is the absence of fair and effective courts. This threatens to undermine all of the progress made. The absence of a fair and effective judiciary remains a prime impediment to effective enforcement.

Fundamental changes took place in the *institutional* landscape of **criminal justice bodies in the area of anti-corruption** in Ukraine. Establishment of the NABU was finalized and it became fully operational and managed to meet the expectations of delivering real high-profile investigations. The SAPO has also since then was established and became fully operational. Again, just like the NABU is has delivered procedural guidance on NABU cases and submitted high-profile cases to courts. Unfortunately, further progress on these cases stopped there. Nevertheless, these two new institutions (the NABU and the SAPO) demonstrated that high level officials and grand corruption are no longer beyond the remit of the law enforcement in the country. They also sent some unsettling messages to the powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine. To some extent their rigor in curbing high-profile corruption and their attempts at keeping independence caused a backlash. They are being attacked in various forms: through media and legislative initiatives, investigations and prosecutions launched against their leadership and staff, as well as through various other methods applied to prevent them from doing their job. Measures need to be taken to ensure that their independence is preserved and that the cases that they have accumulated are finally resolved.

The debate on the establishment of the anti-corruption courts was initiated and found its reflection in the judicial reform, which now provides for establishment of the anti-corruption courts. However, the plans seem vague, are viewed as ineffective by many in civil society, and are not being implemented swiftly enough to address this critical failure in the justice system. It is extremely important to ensure that the cases which were investigated and brought to court by the NABU and SAPO are properly adjudicated by the judges with high integrity and independence. The failure to take this on immediately and in a way that the society believes will be fair and just may well spell the end of the anti-corruption reforms Ukraine has undertaken. Ukraine's freedom and economic prosperity depend on it getting this right.

## SUMMARY OF COMPLIANCE RATINGS

Table 1. Summary table of compliance ratings for the Third Monitoring round recommendations.

Third Monitoring Round Recommendation	Compliance Rating			
	Fully	Largely	Partially	Not
<b>1. Anti-corruption policy and political will</b>			×	
<b>2. Corruption surveys</b>			×	
<b>3. Public participation</b>			×	
<b>4. Anti-corruption prevention and coordination institutions</b>			×	
<b>5. Offence and Legal persons</b>			×	
<b>6. Confiscation</b>			×	
<b>7. Immunities</b>			×	
<b>8. International cooperation, asset recovery</b>			×	
<b>9. Investigation</b>			×	
<b>10. Specialised anti-corruption law enforcement bodies</b>		×		
<b>13. Integrity of civil service</b>			×	
<b>14. Transparency in public administration</b>			×	
<b>15. Public financial control and audit*</b>	N/A			
<b>16. Public procurement</b>		×		
<b>17. Access to information</b>			×	
<b>18. Political corruption*</b>	N/A			
<b>19. Integrity in the judiciary</b>		×		
<b>20. Business integrity</b>		×		

\* “Public financial control and audit” and “Political corruption” are not covered by the Fourth Round of Monitoring.

## INTRODUCTION

The Istanbul Anti-Corruption Action Plan (Istanbul Action Plan or IAP) was endorsed in 2003. It is the main sub-regional initiative in the framework of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN). The Istanbul Action Plan covers Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Ukraine and Uzbekistan; other ACN countries participate in its implementation. The implementation of the Istanbul Action Plan includes a systematic and regular peer review of the legal and institutional framework for fighting corruption in the covered countries.

Ukraine joined the Istanbul Action Plan in 2003. The initial review of legal and institutional framework for the fight against corruption and recommendations for Georgia were endorsed in 2004. The first monitoring round report, which assessed the implementation of initial recommendations and established compliance ratings of Ukraine, was adopted in 2006. The second monitoring round report was adopted in 2010 and the third monitoring round report – in March 2015. The monitoring reports updated compliance ratings of Ukraine with regard to previous recommendations and included new recommendations. In-between of the monitoring rounds Ukraine had provided updates about actions taken to implement the recommendations at all the IAP monitoring meetings. Ukraine has also actively participated and supported other activities of the ACN. All reports and updates are available at the ACN web-site at [www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm](http://www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm).

The fourth monitoring round under the Istanbul Action Plan was launched in 2016 according to the methodology adopted by the ACN countries. Ukrainian authorities submitted replies to the country-specific questionnaire in February 2017 along with other requested materials. The on-site visit to Kyiv took place on 27-31 March 2017. After the on-site visit, Ukrainian authorities provided limited additional information.

Mr Daniel Thelesklaf, Director of Financial Intelligence Unit, Principality of Liechtenstein, led the monitoring team. The team included:

- Mrs Inese Kuške, Department of Public Administration Policy, State Chancellery, Latvia;
- Mrs Airi Alakivi, Ministry of Foreign Affairs, Estonia;
- Mrs Mary Butler, Prosecutor, Chief of International Unit of the Money Laundering and Asset Recovery Section, Criminal Division, Department of Justice, USA;
- Mr Dirk Plutz, Associate Director, Policy Advisor at the Procurement Policy Department, EBRD;
- Mr Artur Ginatulin, Associate Director, Project Integrity, EBRD;
- Mr Davor Dubravica, Judge, Croatia, Chairperson of Regional Anti-Corruption Initiative (RAI);
- Mr Arto Honkaniemi, OECD expert, former Senior Financial Counsellor at Ownership Steering Department of the Prime Minister's Office, Finland;
- Mrs Rusudan Mikhelidze, Project Manager, Anti-Corruption Division, OECD;
- Mrs Antonina Prudko, Resident Advisor, Anti-Corruption Project for Ukraine, OECD;
- Ms Tanya Khavanska, Project Manager, Anti-Corruption Division, OECD.

National Agency on Corruption Prevention (NACP) was Ukraine's national co-ordinator for the monitoring. Mr Rouslan Riaboshapka, Commissioner, NACP, Mr Bogdan Shapka, Director of the Anti-Corruption Policy Department, Mr Igor Tkatchenko, Chief of Staff, NACP, and Mr Nazar Grom, Head of the International Department, NACP were in charge of the monitoring on behalf of Ukraine.



During the on-site visit, the monitoring team held 10 thematic panels and 3 special sessions on sector-related issues with representatives of various public authorities of Ukraine organised by the national coordinator. The OECD Secretariat arranged for separate meetings with representatives of civil society, business and international organisations. RPR Anti-Corruption Group hosted and co-organised meeting with representatives of NGOs; the Business Ombudsman Council of Ukraine hosted and co-organised meeting with business community; meeting with international community was organised by the OECD.

This report was prepared on the basis of the government of Ukraine's answers to the questionnaire, the monitoring team's findings from the on-site visit, additional information provided by the civil society, international community, the government of Ukraine, and research by the monitoring team, as well as relevant information received during the plenary meeting.

According to the methodology of the fourth monitoring round, the prevention and prosecution of corruption in state-owned enterprises (SOEs) was selected as the sector for in-depth review, with the case-study of one SOE, Naftogaz of Ukraine. However, the ACN decided that information provided during the monitoring process was not sufficient for the in-depth review of the sector and it will be conducted separately through a bis-procedure. Subsequently, the report was adopted without the in-depth sector Chapter at the ACN/Istanbul Action Plan plenary meeting in Paris on 14 September 2017.

The report contains the following compliance ratings with regard to recommendations of the Third Round of Monitoring of Ukraine: **out of 18 previous recommendations Ukraine was found to be partially compliant with 12 recommendations and largely compliant with 4 recommendations. Two recommendations of the previous round were not evaluated, as the fourth monitoring round does not cover relevant topics (Public financial control and audit, Party financing). The fourth monitoring round report includes 26 recommendations.**

The report is made public after the meeting, including at [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn). Authorities of Ukraine are invited to disseminate the report as widely as possible and, in particular, to translate it into national language. To present and promote implementation of the results of the fourth round of monitoring the ACN Secretariat will organize a return mission to Ukraine, which will include a meeting with representatives of the public authorities, civil society, business and international communities. The Government of Ukraine will be invited to provide regular updates on measures taken to implement recommendations at the Istanbul Action Plan plenary meetings.

The fourth round of monitoring under the OECD/ACN Istanbul Anti-Corruption Action Plan is carried out within the ACN Work Programme for 2016-2019 that is financially supported by Latvia, Liechtenstein, Lithuania, the Slovak Republic, Sweden, Switzerland and the United States.

## CHAPTER I: ANTI-CORRUPTION POLICY

### 1.1. Key anti-corruption reforms and corruption trends

#### *Reforms*

The Government of Ukraine took bold anti-corruption measures after the Revolution of Dignity, which was largely instigated by the endemic corruption in the country.<sup>1</sup> The first step was the adoption of a comprehensive anti-corruption package of laws, followed by the complete reform of the anti-corruption infrastructure.<sup>2</sup> The fundamental laws were enacted and the new specialised institutions -- NABU, SAPO, NACP, ARMA -- were set up.<sup>3</sup> Finalizing formation of institutional, legal and policy foundations for fighting and preventing corruption is an important accomplishment since the previous monitoring round. Unprecedented transparency achieved in several areas using modern tools is another key aspect of Ukraine's ongoing anti-corruption reforms, which includes electronic asset disclosure, e-procurement and opening up the public registries.

These important changes however are not yet reflected on actual and perceived level of corruption in Ukraine, which remain very high. Anti-corruption enforcement in general and particularly against high-level officials is stalling and meets enormous resistance, and the public trust to the Government has further decreased in recent years. According to civil society, "the new anti-corruption tools face growing resistance from the country's political and business elite."<sup>4</sup> This raises serious doubts regarding the sincerity of commitments and the political will of the Government to genuinely fight corruption.

Yet, the most pressing challenge now is how to preserve and strengthen the new institutional framework and boost anti-corruption efforts, that are constantly undermined by the governing elite. In the context of turbulence and unrest, even a small achievement does not come easy and is under the constant threat of fall-back and reversal. A small group of dedicated anti-corruption reformers in Ukraine are courageous enough to stay in the public administration, fight back and help reform their country. However, as the pressure is mounting some of them are forced to leave their offices.

Civil society of Ukraine continues to play a significant role in pushing anti-corruption reforms forward.<sup>5</sup> It is vibrant, competent and proactive, putting pressure on the Government at critical moments when the threat of reversal, blockage or sabotage of the reforms is imminent, and contributing to the implementation of the measures that take right direction. International community has played an important role in promoting anti-corruption reforms through funding conditions and technical assistance, and continue supporting Ukraine in its anti-corruption fight.

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<sup>1</sup> [Principles of Anti-Corruption Policy of Ukraine](#) (Anti-Corruption Strategy) for 2014-2017, general provisions.

<sup>2</sup> Package of anti-corruption laws was adopted in October 2014. See details in the [OECD/ACN \(2015\) Third Round Monitoring Report on Ukraine](#). Also, [Anti-Corruption Measures in Ukraine after the Revolution of Dignity: Key Legislative Aspects](#) (2016) Centre for Army, Conversion and Disarmament Studies, Kyiv, 2016.

<sup>3</sup> Most of them are adequately resourced, have their own budget and started operation as shown further in the report.

<sup>4</sup> NGO Coalition *Reanimation Package of Reforms* (2016) [Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance](#).

<sup>5</sup> European Commission (2016) [Association Implementation Report on Ukraine](#).

The third round monitoring report (2015) on Ukraine noted that “so far policy, legislative and institutional measures were not supported by strong and practical measures and enforcement”.<sup>6</sup> Since the previous round, overall Ukraine has made important steps in preventing and fighting corruption as shown further in this report. In June 2017, the European Commission, concluding that all visa liberalisation related benchmarks, including anti-corruption commitments, had been fully achieved, granted visa free regime to Ukraine.

The main anti-corruption reforms carried out since the last monitoring:

- The anti-corruption legislation package and setting up the anti-corruption institutions (NABU, SAPO, NACP, ARMA).
- E-procurement system
- Electronic system of asset declarations with the open access to data, launch of verification
- Opening up public registries and information on public finances; making accessible beneficial ownership information
- Reforms in banking and energy sector
- Constitutional amendments and new legislation on Judiciary
- Civil service law and public administration reform strategy in line with EU standards
- National police reform

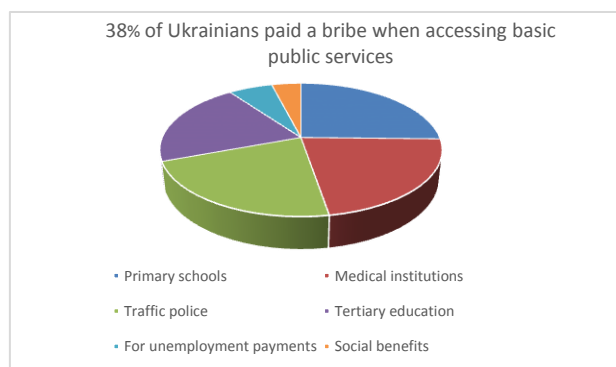
Ukraine has not yet firmly established itself on its path of steady and consistent anti-corruption reforms, but is certainly on a right trail. Resilience, persistency and full determination of the anti-corruption fight of the Ukrainian society at large will be critical in the coming years. Time has long come for Ukraine to take decisive steps to root-out pervasive corruption.

### Corruption trends

This section highlights corruption trends in Ukraine based on selected international rankings and national surveys. It shows that corruption is still endemic in Ukraine and extends to all levels of public administration. According to the IMF, corruption remains the most frequently mentioned obstacle in doing business in Ukraine.<sup>7</sup>

The results of the *Global Corruption Barometer, Europe and Central Asia (2016)* put Ukraine among the worst performing countries in the region. The citizens of Ukraine are among the countries particularly critical of the Government’s efforts to fight corruption four out of five giving negative assessment to the Government. 56% of Ukrainians think that corruption is the main problem in the country. 86% consider that anti-corruption activities have no results. Only 58% of the respondents are ready to report corruption, which is a positive increase as compared to 26% in 2013. 16% are certain that a notification on bribery will change nothing, and 14% are afraid of the

**Figure 1. Have you paid a bribe to any one of 8 services in the past 12 months?, % “Yes” of those who had contact with the service**



Source: Global Corruption Barometer, Transparency

<sup>6</sup> [OECD/ACN \(2015\) Third Round Monitoring Report on Ukraine.](#)

<sup>7</sup> [International Monetary Fund \(IMF\) Country Report \(No. 17/83\) on Ukraine \(2017\).](#)

consequences of reporting. 38% of Ukrainians paid a bribe when accessing the basic public services.<sup>8</sup> International, 2015/16, <https://goo.gl/Eqd0c9>.

Ukraine shows marginal improvement (by 2 points) in 2016 Transparency International's Corruption Perception Index. Overall improvement compared to 2013 is only 6 points. Ukraine is ranked 131 out of 176 countries with Kazakhstan, Russia, Nepal, and Iran having the same score. The comparative score and ranking of Ukraine among the countries of Eastern Europe and Central Asia is provided below.

**Table 2. Corruption Perception Index, Transparency International, Eastern and Central Europe and Central Asia**

Global Country Rank 2016	Country	CPI 2016 Score	CPI 2015 Score	CPI 2014 Score	CPI 2013 Score	CPI 2012 Score	CPI 2008 Score**	CPI 2003 Score**
22	Estonia	70	70	69	68	64	66	55
29	Poland	62	62	61	60	58	46	36
31	Slovenia	61↑	60	58	57	61	67	59
38	Lithuania	59↓	61	58	57	54	46	47
44	Georgia	57↑	52	52	49	52	39	18
44	Latvia	57↑	55	55	53	49	50	38
47	Czech Republic	55↓	56↑	51	48	49	52	39
54	Slovakia	51	51	50	47	46	50	37
55	Croatia	49↓	51	48	48	46	44	37
57	Hungary	48↓	51	54	54	55	51	48
57	Romania	48↑	46	43	43	44	38	28
64	Montenegro	45↑	44	42	44	41	34	23
72	Serbia	42↑	40	41	42	39	34	23
75	Bulgaria	41	41	43	41	41	36	39
75	Turkey	41↓	42	45	50	49	46	31
79	Belarus	40↑	32	31	29	31	20	42
83	Albania	39↑	36	33	31	33	34	25
83	Bosnia and Herzegovina	39↑	38	39	42	42	32	33
87	Mongolia	38↓	39	39	38	36	30	-
90	FYR Macedonia	37↓	42	45	44	43	36	23
95	Kosovo	36↑	33	33	33	34	-	-
113	Armenia	33↓	35	37	36	34	29	30
123	Azerbaijan	30↑	29	29	28	27	19	18
123	Moldova	30↓	33	35	35	36	29	24
131	Kazakhstan	29↑	28	29	26	28	22	24
131	Russia	29	29	27	28	28	21	27
131	<b>Ukraine</b>	<b>29↑</b>	<b>27</b>	<b>26</b>	<b>25</b>	<b>26</b>	<b>25</b>	<b>23</b>
136	Kyrgyzstan	28	28	27	24	24	18	21
151	Tajikistan	25↓	26	23	22	22	20	18
154	Turkmenistan	22↑	18	17	17	17	18	-

<sup>8</sup> [Global Corruption Barometer](#), Europe and Central Asia (2016) Fieldworks carried out in February-May 2016.

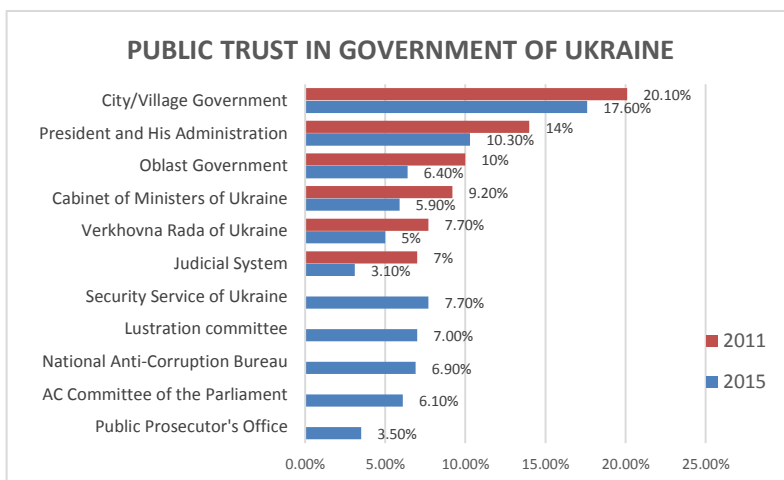
Notes: A higher score means 'less corrupt'. Until 2013, the CPI score was calculated differently (on 0-10 scale); to enable comparison, the CPI 2003 and 2008 scores were converted to 0-100 scale.

Source: Transparency International, CPI, <http://goo.gl/1Ag4HZ>

A national survey (2015) data show decrease in public trust across all levels of the Government compared to 2011 and increase of the perception of corruption. Only 14% believe that the authorities are willing to fight corruption. 94% of Ukrainians consider corruption a serious problem, after the military action in Ukraine and the high cost of living.<sup>9</sup>

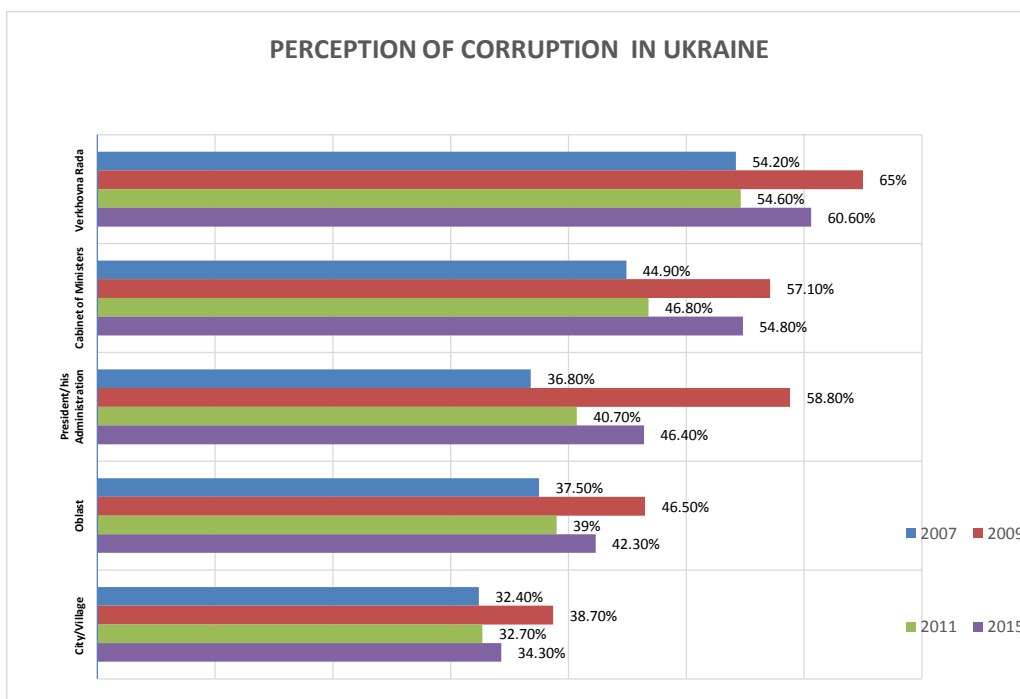
According to another national survey (2016), respondents considered corruption as the number one internal threat for the national security.<sup>10</sup>

**Figure 2 Public Trust in Government**



Source: [national corruption survey](#) conducted by the Kiev International Institute of Sociology (2015).

**Figure 3 Perception of Corruption in Public Institutions of Ukraine, Comparative Data 2011-2017**



Source: [national corruption survey](#) conducted by the Kiev International Institute of Sociology (2015)

<sup>9</sup> [National corruption survey](#) conducted by the Kiev International Institute of Sociology (2015) with the support of the USAID provides comparative data (2007, 2009, 2011, 2015).

<sup>10</sup> [National survey by Razumkov Centre.](#)

## 1.2. Impact of anti-corruption policy implementation

### **Recommendation 1.1-1.2 from the Third Monitoring Round report on Ukraine:**

- Develop and adopt without delay an action plan for the 2014 Anti-Corruption Strategy with effective measures and measurable performance indicators.
- Allocate proper budget for the Anti-Corruption Strategy and its action plan implementation.

### **Recommendation 1.3 from the Third Monitoring Round report on Ukraine:**

- Conduct regular corruption surveys to provide analytical basis for the monitoring of implementation of the Anti-Corruption Strategy and its future updates.
- Such surveys should be commissioned by the government, through an open and competitive tender.
- Use surveys conducted by non-governmental organisations for the monitoring of the Anti-Corruption Strategy implementation and adjustment of the anti-corruption policy.

### **Recommendation 1.4-1.5 from the Third Monitoring Round report on Ukraine:**

- Ensure that there is a functioning institutional mechanism for civil society participation in the designing and monitoring of the Anti-Corruption Strategy and Action Plan implementation.

### ***Anti-corruption policy documents***

The previous monitoring report positively assessed the quality of the Anti-Corruption Strategy of Ukraine for 2014-2017 (the Strategy) and its adoption by the Parliament as a law.<sup>11</sup> Its scope was considered sufficient for anti-corruption reforms in Ukraine at that time, even though the Strategy lacked the analytical basis, research and evaluation of the corruption situation in the country. The report recommended to a) develop and adopt the corresponding action plan with effective measures and measurable performance indicators and b) allocate proper budget for its implementation.

In April 2015, the Government approved the State Programme (2015-2017)<sup>12</sup> for the implementation of the Anti-Corruption Strategy (the State Programme).<sup>13</sup> According to the NGOs: “for the first time in the history of independent Ukraine, the Anti-Corruption Strategy for 2014-2017 and the State Program for Its Implementation are distinguished by outstanding textual quality and the capacity to create conditions for implementation of real anti-corruption policy.”<sup>14</sup> Several weaknesses are also pointed out: the lack of a

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<sup>11</sup> The Strategy was adopted in the form of the law in 2014 and enacted 2015. [Principles of Anti-Corruption Policy of Ukraine](#) (Anti-Corruption Strategy) for 2014-2017.

<sup>12</sup> [State Programme on Implementation of Anti-Corruption Strategy](#), approved by the Cabinet of Ministers Resolution No. 265 of 29 April 2015.

<sup>13</sup> The development of a comprehensive implementation plan was a part of the EU-Ukraine association agenda as well. See [Association Implementation Report on Ukraine Joint Staff Working Document](#).

<sup>14</sup> Shadow Report (2017) [“Evaluating the Effectiveness of State Anti-Corruption Policy Implementation”](#).

baseline assessment as well as the need to link these policy documents with the broader reform processes, for example, in healthcare, decentralization, and administrative services.<sup>15</sup>

The State Programme is built around four components: the development and implementation of state anti-corruption policy; prevention of corruption; punishment for corruption and awareness raising. The prevention block includes measures for legislature and representative authorities, public service, executive branches and state-owned enterprises and the following issue are covered: public procurement, judiciary and criminal justice bodies, private sector and access to information.

The depth of these components varies, however. For example, the anti-corruption policy and prevention of corruption that are under the NACP competence (see below) are spelled out in detail, whereas the section on enforcement is more general and superficial. In many instances, the development of new, sectoral strategies/action plans is foreseen (for judiciary, prosecution etc.) instead of concrete measures for these institutions. Also, not all the areas covered by the Strategy are included in the Programme.<sup>16</sup> The NACP explained at the on-site that for the current State Programme, the priority was launching the NACP and its proper functioning. As regards the law enforcement and the judiciary, separate anti-corruption programmes were envisaged for them not to interfere in their functioning. The monitoring team agrees on the importance of prioritizing measures for the inclusion in State Programme but also sees the need to fully implement the Strategy and include in new policy documents the measures that were left out or not fulfilled.

The State Programme has a list of expected results under each section, projecting where the government wants to be in two years-time. This can serve as a good basis for assessment of implementation. The Programme also has an annexed log-frame with the objectives, expected results and indicators under each goal that can be a good tool for monitoring. There is an attempt to introduce quantitative impact *indicators* in some parts, but there is no baseline value provided.<sup>17</sup> For example, indicators for the year 2017 in the awareness raising section are: increase of the percentage of people a) who trust anti-corruption bodies, b) are aware of corruption consequences, c) do not resort to corruption as a way of settling their businesses and d) have never had corruption experience. While these are good impact indicators, it is not clear what is the baseline to compare to or what are the targets to aim for (% of increase) and how the government is planning to use the indicator to assess the implementation (what would be the source of data).

As regards the *budget* for implementation of the State Programme, the Government reported that the activities are carried out within the budgetary allocations of the responsible agencies and with the donor support. The NACP, one of the main implementers of the programme, indeed has a separate substantial budget (see below section 1.6).<sup>18</sup> However, NGOs note that one of the obstacles to better implementation was the lack of proper funding.<sup>19</sup> The monitoring team was not provided with the budget execution reports or other information that would enable assessing the spending and sufficiency of budgetary resources for the anti-corruption programme. In addition, in the absence of the national annual report by the NACP (see below),<sup>20</sup> it is difficult to speculate, which part of the programme was not implemented and why. Nevertheless, the previous round recommendation regarding a separate budget remains unaddressed.

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<sup>15</sup> Reanimation Package of Reforms (2016) [Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance](#).

<sup>16</sup> Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)" at pg. 16.

<sup>17</sup> See Annex 3 to the programme at pg. 49-57.

<sup>18</sup> In 2017, UAH 773 million was allocated for the National Anti-Corruption Bureau; UAH 119 million for the Specialised Anti-Corruption Prosecution Office; UAH 640 million for the State Bureau of Investigations and UAH 40 million for the National Agency on detection, tracing and management of assets received from corruption or other crimes.

<sup>19</sup> Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)" at pg. 23.

<sup>20</sup> This report was due on 1 April 2017. The monitoring team has not been informed about its finalization.



Despite these deficiencies, overall, the State Programme is a sound document with clear measures and timelines that can guide the responsible agencies in implementation. The policy chapter of the State Programme foresees measures that will further improve the strategic planning quality (developing tools for collecting reliable quantitative and qualitative data and methodologies for assessing the level of corruption) and the Public Administration Reform Strategy of Ukraine provides for a substantial enhancement of strategic planning capacities in the public administration. The implementation of these measures is indeed encouraged.

The Strategy and the State Programme expire in 2017. New strategic documents should be developed based on the evaluation of the implementation of the current policy documents, meaningful CSO participation, and broad public consultations. The development of a new state programme is listed as one of the priority tasks by the NACP for 2017.<sup>21</sup> At the time of the on-site visit, the NACP representatives shared preliminary ideas about the future programme, pointing out that it should focus on eliminating factors hampering economic development, should be less complex, more concrete and set priority measures in the areas, where the best results can be achieved. After the on-site visit, the NACP reported that an interdepartmental working group was created, the analysis of corruption situation together with the report on implementation of the policy documents was ready and the first draft strategy would be sent to the Cabinet of Ministers by 1 October 2017 for comments. According to the Government, the public consultations will continue after this date before the draft is finalized and submitted to the Parliament in December.

The monitoring team was concerned to learn about three other governmental anti-corruption action plans, all adopted in 2016, not linked to the Strategy and the State Programme.<sup>22</sup> One of them the Government Resolution 803, was mentioned by several interlocutors at the on-site as an example of a good coordination involving CSOs, providing for anti-corruption measures for individual state bodies and requiring them to report on progress to the Cabinet of Ministers. However, this process does not involve the NACP and is not coordinated with the State Programme and its monitoring requirements. The monitoring team did not have a possibility to review these documents to assess the purpose and the added value of these action plans. Nevertheless, the monitoring team believes that a clear anti-corruption reform agenda and coordination should be achieved for a joint and successful action against corruption in Ukraine. Several distinct anti-corruption policy documents developed without clear coordination may create uncertainties and complicate implementation, undermining the NACP's coordination efforts. In addition, this arrangement raises issues as to the efficiency of spending the state resources. In the future, Ukraine is encouraged to take a whole-of-government approach, consolidate its anti-corruption measures and coordination efforts under a single national anti-corruption policy framework, complemented by sectoral plans or plans for individual public agencies. In the short term, it would be useful to include all these anti-corruption policy documents and analysis of their implementation in the national annual anti-corruption report.

After the entry into force of the CPL in 2015, all public agencies of Ukraine are obliged to develop *risk-based anti-corruption programmes* to be endorsed by the NACP (Art. 19 of the CPL). To support this work, the NACP approved the methodology for corruption risk assessment and recommendations for developing these programmes.<sup>23</sup> In addition, a sample anti-corruption programme was approved for legal persons.<sup>24</sup> Several public bodies have good anti-corruption programmes, among them the Ministry of Justice; National Police of Ukraine; Customs, and Judiciary, as highlighted at the on-site visit. These efforts are commendable. However, it seems that risk assessment is not yet consistently used throughout

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<sup>21</sup> Annual activity report of the NACP (2016).

<sup>22</sup> These three documents are: (1) the Government Action Program adopted on April 14, 2016 and (2) the Plan of Government's Priority Actions for 2016 adopted on May 27, 2016 cited in the Shadow Report "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" at pt. 8. Para 4 and 5 of the executive summary, as well as (3) "[Some issues of prevention of corruption in ministries and other central bodies](#)", adopted on 5 October, 2016 by Cabinet of Ministers Resolution 803.

<sup>23</sup> [Methodology for assessing corruption risks in state authorities](#), approved by NACP decision No. 126 of 22 December, 2016.

<sup>24</sup> Adopted by NACP Decision #75, 2 March, 2017.



the public agencies and the guidance and follow up by the NACP are limited. The representative of the authorized unit of the MOJ explained that the interaction is basically confined with sending quarterly reports on implementation to the NACP.

The special session with businesses showed that the mandatory anti-corruption programmes by SOEs and companies who take part in public tenders (Art. 61 of the CPL)<sup>25</sup> is a formal box-ticking exercise since the NACP only checks that such programmes are in place and does not assess their quality or implementation. However, some companies are using this tool and developing good anti-corruption programmes based on this requirement.

After the on-site visit, the monitoring team was informed that as of the beginning of 2017, 98 anti-corruption programmes were in place, among them in 17 ministries, 40 other central executive bodies, 24 regional and city administrations and 17 other bodies. Out of these 98, the NACP provided its recommendations for 58 before approval. The NACP is planning to strengthen the coordination and the methodological assistance for corruption risk identification, support the development and oversee the implementation of anti-corruption programs at the agency level in line with its mandate. The NACP is currently working on the procedure for monitoring preparation and implementation of these programmes. These measures are encouraged. Overall, it is important to develop the practice further, increase the risk assessment capacities in the agencies, overcome coordination challenges discussed below and establish an active interaction with the agencies to support their work at the individual agency level.

### ***Involvement of civil society***

The previous monitoring report stresses the key role NGOs played in developing anti-corruption policy and advocating for critical reforms in today's Ukraine. However, since CSO involvement in anti-corruption policymaking did not have a structured form, it recommended to ensuring a functioning institutional mechanism for civil society participation in designing and monitoring anti-corruption policy implementation.

After the previous round, the vibrant civil society of Ukraine continued to significantly contribute to the implementation of the anti-corruption reforms. It stays informed, competent and proactive to exert targeted pressure on the decision-makers to push forward important anti-corruption measures and expose corruption, as shown throughout this report. The coalition of leading anti-corruption NGOs *Reanimation Package of Reforms* (RPR)<sup>26</sup> continued its wide-ranging work, providing the roadmap for reforms and following up on the implementation on a daily basis, developing draft laws and proposals, advocating legislation and making alarming statements when needed. The individual work of the NGOs such as TI Ukraine, Anti-Corruption Action Centre (AntAC), NGO Lustration Committee, has also been instrumental in digging deep and understanding the problems behind the Government's dubious initiatives. Investigative journalists and media continued to actively expose corruption. It should be noted, that in the absence of the full and updated information from the Government these open sources have been useful to the monitoring team to fill in information gaps.

According to the Government, civil society plays an important role in developing anti-corruption policy in Ukraine. CSOs met during the on-site, confirmed that they have influenced elaboration of the current

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<sup>25</sup> According to Art. 61 of the CPL, anti-corruption program is obligatory for approval by the heads of: 1) state, municipal enterprises, business partnerships, the state or municipal share of which exceeds 50 percent, average number of employees for the accounting (fiscal) year exceeds fifty, and gross revenue from sale of goods (works, services) during this period is more than seventy million hryvnias; 2) legal entities that are participants of pre-qualification, participants of the procurement procedure in accordance with the Law of Ukraine "On Public Procurement", if the cost of procurement of goods and services is equal to or exceeds 20 million UAH.

<sup>26</sup> The RPR functions as a coordination center for 73 non-governmental organizations and 23 expert groups which develop, promote, and control implementation of the reforms. It was established in March 2014 after the Maidan events, and since then experts of the RPR organizations-members have been taking part in development, advocacy and implementation of more than 120 reformist laws.

policy documents, with some of their recommendations taken on board by the Government (on e-procurement, transfer of medicine procurement to international organisations, opening up the registry of beneficiary owners of companies) and some rejected (the right to wiretapping of the NABU, special fund for recovered assets, independent selection of judges of anti-corruption courts). However, they expressed concerns on the lack of opportunities to systematically work with the NACP. According to the recent shadow report the lack of cooperation between civil society and the NACP, particularly in monitoring of the state anti-corruption policy implementation is one of the critical weaknesses.<sup>27</sup> CSOs also feared that they would not be meaningfully included in developing the new policy documents, since the Public Council of the NACP was not yet set up, and no other format of cooperation was proposed to them.

By the time of the on-site visit the NACP had already initiated the process of creation of its civil society oversight body – the Public Council to include the NGOs working in the anti-corruption area selected based on the competition.<sup>28</sup> Soon after the visit the Public Council composition was approved.<sup>29</sup> Reportedly, it is already operational and held several meetings, however, several key NGOs declined participation (see section 1.4 below).

Nevertheless, sincerity of the Government's intention to work with CSOs is seriously questioned considering the recent practices aimed at restricting NGO activities. The monitoring team is troubled to learn that the CSOs have been subject to an increasing pressure, *inter alia*, with the new amendments to the asset declarations regime (see below section 2.1), attempting to discredit them, initiating criminal prosecution and even requesting to shut down some of the most active ones.<sup>30</sup> A criminal investigation was initiated by the tax police against one of the leading anti-corruption NGOs Anti-Corruption Action Centre (AntAC). The NGO believes, that the criminal proceedings constitutes a continued pressure and an attempt to block its functioning.<sup>31</sup> Another criminal case is ongoing against a well-known anti-corruption activist Mr. Vitaliy Shabunin.<sup>32</sup> TI Ukraine recently made a statement demanding the government to stop pressure on the anti-corruption NGOs. According to the TI Ukraine executive director: "Taking into account the negative trends in public prosecution against anti-corruption activists, TI Ukraine considers actions of the law enforcement agencies against AntAC as a tool of political pressure. We urge the authorities to stop using controlling functions and harassment against civil activists."<sup>33</sup> Some recent news headlines, however, inform that the war against anti-corruption activists intensified and that it acquired systematic nature extending to the local and regional level and even mounting to the physical pressure.<sup>34</sup> According to the NGOs, they are viewed as "dangerous opponents" rather than partners now.<sup>35</sup>

These worrying signals leave the monitoring team with the impression of a targeted action by the Government to suppress the anti-corruption activism that not long ago instigated the Revolution of Dignity in Ukraine. The monitoring team urges the Government to stop the practices that have chilling effect on anti-corruption activism in Ukraine and create enabling environment for civil society participation in developing and implementing anti-corruption policy.

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<sup>27</sup> Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)"

<sup>28</sup> Pre-requisite for taking part in the competition is two years of experience in anti-corruption (see below).

<sup>29</sup> Decision of the Cabinet of Ministers of Ukraine No.231-p of 5 April, 2017.

<sup>30</sup> AntAC (2017) [Who and why discredits Shabunin and his associates](#) and Mr. [Pynzenyk requested to shut down AntAC as a non-profit organization](#).

<sup>31</sup> [Tax Police Started a Criminal Proceedings against the Anti-Corruption Action Centre](#).

<sup>32</sup> TI Ukraine: [The public crackdown on anti-corruption is gaining momentum. TI Ukraine calls for information on such cases](#).

<sup>33</sup> [TI Ukraine Demands to Stop Pressure on Anti-Corruption NGOs](#).

<sup>34</sup> [How the NGOs are persecuted in Ukraine; Rivne Security Service of Ukraine demands investigative journalists a report on grants \(updated\)](#). The latest example of pressure are [physical injuries](#) of Dmytro Bulakh, the Head of Board of NGO "Kharkiv Anti-corruption Centre", prominent regional anti-corruption CSO.

<sup>35</sup> Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" pg.11.

## *Monitoring of implementation*

The monitoring of implementation of the anti-corruption policy is the function of the NACP, which in turn is reporting to the Cabinet of Ministers *quarterly*, on the progress of implementation of the State Programme based on the information received from the agencies, and *annually*, by submitting the national report on implementation of the anti-corruption strategy (national annual report), which is subsequently presented to the Parliament of Ukraine, discussed, adopted and published.

The CPL (Art. 20) explicitly details the information that should form the part of the national annual report. It includes statistical indicators ranging from criminal enforcement to anti-corruption expertise of legal acts, and to the information about cooperation with CSOs and media and performance of anti-corruption units/officials in the state bodies. The CPL also prescribes that the assessment should be based on surveys and should also include information on the implementation of Ukraine's international anti-corruption obligations. This comprehensive report is submitted to the Cabinet of Ministers annually by 1 April with the proposals and recommendations for updating the national anti-corruption policy.

However, from these statutory requirements of monitoring, the NACP has implemented only a few: it has been receiving the implementation reports from the public agencies and recently developed the national anti-corruption report (finalized in May) and the report on implementation of the State Programme (finalized in August). At the on-site, the agencies confirmed that they submit quarterly implementation reports to the NACP (on 15 February, 15 April, 15 July and 15 October). However, no follow up has taken place so far i.e. discussion at the quarterly meetings by the NACP or submitting them to the Cabinet of Ministers. The NGOs also noted that the monitoring of the State Programme has not taken place since its adoption.

During the on-site visit, the NACP was in the process of finalizing the national annual report based on the submissions from the state bodies, sociological data and risk assessment. After the visit, the monitoring team was informed that the report, was approved by the Cabinet of Ministers and presented to the Parliament in May 2017. However, its full text was never published according to civil society and thus its quality cannot be assessed. The conclusions of the report were provided to the monitoring team: the assessment and recommendations covering 14 main areas, including ratification of several international agreements, finalization of the reforms in prosecution service, intensifying the cooperation with the public, enhanced legislative framework for whistle-blower protection, unimpeded exercise of the full verification of asset declarations by the NACP, shift of the focus from punitive to preventive measures in fiscal and custom authorities.

Whereas the Government has not yet set up a monitoring mechanism to involve civil society, the NGOs have closely followed the Government efforts of implementing its anti-corruption commitments, within the framework and beyond the State Programme. An independent monitoring report with recommendations was prepared jointly by the Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters in May 2017 "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)", using information collected from the responsible agencies and the expert polls. Another shadow report "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" was prepared by the Centre of Policy and Legal Reform in collaboration with the TI Ukraine, RPR and independent experts. The independent evaluation assesses the effectiveness of the state programme and proposes the recommendations. The public discussion of the draft shadow report "The state anti-corruption policy: is it effective?" was held in a form of a roundtable and the results were reflected in the report. AntAC launched the web-site [map of anti-corruption conditionalities](#) to monitoring implementation of Government's international anti-corruption obligations.<sup>36</sup>

### *Corruption surveys*

The third round monitoring report recommended to commission regular corruption surveys and use the surveys conducted by non-governmental organisations as analytical basis for the monitoring of

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<sup>36</sup> <https://map.antac.org.ua/> the website only includes the anti-corruption conditionalities by international partners.

implementation of the anti-corruption strategy and its revisions. In addition, the CPL provides that sociological data should be used in developing the national annual anti-corruption report and gives the mandate to the NACP to conduct research and analysis of the corruption situation in the country.

To comply with these requirements, the NACP, in cooperation with the national and international experts and with the support of the OSCE, using the relevant UN standards, elaborated the standard corruption survey methodology. As indicated during the on-site visit, the survey captures dynamics and prevalence of corruption, experience and perception of corruption, as well as public assessment of effectiveness of anti-corruption activities. This survey of households and businesses will be annually commissioned by the NACP and conducted by a non-governmental polling/research institution. The results will be published on the NACP's website and disseminated through other available information channels.

By the time of the on-site visit, the pilot survey was carried out. After the on-site visit, the monitoring team learned that the survey was completed and the report with the recommendations was to be finalized soon. The results would be used for elaborating a new anti-corruption strategy. Furthermore, the Government informed that the NACP performance monitoring toolkit was developed with the support of the Council of Europe and another survey for assessing the effectiveness of the NACP and the impact of its work on the level of corruption would be carried out annually as well.

There are various national surveys conducted in Ukraine on a regular basis. Among them local surveys cited in section 1.1 of the report providing for comparative data for several years.<sup>37</sup> The Government noted however, that they cannot be used for evaluating impact as they do not follow uniform methodology and do not provide consistent data. After the on-site visit the Government reported that various latest surveys have been used in developing the national report on implementation of anti-corruption strategy that will form the basis for the new strategic documents. These include:

- [Corruption as the Biggest Threat to National Security](#) by the Razumkov Centre;
- [Nationwide Municipal Survey](#) in Ukraine by the Center for Insights in Survey Research;
- [The State of Corruption in Ukraine: A Comparative Analysis of Nationwide Research Conducted in 2007, 2009, 2011, and 2015](#) by Kiev International Institute of Sociology;
- [12 Steps to Peace: Section 4. Corruption, Lustration and Reform of Police](#) by TNS Ukraine;
- [Ukrainian Mass Media Corruption Perception Index](#) by Democratic Initiative Fund.

The monitoring team welcomes the new survey methodology, initiatives to conduct the regular surveys and using other available surveys in the strategic planning. It encourages Ukraine to fully realize its plans in connection with the corruption surveys: conduct them regularly and use the results in developing the future policy documents.

Accordingly, Ukraine is **largely compliant** with the recommendation 1.3.

### ***Implementation and impact***

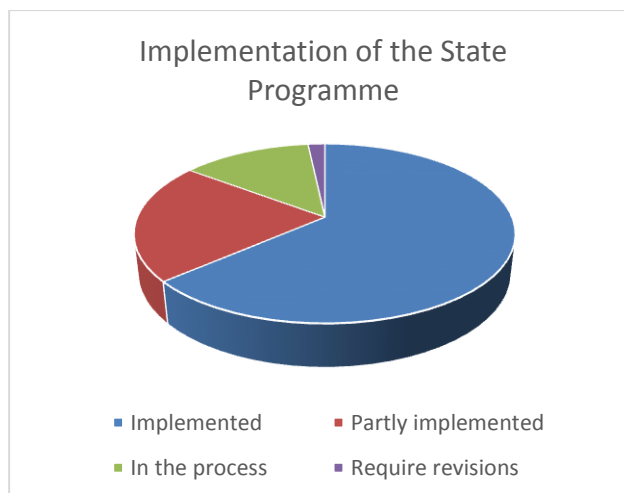
During the on-site visit, the NACP shared its preliminary findings on the implementation and impact of anticorruption policy, as no written reports were ready at that time. Regarding the level of implementation, the NACP informed that the two thirds of the State Programme have been implemented. The lack of implementation was primarily due to the late launch of the NACP (see below, section 1.6) and mainly concerned the awareness-raising block of the State Programme. However, no significant measures have been left unimplemented.

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<sup>37</sup> See section 1.1. on corruption trends above.

The report on implementation of the State Programme was finalized on 1 August 2017.<sup>38</sup> The NACP provided numbers from this report, showing that 63.6% of the measures have been implemented, confirming the above estimate.

**Figure 4. Level of Implementation of the Anti-Corruption Programme as of 1 August 2017**



Source: The data from the report on implementation of the State Programme, 1 August 2017 provided as an additional information provided by Ukraine after the on-site.

Overall, the shadow reports positively evaluate the implementation noting that whereas the measures related to the legislation were almost fully achieved, those aimed at practical implementation are lagging behind. Weak political will is underscored as one of the biggest challenges. It is noted that numerous attempts are being made to block the implementation of the reforms and to exert political pressure on new institutions to reduce their efficiency. The report further notes, that the EU visa liberalisation and IMF requirements have evidently pushed the performance forward.<sup>39</sup>

Ukraine is encouraged to implement the outstanding measures in the remaining period and transfer the rest of the measures into the new policy documents respectively.

As regards the main outcomes and impact of implementation, although the monitoring team could not study the national anti-corruption report or the report on implementation of the State Programme, the main milestones in implementation can still be identified. These are finalizing formation of the anti-corruption institutional and legislative framework, launching various innovative preventive initiatives (discussed in the section 1.1. above), and some increase in enforcement statistics. Nevertheless, these results are still not reflected on the actual level of corruption, perception of corruption or the public trust in institutions. Corruption in Ukraine is still widespread as shown in section 1.1 of this report. Thus, continuous, persistent and vigorous implementation of the reforms is needed in order to achieve the desired results reflected in the Strategy and the State Anti-Corruption Programme. The Government must take decisive steps and communicate the results to the public.

## Conclusion

Since the last monitoring, Ukraine adopted the State Programme for implementation of the anti-corruption strategy with CSO participation. It contains important anti-corruption measures on policy, prevention, law enforcement and awareness raising. The State Programme overall is a quality policy document with clear measures, timelines and indicators and represents a good tool for implementation of the most parts of the

<sup>38</sup> Available in Ukrainian on the NACP website [here](#).

<sup>39</sup> Anti-Corruption Research and Education Centre of the Kyiv-Mohyla Academy University and the NGO Anti-Corruption Headquarters (2017) "[The Assessment of the Anti-Corruption Strategy Implementation: Successes and Challenges](#)" at pg. 16.

Strategy. Ukraine did not address the recommendation on a separate budget for the State Programme, however, the anti-corruption institutions have been granted substantial budgetary allocations that should have allowed a good level of implementation. In addition, donor assistance has been used to implement some measures.

While the implementation of the State Programme has evolved during the last years, the progress has not been systematically tracked, and consequently, the Government and the Parliament have not been involved in overseeing the implementation. Neither has the State Programme been modified to take into account new developments and needs. The Public Council of the NACP was recently set up, however, the its operation and efficiency as a functional institutional mechanism for civil society participation in designing and monitoring the anti-corruption policy implementation in practice has yet to be tested. Nevertheless, several NGOs have monitored implementation of anti-corruption policy documents. The Government is encouraged to use the NGO expertise and systematically involve them in the monitoring procedure in the future.

The report on implementation of the State Programme was finalized after the on-site visit together with the national report for the implementation of the Strategy. The NACP informed that the two thirds of the measures of the State Programme have been implemented and that not implemented one third concern the awareness raising function of the NACP. This assessment was largely confirmed by the NGO shadow reports. When assessing the remaining implementation challenges, the NACP leadership noted that they are now in a survival mode and the main priority and the pressing challenge is retaining the newly created anti-corruption infrastructure. Ukraine is encouraged to finalize the implementation of the anti-corruption measures that are still pending in the current State Programme or transfer them later in the new policy document.

The Strategy and the State Programme expire in 2017. Ukraine is recommended to develop a new anti-corruption strategy using the wealth of the available evidence -- the analysis of implementation of the previous policy documents, available surveys and assessments of the corruption situation in the country and with the broad and meaningful participation of stakeholders. The NACP developed a corruption research methodology for evaluating impact of anti-corruption reforms on a regular basis. The first survey was carried out, the results should be available soon and form the basis for the policy documents.

Parallel documents and coordination mechanisms for anti-corruption policy are bad practice and should be avoided in the future. Whereas the corruption risk assessments and sectoral anti-corruption programmes in the state agencies are good practice that should be further developed and stimulated by the NACP.

In sum, the monitoring team believes that the implementation of the measures that did not have political connotation has been mostly sufficient. However, the implementation has been challenging each time when it came to the interests of the President and the governing elite. This is evident on the example of the asset declaration system starting from its launch, continued to the enforcement of the NACP mandate over the influential part of the modern Ukrainian government (see sections 2.1. and 2.2 of the report). Civil society and international partners had to get involved each time to the rescue of progressive anti-corruption initiatives. The implementation was also stimulated by the international obligations of Ukraine, particularly EU visa liberalisation and IMF conditions.

In conclusion, major output of the anti-corruption reforms in Ukraine since the last monitoring has been finalizing complete restructuring of the anti-corruption infrastructure and laying down the legislative, policy and institutional foundations for fighting and preventing corruption. The challenge however now is how to ensure that these results and processes are irreversible and that the newly established institutions form into independent and resilient actors. Genuine political support and resistance to undue influence is key to make change.

The recent developments aimed at discouraging the anti-corruption activism in Ukraine are alarming and must be stopped urgently. The monitoring team calls on Ukraine to provide enabling environment for open and full participation of civil society in anti-corruption policy development and monitoring.

Ukraine is **partially compliant** with the recommendations 1.1.-1.2; **partially compliant** with the recommendation 1.3 and **not compliant** with the bullet point one of the recommendation 1.4.-1.5 of the previous monitoring round.

#### New recommendation 1: Anti-corruption policy

- 1. Ensure full implementation of the Anti-Corruption Strategy and the State Programme regardless of the political sensitivity of the measures involved.**
- 2. Ensure that the anti-corruption policy documents are evidence-based, developed with the meaningful participation of stakeholders and in coordination with the relevant state bodies. Ensure that the anti-corruption policy covers the regions. Provide resources necessary for policy implementation.**
- 3. Conduct corruption surveys regularly. Evaluate results and impact and update policy documents accordingly. Publish the survey results in open data format.**
- 4. Increase capacity and promote corruption risk assessment by public agencies. Support development and implementation of quality anti-corruption action plans across all public agencies.**
- 5. Regularly monitor the progress and evaluate impact of anti-corruption policy implementation, including at the sector, individual agencies and regional level, involving civil society. Ensure operational mechanism of monitoring of anti-corruption programmes. Regularly publish the results of the monitoring.**
- 6. Ensure that civil society conducts its anti-corruption activities free from interference.**

#### 1.3. Public awareness and education in anti-corruption

##### Recommendation 1.4-1.5 from the Third Monitoring Round report on Ukraine:

- Include systemic awareness-raising and anti-corruption public education in the Government anti-corruption measures.
- Engage civil society in the development and delivery of education and awareness raising activities.

##### *Public awareness*

The previous monitoring report pointed out the formalistic approach to the anti-corruption awareness before the Euromaidan and recommended Ukraine a) to include awareness raising and anti-corruption education in the policy and b) engage civil society in development and implementation of these measures.

The first part of the recommendation has been addressed by Ukraine, the State Programme extensively covers the anti-corruption awareness raising, diverse measures are included in the State Programme.<sup>40</sup>A

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<sup>40</sup> Various awareness raising activities are foreseen in relation to the concrete reforms to gain public support for these reforms, such as: election and political party financing (responsible agency: Ministry of Justice); conflict of interest (specific target groups: MPs and City Councils. Responsible agencies: NACP, Parliament and the Ministry of



dedicated section IV focuses on forming negative attitudes towards corruption and includes various results and indicators.

Expected Results	Indicators of assessment (baseline year 2015)
<ul style="list-style-type: none"> <li>• The citizens' attitudes to corruption and actions in situations of corruption risks have changed;</li> <li>• The level of trust to anti-corruption state bodies has increased;</li> <li>• The share of citizens who voluntarily report about corruption has increased;</li> <li>• The share of persons who have corruption experience has decreased.</li> </ul>	<ul style="list-style-type: none"> <li>• Share of those who recognize corruption as a way to settle a problem;</li> <li>• Trust to anti-corruption state bodies</li> <li>• Share of those aware of corruption and its consequences;</li> <li>• Voluntarily report about corruption offence;</li> <li>• Have never had corruption experience.</li> </ul>

Under the current setup, the NACP is responsible for anti-corruption awareness and education. However, this is the area in which the NACP has underperformed the most according to the leadership of the agency and the stakeholders. The one third of the measures of the State Programme that have not been implemented yet are related to this component. At the same time, the NACP worked on awareness raising on specific reform areas, such as conflict of interests, asset declarations and political party funding as shown below. It also organized trainings on certain aspects of anti-corruption legislation for public sector employees covering 1700 persons overall. The NACP also developed its draft communication strategy and presented it for public discussion. The communication strategy was adopted on 23 August, 2017. In addition, the Ministry of Education developed a 17-hour long training course for 10-11 grades "Prevention of Corruption through the Eyes of Pupils". However, according to civil society, this course is not obligatory for schools and exists only on paper. In this connection, important to highlight is that in 2016, the UNDP and the educational project "EdEra" developed "Anti-corruption Lesson", which according to the CSOs covered some schools and was successful.

According to the NGO shadow report, the objectives of the State Programme with regard to the awareness raising have not been reached. The NACP should swiftly start implementation of the communication strategy, allocate budget for awareness and use innovative tools and modern technologies to achieve the results.<sup>41</sup>

As regards the second part of the recommendation on involving the NGOs, Ukraine has not taken measures in this regard. However, NGOs have been active. TI Ukraine highlighted the following anti-corruption campaigns: [Corruption must be spotted](#); ["De-Corruption Communication" Platform](#); [Corruption kills](#); [They would not keep silent](#). According to the TI Ukraine's Annual Report for 2016, 800 billboards have been put in 15 regions to raise awareness of corruption, 700 people received lectures on how to contribute to the fight against corruption.<sup>42</sup>

### **Conclusion**

Ukraine included systemic awareness-raising and anti-corruption public education in the anti-corruption policy documents. However, the implementation has been lacking mainly due to the delays in starting up

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Justice); increasing transparency of the Parliament and City Councils (Responsible agency: Ministry of Justice); asset declarations (NACP And State Committee on Television and Radio Broadcasting); whistleblowing (NACP, NABU, State Committee on Television and Radio Broadcasting); new law on prevention of corruption (target group Businesses. Responsible agency: NACP and Business ombudsman).

<sup>41</sup> Shadow Report (2017) ["Evaluating the Effectiveness of State Anti-Corruption Policy Implementation"](#), pg. 19.

<sup>42</sup> TI Ukraine (2016) [Annual Report](#).



the NACP. Ukraine has not engaged with civil society in the development and delivery of the education and awareness raising activities either. The NACP communication strategy was adopted recently. Ukraine must proceed swiftly with the implementation of the measures included in the State Programme and the communication strategy, target awareness raising activities to the sectors most vulnerable to corruption, allocate sufficient resources to awareness raising, measure the results and plan the next cycle of activities accordingly.

Ukraine is **partially compliant** with the recommendations 1.4.-1.5 of the previous monitoring round.

#### **New recommendation 2: Anti-Corruption awareness and education**

- 1. Implement awareness raising activities envisaged by the anti-corruption policy documents and the NACP communication strategy.**
- 2. Allocate sufficient resources for implementation of the awareness raising measures.**
- 3. Measure the results of awareness raising activities to plan the next cycle accordingly.**
- 4. Target awareness raising activities to the sectors most prone to corruption, use diverse methods and carry out activities adapted to each target group.**

#### **1.4. Corruption prevention and coordination institutions**

##### **Recommendation 1.6 from the Third Monitoring Round report on Ukraine:**

- Ensure effective operation of the new National Council on Anti-Corruption Policy; consider assigning the function of its secretariat to the National Agency for Corruption Prevention.
- Establish without delay and ensure effective and independent functioning of the National Agency for Corruption Prevention.
- Ensure that the budget of the National Agency for Corruption Prevention provides for the necessary resources and operational autonomy.
- Subordinate anti-corruption units/officers in executive bodies to the National Agency for Corruption Prevention.
- Provide necessary training and other capacity building support to the staff of the National Agency for Corruption Prevention.
- Develop effective mechanism of coordination between the National Agency for Corruption Prevention, National Anti-Corruption Bureau, and other executive, legislative and judiciary authorities.
- Ensure in practice functioning of an effective mechanism for NGO participation in the work of the National Agency for Corruption Prevention.

The main accomplishment under the corruption prevention and policy coordination institutions pillar after the third monitoring round is the establishment and resourcing of the *National Agency on Prevention of Corruption (NACP)* – the key institution with the potential of playing an instrumental role in the anti-

corruption infrastructure of Ukraine,<sup>43</sup> however, facing serious challenges now as described further in this report. A high-level supervisory body, the *National Council for Anti-Corruption Policy (the Council)* was also launched and held several meetings. However, it lacks secretariat support and remains passive. With the adoption of the Law on Prevention of Corruption (CPL), the Parliament of Ukraine has acquired the central role in anti-corruption policy<sup>44</sup> and its *Committee on Corruption Prevention and Counteraction of the Verkhovna Rada of Ukraine (Anti-corruption Committee)* has reportedly been active.<sup>45</sup>

This section focuses on the operation of the institutions responsible for the anti-corruption policy coordination and prevention of corruption. The specialized anti-corruption law enforcement bodies (NABU, SAPO and others) are discussed in Chapter 3. It must be noted, that the monitoring team did not have a possibility to interview the Council or the Anti-Corruption Committee representatives. Information on their activities in the answers to the questionnaire was also limited, thus the sections are mostly based on the complementary sources.

### ***National Agency on Corruption Prevention***

#### *Mandate, composition, independence, participation of non-governmental stakeholders*

The third monitoring round report assessed the laws establishing the National Agency on Prevention of Corruption (NACP) and the National Anti-Corruption Bureau (NABU) as "the major break-through in the anti-corruption institutional reform in Ukraine." However, concerns were expressed regarding the apparent delay of launching the NACP and the recommendations were put forward on its swift creation and independent functioning.

The NACP is an independent central executive body with the special status established under the CPL. Its mandate is broad, ranging from the anti-corruption policy development and implementation, to the prevention of corruption, including the issues of conflict of interests and ethical standards, management and verification of asset declarations, protection of whistle-blowers and political party financing.<sup>46</sup> The NACP also manages two electronic registers: the electronic declarations and the register of persons having committed corruption or related offences. Its anti-corruption policy function extends to the research and analysis, developing, coordinating and monitoring of implementation and endorsement of anti-corruption programmes in all public agencies, coordinating the anti-corruption units in state bodies, providing methodological guidance and consultations, public awareness raising and international cooperation.<sup>47</sup> (Art 11 of the CPL).

The NACP is composed of five members (Commissioners) selected with the open competition conducted by a special selection commission. The work of this collegial body is supported by a structured administration. The Commissioners are appointed by the Cabinet of Ministers for 4 years with the

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<sup>43</sup> In its [fourth evaluation round report](#) on Ukraine (2017) published recently GRECO noted: "GET wishes to underscore the significance of the establishment of the NACP and the potential this institution has to further contribute to anticorruption efforts in the country. The creation of the NACP has not been an easy path: legislation setting up the NACP dates back to 2014, but the body began operations only in 2016. Thus, the NACP is a very new body, which needs to acquire capacity, experience and confidence as it operates. The GET was made aware of certain shortcomings in the so far limited record of the NACP: these points, which will be described below in detail, rather than questioning the pivotal role that the NACP is to play in the anticorruption field, call for further readjustments and fine tuning of the system." The NACP took over the anti-corruption policy function from the Ministry of Justice.

<sup>44</sup> It adopts the anti-corruption strategy and approves the annual report on its implementation through its hearing together with the revisions of the strategy as needed (Art. 18 of the CPL).

<sup>45</sup> Andrii Marusov, Head of the Board, Transparency International Ukraine (2016) [Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance](#).

<sup>46</sup> Conflict of interests management, asset declarations and whistle-blower protection are discussed in Chapter 2 of this report.

<sup>47</sup> The NACP took over the anti-corruption policy function from the Ministry of Justice of Ukraine. According to the State Programme, NACP is the key institution to oversee state anti-corruption policy: monitoring and coordination of the programme are among its tasks. As a result, the anti-corruption policy department of the Ministry of Justice was abolished.

possibility of renewal for another term. The law provides for independence guarantees to the NACP members as reflected, *inter alia*, in the procedures for selection, appointment and dismissal, funding and remuneration levels. Nevertheless, these statutory guarantees have been recently questioned considering the challenges surrounding the operation of the NACP as discussed below. The NACP is accountable to the Parliament but it also reports to the Cabinet of Ministers on implementation of anti-corruption policy quarterly and annually. The body is competent to take decisions when at least half of its composition, i.e. 3 commissioners, is appointed.

The NACP was formally established on 18 March 2015,<sup>48</sup> but it did not start operation until 15 August 2016. Substantial time was devoted to selection of members, drafting secondary legislation and recruiting the staff of the agency. When commenting on the reasons for delay, TI Ukraine stated that the Government was deliberately and unjustifiably postponing competitions to select the NACP members and that there were numerous attempts to influence the selection process to appoint politically favourable candidates. According to the TI Ukraine, even after the selection was finalized, the Government did not provide the NACP with the necessary premises, equipment and funding on time to hinder its operation. Then “civil society and international partners became involved, using all instruments at their disposal - from official statements to street protests.”<sup>49</sup>

Speaking about the deficiencies of the selection and launching process, the NGO coalition RPR, furthermore, stated that the Government failed to secure independent and effective composition of the NACP despite the statutory guarantees.<sup>50</sup> The selection panel was manipulated and the decisions were made with the violation of the procedure. As a result, at least two appointed members are loyal to the Government selected in the situation of the conflict of interest and nepotism that marked the selection process.<sup>51</sup> It was also maintained, that while civil society managed to secure open, objective and fair competitions for NABU and SAPO leadership, as an example, it failed to keep an eye on and do so for the NACP.

At the time of the on-site visit, four out of five members (commissioners) of the NACP had been appointed and one position remained vacant. Following the on-site visit, the monitoring team learned about the resignation of another commissioner leaving the NACP with 3 members that is just enough for it to be operational (see below). The reason behind the resignation has not been announced, however, the Commissioner noted that the NACP urgently needs the reset. In August 2017, another NACP commissioner resigned. On 15 August 2017, a new commissioner was appointed and currently the NACP functions with the three commissioners. Soon after the appointment of a new commissioner, it was reported that he voted in violation of the conflict of interest rules, which is a ground for a disciplinary or an administrative action. However, the NACP declined the existence of conflict of interests and no action followed.<sup>52</sup>

The NACP found itself in a major crisis due to the electronic asset declaration system overload just before the deadline of submission of declarations by the second wave declarants. During the on-site visit, the monitoring team could witness the protests by declarants gathered at the entrance of the premises of the NACP, fearing the consequences of non-submission of declarations and demanding the answers to their questions (see details below in section 2.1). As a result, the Prime Minister called on the commissioners to resign, however, no resignations followed. Verkhovna Rada called the NACP Chair to report in the Parliament. The Minister of Justice made a statement that the NACP represents an institutional error that must be corrected. “The collegial body is a collegial irresponsibility, we are doing all the work for the

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<sup>48</sup> Resolution of the Cabinet of Ministers of Ukraine No 118 of 18 March 2015.

<sup>49</sup> Andrii Marusov, Head of the Board, Transparency International Ukraine (2016) [Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance](#).

<sup>50</sup> For more details on the mandate and independence guarantees of the NACP, see the [CPL and the OECD/ACN \(2015\) Third Round Monitoring Report on Ukraine](#).

<sup>51</sup> RPR: [The Government of Ukraine failed to secure independent and effective composition of the NACP](#)

<sup>52</sup> [The member of the NACP is accused of conflict of interest already](#).

NACP now, as soon as the second wave declarations will be submitted, we will propose the bill to reform the agency”, stated the Minister.<sup>53</sup>

During the on-site visit, held at the premises of the NACP in March 2017, the monitoring team had an opportunity to meet the leadership of the NACP and interview several of its Commissioners and the staff members. Based on what it has observed, in terms of the resources, staff capacity and competences of the NACP, the monitoring team believes that substantial work has been carried out in a very short period of time to find premises, to staff and to resource the NACP, put in place voluminous secondary legislation necessary for realisation of its broad mandate and make it operational in most of its functions. This is a significant achievement that should not be underestimated, especially considering the turbulent context of Ukraine.

Having said that, it is also evident, that the operation of the NACP is seriously hampered at least with the following factors: a) outside interference; b) decision-making procedure and the need for some of its decisions to be approved by the MOJ c) coordination weaknesses, challenges related to its image and authority in the current administration of Ukraine and d) the capacity needs of its new staff.

The high-level representatives of the NACP and the Parliament repeatedly stressed outside pressure on the NACP and unlawful interference in its functioning as a pressing challenge the NACP is facing now. This has been a major point of criticism in relation to the performance of the NACP by civil society as well corroborated with the specific examples (see the section 2.1 below).

As to the decision-making procedure, the criticism mainly related to the collegial decisions of the NACP which often resulted in ties in view of its actual composition of 4 commissioners. Ironically though, with 3 commissioners now this seemingly does not represent a challenge, as more decisions have been approved by the NACP lately (see section 2.1 on verification of asset declarations). Another weakness is that some of the important decisions (such as secondary legislation) of the NACP do not have a binding force unless approved by the MOJ. This has created problems in practice, for example, in relation to the verification of asset declarations, when the MOJ refused to register the NACP’s decree several times and reportedly, developed its own version of the procedure, which was eventually adopted.<sup>54</sup> This arrangement limits the independence of the NACP.<sup>55</sup>

The challenges in coordination and authority of the NACP were evident to the monitoring team during the on-site which was not attended by several important agencies (see below). Thus, whereas the staff and competences of the NACP are growing and do not represent that big of a challenge for its efficient functioning, the outside interference certainly does. Accordingly, the independent and effective functioning of the NACP, recommended by previous monitoring round, has yet to be secured.

The debate around the reform of the NACP continues in Ukraine. There are several bills in the Parliament providing for dismissal and selection of the NACP members anew. One of these drafts, reportedly, envisages changes in the selection of NACP commissioners and the decision-making procedure of the NACP and is aimed at strengthening it, whereas other two aim at taking away the independence of the NACP and placing it under the control of the Government.

The monitoring team calls on Ukraine to end the upheaval and chaos around the NACP and ensure its independent functioning, including by taking legislative measures if necessary, to free it from outside interference and allow it to build the capacity, experience and authority and establish itself as a strong corruption prevention agency of Ukraine. The monitoring team concurs with GRECO that: “the actual independence of the NACP, both on paper and in practice and its means and resources are to be fully secured as a matter of priority”.<sup>56</sup>

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<sup>53</sup> [The statement of the Minister of Justice P. Petrenko Regarding the NACP.](#)

<sup>54</sup> [Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.](#)

<sup>55</sup> GRECO (2017) [fourth evaluation round report on Ukraine](#), para 29.

<sup>56</sup> GRECO (2017) [fourth evaluation round report on Ukraine](#), para. 2.

As regards CSO participation, at the time of the on-site visit, the NACP was in the process of setting up a Public Council which is a public oversight body composed of 15 representatives of NGOs selected on the basis of a competition. The procedure for conducting the competition to form the Public Council was approved<sup>57</sup> at that time and the main NGOs working on anti-corruption have agreed to participate in the selection process (TI Ukraine, Reanimation Package of Reforms, Anti-Corruption Headquarters) and another resolution of the Cabinet of Ministers approved the action plan for conducting the competitions. As noted above, the selection of the NACP Public Council members took place after the on-site visit, the composition was approved in April and the Public Council started operation. Reportedly, only several experts of RPR participated as candidates for the Public Council. The NGO Anti-Corruption Headquarters helped to organize transparent selection process. Many prominent experts and NGOs however, (e.g. TI Ukraine, AntAC) refused to participate in the selection process because of the low trust to the NACP leadership and ineffectiveness of the Agency. As discussed above the Public Council was recently set up but its operation and efficiency is yet to be tested.

### ***Resources and funding***

The previous monitoring report recommended Ukraine to ensure that the NACP is provided with the necessary resources that support its operational autonomy and building its staff capacity. The NACP is funded from the state budget. Its operational funds of the NACP in 2016, excluding funding that goes to the political parties, were about 3.1 million EUR (95.4 million UAH).<sup>58</sup> Reportedly, the NACP spent only 69.5% of the allocated amount, apparently due to its late launch. In 2017, the funding of the NACP increased by about 71% reaching about 5.3 million EUR (163 million UAH). According to the NACP, its budget is still insufficient for the development of the NACP capacity and full implementation of its functions. As an example, no funding is provided for establishment of territorial units/regional offices of the NACP.

The total staff capacity of the NACP is 311.<sup>59</sup> By the time of the on-site visit in March 2017, the chief of staff and its deputy were already appointed and 211 persons recruited, among them 92 based on the merit-based competitions and the rest by transferring them from the equivalent positions of the civil service (Art. 41.2 of the CSL). The NACP was already registered as a legal person and had its premises. The agency had also approved numerous regulations necessary for its functioning, this has been critical, since, firstly the number of regulations is very high, every small procedure is approved by a separate act and secondly, the Minister of Justice has to register a normative act before it enters into force and, as mentioned above, it has refused to do so several times.

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<sup>57</sup> Resolution of the Cabinet of Ministers of Ukraine No. 140 dated 25 March 2015.

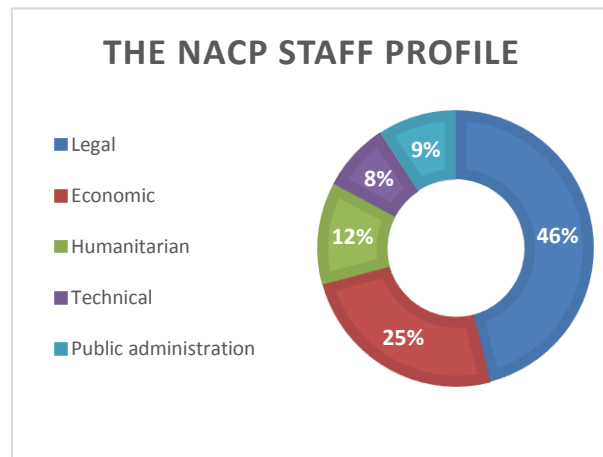
<sup>58</sup> Please note that the total budget of NACP was 486.4 million UAH. (about 18 million EUR) of which 391 million UAH. (about 14.5 million EUR) goes to the political parties.

<sup>59</sup> As determined by the Cabinet of Ministers (Cabinet of Ministers of Ukraine resolution № 244 from 30 March 2016).

The NACP is divided into thirteen departments, five of them are substantive, related to its mandate (anti-corruption policy; prevention and detection of corruption; conflict of interests; financial control and lifestyle monitoring and department of prevention of political corruption) and eight are performing support functions. Supervision of the substantive departments are split among the Commissioners. The staff are civil servants with the dominant age category between 30-40 years.

During the on-site visit, it was mentioned that the salaries at the NACP are higher than similar salaries in other state bodies and that many people apply for the NACP's vacancies (average 9 candidates per vacancy). According to the NGOs, however, the high salaries are not accompanied with the high performance.<sup>60</sup> The recent decision of the head of the NACP to prescribe the bonus for herself "for work" in the midst of the asset declaration system crisis faced major criticism.<sup>61</sup>

Figure 5 the NACP Staff Profile



Source: additional information provided by the Government of Ukraine

The monitoring team had a good impression of the NACP staff it met, their competencies, determination and dedication to work. The NACP staff are undergoing continuous training and have participated in several study visits (Georgia, Romania, Poland, Latvia, Estonia). Only in 2016, 22 trainings have been organised with the support of the international and national partners. The NACP has approved the training plan for its staff. Capacity building is also provided in the priorities approved by the NACP in December 2016 and the NACP Development Strategy 2017-2020 and its implementation plan prepared by the NACP staff with the assistance of the EU Anti-Corruption Initiative and adopted by the NACP in June 2017.

Resourcing the NACP and recruiting its staff has been one of the major achievements after the previous monitoring round, as mentioned above. Although current level of staffing and budget are fairly adequate and commendable, Ukraine is encouraged to fully resource the agency, provide necessary budget for its territorial units and staff capacity building.

### *Coordination at the central and municipal level*

The NACP is responsible for coordinating the anti-corruption policy implementation and is interacting with the state bodies at the local and municipal level in exercise of its mandate. It also works with the designated anti-corruption officers in SOEs and private companies (see section 2.6). The previous report recommended developing effective mechanism of coordination between the NACP, NABU and other executive, legislative and judicial authorities and subordinating the anti-corruption units/officers in the state bodies to the NACP.

<sup>60</sup> About high salaries and underperformance of the NACP commissioners [Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.](#)

<sup>61</sup> 5 April 2017, the [head of NACP granted herself a bonus "for work"](#).



The Government reported that the NACP signed MoUs with and the Ministry of Justice, the State Service for Financial Monitoring, the State Fiscal Service, the State Audit Office, the Council of business Ombudsman and the NABU to ensure better coordination and exchange of information. Yet, the NACP has access to only 11 out of 23 relevant databases now. The NACP started referring cases to the law enforcement agencies. However, the coordination weaknesses and difficulties are still evident. Firstly, it is telling that the NABU was not granted the access to the electronic asset declarations until May 2017 and reportedly the lack of direct access to the database is still an issue (see the section on asset declarations in chapter 2). Secondly, during the on-site visit, the level of participation in the sessions as well as poor preparation for the monitoring exercise were clear indicators of the coordination challenges the NACP is facing within the administration of Ukraine. As a national coordinator of the OECD/ACN, the NACP was responsible for coordinating the monitoring exercise. However, the representatives of the most of the institutions met during the on-site stated that they have not been consulted when preparing the answers to the monitoring questionnaire and the key institutions responsible for anti-corruption did not show up at the sessions at all (Presidential Administration, Cabinet of Ministers, Ministry of Justice, E-Government agency and others.)

One of the statutory functions of the NACP is to coordinate, provide methodological support and analyse the efficiency of the performance of the units/officers authorized for prevention and detection of corruption (anti-corruption units/officers) that should be appointed by each public agency (Art. 11. 11 of the CPL). The functions of these units are further defined by the Cabinet of Ministers Resolution and include support and monitoring of implementation of measures to prevent corruption, methodological and advisory assistance, research, international cooperation, detecting and reporting violations and training.<sup>62</sup> Notably, even after the establishment of the NACP anti-corruption units/officers are still subordinated and coordinated by the Secretariat of the Cabinet of Ministers, which retains the functions related to the coordination and methodological assistance of the authorized units/officers.<sup>63</sup> The NACP is only consulted before their dismissal.<sup>64</sup> Notably, the draft CPL included the requirement for the network of the authorized units and further functions of the NACP in this regard, however, the relevant provisions were removed by the Parliament before the adoption of the law.

To guide the work of the authorized units/persons, the NACP approved the methodological recommendations and gave 96 consultations to the authorized units in 2016. It also carried out the assessment of their work in 84 state bodies,<sup>65</sup> 64 of which had authorized units/officers, one did not have it at all and in 19 bodies, these functions were combined with legal, human resources or internal audit functions. Several anti-corruption officers confirmed at the on-site that they submit the implementation reports to the NACP regularly. Other than this, it was evident that little has been done by the NACP in practice in order to coordinate and work with these units/officers. Thus, further measures are needed firstly to comply with the recommendation of the previous monitoring round and secondly to strengthen these units, their role and ensure effective coordination, assistance and methodological guidance by the NACP.

The NACP has the authority to request to Government to create regional commissions if necessary to enhance the coordination at the regional level, according to the CSO shadow report the process was launched in 2016,<sup>66</sup> however no regional commissions have been established as of now, as noted by the Government the funding was not sufficient to establish them in 2017.

### ***The Parliament and its Anti-Corruption Committee***

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<sup>62</sup> Cabinet of Ministers Resolution No 706, 4 September 2013 on [the issues of prevention and detection of corruption](#).

<sup>63</sup> Ibid, sections 3.2 and 12.

<sup>64</sup> The Procedure for Granting Consent by the National Agency for Dismissal of a Person Responsible for Implementation of the Anti-Corruption Program was adopted (decision No. 74 dated 7 October 2016 registered with the Ministry of Justice of Ukraine on 28 November 2016 under the number 1542/29672).

<sup>65</sup> Reportedly there are more than 500 such units/persons.

<sup>66</sup> Shadow Report (2017) [“Evaluating the Effectiveness of State Anti-Corruption Policy Implementation” pg. 21](#)

The Parliament acquired an important role in developing and monitoring implementation of anti-corruption policy with the adoption of the CPL. It is responsible for adoption of the anti-corruption strategy and monitoring implementation through the hearing and approval of the annual national anti-corruption reports. (has not taken place so far). Limited information was provided regarding the anti-corruption activities of the Parliament. At the on-site, the monitoring team met the representatives of the administration of the Committee that informed only about the anti-corruption expertise of legal acts by the Committee, which is discussed in the section 2.4.

The NGO shadow report noted that “in 2014-2016, the Parliament has distinguished itself as a highly productive body in the anti-corruption policy area, since all the basic anti-corruption laws and the absolute majority of those anti-corruption laws that were submitted for its consideration have been adopted [...] At present, this “policy” is chaotic (especially when it comes to the Parliament members’ initiatives), situational (for example, as happened with implementation of the Visa Liberalization Action Plan), and occasionally even intuitive.” It recommended “creating conditions for adequate expert support to the Committee’s Secretariat, in view of to its excessive overload with the draft laws subject to anti-corruption expert evaluation”<sup>67</sup>

### ***National Council for Anti-Corruption Policy***

The National Council for Anti-Corruption Policy was established in 2014 as a high-level coordination advisory body under the President of Ukraine, but its composition was not approved by the time of the previous monitoring.<sup>68</sup> The third round report assessed its creation as a step to the right direction and recommended Ukraine to ensure its effective operation.

The Council is tasked with supporting the development of anti-corruption policy, its implementation and coordination and the implementation of the recommendations of international organisations (OECD/ACN; GRECO and others). It is composed of the executive, legislative and judicial branches, representatives of NGOs, experts and academia, local self-government, businesses, and the Business Ombudsman of Ukraine.<sup>69</sup> The decisions of the Council are binding only if adopted as normative acts by the Government or the Parliament.

According to the Government, the organizational and analytical support to the Council is provided by the Presidential Administration of Ukraine in cooperation with the Ministry of Justice. However, at the time of the on-site visit, the relevant staff was not appointed. The monitoring team was informed that the functions of the Secretariat are now carried out by one person - the head of the Department on Law Enforcement Bodies and Combating Corruption, who performs a number of other duties. In addition, the monitoring team did not have an opportunity to meet the relevant representatives of the Council to discuss the current work or the future plans.

The previous recommendation required Ukraine to consider that the NACP performs the functions of the Secretariat for the Council. The NACP informed that they intended to include this issue in the agenda of the Council for December, 2016 session. However, the session was cancelled and the Council has not been convened since then. Thus, assigning the functions of the secretariat for the Council has not been considered.

During the past two years, the Council held only four meetings and discussed the issues ranging from the general corruption situation, to challenges related to establishing the institutions such as the SAPO and the NABU, EU visa liberalisation conditions and the judicial reform. According to the Government responses, the activities of the Council positively influenced the formation and organization of the new anti-corruption bodies. Two instances were mentioned at the on-site visit by the NACP representatives, when

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<sup>67</sup> Ibid.

<sup>68</sup> [Decree of the President of Ukraine from October 14, 2014 № 808 approved the Regulations on the National Council.](#)

<sup>69</sup> Approved by the Decree of the President of Ukraine from September 26, 2015 No. 563 and revised in November 2016 (Presidential Decree No 482).



the Council was instrumental to carry the anti-corruption agenda forward: the first was the competition of the NACP members and the second, e-declarations. The NACP explained that this platform is important, since it unites all key anti-corruption institutions and state agencies as well as civil society and academia and it is attended by the President personally. According to the NACP, there is no other comparable platform, thus, maintaining and activating the Council is an important priority. The shadow report underscores the importance of using the full potential of this body as well.<sup>70</sup> However, according to some NGOs, the role of this body is nominal as it is not operational due to the rare meetings. It is not involved in active decision making process on anti-corruption reforms, "its voice is not present in public domain during the discussions of anti-corruption policies" and although the NGOs participate in its work, they are selected by the President and the process is not transparent.

The monitoring team shares the opinion regarding the need of such an overarching political body in the context of Ukraine. It believes that the Council can be a useful platform to attract political attention to the implementation of the anti-corruption agenda and pushing the stalled initiatives forward. The Council's meetings would help develop a whole-of-government approach to anti-corruption work in Ukraine and facilitate its coordination, supporting the work of the NACP. Thus, the monitoring team encourages Ukraine to ensure active and efficient operation of the Council. Furthermore, the mandate of the Council *vis-a-vis* the NACP should be clarified and the capacity of the secretariat of the Council strengthened.

## Conclusion

Since the last monitoring round, Ukraine has made substantial efforts for launching its anti-corruption policy coordination and prevention body, the National Agency on Corruption Prevention (NACP). The establishment and independent operation of the NACP faced numerous hurdles, from the attempts to manipulate selection of its Commissioners, to delaying its launch by rejecting the secondary legislation it needed for operation, to political interference in its enforcement mandate. Nevertheless, after less than eight months since its launch, during the time of the on-site visit in March 2017, the NACP was already sufficiently resourced and equipped to exercise its mandate almost in full. Substantial work had been carried out in a very short period of time to staff and resource the agency, put in place voluminous secondary legislation necessary for realisation of its broad mandate and make it operational in most of its functions. This is a significant achievement in the turbulent context of anti-corruption reforms in Ukraine.

The NACP has started the operation and while it is struggling to establish itself as a strong and functional body, its efforts are undermined by outside political interference and even the attempts to take away its independence altogether. As one of the interlocutors noted at the on-site visit, establishing the NACP is a big step forward, it is a good institution and the laws are good, but it is facing many challenges and unfortunately, the oligarchs' influence is still very high. The NACP leadership further noted that they are now in a survival mode and the key priority is maintaining the existing infrastructure.

Currently, there are several bills in the Parliament providing for dismissal and selection of the NACP members anew. One of these draft, reportedly, envisages changes in the selection procedure of the NACP commissioners and the decision-making of the NACP and is aimed at strengthening it. Whereas other two aim at taking away independence of the NACP and placing it under the control of the Government. For the credibility of the anti-corruption reforms, it is critical that the recently established NACP is preserved, and that the continuity of its work and its independence are ensured in practice. Thus, Ukraine is urged to secure independent functioning of the NACP as a matter of priority, including by taking legislative measures if necessary, to free it from outside interference, allow it to build the capacity, experience and authority and establish itself as a strong corruption prevention agency of Ukraine.

It is now important to ensure that the vacant positions of the NACP are filled in through an open, transparent, credible and objective competition and are merit-based, the work on the remaining secondary legislation is finalized swiftly and the NACP is provided with the necessary resources to perform its

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<sup>70</sup> Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)" pg. 18.

functions, including at the regional level. Furthermore, the NACP must be provided with the access to all databases held by public agencies that are necessary for its functioning.

The coordination role of the NACP needs to be substantially enhanced as well. The NACP must increase its visibility and establish itself as a trusted authority to be able to fully discharge its coordination functions. Further measures are needed to strengthen the anti-corruption units/officers, their role and ensure their effective coordination, assistance and methodological guidance by the NACP.

In order to finalize the institutional reform, the role of the Secretariat of the Cabinet of Ministers should be clarified *vis-à-vis* anti-corruption units/officers. The NACP should be granted the authority to fully exercise its functions related to the guidance support and coordination of the anti-corruption units/officers.

The National Anti-Corruption Council as a high level body overseeing and supporting anti-corruption policy development and implementation must also be enhanced, *inter alia*, to support the NACP functioning. The mandate of the Council *vis-a-vis* the NACP should be clarified and coordination and closer interaction established in practice.

The new institutional framework for corruption prevention and anti-corruption policy in Ukraine is still very young to be able to fully deliver the results. To acquire necessary experience, capacity and confidence to carry the reforms, it must be strengthened and nurtured, and not undermined and confronted, but this is more often than not against the interests of powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine.

Ukraine is **partially compliant** with the recommendations 1.6 of the previous monitoring round.

### New recommendation 3: Corruption prevention and coordination institutions

- 1. Ensure without delay that the vacant positions of the NACP commissioners are filled by experienced and highly professional candidates with good reputation recruited through an open, transparent and objective competition.**
- 2. Ensure unimpeded and full exercise of its mandate by the NACP independently, free from outside interference.**
- 3. Finalize adoption of the secondary legislation and provide necessary resources to the NACP to perform its functions, including at the regional level. Establish and make operational the regional branches of the NACP. Ensure continuous training of the NACP staff to build their skills and capacity.**
- 4. Ensure systematic and efficient functioning of the Public Council of the NACP to provide effective mechanism for civil society participation.**
- 5. Substantially enhance the coordination role of the NACP, its authority and leadership among the public agencies. Clarify and enhance the powers of the NACP in relation to anti-corruption units/officers in public agencies and ensure that the NACP provides guidance to support realization of their functions.**
- 6. Ensure that the NACP has the direct access to all databases and information held by public agencies necessary for its full-fledged operation.**
- 7. Ensure systematic and efficient functioning of the National Council on Anti-Corruption Policy.**

## CHAPTER II: PREVENTION OF CORRUPTION

### 2.1. Integrity in the civil service

#### **Recommendation 3.2 from the Third Monitoring Round report on Ukraine:**

- 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.
- Once the new law is adopted and enacted: Implement the regulations on recruitment and selection of civil servants, including the senior civil servants, based on merit, equal opportunity and open competition to ensure professionalism and avoid direct or indirect political influence on civil service as foreseen in the Law on Civil Service.
- Implement and ensure effective functioning of the regulations on conflict of interest, asset declarations, code of ethics and whistle-blower protection as foreseen in the Law on Prevention of Corruption.
- Consider adopting a stand-alone whistle-blower protection law to cover both public and private sector.

Since the third monitoring round, Ukraine has made a major step forward towards the civil service reform in line with the European standards: the new Civil Service Law (CSL) was adopted in December, 2015 and entered into force on 1 May, 2016.<sup>71</sup> The law is aimed at ensuring professional, depoliticized and efficient civil service in Ukraine, *inter alia*, through the merit-based recruitment and promotion, reformed remuneration system and increased oversight by the National Agency of Ukraine on Civil Service (NACS). According to the NACS the secondary legislation has been adopted (41 bylaws) within a short period of time and all the bylaws necessary for the implementation of the CSL are now in place (revisions are however needed with regard to the bonuses and so-called “priority promotion” as discussed below).<sup>72</sup> The Government also adopted the comprehensive public administration reform (PAR) strategy 2016-2020 and

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<sup>71</sup> Law of Ukraine on Civil Service, 10 December, 2015, No 889, available in English [here](#).

<sup>72</sup> See the brief information about the [first results of the civil service legislation implementation](#) presented at the conference in Ukraine. See also, the [Resolution 2145\(2017\) of the Parliamentary Assembly of the Council of Europe \(PACE\) on the Functioning of Democratic Institutions in Ukraine](#).

its implementation plan structured around the Principles of Public Administration by the OECD/SIGMA.<sup>73</sup> The EU is supporting Ukraine's public administration reform with a comprehensive programme.<sup>74</sup>

Main aspects of the CSL related to the IAP monitoring have already been assessed during the third monitoring round. However, since the CSL was still a draft at that time, the recommendation on civil service integrity still focused on its adoption and subsequent implementation of the relevant rules. This chapter welcomes the adoption of the legal basis for the civil service reform in Ukraine and looks into the practical implementation of the elements of civil service integrity and integrity of public political officials to assess the compliance with the previous recommendations and provide new findings within the scope of the fourth monitoring round.

### ***Civil service integrity policy and its impact***

The State Anti-Corruption Programme 2014-2017 contains a section on reforming civil service, however it only includes the adoption of necessary laws and action plans. In addition, Ukraine has a dedicated strategy and action plan on reforming the civil service and the service in local government.<sup>75</sup> The documents are short and concise and aim at addressing the most acute challenges in civil service to achieve merit-based, well-paid, politically neutral and transparent civil service, using modern technologies in HRM, increasing prestige of civil service and public trust towards civil servants. The measures focus, *inter alia*, on adoption of the new CSL and the necessary bylaws and methodological guidelines, uniform standards of HRM, increasing qualification of civil servants through trainings and increasing awareness and knowledge of the new provisions of the law. However, the NACS representatives met during the on-site informed that this action plan is not used in practice and the capacity and resources needed for its implementation were underestimated when it was drafted. Instead, they referred to the PAR Strategy (2016-2020) and the action plan that follow the structure of the OECD/SIGMA Public Administration Principles and serve as instruments for PAR reform at large in Ukraine. They focus on: public policy development and coordination (strategic planning of government policies, quality of regulations and public policies, evidence-based policy making and public participation); modernization of public service and human resources management; ensuring accountability of public administration (transparency of work, free access to public information, transparent organization of public administration with clear lines of accountability, possibility of judicial review); service delivery (standards and safeguards of administrative procedures, quality of administrative services, e-government); and public financial management (administration of taxes, preparation of state budget, execution of state budget, public procurement system, internal audit, accounting and reporting, and external audit).<sup>76</sup>

The adoption of strategic documents is commendable, nevertheless it remains problematic that they are not evidence-based, their implementation is not ensured (in case of civil service policy documents) and the impact is not evaluated. According to the Government, no regular studies are conducted to analyse integrity risks in civil service and design responses. Moreover, even basic statistical data is not available on civil service as the information management system is lacking. No statistics has been provided by the Government in the answers to the monitoring questionnaire referring to the lack of a unified registry. The monitoring team was informed that the annual report on the results of the first year of implementation of the reform was being prepared for the submission to the Parliament that would contain some statistics, however, it was not provided to the monitoring team either. Accordingly, the data in the subsequent chapters are largely based on open sources.

Currently, the civil service statistics management is in the process of reform. The function was previously held by the national statistics services and later transferred to the NACS. The monitoring team was informed that the human resources management information system (HRMIS) is currently in the

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<sup>73</sup> [OECD/SIGMA Principles of Public Administration.](#)

<sup>74</sup> [https://eeas.europa.eu/sites/eeas/files/ukraine\\_v2\\_0.pdf](https://eeas.europa.eu/sites/eeas/files/ukraine_v2_0.pdf)

<sup>75</sup> Approved by the [Ordinance of the Cabinet of Ministers dated 18 March, 2015, No.227](#)-p.

<sup>76</sup> Order of the Cabinet of Ministers of Ukraine dated 24 June, 2016, No.474.

development with the support of international partners (the concept was approved and the TOR for the system is currently being developed, a tender should be conducted to procure services) and is expected to be functional as of second quarter of 2018 according to the NACS. The EU and the World Bank joint programme, supporting its design and implementation was signed on 30 June 2017 in Kiev.<sup>77</sup> The HRMIS would be a unified system integrating all the central and territorial units of the civil service management system, including HR functions of each institution and creating a nationwide database for the civil service. The NACS representatives informed that subject to available funding, they would like to fully automatize the system, including the salaries, planning the budget for remuneration and merit-based recruitment, to exclude a human factor from these automated processes as much as possible. The plans for linking the system to the portal on vacancies have not been disclosed, however, would be encouraged. The monitoring team welcomes this timely initiative. As discussed further in this report, such a system would be a tool for maintaining up-to-date statistics on civil service. Publication of these date would be further encouraged.

The human resource management information system would be one of the important tools to facilitate the implementation of the ongoing civil service reform. The monitoring team thus encourages Ukraine to introduce the HRMIS as a matter of priority. However, since the development of this grand project is only at an early stage, the monitoring team stresses that, before the system is in place, the interim solution should be found for maintaining and using up-to-date civil service statistics, since at present the lack of even basic civil service data makes it impossible not only to assess impact, but also to plan for launch and management of any new initiatives (for example, the number of the subjects of the asset declarations was not known and estimated at the time of its launch).

## Conclusion

Quality strategic documents and implementation plans for civil service and public administration reform are in place. Nevertheless, they are not evidence-based. No regular studies are carried out to plan risk-based integrity policies or assess the impact of implementation for future planning. Civil service statistics system is in the process of reform and even basic data on civil service is lacking at this point. The HRMIS is being developed with the support of international partners.

The adequate information system is key for carrying out any comprehensive reform. Therefore, Ukraine is recommended to ensure evidence-based policy development and implementation. A human resource management information system to support policy making, management and monitoring of civil service reform by the NACS and other responsible authorities, including accurate and complete data at the level of the entire civil service, administrative bodies and individual civil servants, as a matter of priority. Before its introduction an interim solution must be found to maintain relevant statistics. Ukraine is also encouraged to conduct studies for evidence and risk based civil service policy.

### New recommendation 4: Evidence-based civil service policy

- 1. Ensure that the civil service reform policy is evidence-based and implementation strategies are supported by relevant data, risk and impact assessment.**
- 2. Proceed with the introduction of the HRMIS as a matter of priority.**
- 3. Ensure that the disaggregated statistical data on civil service is produced and made public.**

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<sup>77</sup> [Ukraine to Increase Transparency, Efficiency in Public Resource Management, with European Union and World Bank Support.](#)



## *Institutional framework*

The adoption of the CSL reshuffled the institutional framework for civil service management in Ukraine that now includes: the Cabinet of Ministers; the National Agency of Ukraine on Civil Service (NACS); Commission on Senior Civil Service and corresponding competition commissions; heads of civil service; and HR functions (Article 12 of the CSL).

**The NACS** is a central executive body responsible for development and implementation of civil service policy and ensuring functional management of civil service in the state bodies. Its oversight functions include conducting inspections and internal investigations on compliance with the requirement of the CSL; providing methodological guidance to the HRM units in government agencies, identifying training needs and managing education for civil servants (Article 13 of the CSL). The head of the NACS is appointed and dismissed by the Cabinet of Ministers upon the proposal of the Prime Minister for 5 years of term of service with the right for reappointment for another term. The procedure is the same as for category A civil service positions.<sup>78</sup> With the adoption of the new CSL the oversight functions of the NACP and its workload have been expanded.

**The Commission on Senior Civil Service** is a permanent collegial body operating on a voluntary basis, with the recruitment, dismissal and other related powers in relation to the category A civil servants: it approves standard requirements for recruitment, carries out competitions, gives consent for early dismissals and conducts disciplinary proceedings.<sup>79</sup> The Commission is composed of the representatives of all three branches of power, NACP, professional association and CSOs, research and academic institutions acting *pro bono*.<sup>80</sup> The composition is approved by the Cabinet of Ministers for the period of 4 years. The administrative and organisational support to its work is provided by the NACS. The CSL and the Statute of the Commission provide detailed regulations on organisation, administration and transparency of its work.<sup>81</sup> The Commission composed of 10 members is currently up and running. It has already carried out recruitment of State Secretaries and other category A civil servants (see below).

**Head of Civil Service** in a government agency, among other functions, is mandated to organize competitions for categories B and C of civil service and reporting to citizens. The role of the heads of civil service in ensuring discipline, leading by example and creating the spirit of high integrity are defined by the CSL as well (Art. 61). Each government agency shall have Human Resources Management (**HRM**) **function**, directly subordinated to the head of civil service. The standard regulation of HRM function is approved by the NACS. In addition, NACS is providing methodological guidance to these units. According to the NACS, the HR functions have been introduced in the state bodies already.<sup>82</sup>

Currently, the capacity of the NACS, based on the information provided during the on-site visit, is 133 in the central agency and 85 in 10 territorial bodies (each covering 2-4 regions). In 2016, the NACS had a slight increase in the staff capacity in both central agency and the regions. The monitoring team did not have an opportunity to meet with the head of NACS or other high level management of the agency to discuss the its capacity to lead, support, monitor the implementation and measure the impact of the civil service reform. Representatives from the middle-management of the NACS interviewed during the on-site, however, saw a clear need for enhanced capacity to provide awareness-raising, consultations, guidance and

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<sup>78</sup> Under article of the Civil Service Law of Ukraine the civils service is divided into three categories: Category "A"; "B" and "C" for the definition see Article 6.

<sup>79</sup> Requirements are prepared by the NACS and after the adoption by the Commission submitted to the Cabinet of Ministers for endorsement; See Standard Requirements for professional competency for category A for a respective position approved by the Resolution of the Cabinet of Ministers of Ukraine of 22 July 2016, No.448.

<sup>80</sup> Article 14 of the CSL.

<sup>81</sup> [Regulation of the Commission on Senior Civil Service](#), approved by the Resolution of the Cabinet of Ministers of Ukraine dated 25 March 2016 No. 243; and the [Composition of the Commission](#) approved by the Ordinance of the Cabinet of Ministers of Ukraine dated July 13, 2016, No. 490.

<sup>82</sup> See the brief information about the [first results of the civil service legislation implementation](#) presented at the conference in Ukraine.

training on how to implement the new civil service primary and secondary legislation. It was also stressed that the expanded oversight functions of the NACS was currently underperformed as the caseload was much bigger now. The NACS representatives noted during the on-site visit that considerable resources were put into developing the significant volume of the secondary legislation in a short period of time, after the adoption of the CSL. They also focused on awareness raising to convey ideas and principles of the new CSL across the board in civil service and train their staff. Institutional strengthening of the NACS is foreseen as one of the objectives is provided for in the civil service reform and the public administration reform strategies mentioned above.

One important instrument to support the NACS in fulfilling its mandate of overseeing the human resource management practices across the civil service in Ukraine is a human resources management information system (HRMIS) which is missing. The functioning HRMIS would also enable the central management unit to provide the government and the parliament as well as the citizens of Ukraine the accurate information on the civil service on a regular basis. The work has been started on designing it with the support of international partners as mentioned above.

## Conclusion

The CSL introduced a new enhanced institutional set-up for civil service management in Ukraine. The role and oversight functions of the NACS have expanded considerably and significant resources are needed to oversee and manage the implementation of the ongoing large-scale civil service reform throughout the whole country, provide guidance, increase awareness and carry out trainings for civil servants. The Commission on Senior Civil Service comprising all branches of power and non-governmental sector was set up with the broad mandate in relation to the category A civil servants. Its primary function, merit-based recruitment is already carried out, albeit with some deficiencies: perceived political interference and lack of skills for conducting evaluation of candidates. According to the NACS, the HRM functions have been set up in civil service as required by the CSL. It is important to introduce these units in all public agencies and ensure their proper functioning and coordination by the NACS.

### New recommendation 5: Institutional framework for civil service reform

- 1. Assess the capacity of the NACS, its central and regional units, and increase it, if necessary, in view of the ongoing comprehensive civil service reform implementation and oversight needs.**
- 2. Ensure that the competition commissions include persons with necessary skills to assess the candidates for civil service. Take measures for unimpeded and professional functioning of the Commission on Senior Civil Service and competition commissions, free from political interference.**
- 3. Ensure introduction and proper operation of HRM functions in state agencies across the board of the entire civil service, provide coordination and adequate methodological guidance by the NACS.**

### *Professionalism in civil service*

The new CSL established *clear delineation between political and professional* positions in the civil service of Ukraine. The position of a civil servant of the highest rank – the head of civil service was introduced. These are the state secretaries in the Cabinet of Ministers/line ministries and heads of institutions in other government agencies (Art. 17). In more detail, the CSL determines the horizontal and vertical scope of civil service, providing for definitions of civil service, a civil servant and head of civil service (Articles 1

and 2.3), the list of positions within and outside the scope of the law, including those belonging to the "political advisory office" falling under the labour legislation<sup>83</sup>(Art. 3 and 92.).

The principles of civil service: the rule of law, legality, political neutrality, integrity, professionalism, patriotism, efficiency, equal access, transparency and stability are prescribed by the CSL (Art. 4). A separate article is devoted to political impartiality of a civil servant (Art. 10). Civil servants are not obliged to execute instructions of a political advisory office (Art. 9). Stability of the civil service is guaranteed by prescribing that the appointment to a civil service position is indefinite, except the cases determined by legislation (Art. 34)<sup>84</sup> and that the change of managers in civil service may not be ground for termination of civil service (Art. 83.2). Clear and detailed rights and obligations of a civil servant is provided for in Articles 7 and 8. In case of violation of his/her rights, a civil servant may file a complaint with the head of civil service. Procedure of consideration of complaints is provide as well (Art. 11).

Thus, by introducing above-described regulations, Ukraine complied with the parts of the previous recommendation on delineation of political and civil service positions and establishing clear and well-balanced rights and duties of a civil servant.

One of the main elements of the civil service reform and the major achievements for politically neutral civil service in Ukraine is the introduction of the position of state secretaries and their recruitment. State secretaries belong to category A civil servants<sup>85</sup> and as other civil servants, are subject to merit-based recruitment by the Commission on Senior Civil Service. They are appointed for 5 years with the possibility of renewal of the office. They, as other heads of civil service agencies, are in charge of managing the civil service functions in their agency, among them publication of vacancies, competitive selection, appointment, career planning, promotion and training, discipline and the complaints of civil servants (Art. 17 of the CSL).<sup>86</sup> In order to attract the best candidates, salary of a state secretary was set to 30 000 UAH (1000 EUR), which is significantly higher than the average rate in the civil service sector.<sup>87</sup> The competitions for state secretary positions were launched in November, 2016. State secretaries have been recruited in all line ministries except for the Ministry of Energy and Coal Industry and the Ministry of Health of Ukraine. RPR's public administration experts monitored selection of state secretaries within the framework of the project "DobroChesno" informed the public about the applicants' profiles, and ensure greater transparency "to avoid the appointment of dubious individuals to high-level positions within the ministries."<sup>88</sup>

Civil service experts in Ukraine positively assess the recruitment process overall, however point to several shortcomings. RPR, which has been monitoring the process of recruitment issued a statement citing the introduction and appointment of state secretaries is a major step but urging the Government to address the existing shortcomings of the competition procedure (see the subsection on merit-based recruitment).<sup>89</sup>

The civil service positions in Ukraine are split among three categories: category A – the senior civil service – comprising of state secretaries, heads and deputy heads of central executive bodies and local state administrations is a newly defined group of professional civil servants in Ukraine. Category B includes middle level managers and category C -- the rest of civil servants. (Art. 6 of the CSL). While all these

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<sup>83</sup> These include: advisor, assistant, press-secretary of the President; First Deputy Chair and Deputy Chair of Verkhovna Rada etc, these positions fall under the Labour regulations. On the issues of integrity of political officials see the section 2.2. below.

<sup>84</sup> Exceptions when the fixed term appointments are made: the appointment to the position of civil service of the category "A" – for five years unless otherwise is prescribed by the law, with the right to be reappointed or be transferred to equivalent or lower position in another state body on the proposal of the Commission of senior civil service; substitute the position of civil service for the period of the absence of a civil servant, which under the Law keep the position of civil service.

<sup>85</sup> Under article of the Civil Service Law of Ukraine the civils service is divided into three categories: Category "A"; "B" and "C" for the definition see Article 6.

<sup>86</sup> For the functions of the state secretaries of line ministries see Art. 10 of the [Law on Central Executive Authorities](#).

<sup>87</sup> Reanimation Package of Reforms (RPR) [Newsletter](#) September 2016-January 2017.

<sup>88</sup> [RPR Newsletter September 2016-January 2017](#).

<sup>89</sup> [RPR Calls on Authorities to Improve the Procedure of Competition to Fill the Civil Service Offices](#).



categories are within the scope of merit-based civil service and all main principles extend to them, different regulations of recruitment, remuneration and discipline apply to different categories as described below.

**Table 2 Number of Civil Servants according to the Categories A, B and C, as of 30 June 2017**

<i>Category</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>Total</i>
<i>Number</i>	733	62777	174509	238019

Source: additional information provided by Ukraine after the on-site visit

Another issue to be highlighted is the efficiency of the civil service in view of its size. The size of the civil service of Ukraine is considered high, however, its efficiency is assessed as low. Ukraine ranks 119 on the indicator of public sector performance according to the WEF Global Competitiveness Report.<sup>90</sup> One of the objectives of the civil service reform has been its optimization. By the time of the on-site visit, the annual report on civil service reform implementation for the year 2016 was not available. However, the NACS confirmed that the number of civil servants, in comparison to the previous years before starting the reform, has decreased by 12% to 238 019 civil servants in total.

### ***Merit-based civil service***

The new CSL introduced the merit-based civil service in Ukraine for all categories of civil servants. The civil service offices can only be filled by open, transparent and competitive selection procedure now.<sup>91</sup> General and special requirements for the candidates are prescribed by the CSL (Articles 19, 20) and the secondary legislation.<sup>92</sup> Among them is the knowledge of anti-corruption legislation. The requirements of transparency, possibility of audio-video recording, random selection of test questions and automatic scoring are among the novelties of the detailed recruitment procedure developed with the support of the OECD/SIGMA and adopted in 2016.<sup>93</sup> The vacancies are advertised on the website of the NACS together with the eligibility criteria and procedure for recruitment.<sup>94</sup> The stages of competition include the screening of documents, tests, case-based tasks and interviews. Each Commission Member evaluates candidate's case-based tasks and interviews individually. Final score is calculated by the NACS supporting administration of the procedure. The information about the winners and the second-best candidates are made public. The recruitment for category A is under the mandate of the Commission of Senior Civil Service described above and is fully automated. With these regulations, Ukraine complied with the relevant part of the recommendation of the third monitoring round calling for introduction of a merit-based recruitment in civil service.

As regards the implementation of merit-based recruitment provisions in practice, according to the data provided by the NACS representatives during the on-site visit, there were no exceptions to filling the positions by open competitions. Among all open competitions, more than 182 competitions to category A positions took place with total of above 1374 candidates. For categories B and C, 26 375 competitions were held with the average of 3.5 candidates for each position. This practice is commendable and must be continued. At the same time, challenges such as insufficient level of competences of the members of the commissions, political influence, inconsistent and subjective assessments of candidate's competences,

<sup>90</sup> [World Economic Forum, The Global Competitiveness Report 2015-2016, Public Sector Performance.](#)

<sup>91</sup> A few exceptions are provided in the CSL itself. See the Art.22.4. Special modality for closed competition to civil service positions related to issues of state secret, mobilization readiness, defence and national security are provided in the recruitment regulation.

<sup>92</sup> Standard Requirements for professional competency for category A for a respective position approved by the Resolution of the Cabinet of Ministers of Ukraine of 22 July 2016, No.448. Requirements for categories B and C prescribed [by the Order of the NACS of 6 April](#), 2016, No. 72.

<sup>93</sup> Cabinet of Ministers Resolution of [March 25, 2016 No.246](#)

<sup>94</sup> <http://nads.gov.ua/page/vakansiyi>

remain, as described by the NACS Chairman in his presentation of the results of implementation of new recruitment.<sup>95</sup>

Civil society expressed similar concerns albeit more acutely during the special session of the on-site visit. They showed the appreciation of the introduction of the merit-based recruitment in practice, and more so for the senior civil service positions, but also pointed out main shortcomings that need to be addressed in relation to the composition of the competition commissions and the professional skills of the members to ensure that the selection process is based on merit and equal opportunities. Furthermore, the alleged manipulations of the existing procedure have been noted with the instances when the qualified candidates could not get civil service positions, among them due to the shortcomings in regulations. Another challenge has been insufficient advertising of vacancies for category A positions which may have precluded attracting highly qualified candidates. It appears that Ukrainian administration has already started to address these challenges with the renewed commissions that would be set up with the help of an international company.<sup>96</sup>

According to RPR, the recruitment regulation should be amended to ensure greater transparency, objectivity of assessment, specifically of the case-based tasks and the observance of anonymity in the process of assessment by commission members.<sup>97</sup> Likewise, the alternative report on implementation of the anti-corruption programme, recommends drafting a new procedure for competitions taking into account the experience of the competitions conducted so far.<sup>98</sup>

The examination of the recruitment regulation and its annexes indeed suggests that there may be a need for more guidance on how the competences and requirements should be assessed and what are the criteria for assessment within the range of available scores (0-3) by commission members, particularly in the process of assessing the case-based tasks or interviews. The monitoring team believes that further measures are required to address the concern raised since, the mere fact that the process is seen as biased, subjective and lacking transparency, undermines the whole spirit of a merit-based civil service.

## Conclusion

Ukraine has set forth the legal framework for merit-based recruitment in line with European standards and started its application in practice. All appointments to civil service positions are now made through open competitions. A substantial number of civil servants have already been recruited. Introduction of the highest position in civil service, head of civil service, and their merit-based recruitment is commendable. Senior appointments to the civil service are now based on open competitions as well in contrast with the past deficient practice. Examples of senior appointment through open competition include the appointment of the heads and senior officials of various anti-corruption bodies, such as NABU, SAPO, NACP and others.

Nevertheless, the challenges such as low qualification of commission members, political interference and difficulties in assessing various competencies/tests have been identified by the NACS and civil society. The question also remains, as to whether this process has allowed to recruit and maintain the best candidates in the civil service of Ukraine.

It is now critical that the merit-based recruitment of civil servants to all vacant positions are consistently implemented. Of particular importance is that recruitments to the category A/senior civil service positions are clearly based on merit, equal opportunities and open competition. Ukraine must ensure that the competition commissions include persons with necessary skills to assess the candidates, and they function free from political interference. Ukraine is encouraged to take all necessary measures, including legislative

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<sup>95</sup> See the brief information about the [first results of the civil service legislation implementation](#) presented at the conference in Ukraine.

<sup>96</sup> [State secretaries in line ministries what will the European reform of the civil service will change in the country.](#)

<sup>97</sup> [RPR Calls on Authorities to Improve the Procedure of Competition to Fill the Civil Service Offices.](#)

<sup>98</sup> Shadow Report (2017) [“Evaluating the Effectiveness of State Anti-Corruption Policy Implementation”](#) pg. 25.

steps, if necessary, in cooperation with civil society, to address the challenges and valid concerns of CSOs and ensure that the recruitment in civil service is and is perceived to be open, transparent, free from political interference, based on merit and allows employing best candidates in the civil service positions.

#### **New recommendation 6: Merit-based civil service**

- 1. Take all necessary measures in cooperation with civil society, to address the existing challenges of the recruitment both in legislation and in practice, including the lack of relevant competences of the competition commission members and the lack of transparency.**
- 2. Continue consistent implementation of open, transparent merit-based recruitment to ensure that the civil service is in fact based on merit, is perceived as such and allows selecting the best candidates, free from political interference guarantying equal opportunities and professionalism.**
- 3. Ensure that the civil service vacancies are adequately and broadly advertised to provide for equal access and attract highly qualified candidates.**

#### *Performance appraisal*

Under the new CSL, civil servant's performance is subject to an annual appraisal. The bonuses can be allocated, career plan defined and training needs identified based on the outcomes of the evaluation. Evaluation involves the manager of a civil servant, HRM unit and NACS. Performance is assessed against the pre-determined indicators, the compliance with the anti-corruption legislation and ethical behaviour are one of them. Evaluation grades range between: "negative", "positive" and "excellent". In case of "negative" grade, the evaluation is repeated after three months. Civil servant may appeal the results of an evaluation. Two consecutive negative assessments result in dismissal of a civil servant. The "excellent" grade is the ground for bonuses and a priority promotion. Promotion is one of the rights of a civil servant and is based on competition (Art. 40). No further guidance is provided in the legislation how the priority promotion is granted in view of the requirement of a competitive promotion.

A standard performance appraisal procedure mentioned above (Article 44.1 of the CSL) was only approved on 23 August, 2017 by the Cabinet of Ministers of Ukraine.<sup>99</sup> Thus, the performance evaluations have not started in practice yet. The representatives of the NACS explained during the on-site visit that the first version of the regulation was too complex, cumbersome and would be difficult to implement in practice if adopted. The second version was developed with the broad participation of stakeholders. It describes the process of setting the targets and assessing the compliance, rights and responsibilities of the evaluators and the civil servants to be evaluated, details and the consequences of the assessment. While the document seems to offer appropriate guidance for annual performance evaluation, it is not clear how the evaluation is linked with bonuses and incentives or priority promotion as provided by the CSL and the secondary legislation. Specifically, according to the standard regulation on bonuses, monthly/quarterly bonuses are allocated at the discretion of the head of an institution outside the scope of the performance appraisal system. Similarly, the incentives are paid based on the criteria established by the Cabinet of Minister's Resolution on the issues of remuneration.<sup>100</sup> As to the promotion, the CSL (Art. 40) provides that the promotion is based on competition, whereas Art. 44.9 mentions priority promotion in case of excellent grade with no further details provided.

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<sup>99</sup> [Model procedure for assessing the performance of a civil servant.](#)

<sup>100</sup> Please note, that the incentives as a part of the remuneration is not provided under the CSL. However, these will continue to be paid to the civil servants before the regulations on bonuses will enter into force on 1 January, 2019 (for details see subsection on remuneration below).

The NACS representatives explained during the on-site visit that these regulations on bonuses and incentives would be applicable temporarily until the CSL regulations on bonuses would enter into force (however this is not specified in the regulations themselves). Yet, in this case additional rules would be needed to prescribe the procedure for allocation of monthly/quarterly bonuses and granting priority promotion and linking those to the performance evaluation. Ukraine is encouraged to adopt and start implementing in practice the standard regulation for performance evaluation and link the promotion, increase in salary and bonuses to the results of the evaluation, in order to close the regulatory gap for merit-based civil service.

## Conclusion

The legal foundation for performance appraisal of a civil servant that supports career development, awards and incentivises better performance has been laid down by the CSL. Performance appraisal, according to the recently adopted Model Procedure for Assessing the Performance of a Civil Servant, involves setting the targets and evaluation of their accomplishment on an annual basis with the participation of a civil servant in question. Outcomes of the evaluation can be used to define a professional development plan, allocate bonuses and grant priority promotion. However, the regulatory gap remains. Specifically, the regulations are needed to a) link the performance appraisal with the monthly/quarterly bonuses that represent the principle part of total bonuses (up to 30% of the annual salary Art. 50.3.2 of the CSL) and b) provide guidance on how the annual assessment results in priority promotion.

Thus, Ukraine is encouraged to start implementing in practice the newly adopted performance appraisal regulation and link the promotion, increase in salary and bonuses to the results of evaluation, in order to close the regulatory gap for merit-based civil service.

### New recommendation 7: Performance appraisal

- 1. Ensure implementation of performance appraisal in practice.**
- 2. Adopt and put in practice the regulation to link the monthly/annual bonuses and priority promotion to the performance appraisal.**

## *Discipline and dismissals*

The grounds and procedure for disciplinary action with due process guarantees are provided in the CSL (Chapter 2, Section VIII). The CSL regulates dismissals of civil servants in detail as well (Chapter IX). A disciplinary action can be initiated and the sanctions imposed by the appointing agency in consultation with the Commission on Senior Civil Servants (for category A civil servants) or a disciplinary committee of an appointing agency (for categories B and C civil servants). Reprimand can be imposed as a sanction by the appointing agency itself without further consultations with the Commission or the committees.

Notably, the disciplinary proceedings and dismissals of A category civil servants fall under the remit of the Commission on Senior Civil Servants. Disciplinary Committee comprising 5 members is created by the Commission for this purpose.<sup>101</sup> According to the Rules of Procedure of the Commission on Senior Civil Servants,<sup>102</sup> the Disciplinary Committee previews the information received from the appointing agency regarding the alleged disciplinary violation by A category civil servant and presents the information to the Commission on Senior Civil Service for the decision on opening the case. If the decision is positive, Disciplinary Committee proceeds with the case and prepares the proposals to the appointing agency regarding the existence or the lack of grounds for disciplinary responsibility, imposing responsibility or closing the case. The same Committee prepares proposals for dismissals of the A category civil servants on

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<sup>101</sup> Section 29 of the [Regulation of the Commission on Senior Civil Service](#), approved by the Resolution of the Cabinet of Ministers of Ukraine dated 25 March 2016 No. 243;

<sup>102</sup> [Rules of Procedure of the Commission on Senior Civil Servants](#) adopted by the Commission on Senior Civil Servants on July 28, 2016.

the initiative of the appointing agency and presents them to the Commission for the decision. The right to appeal of the decision is provided by CSL (Art. 7.10)

The head of civil service has the power of the disciplinary action in relation to the categories B and C in cooperation with the disciplinary committee set up in the agency. Furthermore, the head bears the responsibility in case of a failure to take disciplinary action or bring the case of the alleged commission of the corruption offences or administrative violations to the attention of the relevant bodies (Art. 63.4).

Most of the grounds for disciplinary action are specific and clear (such as absence or appearance in the office under the influence of alcohol or other intoxication; failure to notify about the conflict of interest), on the other hand some grounds are vague and subject to interpretation (such as the breach of the Oath of a civil servant or actions affecting the authority of the civil service). More worrying is the fact that breach of the Oath, is among the category of grounds that can result in dismissal of a civil servant. The Government informed about 7 cases initiated in the first half of 2017 on this ground.

The government has not provided statistics of disciplinary actions and their consequences. The following data is based on the presentation of the results of the implementation of the CSL by the Chairman of the NACS.

**Table 3 Disciplinary proceedings in state bodies in 2016**

<b>Disciplinary violation confirmed</b>	<b>Possibility of disciplinary enforcement excluded</b>	<b>Disciplinary violation not confirmed</b>	<b>Proceedings are ongoing</b>
<b>33%</b> <b>(1163)</b>	<b>5%</b> <b>(188)</b>	<b>52%</b> <b>(1804)</b>	<b>10%</b> <b>(336)</b>

Source: The Presentation of Results of the Civil Service Reform by the Chairman of NACP obtained by the ACN Secretariat.

Another issue that needs to be mentioned in connection with the dismissals in civil service is the Law on Cleansing the Government (Lustration Law) adopted in 2014.<sup>103</sup> The law stipulates that those involved in corruption, treason or the violation of human rights, especially against the Maidan protesters, as well as persons holding high-level posts in the former President Yanukovich administration will be dismissed or disqualified from competing for public service posts for 10 years. This Law was a response to the acute political situation, and forced many notoriously corrupt officials out of office.<sup>104</sup> Though, the previous monitoring round report noted that the negative by-effect of elimination from public life of most politicians and civil servants of the older generation and accelerating the process of generational change, is a disruption of the administration as a result of a large-scale dismissals and resignations of experienced personnel, who cannot be replaced in a short time.

According to the Venice Commission opinion, the purposes of the law are legitimate. Lustration strengthens public trust in the new government and enables the society to have a new, fresh start. However, “Lustration must never replace structural reforms aimed at strengthening the rule of law and combating corruption, but may complement them as an extraordinary measure of a democracy defending itself, to the extent that it respects European human rights and European rule of law standards.”<sup>105</sup>

<sup>103</sup> Entered into force on 16 October 2014 amended in 2015.

<sup>104</sup> OECD (2016) [Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016](#), pg. 166.

<sup>105</sup> Venice Commission (2015) [Opinion on the Law of Government Cleansing](#) (Lustration Law) of Ukraine.

The administration of Ukraine estimated that the law would affect up to one million persons holding civil service posts.<sup>106</sup> In 2015, the news article informed that 700 officials have been lustrated in Ukraine.<sup>107</sup> The Government informed that according to the Ministry of Justice, which is maintaining the relevant registry, 929 persons were dismissed from the office based on this law. The NACS does not hold this information due to the fact that the law defines the lustration as a process falling under the remit of the Ministry of Justice. However, the NACS did provide overall number of civil servants dismissed – it was 11 349 in total or almost 5% of the whole civil service.

#### New Recommendation 8: Dismissals and discipline

- 1. Clarify the grounds for disciplinary proceedings and ensure that they are objective.**
- 2. Ensure that the dismissals are based on the legal grounds and are not politically motivated.**

#### *Fair and transparent remuneration*

At the time of the previous monitoring round the fixed salary constituted only 20-30% of a total pay; managerial discretion in allocating bonuses, additional payments/supplements or other benefits and thus the risk of nepotism, loyalty to the manager and arbitrariness was high; there was no upper limit on bonuses or detailed guidelines for their payment. Some of these issues have been partially resolved with the new remuneration framework as analysed below.

One of the key aspects of civil service reform in Ukraine is streamlining the remuneration system: decreasing arbitrariness in allocating bonuses, additional payments and benefits and increasing competitiveness of the civil service with higher and fair remuneration, performance appraisals and corresponding rewards.<sup>108</sup> The system of remuneration was reformed with the new CSL (Articles 50, 51, 52, 53) and subsequent secondary legislation.<sup>109</sup> Under the CSL, the state is obliged to provide an adequate remuneration to a civil servant and the reduction of budget cannot serve as basis for reduction of salary or its supplements. CSL provides for balanced and proportionate payment for 9 different wage groups.<sup>110</sup> Salary rates are determined each year by the Cabinet of Ministers as part of the draft law on State Budget for the next year. The civil servants may also be provided with social benefits, the rent of the house or additional financial aid to resolve social and household issues.

According to the CSL, salary of a civil servant consists of fixed official salary; long-service premium/supplement; rank-related premium/supplement; bonuses. Bonuses are given based on the results of an annual performance evaluation<sup>111</sup> or on a monthly/quarterly basis for personal contribution to the performance of a state body. The latter, however, is not a part of the performance appraisal system and is allocated at the discretion of the head of each state body within the budget for salaries of that agency on the

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<sup>106</sup> [Yatsenyuk: Ukraine lustration will cover 1 million officials](#), Kyivpost, 17 September, 2014.

<sup>107</sup> <https://www.unian.info/society/1157911-week-in-numbers.html>

<sup>108</sup> On performance appraisal see above.

<sup>109</sup> A set of bylaws have been adopted on the issue of remuneration system in 2016 (including: *Issues of Remuneration of Civil Servants*, Resolution of the Cabinet of Ministers of Ukraine No. 292, dated 6 April 2016 and *Rules of the Application of Incentive Payments to Civil servants*, Resolution of the Cabinet of Ministers of Ukraine No. 289, dated April 9, 2016.), later abolished by the Cabinet of Minister's Resolution No. 15 of 18 January, 2017. [Standard bonus policy approved by the Order of the Ministry of Social Policy of Ukraine, 13 June, 2016, No.646](#) remains in force.

<sup>110</sup> Minimal salary rate within group 1 in government agencies with jurisdiction extending onto the entire territory of Ukraine may not exceed 7 minimal salary rates within group 9 of government agencies with jurisdiction extending onto the territory of one or several districts, cities of regional significance.

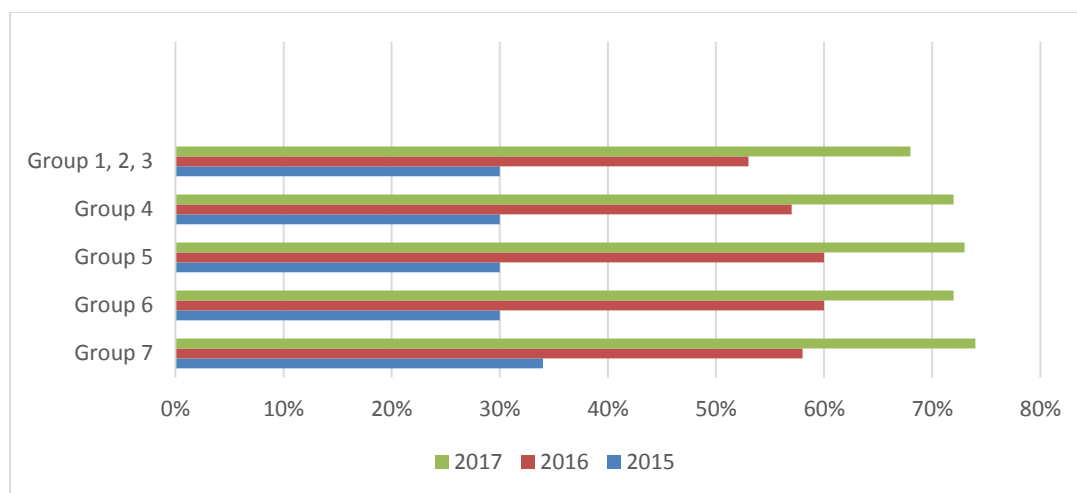
<sup>111</sup> If the evaluation grade is "excellent."



basis of the criteria provided in the secondary legislation on bonuses (initiative at work, urgency of tasks, additional tasks and quality of the work performed).<sup>112</sup>

Maximum share of bonuses paid on a monthly/quarterly basis can represent up to 30% of the fixed annual salary (Art. 50.3.4 of the CSL). Close reading of Art. 50 of the CSL suggests that there is no upper limit for the annual bonuses. The bonus fund of each governmental body cannot exceed 20% of total salary budget each year, plus the amount of savings of unpaid salaries due to the vacancies.<sup>113</sup> The new regulations on bonuses will only enter into force starting 1 January, 2019. Till that time, the heads of civil service have a discretion to grant additional *incentives payments*<sup>114</sup> to civil servants within the limit of the agency's salary funds. The issue is regulated by yet another piece of the secondary legislation -- the Cabinet of Minister's Resolution No. 15 on the issues of remuneration of the state body employees (Resolution No. 15),<sup>115</sup> establishing criteria related to intensive and highly important work for providing incentives, that are largely similar but slightly elaborated as the criteria provided by the regulation on bonuses mentioned above. The upper limit of incentives is not specified. For category A civil servants *minimum* of the bonus is established at 50% of an annual salary. A separate part of the Resolution is devoted to the bonuses to the A category of civil servants. According to the NACP representatives met during the on-site this regulation is of a temporary nature for the transition period and is effective only till the entry into force of the provisions on bonuses in 2019. The logic of this approach may be to buy some time until the administration of Ukraine will be able to increase the salary to the competitive minimum to retain qualified civil servants. At the same time, compensating low salaries with the discretionary, arbitrary and sometimes discriminatory bonuses is not in line with the European standards. Therefore, Ukraine is encouraged to fully enact the reform of the remuneration system, set upper limits for annual bonuses and start the application of new provisions in practice. Despite regulatory loopholes, practice seems to be improving and the share of the basic salary in the total remuneration is increasing. See the chart below.

**Figure 6 Basic Salary Percentage in Total Pay based on the Wage Groups (2015-2017)**



Source: Data provided by the Government as a part of the additional comments.

Another important aspect of remuneration in civil service is its competitiveness. Adequate remuneration should be offered to civil servants to attract and retain highly qualified professionals in civil service. The

<sup>112</sup> Regulations on the payment of bonuses have to be approved by the heads of each institution in accordance with the [Standard bonus policy approved by the Order of the Ministry of Social Policy of Ukraine, 13 June, 2016, No.646.](#)

<sup>113</sup> in OECD countries the bonuses are usually limited to 20% of the base salary and total budget of bonuses constitutes 5% of total annual salary budget.

<sup>114</sup> The CSL does not envisage such a concept.

<sup>115</sup> [Provisions on the application of incentive payments to civil servants](#) is a part of the Cabinet of Minister's Resolution No.15 of 18 January, 2017.



previous monitoring report criticised low and non-competitive salaries in the civil service of Ukraine and issued a recommendation to provide *decent salaries*.

The Resolution No.15 brought about several important changes: it established the minimum salary in civil service at UAH 2000 (67 EUR) and increased the salaries of civil servants by 5-27%. The civil service positions have been split between various wage groups and salary schemes defined for each of them. Rank-related supplement and social and housing benefits to civil servants have also been regulated.

One new initiative within the framework of the comprehensive public administration reform programme that raises questions with regard to the objective and equal pay is the gradual introduction of so-called “reform staff” positions that are outside the general salary system, with much higher salaries. The initiative is aimed at introducing the policy analysis and strategic planning functions in the line ministries to carry out efficient reforms in the priority areas. The reform staff are special category of civil servants recruited through a merit-based competition, with additional requirements and special procedure for recruitment and substantially higher remuneration compared to other civil servants (from 30 thousand - for an expert, up to 60 thousand UAH - for the director of the directorate).<sup>116</sup>

The first practical steps towards introduction of this concept were made just recently when the Cabinet of Ministers approved a series of changes in the secondary legislation to pilot the initiative in 10 line ministries, Government Secretariat, State Agency on E-Governance and the NACS (around 1000 positions for the pilot stage up to 3000 positions by the end of 2020). According to the NACS management, this initiative is aimed at breaking the soviet style public administration in Ukraine, by attracting highly qualified professionals and introducing the strong strategic policy analysis to carry out real reforms. 300 million UAH was allocated in the 2017 state budget for the implementation of this concept. The new positions such as director general of the directorate, head of expert group, national expert were added to the salary scheme and the bonuses were specified. The competitions will be launched soon and the first staff members are expected to be appointed late October. Since the relevant amendments were adopted in August,<sup>117</sup> just before the adoption of this report, the monitoring team did not have an opportunity to study them and provide its assessment of the changes.

According to the NACS representatives met during the on-site visit, the salaries are gradually increasing and civil service is becoming more competitive and attractive, as shown by the increased number of applicants for the vacancies in the civil service positions. However, according to the NACS, the challenges in transforming the remuneration system of civil servants to enable reasonable conditions for recruiting, motivating and retaining civil servants with required education level and professional skills, remain to be solved.

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<sup>116</sup> [Interview](#) with the Head of Civil Service Agency of Ukraine.

<sup>117</sup> Decree of the Cabinet of Ministers No. 647, [Some issues of the Implementation of a Comprehensive Reform of Public Administration](#).

**Table 4 Salary Trend in Civil Service of Ukraine (2015-2017) UAH**

Name of position of government service	Salary group	Ministries and Central Executive Authorities (without territorial bodies) Average payment amount for 1 person per month in UAH		
		2015	2016	2017
Head of a state body, first deputy, deputy	1, 2, 3	11 600	21 600	35 500
Head of an independent structural division	4	10 700	15 900	18 400
Deputy head of independent structural unit	5	10 000	15 300	17 000
Chief of unit in independent unit	6	7 800	12 100	14 500
Chief specialist	7	4 900	7 700	11 100
Leading specialist	8	3 300	5 200	8 600
Specialist	9	2 000	2 500	4 700

Source: additional information provided by Ukraine after the on-site visit

## Conclusion

The new CSL clearly represents a step forward to a transparent and fair remuneration system in Ukraine. Gradual increase of salaries in civil service is also a positive development that should be continued. However, the monitoring team is concerned that the important part of the new provisions on bonuses will only enter into force in 2019. Furthermore, it is worrying that the allocation of a large part of bonuses (monthly/quarterly bonuses constituting up to 30% of an annual salary) is not linked to the performance appraisal process and is left at the discretion of heads of state bodies based on some vague and somewhat discriminatory criteria, since most of the civil servants may not typically perform high intensity or particularly important work. Such criteria would not represent a problem if applied as an exception to the existing practice, as a measure to award the extraordinary performance of a civil servant and a large part of the bonuses would still be allocated according to the performance evaluation results. The issue of performance-based monthly/quarterly bonuses would remain after the full entry into force of the provisions of the CSL as well, since it is not yet resolved by the CSL or any secondary legislation.

Accordingly, the concerns regarding the remuneration policy in the civil service of Ukraine remain. To achieve the goal of streamlining the remuneration system, decreasing arbitrariness in allocating bonuses and increasing competitiveness of civil service, the civil service salary system providing fair and reasonable conditions for recruiting, motivating and retaining professional civil servants needs still to be enforced and implemented.

## New Recommendation 9: Remuneration

- 1. Finalize the adoption of the necessary regulatory framework and ensure in practice fair, transparent and competitive remuneration in civil service.**
- 2. Ensure that there is an upper limit to the bonuses granted based on an annual performance evaluation not exceeding 30% limit provided by CSL.**

### *Conflict of interests*

The conflict of interest legislation was adopted in October, 2014 and entered into force in April, 2015. The rules are part of the CPL. The previous monitoring report concluded that the newly adopted legislation was largely in line with international standards.<sup>118</sup> Ukraine was found to be fully compliant with the recommendations on ensuring an effective institutional mechanism for management and control of implementation of conflict of interest regulations. The ACN Summary Report considered the creation of the enforcement mechanism is a major achievement for Ukraine.<sup>119</sup>

Enforcement of the conflict of interest regulations is one of the statutory functions of the NACP. It monitors implementation across the entire public service, including local self-government. NACP provides guidance, consultations, trainings to state bodies and is also responsible for awareness raising. If the conflict of interest is identified, NACP requires the agency in question to eliminate the violation, conduct internal investigation and take disciplinary action against the perpetrator. These instructions are binding. The state institution in question has to report back on the measures carried out in accordance with the instructions. In addition, the NACP has the power to initiate administrative action and refer the case to the court for administrative sanctions.

Since the last monitoring, the NACP approved the methodological recommendations on prevention and settlement of conflicts of interest in the activities of persons authorized to perform the functions of the state or local self-government.<sup>120</sup> The recommendations are based on the existing legislation, local and international best practices and propose basic practical tools to enhance the effectiveness of detection, prevention and settlement of conflicts of interest. In particular, notions of potential and real conflicts of interests are explained with practical examples; the test for identifying conflict of interest situation and suggested subsequent actions of an employee and the manager are spelled out. In addition, the methodological recommendations on transferring enterprise and/or corporate rights control were approved.<sup>121</sup> With these measures the methodological guidance needed for efficient enforcement has been set forth.

To raise awareness and facilitate the practical application, the NACP carried out an awareness-raising campaign in cooperation with the UNDP under the name "Conflict of interests: need to know!" 13 trainings

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<sup>118</sup> Only the element of "apparent conflict of interest" is missing which exists "where it appears that a public official's private interests could improperly influence the performance of the duties but this is not in fact the case.

<sup>119</sup> OECD (2016) [Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016](#), pg. 177. ; These regulations have not been changed since the last monitoring. Detailed description of the legislation including definition of conflict of interests, managing and sanctioning conflict of interests as well as enforcement procedure are described in detail in the [previous monitoring round report](#) and the ACN summary report.

<sup>120</sup> Decision No. 2, dated July 14, 2016.

<sup>121</sup> Decision No. 10, dated August 11, 2016.

for the central executive bodies, regional and district administrations, deputies and employees of local self-governments have been conducted covering more than 1200 people.<sup>122</sup>

As to the enforcement statistics, the government reported that the NACP received 860 reports on corruption related offences in 2016, 264 inspections were completed and 249 are ongoing. The NACP provided 922 clarifications about the presence/absence of a real conflict of interests and the plan of actions for settlement of conflict of interest. 27 requests to eliminate violations were sent to public agencies, 23 of these requests are fulfilled. 61 protocols on administrative offences related to corruption were drawn up and submitted to courts. The court imposed administrative liability in 2 cases in 2017. As regards the National Police statistics for 2017, 1760 administrative protocols were drawn up on conflict of interest-based corruption-related offences. The court imposed administrative liability on 858 persons, among them 20 civil servants, 607 deputies of local councils, and 235 officials of local self-governments.

Nevertheless, proactive approach has been expected from the NACP in exercise of its enforcement powers, especially in relation to the high-level officials whose disputable wealth have been recently uncovered. As shown in the below section, NACP has started verifying the asset declarations, albeit with the actions that leave the impression of “going after small fish”, followed by frustration and deeper scepticism from the public as to the ability to enforce the rules in practice (see more details on asset declarations).

## Conclusion

The progress achieved in the area of conflict of interest management by Ukraine is undisputable, particularly in view of the short track-record of the NACP and should not be underestimated. Since the previous monitoring round and after its establishment in 2016, the NACP issued various methodological guidance on conflict of interest, carried out information campaign and training of staff, started inspections and implementation of the rules in practice. This is commendable and must be continued.

Nevertheless, the implementation of the conflict of interest rules cannot be seen in isolation and must be looked at in the light of the overall picture of NACP’s operation and performance as described elsewhere in the report. More specifically, the questions as to the independent functioning of the NACP free from political interference and bias, persist and must be addressed in order the implementation of CoI rules, as well as other parts of its mandate, to be assessed as efficient and seen as politically neutral.

### New Recommendation 10: Conflict of interests

- 1. Ensure full and unbiased enforcement of conflict of interest rules in practice by the NACP free from political influence.**
- 2. Further raise awareness and continue training to fully introduce the new regulations and ease their practical implementation.**

### *Ethical rules*

The CPL regulates the rules of ethical conduct (articles 37-44) in general terms. It provides regulations on priority of interests, political neutrality, impartiality competences and efficiency, refraining from execution of illegal orders and others. Monitoring and control over implementation, clarification and guidance over the rules of ethical conduct are intrusted to the NACP under Art. 12 of the CPL, whereas the NACS approves the ethical rules for civil servants under CSL (Art. 37). The CPL further provides that the state bodies may adopt specific ethics codes, if necessary. The training of civil servants in general is under the mandate of the NACS, however, it is not entirely clear who is responsible for ethics training of civil servants in view of the NACP’s function of enforcement and guidance on ethical standards, also extending to the civil servants.

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<sup>122</sup> The following cities were covered: Vinnytsia, Ivano-Frankivsk, Lutsk, Kyiv, Odesa, Mykolaiv, Kramatorsk, Lviv, Kharkiv, Poltava, Cherkasy, Dnipro and Zaporizhia.

The NACS approved the ethical rules for civil servants and local self-government in 2016.<sup>123</sup> However, these rules are somewhat different from those provided in the CPL and are split into four blocks: general duties of a civil servant; use of state resources; use of official position; exchange of information and obligation to provide access to public information. Civil servants are made aware of these rules once appointed. Assessment of compliance with these rules is part of the annual performance evaluation. Furthermore, CSL provides that the general rules of ethical conduct should be part of the internal regulations of each agency (Art.47.6). The heads of state bodies are obligated to monitor enforcement of these rules in their individual agencies and take disciplinary action or if there are signs of criminal or administrative offenses, refer the case to the relevant authorities. Taking into account some discrepancies between the CPL regulations and the NACS order on ethical rules, it is advisable to align them and provide methodological guidance on application of ethical rules in practice. Information about approval by specific ethics codes by state agencies, trainings or enforcement has not been provided. However, the monitoring team is aware that as an example the NABU has its own code of conduct.

#### **New Recommendation 11: Ethics**

- 1. Clarify the mandate of agencies responsible for awareness raising and training on ethical standards**
- 2. Carry out systematic awareness raising and training throughout the public service.**
- 3. Analyse the needs and consider adoption of the specific ethics codes for individual agencies/categories.**

#### ***Asset declarations***

At the time of the previous monitoring round, the reformed primary legislation for e-declarations was already adopted and the preparations were ongoing to design and launch the electronic system upon the entry into force of the CPL in April 2015. Ukraine was hence found fully compliant with the recommendation on legal framework, including in relation to focusing on the high-level officials and high risk areas, the list of information included in the asset declarations, the requirements for publication, verification and sanctions. Only one element of the recommendation on exchange of information with law enforcement was found partially implemented. The new legal and institutional framework introduced by the CPL have been extensively analysed by the previous monitoring report as well as the ACN key publication.<sup>124</sup> The following sections, therefore, only provides a brief overview of the system and focuses on the developments since the previous round with the emphasis on impact of implementation.

#### ***Launching the system***

One of the crucial accomplishments of Ukraine in the area of prevention of corruption since the last monitoring round is the launch of the electronic asset declarations system with the unprecedented coverage of declarants and granting online access to these declaration (excluding some personal data). Over 1 210 000 declarations are already accessible online in an open format. Also, some steps have been made for preparing grounds for verification of declarations and using the system not only as a tool of public scrutiny, but as an instrument for the law enforcement to hold those liable for corruption offences accountable.

Introduction of the electronic system was widely welcomed by the international community.<sup>125</sup> At the local level, it was named as a "truly revolutionary step towards eradicating corruption" and a joint achievement

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<sup>123</sup> The Order of the National agency on Civil Service N 158 (5 September 2016) on [Approval of the General Rules of Ethical Behavior of Civil Servants and Local Self-Government Officials](#)

<sup>124</sup> OECD (2016) [Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016, at page 63.](#)

<sup>125</sup> EU, NATO, COE and others made welcoming statements encouraging Ukraine's fight against corruption.

of civil society, international partners and reformists in all branches of power.<sup>126</sup> President Poroshenko called it: “A truly historic event of openness and transparency [...] Corruption must be eradicated, but it is even better to prevent it. Prevention is the best cure. For this, we need an effective control over income and expenditures of all officials, judges, prosecutors, and law enforcement officers. People have long been waiting for the estate, cars and money owned by public servants to come to light. The tool for such control exists” – stated the President.<sup>127</sup>

Yet, the launch of the new system faced fierce resistance and confrontation in Ukraine. Reportedly, several attempts were made by the old regime proponents to block and sabotage its introduction at various stages and to obstruct its implementation after it was put in place. First, the development of the system and the necessary bylaws was delayed and it was argued that the system was not technically ready for the launch, then the secondary legislation for verification could not be adopted, later granting access to the full database to NABU became problematic, further the constitutionality of the new regulations have been challenged in the Constitutional Court by the Members of Parliament (the court decision has not been adopted yet). The war against the system continued with the publication of a false declaration of one of the NACP members to imply that the system is fragile and can easily be manipulated. Shortly thereafter several MPs announced the breakdown of the system, but the statement was confronted by NACP defending the system: that the system was under control and the publication of this declaration was a “test”, carried out by “Ukrainian Special Systems” the state-owned enterprise, that is administering the e-declarations.<sup>128</sup>

Moreover, as the administration could not precisely define the number of public servants subject to the asset declaration in the absence of HRMIS, the capacity of the system was underestimated, it encountered technical obstacles several times and temporarily crashed just before the deadline for the submission of declarations by the second wave declarants. This crisis witnessed by the monitoring team at the time of the on-site visit, probably caused by the system overload as the deadline of the submission of the asset declarations for the second wave of the declarants approached on 1 April 2017. As a result, for several days the system did not allow entering the data causing civil servants’ anxiety and protests as they feared potential sanctions for late submission of declarations. Some NGOs alleged that the security service forces unlawfully interfered in the operation of the system to cause its crash.<sup>129</sup> The situation escalated to the extent that the Cabinet of Ministers meeting was quickly convened to decide on the next steps in view of the system overload. Eventually, the deadline of submitting the declarations was postponed for one month. However, the Prime Minister called for taking the responsibility by NACP and resignation of the NACP leadership which has not followed.<sup>130</sup>

To respond to this upheaval concerning the functioning of the system, NACP initiated the discussion about conducting an external evaluation (audit) to check if it was fully functional and protected from outside manipulations, and identify the causes of experienced technical issues. CSOs widely believed that such an audit was necessary to assess the integrity of the system and its ability to integrate upgraded modules for interoperability with the databases needed for verification of declarations. However, this initiative was followed with the confrontation within the NACP leadership in particular, between the Head and one member of the NACP.<sup>131</sup> According to the latter, the audit as proposed by NACP was doomed for subjective and superficial assessment. As a result, the NACP could not come up with the joint decision and the audit of the system was postponed. After the on-site visit, the monitoring team was informed that an independent external review of the system was launched with the support of the EU ACI. In addition, the NACP adopted the action plan to modernize the electronic declarations system.

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<sup>126</sup> RPR [statement](#) (2016)

<sup>127</sup> <http://www.president.gov.ua/news/komentar-prezidenta-povnocinne-elektronne-deklaruvannya-akti-37847>

<sup>128</sup> <http://www.eurointegration.com.ua/news/2016/08/19/7053590/>

<sup>129</sup> [Will the \(in\) dependent NACP’s leadership vote for an independent expert review of the e-declaration system?](#)

<sup>130</sup> One of the Commissioners resigned later, but for the reasons reportedly not connected with the asset declaration system (see above chapter 1).

<sup>131</sup> Deputy Head of the NSCC Ruslan Radetsky: [How a positive idea can be turned into evil](#)



Implementation of the external audit stalled after the “Ukrainian Special Systems” enterprise refused to provide the NACP with the copy of the assets declaration software for the testing purposes referring to possible security risks. The lack of proper follow-up may cause repetition of the technical problems with the system for the next wave of declarations.

While NACP provided some reasoning behind all the above-mentioned hurdles, perception of civil society met during the on-site was radically different. They harshly criticized the NACP for the failure to act, believing that it was deliberately hindering the process for most of the time. According to the CSOs, "It was evident that the NACP was under the political pressure to postpone the launch of asset e-declarations."<sup>132</sup> Even after the web-portal was ultimately launched, NACP was delaying the adoption of secondary legislation to verify declarations, according to them (see below).

After the on-site visit, the monitoring team was informed that the public access to electronic declarations of specific categories of public employees: the staff of the Security Service of Ukraine and the military prosecutors has been recently closed. Reportedly, the Security Service of Ukraine, citing the threat to the national security, created its own parallel system of asset declarations for its staff, including the top management, which is not public. The Chief military prosecutor of Ukraine in turn issued a Decree in April 2017 obliging the NACP to close public access to more than 100 declarations of military prosecutors. According to the CSOs both actions contradict the CSL. AntAC has filed lawsuits to challenge both decisions.<sup>133</sup>

The monitoring team urges Ukraine to ensure unimpeded functioning of the asset declarations system in line with the CSL and take all necessary measure to prevent its obstruction any further, including unduly limiting the public access to declarations.

### ***Brief overview of regulations***

Under the CPL, all declarations are submitted in an electronic form via the NACP’s web-site and published automatically, except for certain confidential data, such as tax numbers, dates of birth, places of residence, or the specific locations of real estate (the city/village and region where the property is located, is published). The scope of disclosure was extended to include: cash not kept in financial institutions; valuable movable property (e.g. jewellery, antiques, art) worth more than the equivalent of about EUR 4,500 per object; intangible assets (e.g. intellectual property rights); beneficial ownership of legal persons or any assets; unfinished construction of real estate; membership in civic unions, etc.

The asset declarations are submitted by the candidates to civil service and civil servants during the office and after termination of the office.<sup>134</sup> In addition, the NACP should be informed about the opening of a foreign account or the significant change in the material status of the declarant (i.e. within 10 days after they received an income or made a purchase in the amount exceeding about EUR 2,300) (Art. 52 of the CPL). These notifications are also submitted electronically and available on-line on the NACP web-site for public scrutiny. According to the legislation (Art. 17.3 of the NABU Law), the NABU has direct access to the databases held by public authorities. According to the NACP, the data protection requirements also apply in this regard. Art. 17.3 of the NABU Law provides that the NABU is bound of the data protection requirements of the legislation.

### ***Sanctions***

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<sup>132</sup> RPR report (December, 2016) at pg. 4.

<sup>133</sup> [AntAC went to court to verify legal grounds for hiding e-declarations of military prosecutors.; AntAC Sues Security Service of Ukraine for E-declarations.](#)

<sup>134</sup> The following special subjects are included pending a special procedure approved by NACP: the persons referred to in article 52-1 of the Law - the person mentioned in paragraph 1, subparagraph a of paragraph 2 of article 3 of the Law, the personnel of intelligence bodies of Ukraine and/or hold positions involving state secret, in particular, at military units and operational-detective, counterintelligence and intelligence authorities, as well as persons nominated for the above listed positions.



Sanctions for either failing to submit or late submission of declarations and deliberate submission of false information, can cause criminal, administrative or disciplinary liability. The criminal liability arises for false statement in the declaration with regard to assets with value in excess of about EUR 12,000, while false information of value between about EUR 4,750 and EUR 12,000 will be sanctioned as an administrative offence. Violations below the EUR 4,750 threshold may be punished as a disciplinary offence. In addition to the original criminal sanction of imprisonment of up to two years, additional sanctions of a fine and correctional work were introduced. The asset declaration will also be an obvious source of evidence for the public prosecution in proceedings related to illicit enrichment, which is established as an offence in the Criminal Code of Ukraine in accordance with the UNCAC.<sup>135</sup>

### **Verification**

The NACP is responsible for monitoring and verifying declarations as well as monitoring the lifestyle of persons covered by the law. The declarations of high-level officials and persons holding positions associated with a high-risk of corruption are subject to mandatory full verification. *Control and verification* of asset declarations is entrusted to the NACP, which checks timely submission, completeness and accuracy of declarations as well as conducts full verification and monitoring of the lifestyle of declarants (Articles 48-51 of the CPL).<sup>136</sup> The persons with high status and responsibility and high level of corruption risks are subject to mandatory full examination. The list of positions with high corruption risk was approved by the NACP in 2016.<sup>137</sup> The NACP has also gained access to the database of National Commission on Securities and other databases (MOJ databases, taxes etc) which is essential for verifying asset declarations.<sup>138</sup> The monitoring team however learned that the NACP does not have access to a number of other databases and “secret information” which is also necessary for fulfilling its verification mandate. It also learned that the existing access to external databases does not allow automatic interaction with the electronic declarations system.

Despite these regulations the NACP could not start implementing its monitoring functions until recently since the procedure for full verification was only approved on 10 February, 2017.<sup>139</sup> The procedure for lifestyle monitoring is still a draft. The NACP informed the monitoring team that the Ministry of Justice, twice refused to register these documents.<sup>140</sup> Civil society however believes that NACP and the Ministry of Justice deliberately delayed the process in order to avoid initiating the verification.<sup>141</sup> RPR wrote about threats of sabotaging the system: “the National Agency on Corruption Prevention should immediately set the deadlines for complete checks of e-declaration and lifestyle monitoring, as well as automate the process of checking declarations against other state registers and request for access to the relevant registers”<sup>142</sup> The local experts and CSOs believe that the sabotage of the system continues now with the adoption of an

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<sup>135</sup> OECD (2016) [Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016, at pg.63](#)

<sup>136</sup> Full verification of the declaration consists of: clarification of the authenticity of the declared information; Clarification of the accuracy of the declared assets; Checking for conflict of interests; Checking for signs of illegal enrichment.

<sup>137</sup> [List of positions](#) with the high corrupting risks subject to mandatory full examination of declarations approved by NACP [Decision](#) in 2016.

<sup>138</sup> News [article](#) (2016).

<sup>139</sup> NACP Decision No. 56 of 10 February, 2017 On Approval of the Procedure for Controlling and [Full Verification of the Declaration of the Person Authorized to Perform the Functions of the State or Local Self-Government](#).

<sup>140</sup> On 11 November 2016 the NACP adopted the Decisions No. 114 “On approval of *the procedure for control and full verification of the declaration of persons authorized to perform the functions of State or local self-government*” and No. 112 “On approval of *the procedure for the monitoring of the lifestyle of persons authorized to perform the functions of State or local self- governments*”. These decisions were overturned on 28 December 2016 due to refusal of the Ministry of Justice with regard to State registration.

<sup>141</sup> [Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.](#)

<sup>142</sup> RPR statement (2016) [It is unacceptable to sabotage introduction of a complete check of e-declarations or monitoring of public officials lifestyle.](#)

inadequate verification procedure not allowing for transparent and objective verification and instead is legalizing illegal income of the public officials.<sup>143</sup>

The new procedure details the rules for *control* and *full verification* of asset declarations (Art. 48 and 50 of the CPL). *Control* of declarations includes: a) checking timely submission and b) completeness of the declaration and c) arithmetical and logical check. The violation of the submission deadline or failure to submit can only be monitored with the notifications from relevant agencies, civil society or the information obtained from the NACP in open sources, since Ukraine does not have HRMIS to compare against e-declaration system data. Completeness is assessed automatically by analysing whether all the fields of the asset declaration have been filled in. As regards the final and more important component, the logical and arithmetical monitoring of the declarations, it can only be launched once the secondary legislation and the additional software is in place.<sup>144</sup> *Full verification* of declarations is aimed at revealing the conflict of interests, or signs of illicit enrichment, accuracy of information and the evaluation of assets. Full verification of declarations can be mandatory (for the list of high risk positions; in case the arithmetical logical check showed high risks; declarant has chosen not to indicate the information about the family members) or based on the substantiated decision of the NACP. The request for full verification of a declaration can be submitted by citizens of Ukraine, or initiated by the NACP on its own if the results of the full verification have shown the signs for conflict of interest or illicit enrichment or other illegal activity.

Arithmetical and logical check as an element of monitoring is crucial since its outcomes are linked to the decision on full verification. In this light, it is paradoxical and troubling that before adoption of the required secondary legislation and setting up the relevant software module, *all declarations are considered to have successfully passed the arithmetical and logical verification test*. Further deficiencies of the procedure have been analysed by civil society in detail, reporting about various ways of manipulation, the regulation allows to avoid the full verification of declarations of high officials.<sup>145</sup> Among them is that NACP is obligated to issue conclusions of verification in the absence of sufficient information even if the relevant state body did not cooperate and did not provide the data (which happened in the case of the declaration of the Minister of Justice).<sup>146</sup> Reportedly, the NACP leadership recognizes existence of some of these deficiencies. One of the Commissioners to that effect requested the NGOs to provide their comments on the current procedure.

### ***New development: extending the scope of asset declarations to anti-corruption activists***

A worrying development the monitoring team became aware of during the on-site visit was the latest amendments to the CPL, subjecting the anti-corruption activists to full asset disclosure. The Parliament adopted the amendments in March this year extending the scope of the declarants to include a large number of subjects from civil society, independent experts, those members of various panels for merit-based recruitment or other platforms, academia, individuals who receive funds for anti-corruption programmes. Even those who have *participated in trainings* funded by anti-corruption projects are subject to the full regime according the NACP legal opinion.<sup>147</sup> The NACP obviously has no way to identify these subjects in advance to notify about the need to submit the declaration, thus the declarants may end up being sanctioned, not knowing that they are required to declare. These new categories of declarants will have to file their first declarations in 2018.

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<sup>143</sup> [The full verification procedure allows officials to escape responsibility.](#)

<sup>144</sup> Arithmetical and logical verification implies: a) verifying various sections of the declaration against each other to check conformity (done by NACP based on the procedure yet to be adopted); b) checking the data for compatibility with other relevant databases (to be performed automatically by the software once the necessary regulations are developed and the system is put in place)

<sup>145</sup> [The full verification procedure allows officials to escape responsibility.](#)

<sup>146</sup> Conclusions of the full verification by NACP are provided [here](#).

<sup>147</sup> The NACP legal opinion is available in [Ukrainian](#).

It goes without saying that the provisions of CPL on asset declarations were aimed at public officials who receive remuneration from public funds, operate with public money, influence public policy and can abuse their public position for personal gain. No such rationale can be found with regard to civil society, anti-corruption watchdog organisations and activists. The amendments cover members of the competition commissions too that take part in the recruitment of civil servants, this will discourage independent experts from taking part in this process in the future, thus reducing transparency and integrity of the merit-based recruitment of civil servants.

The monitoring team is extremely disturbed with these amendments that deviate from the intention and purpose of the CPL and rather seem to be aimed at discouraging anti-corruption activism in the country.<sup>148</sup> It shares the concerns widely expressed by the international community regarding the intimidating effect and discriminatory nature of the provisions and urges Ukraine to abolish them as a matter of priority.

After the on-site visit, the monitoring team learned that as a result of the heavy criticism and substantial pressure, the President initiated the bill aimed at abolishing the e-declarations for anti-corruption activists, however Ukrainian Rada did not include it in the agenda for some time now. NGOs believe the bill needs to be further revised, since they may put undue pressure on NGOs from the State Fiscal Service.

### **Implementation**

the *Unified State Register of Declarations of Persons authorized to perform functions of the state, or local self-governments* – electronic asset declarations was launched on 1 September, 2016.<sup>149</sup> The system contains all the declarations received by NACP in an open format except for some data that is left confidential as mentioned above. The launching of the system was split in two stages.<sup>150</sup> The first wave of declarations (from 1 September to 30 October, 2016) included only the "persons holding responsible and especially responsible positions" (art. 50 of the CPL)<sup>151</sup> for 2015 for persons in office and those leaving the public service as well as the notifications on substantial changes in assets. The second wave (from 1 January, 2017) included all other employees. For the first wave, NACP estimated that approximately 50 thousand officials would submit the declarations, however, it turned out that the local self-government officials, diplomats, judges, investigators, prosecutors, were not taken into account. Additionally, as there is no registry of civil servants, the exact calculation of the number of public officials subject to asset declarations has never been made.

The system was developed with the support of the UNDP.<sup>152</sup> Its current technical capabilities do not include automatic verification as it is not yet connected to other registries and databases. However, it is planned to add the relevant modules in the future (66 million 200 thousand UAH allocated from the State budget for this purpose). NGOs are advocating that "the NACP should also make technical improvements to the system, as it still fails to meet a number of effective legislative regulations in an electronic form or ensure user-friendliness and continuous performance. In particular, it is necessary to lift unlawful restrictions on access to information. [...] In addition, there should be enough capacities to analyse declarations in automated manner in bulk, while the declarants shall receive electronic digital signatures."<sup>153</sup> According to the initial idea, automated verification was supposed to be the first stage of the

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<sup>148</sup> For CSO participation, anti-corruption activism and the developments restricting them see Chapter 1.

<sup>149</sup> Relevant regulations are provided in the NACP Decision № 3, dated June 10, 2016 registered at the Ministry of Justice of Ukraine on 15 July 2016 No. 959/29089, "On the functioning of the Unified State Register of Declarations of Persons authorized to perform functions of the state, or local self-governments"

<sup>150</sup> In line with the Decision of the NACP No. 2 dated June 10, 2016 "On the launch of the system for submission and disclosure of declarations by public officials who are to function on behalf of the state or local self-governments", registered in the Ministry of Justice of Ukraine on 15 July 2016 under the No. 958/29088.

<sup>151</sup> [List of positions](#) with the high corrupting risks subject to mandatory full examination of declarations approved by NACP [Decision](#) in 2016.

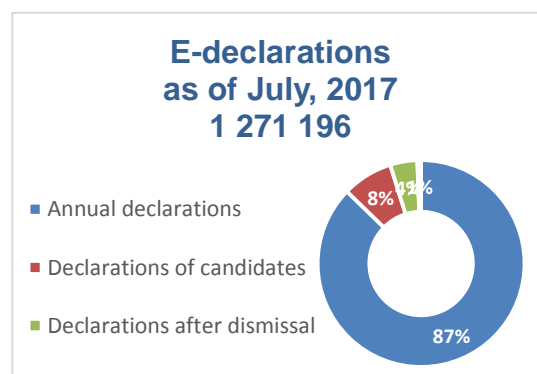
<sup>152</sup> UNDP Ukraine [E-Declaration for public servants' assets: public scrutiny to curb corruption?](#)

<sup>153</sup> RPR statement (2016) [It is unacceptable to sabotage introduction of a complete check of e-declarations or monitoring of public officials lifestyle.](#)

full verification process that could filter small amount of declarations with higher corruption risks out of more than 100 000 declarations for full verification. Only the filtered declarations would be verified manually at later stages of the verification process. This approach would make it feasible to conduct full verification, but only in the case if the software of automatic verification is launched.

According to the recent statistics the NACP is conducting full verification of 313 declarations of 244 declarants. 39 checks have already been completed.<sup>154</sup> 4 cases were submitted to the NABU and 4 to the SAPO. Since the beginning of 2017, the NACP received 23 293 notifications on failure to submit declarations (19 229) and late submissions (4064) and more than 6296 declarations have been reviewed.<sup>155</sup> 29 protocols on administrative violations were sent to courts, 4 of them in relation to the late submission of a notice of significant changes in property status and 21 on late submission of declarations.

Figure 7 Asset Declarations



Source: NACP web-site: <https://goo.gl/ojU1sp>

In addition, within the period of eight months of 2017, the National Police of Ukraine have drawn up and sent to the court administrative protocols for: delayed submission of e-declarations – 542; failure to report about substantial change in assets – 158; submission of false information – 8. As a result, the court imposed administrative liability on 290 persons including civil servants, judges and officials of local self-government.

On 28 July 2017, the NACP approved the results of monitoring of declarations of 11 top officials including the Prime Minister, and the cabinet members.<sup>156</sup> According to the decision, no inaccuracies have been found in the declarations of the Prime Minister and the Minister of Agrarian Policy and Food. For the rest, some incomplete information has been identified, however, signs of corruption, illicit enrichment or conflict of interests have not been established. Also, the decision was made to start full verification of 4 declarations (prosecutors, former customs officer) out of 23 requests to conduct full verification by civil society, citizens or the law enforcement.

NGOs created a coalition to monitor declarations called “[Declarations under Control](#)”. Civil society organization Lustration Committee maintains a [portal](#) allowing citizens to report any irregularities seen in the declarations. According to CSOs, the NACP instead of monitoring public officials “legalized” their illegal income by using the deficient procedure of verifications. The NGOs are strongly advocating for changing the verification procedure as soon as possible.<sup>157</sup>

As regards the use of asset declaration system for criminal investigations, the Government informed that as of 1 September 2017, 1133 criminal proceedings were opened on failure to submit e-declarations or false declarations (Art. 366 of the CC), 81 cases were sent to the court. As of the end of June 2017, the NABU detectives were investigating 61 criminal proceedings opened as a result of the analysis of e-declarations

<sup>154</sup> Statistics on e-declarations as of 28 July, 2017 available on the website of NACP [here](#).

<sup>155</sup> The state agencies are obligated to notify NACP about failure to submit asset declarations or late submissions. The decision of the NACP No. 19, dated September 06, 2016, registered at the Ministry of Justice of Ukraine on 15 November 2016 by the No. 1479/29609, approved the procedure for verifying the fact of submission of declaration by the subjects of declarations, according to the Law of Ukraine “On prevention of corruption” and “Notification of the NACP about cases of failure or untimely submission of such declarations”.

<sup>156</sup> 28 July 2017 [the NACP approves the results of monitoring of declarations of high officials](#).

<sup>157</sup> [Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable](#).

on alleged false declarations (Art. 366 of the CC) and illicit enrichment (Art. 368 of the CC), among them 17 Judges<sup>158</sup> 18 MPs, 12 – heads of central executive authorities. The first case where the suspect was recently identified based on the false data in declaration, is of a retired judge, the case is at the pre-trial stage pending decision on the remand measure to be applied.<sup>159</sup> NABU has acquired full access to e-declaration system only in May 2017, after the signature of the MoU with the NACP. As of September 2017, SAPO is supervising 90 related criminal cases. One of the cases that was submitted to the court concerns an alleged illicit enrichment of a high-ranking official in the GPO involving about 2.8 mln UAH illegal assets. Other cases involve high level officials of tax authorities and local government.

Enforcing the asset declarations verification mandate in relation to the high-ranking officials and the submitted cases to NABU is a part of the IMF conditions for Ukraine. The authorities committed to “enforce the filing of comprehensive asset declarations by all high-level officials including managers of SOEs and evaluate the effectiveness of the asset declaration requirements to ensure that they remain appropriately focused on high-level officials and consider amending the categories of officials that will be required to submit asset declarations.”<sup>160</sup>

## Conclusion

Electronic declaration system is the fundamental anti-corruption measure implemented by Ukraine in recent years. Over 1 271,000 declarations can now be openly accessed, disclosing enormous wealth of the high level public officials. The law enforcement are using the system and have started criminal proceedings based on its data. Since its introduction, civil society, international community and public at large have been mobilised to defend the system from multiple interferences. The turmoil around the e-declarations on the one hand shows how important the system is for the anti-corruption action of the Ukrainian society. On the other hand, it demonstrates the magnitude of opposition and barriers any initiative aimed at revealing the extent of corruption and genuinely fighting it, faces in Ukraine. At the same time, these processes revealed the complete powerlessness of the NACP and inability to efficiently carry out its mandate when it comes to the interference by outside forces.

Now, as the system is operational and is showing its first results in practice, it is important to ensure that it is used for the purposes it was designed for: to hold responsible public officials to account and prevent the illegal practices in the future. For this, it is critical to ensure full and uninterrupted functioning of the system; adopt bylaws that serve the purpose of implementing the primary legislation fully, launch automated verification software, connect the system with the relevant databases to perform this function and allow the NACP to exercise its verification mandate fully and independently.<sup>161</sup>

Considering the chaos around the massive number of e-declarations and malfunctioning of the system, largely caused by huge number of declarations, it is evident to the monitoring team that the number of the declarants is unreasonably high complicating management of the system by the NACP. It thus recommends Ukraine to focus its verification efforts on the high-level officials that are most exposed to corruption and related violation. Nevertheless, this does by no means suggests decreasing the its public sector transparency standards that Ukraine has set high.

The monitoring team cannot stress enough the importance it attaches to the full enactment and integral application of the system, especially unimpeded and full functioning of its verification component to yield the outcomes for which the system was designed as promised by the Government and long awaited by the Ukrainian society.

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<sup>158</sup> [Statistics of the NABU cases](#) based on e-declarations as of 30 June 2017.

<sup>159</sup> First suspect after analysing e-declarations by NABU: news article available [here](#).

<sup>160</sup> International Monetary Fund (IMF) [Country Report \(No. 17/83\) on Ukraine \(2017\)](#), Attachment I. Memorandum of Economic and Financial Policies.

<sup>161</sup> EU Delegation statement (2016) (including through a private API).



The latest amendments to the CPL that extended the scope of the declarants to anti-corruption activists are worrying as they depart from the purpose of the asset declaration system and can serve as a tool to discourage and intimidate anti-corruption activism in Ukraine. These amendments should be ultimately abolished.

### **New Recommendation 12: Asset Declarations**

- 1. Ensure integrity, full and unimpeded functioning of the electronic asset declaration system allowing timely submission of asset declarations, disclosure of asset declarations, including in open data format. Ensure that any exceptions for disclosure are directly envisaged by the CPL.**
- 2. Amend verification procedure to address its shortcomings, adopt the lifestyle monitoring regulation, ensure automated verifications of asset declarations by the NACP and implement data exchange between the asset declarations system and state databases to support automated verification.**
- 3. Ensure that the actions are taken proactively on the alleged violations disclosed through the e-declaration system and that cases with the signs of criminal activity are dully referred to the law enforcement for the follow up.**
- 4. Ensure that verification is carried out systematically and without improper outside interference with the focus on high-level officials.**
- 5. Abolish amendments subjecting a broad range of persons that are not public sector employees (i.e. members of NGOs, activists, experts) to asset disclosure requirements.**
- 6. Ensure that the NABU has direct access to the asset declaration database in line with the Article 17 of the Law on NABU and is able to use it for the effective execution of its functions.**

### ***Reporting and whistleblowing***

The legal basis for corruption reporting and whistleblower protection is provided by CPL Art. 53. Having analysed applicable legal framework, the previous report concluded that while Ukraine has a proper legal framework for whistleblower protection, no training and guidance is available for its implementation in practice.<sup>162</sup> It was recommended to enforce the existing rules and consider adoption of a stand-alone law to cover both public and private sector whistleblowing.

According to the data of 2016 Global Corruption Barometer, in Ukraine, only 58% of the respondents are ready to report corruption, which however is a positive increase as compared to 26% in 2013. 16% are certain that a notification on bribery will change nothing, and 14% are afraid of the consequences of reporting.<sup>163</sup>

The CPL (Art. 53) provides for reporting the violations stipulated in [this] law or information related to prevention and fighting corruption to the NACP. The protection of these persons falls under the mandate of

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<sup>162</sup> Article 53 of the CPL; Article 11 of the Law of Ukraine on Access to Public Information. See [OECD/ACN Third Round of Monitoring Report on Ukraine](#), pages 113–114.

<sup>163</sup> [Global Corruption Barometer](#), Europe and Central Asia (2016).

the NACP, which can intervene in administrative or civil proceedings to represent a whistleblower.<sup>164</sup> Furthermore, the NACP is responsible for raising awareness to promote whistleblowing.

To start implementing these regulations in practice, the NACP drafted the relevant rules of procedure, however, they are not adopted yet.<sup>165</sup> In addition, the NACP introduced a special phone-line and an electronic notification form on its web-site. Online notification about corruption can be submitted by filling in several pre-determined fields and providing additional information or attachments.<sup>166</sup> The NACP has also conducted trainings for its staff and plans further activities with the donor support to increase capacity of the employees working in this area.<sup>167</sup> As a result of the first steps in implementation, in 2016-2017, the NACP received 860 reports on corruption-related offences, among them 292 were anonymous. Among these reports, 316 have been found ungrounded, 106 reports have been verified but the information was found inaccurate. 195 reports were sent to the National Police of Ukraine for the mere reason that the NACP has had no its territory divisions yet; 35 reports resulted in 70 Protocols on Administrative Offence filed that were brought to court and, eventually, UAH 34 000 (approximately EUR 1 300) was charged as penalty; and currently 208 reports are being processed by the NACP.

TI Ukraine actively supports the work of incentivizing reporting, increasing capacity of NACP and is receiving reports from whistleblowers, similarly to TI national chapters in other countries. A campaign: "It Is Not Shameful to Whistleblow" covering 400 000 people<sup>168</sup> and a training of NACP staff on how to protect whistleblowers has been carried out in 2016. The reports on corruption (168 in total) have been submitted to the relevant authorities for further action.

However, several CSOs consider the progress of the NACP in relation to whistle-blower protection insufficient. During the on-site visit, NGOs raised concerns regarding the inefficiency of the NACP in implementing its mandate, referring to the concrete cases when NACP, despite having the power to interfere in court proceedings, refused to do so. Furthermore, CSOs strongly advocate for reinforcing legislative protection of whistle blowers, since according to them the existing provisions are declaratory and detailed procedural rules are needed to enforce them in practice. Analysing international practice of reward system for whistle-blowers and implementing it in Ukraine to incentivise whistleblowing are also recommended.<sup>169</sup>

In 2016, a group of eight lawyers together with the twenty-three MPs prepared a comprehensive stand-alone whistle-blower protection draft law and submitted it to the Parliament.<sup>170</sup> The draft is now in the Parliament for consideration in various committees. During the on-site NACP representatives informed that the agency is not supporting the adoption of a new, stand-alone law since, in its view, firstly, the provisions in force are sufficient for implementation and secondly, reopening the issue for discussion and consideration may do more harm than good to the legal system of whistle-blower protection in Ukraine. The monitoring team was also informed that NACP provided its negative conclusion on the draft mainly due to the declarative nature of its provisions and expansion of the powers of the Ombudsman in relation to the whistleblowers.

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<sup>164</sup> For the detailed description of the functions of the NACP see Chapter 1 of this report.

<sup>165</sup> Rules for Processing Signals on Corruption and Methodical Recommendations for Organization of Processing of Signals about Facts of Corruption Offences Disclosed by Whistleblowers.

<sup>166</sup> [Electronic whistleblowing form](#) is available on the NACP website.

<sup>167</sup> The Joint Action plan of Agriteam Canada Consulting Ltd. and the NACP approved by the Decision of the NACP No. 168 on 22 December 2016 includes supporting training on and other measures for enhanced whistleblower protection. See the [news article](#) on the NACP website.

<sup>168</sup> Transparency International Ukraine, [2016 Annual Report](#).

<sup>169</sup> Shadow Report (2017) ["Evaluating the Effectiveness of State Anti-Corruption Policy Implementation"](#), pages 16, 18 and 27.

<sup>170</sup> See Oksana Nesterenko, Olena Shostko (ed.), (2016) [Whistleblower Protection](#), Kharkiv, Human Rights Publisher. The publication contains the draft law in English on pages 17-45.



The monitoring team welcomes the development of a stand-alone draft law as recommended by the previous report. The draft is ambitious and fairly comprehensive, generally in line with the relevant international standards and good practices. It covers public and private sectors (public authorities, state-owned enterprises and legal entities corresponding defined criteria), provides for various reporting channels and defines what can be reported, extending the scope beyond the corruption offences. The detailed procedure for reviewing whistleblower reports is also envisaged. The significant part is dedicated to the protection, including some of the new measures, right to compensation and financial awards.

Nevertheless, the monitoring team believes, that when discussing the draft in the Parliament, it is important to consider whether sufficient regulations have been included to secure the enforcement in practice. For instance, how restoration of violated rights and immediate reinstatement (draft Art. 12) will be provided or how the compensation of the caused damage (draft Art. 14) will be ensured and what is the role of the executive *vis-à-vis* the courts in this process. It is also important to ensure a working mechanism of establishing a causal link between the whistleblowing and the action taken against the whistleblower. Furthermore, the implementation of this law will require significant financial resources. Thus, noting these and other potential implementation challenges, the monitoring team encourages Ukraine to further analyse and discuss the draft law together with its authors and competent authorities and invites Ukraine to take into account in this process the [Council of Europe CM/Rec\(2014\)7 recommendation “Protection of Whistleblowers”](#) and the growing good practices of stand-alone whistleblower protection laws.<sup>171</sup>

## Conclusion

The CPL provides regulations for protecting whistle-blowers disclosing corruption. The number of reports received so far represents a good start showing the willingness of the public to cooperate with the NACP. Introducing clear reporting channels and online anonymous reporting by the NACP is a welcome development. However, challenges have been noted in ensuring protection in practice (some instances of not intervening in court proceeding and not providing protection were noted by NGOs). Nevertheless, given the short track record since its establishment, it is difficult to judge the NACP’s performance in this respect. The practice is not ripe yet to give grounds for definite conclusions. The trends in whistleblower reports in the coming years and criminal/administrative cases based on these reports would be good indicators to assess the efficiency of the work done in this area in the future.

While introducing stronger regulations reflecting international standards and good practices is encouraged (to cover both private and public sector, provide for financial reward, etc.),<sup>172</sup> practical measures to increase awareness and incentivize reporting, provide efficient reporting channels and protection for whistle-blowers that are subject to retaliation are no less necessary.

The monitoring team recommends Ukraine set fourth clear procedures for receiving and reviewing whistleblower reports and protecting whistle-blower in case of retaliation for reporting. Further, it encourages the NACP to promptly investigate the reports, follow up on the information received from whistle-blowers and provide needed protection to promote reporting. Also, negative stereotypes around whistleblowing need to be tackled further with the information campaigns. More importantly, in order for the whistleblowing to increase, the NACP should be seen as an objective and reliable ally to provide information to and receive protection from.

### New Recommendation 13: Reporting and Whistleblowing

- 1. Ensure clear procedures for submitting, reviewing and following up on whistleblower reports and providing protection. Further train the responsible staff.**
- 2. Raise public awareness on whistleblowing channels and protection mechanism to**

<sup>171</sup> Over the last four years such laws were adopted in Belgium, Ireland, Slovakia, Netherlands, France and Sweden, and was approved by the Cabinet of Ministers and is in the Parliament in Latvia.

<sup>172</sup> OECD (2016) [Committing to Effective Whistleblower Protection](#).

**incentivize reporting.**

- 3. Consider adoption of a stand-alone law on whistleblower protection in line with international standards and good practices.**

Ukraine is **partially compliant** with the recommendation 3.2 of the previous monitoring round.

## 2.2. Integrity of political public officials

Public trust to the political public officials in Ukraine is minimal. There is a wide belief that the officials are obstructing and undermining the implementation of progressive reforms to protect their businesses and personal interests, and continue corrupt practices in peace.<sup>173</sup> Among the most often cited instances are the launch of the asset declaration system and the recent attacks on the anti-corruption activists as described in the previous chapters.

A former investigative journalist and the current MP calls the Ukrainian Parliament “the largest business club in Europe” where it is “considered normal” to combine the parliament membership and businesses and that this is openly discussed by MPs in the premises of the Parliament.<sup>174</sup> According to the national survey results (2015), perceived corruption in the government has increased compared to 2011. Corruption is perceived to be highest in Verkhovna Rada (60.6%); Cabinet of Ministers (54.8%); the President and his administration (46.4%).<sup>175</sup>

Recently published asset declarations of political officials brought to the surface immense wealth and enormous assets of the governing elite, giving reasonable grounds to allege integrity violations.<sup>176</sup> Civil society closely followed and aggressively exposed the alleged violations referring them to the NACP. Against this background, the enforcement of the regulations and the follow up on the allegations has been inadequate. The following section describes the integrity rules applicable to the public political officials and challenges related to their enforcement in the current context of Ukraine.

The information received by the monitoring team in relation to this section both in the form of the answers to the questionnaire and the on-site visit was limited. The monitoring team did not have an opportunity to meet the representatives who would provide responses to its questions to fill in information gaps either. Thus, the section is based on the analysis of legislation and information obtained through the research in open sources.

### *Applicable integrity rules*

There is no statutory definition of a political official or the list of political officials as such in the legislation of Ukraine.<sup>177</sup> Yet, Art. 3.3 the CSL lists the persons to whom the law does not apply, including political officials and article 3 of the CPL lists the positions to whom it applies, among them, the political officials.<sup>178</sup> Art. 50 of the CPL prescribing special full verification procedure of declarations, includes the list of “responsible and especially responsible” persons, among them political officials of all levels. Thus, the integrity rules provided by the CPL extend to the political officials, including members of parliament and local authorities. These rules comprise, as described above, conflict of interest prevention, gifts, declarations of interests, restrictions and ethical conduct (Art. 37–44). State authorities and local self-government may develop their own codes of conduct according to the CPL (Art. 37), for more specific

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<sup>173</sup> See, *inter alia*, Sergii Leshchenko (2017) [Corruption Inc.](#); GRECO (2017) [fourth evaluation round report on Ukraine.](#)

<sup>174</sup> Sergii Leshchenko (2017) [Corruption Inc.](#)

<sup>175</sup> See Kyiv International Institution of Sociology (2015) [Corruption in Ukraine, Comparative Analysis of National Surveys: 2007, 2009, 2011, and 2015.](#)

<sup>176</sup> Kleptocracy Initiative (2016) [Luxuries and Loopholes: Ukraine’s New Asset Declaration Law.](#)

<sup>177</sup> Art. 9.5 of the Law on Central Executive Authorities defines first deputy minister and deputy ministers as “political positions” similarly to Art. 6.3 of the Law on Cabinet of Ministers of Ukraine for Government members.

<sup>178</sup> Article 3 lists the subjects of the law including: the President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine, his First Deputy and Deputy, Prime Minister of Ukraine, First Deputy Prime Minister of Ukraine, Vice Prime Minister of Ukraine, ministers, the Head of the Security Service of Ukraine, the Prosecutor General of Ukraine, the Head of the National Bank of Ukraine, the Head and other members of the Accounting Chamber of Ukraine, Verkhovna Rada’s Commissioner for Human Rights, Chairman of the Verkhovna Rada of the Autonomous Republic of Crimea, the President of the Council of Ministers ARC and others.

integrity regulations. No such code of conduct has been yet adopted in relation to the MPs or other political officials.

[European Parliament Needs Assessment](#) to the Verkhovna Rada of Ukraine recommended to develop a code of conduct for the members of parliament as a matter of priority through an inclusive and transparent process. OSCE/ODIHR has been supporting the work on parliamentary ethics and public integrity since 2013 together with the USAID/RADA Programme.<sup>179</sup> A group of Ukrainian MPs announced their intent to set up a working group that will draft a Code of Ethics for the Verkhovna Rada.<sup>180</sup> In the view of the monitoring team, the development and implementation of a separate code of conduct for MPs is especially important in the Ukrainian context in view of the low level of trust and high level of perceived corruption in Verkhovna Rada of Ukraine.

The Law on the Status of People's Deputy of Ukraine provides some integrity rules and its implementation is entrusted to the Parliamentary Rules and Procedures Committee. However, no information was provided as to its actual implementation. Based on the information collected by the monitoring team, there seems to be no meaningful follow up to the violations of these provisions.

### *Enforcement of integrity rules*

The supervision and enforcement of the integrity rules for the entire public service and among them political officials are entrusted to the NACP.<sup>181</sup> This includes the enforcement of conflict of interest regulations, providing guidance and consultations, as well as control and verification of asset declarations.

While the asset disclosure rules are the same for political officials as for all other declarants, special rules of verification apply for “responsible and particularly responsible positions” (as listed in the note of Art. 50 of the CPL) and the positions associated with a high level of corruption risk (list was approved by NACP in 2016<sup>182</sup>). The asset declarations of these persons are subject to mandatory full verification (Art. 50 of the CPL).<sup>183</sup> The list of responsible positions is extensive covering highest positions in the state among them the President, Prime Minister, ministers, and deputy ministers and all high political positions.<sup>184</sup>

During the onsite visit the NACP confirmed the scope of the political public officials, however it could not provide the exact numbers for this category. The representatives informed that there have not been any specific trainings or consultations on conflict of interest and ethics to the public political officials specifically. Neither there have been any official surveys conducted as regards the trust to the political officials. NACP emphasized that all political public officials should comply with the ethical behaviour as provided in Chapter 6 of the CPL, and NACP remains available for organising trainings and providing guidance (Art. 28 the CPL) as needs emerge.

The monitoring team, however, considers that the oversight and enforcement of the conflict of interests and integrity rules as they stand now are currently unsatisfactory both by the NACP and by respective parliamentary committee mentioned above. The NACP has not paid a particular attention to providing training, guidance or consultations to public political officials, even though this group is especially vulnerable to corruption and the impact of violations committed by them on the public good is significant. Whereas the mandate and the tools in the hands of the NACP in terms of conflict of interest and ethical

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<sup>179</sup> See [OSCE/ODIHR event in Kyiv stresses importance of adopting code of conduct for Ukraine parliamentarians](#).

<sup>180</sup> See [International Conference on Parliamentary Ethics: Ukrainian MPs to Develop Own Code of Conduct](#) (2016)

<sup>181</sup> The mandate of the NACP is spelled out in Chapter 1 and section 2.1 of the report.

<sup>182</sup> [List of positions](#) with the high corrupting risks subject to mandatory full examination of declarations approved by the NACP [Decision](#) in 2016.

<sup>183</sup> Notion of control and verification of asset declarations are explained in section 2.1. of the report.

<sup>184</sup> As to the civil service positions the note prescribes that all positions belonging to A and B category are also covered.

rules enforcement over the political officials may still be insufficient, there is at least one tool, which could be successfully used for identifying and following up on integrity violations by political officials. This is the electronic asset declarations system with the special procedure for full verification of declarations of political public officials.

The authorities explained that despite difficulties to launch the asset declaration systems and adopt the relevant regulations to verify them, the NACP is already actively engaged in supervising implementation of these rules, *inter alia*, by investigating potential violations by MPs and high officials, on the basis of the information received from NGOs, but they could not provide the details of the results of such investigations.

However, CSOs met during the on-site widely believe that the NACP is failing to enforce its mandate over the high level officials in Ukraine and that it is selective and biased in its investigations of integrity violations in the absence of the objective asset declaration verification procedure. One NGO, for example, informed about 20 notifications of alleged serious violations and potentially criminal offences by public officials they have sent to the NACP, that the agency failed to check. By contrast, NACP started investigation of the alleged misconduct of an MP as he received 9000 UAH (300 EUR) from the NGO Anti-Corruption Centre (AntAC) for developing anti-corruption course for students of Kyiv-Mohyla academy.<sup>185</sup> According to the information available in the open sources, Ukrainian Prosecutor General's Office have processed e-declarations and also sent materials concerning 53 MPs to the National Agency on Corruption Prevention (NACP) for further action.<sup>186</sup>

On 28 July 2017, the NACP approved the results of monitoring of declarations of 11 top officials including the Prime Minister, and the cabinet members.<sup>187</sup> According to the decision, no inaccuracies have been found in the declarations of the Prime Minister and the Minister of Agrarian Policy and Food. For the rest, some incomplete information has been identified, however, signs of corruption, illicit enrichment or conflict of interests have not been established. The NACP made decision to carry out 181 full verifications of declarations and refused to do so in case of 156 requests to conduct full verification by civil society, citizens or the law enforcement. According to CSOs, with the new verification procedure, however, the NACP instead of monitoring public officials “legalized” their illegal income (for more details see the section on asset declaration above).<sup>188</sup> It was also noted that some agencies do not cooperate and provide information necessary for full verification. These data, in conjunction with the recently approved deficient verification procedure raise serious doubts as to the impartial and unbiased application of its mandate by NACP with regard to the political officials.

The NABU is currently investigating cases in relation to 18 MPs on alleged false declarations (Art. 366 of the CC) and illicit enrichment (Art. 368 of the CC), as a result of the analysis of e-declarations. The recent “amber mafia” case shows how MPs use their legislative powers for private gain. A foreign company allegedly provided the advantage in the amount more than 300 thousand USD to the persons closely related to the Members of Parliament<sup>189</sup> to prepare draft laws and unlawfully influence officials of the State Service of Ukraine for Geodesy, Cartography and Cadastre, the State Forestry Agency, the State Service of Geology and Mineral Resources of Ukraine, local self-government bodies, the courts and the Prosecutor's offices to take decisions favourable to this company. Out of 7 detained, 6 are closely affiliated with the MPs and 2 MPs have allegedly participated. More than 100 kg of amber, firearms, ammunition, computer equipment, drafts and copies of documents containing information about the crime were seized. The case is

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<sup>185</sup> [National Agency on Corruption Prevention is looking for illegal secondary employment in teaching activities of Serhiy Leshchenko.](#)

<sup>186</sup> [Ukrainian GPO sends materials on 53 MPs' e-declarations to NACP](#)

<sup>187</sup> [The NACP approves results of inspections.](#)

<sup>188</sup> [Change of the full verification order is urgently needed, otherwise NACP will legalize the assets of corrupt officials instead of holding them accountable.](#)

<sup>189</sup> [NABU and SAPO detained and gave notices of suspicion to accomplices of the so-called "amber mafia". Two MPs allegedly affiliated.](#)

now on the pre-trial stage. SAPO requested the lifting of immunities of 2 MPs which was partially granted by Verkhovna Rada. The Parliament approved the filing of charges but not the arrest of the MPs. The Rules of Procedure Committee of the Parliament did not support most of the requests for lifting immunity and was heavily criticized for this by the CSOs. Reportedly, the acting chair of the committee was later seen having lunch with one of the MPs whose immunity the committee refused to lift, shortly after the decision was taken.

## Conclusion

Integrity of MPs and other political officials is a concern in Ukraine. There is a wide and strong public perception of high level of corruption among the politicians. The CPL applies to political officials including high level and local government. Supervision and control is entrusted to the NACP, but there is a wide distrust to this agency as to the impartiality and unbiased implementation of its mandate. While measures still are pending to render the system of verification of asset declarations and lifestyle monitoring operational, it is clear, that so far NACP has been after “a small fish” leaving corrupt politicians and public officials untouched. NACP has not taken adequate measures in response to the recently disclosed millions of cash and significant assets of high officials, that left public in shock.<sup>190</sup>

While some integrity rules are provided in the CPL, a separate ethics code for parliamentarians is needed with the necessary training and guidance for its application. It is also important to clarify the oversight mandate of the NACP vis-a-vis the Parliamentary Committee of Rules and Procedure and how the awareness, training consultations and guidance are provided to the MPs. Moreover, it is crucial that the NACP starts exercising its powers related to monitoring the enforcement of the conflict of interest rules and verification of asset declarations fully and objectively in relation to this category.

### New Recommendation 14: Integrity of Political Officials

- 1. Provide training, awareness raising and guidance on applicable integrity rules to the political officials.**
- 2. Proceed with the development and adoption of the parliamentary ethics code. Provide trainings, consultations and guidance for its application in practice, once adopted.**
- 3. Clarify responsibilities and mandates for enforcement of integrity rules by parliamentarians, including in relation to the conflict of interest, ethical conduct and consequences of their violation. Ensure independent and objective monitoring and enforcement.**
- 4. Provide for systematic objective scrutiny of declarations of political officials and the subsequent follow up as provided by law.**

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<sup>190</sup> See, inter alia: [Assets On Parade: Ukraine Officials Made To Declare Their Bling](#).



## 2.3. Integrity in the judiciary and public prosecution service

### *Judiciary*

#### **Recommendation 3.8. from the Third Monitoring Round report on Ukraine:**

- Adopt, without further delay, 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, their life tenure, composition of the High Council of Justice.
- Introduce comprehensive changes in the legislation on the judiciary and status of judges, procedural legislation in particular to revise provisions on the system of judicial self-governance, disciplinary proceedings, dismissal and recusal of judges to guarantee their impartiality and protection of judicial independence.
- Ensure sufficient and transparent funding of the judiciary and remuneration of judges that is commensurate to their role and reduces corruption risks.
- Make public on Internet all court decisions, including interim ones.
- Review system of automated distribution of cases among judges to remove loopholes that allow manipulating the system and ensure that results of automated distribution are public and included in the case-file. Introduce ICT tools in the judicial procedures and court functioning (e.g. electronic filing of lawsuits and other legal documents).

Since the adoption of the 3<sup>rd</sup> round IAP monitoring report many developments took place in the area of judicial reform in Ukraine.

In May 2015 the Strategy on Reform of the Judiciary, Justice and other Related Legal Institutes for 2015-2020 (the Strategy) was adopted by the Presidential Decree # 276/2015. The strategy was envisioned in two stages: first stage would introduce general legislative changes and the second stage would commence with adoption of the constitutional changes and will proceed to setting up of the institutional framework in line with the new legal framework. According to the Ukrainian authorities, Ukraine is currently at the second stage of the Strategy implementation.

On 2 June 2016, Ukraine's parliament approved a package of constitutional amendments reforming the justice system<sup>191</sup> and the Law on the judiciary and the status of judges<sup>192</sup>, which came into force on 30 September 2016. In addition the Law on the High Council of Justice<sup>193</sup> was adopted on 21 December 2016 and entered into force on 5 January 2017. Effectively the entire legislative framework of the judiciary was revised and will need to be put into practice.

New legislation simplified the court system, transforming it from the four into the three-level system. It now consists of local courts, appellate courts, and the Supreme Court, which in effect shortened the court time for the hearings. However, in order for these to be properly implemented draft law 6232, introducing amendments into the Civil Procedure Code, Commercial Procedure Code, Code of Administrative justice, changes into the Criminal Procedure Code, would need to be adopted.

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<sup>191</sup> Law On Amendments to the Constitution of Ukraine (provisions on justice) # 1401-VIII

<sup>192</sup> Law On Judiciary and Judges Status # 1402-VIII

<sup>193</sup> Even though amendments into Constitution use the new term which is the closest in translation to "High Council of Judiciary" the monitoring report uses the term "High Council of Justice" to keep the same name as GRECO is using in its latest report.



These legislative changes addressed many elements of the Recommendation 3.8 adopted for Ukraine in the 3<sup>rd</sup> round of IAP monitoring. The reform brought forward various other positive changes that have not been directly recommended but were discussed in the previous report. In particular, the authority of the Prosecutor General's Office was reduced and access to the Constitutional Court of Ukraine was significantly expanded to include all individuals and companies.

This being said, the implementation of these laws will be the actual test of the introduced changes, and this is the most challenging task ahead of Ukraine.

And finally despite these good developments there are still some issues remaining and emerging from the latest legislative changes. Some of them are discussed in this section of the report.

***Adopt, without further delay, 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, their life tenure, and composition of the High Council of Justice.***

This part of the recommendation was pending from the 2<sup>nd</sup> round of monitoring and was reiterated in the 3<sup>rd</sup>. Ukraine was prompted by various international organisations to take this step. Therefore, Ukraine is commenced on finally moving forward with the constitutional reform.

Constitutional amendments changed the judicial appointment procedure: all judges are now appointed by the President upon a binding submission of the High Council of Justice following a competitive selection.<sup>194</sup> In addition, various procedural steps, including eligibility assessment, special verification procedure and qualification assessment are regulated in detail in the legislation. Professional ethics and integrity, along with the candidate's competence, are now among decisive criteria in selection process.

Decisions on judicial dismissal have also to be approved by the High Council of Justice.

The time limit on judicial tenure has been abolished. All judges are now to be appointed for life with no probationary appointment. However in practice judges that have been on their 5 years' probation term at the time of the adoption of the law get their mandates terminated when that period lapses and have to be appointed following the procedure described in the Transitional Provisions of the Constitution of Ukraine.

During the on-site visit, the monitoring team has learnt that many judges are finding themselves in the position when they are still in office with their "re-appointment" pending, rendering their judicial posts and their decisions ineffective. Representatives of the judiciary met at the on-site visit estimated that there are approximately 781 judges whose probation term expired by the time of the law entering into force. As of 28 August 2017 the decisions in regards to their "re-appointment" were taken only in regards to 137 judges with many of these files being postponed for a long time. The monitoring team was further informed that 13 courts have become ineffective because the probation term of the judges ran out. Member of the judiciary met at the on-site visit shared serious concerns over this situation; the monitoring team is also highly concerned, and believes that this should be rectified without further delay.

Composition of the High Council of Justice has been changed to 21 members, the majority of which will now be judges elected by their peers, which is in line with European standards. The President and the Parliament still take part in the forming of the composition of the High Council of Justice (appointing two members each). Two members will also be appointed by each - the Congress of Advocates of Ukraine, the Congress of Prosecutors and the Congress of representatives of the legal higher education and scientific institutions. Congress of judges of Ukraine will appoint ten members, who must be serving or former judges and the only ex-officio member of the High Council of Justice will be the President of the Supreme Court, both the Minister of Justice and the Prosecutor General will no longer be part of this body. The members will be appointed for the four year term and cannot serve consecutive terms. The High Council of Justice will become operational with the minimum of 15 members, the majority of which should be judges. However, Civil Society representatives are critical of this approach. Taking into account the situation in

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<sup>194</sup> For detailed description of the selection procedure see Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017 (pp. 38-40)

Ukraine, selection procedure for High Council of Justice and High Qualifications Commission should include safeguards to ensure high level of qualification and integrity of candidates for these positions.

In addition to legislative deficiencies that translated into the Recommendation 3.8, the 3<sup>rd</sup> round of monitoring discussed practical challenges that related to the impact of the Law on Restoration of Trust. The law terminated the offices of all members of the High Council of Justice and previous members were no longer allowed to take up these positions. This rendered the High Council of Justice inactive: by the time of the adoption of the report only 7 members out of 20 were in the High Council of Justice. High Qualifications Commission, in addition to its very high workload, was also ineffective for almost the whole of 2014. Such situation was found to be unacceptable.

Since then, before adoption of the judicial reform new composition of the High Council of Justice was appointed in April-May 2015. On 4 June 2015 it became effective with 17 members in the office. This High Council of Justice continues to operate now. According to the Constitutional amendments, the serving members of the High Council of Justice can hold their posts until 30 April 2019, by which point appointment of the new composition has to take place.

The 3<sup>rd</sup> round of monitoring recommendation 3.8 referred specifically to the need of aligning the changes to the recommendations of the Venice Commission. At the time of the report the latest opinion dated back to 2014. Since then the Venice Commission produced another assessment relevant to this issue<sup>195</sup>. The only new Venice Commission recommendation, which relates directly to this part of Recommendation 3.8, and which was not followed, regards the election of two members of the High Council of Justice by the Parliament and prescribes that it should be done by qualified majority.

In its latest Report on Ukraine<sup>196</sup> GRECO confirms that the 2016 constitutional reform benefited from the expertise of the Venice Commission to a large extent. It also underlines that the adopted Law on the Judiciary and the status of judges has not been reviewed by any Council of Europe body yet. PACE also calls Ukraine on seeking the opinion of the Venice Commission on the Law on the High Council of Justice with the view to implement its recommendations.<sup>197</sup> The monitoring team strongly believes that this should be done.

All of these positive legislative changes can only be definitively assessed once they are tried out in practice. However, in terms of the requirements under this part of the Recommendation they are considered to be largely implemented.

***Introduce comprehensive changes in the legislation on the judiciary and status of judges, procedural legislation in particular to revise provisions on the system of judicial self-governance, disciplinary proceedings, dismissal and recusal of judges to guarantee their impartiality and protection of judicial independence.***

Similarly, this part of the Recommendation 3.8 mostly reiterates an even earlier recommendation given to Ukraine in the 2<sup>nd</sup> round of IAP monitoring. Therefore, comprehensive changes into the legislation on the judiciary and status of judges which indisputably took place in Ukraine, with adoption of the Law on the judiciary and the status of judges, as well as the Law on the High Council of Justice are welcomed.

*System of judicial self-governance*

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<sup>195</sup> Secretariat Memorandum on the compatibility of the Draft Law of Ukraine on amending the Constitution of Ukraine as to Justice as submitted by the President to the Verkhovna Rada on 25 November 2015 (CDL-REF(2015)047) with the Venice Commission's Opinion on the proposed amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015 (CDL-AD(2015)027), Opinion no. 803/2015 available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)043-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)043-e)

<sup>196</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017.

<sup>197</sup> Resolution 2145(2017) of the Parliamentary Assembly of the Council of Europe (PACE) and its Explanatory memorandum.

With regards to the issue of judicial self-governance, the system now has the following structure:

- The Congress of Judges is the supreme body of the judicial self-governance.
- The Council of Judges is responsible for ensuring that the decisions of the Congress of Judges are implemented.
- The High Council of Justice is responsible for appointment and dismissal of judges, supervision of the incompatibility requirements on judges and for all disciplinary proceedings. It also gives consent on detention and taking in custody of the judges and decides on the transfer of judges to other courts.
- The High Qualifications Commission of Judges has tasks relevant to the appointment procedure and the qualifications examination of judges. It is still responsible for completing disciplinary procedures which were launched before the adoption of this law.
- The State Court Administration is a state body accountable to the High Council of Justice. It provides organisational and financial support to the judiciary.

The role of the judicial self-governance bodies has been strengthened, as well as the procedures in which they are being established and function.

In particular, decisions of the Congress of Judges are now binding on other bodies of the judicial self-governance and on all judges. Delegates of all courts are elected at the meetings of judges and compose this body. It elects justices of the Constitutional Court, as well as members of all other bodies of judicial self-governance.

The Council of Judges has representation of judges of different court levels.

The improvements into the composition of the High Council of Justice have been already discussed above. Additionally, the members of the High Council of Justice now work on the permanent basis (apart from the President of the Supreme Court) and just like the members of the High Qualifications Commission of Judges, are subject to strict rules on incompatibilities. This change addresses one of the deficiencies highlighted in the previous round of monitoring and pointed out in the opinion of the Venice Commission and the ECtHR judgement. The High Council of Justice is now endowed with broad powers for most matters concerning the status of judges as well as the organisation and the functioning of judicial institutions.

The functions of the High Qualifications Commission of Judges in regards to the disciplinary proceedings have been transferred to the High Council of Justice. This is a positive step in line with the recommendation of the Venice Commission, which in 2013 opined that there is no need for two bodies such as the High Council of Justice and the High Qualifications Commission of Judges. However more is needed in this regard. Due to the continued existence of these two bodies the institutional set-up even for the judicial appointment remains to be over-complicated and the monitoring team agrees with the opinion of the Venice Commission that was also reiterated by GRECO that “ideally, in order to ensure a coherent approach to judicial careers, the High Qualifications Commission should become part of the High Council of Justice, possibly as a chamber in charge of the selection of candidates for judicial positions.”<sup>198</sup>

#### *Disciplinary proceedings*

Various concerns in regards to the disciplining of judges have been raised in the 3<sup>rd</sup> round of IAP monitoring. They called for:

- clear and established in the law grounds for liability that would be in line with legal certainty requirements and proportionate sanctions;
- disciplinary proceedings complying with fair trial guarantees by (a) separation of functions of initiating disciplinary proceedings and conducting investigation and taking decision on the case and (b) giving judges means to appeal (this concerned in particular the judges of the Supreme Court and higher specialised courts).

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<sup>198</sup> Opinion of the Venice Commission CDL-AD(2015)026 and its Opinion CDLAD(2013)034.

In respect to the first point, the adopted Law on the judiciary and the status of judges contains the full list of disciplinary misconduct that results in disciplinary liability.<sup>199</sup> However, as pointed out in the latest GRECO report “references to some imprecise concepts such as “conduct which disgraces the status of judge or undermines the authority of justice” and “compliance with other norms of judicial ethics and standards of conduct which ensure public trust in court” have still been maintained. Venice Commission continuously criticised Ukraine for such approach<sup>200</sup>, and the 3<sup>rd</sup> round IAP monitoring report highlighted this issue when providing grounds for Recommendation 3.8. This important issue therefore remains pending for Ukraine.

On the positive side, with the judicial reform of 2016 the appropriate scale of sanctions can be selected with respect for the principle of proportionality. Dismissal of the judge can be made in the clearly defined cases (if the judge violated the duty to prove the legality of the sources of his/her assets, or if s/he committed a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of the judge or which has revealed his/her incompatibility with the office)<sup>201</sup>. The use of the “breach of oath” as ground for dismissal has been done away with.

In regards to the second point, the rules on disciplinary proceedings have been fully revamped by the judicial reform of 2016. Most of the deficiencies pointed out in the 3<sup>rd</sup> round of IAP monitoring have been addressed, at least to some extent.

Namely, the disciplining functions have been all transferred to the High Council of Justice, where disciplinary chambers are being established. These chambers are composed of at least four members of the High Council of Justice, the majority of which should be serving or retired judges.

Disciplinary proceedings are conducted according to the procedure defined in the Law On the Judiciary and the Status of Judges. They include preliminary review of the complaint by the member of the High Council of Justice (rapporteur), opening of the disciplinary case by the disciplinary chamber, the hearing of the complaint and adoption of the decision. The decisions are adopted by simple majority; decisions on dismissal of a judge are taken in full session of the High Council of Justice upon recommendation from the disciplinary chamber.

Disciplinary decision may be challenged by the judge to the High Council of Justice. However, the complainant can only do so if the disciplinary chamber grants him/her permission for that, this appears to be restrictive considering that no further details are provided on such situations. The members of the relevant disciplinary chamber do not participate in the consideration of the appeal. The decisions on the appeal can be appealed to court (but only on certain procedural grounds).

Statistics on the disciplinary liability of judges in 2015 and 2016 was not made available. It was only communicated that complaints against 3 judges were made to the High Qualifications Commission of Judges. According to the answer to the questionnaire provided by Ukraine, information about sanctions applied to judges for violations of all forms is being published on the official websites of the High Qualifications Commission of Judges and High Council of Justice from January 2017. From the look at the website of the High Council of Justice, it appears that as of 11 August there were 47 entries made. Ukraine is commended on such steps towards transparency, however, since the information on the website is not generalized and is in the Ukrainian language the monitoring team could not properly analyse it in more depth.

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<sup>199</sup> Article 106.

<sup>200</sup> Opinion of the Venice Commission CDL-AD(2015)007.

<sup>201</sup> Article 126 of the Constitution of Ukraine, Article 109 of the Law on the judiciary and the status of judges.

Ukraine is commended on addressing two more issues that were covered in the 3<sup>rd</sup> round report. Namely, the information on disciplining of judges is now being published on the website of the court where the judge is working, in addition to the website of the High Council of Justice. And statute of limitation for disciplinary liability of judges was introduced; it constitutes 3 years. These are welcome steps.

Again, it will be important now to see how all of the introduced changes work in practice and what elements would require adjustment.

#### *Dismissal of judges*

Different procedure is followed for the decisions on the dismissal of the judge. These decisions are within the preview of the High Council of Justice and can be appealed directly to court. The grounds for the dismissal now include failure to exercise his/her powers for health reasons; violation of the incompatibility regulations; commission of a substantial disciplinary offence, gross or systematic neglect of duties which is incompatible with the status of judge or which has revealed his/her incompatibility with the office; resignation or voluntary termination of service; refusal to be transferred to another court in case of dissolution or reorganisation of a court; breach of the obligation to prove the legality of the sources of his/her assets.<sup>202</sup>

The following information was provided by Ukraine in regards to the number of judges dismissed and in regards to the grounds for such dismissals for 2015 – 2016.

	<b>Grounds for dismissal</b>	<b>2015</b>	<b>2016</b>
1	Expiry of the term of chairing an office of a judge	2	10
2	Reaching the age of 65 years	14	8
3	Due to inability to exercise judiciary functions caused by poor health conditions	8	5
4	Personal desire	79	47
5	Submitting resignation (letter of resignation)	362	1449
6	Due to conviction court decision entering into force	6	1
7	Recommendation made by the HQCJ as a result of judge's having broken his or her oath of office	282	22
8	Conclusions made by the Temporary Special Commission on Auditing Judges of General Jurisdiction (the TSC)	20	9
9	Statements of claim given by the TSC	0	2
10	Violation of provisions of legislation on incompatibility	1	10
11	Breaking the oath of office by judges of the Supreme Court of Ukraine and judges of High Specialized Courts (as a result of disciplinary proceedings)	1	2
<b>Total number of judges dismissed</b>		<b>775</b>	<b>1565</b>

<sup>202</sup> Article 131 of the Constitution of Ukraine.

The number of judicial resignations is alarming, especially with the dramatic increase in 2016. The answers to the questionnaire also state that the High Council of Justice has discharged 246 judges based on their resignation letters in 2016. It is unclear whether this number is to be added to the one already cited in the table for 2016. Regardless, situation with so many resignations requires a more in-depth look and close monitoring in the future.

GRECO also raises concerns in this regard. In its latest report it stated that “Already at the time of the visit, in some 20 courts there were no more judges and many others were critically understaffed: about 1 500 judges resigned in 2016. Several interlocutors asserted that many of those judges wanted to avoid the qualification assessment – as well as the electronic and public declaration of their assets which was launched in September 2016. However, the authorities stress that the reasons for those’ resignations in 2016 have not been analysed and that one reason evoked by many of the judges concerned was that they did not want to lose their lifelong maintenance allowance which the state periodically considered abolishing.” At present, there are 8 418 judge posts but only approximately 7 000 acting judges.”<sup>203</sup>

Information provided by Ukrainian authorities to the monitoring team is even bleaker – see table below for the numbers as of August 2017.

**Table 5 Number of sitting judges vs vacant positions in the court system of Ukraine.**

	Court	Number of judges	Total number of vacant positions of judges
1	local general courts	4855	1374
2	local commercial courts	754	187
3	local administrative courts	676	105
4	appellate courts	1706	951
5	appellate economic courts	302	115
6	appellate administrative courts	380	141
7	High Specialized Court of Ukraine for Civil and Criminal Time	120	60
8	High Economic Court of Ukraine	90	34
9	High Administrative Court	97	57
10	Supreme Court	48	30
Total		9028	3054

This in addition to the issues discussed earlier in the context of the appointment and “re-appointment” of judges creates a serious gap in the capacity of the judiciary to carry out its functions.

#### *Recusal of judges*

Conditions for recusal of judges are stipulated in the Criminal Procedure Code, Civil Procedure Code, Commercial Procedure Code and Code of Administrative Procedure. If those conditions are present the judge must withdraw from the case, or his participation may be challenged by parties to the case.

Issues that were identified by GRECO in this regard in their 4<sup>th</sup> evaluation round are of concern to this monitoring team as well.

<sup>203</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017.

In particular, possibility of and or participation of the judge, whose case for recusal is being reviewed, in the decision making process on this case is of serious concern. Moreover, GRECO report refers to the examples of the judges deciding on motions for their own recusals unilaterally.<sup>204</sup>

This should be rectified and appropriate appeal process which is currently absent in Ukraine should be introduced.

Again, considering the nature of this part of the Recommendation 3.8, which called for legislative changes –the changes introduced by the judicial reform of 2016 addressed most of its elements to a large degree.

***Ensure sufficient and transparent funding of the judiciary and remuneration of judges that is commensurate to their role and reduces corruption risks.***

The same as at the time of the 3<sup>rd</sup> round IAP monitoring, judiciary can be only funded by the state. Money collected from the judicial fees goes to fund judiciary. This fee has been increased since 2015 and provides higher inflows.

It was not possible to fully assess the actual state of affairs in regards to the state funding of the judiciary. Provided data on state financing of the courts for 2015, 2016, or 2017 did not include estimated budget needs (or amounts of funds which have been forecasted and requested) and did not allow for comparisons and conclusions.

**Table 6 Allocated funding to the Judiciary.**

	Organization	allocated funds UAH 2015	allocated funds UAH 2016	allocated funds UAH 2017
1	State court administration of Ukraine	2 856 778,9	3 577 914,1	6 632 128. 1
2	Supreme Court	88 456,5	95 751,5	986 901,8
3	High Specialized Court of Ukraine for Civil and Criminal Matters	87 452,6	94 885,5	95 055,4
4	High Economic Court of Ukraine	86 951,4	93 909,9	94 102,3
5	High Administrative Court	76 576.8	82 426.4	82 629.1
6	Constitutional court	59 029.7	99 851.6	173 192.3
7	High Council of justice			283 292.7
8	Council of Judges	4 607,6	6 576,4	8 922,5

Interlocutors met at the on-site visit informed the monitoring team that in 2016 54% of the requested budget for the judiciary was allocated. In 2017 the judiciary has been financed at 74%, the highest percentage in the recent history of the country. The number of court facilities was growing, along with their conditions.

Financial independence of judges is regulated by the Law On the Judicial System and Status of Judges.<sup>205</sup> The judge is to be remunerated starting from the first day of his/her appointment. Judicial remuneration consists of a base salary and additional payments for length of service, for holding an administrative position in court (e.g. president of the court), scientific degree and work that involves access to State secrets; regional and size of the administrative community where the judge is practicing are also taken into consideration.

The base salary rates for a judge of:

<sup>204</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017.

<sup>205</sup> Article 135



- 1) the local court is set at 30 minimal salaries<sup>206</sup>;
- 2) the appeal court and high specialised court is set at 50 minimal salaries;
- 3) the Supreme Court is set at 75 minimal salaries.

According to the information cited by GRECO in their latest report “gross monthly base salary thus ranges from approximately 1 766 € for local court judges to approximately 4 416 € for Supreme Court justices. Judges are entitled to social insurance and, in case of need, service housing at the location of the court”.<sup>207</sup>

Judges are remunerated monthly with bonuses paid for the years of service (for over 3 years’ working experience the bonus is 15 per cent; for over 5 years – 20 per cent; for over 10 years – 30 per cent; for over 15 years – 40 per cent; for over 20 years – 50 per cent; for over 25 years – 60 per cent; for over 30 years – 70 per cent; and for over 35 years – 80 per cent of the monthly salary rate of a judge of the corresponding court).

And finally, the monitoring team was informed at the on-site visit that after “qualification evaluation” the legislator will be raising judicial salaries 2 or 3-fold.

These represent significant increases from the time of the 3<sup>rd</sup> round of IAP monitoring, when monthly remuneration of the local court judge was supposed to be raised from 6 to 15 minimum salaries over four years but then was revoked. The salary rate was then set at 10 salary minimums but in the mid 2014 suffered further cuts to 1/3 of that amount. Ukraine is commended on such substantial increases introduced into the system of judicial remuneration. This should certainly contribute to building a professional and more stable judiciary which is less prone to corruption risks.

Representatives of the judiciary met at the on-site visit were fairly satisfied with the level of salaries, which they thought commensurate to their role.

It appears that at the least one element of this part of the recommendation was implemented.

***Make public on Internet all court decisions, including interim ones.***

The Law On Access to Court Decisions<sup>208</sup> requires that all court decisions are open and are subject to electronic publication no later than on the next day following completion and sign-off.

Access to decisions of courts of general jurisdiction is secured through the Unified State Registry. It is a computerized system on collection, storage, protection, records, search, and presentation of electronic copies of court decisions. Court decisions registered with the system are open for free round-the-clock access at the official website of the judiciary of Ukraine (<http://reyestr.court.gov.ua>).

The Law of Ukraine On Ensuring the Right for Fair Trial<sup>209</sup> significantly changed legislative prescriptions on filling into the Unified State Registry of court decisions by setting requirements on inclusion of all decisions of courts of general jurisdictions (including interim ones) into the Registry, as well as dissenting opinions of the judges executed in writing.

Multiple interlocutors confirmed at the on-site visit that the Unified State Registry is efficient and is being widely used by all parties to the court proceedings, civil society, media, etc.

This part of the Recommendation 3.8 was fully implemented.

In addition, legislation envisages other guarantees for participants of the court proceedings. In particular,

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<sup>206</sup> Minimal salary in 2016 amounted to 1 600 UAH (approximately 58.88 EUR). This number has been already changed from 2 May 2017 to 1 684 UAH, and from 1 December 2017 it will be set at 1 762 UAH.

<sup>207</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017 (p. 43)

<sup>208</sup>

<sup>209</sup> Law of Ukraine On Ensuring the Right for Fair Trial №192-VIII, adopted on February 12, 2015.

information about a court hearing the case, the parties to the dispute and the essence of the claim, the date of receipt of the statement of claim, or a statement of appeal, cassation complaint, application for review of court decision, the current status of the proceedings, venue, date and time of the court session are open and subject to immediate publication at the official website of the judiciary in Ukraine (except in cases stipulated by law). It also grants the right for any person to be present at and to take photo/video recording during a court session.<sup>210</sup>

Such steps are welcomed and they will likely help ensure transparency of the court proceedings and ultimately will have effect on building up of the positive image of the judiciary in Ukraine.

***Review system of automated distribution of cases among judges to remove loopholes that allow manipulating the system and ensure that results of automated distribution are public and included in the case-file. Introduce ICT tools in the judicial procedures and court functioning (e.g. electronic filing of lawsuits and other legal documents).***

#### *Automated distribution of cases*

It is not clear whether the system of automated distribution of cases among judges was reviewed with the view to remove loopholes that were allowing manipulating the system. However, changes into the system have been introduced and as suggested in the 3<sup>rd</sup> round of monitoring report the case allocation is now regulated in detail directly in the law. Law On the Judicial System and Status of Judges<sup>211</sup> provides for assignment of a judge or judges to consider a specific case through the automated case-management system in the manner prescribed in the procedural law.

The cases are distributed taking into account specialization of judges, the caseload of each judge, restrictions on participation in the review of the decision imposed on the judges who rendered the court decision in question, leave, absence on the ground of temporary disability, business trips, and other cases provided by the law that prevent a judge from exercising justice or participating in a trial.

When a case is heard with participation of the jury, the panel of jury is assigned with the System.

The system is not utilized only in cases if there were objective circumstances that rendered the use of system impossible for the duration of 5 days. In such cases old procedure under the 2010 Regulations is applied.

Information on the results of distribution is saved in the System and must be protected against unauthorized access and interference. Unlawful interference with the system entails criminal liability under Article 376-1 of the Criminal Code.

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<sup>210</sup> Ukraine IAP 3<sup>rd</sup> round of monitoring Progress Update, October 2015

<sup>211</sup> Article 15

Statistics on committed criminal offences stipulated by the Article 376 <sup>1</sup> of the Criminal Code of Ukraine in 2015-2016, January-July 2017 and consequences of their investigations						
Period	Registered	Cases dismissed	including	Taken into account	Submitted to the court**	including
			Dismissed pursuant to part 1 paragraphs 1,2,4,6 of the Article 284 of CC of Ukraine			bill of indictment
2015	<b>27</b>	9	9	18	0	0
2016	<b>61</b>	24	24	37	2	2
January - July 2017	<b>43</b>	3	3	40	2	2

According to the information that the State Judicial Administration of Ukraine released on its website (<http://court.gov.ua>), daily automatic publication of reports on computerized allocation of court cases has been launched as of September 1, 2015 at the ‘Information on Consideration Stages of Court Cases’ section of the website of State Judicial Administration of Ukraine.

Complete detailed information on results of computerized allocation of court cases is attached to the court case file. After such information is recorded, making adjustments to it in the computerized system is impossible, since access for editing respective protocol and report gets blocked by the computerized system. This according to the Ukrainian authorities makes it impossible to manipulate the system.

Introduced innovations allow making the information about results on computerized allocation of court cases open and available to parties of court proceedings.

And finally, Ukrainian authorities report that the procedure for automated case allocation within the system of the Supreme Court of Ukraine was adopted in June 2015.<sup>212</sup>

#### *ICT tools in judicial procedures and court functioning*

With respect to introduction of informational and communicational technologies into court proceedings and work of judges, Ukrainian authorities state that ‘electronic justice’ has already been partially introduced and has been successfully operating in courts of Ukraine. The court fees can be paid via payment terminals, final court decisions can be shared via email, summons and messages can be transmitted via use of sms-messaging.<sup>213</sup>

These practices should be continued and further expended.

It is hard to make a definitive judgement in regards to whether the system is being manipulated and/or to what extent and the monitoring team could not find enough information to substantiate such conclusions. However, it would be fair to say that the system is now better protected from manipulation, as compared to the times of the 3<sup>rd</sup> round of monitoring report. Moreover, the results of the case allocation are made public

<sup>212</sup> Council of Judges of the Supreme Court of Ukraine Decision #10, from 15.06.2015 On the Fundamentals of Performance of Computerized Documents Control System of the Supreme Court of Ukraine.

<sup>213</sup> Ukraine IAP 3<sup>rd</sup> round of monitoring Progress Update, October 2015.

and are attached to the case-file. Other ICT tools have also been introduced in Ukraine since March 2015. Therefore, this part of the recommendation can be considered implemented.

This being said, Ukraine is strongly encouraged to continue monitoring functioning of the system to ensure that it is being properly applied. Any manipulations should be looked into with the view to eliminate circumstances that enabled such manipulations. This issue should be further followed up on in the progress updates and in the next round of monitoring.

### *Other issues*

Despite positive legal changes the judiciary continues to be perceived as a weak branch, often lacking independence and suffering from corruption. This is the case both according to the international reports, reports and studies of the civil society. Many interlocutors met during the on-site visit by the monitoring team confirmed this perception, including representatives of the judiciary themselves.

There are various factors that contribute to this situation in Ukraine, including serious indicators of entrenched corruption within the system. However, there are also other considerations raised in this report. These considerations deal with various factors that undermine judicial independence, making judges vulnerable to various types of outside improper pressure, especially given the volatile situation in Ukraine.

#### *“Cleaning up” of the judiciary*

In addition to the overhaul of the legal system several steps have been proposed in Ukraine with the view to clean up the judiciary. One such proposal was to dismiss all sitting judges and make them reapply for their positions. Such measure on one hand raised controversy in regards to the international standards on judicial independence and rule of law. On the other hand the need for such drastic measures was heavily advocated by various political forces, as well as much welcomed by the civil society and the general public.

In the end a compromise solution was reached. Namely, starting from February 2016 all sitting judges are being submitted to the qualification assessment (with vetting) before they are being granted life tenure.

This is being done in addition to the vetting procedures under the Law on the Restoration of trust in the judiciary in Ukraine and the Law on Lustration. The 3<sup>rd</sup> round of monitoring report already covered this topic extensively. While such measure should be reviewed in the Ukraine’s context of the “Revolution of Dignity” and the expectations of the society that followed, they do raise serious concerns in addition to non-compliance with the international standards.

As it was already mentioned in this report, in 2016 1 449 judges resigned in addition to 47 who left on their own accord, which constitutes almost one fifth of the judicial posts. Unwillingness to undergo this assessment is prominently featured among the reasons cited for such high numbers of judges leaving their offices.

The new Supreme Court competition is being finalised with 120 judges shortlisted by the HQCJ. However, according to the Public Integrity Council 30 candidates recommended by the HQCJ do not meet the integrity requirements.

#### *Allegations of prosecutorial pressure*

The report already mentions positive changes that the judicial reform brought in regards to reducing potentials for prosecutors to exert pressure on judges, including their exclusion from the High Council of Justice and abolishment of the prosecutorial supervision function.

However, representatives of the judiciary met at the on-site visit expressed concerns that prosecutorial pressure continues. One issue, in particular, was raised by the judges. It concerned the use of the Article 375 of the Criminal Code “on delivery of the knowingly unfair sentence, judgement, ruling or order by a judge” by the prosecutors to put pressure on judges.

Representatives of the judiciary met at the onsite visit informed the monitoring team that in 2015 – 388 proceedings have been initiated under this Article; in 2016 – 285. According to the statistical data provided by Ukraine in 2015-2016 6 criminal cases have been opened against judges under this Article.

This issue is a concern and, similarly, to the Recommendation issued for Ukraine in GRECO report, it is believed that the criminal offence of “delivery of a knowingly unfair sentence, judgement, ruling or order by a judge” should either be abolished or at least changed to clarify that it criminalizing only deliberate miscarriages of justice to prevent any misuses by the prosecutors. The civil society would prefer the second option.

### *Safety of judges*

Another issue that was raised by the representatives of the judiciary during the on-site visit and that is of high concern is the safety of judges in Ukraine; this includes their physical security, security of their families and property.

The judges shared that they do not feel safe in the courtrooms. Security measures that were in place in the courtrooms before are no longer provided. National police protection was removed due to the lack of funds in the budget. In their opinion, this approach sends a particular message by the state.

They have provided examples of many instances of attack on judges or their property, citing 3 cases of damages done to the property of judges, several hundred attacks on the judges with only 2 having gone to court, 1 case of the murder of the judge.

This is further corroborated by the information from the survey of Judges conducted in May 2016.<sup>214</sup> When asked about security in court premises 88% of the surveyed judges responded that they do not feel safe, with unsubstantial differences between jurisdictions and court instances.

Judiciary in Ukraine is already in a very fragile position; ensuring safety of judges is the basic prerequisite to their resistance to external pressure or corruption and should be dealt with as a matter of priority.

Several other issues that directly relate to the judiciary and to the matters covered in this section are covered in other sections of the report which should be read in conjunction, such as the issue of the anti-corruption courts (see Section 3.4). And finally one more such issue touches upon asset declarations and also might have some relevance in the context of safety of judges. The judges, similarly to civil servants, political appointees and the prosecutors, have to submit their annual asset declarations to the NACP.<sup>215</sup> These are also being entered into the Unified State Register held by NACP, which provides open access to the submitted information. Another declaration that the judges need to submit is “declaration on family relations” and “declaration of judicial integrity”. These are being published on the website of the High Qualifications Commission. While these are no doubt contributing to the increase in transparency of the judiciary, they need to be tested in practice to see if they remain to be of declarative nature only and whether in any way they can have impact on the safety of individual judges. In particular, the monitoring team was alerted during the monitoring visit by the representatives of the judiciary that information disclosed by judges as part of their asset declarations was used to target their homes for attacks and burglaries; this pertained especially to small communities where even though address and other personal details of the judge are not revealed in the declaration they are known to the community. For more information regarding the issue of asset declarations, please see Section. 2.1.

### ***Conclusion***

In conclusion, judicial reform of 2016 helped address most of the legislative elements of the Recommendation 3.8, including appointment and dismissal of judges on recommendation of the High Council of Justice instead of the Parliament, abolishment of the five-year probation period for junior judges, changes into the composition of the High Council of Justice to include the majority of judges. It introduced changes into the system of judicial self-governance and disciplining of judges. Other elements of the recommendation that have been of a more practical nature have also been largely addressed.

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<sup>214</sup> National survey of judges of Ukraine regarding the judicial reform in Ukraine, February-March 2016, USAID FAIR Justice Project.

<sup>215</sup> Article 56 of the Law on the Judiciary and the Status of Judges.

Ukraine is **largely compliant** with the recommendations 3.8 of the previous monitoring round.

### **New Recommendation 15**

- 1. Ensure that introduced by the judicial reform changes are effectively implemented and that their practical application is analysed with the view to identify deficiencies and address them.**
- 2. Continue to reform with the view to address the remaining deficiencies in the system of judicial self-governance, appointment, disciplinary proceedings, dismissal and recusal of judges to bring them in line with European standards and recommendations of the Venice Commission.**
- 3. Analyse the reasons for the big number of judicial resignations and take necessary measures to ensure that judicial posts are being filled, including resolving the situation with pending ‘re-appointment’ of the judges whose 5 years’ probation term lapsed after the adoption of the judicial reform.**
- 4. Closely monitor the functioning of the automated distribution of cases system to ensure that it is being properly applied. Look into instances of manipulations and take necessary measures to eliminate circumstances that enabled such manipulations.**
- 5. Consider abolishing Article 375 of the Criminal Code of Ukraine or at the least ensure in other ways that only deliberate miscarriages of justice are criminalised to eliminate potential for abuse or exerting of pressure on judges.**
- 6. Take all necessary measures to ensure the safety of judges; these measures should involve protection of the courts and of the judges.**

### ***Public prosecution service***

Previous monitoring reports did not examine prosecution service integrity to the same extent as outlined in the 4<sup>th</sup> Round Monitoring methodology. As a result, no recommendations on this issue have been made in the 3<sup>rd</sup> Round.

The prosecution service plays a crucial role in sustaining the rule of law. Corruption within the prosecution office undermines the justice system of the country and fosters impunity. Effective anti-corruption efforts are impossible in the system where prosecutorial bodies lack integrity and are vulnerable to undue influence, and a “clean” prosecution service requires robust safeguards of independence, integrity and accountability.

The Ukrainian prosecution service has been undergoing major reforms; the current Law on the Prosecutor’s Office was adopted on 14 October 2014 and since then has been amended 14 times, with the latest amendments adopted in December 2016. Just like the judiciary, the prosecution service was also affected by the constitutional amendments of 2016.

Reforms included abolishment of the general supervision function of the prosecution service, for which Ukraine has been criticised by many international organisations for years. Now functions of the prosecution service are limited to: public prosecution; organisation and procedural supervision of the pre-trial investigations, supervision of investigative and search activities of the law enforcement agencies and



decisions in regard to other matters in criminal proceedings; representation of the interests of the state in exceptional cases.<sup>216</sup>

New legislation also provides for guarantees of the independence of the prosecutors, identifies more specific criteria and procedures for appointment and disciplining of prosecutors, and establishes the system of self-governance of the prosecution service. All of these are positive developments and should be continued, and any attempts at rollback, as described in the latest GRECO report,<sup>217</sup> should be circumvented.

The Prosecution service of Ukraine is composed of the General Prosecutor's Office (GPO), regional prosecution offices, local prosecution offices, as well as the military prosecution office and the Specialised Anti-Corruption Prosecutor's Office (SAPO) generally mirroring the court system of Ukraine. Consistent with recommendations of experts for many years, the number of prosecutors has in recent years been reduced almost in half. According to the GPO, the number of prosecutors was reduced from 18 500 to 11 300<sup>218</sup> (of them 770 investigators, 672 military investigators and prosecutors, and 38 SAPO prosecutors), which according to GRECO still represents one of the highest prosecutors per citizen ratios in the Council of Europe member states.<sup>219</sup>

Despite the above mentioned changes and considerable reduction of the number of prosecutors, the prosecution service continues to be a powerful body with direct links to the President of Ukraine and headed by a political appointee, who is a close political ally of the President. The current PG was the head of the Petro Poroshenko's Bloc (President's political faction) in the Parliament at the time of his appointment. The monitoring team notes that the IMF has noted political interference in the efforts of prosecutors to fight corruption.<sup>220</sup> The prosecution service of Ukraine, along with courts, continues to be one of the least-trusted public administration institutions, with only 8% (in 2015) and 11% (in 2016) of the population of Ukraine having trust in it according to the survey conducted by the USAID Fair Justice Project in 2016.<sup>221</sup>

#### *Institutional, operational and financial independence, appointment and dismissal of Chief Prosecutor*

Prosecutorial independence should ensure that the prosecutor's activities are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system.<sup>222</sup> The complete independence of the public prosecution from intervention on the level of individual cases by any branch of government is essential.<sup>223</sup> External independence of prosecutors can be ensured through a variety of methods and should include sufficient and non-arbitrary budgetary funding.<sup>224</sup> And finally in order to

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<sup>216</sup> Article 131.1 of the Constitution of Ukraine.

<sup>217</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017

<sup>218</sup> According to part 1, Art 14 of the Law on the Prosecution office – there should be only 10 000 of them remaining by 1 January 2018.

<sup>219</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017

<sup>220</sup> Ukraine : Second Review Under the Extended Fund Facility and Requests for Waivers of Non-Observance of Performance Criteria, Rephasing of Access and Financing Assurances Review-Press Release; Staff Report; and Statement by the Executive Director for Ukraine, IMF 3 October 2016. See at <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Ukraine-Second-Review-Under-the-Extended-Fund-Facility-and-Requests-for-Waivers-of-Non-44318>

<sup>221</sup> National Public Opinion Survey Regarding Democratic Development, Judicial Reform and the Process of Purification of Government, USAID Fair Justice Project, 2016 at: [http://www.fair.org.ua/content/library\\_doc/fair\\_gfk\\_eng.pdf](http://www.fair.org.ua/content/library_doc/fair_gfk_eng.pdf)

<sup>222</sup> Study No. 494/2008, Venice Commission, December 2010.

<sup>223</sup> PACE Recommendation 1604 (2003).

<sup>224</sup> The Council of Europe CM Recommendation 19 (2000).

ensure proper functioning of the prosecution service the Chief Prosecutor has to be appointed and dismissed in the transparent manner, strictly according to the law and through an objective and merit based process.

Institutional, operational and financial independence are provided for in the Law on the Prosecutor's Office: Article 3 includes independence of prosecutors in the principles of operation of the prosecution office and Article 16 lists the safeguards, including special procedure for appointment, dismissal and disciplining of prosecutors, the functioning of the bodies of the prosecutorial self-governance, etc.

The prosecutors "shall be independent and independently make decisions on the procedure of exercising their powers in compliance with laws".<sup>225</sup> However, higher level prosecutors have the right to give instructions to lower level prosecutors, to approve their decision making and to exercise other actions directly connected to the implementation of the prosecution functions within the limits and in line with procedure prescribed by the law. The Prosecutor General (PG) has the right to give instructions to any prosecutor.

To try to minimize against improper interference in how cases are handled, orders and instructions concerning administrative matters are binding upon the prosecutor only if they are received in the written form. The prosecutor can report to the Council of Prosecutor's a threat to his/her independence due to an order of instruction issued by higher prosecutor. Nevertheless, GRECO in its report alerts to the frequent practice of oral instructions still being given, especially by the PG himself, and states that "instructions by the PG in individual cases could be problematic in the country-specific context where the PG is a political appointee and where according to a number of interlocutors the reputation of that office is damaged by public perceptions of undue political influence."<sup>226</sup> The monitoring team is aligned with the opinion of the GRECO that the matter of whether the PG's right to issue instructions in individual cases should be abolished in Ukraine requires serious consideration. In addition, GRECO states that giving instructions to prosecutors of lower subordination does not contradict the standards of the Council of Europe.

Funding of the prosecutor's office is provided for in the Chapter X of the Law on the Prosecutor's Office, and the funding necessary for proper functioning of the prosecutorial system should be accordingly fully ensured by the State Budget. However, in 2016 fulfilment of these provisions were made dependent on the CoM decision subject to the availability of the funds in the state and local budgets.<sup>227</sup> And in 2017 Art 81 of Law on the Prosecutor's Office, which defines the size of the base salary started to have direct application. However the PG did not provide for its enforcement and the prosecutors continue to receive salaries that are smaller than what is defined in the law. As discussed below, this situation is seriously undermining proper exercise of the prosecution function in the state. Specifically, inadequate salaries and funds for other expenses create serious corruption risks.

According to the information provided by the Ukrainian authorities during the bilateral meetings, one of the steps for improving the situation was taken with adoption of the Decree by the Cabinet of Ministers of Ukraine on 30 August 2017 No. 657, that regulates payment package for prosecutors and investigators. According to this decree the salaries of the prosecutors at the local level will rise on average by 40 %, at the regional level by 40% and for the prosecutors of the GPO by 30%.

While the reform of the prosecution service was intended to subject the exercise of power within the GPO to more democratic and lower level control on many issues involving hiring, advancement and discipline, there is abundant evidence that the highest levels of the GPO, if not the PG himself still exercise inordinate power over such decisions. The PG represents prosecution service in relations with state authorities and

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<sup>225</sup> Article 17 of the Law on the Prosecutor's Office.

<sup>226</sup> See the Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017 (p. 63).

<sup>227</sup> Law of Ukraine on State Budget of Ukraine for 2016 # 928-VIII, adopted on 25 December 2015.

other bodies, organises the operation of the prosecution offices, and subject to some new limits in the text of the law appoints and dismisses prosecutors, and decides on disciplinary sanctions among other duties.

The PG is appointed by the President of Ukraine with the consent of the Parliament for a 6 year non-renewable term. The PG appoints his/her deputies on the recommendation of the Council of Prosecutors. He can be dismissed from his/her position by the President of Ukraine with the consent of the Parliament on the basis of and in accordance with the scope of the dismissal motion of the Qualification Disciplinary Commission or the High Council of Justice. The PG can also be voted out of the office by the Parliament through the vote of non-confidence.

In the recent years, the position of the PG has been highly volatile (since 2014 – 5 PGs have held that office, namely, Pshonka, Mahnitskyi, Yarema, Shokin, Lutsenko), and surrounded by much controversy and public discontent. The GPO was believed to be engaged directly in and permitting rampant corruption to go on unabated. Holding anyone accountable for serious corruption offenses was the exception not the norm. If major corruption allegations were pursued and charged, the cases appeared to be serving political objectives rather than even handed enforcement of the law. The PG who served under President Yanukovich has been linked to major corruption scandals sometimes involving his son a member of parliament, and has fled to Russia. The fourth of the 5 PG's since the Revolution of Dignity was dismissed under tremendous public and international pressure and was considered to be instrumental in blocking reforms of the PGO as well as the anti-corruption enforcement priorities.

The current PG was appointed to the office on 12 May 2016, shortly after the Law was changed to eliminate the requirement that the PG hold a law degree, which the incumbent does not have. In addition to the political context in which it was introduced, the absence of this requirement does not set a good tone for the rule of law in the overall prosecution system. In Ukraine, the Chief prosecutor in order to carry out his/her functions does not need the same basic qualifications as all other prosecutors in the country since all other prosecutors of Ukraine are required to hold law degrees. Furthermore it does not contribute to building up of public trust that the office of the PG is independent of the political bodies who changed these basic rules to be able to appoint their candidate.

The procedure for selection of the appointees for PG is also highly discretionary. Current legislation does not require seeking of any expert advice on professional qualifications of the candidate from the relevant bodies by the President or the Parliament. This should be introduced to ensure a transparent process. As recommended by GRECO, due consideration should be given “to reviewing the procedures for the appointment and dismissal of the PG in order to make this process less prone to undue political influence and more oriented towards objective criteria on the merits of the candidate”.<sup>228</sup>

#### *Merit-based recruitment and promotion of prosecutors<sup>229</sup>, grounds for dismissal and statistics*

The prosecutors are appointed for life by the head of the relevant prosecution office on the recommendation of the Qualification Disciplinary Commission and can be dismissed only on the grounds and in the manner prescribed in the law.<sup>230</sup>

First time appointed prosecutors at the local office level are to be selected on a competitive basis. Candidates have to undergo a proficiency test, the results of which are published by the Qualification Disciplinary Commission together with the ranking list of the candidates. After this vetting procedure, the Qualification Disciplinary Commission may decide to exclude the candidate from further stages of the procedure. This decision can be appealed to court. Successful candidates undergo 12 months training at the National Academy of Prosecutors. Once positions become available, the Qualification Disciplinary

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<sup>228</sup> See Recommendation xxiv in the Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017.

<sup>229</sup> Unfortunately the military prosecutors are not covered by the rules described in this section.

<sup>230</sup> Articles 16 and 28 of the Law on Prosecutor's Office.

Commission conducts a further contest and rates the candidates and submits its recommendations to the head of the prosecution office which has vacancies. The heads of local and regional offices are appointed for 5 year term and dismissed by the PG on the recommendation from the Council of Prosecutors. On the basis of these recommendations the heads of the concerned offices take the appointment decision. These are welcome developments in the context of open and competitive selection procedure. However, representatives of the expert community in Ukraine alert that in practice this procedure is indeed closed and not competitive.

Prosecutors may be transferred to another office only on their consent. Promotion to a higher level within the prosecution service is done based on the results of a competition organized by the Qualification Disciplinary Commission. The law specifies no details about the criteria to be used but it is the only specified way in which prosecutors are supposed to be promoted. The absence of specific rules or criteria for prosecutor's promotion is a concern. As it was pointed out by GRECO in its latest report "regulating in more detail the promotion/career advancement of prosecutors so as to provide for uniform, transparent procedures based on precise, objective criteria, notably merit, and ensuring that any decisions on promotion/career advancement are reasoned and subject to appeal"<sup>231</sup> is imperative. However, on 7 June 2017 Qualification Disciplinary Commission has adopted procedure for competition to fill vacant position through transfer of prosecutors. The monitoring team did not have the opportunity to review it in-depth and it is yet to be seen how it will be applied in practice.

The powers of each prosecutor are terminated when s/he reaches the age of 65, in the event of death or absence, if the Qualification Disciplinary Commission decides that it is impossible for him/her to maintain position. Such decision may also be taken by the Qualification Disciplinary Commission if the prosecutor committed grave disciplinary offence or disciplinary offence while under disciplinary measures. Performance evaluations appear only to be done, if necessary, during disciplinary proceedings opened against the prosecutor if s/he failed to perform his/her official duties properly. No regular performance evaluations are held. This should be rectified: performance of prosecutors should be done on a regular basis against clearly written criteria. And prosecutors should have the opportunity to provide their own statement regarding their performance in the period under examination to be considered by the reviewers. It is noted that Ukraine is already working towards this end: representatives of the GPO met at the on-site visit informed the monitoring team of the creation of the working group that was working on the development of performance indicators. This group with the support from the CoE and EU Advisory Mission experts is currently analysing work load, job descriptions, organizational structure and other issues related to the duties of the local prosecutors with the view to develop criteria for evaluation of their work.

Grounds for dismissal of the prosecutor besides the commission of the disciplinary offence include violation of the incompatibility regulations, entry into force of the judgement on administrative liability for corruption offence, entry into force of the court judgement of guilt against the prosecutor, etc. Prosecutors in Ukraine do not enjoy immunity and can be investigated by the NABU (deputy PG and SAPO prosecutors fall under the jurisdiction of the National Bureau of Investigations, which does not yet exist). Improper conduct can also be reprimanded by the head of the prosecution office via imposing of the warning.

Statistics on dismissal of prosecutors was found in the latest GRECO report: it appears that 32 prosecutors have been notified that they are suspected of committing corruption offences in 2016, in 2015 – there were 20 such cases and in 2014 – 8. Two of these prosecutors were held criminally liable. These numbers are extremely low if compared to the huge numbers of prosecutors and the fact that a large number were hired before even the new competitive hiring procedures were in place. These new hiring procedures were intended to make it possible for new types of candidates to become prosecutors who may not have political connections and to eliminate the incentive for candidates to offer and for candidates to be extorted for bribes as a condition for hiring.

However, in practical terms, there has been very little turnover in the personnel of the GPO in many years

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<sup>231</sup> See the Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017 (pp. 60-61).

except at the lowest level. In 2016, 559 prosecutors were appointed to the local prosecution offices and 462 of them have never worked in the prosecution offices before. The same steps have not yet followed at other levels, with the exception of the deputy prosecutor generals. The non-governmental interlocutors met at the on-site level shared with the monitoring team that prosecutors at the higher levels have been mostly unchanged and were simply re-appointed to the same positions of the management positions at the local prosecutors offices. GPO representatives maintain that management positions were changed. This is regrettable and needs to be addressed by Ukraine as a matter of priority in the opinion of the monitoring team.

### *System of prosecutorial self-governance*

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With regards to the issue of prosecutorial self-governance, the system has the following structure:

- The All Ukrainian Conference of Prosecutors (AUCP) is the supreme body of the prosecutorial self-governance. Its decisions are binding on all prosecutors and the Council of Prosecutors. It appoints members of the HCJ, the Council of Prosecutors, and the Qualifications and Disciplinary Commission. Its delegates are elected at the meetings of the prosecutors from different levels of prosecution offices. In particular, 2 prosecutors represent each of the 155 local prosecution offices, 3 represent each of the 26 regional offices and 6 represent the GPO. Its Presidium is elected by secret ballot and decisions are adopted by majority of all delegates. The first Conference of the AUCP under the new legislative provisions that entered into force on 15 April 2017 was held on 26-28 April 2017. The monitoring team was alerted by the Civil society that the military prosecutors took part in this conference, even though the bodies of self-governance of the prosecutors do not encompass them. According to the Articles 15, 43-50 of the Law 'On Prosecutors Service' military prosecutors undergo the same disciplinary procedures applied to all other prosecutors by the bodies of prosecutorial self-governance and there are currently 672 of them in total. This was allegedly used by the leadership of the prosecution office to influence the outcomes of the conference.
- The Council of Prosecutors is responsible for making recommendations on the appointment and dismissal of prosecutors from the administrative positions (i.e.: head and deputy head of the prosecution office); overseeing measures to ensure independence of prosecutors, etc. It consists of 13 members, which serve 5 year non-renewable term (11 prosecutors from various levels of the prosecution offices and 2 representatives of academia appointed by the Congress of law schools and scientific institutions). The members elect their Chair and Vice Chair. Eleven prosecutorial members were elected by the AUCP on 26-28 April 2017.
- The Qualifications and Disciplinary Commission (QDC) is the collegial body responsible for setting the level of professional requirements for candidate prosecutors, deciding on disciplinary responsibility, transfer and dismissal of prosecutors. It is composed of 11 members who serve a non-renewable three year term. Five of the members are to be prosecutors appointed by the AUCP, 2 are to be representatives of academia appointed by the Congress of law schools and scientific institutions, 1 is to be a defence lawyer appointed by the Congress of defence lawyers and 3 members are to be appointed by the Parliament Commissioner for Human Rights. They elect their chair by secret ballot and adopt their decisions by the majority. The 5 members representing the prosecutors also were elected at the AUCP meeting on 26 April 2017. In May QDC became operational and according to the information provided at the bilater meetings, as of 1 September 2017 it received 351 complaints and began consideration of 196 of them. Furthermore 146 disciplinary proceedings have been opened and 36 of them relate to integrity. As a result, 8 prosecutors were held disciplinary liable and 4 have been dismissed. It also announced competition for 300 positions at the local prosecution offices and 2 positions of the higher level.

These are all positive steps towards ensuring independence of the prosecution service from undue political influence, especially from the executive level of the GPO. With the exception of the QDC, all bodies of the prosecutorial self-governance have the membership and functions that correspond to international standards and best practice. The issue of QDC membership needs to be further reviewed to ensure that the majority of its members are prosecutors. This was also reflected in the GRECO recommendation xxiii, with which this monitoring team fully agrees.

However, it is even more important that the bodies of the prosecutorial self-government which are being established under the new legislation do represent the interests of all of the prosecutors and do so to ensure that in the opinion of the prosecutors and the public that the “old prosecutorial cadre” does not gain control over these bodies rendering them purposeless in terms of any future reforms of the prosecutorial system.

Once the bodies are fully and properly formed it would also be of outmost importance to ensure their functions are independently and proactively implemented and Ukraine is strongly recommended to pay close attention to this issue.

*Ethics rules (code of conduct) – special rules, enforcement mechanism, statistics*

Prosecutors are bound by ethical rules in accordance with Article 19 of the Law on the Prosecutor’s Office. Regular (two or more times a year) or one gross violation of prosecutorial ethics results in disciplinary liability.<sup>232</sup>

On April 27 2017, the AUCP has adopted the Code of Professional Ethics and Rules of Professional Conduct for the Prosecution Office, which is the improved version of the Code of 2012. It now contains provisions on prevention of corruption, clearer guidance on the Conflicts of Interests to be avoided, and calls for respect of judicial independence. Nevertheless, the Code remains to be fairly general in nature and requires supplementary guidance in order to be put it in practice. Interlocutors met at the on-site visit informed the monitoring team that such work was being done by the prosecution office. This would be a welcome development once it is finalized, made public and properly circulated to the prosecutors for their wide use.

In addition, disciplinary liability is the result of any actions which discredit the prosecutor and may raise doubts about his/her objectivity, impartiality and independences, and about the integrity and incorruptibility of prosecution office.<sup>233</sup> This definition appears to be too vague and would benefit from further clarifications.

The breach of prosecutor’s oath also results in liability. This also raises concerns. GRECO in its latest report draws attention to the fact that such vaguely defined actions may result in criminal or disciplinary liability and recommends defining disciplinary offences in relations to prosecutorial breach of ethical norms more precisely in its recommendation xxix.<sup>234</sup>

The following information on how ethics rules are being applied in practice was made available to the monitoring team: in the answers to the questionnaire the authorities stated that statistical data is not collected in respect to violations of ethical rules, however, according to the available records in 2015 – such liability was applied to 50 prosecutors, out of whom 42 were dismissed; and in 2016 – such liability was applied to 44 prosecutors, of which 33 were dismissed. Again, the numbers appear to be extremely limited if compared to the overall prosecutorial corpus of 11,300, and represent 0,4% and 0,3% of prosecutors to whom such liability was applied and who were subsequently dismissed in 2016.

*Conflict of interests - special rules, enforcement mechanism, sanctions, statistics*

The Law on Prevention of Corruption covers the prosecutors and provisions on the prevention of corruption, including the Conflicts of Interest that are applicable to them under the general rules of the Chapter V of the Law. This issue is discussed in more depth under Section 2.1 of this report.

In terms of issues specific to prosecutors, rules on conflict of interest are included in the CPC in the provisions on the disqualification of the prosecutor.

No information was provided to the monitoring team about how these rules are being applied in practice.

*Other restrictions (gifts, incompatibility, post-employment, etc.)*

Under the Law on Prevention of Corruption prosecutors are prohibited from demanding, asking, or receiving gifts for themselves or close persons from legal entities or individuals in connection with their activity as a prosecutor or from subordinate persons. Allowed hospitality sets the value at approximately

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<sup>232</sup> Article 3 of the Law on Prosecutor’s Office.

<sup>233</sup> Article 43 of the Law on Prosecutor’s Office.

<sup>234</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017

the equivalent of EUR 52 from an individual and aggregate value of approximately EUR 97 from a group of persons over the prosecutor’s entire career.

The prosecutor may not hold office at any state authority, other state body, local government authority or be in a publicly elected position. The prosecutor may not be a member of the political party or take part in any political actions. The prosecutors cannot be involved in any part-time or other paid activity other than teaching, research, creative activity, medical practice or sports.

Post-employment restrictions include a one year cooling-off period in certain cases, such as entering into employment agreements/performing business transactions with persons over whom the prosecutor exercised control, supervision or decision making powers.

*Asset and interests disclosure - special rules, enforcement mechanism, sanctions, statistics*

Prosecutors are obliged to submit their annual asset declarations to the NACP and these declarations are entered into the Unified State Register, as described earlier in the Section 2.1 of this report. Violation of the legal procedures on submission of asset declarations results in disciplinary liability. Administrative and criminal liability is also foreseen as describe in the Section 2.1 of this report.

Uniquely to the prosecutors, they additionally submit to investigations focused on identifying lapses in integrity, the results of which are to be published on the Website of the GPO. This is done annually. These applications on integrity are used for integrity testing by the IG unit of the GPO.

All of the anti-corruption provisions described above which are covered by the Law on Prevention of Corruption fall under the competence of the NACP which supervises their compliance and is described in the Section 2.1 of this report.

In addition, an Inspector General unit of the GPO which became operational in January 2017 is staffed with 87 employees according to the information available in the GRECO report. They are responsible for carrying out of annual integrity tests. They are also supposed to investigate misconduct by employees of the prosecution services. Information on the results of the work of this unit is very limited and it was therefore not possible to draw conclusions on the effectiveness of this unit. The previous office of inspector general unit appeared to be aggressively fulfilling its mandate. Within months, as a result of the competition the leadership and staff was almost completely replaced and the investigations and prosecutions it undertook involving serious misconduct appear to have been abandoned without any principled reason.

**Table 7 Statistics regarding the number of initiated and completed criminal proceedings by the General Inspectorate of the General Prosecutor's Office of Ukraine for 7 months of 2017**

Number of initiated criminal proceedings in the reporting period		183
Number of completed criminal proceedings (together with recompleted ones)		26
Among them	Submitted to the court with the bill of indictment	8
	Completed criminal proceedings	18

*Availability of training, advice and guidance on request, written guidelines*

All prosecutors are required to undergo regular trainings at the National Academy of Prosecutors which include courses on rules of the prosecutorial ethics. Interlocutors met at the on-site visit confirmed that they have in fact benefited from such training in practice as part of their regular training curriculum at the Academy.

Representatives of the National Academy of Prosecutors also shared their plans to conduct regional trainings on the issues related to the asset declarations to raise awareness on the requirements for prosecutors under the Law on Prevention of Corruption.

In terms of advice and guidance, the prosecutors can turn to NACP. They also can seek advice from the higher-level prosecutor or from one of the inspector generals within the GPO IG unit whenever they have questions on ethical conduct.

*Fair and transparent remuneration*



Remuneration of the prosecutors is defined in the law<sup>235</sup> and consists of a base salary, bonuses and additional payments for length of service, for holding an administrative position in the prosecution offices (e.g. head of the prosecution office) and other payments established by law.

As of January 2017 the base salary rate for the prosecutor from the local prosecution office is set at 12 minimal salaries<sup>236</sup> and the other levels are counted based on the coefficient defined in the law.

According to the information cited by GRECO in their latest report gross monthly base salary thus ranges from approximately EUR 707 for local prosecutor to approximately EUR 1,380 for GPO prosecutors at the headquarters. However, as mentioned earlier these are also not being honoured due to the CoM decision regarding the availability of the funds in the state and local budgets.<sup>237</sup>

Based on this information it is clear that remuneration of the prosecutors (apart from SAPO prosecutors) is considerably lower than that of judges or detectives of NABU and SAPO, at least three times smaller. This cannot positively contribute to prosecutors carrying out their functions properly in the criminal justice system of Ukraine and requires actions from its authorities.

In addition, the monitoring team learned at the on-site visit, that the critically low base salaries, are widely supplemented by additional bonuses. However, this is being done at the discretion of the heads of the prosecution offices. This discretionary bonus system presents a serious potential for improper external influence on the prosecutors and needs to be addressed by Ukraine, along with the general level of remuneration of the prosecutors and funding made available to the prosecution offices of Ukraine.

#### *Complaints against prosecutors, disciplinary proceedings*

On 15 April 2017 new provisions on disciplinary proceedings for prosecutors entered into force.<sup>238</sup> Disciplinary proceedings may now be conducted by the QDC based on the complaints from citizens, as long as they are not anonymous. The QDC adopts its decisions in disciplinary proceedings by the majority of the vote of its members. Information on disciplining of the prosecutor is published on the website of the QDC. In the case of the PG, the QDC and the HCJ can submit a motion for his/her dismissal to the President of Ukraine.

Grounds for disciplinary liability include:

- failure to perform or improper performance by the prosecutor of his official duties;
- unreasonable delay in consideration of an application;
- disclosure of secrets protected by law; violation of the legal procedures for the submission of asset declarations (including the submission of incorrect or incomplete information);
- actions which discredit the prosecutor and may raise doubts on his/her objectivity, impartiality and independence and on integrity and incorruptibility of prosecution offices;
- a regular or one-off gross violation of prosecutorial ethics; violation of internal service regulations; and
- intervention or other influence in cases in a manner other than that established by the law.

Disciplinary sanctions include reprimand, ban for up to one year on a transfer to a higher prosecution office or on appointment to a higher position, and dismissal from the office.

Disciplinary liability has a statute of limitation of one year from the time the offense is committed regardless of vacation or temporary disability of the prosecutor. This statute of limitation is very short for the disclosure of the misconduct in all cases, and it should be addressed by Ukraine.

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<sup>235</sup> Article 81 of the Law on Prosecutor's Office.

<sup>236</sup> Minimal salary in 2016 amounted to 1 600 UAH (approximately 58.88 EUR). This number has been already changed from 2 May 2017 to 1 684 UAH, and from 1 December 2017 it will be set at 1 762 UAH.

<sup>237</sup> Law of Ukraine on State Budget of Ukraine for 2016 # 928-VIII, adopted on 25 December 2015.

<sup>238</sup> Article 44 of the Law on the Prosecutor's Office.

Case allocation

The head of the relevant prosecution office after the start of the preliminary investigation assigns the case to the prosecutor taking into consideration the complexity and publicity of the case, workload and professional skills and experience of the prosecutors.<sup>239</sup>

The prosecutor is then usually responsible for the case from the start until the end of the proceedings. However, the head of the relevant prosecution office may re-assign the case to another prosecutor in particular circumstances (due to disqualification, serious disease, dismissal, or as an exception due to ineffective supervision over the pre-trial investigation).

This approach is not in line with good practices and international standards, and the monitoring team agrees with the conclusion of the GRECO and would like to echo its recommendation xxvi to introduce “a system of random allocation of cases to individual prosecutors, based on strict and objective pre-established criteria including specialisation, and experience coupled with adequate safeguards – including stringent controls – against any possible manipulation of the system”.<sup>240</sup>

### New Recommendation 16

- 1. Ensure implementation of the reform and continue with the view to address the remaining deficiencies to bring them fully in line with European standards. In particular:**
  - a) review the procedures for the appointment and dismissal of the PG in order to make this process more insulated from undue political influence and more oriented towards objective criteria on the merits of the candidate;**
  - b) reform further the system of prosecutorial self-governance, including the statutory composition of the QDC, and ensure that the self-governance bodies function independently and proactively, represent the interests of all of the prosecutors, and do so in the opinion of these prosecutors and the public;**
  - c) improve disciplining proceedings by (i) clearly defining grounds for disciplinary liability, (ii) extending the statute of limitation, and (iii) ensuring robust enforcement with complaints diligently investigated and the violators held responsible. Consider whether the right to legal representation is allowed at some stages in selected cases. Relatedly, conduct a review of the operation of the general inspector office to determine if it is properly addressing the most serious allegations of prosecutorial misconduct and/or is making appropriate referrals to the NABU and other appropriate bodies;**
  - d) regulate in more detail career advancement, including by (i) establishing uniform and transparent procedures, and (ii) introducing regular performance evaluations.**
- 2. Ensure sufficient and transparent funding of the prosecution service and remuneration of prosecutors that is commensurate to their role and reduces corruption risks.**
- 3. Further strengthen procedural independence of the prosecutors. In particular, introduce**

<sup>239</sup> Order of the Prosecutor General # 4 On the Organisation of the Prosecutor’s Activities in Criminal Proceedings, adopted on 19 December 2012.

<sup>240</sup> Fourth Evaluation Round Report on Ukraine, adopted by GRECO at its 76<sup>th</sup> Plenary Meeting on 23 June 2017

**random allocation of cases to individual prosecutors based on strict and objective criteria with safeguards against possible manipulations.**

## 2.4. Accountability and transparency in the public sector

### **Recommendation 3.3. from the Second Monitoring Round of Ukraine valid in the Third round:**

- 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.

### **Recommendation 3.6. from the Third Monitoring Round report on Ukraine:**

- Set up or designate an independent authority to supervise enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting relevant statistics and reports. Provide such authority with necessary powers and resources for effective functioning.
- Reach compliance with the EITI Standards and cover in the EITI reports all material oil, gas and mining industries. Adopt legislation on transparency of extractive industries.
- Implement the law on openness of public funds, including provisions on on-line access to information on Treasury transactions.
- Ensure in practice unhindered public access to urban planning documentation.
- Adopt the law on publication of information in machine-readable open formats (open data) and ensure publication in such format of information of public interest (in particular, on public procurement, budgetary expenditures, asset declarations of public officials, state company register, normative legal acts).

Limited information was provided by the Ukrainian authorities on most of the issues covered by this section both in the form of the answers to the questionnaire and the on-site visit. The representatives of the key agencies, Ministry of Justice, E-government Agency, the Secretariat of the Cabinet of Ministers and others have been invited but did not take part. Only the representatives of the Ombudsman of Ukraine and the State Committee for Television and Radio-Broadcasting were present at the meeting. Thus, the findings of this section may be limited, and may not reflect the current situation.

The highlights of this part are the launch of the open data portal, opening up the beneficial ownership information and the information held in the public registries. It should be noted, that the level of transparency achieved by Ukraine, since the previous monitoring round as reflected, *inter alia*, in this section, is unprecedented, commendable and encouraged further.

### ***Code of Administrative Procedures***

The previous monitoring report found that by drafting the Law on Administrative Procedures (LAP), which in general integrates European standards on good governance and administration, although not yet adopting it, Ukraine was partially compliant with the sub-recommendation of 3.3 As of the fourth monitoring round, the LAP is still pending. According to CSOs, this law has been pending for almost 19 years and in order to move forward, a new working group should be created under the MOJ, which would finalize the draft LAP (version of 2015). This process should include various stakeholders, among them local self-governing bodies.<sup>241</sup> In addition, an implementation plan should be designed to include the commentaries, trainings, awareness raising and other accompanying measures for efficient implementation. NGOs continue to use various platforms to advocate for the adoption of this law.<sup>242</sup>

Accordingly, Ukraine **is not compliant** with the first part of the recommendation 3.3 of the previous monitoring round.

### ***Transparency and discretion in public administration, public participation***

The previous report highlights the efforts of the Ministry of Revenue and Taxes to prevent and detect corruption as well as the use of risk-based approach to anti-corruption policies in public agencies. The latter issue is discussed in section 1.2 of this report and no information has been provided regarding the former.

The Government reported that the MOJ is preparing the draft Law of Ukraine "On public consultation." The purpose of the draft law is to define the procedure for public consultations in the process of preparation of the draft legal acts and public policy documents (concepts, strategies, programs and action plans, etc.), introduce modern standards of drafting and an efficient mechanism of interaction with the public. While such an initiative would be encouraged, the provided information is not sufficient to conclude compliance with the recommendation of the previous monitoring round report. Thus, Ukraine **is not compliant** with the second part of the recommendation 3.3 of the previous round.

### ***Anti-corruption screening of legal acts***

Ukraine was recommended to encourage public participation in anti-corruption screening of laws, including for the draft legislation initiated by the Parliament. The answers to the questionnaire do not provide information regarding the implementation of this recommendation and only describe the statutory duties of the MOJ and the Anti-Corruption Committee of the Parliament of Ukraine related to the mandatory screening of legislation and the NACP's right to conduct such an examination at its own initiative.

The previous monitoring report describes the anti-corruption screening by the Anti-Corruption Committee of the Parliament as inefficient and not meaningful, referring *inter alia* to the NGO feedback. According to the report, the volume of the legal acts for the anti-corruption screening is so big that the Anti-Corruption Committee is not in a position to perform the expertise efficiently. The NGOs developed the methodology of unofficial screening, envisaged by the legislation and conducted the selective screening of draft laws, however, their opinions have been discarded by the Parliament and did not affect the final results, according to the report.<sup>243</sup>

At the on-site, the representative of the Secretariat of the Anti-Corruption Committee confirmed that the draft laws subject to screening are numerous and the workload compared to the staff capacity is excessive reaffirming that the findings of the previous monitoring report are still valid. After the on-site, the Government provided the additional information regarding the exercise of its mandate of mandatory anti-corruption screening by Verkhovna Rada of Ukraine, which during the last four years has analyzed 5982 out of 8445 drafts received, provided conclusions on compliance with anti-corruption legislation and rejected those that contained provisions with the corruption risks. In addition, the Committee established the Council of Public Expertise in 2015 to support its work. The Council includes nine independent experts

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<sup>241</sup> Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)".

<sup>242</sup> Reanimation Package of Reforms (2016), Roadmap for Reforms of Ukraine. Available [here](#). See page 11-12.

<sup>243</sup> [OECD/ACN \(2015\) Third Round of Monitoring Report on Ukraine](#); page 119.

selected through an open competition. In its support functions, the Council involves a wide range of stakeholders, including the specialized NGOs.

The NGO shadow report praises the work of the Anti-Corruption Committee of the Parliament, criticizing the MOJ which has been passive in its role and the NACP which has not started to carry out the anti-corruption expertise yet. The report states that the Committee members showed willingness to use this tool, including in cooperation with the NGOs and confirms the information provided by the Government. According to the report 90.5% of 8 445 legislative drafts received by the Committee in four years' time were analysed and corruption factors identified in 5.9%.<sup>244</sup> These the draft laws were subsequently rejected. The NGOs encourage the MOJ and the NACP to efficiently work on this direction of their mandate. In the long run, they recommend amendments to the legislation transferring the anti-corruption expertise functions from the MOJ to the NACP and streamlining its procedure as well as ensuring the efficient use of the tool.<sup>245</sup> The monitoring team learned after the on-site that currently, the EU Anti-Corruption Initiative is helping the parliament to streamline this function.

Reportedly, the NACP approved the procedure<sup>246</sup> and in cooperation with the UNDP, national and international experts developed the Methodology for conducting anti-corruption expertise and conducted anti-corruption expertise of 97 legal acts.

Thus, although the efficiency and impact of this work can still not determined, clearly, the steps have been made to include the public in the anti-corruption expertise and there are plans to improve the anti-corruption expertise further.

#### *Transparency and discretion in risk areas, including tax and customs, and other sectors*

Answers to the questionnaire refer to the obligation by state agencies to prepare anti-corruption plans based on the risk assessment. This issue is discussed in Chapter I of the report. The previous report commends Ukraine on initiating sector specific approach in the Ministry of Revenues and Taxes and State Fiscal Services.

The monitoring team is not in a position to assess compliance with this part of the recommendation due to the lack of information in the answers to the questionnaire and no opportunity to meet the representatives of the relevant agencies at the on-site.

#### *Access to information*

The access to information legislation of Ukraine is well-advanced, incorporating important rights and guarantees, including presumption of openness of information held or produced by public bodies and the requirement to apply the public interest (harm) test when deciding on granting or rejecting requests of information with so-called "limited access" (confidential, secret and official).<sup>247</sup> Thus, no information held by public authorities can be closed *per se* and each time the determination should be made using the test. Moreover, the law lists the information that cannot be withheld, provides for the obligation to appoint freedom of information officers (FOI Officers) in public bodies and for proactive mandatory publication of some information. The Law does not provide for an independent oversight mechanism, but it assigns some monitoring functions (Art 17 of the Law on Access to Public Information) to the Secretariat of the Ukrainian Parliament Commissioner for Human Rights (Ombudsman's Office). The Global Right to Information rating (RTI) of Ukraine is high (23<sup>rd</sup> place and 108 points out of 150).<sup>248</sup>

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<sup>244</sup> A slightly higher percentage than indicated by the government.

<sup>245</sup> Shadow Report (2017) "[Evaluating the Effectiveness of State Anti-Corruption Policy Implementation](#)".

<sup>246</sup> The procedure of anti-corruption expertise approved by NACP's decision on July 28, 2016 №1 and registered in the Ministry of Justice on 25 August, 2016 for No 1184/29314.

<sup>247</sup> See the detailed analysis in the [OECD/ACN Third Round of Monitoring Report on Ukraine](#).

<sup>248</sup> The rating assesses the quality of access to information laws against the pre-determined indicators. See Centre for Law and Democracy, [Global Right to Information Rating](#).

Whereas the quality of the laws is good, the enforcement is marked with the evident challenges, similar to those described in the previous monitoring round as well. Most of these challenges, as highlighted by the authorities at the on-site and confirmed by civil society, are related to the lack of knowledge of the legal requirements and how to interpret them in practice by public servants providing answers to the requests. In addition, according to the NGO analysis of implementation, often the responses are of poor quality, incomplete and provided with the delay. Additionally, the fees of administrative proceedings have been increased recently and are unreasonably high, therefore not used by citizens regularly when their requests are denied, and the cost for the information requiring copying documents (that are more than 10 pages) is mentioned to represent a problem.<sup>249</sup>

During the on-site visit, the authorities further explained the difficulties related to the interpretation of the public interest test by freedom of information officers (FOI officers). Since there is no designated body to provide guidance and consultations, the practice has been inconsistent resulting in ungrounded refusals. Likewise, the recent joint submission of the NGOs to the Universal Periodic Review (UPR) highlights that: “Despite improvements in access to information legislation, implementation remains problematic. Civil servants, even at higher levels, lack knowledge about requirements on disclosure of information and understanding of how to process requests, resulting in too many public interest requests being denied [...] There are at least nine cases pending before the European Court of Human Rights regarding denied access to information cases.”<sup>250</sup> According to the joint submission, one of the weakest points in enforcement has been the judiciary: the courts disregarding the requests for information on budgets and salaries of judicial personnel.<sup>251</sup>

After the on-site visit, in addition, the Government informed about the following challenges of implementation: the use of departmental lists of information “for official use” as a ground for refusal of the access to information; non-disclosure of information that is open under the law and the failure to answer email requests electronically. According to the Government, the main problems that lead to systematic violations are the lack of the culture of openness and the knowledge of the requirements of the law as well as controversial judicial practice of resolving the disputes concerning the application of the law in similar cases.

Some commentaries for the interpretation and application of the provisions of access to information is provided in the decision of the Supreme Administrative Court Plenum.<sup>252</sup> Whereas the Ombudsman’s Office representative mentioned their joint activities with CSOs to monitor implementation of access to information legislation and provide recommendations to the officials on the best practices, it is evident that the public agencies do not receive any guidance or clarifications on a systematic basis.<sup>253</sup> Clearly, guidance, trainings and awareness raising have been insufficient since the introduction of the law. The Government has not reported any trainings or awareness campaigns for the staff of the public agencies or the general public since the previous monitoring round.

### *Oversight body*

The previous monitoring round recommended to set up or designate an independent authority for supervising enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting

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<sup>249</sup> <https://helsinki.org.ua/en/right-to-public-information/>

<sup>250</sup> Joint submission of Ukrainian NGOs to the Universal Periodic Review (2017) [Ukraine by ARTICLE 19, Centre for Democracy and Rule of Law, Anti-corruption Research and Education Centre, Human Rights Information Centre, Human Rights Platform, and Regional Press Development Institute](#)

<sup>251</sup> *Ibid*, para 40.

<sup>252</sup> Decree (September, 2016) on [practice of administrative courts' application of legislation on access to public information](#).

<sup>253</sup> Further, Ombudsman’s webpage contains information about FOI, legislation and clarifications/information on various cases and judicial practice but it is not up-to-date.



relevant statistics and to provide such an authority with the necessary powers and resources for effective functioning.

The Ombudsman's Office has the powers for oversight of implementation of access to information legislation. However, necessary resources have not been provided as confirmed by the head of the unit responsible for access to information issues in the Ombudsman's Office during the on-site. This unit comprises 13 staff members, which is clearly insufficient in the context of the relatively new legislation and the currently developing practice. The monitoring team was informed about the joint initiatives of the Ombudsman's Office and CSOs aimed at enhancing the monitoring. A new methodology was developed in 2017 with the support of the UNDP and Denmark together with the leading non-governmental organizations in the field of access to information (Eidos Center for Political Studies and Analysts, Institute for the Development of Regional Press, and as well as the Center for Democracy and Rule of Law), which was planned to be tested soon. This initiative would be implemented under the Ombudsman Plus platform in 2017.

The NGOs actively follow the progress and issues on FOI.<sup>254</sup> **Ombudsman Plus** already monitored implementation of the law in all regions of Ukraine during the 6 months. This seems to be a good source to analyse the problems and provide guidance for uniform practice to support the work of the FOI officer.<sup>255</sup>

Nevertheless, representatives of the both agencies present at the on-site visit session on the access to public information, Ombudsman's Office and State Committee for Television and Radio-Broadcasting, concurred with the view that an oversight body is necessary. The previous report already included the information about the initiative of the Ombudsman's Office to create an independent information commissioner with the right to issue binding decisions. The creation of an independent oversight institution, which would require changes in the Constitution, is currently debated by the Parliament. The draft law was already available during the previous monitoring.

As regards the enforcement statistics and analysis, the situation has not changed in this regard either. The Government did not provide data on the number or requests, the percentage of satisfied requests against rejected or the use of sanctions for violations of access to information provisions.

The Department of Information and Communications of the Government Secretariat continues to collect statistics on FOI requests providing some basic data with analytics on its web-page (data for 2012-2016 also quoted in the previous report) at its own initiative, including the number of requests received, the content of requests, the form of requests, appeals and the decision on appeals. However, no data is available on the questions such as what are the main challenges in access to information; the ratio of granted requests; rate of rejections and the grounds for refusal. Analysis of the consistency of application of public interest test, which represents a challenge has not been conducted. It is not clear either what is the follow up of the analysis of this information.<sup>256</sup>

Some of the available statistics has been quoted below as an illustration, however, they are not informative enough for the findings on the application of the right to access to information in practice.

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<sup>254</sup> M. Petrov (2016), [Right to Public Information](#), Ukrainian Helsinki Human Rights Union.

<sup>255</sup> Results and Recommendations, Developed as a Part of the [Project "Ombudsman Plus"](#) (2016).

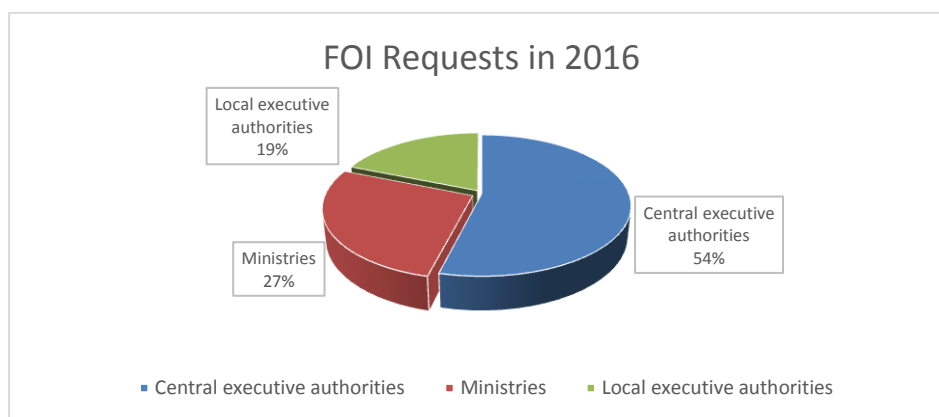
<sup>256</sup> [http://www.kmu.gov.ua/control/uk/publish/article?art\\_id=250178316&cat\\_id=244316991](http://www.kmu.gov.ua/control/uk/publish/article?art_id=250178316&cat_id=244316991)





Source: the [web-site](#) of the Government of Ukraine.

The State Committee for Television and Radio-Broadcasting of Ukraine monitors the web-pages of the line ministries and assesses the level of publication of information based on four main indicators<sup>257</sup> and compiles the transparency rating of the state agencies. The latest monitoring was conducted in April-June 2017 and included 18 ministries, 43 other executive authorities (61 web-sites in total).<sup>258</sup> The overall conclusion is that the transparency and the quality of information has been improved, information became more systematized and up-to-date. The next monitoring is scheduled in October-December 2017.



Source: the [web-site](#) of the Government of Ukraine.

In conclusion, situation under this component has remained largely unchanged and Ukraine is **not compliant** with the first part of the recommendation 3.6. of the previous monitoring round.

<sup>257</sup> These are: availability of information; quality of information (how complete and up-to-date is the information, how is the search function working); transparency index (is calculated based on the first 2 indicators) and progress (how much the website evolved in a given period)

<sup>258</sup> The website of the [State Committee for Television and Radio-Broadcasting of Ukraine](#)

## Open data

The Law of Ukraine on Access to Information (Art. 10<sup>1</sup>) requires all governmental bodies to present their datasets in an open data (machine-readable) format. Datasets should be published and regularly updated on the web-portal. In October 2015, the Cabinet of Ministers Resolution was approved, opening up 331 datasets<sup>259</sup> and Ukraine launched the open data portal [data.gov.ua](http://data.gov.ua) with the support of the UNDP. The initiative significantly evolved since then and the web-page contains 19 992 datasets now organised under 15 themes.<sup>260</sup> Information about the beneficial ownership is publicly available in Ukraine through the Unified State Registers of Legal Entities and Individual Entrepreneurs (USR), as well as through e-declarations (if a public official of his/her family member are beneficial owners of companies). This is a big step forward in Ukraine's efforts for transparency and fight against corruption and also represents the best practice.<sup>261</sup> However, no information was provided regarding the verification mechanisms (e.g. by the National Bank with regard to banks, National Agency on Prevention of Corruption with regard to asset disclosure of public officials, National Broadcasting Council concerning disclosure of ownership structure of broadcasting companies).

According to the Government the following registers are open: state register of rights and immovable property, land cadastre, register of permits and licences, auctions, unified register of state property, car register, in total 105 registries. ProZorro initiative, and implementation of Open Contracting Data Standard are other successful examples of transparency initiatives. In addition, Ukraine became the first country to integrate its national central register of beneficial ownership with the OpenOwnership Register – a global register of ultimate beneficiaries – where its beneficial ownership data will be automatically available.<sup>262</sup> According to the RPR: "A real breakthrough was achieved in the sphere of transparency and access to information and to governmental decision-making: all key governmental registries and databases were made accessible online free of charge or for a small fee [...] In addition, Ukraine is one of a few countries in the world that obliged all legal entities to disclose their final beneficiaries in the governmental business registry."<sup>263</sup>

Ukraine is ranked 31<sup>st</sup> in the Global Open Data Index 2017 with the 48% of the information open, this is a significant leap compare to 2015 (54<sup>th</sup> place with the 34% of information open). Among 100% open are the datasets on the Government budget, national laws and company register. 80-85% is the openness rate for national statistics, draft legislation and procurement. Among the datasets included in the index, these are not open in Ukraine: government spending, water quality, locations, national maps and air quality.<sup>264</sup>

In February 2016, the government approved the roadmap on open data, based on the open data readiness assessment of Ukraine conducted by the State Agency for Electronic Governance in Ukraine with the support of the UNDP.<sup>265</sup> Ukraine committed to achieving 41 tasks in five key areas for open data development: improving open data availability and quality, training public authorities to publish open data,

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<sup>259</sup>The Cabinet of Ministers No. 835 of October 21, 2015, [Resolution on approval of the Provisions on data sets to be made public in the form of open data](#). See also, a news article [Ukraine's Government Opens over 300 Datasets for its Citizens](#).

<sup>260</sup> <http://data.gov.ua/> last visited on 10 August, 2017.

<sup>261</sup> OECD (2016) [Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016](#) pg. 236.

<sup>262</sup> TI Ukraine (2017) [Information about beneficial owners will be listed in a public register](#).

<sup>263</sup> Andrii Marusov, Head of the Board, Transparency International Ukraine (2016) [Anti-Corruption Policy of Ukraine: First Success and the Growing Resistance](#).

<sup>264</sup> Open Knowledge International's first [State of Open Government Data report](#).

<sup>265</sup> [Open Data Readiness Assessment of Ukraine](#)

strengthening the role of open data in implementing state policy, providing regulatory support, and developing citizens' capabilities to deal with open data.<sup>266</sup>

Monitoring team would like to congratulate Ukraine on its progress on these transparency initiatives and encourage to continue opening up further, as envisaged by its plans.

#### *Public access to urban planning documentation*

The previous report noted that the construction and land allocation are one of the most corruption-prone areas in Ukraine. Public access to urban planning documents was included as one of the Open Government Partnership (OGP) commitments. The previous report recommended ensuring unhindered access to such documents. The government informed that although the legislation requires publishing the general and local plans of the inhabited localities and detailed area plans on the website of local government authority, including in open data format, in practice, its implementation turned out to be impossible as these documents contained information with the restricted access. The Ministry of Regional Development drafted the law to remove these obstacles but it was rejected by the Parliament in October, 2016. The Ministry planned to submit the revised draft again in spring 2017.<sup>267</sup> According to the Open Government Partnership Independent Reporting Mechanism (OGP IRM) (2016), OGP commitment on access to urban planning documentation remains unimplemented.

#### *Transparency of budgetary information*

The previous report commends Ukraine on the adoption of the law on transparency of public funds in 2015, which provides for mandatory publication of detailed data on budgetary transaction in real time, budget expenses and revenues in open data format. RPR calls the adoption of the law a revolutionary step requiring all governmental and local self-government bodies as well as municipal and state-owned companies to disclose their budgets and transactions on the online portal [spending.gov.ua](http://spending.gov.ua). In 2016, only half of the governmental bodies and one fifth of companies published their information. In order to secure full compliance, legislative amendments were prepared and advocated by CSO coalition. The Government did not provide any information regarding the progress. Monitoring team could attest that the web-site is functional, but could not verify the level of publication of information to assess the trend. Ukraine's score in open budget index worsened in 2015 to 46 (from 54 in 2012). The opportunities for the public to engage in budget planning are assessed as weak by the index.<sup>268</sup>

#### *EITI*

In 2013, Ukraine received the status of a candidate country to EITI. The Ministry of Energy and Coal-Mining industry manages a multilateral group of stakeholders for implementation of EITI in Ukraine.<sup>269</sup> On 8 September 2015, the government adopted a plan of action to implement the EITI in Ukraine in 2015. In January 2017, Ukraine published its EITI report covering 2014-2015 which includes oil, gas and mining industries.<sup>270</sup> Ukraine's Validation against the EITI Standard were scheduled to begin on 1 July 2017. The Measures foreseen by the State Programme include: draft law on transparency of extraction industry in line with the EITI standards, ensuring Ukraine's participation in EITI: developing and publishing an annual report on payments of companies and governmental revenue from the extractive industries in line with the EITI standards. The Government reported that in addition to preparation of the report, the activities under the project include mechanisms to prevent corruption in the extractive industries: EITI improving regulatory support for the Extractive Industries Transparency; automation of the collection of information on payments to the budget; creation of an open information portal according to the extractive industries to

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<sup>266</sup> Ukraine's [roadmap for promoting open data development](#) in the country.

<sup>267</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=61676](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61676)

<sup>268</sup> [International Open Budget Index](#).

<sup>269</sup> <http://eiti.org.ua/>

<sup>270</sup> EITI, the [National Report of Ukraine](#) (2014-2015).

optimize reporting preparation; conducting of specialized seminars and training for reporting entities to explain the peculiarities of reporting under EITI.

### *OGP*

Ukraine joined the Open Government Partnership (OGP) in 2011 and is now in the process of implementation of its third action plan on open government for 2016-2018.<sup>271</sup> Already the first Action Plan was listed among the top 10 Action Plans. Ukraine has a national OGP Coordination Council which was recently restructured, its composition reduced and the co-chairs from the Government and civil society introduced.<sup>272</sup> The competitive selection of the representatives of civil society is planned. The Secretariat of the Council is placed under the Cabinet of Ministers. Six thematic working groups have been established co-chaired by the Government and civil society. The OGP IRM recommended to reform the OGP coordination mechanism by ensuring better operational management of the initiative and sharing responsibility for the initiative's management with civil society actors, ensure ownership from the implementing agencies through a formal process for coordination. The monitoring team has not been informed about the steps made to comply with this recommendation.

According to the TI Ukraine (2015): 14 out of 32 (44%) commitments of the Action Plan (2014-2015) has been fulfilled, 14 (44%) are in progress – 14 (44%), have yet to be launched – 2 (6%) and removed – 2 (6%). The overall success rate of the Initiative is 88%. More than twenty civil society organizations are engaged in the implementation of the Action Plan.<sup>273</sup> Ukraine is further encouraged to use the platform offered by the Open Government Partnership to advance its transparency and public participation initiatives.

### *CoST*

In Ukraine, the CoST Initiative<sup>274</sup> was established in November 2013, when Ukravtodor<sup>275</sup> became its member and started work in summer 2015 with the support of the World Bank and the Ministry of Infrastructure. CoST Pilot Initiative project in the road sector was established in November 2015 after the signing of the Memorandum on cooperation between the CoST International Secretariat, Ministry of Infrastructure of Ukraine, Ukravtodor and Transparency International Ukraine. TI Ukraine ensures operation of the National Secretariat and a multi-stakeholder group. In December 2016, the first verification report indicating the problems and giving recommendations for reform was presented. The Minister of Infrastructure and President recognized the success of the initiative and expressed commitment for implementation. Moreover, Ukrenergo<sup>276</sup> recently joined CoST Ukraine. The State Programme include the following on this issue: Implementing projects under CoST, submitting proposals for extending Ukraine's participating in CoST to the Cabinet of Ministers. The monitoring team did not have an opportunity to receive more information or meet with the responsible officials to discuss the issue in more detail.

### *Streamlining the public service delivery*

Answers to the questionnaire do not provide information on this issue and no one from the responsible authorities was present at the on-site visit to respond to the questions of the monitoring team. This subsection is therefore not addressed in the report.

## **Conclusions**

The main accomplishment of Ukraine under this section since the previous monitoring round is related to the open data and transparency initiatives. The amendments of the law on access to public information of

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<sup>271</sup> <https://www.opengovpartnership.org/country/ukraine>

<sup>272</sup> TI Ukraine, [The OGP Introduced a New Mechanism for Good Governance and Responsible Partnership](#).

<sup>273</sup> TI Ukraine (2016) [Open Government and Ukraine: is Ukraine able to properly Fulfill its Commitments?](#)

<sup>274</sup> <http://www.constructiontransparency.org/ukraine>

<sup>275</sup> [Ukravtodor](#), SOE for automobile roads in Ukraine.

<sup>276</sup> [Ukrenergo](#), SOE, national power company.

2015 introduced the obligation of state agencies to publishing data in open, machine-readable format. Ukraine launched the open data portal which contains around 20 000 datasets. Furthermore, the information on beneficial ownership and various public registries became public. With these initiatives as well as launching the public procurement portal and electronic asset declarations, Ukraine achieved an unprecedented level of transparency, which is commendable and encouraged further.

Some progress could be observed in relation to the anti-corruption screening of legislation from the side of the NACP, which has approved the procedure and developed the methodology for anti-corruption expertise with the support of the UNDP and national experts and the Anti-Corruption Committee, which made some steps towards streamlining this function and included civil society in this work through the public council.

No tangible progress could be noted however in relation to the recommendations on the Law on Administrative Procedure and access to information. Other parts of the recommendations 3.3 and 3.6 could not be evaluated due to the insufficient information received from the Government.

Ukraine is **partially compliant** with the recommendation 3.3 and **partially compliant** with the recommendation 3.6 (based on the assessment of the recommendation on the open data) The previous round recommendations 3.3 and 3.6 remain valid (Under the new number 17).

Previous round recommendations that remain valid under number 17.

**Recommendation 3.3. from the Second Monitoring Round of Ukraine valid in the Third round:**

- 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.

**Recommendation 3.6. from the Third Monitoring Round report on Ukraine:**

- Set up or designate an independent authority to supervise enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting relevant statistics and reports. Provide such authority with necessary powers and resources for effective functioning.
- Reach compliance with the EITI Standards and cover in the EITI reports all material oil, gas and mining industries. Adopt legislation on transparency of extractive industries.
- Implement the law on openness of public funds, including provisions on on-line access to information on Treasury transactions.
- Ensure in practice unhindered public access to urban planning documentation.
- Adopt the law on publication of information in machine-readable open formats (open data) and ensure publication in such format of information of public interest (in particular, on public procurement, budgetary expenditures, asset declarations of public officials, state company register,

normative legal acts).

## New Recommendation 18

1. **Carry out awareness raising and training of relevant public servants on access to public information laws and their application in practice.**
2. **Gradually increase the datasets and diversify areas on the open data portal.**

## 2.5. Integrity in public procurement

### **Recommendation 3.5. from the Third Monitoring Round report on Ukraine:**

- Continue reforming the public procurement system, based on regular assessment of application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law, minimise application of non-competitive procedures. At the same time ensure that any changes to the Public Procurement Law are subject to public consultations.
- Establish e-procurement system covering all procurement procedures envisaged by the Public Procurement Law.
- Ensure that entities participating in the public procurement process are required to implement internal anti-corruption programmes. Introduce mandatory anti-corruption statements in tender submissions.
- Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in the public procurement.
- Arrange regular trainings for private sector participants and procuring entities on integrity in public procurement at central and local level, and for law enforcement and state control organisations – on public procurement procedures and prevention of corruption.
- Increase transparency of public procurement by ensuring publication and free access to information on specific procurements on Internet, including procurement contracts and results of procurement by publicly owned companies.

This section of the report was drafted mostly based on the research made by the monitoring team and information available from open sources. At the on-site visit the monitoring team was informed by the participants of the panel on public procurement that the answers to the questionnaire provided to the monitoring team did not reflect the current state of affairs. To rectify this situation the Ukrainian participants of the panel agreed to provide correct information following the on-site visit. Subsequently, the questionnaire was re-sent to the Ukrainian participants by the Secretariat, but regrettably no information was provided in response.

Public procurement continues to represent a large part of economic activity in Ukraine. In 2014, the aggregate value of government procurements amounted to UAH 113.8 billion. In 2015 the figure grew to



UAH 152.59 billion, while during the first 6 months of 2016 it already reached UAH 120.52 billion (more than the total for 2014).<sup>277</sup>

Major developments took place in Ukraine since the 3rd round of the IAP monitoring report was adopted in March 2015. There has been a significant revision of the legislative framework: following the adoption of the new framework procurement legislation in December 2015, further regulations have followed. An electronic procurement system for the purchase of goods, works and services by government bodies was first piloted in May 2015 and then became full-scale operational by mid-2016. And finally, Ukraine acceded to the World Trade Organisation (WTO) Government Procurement Agreement (GPA). This allowed companies from GPA member countries (including all EU member countries) to bid for Ukrainian public contracts and provided Ukrainian businesses access to public procurement markets in GPA member states. It is evident that these are all significant achievements.

However, the public procurement system in Ukraine continues to carry high risks of corruption. Companies indicate that bribes are still very common in public procurement procedures.<sup>278</sup> They further report that the diversion of public funds due to corruption and favouritism in decisions of government officials are very common.<sup>279</sup> In the latest report on its activities, the National Anti-Corruption Bureau of Ukraine (NABU) identified corruption in the State-Owned Enterprises (SOEs) sector as one of the main priorities for NABU's work. Out of NABU's 400 criminal proceedings, approximately 100 dealt with SOEs. The analysis of these cases identifies corruption in public procurement as the number one crime typology for this sector.<sup>280</sup> To name a few: NABU's high-profile case linked to SOE "Ukrzaliznitsya"; the cases linked to Administration of sea ports, including SOE "Pivdenniy"; the case linked to SOE "Energoatom". All of these examples represent recent cases of corruption in public procurement.

***Continue reforming the public procurement system, based on regular assessment of application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law, minimise application of non-competitive procedures. At the same time ensure that any changes to the Public Procurement Law are subject to public consultations.***

At the time of the 3<sup>rd</sup> round of IAP monitoring, Ukraine adopted the new Law on Public Procurement #1197 (PPL 1197), which entered into force in April 2014. Recommendation 3.5 in this part refers to that PPL 1197. In addition, the 2014 Law on Prevention of Corruption introduced a number of changes which related directly to public procurement. In September 2015, Ukraine adopted the Law "On amendments of certain laws of Ukraine in the field of public procurement to bring them into compliance with international standards and to take steps to eliminate corruption" No. 679-VIII. The provisions of this Law are aimed at preventing corruption. The Law amended the Laws of Ukraine "On Public Procurement", "On prevention of Corruption", "On specifics of procurement in individual areas of economic activity", "On open use of public funds". This allowed Ukraine to accede to the WTO GPA, as mentioned above.

The situation concerning public procurement has significantly improved after these reforms. The PPL #1197 has introduced a number of simplifications and has introduced provisions that facilitate more transparent public procurement processes. Despite these generally positive developments, a number of

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<sup>277</sup> Data source for 2014-2016: Report of the Accounting Chamber of Ukraine on results of the analysis of the public procurement in Ukraine in 2015-2016, adopted on 31 January 2017.

<sup>278</sup> Global Competitiveness Report 2015-2016, World Economic Forum, at [http://www3.weforum.org/docs/gcr/2015-2016/Global\\_Competitiveness\\_Report\\_2015-2016.pdf](http://www3.weforum.org/docs/gcr/2015-2016/Global_Competitiveness_Report_2015-2016.pdf)

<sup>279</sup> Global Competitiveness Report 2016-2017, World Economic Forum, at [http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017\\_FINAL.pdf](http://www3.weforum.org/docs/GCR2016-2017/05FullReport/TheGlobalCompetitivenessReport2016-2017_FINAL.pdf)

<sup>280</sup> NABU report for 1<sup>st</sup> part of 2017, can be further consulted at: <https://nabu.gov.ua/report/zvit-pershe-pivrichchya-2017-roku>

exemptions concerning the application of the PPL have remained in place. In addition, there were eight areas where procurement is regulated by special laws.<sup>281</sup>

In May 2015, two pilot projects were launched: one on the use of e-procurement by the Ministry of Economic Development and Trade (MEDT)<sup>282</sup> and another pilot was launched in the Ministry of Defence on the testing of the use of e-procurement for procurement through the negotiation procedure.<sup>283</sup> Both of these were utilising the then newly developed e-procurement system “Prozorro”. The results of these pilots were used in order to develop draft legislation on the use of e-procurement, which resulted in the Law on Public Procurement #922 (hereinafter PPL), adopted on 25 December 2015. Legislation was drafted and adopted in consultations with EU technical assistance project “Harmonisation of Public Procurement System in Ukraine with EU Standards”.

The new PPL entered into force in 2016, requiring that all procurement of a value exceeding UAH 200,000 (goods) or UAH 1.5 million (works and services) has to be conducted via the new e-procurement system. Contracts that are below these amounts can be procured through Prozorro on a voluntary basis.

In the case of the procurement of goods, works and services without the use of an electronic procurement system, provided that the value of the object of purchase is equal to or exceeds UAH 50,000 and is less than the value set in the Art 2 of the PPL, procuring entities must file a report on the agreements in the system of electronic procurement in accordance with article 10 of the PPL.

Based on the information provided to the monitoring team, the coverage of the PPL has not been significantly extended, despite numerous improvements in the areas where the PPL does apply. Consequently, this part of the Recommendation has not been implemented.

The new PPL (enacted in 2016) provided for the optional establishment of centralised procurement bodies. The Government or local self-government authorities can designate such bodies to conduct procurement on behalf of public entities, including through established framework contracts.

Statistics regarding the use of competitive vs non-competitive procedures provided by the Ukrainian authorities in the answers to the questionnaire are as follows:

In 2015, 103,865 public sector procurement processes were undertaken, out of which 55,790 were conducted using competitive procedures (53.71%) and 48,075 using non-competitive procedures (46.29%).

In 2016, procurement data available on the old platform of the Ministry of Economic Development and Trade (tender.me.gov.ua) provided the following information:

From a total of 79,407 total procurement procedures that were conducted (these were not registered within the new e-procurement system Prozorro), 49,091 (61.82%) followed competitive procedures, and 30,316 (38.18%) were done under non-tendering procedures (negotiated procurement procedure).

The data made available to the monitoring team indicates that a significant volume of public sector procurement, i.e. more than a third of all public sector procurement, is still conducted by using non-competitive procedures. Hence, this part of the recommendation cannot be considered met.

***Establish e-procurement system covering all procurement procedures envisaged by the Public Procurement Law.***

In 2014-2015, Ukraine introduced an innovative system of electronic procurement. The new eProcurement reform in Ukraine was driven by civil society activists and Transparency International Ukraine. In September 2014, a group of volunteers, providers of e-platforms, the regulator and experts signed a memorandum on the creation of a new system and thus launched the Prozorro Project. As the legislative

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<sup>281</sup> Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016. OECD 2016.

<sup>282</sup> It was approved by the CMU Order #501 from 20.05.2015.

<sup>283</sup> This was also enacted by the CMU Order#416 from 31.3.2015.

system at the time did not provide for the use of such system, in February 2015 Prozorro was launched for the voluntary use by contracting authorities for micro value procurements (contracts of less than EUR 5,000).

The pilot initially involved three contracting authorities, three commercial platform operators and offered one electronic bidding procedure: open tendering with post-qualification and a mandatory electronic reverse auction. In March 2015, two Prozorro project volunteers were appointed to key regulatory positions in charge of the public procurement reform: one in the MEDT, which had become the leader of the reform, and one in the National Reforms Council under the President that supported the process.

According to the promoters of e-procurement in Ukraine, the new system had “a strong business background and allowed to benefit from existing electronic procurement capacity in private sector in Ukraine (that is, big number of commercial electronic systems with significant number of registered suppliers and strong sector, with one of the best programming communities in the world) while avoiding shortcomings of other multi models where using electronic procurement did not achieve transparency objectives with complicated data collection for monitoring and market analysis.”

The Ukrainian model includes a single central database unit to which all commercial platforms are connected through a standard application programming interface (API). The process stakeholders (procuring entities, suppliers and contractors) can access the system through these platforms. Full information about any public tender announced on any commercial platform is immediately recorded in the central database and is shared with all other platforms connected to the central unit. Stakeholders can use any commercial platform connected to the central database unit for asking questions and bidding. To achieve this effective exchange and access to information, all data formats, tender procedures, rules, etc. are strictly standardised and made uniform for all commercial platform operators.

To maximise the impact of the eProcurement reforms in the market, a decision was made to fully open the central database code by using the most flexible open-source Apache 2.0 license (it can be freely downloaded from <https://github.com/openprocurement>). “The opening of the source code facilitated joint improvement of the system by the community of Ukrainian programmers and the development of additional applications, as well as created an opportunity for exporting the model to any country wishing to implement a similar system. In addition, the decision to use the Open Contract Data Standard (<http://standard.open-contracting.org/>) from the very beginning will make it possible in the future to link the Ukrainian system with other electronic systems, as well as to perform a general cross-country analysis of public procurement data.”<sup>284</sup>

A business intelligence module for the monitoring of the Prozorro procedures was developed and launched (based on the donation of Qlik ([www.qlik.com](http://www.qlik.com)). Anyone, including civil society and the general public, can check the analytical data at <http://bi.prozorro.org/> in the real time mode.

The reform implementation cost very little. The first donation of USD 35,000 was received by Transparency International Ukraine from the first seven commercial platform operators who joined the Prozorro project in 2014. This funded the development of the single database software. Afterwards, international donors contributed USD 230,000 towards IT services necessary for the development of the single database unit, help desk and project office. The European Bank for Reconstruction and Development (EBRD) funded the eProcurement experts and a European Union (EU)-funded project contributed with advice of EU consultants and legal support on EU policies. In addition, there were private donations ([qlik.com](http://qlik.com)) and volunteers from Ukrainian IT companies, business schools, and individuals who worked and continue working *pro bono* for the ProZorro Project. Other donors have also contributed. Since 2016, the ongoing Transparency and Accountability in Public Administration and Services ([TAPAS](#)) activity, funded by the USAID and the UK-AID and implemented by Eurasia Foundation, provided financial, legal and technical support to the Prozorro project. As of today, over \$188,000 has been spent towards this goal, and over \$500,000 is obligated for improving Prozorro's system in coming years.

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<sup>284</sup> Open Contracting Partnership (2015), Tato Urjumelashvili and David Marghania, «Open Contracting in Ukraine: a collaborative effort for procurement reform», <http://goo.gl/BxRuZ0>.

The piloting exercise proved that the “hybrid” concept was operational. The promoters of Prozorro report that the system produced first savings and business community engagement far beyond the initial expectations. It is further reported that, by November 2015, the Prozorro pilot project had carried out more than 15,000 procurement procedures with a budget of more than USD 150 million, involving 1,500 procuring entities and with savings of more than USD 20 million.

As mentioned earlier, in December 2015 the PPL made the use of Prozorro system mandatory for purchases above a certain threshold by government entities. The connection to the system was implemented in two stages: central executive bodies and large state-owned enterprises were integrated starting 1 April 2016, with all remaining public procurement entities starting 1 August 2016.

To be used for all PPL operations, Prozorro is being upgraded to cover additional procurement methods, including open tender, negotiated procedures without publication, competitive dialogue and online framework agreements with e-catalogues compliant with the GPA/EU standards. Upgrades of Prozorro now include new modules for submitting complaints (e-review), procurement planning (e-planning), electronic payment and integration with the State Treasury. To achieve this, the old notice publication system is upgraded to Open Contracting Data Standard, new web-portal (design, layout, search), integration with e-government registers for qualification of suppliers and contractors as well as building a risk management system and a comprehensive security system.<sup>285</sup>

From the data available, it is difficult to estimate the ratio of contracts that are below and above the threshold determined for obligatory procurement through Prozorro. However, according to the data provided on the MEDT website, the contracts that exceeded the threshold amounted to UAH 192 billion in 2015.

The data provided by the Prozorro system suggest that in the period since August 2016, when the system became mandatory for all government buyers, it features bids for the total declared value of UAH 278 billion. Contracts worth UAH 78 billion were declared unsuccessful, which suggests that qualified suppliers or contractors could not be identified for these contracts. At the same time, the number of trade organisations (legal entities) registered in the system that completed at least one procurement procedure as of the end of January 2017 exceeded 22,000 (as of 30 August 2017 28,160).

As a comprehensive e-procurement system was established during the reporting period, this part of the Recommendation can be considered implemented.

#### *Practical application and further improvements*

When Prozorro was launched, it enjoyed very wide media coverage quoting it as a model of successful reforms in Ukraine.

However, in December 2016, experts of Deloitte Ukraine presented the results of their study of corruption in the field of infrastructure, which was based on anonymous interviews with members of the business community of the transportation market. The most common complaints of the businessmen were divided into 18 sections. Four referred specifically to the operation of Prozorro. These include: corrupt schemes in the selection of suppliers; manipulations with contract conditions; problems in the monitoring of tender implementation; and conspiracy of the bidders.

Whilst the introduction of Prozorro has vastly improved the transparency of procurement processes, it is only one of the tools in the fight of corruption in procurement. One needs to be aware of the fact that there are still a number of loopholes that an electronic procurement system cannot easily close in order to prevent corruption in a procurement process, e.g. procurement opportunities are not detectable due to misspellings of the object to be procured or supplier biased specifications or evaluation criteria are used. Most importantly, an e-procurement system cannot prevent corruption on the level of contract implementation.

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<sup>285</sup> EBRD (2015), «Are you ready for eProcurement? Guide to Electronic Procurement Reform», pages 77-84, <https://goo.gl/ufRCqr>.

Another problem that has been identified is the quality of the tender committees. There are approximately 25,000 tender committees in Ukraine, employing up to 200,000 people. In large SOEs, professionals deal with the tender processes. In contrast, tender committees in smaller public entities might include members who are not experts in the relevant field. These members often lack the professional expertise to draft technically adequate and supplier neutral specifications for a product they seek to purchase. Apparently, unscrupulous suppliers take advantage of this situation and provide goods of poor quality. Public procurement reformers speak openly about these problems and to address this, the Prozorro team has set up a library of standard specifications for the most popular products. This is constantly updated.<sup>286</sup> This problem is being addressed at the moment by the MEDT and is explained in detail below.

Consequently, public control of procurement processes and contract implementation and the development of a competitive environment are of major importance. Therefore, stakeholders have the opportunity to challenge procurement processes on the grounds of allegations of corruption. In Ukraine, the authority to appeal procurement procedures remains to be the Antimonopoly Committee (AMC).

In order to engage a large number of citizens in controlling public procurement processes, the [www.dozorro.org](http://www.dozorro.org) website (Dozorro) was created. The portal provides detailed information on submitting appeals and complaints to various law enforcement and regulatory authorities, as well as appeal templates. It is also possible for a user to refer to a notification of a tender with possible violations, which will be reviewed by lawyers who work for Transparency International

As of the beginning of February 2017, 429 suspicious tenders with a value exceeding UAH 4 billion have been reported through Dozorro. The procurement processes monitored through the portal include infamous examples, such as the purchase of Mitsubishi electric cars for the National Police and the tender to supply GPS systems for electric transport in Lutsk. Dozorro is a very useful tool and should be further supported.

In addition, the following loopholes in the current PPL relevant to the application to e-procurement have been identified in Ukraine's answers to the questionnaire:

- the lack of criminal responsibility in case of non-application of public procurement legislation by the procuring entities;
- the need to reduce the grounds for applying non-competitive procurement procedures;

Ukraine is commended for launching Prozorro and, moreover, for making it fully operational. Whilst the system would benefit from further improvements (particularly the inclusion of all relevant procurement methods), this is a notable and important step in the fight against corruption in Ukraine, which can also serve as an example for other countries in the region and beyond. It is of utmost importance that this achievement will not be reversed and the progress made is maintained. However, as mentioned further above, an electronic procurement system is only one tool in providing transparency and fairness in a procurement process and for reducing opportunities for corruption. It has to be complementary to other measures that prevent corruption.

***Ensure that entities participating in the public procurement process are required to implement internal anti-corruption programmes. Introduce mandatory anti-corruption statements in tender submissions.***

The 2014 Law on Prevention of Corruption introduced mandatory anti-corruption programmes for the participants in public procurement processes. It also provides for the introduction of compliance (anti-corruption) officers in all organisations participating in public procurement processes, which enhances internal control measures. The Public Procurement Law was also amended to prohibit public entities from undertaking public procurement processes, if they fail to implement these requirements. As relevant information was not provided to the monitoring team, it could not be assessed to what degree these requirements have been implemented in practice.

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<sup>286</sup> Press Reader 15.02.2017 at: <https://www.pressreader.com/ukraine/the-ukrainian-week/20170215/281552290611283>



The 3<sup>rd</sup> round of IAP monitoring was concerned that the mandatory introduction of anti-corruption programmes may potentially be a deterrent for small businesses to participate in public procurement processes. However this has been addressed through the introduction of the threshold of UAH 20 million. Tenderers for contracts below this threshold are not required to submit such statements.

The requirement to introduce mandatory anti-corruption statements in tender submissions was introduced in Article 17 by the CPL.

With reference to this part of the recommendation, it has been implemented.

***Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in the public procurement.***

The new PPL established a new system of debarment. The procuring entity is obliged to reject a bid in the following cases:

- it has irrefutable evidence that the tenderer offers, gives or agrees to give, directly or indirectly, a reward to any official of the contracting authority, of another public authority in any form (proposal of employment, valuables, a service, etc.) with the view to influence the decision on selecting the successful tenderer or on choosing a certain procurement procedure by the contracting authority;
- confirmation that a tenderer is included in the Unified State Register of Perpetrators of Corruption or Corruption-related Offences;
- an officer (official) of a tenderer authorized by the tenderer to represent its interests during a procurement procedure, or an individual who is a tenderer was held liable for the commitment of a corruption offence in the field of procurement;
- an economic operator (tenderer), during the last three years, was held liable for an infringement in the form of anti-competitive concerted actions related to bid rigging;
- an individual tenderer, or an officer (official) of a tenderer who signed the tender was convicted of a crime committed with mercenary motives, for which the conviction has not been lifted or cancelled;
- a tender is submitted by a tenderer that is a related person to other tenderers and/or to a member(s) of the tender committee or authorized person(s) of the contracting authority;
- a tenderer has been declared bankrupt;
- the Unified State Register of Legal Entities and Sole Entrepreneurs contains no information on the ultimate beneficial owner (controller) of the tenderer;
- a legal entity that is a tenderer has no anti-corruption programme or no authorized officer is in charge of the implementation of the anti-corruption programme, if the value of the procurement contract equals to or exceeds UAH 20 million.

Information on how and to what extent these provisions of the PPL are being applied and monitored in practice was not made available to the monitoring team. Therefore it could not make conclusions in regards to the operational status of the new debarment system or its effectiveness.

***Arrange regular trainings for private sector participants and procuring entities on integrity in public procurement at central and local level, and for law enforcement and state controlled organisations – on public procurement procedures and prevention of corruption.***

Trainings through Prometheus online course have been organized and covered 13000 persons. The course provided basic and enhanced level of education on a free of charge basis. 2724 of these persons received certification, most of them were from tendering commissions.

In addition according to MEDT information in 2016:

- Trainings for Trainers program was launched (mostly for regional needs). 36 regional trainers conducted 165 seminars for 9000 participants from tendering commissions in the first three months of 2017.

- More than 20 out-of-office seminars were organized and carried out by METD (for NABU, State Audit Service etc).
- 10 regional seminars were organized and carried out by METD with the support of the EU technical assistance project “Harmonisation of Public Procurement System in Ukraine with EU Standards” (975 participants, 496 out of which represented purchasing entities).
- Comprehensive informational resource was launched on METD web-site ([www.me.gov.ua](http://www.me.gov.ua)).
- Methodological assistance is being provided through resource of Prozorro web-site (<http://infobox.prozorro.org>).

This part of the Recommendation therefore was implemented.

***Increase transparency of public procurement by ensuring publication and free access to information on specific procurements on Internet, including procurement contracts and results of procurement by publicly owned companies.***

The new PPL requires on-line publication of all main information about procurement, including tender announcements and detailed information on the procurement results (see the box below).

Tender procedures cannot be carried out before or without publication of the announcement about the procurement procedure on the central web-portal. Procurement announcements should also be published in English on the web-portal if the procurement exceeds the thresholds mentioned above. Information on procurement is published on the central web-portal free of charge via authorised electronic platforms. Public access to the web-portal is provided for free without any limits. Information on the web-portal is also published in a machine-readable format (as open data).

**Table 8. Procurement information published on-line in Ukraine**

According to the recent Public Procurement Law of Ukraine (enacted on 1 April 2016), the following information is to be published by the procuring entity on the central procurement web-portal:

- procurement announcement and tender documentation (not later than 15 days before the opening of tender proposals, if the procurement cost is below EUR 133,000 for goods/services or EUR 5,150,000 for works; not later than 30 days if the procurement cost exceeds the above thresholds);
- amendment of the tender documentation and any explanation attached to them (within one day after making such changes/issuing explanations);
- announcement about concluded framework agreement (within seven days after concluding the agreement);
- protocol of tender proposals consideration (within one day after its adoption);
- notice about intent to conclude a procurement agreement (within one day after making the decision on the procurement procedure winner);
- information about rejection of a participant’s tender proposal (within one day after the relevant decision);
- procurement agreement (within two days after it was concluded);
- notice about amendments in the agreement (within three days after the amendments were made);
- report about implementation of the agreement (within three days after the agreement’s term expiration, fulfilment of the agreement or its dissolution);
- report about concluded agreements (within one day after the agreement conclusion).

Source: OECD/ACN secretariat research.<sup>287</sup>

<sup>287</sup> Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2013-2016, OECD.



Technically, Prozorro is a centralised database connected to electronic trading platforms. Businesses that intend to bid for tenders can register with any of the authorised e-procurement services. By now, authorisation agreements have been entered into with 18 such platforms. Any information provided by these platforms on tenders, procurement procedures and contracts awarded is also recorded and stored in Prozorro. This allows any interested party to access the information free of charge and without authorisation. The design of the system did not incur any direct costs for the Ukrainian authorities as web hosting and IT development were financed by international donors.

Taking into account the above findings, it appears that the part of the Recommendation that deals with increasing transparency of public procurement by ensuring publication and free access to information on specific procurements on Internet has been implemented. Information in regards to contracts procured by SOEs was not available to the monitoring team and therefore it is difficult to assess what information is being published and to what extent procurement by SOEs is not undertaken through the Prozorro system.

### ***Other issues raised in the 3rd round:***

#### *Review of complaints*

Since 2010, the Anti-Monopoly Committee (AMC) has continued to be the body which reviews procurement related complaints. The AMC is a body primarily responsible for competition issues. It is referred to in the Constitution, has a special legal status and is not subordinated to the Government. The Head of the AMC is appointed and dismissed by the President of Ukraine upon agreement by the Parliament. To review procurement complaints, the AMC has set up a permanent administrative panel comprising of three state antimonopoly agents (staff members of the AMC). No prior appeal to the procuring entity is required. Decisions of the administrative panel are binding and can be appealed in court.

Under the new PPL, enacted in 2016, a complaint has to be submitted in an electronic form via the e-procurement system. A complaint, once filed, is published on the procurement web-portal. The Law sets different deadlines for the submission of complaints depending on the procurement process stage. Once a contract has been concluded, a complaint can only be reviewed by court. Within three days after submission of a complaint, the review body decides on the start of the proceedings. A complaint should be reviewed within 15 days after it was filed (during which the tender is suspended). The complainant and the procuring entity have the right to participate in the consideration of the complaint, including via telecommunication in real time. The consideration of the complaint is open to the public and the decision is announced publicly. The review decision can be appealed in court within 30 days after its publication in the e-procurement system.

The PPL introduced the notion of “related persons” and established some restrictions to avoid possible conflicts of interests of said persons. Members of the AMC’s administrative panel (a review body) are not permitted to participate in the consideration of a complaint if he/she is “related” to the complainant or the procuring entity. The Ukrainian Law uses the concept of “related persons” also to prevent bid rigging by prohibiting participation in the procurement of an entity that is “related” to another bidder (or the procuring organisation). The definition of “related party” is sufficiently broad to cover most cases of possible conflicts of interests. Ukraine has also introduced a stronger general system of conflict-of-interests resolution under the 2014 Corruption Prevention Law (see above chapter on integrity of public service) and disclosure of beneficial owners of all legal persons (see below chapter on access to information). However, the 3<sup>rd</sup> round IAP report noted that none of the above mentioned laws seem to identify a conflict of interest, which may occur in a procurement process with respect to affiliated (related) persons, who were involved in the early phases of the procurement cycle, such as feasibility or design stages. There is no formal requirement to present a conflict of interest and/or affiliation declaration/statement, as a part of tender submissions.<sup>288</sup>

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<sup>288</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 134.

## Conclusions

Ukraine is commended for many of the steps taken towards the reform of the procurement system. The introduction of the e-procurement system is certainly expected to have a positive effect on enhancing the level of transparency in public procurement and thus making it less susceptible to corruption. The large amount of relevant information related to procurement that is published in Ukraine is impressive. This creates the possibility for public scrutiny of the Government's spending through procurement. Anti-corruption measures introduced under the anti-corruption legislation of 2014 have also helped build mechanisms to prevent corruption. These steps have contributed to Ukraine progressing in many parts of the 3<sup>rd</sup> round Recommendation. As described above, there are still some actions, tools, policies and practices missing or unsatisfactory, which should be further addressed by Ukraine.

Ukraine is largely compliant with the previous recommendation 3.5

### New Recommendation 19

- 1. Continue reforming the public procurement system, based on regular assessments of the application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law and to minimise the application of non-competitive procedures.**
- 2. Ensure that state owned enterprises (SOEs) use competitive and transparent procurement rules as required by law.**
- 3. Extend electronic procurement systems to cover all public procurement at all levels and stages.**
- 4. Provide sufficient resources to properly implement procurement legislation by procuring entities, including adequate training for members of tender evaluation committees.**
- 5. Ensure that internal anti-corruption programmes are effectively introduced within entities that conduct public procurement processes.**
- 6. Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in public procurement.**
- 7. Arrange regular training for private sector participants and procuring entities on integrity in public procurement at central and local level. Provide training for law enforcement and state controlled organisations on public procurement procedures and prevention of corruption.**

## 2.6. Business integrity

### Recommendation 3.9. from the Third Monitoring Round:

- Rigorously implement provisions of section 6 of the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector.
- Ensure business participation in the development of the Action Plan for the Anti-Corruption Strategy and its implementation and monitoring.
- Pursue further simplification of business regulations to reduce opportunities for corruption and eliminate corruption schemes affecting business.
- Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.
- Ensure that the business has a possibility to report corruption cases without fear of prosecution or other unfavourable consequences.

Information received by the monitoring team in relation to business integrity in the answers to the questionnaire was limited. Therefore, this chapter is primarily based on the analysis of information available from public sources, available pieces of legislation as well as information obtained in the various discussions and meetings during the on-site visit.

According to the World Bank's Doing Business, Ukraine has slightly improved its performance regarding the protection of minority investors and enforcement of contracts, however overall it remains one of the worst performers regarding business climate among the Istanbul Action Plan countries<sup>289</sup>. See below more details on Ukraine's standing in several main business-related ratings.

**Table 9. Ukraine in global governance and doing business ratings**

Index	Armenia	Azerbaijan	Georgia	Kazakhstan	Kyrgyzstan	Mongolia	Tajikistan	Ukraine	Uzbekistan
<b>“Doing Business”, 190 countries. Rank in 2017 (in 2013)</b>	38 (32)	65 (67)	16 (9)	35 (49)	75 (70)	64 (76)	128 (14)	80 (137)	87 (157)
<b>Economic Freedom Index, 186 countries. Rank in 2017 (in 2015, 178 countries)</b>	33 (52)	68 (85)	13 (22)	42 (69)	89 (82)	129 (96)	109 (140)	166 (162)	148 (160)
<b>Global Competitiveness Index, 144 countries.</b>	82 (82)	40 (46)	66 (77)	42 (51)	102 (127)	104 (93)	80 (100)	79 (73)	-

<sup>289</sup> World Bank (2017), Doing Business, <http://www.doingbusiness.org/data/exploreeconomies/ukraine#starting-a-business>

<b>Rank in 2015-2016 ranking (in 2012-2013 ranking)</b>									
<i>-Burden of government regulation</i>	56 (41)	31 (29)	7 (9)	46 (52)	68 (92)	92 (102)	17 (22)	87 (135)	-
<i>-Property rights</i>	94 (64)	99 (87)	78 (131 )	66 (77)	121 (142)	112 (118)	64 (94)	131 (134)	-
<i>-Transparency of government policy making</i>	51 (16)	55 (49)	31 (36)	30 (32)	95 (87)	69 (102)	65 (68)	98 (123)	-
<i>-Irregular payments and bribes</i>	73 (82)	87 (110 )	23 (26)	64 (64)	130 (137)	77 (114)	69 (101)	122 (133)	-
<i>-Judicial independence</i>	106 (110 )	101 (86)	56 (95)	72 (94)	109 (140)	102 (112)	58 (64)	132 (124)	-
<i>-Favouritism in decisions of government officials</i>	71 (75)	58 (43)	48 (51)	50 (91)	101 (136)	129 (130)	41 (40)	99 (119)	-
<i>-Burden of customs procedures</i>	105 (127 )	122 (107 )	9 (13)	55 (77)	97 (136)	86 (117)	73 (91)	113 (138)	-
<i>-Ethical behaviour of firms</i>	96 (91)	60 (69)	51 (55)	43 (70)	110 (141)	97 (121)	46 (78)	76 (124)	-

Source: Doing Business, World Bank (2017); Economic Freedom Index, Heritage Foundation; Global Competitiveness Index, World Economic Forum (2015-2016).

### **Recommendation 3.9. from the Third Monitoring Round:**

- Rigorously implement provisions of section 6 of the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector; Ensure business participation in the development of the Action Plan for the Anti-Corruption Strategy and its implementation and monitoring.

Prevention of corruption in the private sector was included as one of the sections – section 6 - of the National Anti-Corruption Strategy for 2014-2017. While representatives of the Ukrainian government admitted that no risk analysis was conducted regarding corruption involving the business sector, the Strategy identifies the main general problems such as the "merger of business and government", illicit lobbying of business interests, complicated procedures for business regulations, corruption in control authorities and in the judicial system. It is worth noting that many non-governmental groups study corruption risks in the business environment that can be used for the development and monitoring of policy documents, e.g. TI Ukraine has recently studied compliance practices in the private sector.

According to the Ukrainian government, the section was developed in consultations with the private sector. However, no clear information was provided on how representatives of business community were involved into this process. Furthermore, the business sector is not involved in the monitoring of the implementation of the Strategy (for more information on the monitoring of the Strategy please refer to the relevant section of the report), which indicates the low level of interest of the business community in this policy document. During the on-site visit the NACP informed the monitoring team that they would involve business in the development of the next Anti-Corruption Strategy, however this process has not started yet. It is important

to note that there are many active companies and business associations working on business integrity issues in Ukraine that can contribute to such work, e.g. AmCham Compliance club and others.

Regarding the implementation of section 6, the main achievement to date was the development and adoption in 2017 of the model anti-corruption programme for state-owned enterprises (SOEs) and for companies that would like to take part in the public procurement. This model programme was developed by the NACP in consultations with several state and private companies, and with the technical assistance from the UNDP. The SOEs and some companies participating in public tenders are obliged to have adopted their own anti-corruption programmes based on this model.<sup>290</sup> However, no information was provided by the Government about the application of the model programme in practice. As discussed in the section 1.2. of this report, during the on-site visit the representatives of businesses informed that in most of the cases this is just a box-ticking exercise. The NACP is not involved in developing or monitoring these programmes in any ways. On the other hand, one company informed that they made a good use of this regulation and developed a quality anti-corruption programme.

**Recommendation 3.9. from the Third Monitoring Round:**

- Pursue further simplification of business regulations to reduce opportunities for corruption and eliminate corruption schemes affecting business.

While the Anti-corruption Strategy provided only a limited contribution to promoting business integrity, as described above, several important measures in this area were taken by various parts of the Government including the Ministry of Economy, Ministry of Justice and other state bodies. These included simplification of business regulations, promoting e-governance solutions including e-procurement and improving transparency and disclosure of information.

In 2015, Ukraine introduced legislative changes which simplified procedures for starting and conducting business. Among the main achievements was the creation of “one-stop shop“ for corporate registration, allowing registration at the local level, allowing submission of electronic documents and simplification of liquidation and restructuring procedures.

At the end of 2014, the Parliament adopted legislation limiting the rights of the controlling bodies to inspect companies. Additionally the moratorium on business entities inspection has been established.<sup>291</sup>

In 2016, the Cabinet of Ministries approved Resolution No. 926-p, which effectively accepted all the measures that were proposed by the World Bank its Doing Business Roadmap for Ukraine.<sup>292</sup> The Roadmap includes many practical measures that reduce red tape and various bureaucratic obstacles (e.g. cancelling the mandatory use of seals on company documents) as well as fundamental measures liberalising the economy (e.g. removal of price controls on food products). While the Resolution provides key important measures for deregulation, its implementation in practice suffers from considerable delays. According to the 2016 report of the National Reform Council, these delays are due to slow pace of approval of drafted legislation by Parliament.

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<sup>290</sup> According to Art. 61 of the CPL, anti-corruption program is obligatory for approval by the heads of: 1) state, municipal enterprises, business partnerships, the state or municipal share of which exceeds 50 percent, average number of employees for the accounting (fiscal) year exceeds fifty, and gross revenue from sale of goods (works, services) during this period is more than seventy million hryvnias; 2) legal entities that are participants of pre-qualification, participants of the procurement procedure in accordance with the Law of Ukraine “On Public Procurement”, if the cost of procurement of goods and services is equal to or exceeds 20 million UAH.

<sup>291</sup> The Law No. 76-VIII of Ukraine “On Amendments to Some Legislative Acts of Ukraine” of December 28, 2014

<sup>292</sup> <http://www.kmu.gov.ua/control/uk/cardnpd?docid=249579596>

More recently, in 2017, Ukraine abolished a number of mandatory licensing and permits for some industry sectors and introduced the principle of "silent consent" whereby companies wishing to engage in a certain activity need only to make a declaration to the state, instead of requesting a permit.

In 2017 the Government launching an automatic system of VAT reimbursement – one of the notorious corruption risks for companies. The Ministry of Finance has initiated reform of the State Fiscal Service (SFS) in order to reduce corruption in this area as well.

The introduction of the e-procurement system ProZorro in 2016 became a mini revolution in Ukraine. It has radically improved transparency in public procurement and allowed identifying and stopping many corruption cases. For more information about ProZorro please refer to the section on public procurement.

Ukraine has achieved significant improvements in the area of transparency and disclosure of information related to business integrity. On the one hand, the Ministry of Justice has opened for public access all state registered, including for example the State Registry on real estate. On the other hand, since 2014, Ukrainian companies are obliged to disclose their ultimate beneficiaries in the course of the incorporation and then regularly update this information. This information is publicly available in the Unified State Register of Legal Entities and Individual Entrepreneurs (USR) and the data also could be obtained from the public Application Programming Interface (API). These measures brought about unprecedented transparency in the business world of Ukraine, where information about owners of key companies and their possible links to oligarchs and politicians became open. Anti-Corruption and law-enforcement institutions now could use this information during their investigations. In May 2017 the Ministry of Justice together with TI Ukraine and global initiative Open Ownership signed a memorandum on transferring data on beneficial owners of the Ukrainian businesses to the global register of ultimate beneficiaries.<sup>293</sup>

**Recommendation 3.9. from the Third Monitoring Round:**

- Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.

In 2015 the Parliament Committee on Prevention and Fight against Corruption created a working group for preparing the draft law “On Lobbying”. The working group consists of MPs, representatives from the CSOs, academics, and private sector lawyers (Paragraph 11 of the Protocol of the Meeting dated on 3 June 2015 #26). However, at the time of the on-site visit, the draft of the law was not developed yet.

**Recommendation 3.9. from the Third Monitoring Round:**

- Ensure that the business has a possibility to report corruption cases without fear of prosecution or other unfavourable consequences.

Ukrainian companies have several possibilities to report about corruption. As in the past, they can report to the police or prosecution services, however, experience showed that they did not have trust that these bodies would effectively protect them. They can also complain to the NACP hot line launched in 2016, however it does not appear popular among companies. With the establishment of NABU, citizens of Ukraine have witnessed for the first time that powerful individuals were punished for corruption, which gave them hope, that rule of law can be rebuilt.

Establishment of the Business Ombudsman Council in this context provided a powerful tool for companies to report corruption and to seek protection of their legitimate rights.

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<sup>293</sup> <https://minjust.gov.ua/news/ministry/minyust-pidpisav-memorandum-pro-peredachu-do-globalnoi-bazi-vlasnikiv-biznesu-informatsii-pro-kintsevih-benefitsiariv-ukrainskih-kompaniy-23642>

The Business Ombudsman Council (BOC) was established on November 26, 2014, based on the Decree of the Government No. 691 dated 26.11.2014<sup>294</sup> as implementation of Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative dated May 12, 2014<sup>295</sup>, concluded among the Government of Ukraine, EBRD, OECD, and five largest Ukrainian business associations. The BOC is a public-private non-profit entity with high degree of independence and professional staff.

BOC has two main functions - investigation of individual complaints by companies concerning alleged acts of corruption or other violations of their legitimate interests by the state, and proposing systemic solutions to the most common problems. Regarding the investigations, BOC reviews the complaints submitted by companies, conducts preliminary analysis, and in cases where complains are substantiated, BOC goes to the state bodies that infringed company's rights and seeks resolution of specific problems. During 2015-2017 BOC received around 2000 complains and closed over 600 investigations. BOC's actions helped companies to recover around 10 billion UAH.<sup>296</sup>

In addition to this main function, BOC prepared systematic reports on the most common problems faced by companies. During 2015-2016 BOC issued 9 systemic reports 297 in the area of tax administration, abuse of power on the part of law enforcement agencies, competition policy, natural monopoly, etc. The systemic reports include recommendations for individual state bodies. BOC also prepares reports for the Cabinet of Ministers with the proposals of legislative amendments. According to the latest BOC's activity report respective governmental institution implemented 87% of all recommendations issued by the BOC.<sup>298</sup>

The BOC earned the high level of trust and acknowledgement among small and medium business as well as business associations, proving to be instrumental in fighting corruption as the first point of contact for businesses seeking redress against unfair treatment and as an institution that provides for greater transparency of business practices in Ukraine.

In order to strengthen its status, the BOC has prepared a draft law "On Business Ombudsman Institution", which was approved by the Parliament in the first reading on May 31, 2016.<sup>299</sup> In addition to providing a legal basis for the BOC, the Draft Law seeks to build BOC's powers, such as the duty of state bodies to consider BOC's commendations, administrative liability for state bodies for the failure to disclose information on BOC's request. Currently the Draft Law is still awaiting final approval in the second reading.

In January 2017, back-to-back with the regional expert seminar "Business Integrity in Eastern Europe and Central Asia", BOC together with the OECD, UNDP, and EBRD organised a round table "Business Integrity in Ukraine" to discuss practical ways for promoting business integrity in the country. At that meeting BOC proposed a new initiative to the Ukrainian companies - the Ukrainian Network of Integrity and Compliance (UNIC).

The proposal was enthusiastically supported by the participants of the round table, which stressed that it became possible for companies in Ukraine to do business in full compliance with the law. Doing clean business often requires more effort, time and investment, but companies realised that clean business was a good long-term investment. While the number of such clean companies is growing, they are still a minority in the Ukrainian market, they agreed therefore to gather together to promote clean business and to make it

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<sup>294</sup> <http://zakon5.rada.gov.ua/laws/show/691-2014-n>

<sup>295</sup> Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative. – May 12, 2014 – <http://www.ebrd.com/downloads/news/mou-ukraine-aci.pdf>

<sup>296</sup> <https://boi.org.ua/publications/reports>

<sup>297</sup> <https://boi.org.ua/en/publications/reports?page=1>

<sup>298</sup> Ibid

<sup>299</sup> [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=58980](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58980)



'fashionable' in Ukraine. BOC with the assistance of international partners took the lead in establishing the UNIC.

Further consultations with Ukrainian business and international partners indicated that there is a sufficient willingness among many companies operating in Ukraine to engage in active promotion of business integrity. On 19 May 2017, 46 companies signed a pledge of integrity and established UNIC Initiative Group. Companies who joined the network committed to support a good business reputation and improve the standards of integrity. They also agreed that UNIC in order to maintain the high standard of integrity for UNIC members, they will undergo a verification of their integrity systems. In addition to this verification procedure, UNIC will also provide assistance to companies regarding integrity issues, will promote good practices, and will also engage in various promotional activities to make the notation of business integrity well known and popular. At present, UNIC is a private sector initiative, but in the future UNIC may also engage in a dialogue with the government.

The official launch of the UNIC is planned for October 2017, where new members will be invited to join this collective action.

## Conclusions

The State Programme provided only a limited contribution to the promotion of business integrity. The development of the model compliance programme for SOEs and companies participating in the public procurement is a good initiative, but it has to be further promoted in order to produce a visible impact on business practices. In this regard, the focus on business integrity of SOEs should become the priority of the government.

Ukraine implemented several important measures to simplify business regulations; most recent measures to simplify licencing and permits are positive developments. However, most of the actions provided by the Doing Business Roadmap were delayed and remain unimplemented. Moreover, the fundamental challenge of freeing the Ukrainian economy from the control of oligarchs is still to be tackled.

E-governance solutions provide an important contribution to the improvement of business climate and prevention of corruption. In this regard ProZorro e-procurement system is a key achievement. However, this system addresses only one part of the procurement process – the transparency of the bidding process – and further work is needed to clean up public procurement from corruption.

Ukraine has improved transparency and disclosure of information related to business, publication of information beneficiary owners of companies is a good example. Further efforts are needed to improve disclosure requirements for companies.

Ukraine has taken limited steps to develop a law on lobbying, such as the creation of a working group in the Parliament to develop as draft law; however, no tangible results are produced yet.

Creation of the Business Ombudsman Council provided the business with a powerful tool to report corruption cases without fear of prosecution or other unfavourable consequences, to receive protection of legitimate rights, as well as possibility to tackle most common problems in a systematic manner. Independence and professionalism of BOC allowed this institution to gain trust of companies in the rule of law, which, in its turn inspired them to launch the collective action for compliance and integrity, the UNIC. It is crucial for Ukraine to build on this excellent progress and to take further steps. Strengthening the BOC and supporting UNIC should be among these steps. Greater involvement of other state bodies, such as the Ministry of Economy and Trade and National Agency for Corruption Prevention, in the business integrity would be important for the sustainability of this work.

Ukraine **is largely compliant** with the previous recommendation 3.9.

## **New Recommendation 20**

- 1. Ensure further implementation of the following provisions from the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector:**
  - a) Simplification of business regulations and promoting free market competition;**
  - b) Debarment of companies involved in corruption offences from the use of public resource such as public procurement, state loans, subsidies, and tax benefits;**
  - c) Establishing obligations for external and internal auditors to report corruption offenses;**
  - d) Raising awareness of companies about the law on liability of legal entities for corruption offences and enforcing this law in practice;**
  - e) Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.**
- 2. Develop business integrity section of the new National Anticorruption Strategy on the basis of a risk analysis and in consultation with companies and business associations, ensure active participation of business in the monitoring of the Strategy.**
- 3. Promote integrity of state owned enterprises through their systemic reform and by introducing effective compliance or anti-corruption programmes, increasing their transparency and disclosure.**
- 4. Strengthen the Business Ombudsman Council by creating a legal basis for this institution in the law and by providing it with necessary powers for effective work.**
- 5. Support the Ukrainian Network of Integrity and Compliance.**

## CHAPTER III: ENFORCEMENT OF CRIMINAL RESPONSIBILITY FOR CORRUPTION

This report comes in a very volatile time for Ukraine, which still has a long way to go in terms of establishing functioning democratic anti-corruption institutions and actions and there are serious signs that it is in danger of backsliding into the kleptocracy that it was despite many substantial positive steps since the dignity revolution. This section attempts to do both: point out the achievements and areas of potential risk of regress.

### 3.1. Criminal law against corruption

#### **Recommendation 2.1.-2.2. from the Third Monitoring Round report on Ukraine:**

- Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.
- Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering.
- Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.

By the time of the 3<sup>rd</sup> round of IAP monitoring Ukraine had introduced into its national law most of the international requirements on criminalization of corruption. New recommendations pointed out as outstanding only two issues that related to the statute of limitations and shortcomings in the legislation on corporate liability.

In addition, a new recommendation was made in the 3<sup>rd</sup> round to take steps focused on increasing the enforcement of the offences that have been introduced into Ukrainian legislation through adequate training and resources to the investigators and prosecutors.

***Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.***

At the time of the 3<sup>rd</sup> round, under Ukrainian law the statute of limitation for such basic offences as Active bribery of employee of state enterprise, institution or organisation (Criminal Code (CC) Art 354, para 1), Passive bribery of employee of state enterprise, institution or organisation (CC Art 354, para 3), Illicit enrichment (CC Art 368(2), para 1), Active bribery in private law legal persons (CC Art 368(3), para 1),

Active bribery of persons providing public services (CC Art 368(4), para 1), and Active trafficking in influence (CC Art 369(2), para 1) was set at 3 years.

This was deemed problematic for effective investigation and prosecution of such cases in light of the complexity of most cases in this area and the concealment efforts which are usually involved. It was also pointed out that the absence of the suspension of the statute of limitation for the time when a person enjoys immunity from prosecution represents another problem.

Therefore, the 3<sup>rd</sup> round IAP report recommended expanding the statute of limitations for all corruption offences to at least 5 years, and providing for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.

No relevant information was provided by authorities on these issues in the answer to the questionnaire. Specifically, the request for statistics on the number of corruption cases that were abandoned because of the expiry of limitation period which would be helpful in assessing the issue was not provided on the request of the monitoring team.

Interlocutors met during the on-site visit told the monitoring team that there were corruption cases that have been closed due to running out of the statute of limitation; 2 cases in 2016 have been mentioned in particular. However, most of the law enforcement officials, met at the on-site visit, were more concerned with tight timelines of the pre-trial investigations. The monitoring team followed up on this issue and requested statistical data to support these concerns; the information provided indicated no cases that have been closed due to running out of the pre-trial investigation term in 2015 or 2016.

After review of the texts of the relevant articles of the CC, no changes that relate to sanctions have been made since March 2015, and therefore the statute of limitation of 3 years continues to apply.

No changes have been also made into CC Art 49, which regulates release from criminal responsibility in cases when the statute of limitation runs out since the 3<sup>rd</sup> round of monitoring.

This part of the recommendation is not implemented.

***Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering.***

#### *Trainings and resources*

In the answers to the questionnaire Ukrainian authorities provided very little information regarding trainings and resources on such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, and the new definition of money laundering. No relevant information on this issue was provided to the monitoring team at the on-site visit.

It was communicated that due to the very recent establishment of the Specialised Anti-Corruption Prosecutor's Office (SAPO) they didn't have time to undergo many trainings. Only examples of conferences in which the prosecutors of SAPO took part were provided. Information regarding trainings of investigators which would focus on these offences was not made available. The GPO has jurisdiction to enforce these same statutes for lower ranking officials. No information was provided as to their training on these issues either. While it would seem the topics should at least be addressed in the curriculum for students at Academy of Prosecutors, if not in continuing legal education, no such information was provided. Therefore, on the information provided, such efforts cannot be considered as adequate training

that would ensure effective enforcement of the abovementioned offences which are critical to an effective anti-corruption program.

Similarly, no guidelines or methodological recommendations for the investigators or prosecutors in this regard have been mentioned to the monitoring team. Also it appears that no policy priorities have been set to focus on these types of crimes.

Nevertheless, it is understandable that the newly created anti-corruption agencies – National Anti-Corruption Bureau of Ukraine (NABU) and SAPO – have only recently started their operations: NABU hired its first detectives in August 2015 and SAPO was being staffed in December 2015. They have just started providing more in-depth training to their staff. Initial trainings for NABU detectives have commenced in September 2015; SAPO prosecutors have also undergone training. Newly recruited detectives of NABU (and their analysts), as well as SAPO prosecutors dove right into the practical work and have shown some impressive results to date. However, it would be important as these institutions' training capacities develop to ensure that the training programs that they devise focus on these offences and provide adequate guidance to ensure effective enforcement.

And finally, in terms of resources to ensure effective enforcement of these offences, they have been allocated in Ukraine: through the establishment and appropriate staffing of the NABU and SAPO. Both agencies are very well resourced and fare well compared to other state bodies in the criminal justice system of Ukraine. In addition, investigative capacity has been successfully supported by analytical capacities (NABU retains analytics in addition to detectives). All of this contributed to the good results of these institutions to date in terms of actual enforcement. (See Section 3.4. for more details in regards to resources of these institutions.)

It is noted that there are adequate salaries for NABU employees which seems to have helped to attract talented applicants, salaries of prosecutors within the SAPO are also at the same or above level as NABU's and this is stipulated in the law.

As discussed in other sections, no information was provided about the resources of the PGO outside of SAPO to investigate and prosecute corruption which is important because it has the jurisdiction to investigate and prosecute high level corruption from the previous presidential administration as well as all corruption at levels lower than the SAPO and NABU. Judging by the results reported, adequacy of resources and/or lack of priority for addressing these offenses might be an issue.

### *Enforcement*

Enforcement efforts of NABU and SAPO to date have been successful (this subject is delved into more depth in the Section 3.3 of this report). Moreover, there is actual enforcement of some of the offences mentioned in the Recommendation 2.1-2.2. In particular:

- With regard to illicit enrichment, in 2015 NABU registered two criminal proceedings on the fact of committing a crime under CC Article 368-2. In 2016 there were already 11 criminal proceedings. In 2016 1 case was submitted with charges to court and the trial on this case is ongoing.
- With regard to trafficking in influence, in 2015 NABU registered one criminal proceeding on the offence under CC Article 369-2. In 2016 there were already 5 criminal proceedings. In 2016 3 cases were submitted with charges to court, with the trials on-going.
- With regards to money laundering, in 2015 NABU registered 3 criminal proceedings under the CC Article 209. In 2016 there were 9 criminal proceedings. However, none of them had been submitted with charges to court. As of 7 September 2017, 2 criminal proceedings were filed with the court by SAPO.

Ukrainian authorities provided information in regards to enforcement by other investigative bodies, as follows:

- With regard to illicit enrichment, in 2015 there were 31 criminal proceedings. In 2016 there were 14 criminal proceedings and 38 in 2017. As of end August 2017 one of them has been submitted to court, with 1 conviction.
- With regard to trafficking in influence, 208 criminal proceedings were registered in 2015, 254 in 2016, and 192 in 2017. As of end August 2017 171 of them have been submitted to court, with 164 convicted persons.
- With regard to money laundering, in 2015 there were 220 criminal proceedings; in 2016 there were 144 criminal proceedings and 147 in 2017. As of end August 2017 76 of them have been submitted to court.

No information was provided regarding investigations or charges in cases on offer and promise of unlawful benefit, or that involve the definition of unlawful benefit including intangible and non-pecuniary benefits.

Finally, no information in regards to the obstacles that the investigators and prosecutors are facing in these cases was provided. However, as discussed in Section 3.4 of this report, in the onsite visit the monitoring team heard about concerns that NABU has no wiretap authority and is required to work with other agencies that have such authority. This can undermine the independence of NABU and the confidentiality of their investigations.

To conclude information made available to the monitoring team refers only to some of the offences mentioned in the recommendation and therefore it was only partially implemented.

***Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.***

Quasi-criminal corporate liability for corruption offences was introduced in Ukraine at the time of the 3<sup>rd</sup> round of IAP monitoring. Some of the deficiencies in the initial legislation have been addressed by the amendments of May 2014 and are covered in detail in the 3<sup>rd</sup> round report.

While it was not directly stated in the introduced provisions of the Ukrainian CC, it is clear from them that corporate liability is linked to that of the “authorised person” who committed the offence. The very model used (“measures of criminal nature”) presumes that such measures are secondary to individual liability; it requires “commission of the crime” by the authorised person on behalf and in the interests of the legal entity; according to Article 96(10) CC when applying such measures to a legal entity court takes into account, *inter alia*, gravity of the crime committed, degree of criminal intent of the perpetrator; according to Article 214, para. 8, of the Criminal Procedure Code (CPC) proceedings with regard to the legal entity are carried out simultaneously with the proceedings concerning natural person; under Article 284 CPC, para. 3, proceedings with regard to the legal entity should be closed in case criminal proceedings against the natural person were closed or the relevant person was acquitted.<sup>300</sup>

As a result, in the 3<sup>rd</sup> round of monitoring Ukraine was recommended to ensure the autonomous nature of the corporate liability. Ukraine was also called to analyse the practice of application of the new provisions and address any challenges, etc. And finally it was recommended that with the assistance of qualified international organizations where possible, Ukraine should plan, create and provide trainings and written

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guidelines and other advice on the law, and how to employ it in specific cases, for at least prosecutors and judges.

No changes were introduced into the legislation since the 3<sup>rd</sup> round of IAP monitoring and no information in regards to analysis of the application of these provisions conducted by Ukrainian authorities was made available. The actual practice of application, according to the information provided by Ukrainian authorities, at the moment appeared to be one criminal proceeding, which was initiated by NABU and concerned a private university (as legal entity) attempting to bribe a Deputy Minister of Education and Science. This case was submitted with charges to court.

When this issue was discussed with various interlocutors at the on-site visit, including detectives, prosecutors and judges, they all agreed that the cases were not forthcoming because the legislation was too new and “foreign”. They also said the practice needs to be formed before any guidelines or even analysis can be carried out. The judges expressed most active interest in taking up such cases, while prosecutors expressed more skepticism. The novelty of this legal concept is understandable, however, in order for the practice to form there needs to be a concerted push for pursuing of such liability. Perhaps it could be done both in terms of policy messages and in practical terms of providing training specifically focused on liability of legal persons for corruption offences.

Interestingly, at the on-site visit the monitoring team was also provided with the copy of the court decision of the Mariupol court, in which it applied measures of criminal nature to a legal person implicated in the case under CC Art 369 (active bribery) in the form of the fine amounting to UAH 19840. This decision was appealed to the Donets oblast court which upheld the decision of the 1<sup>st</sup> instance court.

This case is interesting in several aspects. Firstly, taking into account that this case was never reported in the framework of the statistics provided for the monitoring, it may mean that there could be more cases of this nature. Secondly, the case has been tried outside of the capital where courts were traditionally viewed as less receptive to new concepts. Thus, this seems to be in line with opinions expressed by the representatives of the judiciary met at the on-site visit that they are ready and open to trying such cases. Thirdly, the circumstances of the case support the position taken in the 3<sup>rd</sup> IAP monitoring round in regards to the lack of autonomous liability. The legal person in this case was fined when the natural person was found guilty and criminal measures applied to the legal person were indeed secondary to individual liability. And finally, it is without a doubt a positive development that the decision of the first instance court was further upheld.

For the reasons stated, this part of the recommendation was not implemented.

## Conclusions

Very little was done by Ukraine towards implementation of this recommendation, especially in legislative terms. The statute of limitation has not been changed, and legislation on liability of legal persons for corruption offences has not been analysed or further improved.

Focused training on offences introduced at the time of the 3<sup>rd</sup> round of monitoring was not offered to the investigators or prosecutors on an in-depth and systematic basis. In terms of training of NABU and SAPO, this is objectively explained by the recent establishment of the new anti-corruption criminal justice institutions, but this explanation is not applicable to the PGO which has and continues to have responsibilities for these offenses for certain offenders.

However, it is undisputable that proper resources have been allocated to tackle these crimes at the very least at the top level of crimes falling under jurisdiction of NABU and SAPO. And newly established agencies already managed to demonstrate some results of actual enforcement of the offences covered by the Recommendation 2.1.-2.2; which is a positive sign. Further enforcement practice as it develops will be a real test of the capacity of these agencies to apply these particular norms. For the PGO which continues



to have responsibility to enforce these offenses, no information was provided in the questionnaire or in the onsite visit about resources or results in this area.

Ukraine is **partially compliant** with the previous recommendation 2.2 – 2.2. and the previous recommendation remains valid and is reinstated with some additional elements in the 4<sup>th</sup> round.

## New Recommendation 21

- 1. Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.**
- 2. Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering. Training programmes of the specialised anti-corruption agencies should contain modules or focus in other ways on these issues in their regular training curriculum.**
- 3. Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.**
- 4. Take measures at the policy level (for example, set as priorities by the management of the anti-corruption specialised bodies) to encourage investigation and prosecution of corruption committed by legal persons.**

## *Confiscation*

### **Recommendation 2.5. from the Third Monitoring Round report on Ukraine:**

- Ensure that confiscation of assets obtained as a result of crime, their proceeds, or their equivalent in value is applied to all corruption and related crimes in line with international standards; collect and analyse statistics on the application of special confiscation measures (both under criminal and criminal procedure codes).
- Implement an efficient procedure for identification and seizure of proceeds from corruption; consider setting up a special unit responsible for tracing and seizing property that may be subject to confiscation.
- Introduce extended (civil or criminal) confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice.

Overall, Ukraine has made considerable progress since the 3rd round of monitoring in enacting legislation and establishing necessary institutions to implement an effective confiscation program to deprive criminals of access to the profits of crime and to recover assets of Ukraine that have been misappropriated.

This appears to be due in large part to the work of the “Interagency Working Group on Coordination of the Recovery of the Assets Illegally Obtained by High-level Officials of Ukraine” (Interagency Working Group) which was established in March 2015 and included civil society experts in this area (RPR and AnTac). The Interagency Working Group was chaired by a knowledgeable now-former Deputy Prosecutor General, Vitaliy Kasko. In particular, this Interagency Working Group has developed draft legislation which was reviewed favorably by the Council of Europe. Challenges presented in the legislative process

were ultimately overcome in large part and resulted in adoption of the Law of Ukraine 772-VII on 10 November 2015<sup>301</sup>; it was subsequently amended several times, including by Law of Ukraine 1019-VIII on 18 February 2016<sup>302</sup>, and is still mostly compliant with international standards. In addition, the CMU authorized establishment of the Unified Registry of Assets in April 2017, the creation of the Registry is pending.

Many observers credit the requirement imposed by the terms of the EU Liberalization Action Plan for Ukraine and by the EU Macro-Financial Assistance agreements with support from western embassies as a principal motivation for the government to take these steps as is the case with many other anticorruption reforms undertaken since the “Revolution of Dignity” in 2014.

In connection with this monitoring, however, Ukraine provided little statistical or anecdotal evidence of effective implementation of the confiscation authorities. Open source information indicates that confiscation has been sought in a number of cases brought by the NABU and the SAPO, especially through search and seizure warrants but courts have inconsistently granted meaningful pre-trial restraints of assets and, overall, corruption cases are not proceeding to trials which might result in convictions and final confiscation judgments.

There is little open source information about confiscation actions brought by the Prosecutor General’s Office (GPO) in corruption cases it is handling with the exception of one reported matter in which a recovery of approximately \$1.5 billion in assets misappropriated that are linked to a scheme led by Yanukovitch. If true, this major seizure could be a very good development. However, the relevant court decision was not made available to the public. In the future the newly created Asset Recovery Agency should be involved in such cases. According to the information provided by the government the Unified State Registry of Assets will be created only in 2018 or after.

Specifically, three recommendations were made in the 3<sup>rd</sup> round of monitoring concerning confiscation. First, it was recommended that Ukraine ensure that confiscation of assets obtained as a result of crime, their proceeds, or their equivalent in value is applied to all corruption and related crimes in line with international standards. Relatedly, Ukraine was recommended to collect statistics of the application of confiscation measures under both criminal and criminal procedure laws. Second, Ukraine was recommended to implement an efficient procedure for identification and seizure of proceeds from corruption and consider setting up a special unit responsible for tracing and seizing property subject to confiscation. Third, Ukraine was recommended to introduce extended confiscation of assets of perpetrators of corruption crimes in line with international standards and best practices.

*Ensure that confiscation of assets obtained as a result of crime, their proceeds, or their equivalent in value is applied to all corruption and related crimes in line with international standards; collect and analyse statistics on the application of special confiscation measures (both under criminal and criminal procedure codes).*

No information regarding changes in application of confiscation to all corruption and related crimes was provided by Ukrainian authorities in the answers to the questionnaire.

However, from a review of legislation enacted in 2016, the Criminal Code of Ukraine (CC) provides for two types of confiscation:

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<sup>301</sup> Law on National Agency of Ukraine on Detecting, Tracing and Management of Assets deprived from Corruption and other Crimes.

<sup>302</sup> Law On on Amending the Criminal and Criminal Procedure Codes of Ukraine in line with recommendations of the European Commission’s 6<sup>th</sup> report of the state of implementation by Ukraine of the EU visa liberalization plan, in regards to improvement of the procedures on arrest of assets and special confiscation.

1. Confiscation under Art. 59 of CC, also called extended confiscation, which means confiscation of all or part of property directly belonging to the convicted person (no matter of the origin of assets);
2. Special confiscation under Art.96-2 of CC, which resembles ordinary confiscation in European countries which means confiscation of proceeds and means of crime.

Special confiscation under Art.96-2 of CC applies to all corruption crimes. Extended confiscation under Art. 59 of CC applies to embezzlement committed on an especially large scale or by the organized groups, and abuse of authority by public officials, if it resulted in severe consequences, including certain types of bribery, and illicit enrichment.

Thus, all corruption crimes appear to be covered under the special confiscation law but not all by extended confiscation of convicted persons.

Furthermore, it appears that extended confiscation provides for a form of value based confiscation but special confiscation may be more limited to the specific proceeds and means of crime.

It is also not clear that confiscation of transformed/merged assets has been envisaged. Ukrainian legislation does not appear to provide for confiscation of assets which have been transferred to a third party, without an exception for transfers to someone knowledgeable of the involvement of the asset in the scheme or for less than fair market value. Thus, it may still be possible to defeat confiscation by transferring property to family members or nominees. It is recommended that if these gaps still exist in the legislation, that necessary amendments should be introduced to have an effective confiscation process.

As it was mentioned before, no statistical data on the application of special confiscation measures (both under Criminal and Criminal Procedure Codes) was provided by the Ukrainian authorities in the answers to the questionnaire and some limited data was provided following the on-site visit. Interlocutors met at the on-site visit told the monitoring team that statistics were not being collected in regards to special confiscation. They also said that while confiscation powers are being used and some examples were shared with the monitoring team, there was no policy document emphasizing that confiscation is a priority and the law enforcement representatives were hoping that perhaps ARMA would become the driver of the extended confiscation. Some, however, have expressed doubts whether that could happen soon, if at all. They provided some examples when it was applied. This leads to conclusion that this part of the recommendation has not been addressed by Ukraine.

*Implement an efficient procedure for identification and seizure of proceeds from corruption; consider setting up a special unit responsible for tracing and seizing property that may be subject to confiscation.*

Ukraine has made progress in establishing a procedure for identification and seizure of proceeds from corruption and a special office responsible for maintaining a unified record of seized and confiscated assets, as well as responsibility to manage and preserve the value of seized assets and maximum recoveries for confiscated assets. As stated above, through the work of the Interagency Working Group, legislation was developed which was positively reviewed by the Council of Europe to accomplish this goal.

The Law of Ukraine "On the National Agency of Ukraine for the identification, investigation and management of assets derived from corruption and other crimes," came into force on November 26, 2015. The law stipulated that the newly created body would be responsible for the identification, tracing, evaluation of assets on appeal of investigator, detective, prosecutor, and court (the investigating judge). It was also to be responsible for the evaluation, keeping of records and asset management. It was required to establish and maintain the Unified State Register of assets seized in criminal proceedings, replacing the prior patchwork of agency responsibility and transparency. It would be able to cooperate with similar bodies (offices for tracing and asset management) of foreign countries, other competent bodies, relevant international organizations. It would also be authorized to be involved on behalf of Ukraine in obtaining evidence in cases relating to the return of assets derived from crime to Ukraine that is in foreign jurisdictions.

The actual agency – the Asset Recovery and Management Agency of Ukraine (ARMA), which is entrusted with the functions of identification, investigation, evaluation, management and confiscation of criminal assets, was established by the Resolution of the Cabinet of Ministers of Ukraine on February 24, 2016 № 104.

Decree of the Cabinet of Ministers of Ukraine from March 30, 2016 № 244 approved the composition of the selection board for the selection of the candidate for the post of Chairman of the ARMA. The selection procedure was conducted and the first Chairman of ARMA was appointed on December 7, 2016. This appointment was followed by establishment of the inter-departmental working group to support the set-up of the ARMA.

The monitoring team was advised that through a competitive process, people with financial investigations skills have been hired by the ARMA. Presently ARMA employs 45 people, who are properly equipped. Additionally, it is understood that these “investigators” are to have access to all relevant databases about property ownership and income which exist in Ukraine to conduct their investigations. Currently ARMA was already granted access to 5 state registries and two more are pending. It would be important to ensure that they are also granted remote access through secure channels to the databases of the Unified Register of Pre-Trial investigations and have access to data bases of bodies of the local self-governance and others. In the area of international cooperation ARMA has already joined various international networks, including CARIN, StAR and is about to join Interpol Global Focal points for Asset recovery and other regional asset recovery networks. Establishing bi-lateral contacts and cooperation with foreign authorities will be important.

However, it is unclear when the agency is allowed to or will be involved in the process of confiscating assets or in identifying assets which could be confiscated. For example, are they responsible for and do they work with the investigative teams to conduct financial tracing of the proceeds of crime for use as substantive evidence and for special confiscation purposes? Will ARMA be principally responsible to identify assets to be confiscated from convicted persons in extended confiscation proceedings where the assets need not be tied to specific criminal activity? Additionally, it will be important to monitor the level of awareness of various law enforcement authorities responsible for investigations and prosecutions of the available resources that ARMA can provide to increase effective confiscation.

As noted above, by law, the ARMA is to maintain a central database of all seized, restrained and confiscated assets. This is an important requirement to limit corruption in the seizure and misappropriation of seized and confiscated assets. To date, no statistics have been provided about restrained and forfeited assets by whether the bodies previously responsible for such action or ARMA. ARMA is obligated to maintain custody to preserve the value of restrained and confiscated assets but according to open source materials there appear to be assets which are restrained by prosecutors through court orders but are not yet within the oversight of the ARMA. While the process of restraining assets in place rather than liquidating them or transferring custody of them to the control of ARMA before a final order of confiscation is entered may be appropriate to maintain the value of assets subject to confiscation in some instances, it is nevertheless important to maintain a central registry and it is too soon to determine whether these alternative custody arrangements are being implemented successfully.

It appears that until ARMA is properly staffed and operational, there will be no comprehensive database and analysis of the statistics regarding confiscation proceedings in criminal cases and the implementation of an efficient procedure for identification and seizure of corruption proceeds is therefore in progress.

Therefore further progress on both of these recommendations is currently pending.

*Introduce extended (civil or criminal) confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice.*

As discussed, the 3<sup>rd</sup> round monitoring report recommendation that Ukraine introduce extended confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice appears to have been met in 2016.

An amendment to Criminal Procedure Code, Article 100.9, provides that when a court rules on the criminal case it should also order confiscation of assets (money and other assets, including proceeds from them) belonging to a person convicted of a corruption offence or money laundering or to a legal entity related to such a convicted person, if the legal grounds for acquiring such assets have not been established in the court. Similarly, the Civil Procedure Code was supplemented with new Chapter 9, Section III, on proceedings to recognize assets as acquired with unexplained legitimate wealth and forfeit them. According to these new provisions, a prosecutor may file a lawsuit with a civil court after the criminal conviction of a public official for corruption or money laundering. The court will recognize assets as unjustified and forfeited if, based on the evidence submitted, it cannot establish that the assets or the money used to acquire the assets was obtained on a legal basis.<sup>303</sup>

Like other significant legislative reforms in this area, it will be important to see examples of the use of this authority especially in corruption crimes.

Finally, Financial Action Task Force (FATF) Recommendations include a recommendation that countries should adopt a form of non-conviction based confiscation. Extended confiscation as adopted by Ukraine provides some though not all of the same benefits. At the time that Ukraine considered and adopted laws allowing for trials in absentia in the wake of the allegations of grand corruption by former government officials who fled Ukraine in February 2014, the decision was apparently made that the process of trial in absentia was preferable to non-conviction based confiscation given the problems in Ukraine with fair and equitable courts. It should be noted however, that the monitoring team was provided no evidence that this trial in absentia process is being used to confiscate assets upon conviction from persons who have fled the jurisdiction. Accordingly, there seems to be no effective means to recover assets from corrupt officials who have fled Ukraine.

## Conclusions

Based on the analysis above, implementation of the first two parts of this Recommendation are still pending. However, Ukraine's steps taken towards their implementation are recognised, especially the new confiscation legislation and the establishment of ARMA. This is the result of cooperative and effective work together by government and civil society experts taking advantage of international expertise. Such an approach to other legal and practical issues is encouraged. The third part of this recommendation has been formally implemented and will require a close follow-up on the actual implementation of the new legislation.

Ukraine **is partially compliant** with the previous recommendation 2.5.

### New Recommendation 22

- 1. Ensure that ARMA has adequate resources to meet its legislative objectives, including collecting and maintaining statistical evidence about confiscation actions. Ensure that its role and available resources are communicated to the law enforcement and prosecutorial bodies.**
- 2. Step up efforts to confiscate corruption proceeds to family members, friends or nominees.**

<sup>303</sup> OECD/ACN (2015), Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, pages 40-41, <http://goo.gl/IXbRru>

### 3. Continue to make progress in the effective use of the newly enacted confiscation authorities.

#### *Immunities*

#### **Recommendation 2.6. from the Third Monitoring Round report on Ukraine:**

- Review legislation to ensure that the procedures for lifting immunities of MPs and judges are transparent, efficient, based on objective criteria and not subject to misuse.
- Limit immunity of judges and parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of *in flagrante delicto*.
- Revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.

The IAP monitoring consistently has been raising the issue of extensive immunities in Ukraine. Initially in the 2<sup>nd</sup> round report and then in the 3<sup>rd</sup> round monitoring report Ukraine was urged to 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 and to 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*.

At the time of the 3<sup>rd</sup> round monitoring report the law provided that a judge or a parliamentarian, unlike all other persons, may not be apprehended at the time when he/she committed a crime or attempted to do it, immediately after commission of a crime or during pursuit of a person suspected of a crime. Specifically, during the 3<sup>rd</sup> round monitoring the law provided that a judge may not be apprehended or detained – before his conviction by a court - without the consent of the parliament. A member of parliament of Ukraine may not have been “brought to criminal liability” (a stage in the criminal proceedings when a notice of suspicion is delivered to a person), apprehended or subjected to a measure of restraint in the form of detention or house arrest without consent of the parliament.

Limitations of these immunities required amendment of the Constitution of Ukraine. Such amendments with regard to judges were adopted in June 2016 (enacted in September 2016), however they did not address the MPs. Specifically, on 2 June 2016, Ukraine’s parliament approved a package of constitutional amendments reforming the justice system<sup>304</sup> and the Law on the judiciary and the status of judges<sup>305</sup>, which came into force on 30 September 2016. In addition the Law on the High Council of Justice was adopted on 21 December 2016 and entered into force on 5 January 2017. The constitutional and broader judicial reform has had as one of its outcomes the substitution of an absolute immunity of judges with a functional one. Judges may now be remanded in custody in case of commission of grave and especially grave crimes and if apprehended in *in flagrante delicto*. In all other cases the approval by the High Justice Council must be obtained. This is undeniably a positive development. However practice will be the ultimate test of these changes.

This being said, civil society representatives note that there are two difficulties with this provision already. In particular, in January 2017 High Council of Justice adopted Public Appeal, which has to clarify corresponding article of the Constitution<sup>306</sup> and in their opinion contradicts the initial idea of the

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<sup>304</sup> Law On Amendments to the Constitution of Ukraine (provisions on justice) # 1401-VIII

<sup>305</sup> Law On Judiciary and Judges Status # 1402-VIII

<sup>306</sup> <http://www.vru.gov.ua/news/1956>



Constitutional amendments<sup>307</sup>, and there is no clear understanding as to what is being covered by "detention during the crime or just after the crime". This uncertainty leads to different understanding of this clause by the High Council of Justice and law enforcement bodies.<sup>308</sup> As a result the ability of the law enforcement agencies to conduct investigations against judges can be hampered.

At the same time the Criminal Procedure Code of Ukraine, as well as the Law on the Status of People's Deputies of Ukraine, continued to provide additional immunities which were broader than the Constitution: a personal search of a member of parliament of Ukraine, inspection of his personal belongings and luggage, personal transport, residence or work place, as well as breach of privacy of letters, telephone conversations, and other correspondence, and imposing other measures, including covert investigative actions, which, according to the law, restricted the rights and freedoms of an MP, may be applied only if the parliament has given its consent to bringing the MP to criminal liability and if it is not possible to obtain information by other means. The 3<sup>rd</sup> Monitoring Round report urged Ukraine to revoke these provisions, as they presented additional serious obstacles for effective investigation of corruption and were not required by the Constitution of Ukraine. Unfortunately the situation has not changed since then.

Very limited information has been provided by Ukrainian authorities in regards to the application of the procedure of lifting of immunities. In the answers to the questionnaire, they state that requests for lifting of immunities in regards to 3 MPs have been approved by the Parliament in 2017. No information was provided on the refusal to lift immunities or whether the delays which permitted MPS or judges to flee or conceal or destroy assets and evidence while the requests were pending. Open source information and interlocutors met at the on-site visit suggest that the delays have thwarted law enforcement efforts on occasion involving MPS and judges.

Statistical data in regards to the judges was provided following the on-site visit and two judges have had their immunities lifted in 2016 according to the provided information. This information presents a striking contrast to that provided by Ukrainian authorities to GRECO, which in its latest report states: "The authorities indicate that in 2015 i.e. under the previous legislation, judges' immunity was lifted in 31 cases (in 2014: in 17 cases); in 11 cases, Parliament refused to lift judges' immunity."<sup>309</sup>

In any case, whatever the judges-related figures have been before the recent Constitutional changes, new practice will have to indicate whether the procedures for lifting immunities of judges has become transparent, efficient, based on objective criteria and not subject to misuse, and whether functional immunity of judges is sufficient for effective law enforcement measure on corruption cases.

## Conclusions

Only the second part of the Recommendation was partly implemented and only in the part that relates to judges. The first part of the Recommendation was also to some degree addressed in respect of judges, but not for MPs. The third part of the Recommendation remained not implemented.

Practical application of these Constitutional amendments should be closely followed with the possibility to take further steps.

Ukraine is **partially compliant** with the previous recommendation 2.5. and outstanding elements of it are being transferred into the new Recommendation.

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<sup>307</sup> See explanatory note to the draft law at: [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=57209](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57209)

<sup>308</sup> See for example the case of the judge from Lugansk region, investigated by NABU at: <https://www.facebook.com/highcouncilofjustice/posts/1336761393136832>.

<sup>309</sup>

## New Recommendation 23

1. **Review legislation to ensure that the procedures for lifting immunities of MPs are transparent, efficient, based on objective criteria and not subject to misuse.**
2. **Limit immunity of parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of in flagrante delicto.**
3. **Analyse practical application of the judicial reform to take appropriate legal measures to ensure that the procedures for lifting immunities of judges are transparent, efficient, based on objective criteria and not subject to misuse and that the functional immunity contributes to effective law enforcement.**
4. **Revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.**

### 3.2. Procedures for investigation and prosecution of corruption offences

#### *Effective/proactive detection: sources of information, use of FIU reports*

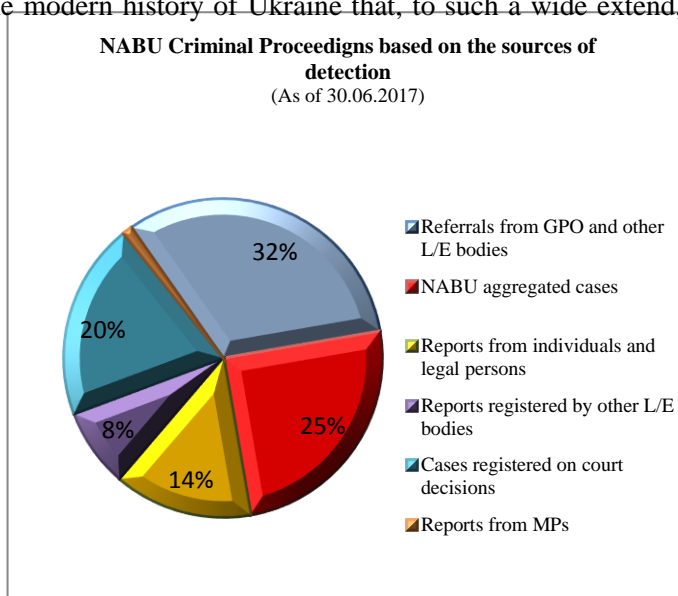
The issue of detection of corruption has not been the focus of the previous rounds of monitoring but is being looked at in this round, as it is key for effectiveness of enforcement of the criminal liability for corruption.

No information was provided by the Ukrainian authorities in responses to the questionnaire on this topic. However, the monitoring team was able to collect some information in this regard through its own research in the open sources of information and during the on-site visit.

#### *Sources of detection*

NABU is the first law enforcement agency in the modern history of Ukraine that, to such a wide extent, began taking proactive measures in detecting corruption cases. There are abundant examples where such detection methods have been effective. Because many of the investigative techniques require court approval obtained by the SAPO, SAPO also is credited for these achievements.

The number of detected cases by NABU is impressive, especially if compared to limited enforcement efforts on high-profile corruption cases before their establishment. As of end of June 2017 detectives of NABU were working under procedural supervision of the SAPO prosecutors on 370 proceedings with 220 persons in the status of suspects.<sup>310</sup>



<sup>310</sup> National Anti-Corruption Bureau's report for the 1<sup>st</sup> half of 2017.

The scale of these cases is also a novelty in Ukraine's enforcement efforts: the cases involve top level officials, many of whom were or remain in the office; use elaborate schemes and structures; and deal with big amounts of funds. (See more information on this in Section 3.3).

As can be seen from the data, the second biggest source of detection constitutes information that NABU itself gathered. Indeed, 25 per cent of cases have been detected by NABU itself as of 30 June 2017.

There are several factors contributing to this. Firstly, NABU is staffed with detectives, which is a new "procedural position" in Ukraine; it combines the functions of the intelligence officers (operatives) and investigators. This position ensures that the primary job of detectives is to detect. Secondly, along with detectives, NABU has been staffed with analytical officers (analytics) working within NABU's Department on analytics and information processing. (More information on NABU's structure can be found in Section 3.4). Both detectives and analysts have access to and use in their work the main registries and databases. They undergo numerous trainings on detection and investigative methods that are being applied world-wide in complex corruption cases. NABU has also made effective use of mentoring by foreign law enforcement officers and analysts who are experts in this area. And finally, its leadership seems to be setting the tone from the top, encouraging its staff to be proactive. These results go hand in hand with proper resourcing and would not be possible without the independence that the detectives have been enjoying so far.

There are other new possibilities that opened to law enforcement in terms of detection since the previous monitoring. Among them access to open source databases of information, such as the Unified Court Registry, and registry of legal entities, as well as databases that contain closed information, such as the asset declarations database to which detectives have access too. These should open new possibilities and it is encouraging to see that they have already being utilized in Ukraine for the purposes of detection and investigation of corruption.

To this end in January 2017 a Memorandum of Cooperation was signed between NABU and NACP. The initial difficulties<sup>311</sup> with access to the Unified Registry of Asset Declarations were overcome and within several months the detectives were able to obtain access to this database. Interlocutors met at the on-site visit opined that organisation of such access is not ideal at the moment: the detectives receive electronic access keys but can use them only in the physical premises of the NACP. This being said, it appears that NACP has set up necessary premises for such access and it was being utilized at the time of the on-site visit and plans to have remote access through the protected channels was discussed and might have happened since then. As of 30 June 2017 NABU was working on 66 proceedings launched based on the analysis of the asset declarations submitted by the public officials.<sup>312</sup>

It would be good to continue scanning media reports and using them as the source of detection, as good practices in other countries suggest. Civil society representatives provided an example when this has been done by NABU and this practice should be continued.<sup>313</sup>

In 2015, investigative units of law enforcement bodies other than NABU initiated 7032 criminal proceedings involving corruption offences, of them 2441 were sent to court, with 875 convictions. In 2016, investigative units of law enforcement bodies other than NABU initiated 7069 criminal proceedings involving corruption offences, of them 2130 were sent to court, with 597 convictions. And in 2017,

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<sup>311</sup> Please see Chapter 2.1, section on the asset declarations for more information.

<sup>312</sup> National Anti-Corruption Bureau's report for the 1<sup>st</sup> half of 2017.

<sup>313</sup> Provided example relates to the case of Pavlo Demchyna, the first deputy of the Head of State Security Service. Journalist Yevheniya Motorevska ("Slidstvo.info") prepared an investigation about his alleged illegal enrichment. On the basis of this report NABU started criminal proceeding. More information can be found here: <https://nabu.gov.ua/novyny/nabu-pochalo-rozsliduvannya-za-faktamy-nezakonnogo-zbagachennya-posadovcya-sbu>.

investigative units of law enforcement bodies other than NABU initiated 6992 criminal proceedings involving corruption offences, of them 2008 were sent to court, with 475 convictions.

#### *Use of FIU reports*

Efforts undertaken by the FIU in order to facilitate detection of corruption cases and support these types of investigations were also impressive. At the on-site visit FIU representatives informed the monitoring team that they received over 2000 requests from various law enforcement bodies in the last year alone, and this number is growing. The information that FIU sends to the law enforcement agency can be used only for the purpose of intelligence and cannot be part of the overt investigative measures.

Recently, the FIU has been working closely with the newly established anti-corruption law enforcement bodies and participated in joint trainings (both being trained and in the capacity of trainers). They also have expressed readiness to work with ARMA staff once it becomes operational, and to the knowledge of the monitoring team participated in the training of the first ARMA recruits in July 2017. And finally FIU developed a typology on corruption cases. All of these are positive developments and should be continued.

The monitoring team was not provided with information about whether the FIU has been using its own authority to suspend transactions temporarily while referrals are made by the appropriate law enforcement or prosecutorial bodies and whether or not this temporary freeze authority can be or is being used to facilitate timely asset restraints through the courts. Such coordination, if possible, could greatly enhance effective confiscation.

#### **Conclusions**

Ukraine should be commended on becoming proactive in detection of the high profile corruption occurring since the last presidential administration, at the very least. These efforts should be maintained and further improved.

Additional steps in this regard can be considered, such as information gathering from open sources outside of Ukraine (considering that most of the money illegally derived from corruption goes outside), including informal networks of practitioners which can provide a wide range of evidence and information without formal MLA requests if no compulsion power is required to obtain it. Use of formal MLA requests should also be maximized to aid in corruption detection. And finally, tax disclosures and asset declarations should become a widely used source of information and evidence in corruption investigations and prosecutions purposes.

## New Recommendation 24

- 1. Ensure that proactive efforts are continued with rigour by NABU, and other law enforcement bodies, to facilitate maximum detection and swift investigation of corruption in Ukraine. These efforts should include:**
  - a) Use of all possible sources of information and tools, including the asset declarations.**
  - b) Cooperation between law enforcement and other non-law enforcement bodies, such as FIU, ARMA, tax, customs, etc. to ensure detection and swift investigation of corruption in Ukraine.**
  - c) Use of information obtained through international cooperation, as well as data collected from the open sources outside of Ukraine.**
  - d) Joint trainings for law enforcement with representatives of the non-law enforcement bodies, especially FIU and ARMA.**
- 2. Establish a centralised register of bank accounts of legal and natural persons, including information about beneficial owners of accounts, making it accessible for authorised bodies, including NABU, NACP and ARMA, without court order to swiftly identify bank accounts in the course of financial investigations and verification.**

*Access to bank, financial, commercial records – procedure, burden of proof, timeframe, obstacles; central register of bank accounts*

### **Recommendation 2.8 from the Third Monitoring Round report on Ukraine (Part 1):**

- Consider establishing a centralised register of bank accounts, including information about beneficial ownership that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.
- Ensure direct access of investigative agencies dealing with financial investigations to tax and customs databases with due protection of personal data.
- Step up law enforcement efforts in prosecution of corruption offences with the focus on high-level public officials and corruption schemes affecting whole sectors of economy.
- Ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Statistical data should be accompanied with analysis of trends in corruption offences.

*Consider establishing a centralised register of bank accounts, including information about beneficial ownership that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.*

*Ensure direct access of investigative agencies dealing with financial investigations to tax and customs databases with due protection of personal data.*

The 3<sup>rd</sup> round monitoring report identified several obstacles to conducting effective criminal investigations concerning financial crimes in Ukraine. These included locating accounts of the suspect/accused in specific banks or other financial institutions. In order to obtain such information, if not already known from the case file, a law enforcement agency needed to send out requests to all banks based on court order (only tax authorities may request information about existence of accounts in banks directly).

Since establishing whether a person owns an account is the first step in the possible further freezing and seizing of the relevant assets as well as tracing illicit funds to establish the elements of offenses for financial and corruption crimes, Ukraine was therefore recommended to simplify the procedure and provide law enforcement agencies with the possibility of establishing the list of accounts a person owns (without accessing further details). One method is to create a centralized register of bank accounts.

Another obstacle which needed addressing according to the 3<sup>rd</sup> monitoring report was the need for access of law enforcement agencies to the databases of the customs and tax bodies.

Little information has been provided by Ukrainian authorities regarding the implementation of this recommendation in the answers to the questionnaire. Authorities confirmed that no centralized register of bank accounts was created in Ukraine. In subsequent meetings with some of the representatives of law enforcement, there was little interest in such a registry. However, the questionnaire does describe the existence of an agreement between the National Anti-Corruption Bureau (NABU) and the State Fiscal Service (SFS) allowing for an exchange of information, including on taxpayers' bank accounts. In particular, according to the agreement NABU has access to SFS's information resources, including information regarding open and closed accounts of taxpayers at banks and other financial institutions and the register of legal entities and individuals - entrepreneurs.

Also from NABU activity reports, available online, the monitoring team has learned about similar agreements on exchange of information and cooperation which were signed between NABU and Border Guards Service of Ukraine, giving NABU direct access to their databases. Additionally, NABU reported it has entered into a Memorandum with the Ministry of Justice (MoJ) granting detectives with access to 23 databases and registries of MoJ.

## **Conclusions**

These are necessary and promising developments. It may be too soon to tell at this time, but in the absence of more information about how the agreements are being implemented, we must conclude that the recommendation is pending. Also they appear to be only covering NABU detectives. The situation with other law enforcement bodies that could be involved in detection, investigation and prosecution of corruption is not clear. However, when appropriate, they should become part of the same arrangements.

Review of Ukraine's efforts under this recommendation is continued in the Section 3.3: it also includes the final rating and the text of the New Recommendation.

## *International cooperation*

### **Recommendation 2.7 from the Third Monitoring Round report on Ukraine:**

- Step up efforts in obtaining mutual legal assistance in corruption cases, in particular with a view to recover assets allegedly stolen by the officials of Yanukovych regime.
- Review procedures on assets recovery to ensure that they are effective and allow swift repatriation of stolen assets.
- Raise capacity of the Prosecutor's General Office and other agencies (notably, the newly established National Anti-Corruption Bureau) on mutual legal assistance and asset recovery issues.
- Establish national mechanism for independent and transparent administration of stolen assets recovered from abroad.

The 3<sup>rd</sup> round report stated that the EU and other jurisdictions froze bank accounts and other assets belonging to the high government officials - alleged perpetrators of crimes in 2010-2013. The Ukrainian FIU reported in April 2014 that it estimated the overall amount of money laundered at more than UAH 77 billion, that it sent requests to 136 FIUs worldwide to trace stolen assets and freeze them, and that the US and the UK assisted in the work on recovery of stolen assets. To address these issues, the Ministry of Justice (MOJ) and the GPO established separate units on asset recovery. Despite these and other efforts not much progress was achieved in repatriating illegal proceeds of the Yanukovych regime's officials to Ukraine. It concluded that this was mainly due to ineffective national investigations into relevant cases, but could also have been due to ineffective procedures for asset recovery, lack of expertise and capacity.

These specific issues were flagged in the 3<sup>rd</sup> round monitoring report in regards to international cooperation, and included the need to (a) step up MLA efforts in corruption cases to recover assets allegedly stolen by Yanukovych regime officials; (b) review of asset recovery procedures; (c) raise capacity of existing central authorities and newly created NABU on MLA; and (d) set up mechanism for management of recovered assets, resulted into the recommendation.

As explained below, it appears that effective exchanges of information by Ukrainian authorities with foreign counterparts are up, even if assets recovered have not significantly increased so far. While there is little evidence that progress was made in actually recovering significant assets misappropriated during the Yanukovich era, open source information suggests some more effective action is being taken against certain former officials and their assets, and many more criminal investigations and prosecutions are being undertaken to address high level corruption occurring since the Yanukovych administration ended by NABU and SAPO.

***Step up efforts in obtaining mutual legal assistance in corruption cases, in particular with a view to recover assets allegedly stolen by the officials of Yanukovych regime.***

***Raise capacity of the Prosecutor's General Office and other agencies (notably, the newly established National Anti-Corruption Bureau) on mutual legal assistance and asset recovery issues.***

Since the last round of IAP monitoring, the GPO and MoJ continue their functions in the capacity of the Central authorities, and NABU has acted to transmit its own MLA. The 3<sup>rd</sup> round report noted that the exercise of this function merits follow up in the 4<sup>th</sup> round.

Taking into account the need for confidentiality and the ability to ensure that MLA are transmitted in the form needed for cases under the competence of the NABU and in order to ensure autonomous execution of functions given to it by the law, the legislation provides that NABU is responsible for international



cooperation within its competence and according to national legislation and international treaties (Art 16, p.9 of the Law of Ukraine On National Anti-Corruption Bureau). While the GPO will remain the Central authority under international treaties, the complimentary role of NABU in MLA is enhancing effectiveness of international investigations.

The Criminal Procedure Code was also amended giving the newly created anti-corruption body the mandate for international cooperation, in particular CPC Art 545 part 1. According to these amendments the GPO requests for international legal assistance in criminal proceedings during pre-trial investigation and considers relevant requests of competent foreign authorities, except pre-trial investigation of corruption offences that are under the competence of the NABU which performs functions of central body in such cases.

Anecdotal evidence from countries where MLA requests have been made by NABU indicates that in most cases, the MLA requests are clearly written and ask for evidence which appears logically related to the investigation described. The requests fall appropriately within the scope of the treaties under which the requests are made.

No information was provided by Ukrainian authorities in regards to what is being done by the GPO in this area, or what is done to raise the capacity of its staff in the answers to the questionnaire. Some information on NABU in this context has been provided. However, more details were found in the Progress report from September 2016. In particular, in 2016, Ukrainian authorities reported that during 2014 - 2016 law-enforcement authorities of Ukraine sent 167 requests for international assistance in criminal proceedings against Ukrainian former high-level officials to the competent authorities of foreign states, 64 had been executed.

Additionally, in the beginning of August 2016, efforts were apparently being made to address deficiencies in MLAs. Forty requests for international legal assistance in 17 criminal proceedings against Ukrainian former high-level officials were discussed with the representatives of the Basel Institute of Governance (Swiss Confederation). Under their MOU with the PGO, Basel Institute experts devoted significant resources to working with investigators to prepare effective requests and increase capacity in the process.

Likewise, from its inception through February 2017, NABU reports that it sent 118 requests for international legal assistance in investigation of 29 criminal proceedings to 42 foreign states, including Latvia, Switzerland, Cyprus, Austria and the United Kingdom. As of February 2017, 45 requests had been fully executed. None of the data provided includes a specific comparison to periods before NABU was established, but it seems apparent that an unprecedented increase in investigative activity involving foreign evidence is being undertaken on corruption matters by Ukrainian law enforcement, particularly by NABU and SAPO.

Additionally anecdotal evidence suggests that under the current Prosecutor General, the International Division of the PGO has been given greater authority to pursue certain international criminal investigations into official corruption and recovery of associated criminal proceeds. According to some official statements by the PGO, significant progress is being made in some cases, but the data the monitoring team had so far is not complete to form any firm conclusions.

***Review procedures on assets recovery to ensure that they are effective and allow swift repatriation of stolen assets.***

***Establish national mechanism for independent and transparent administration of stolen assets recovered from abroad.***

As discussed above in connection with Recommendation 2.5, the National Agency of Ukraine for detection, investigation and management of assets derived from corruption and other crimes (ARMA) was established by the Resolution of the Cabinet of Ministers № 104, dated February 24, 2016 and is authorized to detect, investigate, assess, manage and seize proceeds of crime, as well as to keep the Unified State Register of Assets arrested as a result of criminal proceedings. It is also can directly cooperate with the relevant authorities of foreign states (offices for investigation and managing the assets) other competent authorities of foreign states and related international organizations and participate in representing the rights

and interests of Ukraine in foreign authorities with jurisdiction for the matters related to the return of assets derived from corruption and other crimes back to Ukraine etc. The Director of ARMA has been appointed and staff are being hired. Open source material indicates the staff are also being trained by civil society and international experts in this field.

## Conclusions

The latest figures provided in regards to the mutual legal assistance date back to September 2016 and seem to be credible and are not put into doubt. They still fail to corroborate a conclusion that the authorities' efforts in this area have been stepped up, as is required by the Recommendation 2.7.

With no additional data from the government, the monitoring team observed that there is a recognition that the PGO's International Department seems to have more license to take actions on certain cases to obtain information and evidence and to try to recover assets, and the leadership seems to understand the imperative to show results to a sceptical public. The monitoring team further notes the unverified reports of a major recovery of approximately \$1.3 billion in misappropriated assets which could be a significant result, but the confirming facts are not available.

Additionally, there is still some concern expressed by some civil society representatives regarding the lack of effectiveness in the international activity of the Prosecutor General's Office in relation to the huge levels of suspected corruption to be addressed, and some concerns about who is given the responsibility to conduct certain investigations. Questions in particular were raised about the increasing involvement of the Military prosecutors Office in investigations which appear to have no connection to the corruption subject matter.

At the same time, positive trends have been identified in the work of the SAPO and of the NABU (whose commitment has been proven *inter alia* through the successful freezing of property abroad). At the time of the drafting of this report, criminal charges have been brought in an estimated seventy cases involving corruption since the Yanukovych administration ended, and assets are sought to be restrained in about half.

The authorities are therefore urged to reinforce their action along the lines of the recommendation so that concrete and measurable results in terms of asset recovery could be shown. The ACN understands that any further progress in this area also depends in part on the effective functioning of the newly established ARMA, which is as yet to become operational.

Ukraine **is partially compliant** with the previous recommendation 2.7.

### New Recommendation 25

- 1. Show concrete and measurable results in terms of asset recovery. In particular:**
  - a) Proactively take all available measures to obtaining mutual legal assistance in corruption cases;**
  - b) Continue to raise capacity of the General Prosecutor's Office, NABU and ARMA in international cooperation and asset recovery.**
  - c) Ensure that procedures on assets recovery allow swift repatriation of stolen assets;**
  - d) Ensure effective functioning of ARMA in its tasks on asset tracing, recovery and management of stolen assets.**
- 2. Ensure that NABU can independently transmit and respond to MLA requests.**

### 3.3. Enforcement of corruption offences

#### **Recommendation 2.8. from the Third Monitoring Round report on Ukraine (Part 2):**

- Consider establishing a centralised register of bank accounts, including information about beneficial ownership that should be accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.
- Ensure direct access of investigative agencies dealing with financial investigations to tax and customs databases with due protection of personal data.
- Step up law enforcement efforts in prosecution of corruption offences with the focus on high-level public officials and corruption schemes affecting whole sectors of economy.
- Ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Statistical data should be accompanied with analysis of trends in corruption offences.

#### ***Step up law enforcement efforts in prosecution of corruption offences with the focus on high-level public officials and corruption schemes affecting whole sectors of economy.***

Another issue identified in the 3<sup>rd</sup> round report was a strong perception that there was a lack of political will of the Ukrainian authorities to prosecute corruption, and that most cases focused on low to mid-level officials and with leniency of sanctions for convicted corrupt officials. This resulted in recommending that Ukraine step up its enforcement efforts.

While no information towards this end has been provided in the answers to the questionnaire, according to open source information and findings of the on-site visit, considerable progress is being made in addressing high level corruption occurring after the Yanukovich administration. As it was mentioned earlier this progress for the most part can be attributed to the newly established anti-corruption bodies, NABU and SAPO.

In particular, as of 30 June 2017 detectives of NABU under the procedural guidance of SAPO prosecutors have investigated over 370 cases. In total 218 high level officials and CEOs of the SOEs have been accused in these proceedings, including the Head of the Fiscal Service of Ukraine, head of the Accounting Chamber of Ukraine, Head of the Central Election Commission, and others. In these cases the Prosecutor General was asked and filed motions for lifting of immunities with regard to 3 MPs (only two of these were granted and only in the part permitting to charge them without consent to their apprehension or arrest). Some of these cases, in line with Recommendation 2.8, target corruption schemes effecting whole sectors of the economy with a special focus on SOEs. The operations of the major SOEs<sup>314</sup> that have been investigated in NABU/SAPO cases include the following: “EnergoAtom”, “Yuzhno-Ukrainsky Nuclear Station”, “CherkassyOblenergo”, “Ukrzaliznitsia” to name a few. The “Onyshchenko Gas case” is another high profile case involving a scheme with a large impact on the economy. The MP Onyshchenko has been charged along with 8 others so far and it is being closely monitored by the public.<sup>315</sup>

<sup>314</sup> All of them are listed in the top 100 SOEs by the MEDT.

<sup>315</sup> Detailed information in regards to these cases can be found in NABU reports at <https://nabu.gov.ua/reports> and <https://nabu.gov.ua/en/tags/oleksandr-onyshchenko>

As of 30 June 2017, the NABU and SAPO report they have filed charges in approximately 78 cases involving high level corruption. This includes a proactive undercover investigation into corruption involving the sale of amber in which the NABU and SAPO worked with the U.S.'s Federal Bureau of Investigation to complete the investigation. Taking into account that the NABU has initiated its first proceedings in December 2015 and the SAPO was not fully operational until February 2016, and charges could not be filed in NABU cases except by the SAPO, based on the numbers of cases, the seriousness of the charges and the high level of the officials involved, this appears to represent robust action by the two offices.

The monitoring team was advised that several of the cases have been resolved through plea agreements, but ARMRA does not seem to have information about the assets recovered, and as discussed in Section 3.4 of this report, many are stalled in the courts. The inability to routinely try and resolve cases filed in courts undermines public confidence in the new institutions which were created in clear recognition that the old prosecution system was ineffective in addressing grand corruption. When criminals are not ultimately held responsible, it also serves to undermine deterrence of corrupt conduct and prevents significant asset recovery.

In the legislation establishing the NABU and reforming the PGO, the law provided that the Ministry of Interior and PGO's authority to investigate and prosecute cases involving high level corruption as described in the statute would be transferred to the NABU and the SAPO when these bodies were created and became functional, but not later than 3 years since entering into force of the Law on NABU. The PGO and Ministry of Interior (MOI)/State Bureau of Investigations (SBU) would be responsible for corruption cases that do not fall under the remit of NABU/SAPO, including lower levels of corruption.

In July 2015, CPC Art 216, which regulates jurisdiction, was amended providing that the investigations that have been already launched will not be transferred to NABU. This was reportedly done because of concerns that it would undermine NABU's mission if it took on responsibility for all the investigation and prosecutions of the prior administration. The Ministry of Interior and PGO which had been responsible for these matters continued with them and were to be held accountable for their work or lack of progress. It is the understanding of the monitoring team that responsibility along the lines outlined is in fact in place. However, it is unclear if each agency is abiding by the division of labor or that each group is addressing the offenses for which they are now responsible.

In contrast to the NABU and SAPO relatively little is known about actions involving corruption occurring by high level former administration officials which should be addressed by the PGO and MOI/SBU since those investigations and cases were under their responsibility for years prior to July 2015. As noted there are some reports of a significant asset recovery case involving tax evasion and the former head of the State Fiscal Service but few details are public and the ARMA apparently has no information or assets under its control. There are also public reports of charges pending against the former Minister of Justice for charges involving budget fraud and there are signs that some procurement fraud and kickback investigations are underway, especially involving state-owned companies.

However, some high level corruption investigations and prosecutions which were ongoing seem to be stalled. This includes the investigation and prosecution of the so-called "Diamond prosecutors" accused of bribery and extortion which was viewed as a very positive sign that the PGO was policing its own corruption. Media reports were widely read of staggering levels of unexplained wealth of the subjects that were uncovered in searches. Now the personnel of the unit that conducted the investigation and brought the charges appears to be mostly new. This case that was submitted to the court in January 2016 and this very serious matter does not appear to be progressing. The slow progress on a very serious case involving corruption by senior prosecutors and the renewed focus on critics of the PGO feeds the low level of public confidence in the PGO to carry out its responsibilities and demands for accountability.

In general, there is little information to confirm that effective work is being done and progress is being made now almost three years after the former high ranking officials left office amid reports of billions of dollars in embezzlement, misappropriation, abuse of office and bribery. The signs of opulent wealth which could not be explained by published salaries or identifiable prior private sector employment are staggering. This includes information provided by Ukraine in response to the questionnaire and open source material. Resources for combatting high level corruption cases prior to SAPO are scarce. There is also noted that recently under the new Prosecutor General, the office of the military prosecutor is assigned to conduct high level corruption investigations which don't appear to be within its mandate. This raises concerns in regards to the fact that violation of the jurisdiction renders results of the investigation conducted by the improper agency legally void: according to the CPC evidence collected by the incorrect investigative body cannot be used in court. There are already examples when persons have been acquitted because the incorrect body investigated the case.<sup>316</sup> There are also examples of indictments being sent back to the prosecutors.<sup>317</sup>

***Ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Statistical data should be accompanied with analysis of trends in corruption offences.***

As part of addressing the issues of public discontent with the work of the law enforcement and prosecutorial bodies, the 3<sup>rd</sup> round monitoring report recommended that Ukraine ensures free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular on the number of reports of such offences, number of registered cases, the outcomes of their investigation, criminal prosecution and court proceedings (with data on sanctions imposed and categories of the accused depending on their position and place of work). Moreover, it called for the statistical data to be accompanied with analysis of trends in corruption offences.

Ukrainian authorities provided no relevant information in regards to statistics in the answers to the questionnaire. Moreover, most of the requested statistics was simply not provided throughout the whole section of the questionnaire on criminalisation and enforcement of corruption, which puts into question its ready availability.

There does appear to be some piecemeal reporting on each website of the offices of prosecutors and investigators responsible for anti-corruption work. The cases that are being detected, investigated and prosecuted by the NABU and the SAPO are very much in the public domain. For example, information both in the form of statistics and analysis of trends can be found in activity reports of NABU published on their site in Ukrainian and English. With regard to individual cases that NABU and SAPO is working on – it appears that when they reach a public stage, information can be found at the newly created register of cases which contains information in the easily digestible aggregated form. This register allows tracking progress on cases, and if its maintenance is continued and properly updated, would be an interesting information resource for the society at large, as well as various civil society organisations and experts. This is a welcome development, if all legal requirements on confidentiality of investigations are preserved.

Similar information in regards to other offices and cases, including statistics and trends could also be found at the Website of the GPO.

While there are some limits to the significance of statistics in complex investigations and prosecutions, the aggregated data about open and closed cases and prosecutions and sentences and asset recovery is still

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<sup>316</sup> See Alternative Report on Assessment of the effectiveness of the Anti-Corruption Policy implementation, prepared by RPR, Renaissance Foundation and TI-Ukraine in 2017 (pp. 315-316).

<sup>317</sup> In the case of bribe-taking by the deputy Minister of Health Care - Vasylyshynets, jurisdiction over which should be with NABU but in fact investigation was conducted by PGO - trial court decided to send back indictment to prosecutors. More details can be found here: <http://www.pravda.com.ua/news/2017/05/29/7145332/>

important as a measure of the degree to which the corruption problem is being addressed. It contributes to a full picture which can help the society and policy makers assess progress, needs, threats, etc.

## Conclusion

Since the 3<sup>rd</sup> round of IAP monitoring, there has been significant work performed by some of the responsible law enforcement and prosecutorial bodies to address high level corruption. For example, the publicly filed cases by SAPO working with NABU appear to reflect aggressive and effective investigations and prosecution decisions.

Presumably this progress has been aided in part by the improvements in access to information by the investigators as outlined above. But significant progress does not seem to be true across all of the responsible bodies.

Although there appears to be more commitment by the current Prosecutor General in some areas, we note the apparent abandonment of very serious cases brought by the former office of the general inspectorate against senior and experienced prosecutors. Of major concern, investigative and prosecutorial resources also seem to be trained on the critics of the PGO and others.

**Table 10 Statistics on number of initiated and completed criminal proceedings by the General Inspectorate of the General Prosecutor's Office of Ukraine for 7 months of 2017**

Number of initiated criminal proceedings in the reporting period		183
Number of completed criminal proceedings (together with recompleted ones)		26
Among them	Submitted to the court with the bill of indictment	8
	Completed criminal proceedings	18

Of paramount concern is the absence of fair and effective courts to set conditions of release and detention and to resolve the charges which have been brought. This threatens to undermine all of the progress made and continues to limit Ukraine's future.

Progress has been made in creating new institutions and in their growing effectiveness, but it is not possible to conclude that Ukraine has met the recommendation to step up its focus on investigating and prosecuting high level corruption. The absence of a fair and effective judiciary is a prime impediment.

Based on the cumulative conclusions in regards to the first part of the Recommendation 2.8, presented earlier and the conclusions above, Ukraine **is partially compliant** with the previous recommendation 2.8.

(Please see New Recommendation after Section 3.4)

### 3.4. Anti-corruption criminal justice bodies

Since many of the issues connected to this Section have already been covered earlier in this report, in addition to reviewing the status of the implementation of the relevant 3<sup>rd</sup> round IAP Recommendation, it will only look at the outstanding matters that specifically relate to the anti-corruption criminal justice bodies in Ukraine and have not been previously covered. This section should be read in conjunction with the section 3.1, 3.2 and 3.3.

#### **Recommendation 2.9 from the Third Monitoring Round report on Ukraine:**

- Ensure swift establishment and genuine independence of the National Anti-Corruption Bureau, in particular by excluding political bodies from the process of the Bureau's head selection, ensuring his job security, providing it with necessary resources, including the salaries for the Bureau's staff as established by the law.
- Consider introducing amendments in the Constitution of Ukraine to provide legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).
- Ensure operational and institutional autonomy of the specialized anti-corruption prosecutor's office dealing with cases in jurisdiction of the National Anti-Corruption Bureau.
- Consider introducing specialized anti-corruption courts or judges.

***Ensure swift establishment and genuine independence of the National Anti-Corruption Bureau, in particular by excluding political bodies from the process of the Bureau's head selection, ensuring his job security, providing it with necessary resources, including the salaries for the Bureau's staff as established by the law.***

At the time of the IAP 3<sup>rd</sup> round, the Law on NABU has been just adopted and the procedure for the selection and appointment of the first director of the Agency was launched. The report expressed concerns in regards to the procedure being tempered via legislative changes (from the Selection commission making a final decision on the candidate to it proposing three candidates one of which is to be picked and appointed by the President). Ukraine was urged to reconsider this change, however, this was not done and the selection procedure went ahead in accordance with the changed procedure.

Nevertheless, IAP 3<sup>rd</sup> round report positively evaluated composition of the selection commission. Selection procedure went ahead as prescribed by the law with all of the transparency checks put in place and the first Director of NABU was selected and appointed in April 2015.

The staffing of the NABU has followed shortly. All of the staff of the NABU, with the exception of the Director and Deputy Director, has been selected based on the open competition over the summer of 2015. Currently NABU has 572 staff (700 staff is the ceiling set in the law).

At the end of 2015 NABU was provided with premises. Salaries of the NABU staff have been provided as established by the law, in line with the Recommendation 2.9 of the 3<sup>rd</sup> IAP round of monitoring. They are at a very competitive level which resulted in a fierce competition for the vacancies announced within the NABU. In the opinion of the NABU representatives met by the monitoring team – the Bureau is well resourced. It also enjoys strong support from the international community, both in political terms and in terms of resources and training.

This part of the recommendation appears to be implemented to the large degree.

*Additional issue: NABU audit*



Another potential for concern in regards to the independence of NABU that was raised in the 3<sup>rd</sup> round report dealt with the audit commission members that would evaluate NABU's effectiveness, and its operational and institutional independence.<sup>318</sup> If Commission concludes that NABU's operations have been ineffective or Director did not execute his duties properly, the Director can be dismissed by the President or by the Parliament upon request from 150 MPs or more.

3<sup>rd</sup> round report expressed concerns regarding risks of political influence on the audit via appointing members of this commission by the political bodies and final decision making by the President or Parliament. This concern was especially valid at the time of the drafting of this report.

The External control commission will be composed of 3 members with the President, the Parliament, and the government each selecting 1 member, so the concerns of the 3<sup>rd</sup> IAP round were not addressed.

In addition, some of the developments in this regard are alarming. Firstly, the issue of NABU's annual audit was raised only at the end of 2016, almost two years since establishment of NABU (law on NABU adopted in October 2014, Director appointed in April 2015, NABU was staffed with detectives over summer 2015). This seems to coincide with the Bureau's launch of first big investigations linked to various political forces (November 2016 – Naftogaz and Odessa port plant cases; December 2016 - "Party of Regions accounting books case", January 2017 - "Onishenko case", and finally arrest of Mr Nasirov, the Head of Fiscal Service of Ukraine in March 2017). Some of these have been already discussed earlier.

The process of selection and appointment of auditors was marked with several scandals. Mr Nigel Brown (British private lawyer, who worked from 1979-92 in New Scotland yard) was put forward by two biggest Parliament factions (Petro Poroshenko's Bloc and People's Front). His candidacy raised a wave of discontent from the Civil Society, international community and the public in general due to obscure circumstances of his nomination appearing outside of the Anti-Corruption Committee's nomination process, his presence in the Parliament when appointment of auditors was discussed and his "weak" qualifications if compared to other candidates discussed by the Committee. As a result his candidacy was rejected and a-c Committee announced open competition which closed in May 2017. Later on the Government held consultations with the Civil Society, solicited nominations and appointed Mr Buromensky, whose qualifications appear not to be fully in line with requirements of the Law on NABU (he does not have direct experience of working in either foreign law enforcement agencies or international organisations). The President has not yet appointed his auditor.

These developments raise serious concerns and it is of utmost importance that such Commission be formed in a proper a transparent manner and in full compliance with the requirements of the law. If auditors of the Commission are not impartial, their findings can be manipulated and used to discredit NABU and dismiss its Director.

If the Director of NABU is dismissed through undue process or for political motives this will send a strong message to the detectives working in the Bureau regarding the independence of their agency, and most importantly their own independence. Currently they are taking unprecedentedly independent decisions in their investigations. Hierarchical independence is further reinforced by the aggressive position of their leadership, setting the tone for proactive actions. The work of the Bureau will also be disrupted for the period until new Director is appointed. Even in procedural terms, for example, the detectives of NABU will no longer be able to request operative and intelligence cases, as well as criminal proceedings that relate to their cases from other law enforcement bodies; this requires a decision of the Director and his approval of such decision with Special a/c prosecutor.<sup>319</sup> Finally, even if the new Director is properly selected, this might have a chilling effect on him, and also on other agencies tasked with fighting corruption and further feed disillusionment of the public with new a-c instruments.

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<sup>318</sup> Article 26 of the Law on National Anti-Corruption Bureau of Ukraine.

<sup>319</sup> Article 216 of the Criminal Procedure Code of Ukraine and Article 17 of the Law on NABU.

The issue of NABU's audit requires close monitoring and urgent steps need to be taken to ensure that such audit is conducted free of abuse and political interference.

*Capacity of NABU to conduct wire-tapes*

At the time of the on-site visit, the monitoring team was alerted to the following weakness in the institutional set up of NABU. The interlocutors met at the on-site visit stated that NABU did not have capacity (legally and technically) to conduct its own wire-tapping. For such measures they had to rely on the operative officers of other agencies, in particular the SBU. Draft law to address this issue has been registered with Parliament in autumn 2016 and is still pending.

In addition to practical challenges it also presents other potential drawbacks – more specifically dangers of compromising the sensitive investigations of NABU. Such investigations may involve among others – the SBU officials as potential suspects. The monitoring team was also provided anecdotal evidence of leaks occurring.

It would therefore be most effective to ensure that NABU has such capacities within its own institution and can limit the scope of persons involved in the sensitive investigations.

***Consider introducing amendments in the Constitution of Ukraine to provide legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).***

No steps towards implementation of this recommendation have been taken and this part of the Recommendation remains unimplemented.

***Ensure operational and institutional autonomy of the specialized anti-corruption prosecutor's office dealing with cases in jurisdiction of the National Anti-Corruption Bureau.***

Since the adoption of this report, the Head of the SAPO – the Special Anti-Corruption Prosecutor, who also has the position of the Deputy Prosecutor General - has been selected and appointed in accordance with the requirements of the Law. The selection process, similarly to that of NABU's Director, was held in an open competition by the Selection Board and resulted in the appointment on 30 November 2015. Deputies of the Specialised Anti-Corruption prosecutor have been appointed in December 2015.

The staffing of the SAPO has followed shortly. SAPO prosecutors have been selected based on open competition over January-February 2016. Currently SAPO has 51 staff (of whom 12 are administrative) and its organisational structure includes the following departments: department of procedural guidance, support of state accusation and representation in the courts, as well as division on analytics and information and division on documentation.

The SAPO was allocated premises and was provided with other necessary technical and material support. Salaries of the SAPO staff have been provided as established by the law and are also at a very competitive level which is far higher than that of regular prosecutors. In fact, the monitoring team was informed at the time of the on-site that the base salary of the similar rank prosecutor amounted on average to one tenths of that of SAPO prosecutor or NABU detective. Regulation on SAPO was adopted in April 2016.

As described earlier SAPO has become fully operational in early 2016 and since then has demonstrated its ability to carry out its functions professionally and independently. Enforcement results have been earlier discussed in the section 3.3.

This part of the recommendation appears to be implemented.

*Additional issue: General "Reception Office" of the GPO and Administrative Support Services*

At the on-site visit, the monitoring team identified one technical/organisational issue which could be addressed and help eliminate potential impediments to operational independence of SAPO, as well as make its work more efficient and confidential.

Currently all of the administrative support of SAPO, in terms of HR, communications, filing, archiving, etc., is provided by the “General Reception office” and other administrative support services of the GPO. All correspondence and filing also goes through the PGO. This seemingly small function can have greater implications, especially in light of jurisdictional disputes/disambiguates that have been already discussed in section 3.3. and taking into consideration sensitivity of the SAPO cases.

For example, when documents addressed to the SAPO arrive they go through the General Reception Office of the GPO. There they are registered, entered into the system and are being forwarded to the recipient. At this point prosecutors of the GPO and other staff of the GPO, have access to any of these documents. This firstly can present issues in regards to confidentiality of the transmitted information.

Moreover, at this point PG can be alerted of the opportunity to decide to reassign cases, share files with other relevant in his view prosecutors, etc. This provides other prosecutors of the GPO with an easy entry point into cases that fall under the jurisdiction of the SAPO and NABU. And since the PG is vested with powers to resolve jurisdictional disputes according to the CPC Art 216 – this lends itself to potential for channelling of cases away from the newly created specialised bodies.

As it was mentioned earlier, the monitoring team was made aware of a number of cases which were assigned to other units within GPO, including the Military Prosecutor’s Office. Whether misuse of this set up happens in practice is beyond the point of this report. However, even a potential for such misuse should be eliminated. Plus, giving SAPO its own reception service, as well as perhaps other support services, would simply make its work more efficient.

***Consider introducing specialized anti-corruption courts or judges.***

Formally to implement this part of the 3<sup>rd</sup> round recommendation, Ukraine needed to take steps demonstrating that it considered establishing anti-corruption courts. Consideration of this topic has been achieved through recent heated debates over the merits of their establishment. Finally, with adoption of the judicial reform of 2016 – Ukraine’s President and parliament made a clear policy decision that such courts should be established. However, the manner in which they will be established is still a matter of serious controversy and, in any case, is not moving forward sufficiently to address the problem. The new system of courts foresees establishment of specialised courts, including the court responsible to handle anti-corruption cases.

The debate and passage of legislation would bring Ukraine in compliance with this part of the current recommendation. However, the monitoring team believes that this issue requires more in-depth consideration about whether this proposal adequately addresses the problem of the immediate need for fair and impartial courts to begin hearing these matters without further delay.

One of the most serious issues is the shocking fact that the courts currently assigned high level corruption cases are simply not bringing the cases to trials. Clearly, something must be done in regards to the large number of stalled cases brought by SAPO and NABU.

As it was mentioned earlier, approximately 78 cases have been sent to courts by SAPO/NABU. According to the CPC Art 31, p.3 adjudication of cases under SAPO and NABU jurisdiction has to be performed by the panel of 3 judges that should have at least 5 years of judicial experience. However, due to mass resignation of the judges and pending “re-appointment” of judges whose 5 years’ probation term has lapsed with judicial reform - this issue was discussed at length in Section 2.3 – there are simply not enough judges in the individual courts to form panels for trial of these cases. Plus, the monitoring team was informed by some of the interlocutors met at the on-site visit, that many judges in order to avoid trials of these politically sensitive, as well as publicly exposed cases – take extensive sick leaves, recuse themselves, arrange their schedules in such ways that the three are never present. There are also examples when judges send cases to appeal courts arguing that the cases do not fall within their jurisdiction.

Due to these reasons, trials of cases brought by SAPO/NABU are often delayed, or are allowed to be continued for a long time despite the CPC requirement of timely set and continuous trials. As a result, according to the data provided by NABU – as of 30 June 2017 – one third of the 78 cases are awaiting trial. Only 15 cases have been adjudicated so far, most of them deal with secondary participants of the big cases.

This situation is unacceptable and something needs to be done urgently to ensure prompt and proper adjudication of these cases. In addition, the issues that have been raised in the Section 2.3 of this report in regards to selection of the HCJ members should be addressed in this context.

### *Other issues*

There is growing evidence that the practice of using the criminal justice system to silence critics is rising again. Requirements such as the registry of all allegations of crimes and the narrow discretion of law enforcement authorities to refuse to take action when the system is being abused appear to contribute to the problem. In other countries juries of peers and fair and effective judges provide some safeguards against abuse of the system. The control of abuse of this power is also dependent in large measure on the ethics and integrity of the prosecutors and law enforcement officials. But there are some procedural safeguards that could be considered and implemented, including requirements that allegations of crimes be subject to penalties if knowingly false allegations are made.

### **Conclusions**

Fundamental changes took place in the institutional landscape of criminal justice bodies in the area of anti-corruption in Ukraine since the time of the 3<sup>rd</sup> round IAP monitoring. Some of them have already been in the making, others in design and yet others have been only recommended in the 3<sup>rd</sup> round of monitoring report adopted for Ukraine in March 2015.

Establishment of the NABU was finalized and it became fully operational and managed to meet the expectations of delivering real high-profile investigations. The SAPO has also since then was established and became fully operational. Again, just like the NABU is has delivered procedural guidance on NABU cases and submitted high-profile cases to courts. Unfortunately, further progress on these cases stopped there. Nevertheless, these two new institutions (the NABU and the SAPO) demonstrated that high level officials and grand corruption are no longer beyond the remit of the law enforcement in the country. They also sent some unsettling messages to the powerful oligarchs and the well-rooted corrupt high-officials in the public administration of Ukraine.

The debate on the establishment of the anti-corruption courts was initiated and found its reflection in the judicial reform, which now provides for establishment of the anti-corruption courts. However, the plans seem vague, are viewed as ineffective by many in civil society, and are not being implemented swiftly enough to address this critical failure in the justice system. It is extremely important to ensure that the cases which were investigated and brought to court by the NABU and SAPO are properly adjudicated by the judges with high integrity and independence. The failure to take this on immediately and in a way that the society believes will be fair and just may well spell the end of the anti-corruption reforms Ukraine has undertaken. Ukraine's freedom and economic prosperity depend on it getting this right.

To some extent the rigor of the new law enforcement anti-corruption bodies in attempts to curb high-profile corruption and their attempts at keeping independence caused a backlash. They are being attacked in various forms from media and legislative initiatives, to investigation and prosecution of the leadership and staff, as well as to various other methods applied to prevent them from doing their job. Measures need to be taken to ensure that their independence is preserved and that the cases that they have accumulated are finally resolved.

Ukraine **is largely compliant** with the previous recommendation 2.9.

## **New Recommendation 25**

*(This is a joint recommendation addressing issues covered in Sections 3.3 and 3.4)*

- 1. Establish without delay specialized anti-corruption courts insulated from corrupt and political influences which can fairly and effectively hear and resolve high level corruption charges. Select the judges through transparent, independent and highly trusted selection process which will guarantee integrity and professionalism.**
- 2. Ensure strict compliance with exclusive jurisdiction of NABU and SAPO.**
- 3. Provide NABU with capacity (legally and technically) to conduct wire-tapping autonomously.**
- 4. Step up the level of investigations and prosecutions of corruption throughout all responsible government bodies.**
- 5. Ensure that independence of the National Anti-Corruption Bureau is maintained without undue interference into its activities, including by providing for independent and un-biased audit of its activities and safeguard against abuse of criminal process.**
- 6. Consider introducing amendments in the Constitution of Ukraine to strengthen the legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).**
- 7. Ensure that operational and institutional autonomy of the Specialized Anti-Corruption Prosecutor's Office is maintained and further expanded by, among other things, granting it its own administrative support services and the "Reception office", as well as its own capacity for maintaining of classified information.**
- 8. Enact regulations and procedures that in fact reduce the risk that the criminal justice system is used to silence uncomfortable speech from critics of the government.**

## ANNEX. FOURTH MONITORING ROUND RECOMMENDATIONS TO UKRAINE

### CHAPTER 1: ANTI-CORRUPTION POLICY

#### New recommendation 1: Anti-corruption policy

1. **Ensure full implementation of the Anti-Corruption Strategy and the State Programme regardless of the political sensitivity of the measures involved.**
2. **Ensure that the anti-corruption policy documents are evidence-based, developed with the meaningful participation of stakeholders and in coordination with the relevant state bodies. Ensure that the anti-corruption policy covers the regions. Provide resources necessary for policy implementation.**
3. **Conduct corruption surveys regularly. Evaluate results and impact and update policy documents accordingly. Publish the survey results in open data format.**
4. **Increase capacity and promote corruption risk assessment by public agencies. Support development and implementation of quality anti-corruption action plans across all public agencies.**
5. **Regularly monitor the progress and evaluate impact of anti-corruption policy implementation, including at the sector, individual agencies and regional level, involving civil society. Ensure operational mechanism of monitoring of anti-corruption programmes. Regularly publish the results of the monitoring.**
6. **Ensure that civil society conducts its anti-corruption activities free from interference.**

#### New recommendation 2: Anti-Corruption awareness and education

1. **Implement awareness raising activities envisaged by the anti-corruption policy documents and the NACP communication strategy.**
2. **Allocate sufficient resources for implementation of the awareness raising measures.**
3. **Measure the results of awareness raising activities to plan the next cycle accordingly.**
4. **Target awareness raising activities to the sectors most prone to corruption, use diverse methods and carry out activities adapted to each target group.**

#### New recommendation 3: Corruption prevention and coordination institutions

1. **Ensure without delay that the vacant positions of the NACP commissioners are filled by experienced and highly professional candidates with good reputation recruited through an open, transparent and objective competition.**
2. **Ensure unimpeded and full exercise of its mandate by the NACP independently, free from**

outside interference.

3. Finalize adoption of the secondary legislation and provide necessary resources to the NACP to perform its functions, including at the regional level. Establish and make operational the regional branches of the NACP. Ensure continuous training of the NACP staff to build their skills and capacity.
4. Ensure systematic and efficient functioning of the Public Council of the NACP to provide effective mechanism for civil society participation.
5. Substantially enhance the coordination role of the NACP, its authority and leadership among the public agencies. Clarify and enhance the powers of the NACP in relation to anti-corruption units/officers in public agencies and ensure that the NACP provides guidance to support realization of their functions.
6. Ensure that the NACP has the direct access to all databases and information held by public agencies necessary for its full-fledged operation.
7. Ensure systematic and efficient functioning of the National Council on Anti-Corruption Policy.

## CHAPTER 2: PREVENTION OF CORRUPTION

### New recommendation 4: Evidence-based civil service policy

1. Ensure that the civil service reform policy is evidence-based and implementation strategies are supported by relevant data, risk and impact assessment.
2. Proceed with the introduction of the HRMIS as a matter of priority.
3. Ensure that the disaggregated statistical data on civil service is produced and made public.

### New recommendation 5: Institutional framework for civil service reform

1. Assess the capacity of the NACS, its central and regional units, and increase it, if necessary, in view of the ongoing comprehensive civil service reform implementation and oversight needs.
2. Ensure that the competition commissions include persons with necessary skills to assess the candidates for civil service. Take measures for unimpeded and professional functioning of the Commission on Senior Civil Service and competition commissions, free from political interference.
3. Ensure introduction and proper operation of HRM functions in state agencies across the board of the entire civil service, provide coordination and adequate methodological guidance by the NACS.

### New recommendation 6: Merit-based civil service

1. Take all necessary measures in cooperation with civil society, to address the existing challenges of the recruitment both in legislation and in practice, including the lack of relevant competences of the competition commission members and the lack of transparency.



2. Continue consistent implementation of open, transparent merit-based recruitment to ensure that the civil service is in fact based on merit, is perceived as such and allows selecting the best candidates, free from political interference guarantying equal opportunities and professionalism.
3. Ensure that the civil service vacancies are adequately and broadly advertised to provide for equal access and attract highly qualified candidates.

#### **New recommendation 7: Performance appraisal**

1. Ensure implementation of performance appraisal in practice.
2. Adopt and put in practice the regulation to link the monthly/annual bonuses and priority promotion to the performance appraisal.

#### **New Recommendation 8: Dismissals and discipline**

1. Clarify the grounds for disciplinary proceedings and ensure that they are objective.
2. Ensure that the dismissals are based on the legal grounds and are not politically motivated.

#### **New Recommendation 9: Remuneration**

1. Finalize the adoption of the necessary regulatory framework and ensure in practice fair, transparent and competitive remuneration in civil service.
2. Ensure that there is an upper limit to the bonuses granted based on an annual performance evaluation not exceeding 30% limit provided by CSL.

#### **New Recommendation 10: Conflict of interests**

1. Ensure full and unbiased enforcement of conflict of interest rules in practice by the NACP free from political influence.
2. Further raise awareness and continue training to fully introduce the new regulations and ease their practical implementation.

#### **New Recommendation 11: Ethics**

1. Clarify the mandate of agencies responsible for awareness raising and training on ethical standards
2. Carry out systematic awareness raising and training throughout the public service.
3. Analyse the needs and consider adoption of the specific ethics codes for individual agencies/categories.

#### **New Recommendation 12: Asset Declarations**

1. Ensure integrity, full and unimpeded functioning of the electronic asset declaration system allowing timely submission of asset declarations, disclosure of asset

declarations, including in open data format. Ensure that any exceptions for disclosure are directly envisaged by the CPL.

2. Amend verification procedure to address its shortcomings, adopt the lifestyle monitoring regulation, ensure automated verifications of asset declarations by the NACP and implement data exchange between the asset declarations system and state databases to support automated verification.
3. Ensure that the actions are taken proactively on the alleged violations disclosed through the e-declaration system and that cases with the signs of criminal activity are duly referred to the law enforcement for the follow up.
4. Ensure that verification is carried out systematically and without improper outside interference with the focus on high-level officials.
5. Abolish amendments subjecting a broad range of persons that are not public sector employees (i.e. members of NGOs, activists, experts) to asset disclosure requirements.
6. Ensure that the NABU has direct access to the asset declaration database in line with the Article 17 of the Law on NABU and is able to use it for the effective execution of its functions.

#### **New Recommendation 13: Reporting and Whistleblowing**

1. Ensure clear procedures for submitting, reviewing and following up on whistleblower reports and providing protection. Further train the responsible staff.
2. Raise public awareness on whistleblowing channels and protection mechanism to incentivize reporting.
3. Consider adoption of a stand-alone law on whistleblower protection in line with international standards and good practices.

#### **New Recommendation 14: Integrity of Political Officials**

1. Provide training, awareness raising and guidance on applicable integrity rules to the political officials.
2. Proceed with the development and adoption of the parliamentary ethics code. Provide trainings, consultations and guidance for its application in practice, once adopted.
3. Clarify responsibilities and mandates for enforcement of integrity rules by parliamentarians, including in relation to the conflict of interest, ethical conduct and consequences of their violation. Ensure independent and objective monitoring and enforcement.
4. Provide for systematic objective scrutiny of declarations of political officials and the subsequent follow up as provided by law.

#### **New Recommendation 15**

1. Ensure that introduced by the judicial reform changes are effectively implemented and that their practical application is analysed with the view to identify deficiencies and address them.
2. Continue to reform with the view to address the remaining deficiencies in the system of judicial self-governance, appointment, disciplinary proceedings, dismissal and recusal

of judges to bring them in line with European standards and recommendations of the Venice Commission.

3. Analyse the reasons for the big number of judicial resignations and take necessary measures to ensure that judicial posts are being filled, including resolving the situation with pending 're-appointment' of the judges whose 5 years' probation term lapsed after the adoption of the judicial reform.
4. Closely monitor the functioning of the automated distribution of cases system to ensure that it is being properly applied. Look into instances of manipulations and take necessary measures to eliminate circumstances that enabled such manipulations.
5. Consider abolishing Article 375 of the Criminal Code of Ukraine or at the least ensure in other ways that only deliberate miscarriages of justice are criminalised to eliminate potential for abuse or exerting of pressure on judges.
6. Take all necessary measures to ensure the safety of judges; these measures should involve protection of the courts and of the judges.

#### **New Recommendation 16**

1. Ensure implementation of the reform and continue with the view to address the remaining deficiencies to bring them fully in line with European standards. In particular:
  - a) review the procedures for the appointment and dismissal of the PG in order to make this process more insulated from undue political influence and more oriented towards objective criteria on the merits of the candidate;
  - b) reform further the system of prosecutorial self-governance, including the statutory composition of the QDC, and ensure that the self-governance bodies function independently and proactively, represent the interests of all of the prosecutors, and do so in the opinion of these prosecutors and the public;
  - c) improve disciplining proceedings by (i) clearly defining grounds for disciplinary liability, (ii) extending the statute of limitation, and (iii) ensuring robust enforcement with complaints diligently investigated and the violators held responsible. Consider whether the right to legal representation is allowed at some stages in selected cases. Relatedly, conduct a review of the operation of the general inspector office to determine if it is properly addressing the most serious allegations of prosecutorial misconduct and/or is making appropriate referrals to the NABU and other appropriate bodies;
  - d) regulate in more detail career advancement, including by (i) establishing uniform and transparent procedures, and (ii) introducing regular performance evaluations.
2. Ensure sufficient and transparent funding of the prosecution service and remuneration of prosecutors that is commensurate to their role and reduces corruption risks.
3. Further strengthen procedural independence of the prosecutors. In particular, introduce random allocation of cases to individual prosecutors based on strict and objective criteria with safeguards against possible manipulations.

#### **Previous round recommendations that remain valid under number 17:**

##### **Recommendation 3.3. from the Second Monitoring Round of Ukraine valid in the Third round:**

- 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.

**Recommendation 3.6. from the Third Monitoring Round report on Ukraine:**

- Set up or designate an independent authority to supervise enforcement of the access to public information regulations by receiving appeals, conducting administrative investigations and issuing binding decisions, monitoring the enforcement and collecting relevant statistics and reports. Provide such authority with necessary powers and resources for effective functioning.
- Reach compliance with the EITI Standards and cover in the EITI reports all material oil, gas and mining industries. Adopt legislation on transparency of extractive industries.
- Implement the law on openness of public funds, including provisions on on-line access to information on Treasury transactions.
- Ensure in practice unhindered public access to urban planning documentation.
- Adopt the law on publication of information in machine-readable open formats (open data) and ensure publication in such format of information of public interest (in particular, on public procurement, budgetary expenditures, asset declarations of public officials, state company register, normative legal acts).

**New Recommendation 18**

- 1. Carry out awareness raising and training of relevant public servants on access to public information laws and their application in practice.**
- 2. Gradually increase the datasets and diversify areas on the open data portal.**

**New Recommendation 19**

- 1. Continue reforming the public procurement system, based on regular assessments of the application of the new Law on Public Procurement, in particular with a view to maximise the coverage of the Public Procurement Law and to minimise the application of non-competitive procedures.**
- 2. Ensure that state owned enterprises (SOEs) use competitive and transparent procurement rules as required by law.**
- 3. Extend electronic procurement systems to cover all public procurement at all levels and stages.**
- 4. Provide sufficient resources to properly implement procurement legislation by procuring entities, including adequate training for members of tender evaluation committees.**
- 5. Ensure that internal anti-corruption programmes are effectively introduced within entities that conduct public procurement processes.**
- 6. Ensure that the debarment system is fully operational, in particular that legal entities or their officials who have been held liable for corruption offences or bid rigging are barred from participation in public procurement.**
- 7. Arrange regular training for private sector participants and procuring entities on integrity in public procurement at central and local level. Provide training for law enforcement and state controlled organisations on public procurement procedures and prevention of corruption.**

#### **New Recommendation 20**

- 1. Ensure further implementation of the following provisions from the 2014 Anti-Corruption Strategy on the prevention of corruption in the private sector:**
  - a) Simplification of business regulations and promoting free market competition;**
  - b) Debarment of companies involved in corruption offences from the use of public resource such as public procurement, state loans, subsidies, and tax benefits;**
  - c) Establishing obligations for external and internal auditors to report corruption offenses;**
  - d) Raising awareness of companies about the law on liability of legal entities for corruption offences and enforcing this law in practice;**
  - e) Consider introducing regulations for lobbying, in particular clear regulations for business participation in the development and adoption of laws and regulatory acts.**
- 2. Develop business integrity section of the new National Anticorruption Strategy on the basis of a risk analysis and in consultation with companies and business associations, ensure active participation of business in the monitoring of the Strategy.**
- 3. Promote integrity of state owned enterprises through their systemic reform and by introducing effective compliance or anti-corruption programmes, increasing their transparency and disclosure.**
- 4. Strengthen the Business Ombudsman Council by creating a legal basis for this institution in the law and by providing it with necessary powers for effective work.**
- 5. Support the Ukrainian Network of Integrity and Compliance.**

### **CHAPTER 3: ENFORCEMENT OF CRIMINAL RESPONSIBILITY FOR CORRUPTION**

#### **New Recommendation 21**

- 1. Expand the statute of limitations for all corruption offences to at least 5 years and provide for suspension of the statute of limitations during the period an official enjoyed immunity from criminal prosecution.**
- 2. Provide adequate training and resources to prosecutors and investigators to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as illicit enrichment, trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, criminal measures to legal persons, new definition of money laundering. Training programmes of the specialised anti-corruption agencies should contain modules or focus in other ways on these issues in their regular training curriculum.**
- 3. Analyse practice of application of the new provisions on corporate liability for corruption and, based on results of such analysis, introduce amendments to address deficiencies detected. Ensure autonomous nature of the corporate liability.**
- 4. Take measures at the policy level (for example, set as priorities by the management of the anti-corruption specialised bodies) to encourage investigation and prosecution of corruption committed by legal persons.**

#### **New Recommendation 22**

- 1. Ensure that ARMA has adequate resources to meet its legislative objectives, including collecting and maintaining statistical evidence about confiscation actions. Ensure that its role and available resources are communicated to the law enforcement and prosecutorial bodies.**
- 2. Step up efforts to confiscate corruption proceeds to family members, friends or nominees.**
- 3. Continue to make progress in the effective use of the newly enacted confiscation authorities.**

#### **New Recommendation 23**

- 1. Review legislation to ensure that the procedures for lifting immunities of MPs are transparent, efficient, based on objective criteria and not subject to misuse.**
- 2. Limit immunity of parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of in flagrante delicto.**
- 3. Analyse practical application of the judicial reform to take appropriate legal measures to ensure that the procedures for lifting immunities of judges are transparent, efficient, based on objective criteria and not subject to misuse and that the functional immunity contributes to effective law enforcement.**
- 4. Revoke additional restrictions on the investigative measures with regard to MPs, which are not provided for in the Constitution of Ukraine.**

#### **New Recommendation 24**

- 1. Ensure that proactive efforts are continued with rigour by NABU, and other law enforcement bodies, to facilitate maximum detection and swift investigation of corruption in Ukraine. These efforts should include:**
  - a) Use of all possible sources of information and tools, including the asset declarations.**
  - b) Cooperation between law enforcement and other non-law enforcement bodies, such as FIU, ARMA, tax, customs, etc. to ensure detection and swift investigation of corruption in Ukraine.**
  - c) Use of information obtained through international cooperation, as well as data collected from the open sources outside of Ukraine.**
  - d) Joint trainings for law enforcement with representatives of the non-law enforcement bodies, especially FIU and ARMA.**
- 2. Establish a centralised register of bank accounts of legal and natural persons, including information about beneficial owners of accounts, making it accessible for authorised bodies, including NABU, NACP and ARMA, without court order to swiftly identify bank accounts in the course of financial investigations and verification.**

### **New Recommendation 25**

- 1. Show concrete and measurable results in terms of asset recovery. In particular:**
  - a) Proactively take all available measures to obtaining mutual legal assistance in corruption cases;**
  - b) Continue to raise capacity of the General Prosecutor's Office, NABU and ARMA in international cooperation and asset recovery.**
  - c) Ensure that procedures on assets recovery allow swift repatriation of stolen assets;**
  - d) Ensure effective functioning of ARMA in its tasks on asset tracing, recovery and management of stolen assets.**
- 2. Ensure that NABU can independently transmit and respond to MLA requests.**

### **New Recommendation 25**

*(This is a joint recommendation addressing issues covered in Sections 3.3 and 3.4)*

- 1. Establish without delay specialized anti-corruption courts insulated from corrupt and political influences which can fairly and effectively hear and resolve high level corruption charges. Select the judges through transparent, independent and highly trusted selection process which will guarantee integrity and professionalism.**
- 2. Ensure strict compliance with exclusive jurisdiction of NABU and SAPO.**
- 3. Provide NABU with capacity (legally and technically) to conduct wire-tapping autonomously.**
- 4. Step up the level of investigations and prosecutions of corruption throughout all responsible government bodies.**
- 5. Ensure that independence of the National Anti-Corruption Bureau is maintained without undue interference into its activities, including by providing for independent and unbiased audit of its activities and safeguard against abuse of criminal process.**
- 6. Consider introducing amendments in the Constitution of Ukraine to strengthen the legal basis for functioning of independent anti-corruption agencies (law enforcement and preventive).**
- 7. Ensure that operational and institutional autonomy of the Specialized Anti-Corruption Prosecutor's Office is maintained and further expanded by, among other things, granting it its own administrative support services and the "Reception office", as well as its own capacity for maintaining of classified information.**
- 8. Enact regulations and procedures that in fact reduce the risk that the criminal justice system is used to silence uncomfortable speech from critics of the government.**



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