

FIGHTING CORRUPTION IN EASTERN EUROPE AND CENTRAL ASIA

# **Anti-corruption Reforms in Eastern Europe and Central Asia**

Progress and Challenges, 2013-2015





**Fighting Corruption in Eastern Europe and Central Asia**

# **Anti-Corruption Reforms in Eastern Europe and Central Asia**

**PROGRESS AND CHALLENGES,  
2013-2015**



## **About the OECD**

The OECD is a forum in which governments compare and exchange policy experiences, identify good practices in light of emerging challenges, and promote decisions and recommendations to produce better policies for better lives. The OECD's mission is to promote policies that improve economic and social well-being of people around the world. Find out more at [www.oecd.org](http://www.oecd.org).

## **About the Anti-Corruption Network for Eastern Europe and Central Asia**

Established in 1998, the Anti-Corruption Network for Eastern Europe and Central Asia (ACN) supports its member countries in their efforts to prevent and fight corruption. It provides a regional forum for the promotion of anti-corruption activities, the exchange of information, elaboration of best practices and donor coordination via regional meetings and seminars, peer-learning programmes, and thematic projects. ACN also serves as the home for the Istanbul Anti-Corruption Action Plan. Find out more at [www.oecd.org/corruption/acn/](http://www.oecd.org/corruption/acn/).

This report is published on the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of OECD member countries.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

## FOREWORD

Since 2013 countries in Eastern Europe and Central Asia have introduced a number of new important anti-corruption reforms. However, corruption continues to remain high in the region. This report identifies progress achieved in the region as well as remaining challenges that require further action by countries.

The report analyses three broad areas of anti-corruption work, including anti-corruption policies and institutions, criminalisation of corruption and law-enforcement, and measures to prevent corruption in public administration and in the business sector. The analysis is illustrated by examples of good practice from various countries and comparative cross-country data. The report also analyses the role that the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN) played in supporting anti-corruption reforms in the region.

The report focuses on the nine countries in the region that participate in the OECD/ACN initiative known as the Istanbul Anti-Corruption Action Plan: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Ukraine and Uzbekistan. It also presents examples from other countries in the region as well as OECD countries to give a broader perspective for the analysis.

The report covers the period from 2013 till July 2016, when the third round of monitoring of Istanbul Action Plan countries was implemented, and is based on the results of this monitoring. It thus updates the 2013 publication “Fighting Corruption in Eastern Europe and Central Asia, Anti-Corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2009-2013”, which summarised the results of the second round of monitoring.

The ACN countries provided information and comments, and they also reviewed the draft report. The draft report was presented at the ACN High Level Meeting on 21-22 April 2016 and the final report at the ACN plenary meeting on 16 September 2016. The findings of the report provide the basis for the new ACN Work Programme for 2016-2019.

This report was prepared by the OECD/ACN Secretariat at Anti-Corruption Division (ACD) of the OECD Directorate for Financial and Enterprise Affairs. Mr. Dmytro Kotlyar, ACN Consultant, coordinated preparation of the report and drafted chapters 1 (Anti-corruption trends in Eastern Europe and Central Asia), 3 (Criminalisation of corruption and law enforcement), and sections on public procurement, access to information and integrity in the judiciary in chapter 4 (Prevention of corruption). Mrs. Olga Savran, ACN Manager, drafted the sections on integrity in the public service and on business integrity in chapter 4 (Prevention of corruption) and chapter 5 (OECD Anti-corruption network for Eastern Europe and Central Asia). Mrs. Rusudan Mikhelidze, ACN Project Manager, drafted chapter 2 (Anti-corruption policy and institutions) and section on international co-operation in chapter 3 (Criminalisation of corruption and law enforcement). The ACN Ukraine project team (Mrs. Tetyana Khavanska, Mrs. Antonina Prudko and Mr. Andriy Kukharuk) and Mrs. Martina Limonta, ACN Assistant, contributed in the preparation of the report. Mr. Brooks Hickman, ACD Anti-Corruption Analyst, provided editorial assistance.



## *Table of contents*

<b>Acronyms</b> .....	9
<b>Executive summary</b> .....	11
<b>Chapter 1. Anti-corruption trends in Eastern Europe and Central Asia</b> .....	15
Spread of corruption in Eastern Europe and Central Asia .....	15
Participation of the region in global anti-corruption efforts .....	25
<b>Chapter 2. Anti-corruption policy and institutions</b> .....	29
Political will to fight corruption .....	29
Anti-corruption strategies and action plans .....	32
Surveys and research on corruption .....	45
Public participation in fighting corruption .....	50
Awareness-raising and education.....	54
Anti-corruption preventive and policy coordination institutions .....	58
Conclusions and recommendations .....	66
<b>Chapter 3. Criminalisation of corruption and law enforcement</b> .....	69
Criminalisation of corruption and harmonisation of legislation.....	69
Bribery offences and their elements.....	72
Other corruption offences.....	80
Liability of legal persons .....	93
Definition of an official.....	113
Sanctions .....	116
Confiscation.....	121
Statute of limitations, immunities and effective regret .....	125
International co-operation and mutual legal assistance.....	134
Specialised law-enforcement bodies.....	144
Investigation and prosecution of corruption cases.....	150
Conclusions and recommendations .....	158
<b>Chapter 4. Prevention of corruption</b> .....	163
Integrity in the public service.....	163
Public procurement.....	201
Access to information .....	222
Integrity in judiciary .....	239
Business integrity .....	254
<b>Chapter 5. OECD anti-corruption network for Eastern Europe and Central Asia</b> ...	273
How does the ACN work.....	273
ACN Evaluation .....	281
Way forward.....	282
ACN Funding .....	284

## Figures

1. «To what extent do you think that corruption is a problem in the public sector in this country?» .....	15
2. IAP, EU and OECD countries in the TI's Corruption Perception Index (2015, Score) .....	16
3. IAP countries in the Transparency International Corruption Perception Index (CPI Score).....	18
4. «Have you paid a bribe to any one of 8 services listed in the past 12 months?», % «Yes».....	19
5. Country ranking in TI Corruption Perception Index and WEF Global Competitiveness Index.....	20
6. Worldwide Governance Indicators, Control of Corruption .....	21
7. Ranking of IAP countries in global ratings .....	23
8. World Bank's Enterprise Survey, 2013 data .....	25
9. Correlation between confidence in national government and perception of government corruption, 2014 .....	32
10. Statistics on enforcement of private sector bribery in some IAP countries.....	83
11. Legal status of central purchasing bodies in the OECD countries .....	203
12. Volume of procurement methods used in Ukraine (number of procurement, 2010-2015) .....	206
13. Types of review bodies in the EU Members States.....	211

## Tables

1. Corruption Perception Index, Transparency International, Eastern and Central Europe and Central Asia .....	17
2. Corruption, Nations in Transit, Freedom House.....	19
3. Worldwide Governance Indicators: "Control of corruption" and "Rule of law".....	22
4. Istanbul Action Plan countries in global governance and doing business ratings .....	23
5. World Bank's Enterprise Survey.....	24
6. Adherence of the IAP and ACN countries to international anti-corruption and related treaties .....	26
7. Anti-Corruption Strategies and Action Plans adopted in the IAP countries in 2012-2015.....	33
8. How to involve civil society: Practical examples from anti-corruption strategies in 2013-2015.....	53
9. Global Corruption Barometer (2013), IAP countries.....	54
11. Criminalisation of elements of bribery offences in the IAP countries .....	74
12. "To act or refrain from acting in the exercise of his or her official duties" .....	79
13. Elements of private-sector bribery offences .....	82
14. Statistics on enforcement of private sector bribery in some EU countries .....	84
15. Enforcement of trading in influence offence in Ukraine.....	86
16. Statistics on enforcement of trafficking in influence in some EU countries .....	88
17. Offence of illicit enrichment in Lithuania, Moldova, Mongolia and Ukraine .....	88
18. Provisions on corporate liability in international legal instruments .....	94
19. Form of corporate liability in the ACN countries.....	98
20. Models of corporate liability in the ACN countries.....	98
21. Liability of legal persons (LP) for corruption offences in the ACN countries .....	100
22. Mixed (fixed/proportionate) corporate fines for corruption offences in the ACN countries.....	110
23. Legal and natural persons prosecuted for bribery in the ACN countries in 2010-2013 .....	112
24. Definition of foreign public officials in the IAP countries .....	116
25. Maximum sanctions for basic (non-aggravated) offences in the IAP and ACN countries .....	120
26. Provisions on confiscation in IAP countries .....	122
27. Statute of limitations for corruption offences in the IAP countries .....	126
28. Persons with immunities in the IAP countries.....	129
29. International co-operation in the ACN countries: treaties in force .....	137
30. Central Authorities in the IAP countries .....	141
31. Specialised anti-corruption law enforcement bodies in the ACN countries .....	145
32. Statistics of corruption and related offences of public officials in Ukraine (2013-2014) .....	157
33. Civil service of the Republic of Kazakhstan.....	165
34. Trends in the numbers of administrative and political public officials, Kyrgyzstan, 2012 -2014.....	165
35. Summary of asset declarations systems in the ACN countries .....	184



36. Scope of whistle-blower protection in the public and private sector, 2014 .....	198
37. Accession to the WTO Government Procurement Agreement.....	202
38. Role of central purchasing bodies in the OECD countries .....	203
39. Public procurement review systems in the IAP countries .....	209
40. Functionalities provided in e-procurement systems in the OECD countries .....	213
41. Main challenges to the use of e-procurement systems in the OECD countries .....	216
42. Access to information laws in the IAP and ACN countries .....	223
43. Time allowed for processing information requests in the IAP countries.....	228
44. IAP and ACN countries in global transparency and media freedom ratings.....	236
45. Business integrity risks in the ACN countries .....	256
46. ACN funding in 2013-2015.....	284

## Boxes

1. Most recent anti-corruption policy documents in the ACN countries beyond IAP.....	35
2. UK Anti-Corruption Plan .....	35
3. Corruption Risk Mapping in Germany .....	39
4. Example of “Risk Atlas” in Customs in Germany.....	39
5. External evaluation of the Romanian strategy implementation.....	44
6. Examples of anti-corruption awareness-raising and education measures in the recent policy documents .....	58
7. Administrative liability for bribery offences .....	70
8. Definition of corruption .....	70
9. Criminalisation of corruption in Kyrgyzstan.....	72
10. Trading in influence offence in Armenia .....	84
11. Examples of trading in influence cases in Ukraine .....	87
12. Autonomous nature of money laundering offence in Tajikistan and Ukraine .....	93
13. Imputation of guilt to legal persons.....	97
14. Liability of legal persons in Azerbaijan .....	105
15. Liability of legal persons in Ukraine.....	106
16. Definition of a public official in Azerbaijan .....	114
17. Definition of public official in Ukraine.....	114
18. Definition of foreign officials in Kazakhstan .....	116
19. The EU Directive on the freezing and confiscation of instrumentalities and proceeds of crime.....	121
20. International instruments regulating international co-operation relevant for the ACN region .....	139
21. Asset recovery in Ukraine.....	142
22. Law of Georgia on International Law Enforcement Cooperation (2013).....	143
23. Provisions of international treaties on anti-corruption specialisation in law enforcement.....	144
24. Anti-Corruption Directorate under the Prosecutor General of the Republic of Azerbaijan .....	146
25. New specialised anti-corruption law enforcement institutions in Ukraine .....	148
26. Reform of the specialised anti-corruption agency in Moldova .....	150
27. Prosecutorial discretion in the ACN countries .....	151
28. Special investigative techniques.....	153
29. Centralised bank accounts register.....	155
30. Competitive selection of the leadership of anti-corruption institutions in Ukraine .....	170
31. Civil service reforms in several new EU members - professionalism, merit-based and remuneration .....	173
32. Breakthrough with asset declaration system in Slovenia .....	183
33. Public service ethics training in Estonia.....	189
34. Whistle-blower protection in Georgia .....	194
35. Protection of whistle-blowers in Montenegro .....	197
36. Procurement information published on-line in Ukraine.....	212

37. E-procurement in Georgia.....	214
38. Innovative e-procurement system in Ukraine («ProZorro»).....	215
39. Electronic procurement in Uzbekistan.....	217
40. Debarment under the EU Directive 2014/24/EU.....	219
41. Media ownership transparency law in Ukraine.....	233
42. Transparent (“Glass”) Accounts Law of Mongolia.....	234
43. Disclosure of beneficial ownership in companies in Ukraine.....	236
44. Business integrity in the Anti-Corruption Strategy of Ukraine.....	257
45. Business integrity project in Estonia.....	259
46. Example of alleged corrupt business regulation schemes in Ukraine.....	261
47. Business ombudsman in Ukraine.....	264
48. Highlights from the OECD Foreign Bribery Enforcement Database.....	267
49. Customs integrity project in Turkey.....	268
50. "Clear Wave" campaign in Lithuania.....	270
51. Third round of the IAP monitoring in figures.....	276
52. The prevention of corruption in the public sector in Eastern Europe and Central Asia.....	277
53. Business Integrity in Eastern Europe and Central Asia – good practices.....	279
54. ACN peer-learning activities in figures.....	280
55. ACN project on Ukraine.....	281

## ACRONYMS

<b>ACC</b>	Anti-Corruption Council of Georgia
<b>ACD</b>	Anti-Corruption Department within the Prosecutor General's Office of the Republic of Azerbaijan
<b>ACN</b>	Anti-Corruption Network for Eastern Europe and Central Asia
<b>AmCham</b>	American Chamber of Commerce
<b>AML/CFT</b>	Anti-Money Laundering and Countering Financing of Terrorism Act
<b>ETS</b>	European Treaty Series
<b>CC</b>	Criminal Code
<b>CCC</b>	Commission on Combating Corruption of Azerbaijan
<b>CCJE</b>	Consultative Council of European Judges
<b>CEC</b>	Central Election Commission
<b>CETS</b>	Council of Europe Treaty Series
<b>CIS</b>	Commonwealth of Independent States
<b>CoE</b>	Council of Europe
<b>CPC</b>	Criminal Procedure Code
<b>CPI</b>	Corruption Perception Index by Transparency International
<b>CSB</b>	Civil Service Bureau
<b>CSOs</b>	Civil society organisations
<b>CSR</b>	Corporate social responsibility
<b>DFID</b>	Department for International Development of the United Kingdom
<b>EBRD</b>	European Bank for Reconstruction and Development
<b>EU</b>	European Union
<b>EUR</b>	Euro currency
<b>Eurojust</b>	European Union's Judicial Co-operation Unit
<b>Europol</b>	European Police Office
<b>FIU</b>	Financial Intelligence Unit
<b>GCI</b>	Global Competitiveness Index, World Economic Forum
<b>GLEN</b>	Global Network of Law-Enforcement Officials
<b>GRECO</b>	Council of Europe's Group of States against corruption
<b>GUAM</b>	Organization for Democracy and Economic Development – GUAM (Georgia, Ukraine, Azerbaijan and Moldova)
<b>HCJ</b>	High Council of Justice
<b>IAAC</b>	Independent Authority Against Corruption

<b>IAP</b>	Istanbul Anti-Corruption Action Plan
<b>ICAR</b>	International Centre for Asset Recovery
<b>KNAB</b>	Corruption Prevention and Combating Bureau of Latvia
<b>LEN</b>	Law-Enforcement Network
<b>MLA</b>	Mutual legal assistance
<b>MoJ</b>	Ministry of Justice
<b>MONEYVAL</b>	Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
<b>MOU</b>	Memorandum of Understanding
<b>MP</b>	Member of Parliament
<b>NABU</b>	National Anti-Corruption Bureau of Ukraine
<b>NAPC</b>	National Agency for Prevention of Corruption of Ukraine
<b>NGO</b>	Non-governmental organisation
<b>ODIHR</b>	OSCE's Office for Democratic Institutions and Human Rights
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>OGP</b>	Open Government Partnership
<b>OLAF</b>	European Anti-Fraud Office
<b>OSCE</b>	Organisation for Security and Co-operation in Europe
<b>PGO</b>	Prosecutor General's Office
<b>PPL</b>	Public Procurement Law
<b>SIGMA</b>	Support for Improvement in Governance and Management, a joint initiative of the OECD and the EU
<b>SITs</b>	Special investigative techniques
<b>SMEs</b>	Small and medium enterprises
<b>SOEs</b>	State-owned enterprises
<b>StAR</b>	World Bank's Stolen Assets Recovery Initiative
<b>STT</b>	Special Investigation Service of Lithuania
<b>TI</b>	Transparency International
<b>UN</b>	United Nations
<b>UNDP</b>	United Nations Development Programme
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>UNCAC</b>	United Nations Convention against Corruption
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>USAID</b>	United States Agency for International Development
<b>USD</b>	United States dollars currency
<b>WEF</b>	World Economic Forum
<b>WGB</b>	OECD Working Group on Bribery in International Business Transactions
<b>WTO</b>	World Trade Organisation

## EXECUTIVE SUMMARY

### **Anti-corruption policy and institutions**

Since the second monitoring round, countries in the ACN region achieved visible progress in the anti-corruption policy development, co-ordination and monitoring mechanisms. Anti-corruption strategies and action plans became more focused; some of them are also evidence-based and take into account the evaluation of existing corruption situation and corruption risks in various sectors. Co-ordination mechanisms have been improved as well. Countries strengthened and diversified their anti-corruption awareness-raising and education measures; however, such measures still lack a targeted approach. The civil society engagement in policy development has increased. There are positive examples of a wide range of stakeholders being included in the process of developing policy documents, yet participation in the monitoring of the policy implementation is mostly limited. Some progress could be seen in using research for anti-corruption policy development and monitoring. New tools have emerged to allow civil society to participate in the monitoring process. Nevertheless, these tools are yet to be tested. In the future, civil society, the business community and academia should play a more meaningful role and should be more actively involved in anti-corruption reforms.

The lack of solid evidentiary bases for anti-corruption strategies and action plans (including the failure to assess the feasibility of proposed anti-corruption measures), deficient budget planning, the absence of specific timelines and measurable indicators to assess the level and impact of implementation remain the main challenges for the IAP countries. The efficiency of existing programmes is not assessed and the effects of the measures against corruption are not evaluated. Anti-corruption policy development and co-ordination institutions still lack the necessary resources and independence to perform their functions properly.

The fourth monitoring round should therefore emphasise how the policy documents address corruption risks and challenges, including at the sectoral and local level, how effective the new monitoring instruments are in practice, and how the existing mechanisms promote better performance. Furthermore, it would be important to assess how documented corruption risks are reflected in the strategies, as well as the sufficiency of the budgetary resources provided to support the chosen anti-corruption policies. The impact of anti-corruption policy implementation would be key as well.

### **Criminalisation of corruption and law enforcement**

The criminalisation of corruption is an area where all IAP countries have achieved incremental progress in aligning their laws with international standards. Notably, even countries that previously refused to make necessary adjustments have gradually introduced amendments to comply with binding international standards criminalising corruption. This shows that conservatism in legal doctrine can be overcome. For instance, the introduction of corporate liability for corruption in several IAP countries proves that the traditional approach can and should be reformed when it is required to ensure the effective fight against corruption. This—along with other examples of best practices—should encourage other IAP countries to continue the implementation of reforms in the area of criminalisation of corruption offences.

However, poor implementation and ineffective law enforcement practice remain obstacles to achieving tangible results in the investigation and prosecution of corruption. The level of criminal prosecution of corruption remains low, especially with regard to high-profile cases and cases involving political

officials. Prosecutions of trafficking in influence, foreign bribery and illicit enrichment either do not exist or are very rare. Too many officials remain immune from prosecution by law or in practice. Few companies are held liable for corruption offences. Prosecutors and courts continue to rely on direct evidence and do not take full use of the financial investigations to expose and punish corruption. The judiciary is also frequently a weak point in countries' anti-corruption frameworks. Only a handful of countries have credible and open statistical data that can be used to track trends and detect problems in how the criminal justice sector is responding to corruption.

While more and more countries in the region have developed anti-corruption specialisation in their law enforcement agencies, these specialised institutions remain quite weak, and their institutional, functional and financial independence is not guaranteed in practice. They do not have the necessary autonomy to pursue high profile cases or to attack systemic or high-level, political corruption. Countries also lack institutional capacity to effectively track, seize and manage frozen or confiscated criminal assets, or to recover such assets from abroad. At the same time, encouraging examples of competitive and transparent merit-based selection of heads of specialised anti-corruption agencies have appeared in the IAP countries during the reporting period.

The fourth round monitoring should strengthen focus on the enforcement measures to analyse how the existing legal frameworks are applied in practice, including the outcomes of law enforcement activities and the reasons those results were obtained in corruption cases. The independence, capacity and integrity of the judiciary and public prosecution service should also be a focus of future monitoring.

### **Prevention of corruption**

Promoting **integrity in the civil service** is often one of the priorities ACN countries' national anti-corruption strategies, public administration reforms and other national policies. At the same time, the objectives chosen and the measures used to promote civil service integrity are not always based on risk assessment or other evidence. In addition, the coordination of the implementation and monitoring of civil service integrity measures are often dispersed between various institutions and do not focus on measuring their impact.

The results of the third round of the IAP monitoring showed progress in implementing specific recommendations regarding civil service integrity. Many countries have delineated political and professional positions in legislation in order to protect professional civil servants from politicisation. However, undue pressure from political officials on civil servants in practice remains common. Dismissals of public servants after a change of governments undermine the stability of the service. The lack of autonomy of civil servants in their decision-making is a serious challenge. Further progress was identified regarding merit-based recruitment, but the heads of state bodies or political leadership retain broad discretion in the recruitment process, and recruitment without competition in practice is still common.

While legal provisions on the management of conflicts of interest have been clarified and enforcement mechanisms were strengthened, including systems for asset and interest declarations, there is no evidence yet that these efforts have decreased conflicts of interests in practice. Many countries have updated general codes of ethics and developed codes in some sectors, but the impact of these codes on the practical behaviour of civil servants is limited. In a few sectors with a high risk of corruption, such as tax administrations and the judiciary, such codes are relatively common. Many countries have some basic legal provisions regarding the reporting of corruption, and some countries have introduced regulations for the protection of whistleblowing. To promote the implementation of these regulations in practice, specialised training and institutions responsible for their enforcement are needed.

**Public procurement** is one of the areas where IAP countries have launched a number of meaningful reforms aimed, in particular, at increasing transparency and integrity of relevant procedures, including by launching various electronic procurement platforms. Several countries have made significant progress in

establishing e-procurement systems, which make public procurement much more accountable and less prone to corruption. Other IAP countries are beginning this process. At the same time, low capacity and the lack of resources in public procurement institutions, a poor record of prosecuting corruption in public contracting, and the lack of effective integrity instruments (notably, concerning conflicts of interests and debarment) still make public procurement one of the most corrupt activities in the public administration.

All IAP countries have a legal framework on **access to information** held by public authorities. Most of the laws, however, fall short of international standards in several important aspects (scope, restrictions, procedures for access, handling of complaints, etc.) and must be revised to make access to information an enforceable right. Public administration transparency is a powerful tool to prevent corruption, and access to information laws should be designed to achieve this through proactive disclosure of a wide range of information and speedy processing of information requests. As with other areas, enforcement of the legal framework remains a major problem in the region. There is an expanding movement to disclose various information of public interest and to do so in open data formats. Several IAP countries implemented important reforms to provide extensive access to budgetary information. Two countries introduced transparency of the media ownership laws; such measures should become a universal standard and be supported by strong enforcement. A number of IAP countries still retain provisions on criminal defamation and insult, which has an adverse effect on the freedom of information. Excessive civil damages for defamation remain a problem for investigative journalism in the region.

The independence and **integrity of the judiciary** are crucial for anti-corruption efforts and proper democratic governance. A number of IAP countries have conducted reforms in this area, but much remains to be done to align legal framework with applicable international standards. There are also many cases when legal safeguards are ignored in practice, e.g. when judges are dismissed under the pretext of reorganisation or job cuts contrary to irremovability guarantees enshrined in the law. The financial independence of courts is often undermined in practice, e.g. when judicial budgets and salaries are reduced contrary to legal guarantees. Creating a judicial accountability system that does not impair the independence and impartiality of the judiciary remains a challenging task in the region.

**Business integrity** still remains a relatively new and unexplored area of anti-corruption work in the region. While interest in this area is growing across the region, business integrity remains a low priority in the anti-corruption policy. The main progress in promoting business integrity was achieved due to the simplification of business regulations and the introduction of e-governance tools. Governments need to take more focused measures to prevent corruption in the business sector. The key challenges in this area are related to the corruption risks in the publicly owned or controlled enterprises and in public procurement. Governments also need to strengthen incentives for companies to improve their compliance that are still weak. Companies and business associations need to take a proactive stance and engage themselves in awareness raising, collaborating with the government and exploring potential for collective actions.





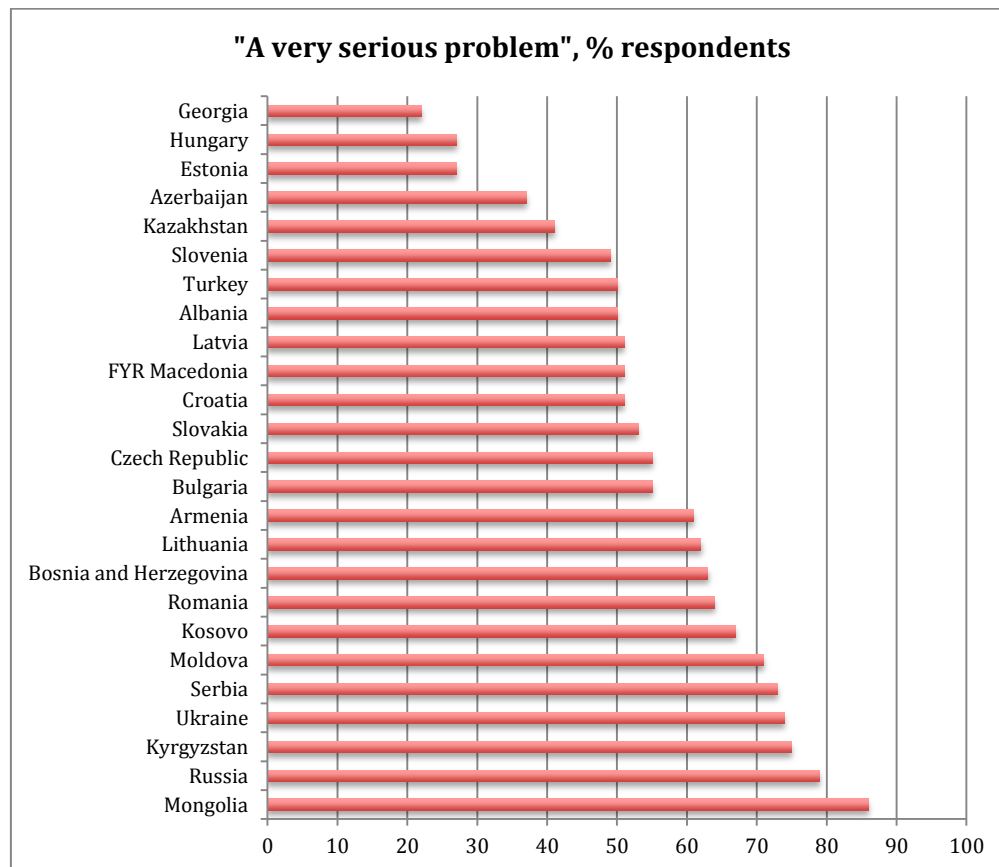
*Chapter 1.*

**ANTI-CORRUPTION TRENDS IN EASTERN EUROPE AND CENTRAL ASIA**

**Spread of corruption in Eastern Europe and Central Asia**

Corruption remains a serious problem for countries in the region. Despite numerous, and often successful, reforms designed to prevent and punish corrupt practices, countries still struggle with corrupt behaviour in the public and private sectors. Corruption affects countries in the region to varying degrees. See Figure 1 below.

**Figure 1. «To what extent do you think that corruption is a problem in the public sector in this country?»**



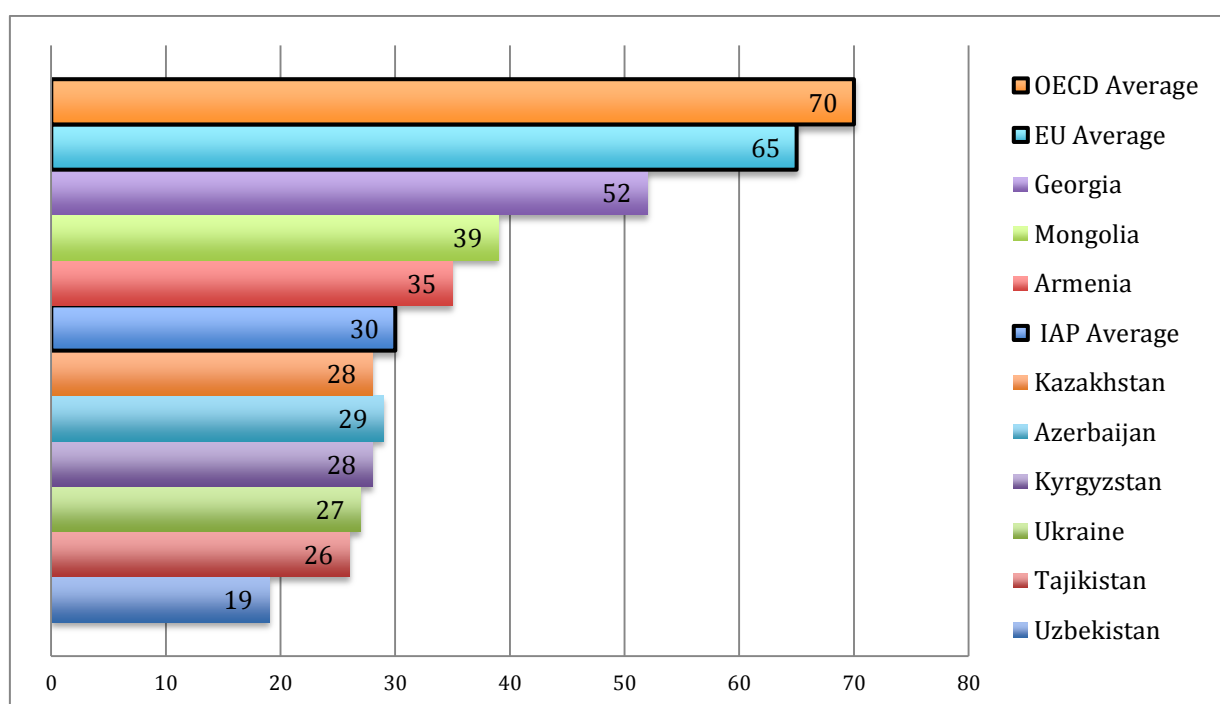
Note: Other possible answers: "Not a problem at all", "Not really a problem", "A slight problem", "A problem".

Source: Transparency International (2013), Global Corruption Barometer, <http://goo.gl/YVdV0n>.

As before, new or aspiring EU member states have been more effective in their efforts to reduce corruption. But even in these countries (e.g. Romania, Bulgaria, Macedonia), progress is often a case of two steps forward, one step back. The anti-corruption efforts sometimes are led by isolated institutions and/or persons, while countries' political elites fail to genuinely support the anti-corruption drive.

The Istanbul Anti-Corruption Action Plan countries still lag significantly behind their regional counterparts in the anti-corruption area. See Figure 2 below. The only exception remains Georgia, which managed, in general, to maintain its previous achievements.

Figure 2. IAP, EU and OECD countries in the TI's Corruption Perception Index (2015, Score)



Note: Higher score means 'less corrupt'.

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

There are a number of surveys trying to measure corruption through perception and expert assessments. Below is a brief overview of results representing how corruption is perceived in the Eastern Europe and Central Asia region and, more specifically, in the Istanbul Anti-Corruption Action Plan countries. While having their limitations (especially when comparing different countries), such surveys are a valuable source for evaluating domestic corruption, especially when the specific country's results are viewed historically.

According to Transparency International's Corruption Perceptions Index, the corruption perception in the region as a whole has not showed any significant changes over the past three years. The perception, however, has somewhat improved (in some cases only marginally) in countries such as Estonia, Poland, Lithuania, Latvia, Czech Republic, Slovakia, Croatia, Macedonia, Bulgaria, Montenegro, Romania, Russia, Serbia, Mongolia, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan; in contrast, the perception deteriorated (in most cases also only marginally) in Slovenia, Hungary, Turkey, Bosnia and Herzegovina, Moldova, Kosovo.

**Table 1. Corruption Perception Index, Transparency International, Eastern and Central Europe and Central Asia**

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

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>.

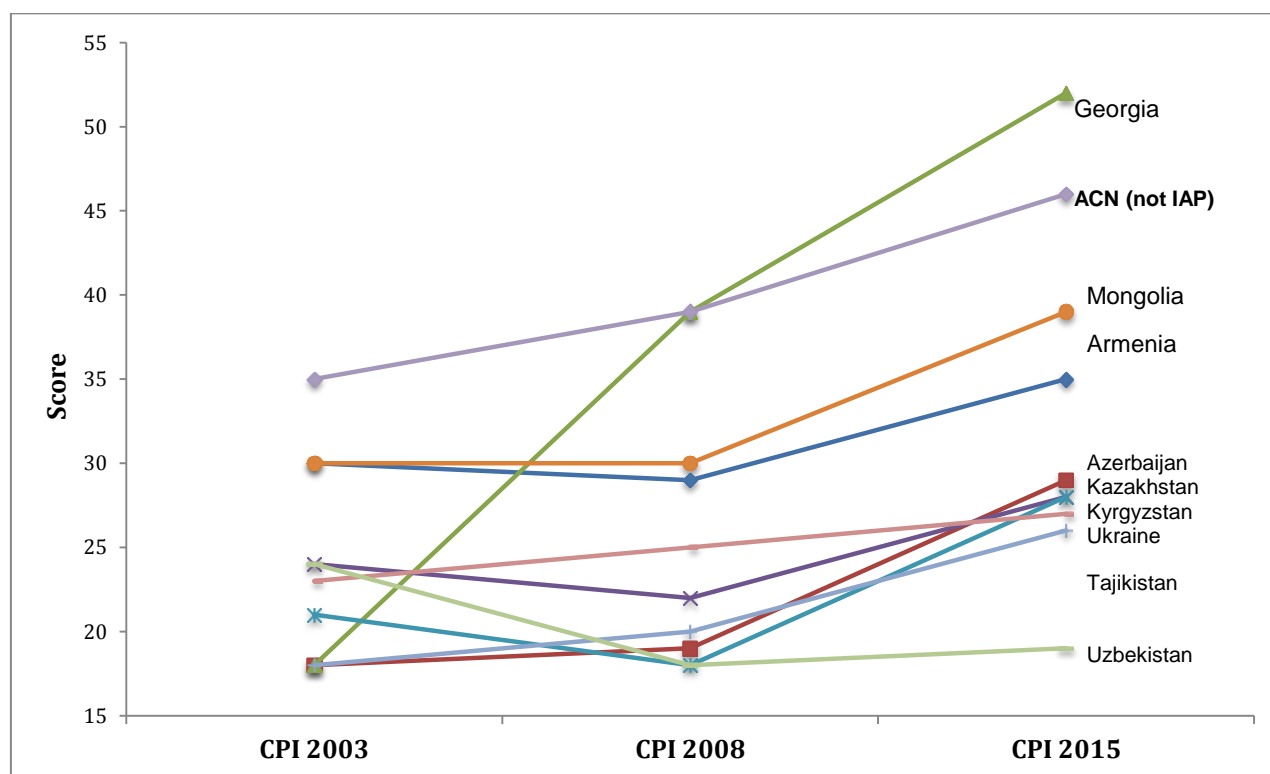
The Transparency International Corruption Perception Index (see Table 1 above) shows the following trends over the last ten years:

- All of the new EU member countries in the region (11) significantly improved their corruption perception record (with exception of Slovenia, which maintained the same high starting level).
- From among the Istanbul Action Plan countries, Georgia has passed the '50' mark of the CPI score, which even surpasses that of some EU member states; Mongolia and Armenia have passed the '30' mark of the CPI score.

- All IAP countries, except for Uzbekistan, have gradually improved – to differing degrees – their score, with Ukraine improving the least.

The CPI score dynamics in the Istanbul Action Plan countries is depicted in the figure below. It shows how scores have changed since 2003, when the Istanbul Action Plan was launched.

Figure 3. IAP countries in the Transparency International Corruption Perception Index (CPI Score)



Notes: A higher score means 'less corrupt'. "ACN (not IAP)" reflects the average scores of Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, FYRM, Latvia, Lithuania, Moldova, Montenegro, Romania, Russia, Serbia and Slovenia.

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

Similar trends can be seen from the Freedom House's *Nations in Transit* reports, which measure public perceptions of corruption, the business interests of top policymakers, laws on financial disclosure and conflict of interest, and the efficacy of anti-corruption mechanisms. There have been no major changes in this indicator in the IAP countries during the past ten years.

Table 2. Corruption, *Nations in Transit*, Freedom House

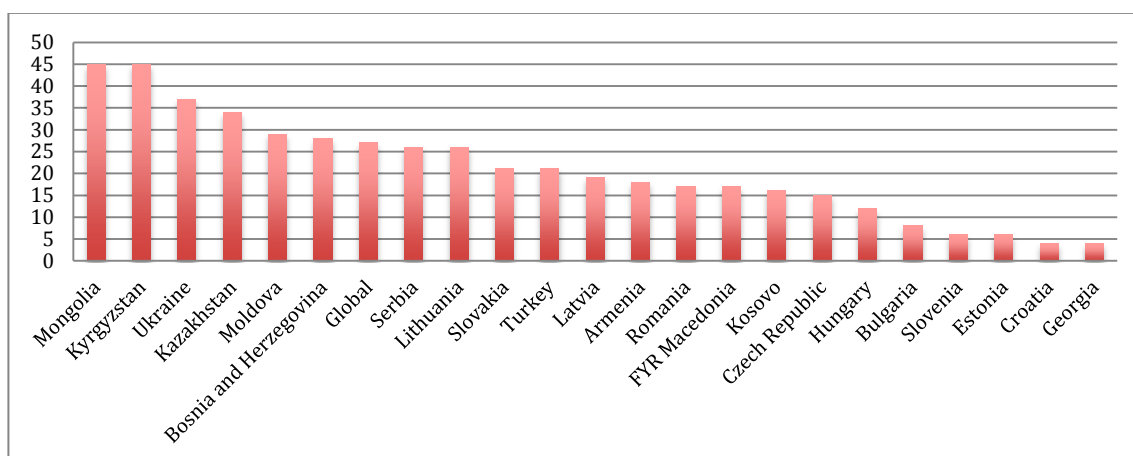
	2003	2008	2012	2015	2016
<b>Armenia</b>	5.75	5.75	5.25	5.25	5.25
<b>Azerbaijan</b>	6.25	6.25	6.5	6.75	6.75
<b>Belarus</b>	5.5	6.25	6.25	6.25	6.25
<b>Georgia</b>	5.75	5	4.5	4.5	4.5
<b>Kazakhstan</b>	6.25	6.5	6.5	6.5	6.5
<b>Kyrgyzstan</b>	6	6.25	6.25	6.25	6.25
<b>Moldova</b>	6.25	6	6	5.75	6
<b>Russia</b>	5.75	6	6.5	6.75	6.75
<b>Tajikistan</b>	6	6.25	6.25	6.25	6.5
<b>Turkmenistan</b>	6.25	6.75	6.75	6.75	6.75
<b>Ukraine</b>	5.75	5.75	6	6	6
<b>Uzbekistan</b>	6	6.5	6.75	6.75	6.75
<b>Average "The IAP"</b>	<b>5.96</b>	<b>6.03</b>	<b>6</b>	<b>6.03</b>	<b>6.06</b>
<b>Average "The Balkans"</b>	5.05	4.82	4.64	4.79	5
<b>Average "The EU Members"</b>	3.36	3.27	3.34	3.45	3.5

Notes: 1=lowest level, 7=highest level. "The EU members" are the countries in Central Europe and the Balkans that have acceded to the EU since 2004.

Source: Compiled based on Freedom House's *Nations in Transit* reports (<http://goo.gl/1RL2OT>).

The scope of corruption in the region can also be shown by another Transparency International global survey – the Global Corruption Barometer. Figure 3 above shows the public's opinion on how serious the problem of corruption is in IAP countries. To compare perceptions with experience, see below the results of the 2013 survey. (Please note that data are not available for all ACN countries or all IAP countries).

Figure 4. «Have you paid a bribe to any one of 8 services listed in the past 12 months?», % «Yes»

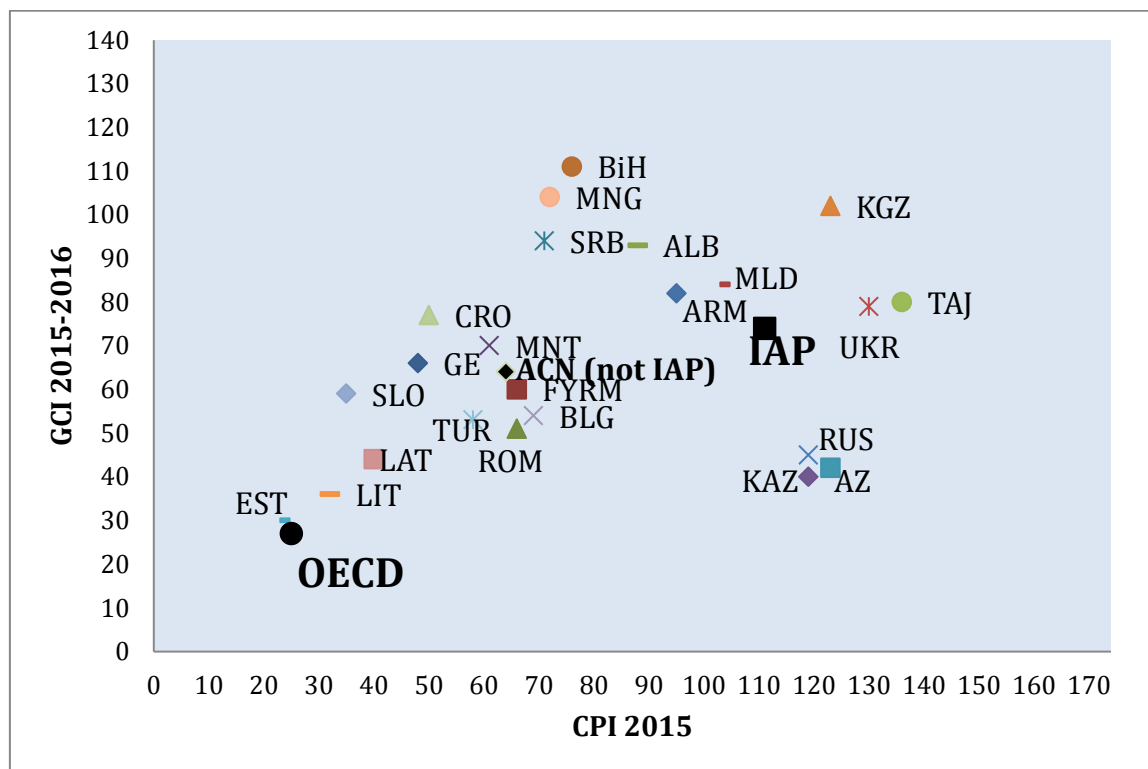


Note: The eight services covered by the survey are: Education, Judiciary, Medical and Health, Police, Registry and Permits, Utilities, Tax and/or Customs, Land Services.

Source: Global Corruption Barometer, Transparency International, 2013, <http://goo.gl/YVdV0n>.

The level of perceived corruption correlates with the country’s competitiveness, as shown in the chart below. It should be recalled, however, that competitive advantages not related to corruption or good governance may help to gain better competitive position (e.g. Azerbaijan, Kazakhstan).

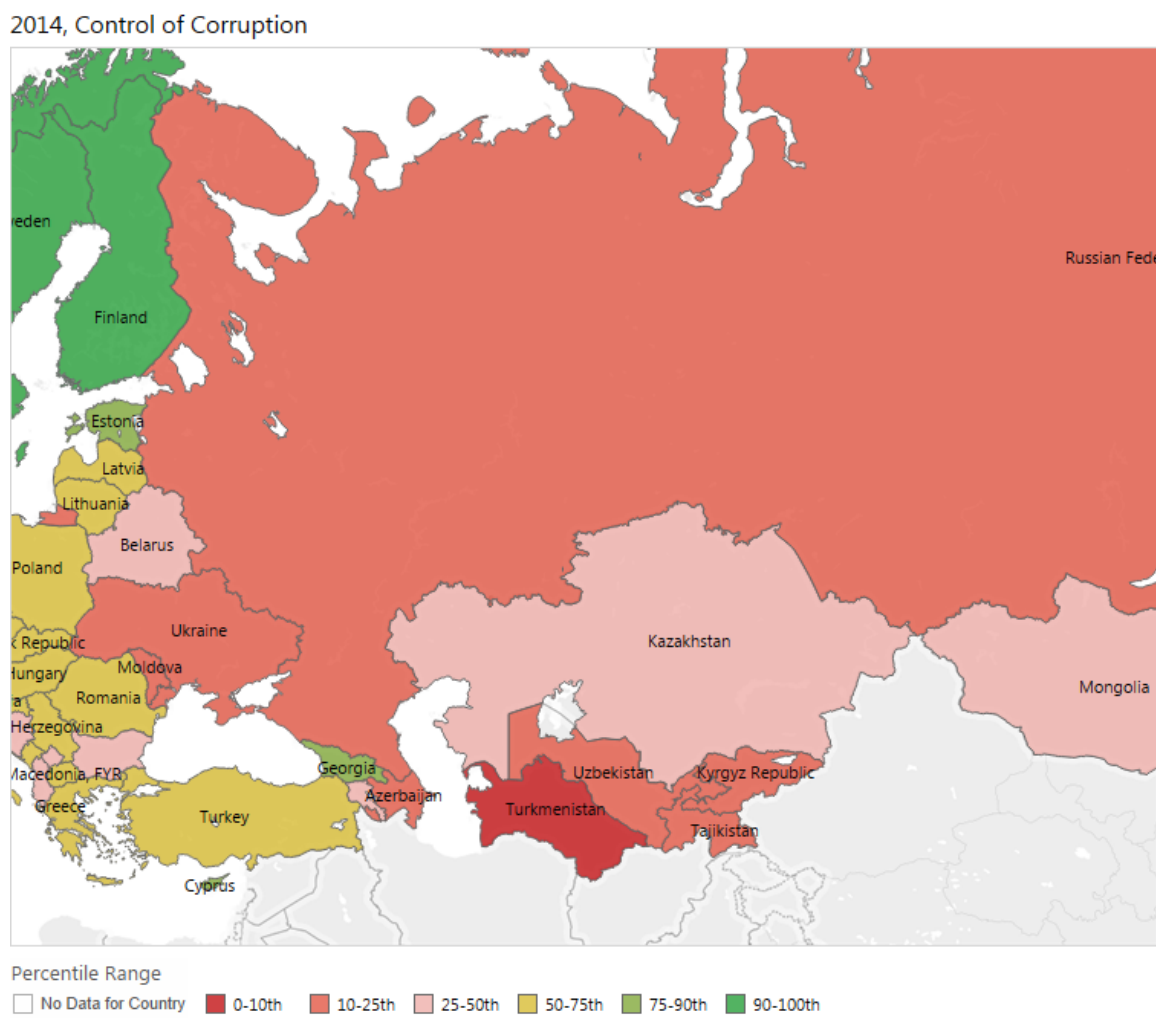
Figure 5. Country ranking in TI Corruption Perception Index and WEF Global Competitiveness Index



Source: Transparency International, CPI, <http://goo.gl/1Ag4HZ>; World Economic Forum, Global Competitiveness Index, <http://goo.gl/GsYCOM>.

The World Bank’s composite Worldwide Governance Indicators aggregate different ratings and show the countries’ dynamics as well. See Figure 6 and Table 3 below.

Figure 6. Worldwide Governance Indicators, Control of Corruption



Note: Percentile rank<sup>1</sup> in 2014.

Source: Kaufmann D., A. Kraay, and M. Mastruzzi (2010), The Worldwide Governance Indicators: Methodology and Analytical Issues (<http://goo.gl/Fxlzp3>). The Worldwide Governance Indicators are available at [www.govindicators.org](http://www.govindicators.org).

<sup>1</sup> Percentile ranks indicate the percentage of countries worldwide that rank lower than the indicated country, such that higher values indicate better governance score.

Table 3. Worldwide Governance Indicators: “Control of corruption” and “Rule of law”

Country	Control of corruption*		Rule of law*	
	2014	2009	2014	2009
Armenia	40	33	44	41
Azerbaijan	18	10	31	22
Georgia	<b>75</b>	<b>52</b>	<b>64</b>	<b>49</b>
Kazakhstan	26	21	34	33
Kyrgyzstan	12	6	16	6
Mongolia	38	24	41	46
Tajikistan	14	10	15	11
Ukraine	15	16	23	24
Uzbekistan	11	7	12	7
<i>High income: OECD</i>	85	86	88	87
<i>Europe and Central Asia</i>	64	62	68	65

Note: Percentile rank indicates the percentage of countries worldwide that rank lower than the indicated country, such that a higher value reflects a better governance score.

Source: Worldwide Governance Indicators, World Bank, <http://goo.gl/WA66JU>.

The IAP countries are doing better in terms of their business climate ratings than in their corruption estimates. Some of the countries in the region have been the best performers during the past several years in terms of improving business environment. For instance, in the World Bank’s *Doing Business 2016* ranking, Europe and Central Asia has the largest share of economies implementing at least one reform, and it accounted for three of the top ten performers.<sup>2</sup> In the same report, two IAP countries – Kazakhstan and Uzbekistan – were named the top performers for showing the most notable improvement in performance in the *Doing Business* indicators. Over the past 12 years, another IAP country – Georgia – improved the most in the areas measured by the *Doing Business* indicators by making improvements in all 10 areas through 39 regulatory reforms.<sup>3</sup>

More details on the IAP countries’ standing in the *Doing Business* rankings and other business-related ratings are shown in Tables 4 and 5 as well as Figures 7 and 8 below.

<sup>2</sup> World Bank (2016), *Doing Business 2016: Measuring Regulatory Quality and Efficiency*, page 11, <http://goo.gl/kcmyUZ>.

<sup>3</sup> Idem, page 14.

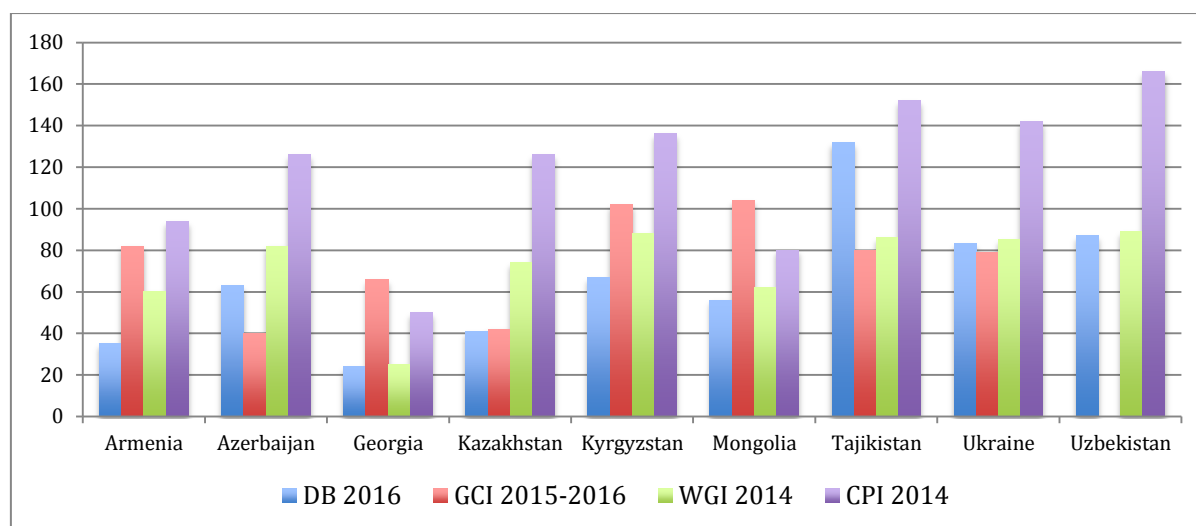


Table 4. Istanbul Action Plan countries in global governance and doing business ratings

Index and organisation	Armenia	Azerbaijan	Georgia	Kazakhstan	Kyrgyzstan	Mongolia	Tajikistan	Ukraine	Uzbekistan
<b>“Doing Business”</b> , 189 countries. Rank in 2016 (in 2013)	35 (32)	63 (67)	<b>24</b> (9)	41 (49)	67 (70)	56 (76)	132 (141)	83 (137)	87 (154)
<b>Economic Freedom Index</b> , 178 countries. Rank in 2015 (in 2013)	52 (38)	85 (88)	<b>22</b> (21)	69 (68)	82 (89)	96 (75)	140 (131)	162 (161)	160 (162)
<b>Global Competitiveness Index</b> , 144 countries. Rank in 2015-2016 ranking (in 2012-2013 ranking)	82 (82)	<b>40</b> (46)	66 (77)	42 (51)	102 (127)	104 (93)	80 (100)	79 (73)	-
- Burden of government regulation	56 (41)	31 (29)	<b>7</b> (9)	46 (52)	68 (92)	92 (102)	17 (22)	87 (135)	-
- Property rights	94 (64)	99 (87)	78 (131)	<b>66</b> (77)	121 (142)	112 (118)	64 (94)	131 (134)	-
- Transparency of government policy making	51 (16)	55 (49)	31 (36)	<b>30</b> (32)	95 (87)	69 (102)	65 (68)	98 (123)	-
- Irregular payments and bribes	73 (82)	87 (110)	<b>23</b> (26)	64 (64)	130 (137)	77 (114)	69 (101)	122 (133)	-
- Judicial independence	106 (110)	101 (86)	<b>56</b> (95)	72 (94)	109 (140)	102 (112)	58 (64)	132 (124)	-
- Favouritism in decisions of government officials	71 (75)	58 (43)	48 (51)	50 (91)	101 (136)	129 (130)	<b>41</b> (40)	99 (119)	-
- Burden of customs procedures	105 (127)	122 (107)	<b>9</b> (13)	55 (77)	97 (136)	86 (117)	73 (91)	113 (138)	-
- Ethical behaviour of firms	96 (91)	60 (69)	51 (55)	<b>43</b> (70)	110 (141)	97 (121)	46 (78)	76 (124)	-

Source: World Bank, *Doing Business*, [www.doingbusiness.org](http://www.doingbusiness.org); Heritage Foundation, *Economic Freedom Index*, [www.heritage.org/index](http://www.heritage.org/index); World Economic Forum, *Global Competitiveness Index*, <http://goo.gl/GsYCOM>.

Figure 7. Ranking of IAP countries in global ratings



Note: A higher value indicates a lower rank.

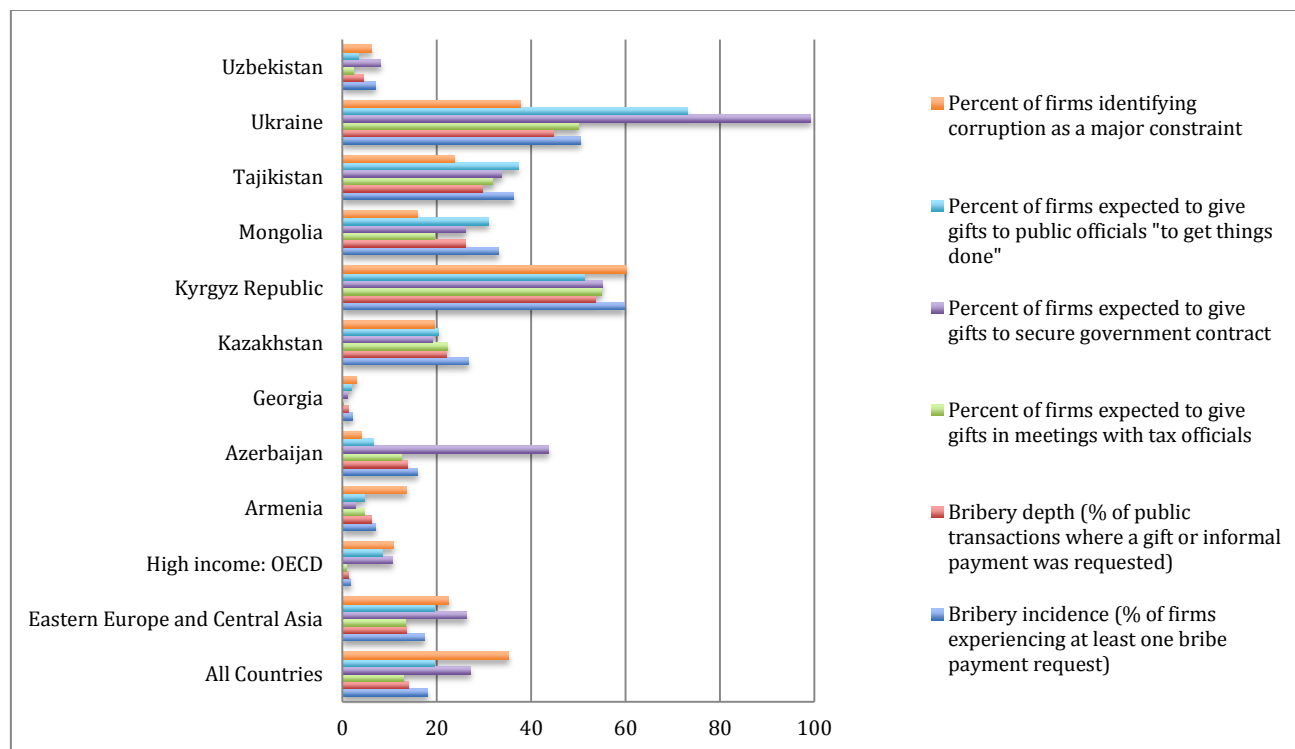
Source: World Bank, *Doing Business 2016*; World Economic Forum, *Global Competitiveness Index, 2015-2016*; World Bank, *Worldwide Governance Indicators, 2014*; Transparency International, *Corruption Perception Index, 2014*.

Table 5. World Bank's Enterprise Survey.

Economy	Bribery incidence (% of firms experiencing at least one bribe payment request)	Bribery depth (% of public transactions where gift/informal payment was requested)	% of firms expected to give gifts in meetings with tax officials	% of firms expected to give gifts to secure government contract	% of firms expected to give gifts to get a construction permit	% of firms expected to give gifts to public officials "to get things done"	% of firms identifying corruption as a major constraint
<b>All Countries</b>	18	14	13	27	23	20	35
<b>Eastern Europe and Central Asia</b>	17	14	13	26	25	20	22
<b>High income: OECD</b>	2	1	1	11	2	8	11
<b>Albania</b>	20	17	18	34	38	18	17
<b>Armenia</b>	7	6	5	3	21	5	14
<b>Azerbaijan</b>	16	14	13	44	41	7	4
<b>Bulgaria</b>	9	6	6	28	17	18	27
<b>Bosnia and Herzegovina</b>	11	8	8	8	10	6	26
<b>Belarus</b>	9	4	3	17	15	13	10
<b>Czech Republic</b>	4	2	0	11	4	11	16
<b>Estonia</b>	0	0	0	0	0	0	3
<b>Georgia</b>	2	1	0	1	12	2	3
<b>Hungary</b>	2	1	0	52	3	35	11
<b>Kazakhstan</b>	27	22	22	19	27	20	20
<b>Kyrgyz Republic</b>	60	54	55	55	43	51	60
<b>Kosovo</b>	14	8	10	39	10	22	51
<b>Moldova</b>	31	22	14	11	49	16	38
<b>Macedonia, FYR</b>	8	4	2	6	28	8	13
<b>Montenegro</b>	19	12	16	0	52	18	3
<b>Poland</b>	2	2	2	19	1	14	13
<b>Romania</b>	10	6	7	7	13	19	46
<b>Serbia</b>	6	5	4	40	12	12	25
<b>Slovak Republic</b>	4	4	3	22	5	19	19
<b>Slovenia</b>	0	0	0	32	0	14	12
<b>Tajikistan</b>	36	30	32	34	26	37	24
<b>Turkey</b>	5	3	1	19	3	6	12
<b>Ukraine</b>	50	45	50	99	73	73	38
<b>Uzbekistan</b>	7	5	2	8	7	4	6

Source: World Bank (2013), Enterprise Survey, <http://goo.gl/iuvAG0>.

Figure 8. World Bank's Enterprise Survey, 2013 data.



Source: World Bank (2013), Enterprise Survey, <http://goo.gl/iuvAG0>.

## Participation of the region in global anti-corruption efforts

Countries in the region take an active part in anti-corruption efforts, most notably by adhering to and implementing relevant international treaties and participating in the monitoring and review processes. All IAP and ACN countries are parties to the UN Convention against Corruption.

In 2014, Latvia acceded to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Some countries also became parties to the Additional Protocol to the Council of Europe Criminal Law Convention on Corruption: Azerbaijan (2013), Georgia and Poland (2014), as well as Belarus (2015). All of the ACN and IAP countries that are members of the Council of Europe are also members of the Group of States against Corruption (GRECO).

Table 6 below provides the status of ACN and IAP countries concerning major international anti-corruption instruments.

Table 6. Adherence of the IAP and ACN countries to international anti-corruption and related treaties

	UNCAC	CoE Criminal Law Convention on Corruption (CETS 173)	CoE Civil Law Convention on Corruption (CETS 174)	Additional Protocol to CoE Criminal Law Convention on Corruption (CETS 191)	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198)	CoE Convention on the Manipulation of Sports Competitions (CETS 215)	OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol
<i>Istanbul Action Plan countries</i>								
Armenia	2007	2006	2005	2006	-	2008	Signed <b>2014</b>	Not signed
Azerbaijan	2005	2004	2004	<b>2013</b>	-	Not signed	Signed <b>2014</b>	<b>2015</b>
Georgia	2008	2008	2003	<b>2014</b>	-	<b>2014</b>	Signed <b>2014</b>	2011
Kazakhstan	2008	-	-	-	-	-	-	<b>2015</b>
Kyrgyzstan	2005	-	-	-	-	-	-	Not signed
Mongolia	2006	-	-	-	-	-	-	Not signed
Tajikistan	2006	-	-	-	-	-	-	Not signed
Ukraine	2009	2010	2006	2010	-	2011	Signed <b>2015</b>	2013
Uzbekistan	2008	-	-	-	-	-	-	Not signed
<i>Other Anti-Corruption Network countries</i>								
Albania	2006	2002	2003	2005	-	2008	-	2013
Belarus	2005	2008	2006	<b>2015</b>	-	-	-	Not signed
Bosnia & Herzegovina	2006	2002	2003	2012	-	2008	-	Not signed
Bulgaria	2006	2002	2003	2005	1999	2013	Signed <b>2014</b>	<b>2016</b>
Croatia	2005	2002	2003	2005	-	2009	-	<b>2014</b>

	UNCAC	CoE Criminal Law Convention on Corruption (CETS 173)	CoE Civil Law Convention on Corruption (CETS 174)	Additional Protocol to CoE Criminal Law Convention on Corruption (CETS 191)	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198)	CoE Convention on the Manipulation of Sports Competitions (CETS 215)	OECD/CoE Convention on Mutual Administrative Assistance in Tax Matters as amended by the 2010 Protocol
Estonia	2010	2002	2003	Not signed	2005	Signed 2013	-	<b>2014</b>
Latvia	2006	2002	2005	2006	<b>2014</b>	2010	-	<b>2014</b>
Lithuania	2006	2002	2003	2012	-	<b>Signed 2015</b>	Signed <b>2015</b>	<b>2014</b>
FYR Macedonia	2007	1999	2003	2006	-	2009	-	Not signed
Moldova	2007	2004	2004	2007	-	2008	-	2012
Montenegro	2006	2006	2008	2008	-	2009	Signed <b>2014</b>	Not signed
Poland	2006	2003	2003	<b>2014</b>	2000	2008	Signed <b>2015</b>	2011
Romania	2004	2002	2003	2005	-	2008	-	<b>2014</b>
Russia	2006	2007	Not signed	Signed 2009	2012	Signed 2009	Signed <b>2014</b>	<b>2015</b>
Serbia	2005	2003	2008	2008	-	2009	Signed <b>2014</b>	Not signed
Slovenia	2008	2002	2003	2005	2001	2010	-	2011
Turkmenistan	2005	-	-	-	-	-	-	Not signed

Note: Status as of January 2016. Year refers to the year of entry into force in respect of the country, unless specified otherwise. “-” – means that the country is not a Member State of the relevant organisation and has not acceded to the treaty under the procedure for non-member accession (if available).

Source: Compiled based on data from the web sites of the Treaty Office of the Council of Europe (<http://goo.gl/e6h5fu>), UNODC (<http://goo.gl/gnqqso>) and OECD (<http://goo.gl/1fnlhC>).



*Chapter 2.***ANTI-CORRUPTION POLICY AND INSTITUTIONS**

This chapter analyses the achievements and challenges of ACN countries in the area of anti-corruption policy and institutions. It looks at political will to fight corruption, anti-corruption policy documents, their quality, the process of their development and how they respond to the existing challenges at the national level. Further, the chapter reviews dedicated corruption prevention and policy coordination institutions, highlights approaches to anti-corruption research, education and public awareness and assesses the civil society engagement in the process of developing and monitoring of anti-corruption policy documents. The chapter ends with the conclusions and recommendations for future action.

The chapter concludes that since the second monitoring round under the IAP, countries have improved their policy development, coordination and monitoring mechanisms. There is some progress in regards to the civil society engagement; however, less progress can be seen in terms of the use of research for anti-corruption policy development and monitoring. The level of implementation of anti-corruption reforms is still relatively low in the region and explicit declaration of political is often not accompanied by effective measures.

**Political will to fight corruption**

In December 2012, the statement on “Reinforcing Political Will to Fight Corruption in Eastern Europe and Central Asia” was adopted at the high-level meeting of the ACN countries held at the OECD headquarters in Paris. In the statement, the Ministers, Heads of Anti-Corruption Agencies and other high officials from ACN countries recognised the seriousness of the challenge, agreed that “fighting corruption will continue to be one of [our] top priorities” and committed to the comprehensive measures to prevent and efficiently fight corruption.<sup>4</sup>

IAP monitoring reports look into the political will to fight corruption, to assess whether anti-corruption measures are carried out as merely cosmetic or rudimentary actions or if instead genuine efforts are being made to decrease the level of corruption in a given country.<sup>5</sup> As noted in the 2013 Summary Report: “Experience in the Istanbul Action Plan countries ... shows that political will helped to launch important anti-corruption reforms in some cases, but remained at the level of political rhetoric without any tangible action in others.”<sup>6</sup> Political will is especially critical in the countries with systemic corruption, where

<sup>4</sup> The full version of the statement is available at <http://goo.gl/HsV2kC>.

<sup>5</sup> “A principal challenge in the examination of political will is the need to distinguish between reform efforts that are intentionally superficial and designed only to bolster the image of political leaders for transitory gain, and substantive reform efforts that are based on real commitment to implement substantive, sustainable change.” Derick W. Brinkerhoff (2000), “Assessing Political Will for Anti-Corruption Efforts. An Analytic Framework”, Public Administration and Development.

<sup>6</sup> OECD/ACN (2013), *Anti-Corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2009-2013*, pages 24-26, available at <http://goo.gl/2Cz7dx>.

comprehensive and complex actions are indispensable for achieving tangible results and bringing about the change. Tackling corruption becomes a crucial task of the national governments, as there is a direct correlation between the perception of public sector corruption and public trust in the national government (see Figure 9 below in this section).

When assessing the political will to fight corruption, the following set of questions should be considered: is the fight against corruption a priority of the country as evidenced in public addresses and various policy documents? Are there special programmes and policy documents with sufficient budgets aimed at fighting corruption? Are the promises and commitments accompanied with real measures, such as institutional and legislative reforms with strong enforcement? Is the corruption situation genuinely evaluated and are existing risks taken into account in the process of planning new measures? To what extent are the measures implemented and how is the level of implementation monitored? Are the anti-corruption laws well enforced? In sum, political will can be demonstrated by commitment and action for achieving the set objective and sustaining the achieved results.<sup>7</sup>

Governments and political leaders of all IAP countries have declared that the fight against corruption is a policy priority. There are dedicated programmes, and anti-corruption policy documents adopted as the binding acts. However, as shown by the third round of monitoring, declared political will is not always accompanied with the real actions against corruption. Indeed, the level of implementation of the programmes is often low, and the level of corruption remains high.

**Ukraine** is an example where the lack of political will to tackle widespread corruption triggered a change of the Government in 2014. The new administration pledged to make the fight corruption one of its policy priorities. This declaration of political will resulted in the adoption of the new Anti-Corruption Strategy for 2014-2017 in October 2014 for the first time in the form of a law.<sup>8</sup> The Coalition Agreement endorsed in the new Parliament in November 2014 contained a section on anti-corruption that included a list of legislative reforms to which the ruling coalition had committed. It could be regarded as the expression of the leadership's political will to fight corruption. The anti-corruption legislative measures, which brought the legislation of Ukraine in line with international standards as well as substantial on-going institutional reforms are indeed a good start. However, it is too early to assess whether political will genuinely exists. This can only be shown by vigorous enforcement, *inter alia*, through prosecution of the corrupt officials free from political interference, which as noted by the third round monitoring report still continues to be the main challenge in the country.<sup>9</sup>

To demonstrate the existence of the political will to fight corruption, **Azerbaijan** reported a number of activities carried out mainly in the area of service delivery ("ASAN" service centres) and increased transparency. However, the findings of the third round monitoring report show that anti-corruption reforms remain limited. Despite accomplishments in certain areas and the express statements about the need to fight corruption, many anti-corruption reforms in Azerbaijan remain formalistic as stated in the third round monitoring report.<sup>10</sup>

Successful anti-corruption reforms have been carried out in **Georgia** in recent years demonstrating how political will and coordinated actions at all levels of the government can bring outstanding results. The continued need to fight corruption is underscored in the new policy documents, and the implementation of further reforms seems to be on track to boost and sustain the results already achieved.

In **Armenia**, the low level of implementation of the last anti-corruption strategy suggests a lack of political will to fight corruption. Signs of insufficient political will included the failure to take robust

<sup>7</sup> Derick W. Brinkerhoff (2000), "Assessing Political Will for Anti-Corruption Efforts. An Analytic Framework", *Public Administration and Development* 20, 239-252, <http://goo.gl/xsp4kT>.

<sup>8</sup> Law No. 1699-VII of 14 October 2014.

<sup>9</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, <http://goo.gl/VTufK0>.

<sup>10</sup> OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, <http://goo.gl/Yx3PkK>.



actions, the lack of effective institutions, and limited human and financial resources dedicated to implementing the strategy. The new recommendations adopted during the third round of monitoring thus called upon the Armenian government to demonstrate its political will to fight corruption by taking measures to plan and implement anti-corruption reforms in practice. The Government of Armenia refers to various steps taken after the adoption of the third round monitoring report as demonstration of the political will, including measures to strengthen the Anti-corruption Council and adopt Anti-Corruption Strategy, cooperation with the civil society, media and business.

**Kazakhstan's** fight against corruption continues to feature as a part of the annual addresses to the nation by the President of the Republic. Specifically, the President's 17 January 2014 address, which described the country's development strategies through 2050, emphasised the development and implementation of a new anti-corruption strategy, ensuring transparency and accessibility of the judiciary, promoting integrity of law enforcement officers and accountability of local governments to the public.<sup>11</sup>

**Uzbekistan's** major policy priority document "Concept for Democratic Reforms" includes fighting against corruption as a state priority. Uzbekistan refers to the successful implementation of the action plan for 2015 and the on-going implementation of the new 2016-2017 Action Plan as well as various legislative changes as examples of achievements. However, the real effects of anti-corruption measures remain to be seen in both countries.

Interestingly, the former Minister of Economy and now Prime Minister of **Kyrgyzstan** emphasized in one of his public statements<sup>12</sup> that mere political will is not sufficient to tackle corruption, insisting that "there should be absolute intolerance of the manifestations of corruption". The Prime Minister added that, "[w]ithout elaboration of concrete measures, Kyrgyzstan cannot overcome corruption or decrease its level". The case of Kyrgyzstan is telling, since it is actively pursuing reforms at the technical/operational level, and its efforts in anti-corruption policy development and in monitoring implementation deserves positive assessment; however, tangible results are still not visible on the level of corruption in the country.

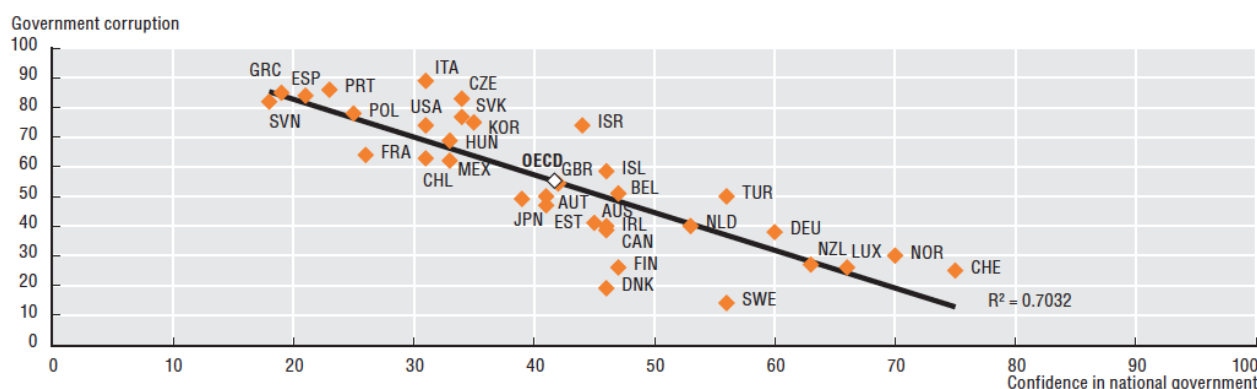
Thus, political will should be manifested in the actual efforts, legal, institutional and practical measures targeted to achieving and sustaining the chosen objectives, which in turn should be defined based on a realistic evaluation of the existing situation and risks. At the same time, political will in itself does not ensure high performance. It is important to have the instruments and sufficient resources in place that would allow proper implementation, coordination of efforts and monitoring of undertaken measures.<sup>13</sup>

<sup>11</sup> Source: <http://goo.gl/rtSL9s>.

<sup>12</sup> Source: <http://goo.gl/1hhfr8>.

<sup>13</sup> RAI (2015), Monitoring and Evaluation of the Implementation of National Anti-corruption Strategies and Action Plans, methodology developed for the Regional Anti-corruption Initiative by Tilman Hoppe, page 9, <http://goo.gl/KVC4nU>.

**Figure 9. Correlation between confidence in national government and perception of government corruption, 2014**



Source: OECD (2015), "Trust in government", in *Government at a Glance 2015*, OECD Publishing, Paris. Available at <http://goo.gl/TA1RmN>.

### Anti-corruption strategies and action plans

Solid strategic planning and monitoring of implementation of anti-corruption policies are important factors for achieving sustainable results from public administration reforms. Policy documents are essential for governance in many respects: they are tools to plan and prioritize resources of the state budget and donor assistance; they represent a roadmap for actions for implementing agencies; with set timeframes for implementation and sound monitoring, they put needed pressure on the implementing agencies to perform. They also may serve as tools for public engagement in decision-making as well as for raising awareness about the public policy priorities in the relevant area.

The development and implementation of anti-corruption policy is an obligation under the UNCAC. Article 5 provides that state parties shall "develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability".

IAP monitoring has focused on this aspect of anti-corruption work since its inception, observing gradual progress in anti-corruption policy development quality and process. The previous Summary Report noted that "Compared to first anti-corruption strategies about a decade ago, formal anti-corruption policies have improved."<sup>14</sup> Further advances can be noticed in the framework of the third monitoring round, both in terms of the process of development (e.g., evidence-based policy design, engagement of stakeholders, monitoring of performance) as well as the quality of the policy documents (e.g., clearer objectives, better indicators for performance, activities and budget). IAP monitoring played an important role in enhancing the strategic planning culture and practices in the monitored countries. IAP countries started to see the importance and the need for long term policy planning and committed to ensuring a better process as well as higher quality documents. This in itself represents an achievement, taking into account the absence of a strategic planning culture and capacity in the monitored countries just a few years ago.

Major remaining challenges are still associated with capacity for strategic planning, monitoring and evaluation, and transparency and inclusiveness of the process, which is ultimately reflected in the quality of the policy documents. Strategies and action plans are not always evidence or risk-based, and shortcomings related to budget planning, budget allocation, the lack of measurable indicators and clear time-frames for implementation still persist. Most importantly, the poor quality of monitoring reports as well as the lack of in-depth analysis and assessment of efficiency of the anti-corruption programmes still

<sup>14</sup> OECD/ACN (2013), *Anti-Corruption Reforms in Eastern Europe and Central Asia*, page 27.

characterise the monitored countries. The low level of implementation of anti-corruption programmes reflects these shortcomings. One of the most commonly cited reasons for the low level of implementation is the lack of resources, even though governments commit to these measures and adopt them as legally binding instruments.

During the third monitoring round, the majority of the Istanbul Anti-Corruption Action Plan countries have either updated their policy documents or adopted new strategies and action plans. **Uzbekistan** adopted its first anti-corruption policy document in 2015.<sup>15</sup>

**Table 7. Anti-Corruption Strategies and Action Plans adopted in the IAP countries in 2012-2015**

Country	Anti-Corruption Strategies and Action Plans	Year of adoption	Source/website
<b>Armenia</b>	Anti-Corruption Strategy and its Implementation Action Plan for 2015-2018	2015	Government Decision No. 1141-N of 25 September, 2015
<b>Azerbaijan</b>	National Anti-Corruption Action Plan 2012-2015 (NACAP for 2012 - 2015)	2012	Presidential Decree No. 2421 on 5 September 2012
	National Action Plan for 2016-2018 on Promotion of Open Government	2016	Presidential Decree of 27 April 2016
<b>Georgia</b>	Anti-Corruption Strategy 2015-2016 Action Plan for the Implementation of the Anti-Corruption Strategy	2015	Government Resolution, No.170, 20 April 2015
<b>Kazakhstan</b>	Anti-Corruption Strategy for 2015-2025	2014	Presidential Decree of 26 December 2014 no. 986
	Action Plan 2015-2017 for Implementing Kazakhstan's Anti-Corruption Strategy 2015-2025 and Combating Shadow Economy	2015	Government Resolution of 14 April 2015 no. 234
<b>Kyrgyzstan</b>	State Strategy of Anti-Corruption Policy	2012	Presidential Decree No.26 of 2 February 2012
	Programme and Action Plan of the Measures to Eradicate the Causes of Political and Systemic Corruption in State Bodies	2013	Presidential Decree No.215 of 12 November, 2013
	Action Plan of the State Agencies of the Kyrgyzstan for the Implementation of State Anti-Corruption Policy for 2015-2017	2015	Government Resolution No.170 of 30 March 2015
<b>Mongolia</b>	2002-2010 National Anti-Corruption Programme (expired)	2002	Parliament Resolution No.41, 4 July, 2002
	Draft new Anti-Corruption Programme was rejected by the Parliament		
<b>Tajikistan</b>	Strategy for Prevention of Corruption in the Republic of Tajikistan for 2013–2020	2013	Presidential Decree No. 1504 of 30 August 2013
<b>Uzbekistan</b>	Comprehensive Plan of Practical Actions for Implementation of Anti-Corruption Measures in Uzbekistan for 2015	2015	Decision of the Cabinet of Ministers of 18 May 2015
<b>Ukraine</b>	Anti-Corruption Strategy for 2014-2017	2014	Law No. 1699-VII of 14 October 2014
	Programme for implementation of the Strategy for 2015 – 2017	2015	Resolution of the Cabinet of Ministers No. 265, 29 April, 2015

Source: Information provided by ACN governments, IAP monitoring and progress reports as well as research by the OECD/ACN Secretariat.

<sup>15</sup> Uzbekistan referred to the “Concept for Democratic Reforms” as the first framework policy document for anti-corruption that was adopted before the 2015 plan of actions.

TI Georgia, in its National Integrity System Assessment, concluded that **Georgia's** new policy documents were a “notable improvement compared to the previous policy framework”.<sup>16</sup> In particular, their conciseness and clarity concerning all necessary elements, as well as the well-planned, structured and inclusive process of their development, merited positive assessment. In **Ukraine**, the latest policy document, Anti-Corruption Strategy for 2014-2017, was for the first time adopted as a law. However, the strategy is not based on substantive research or analysis of Ukraine's previous anti-corruption measures. The new strategy nonetheless shows improvements in terms of setting priorities and includes indicators for monitoring. It was developed in close cooperation with civil society and was preceded by public consultations.<sup>17</sup> The programme for implementation of the strategy for 2015-2017 was approved by the Cabinet of Ministers in 2015.

**Kazakhstan** adopted a new Anti-Corruption Strategy for 2015-2025 (President's Decree of 26 December 2014 no. 986) and also approved Action Plan 2015-2017 for Implementing Kazakhstan's Anti-Corruption Strategy 2015-2025 and Combating the Shadow Economy. However, it is not clear that the new strategy is based on either a thorough analysis of the status of and trends in corruption, or an assessment of Kazakhstan's earlier anti-corruption efforts. In addition, the new strategy does not seem to take into account research on corruption in Kazakhstan, including statistical and other data on the performance of public authorities in fighting corruption, research conducted by NGOs, and analysis by public authorities, civil society and the business sector.

Likewise, in **Azerbaijan**, the third anti-corruption action plan for 2012–2015 does not have references to surveys or analysis of trends in corruption. Thus, the correlation between causes of corruption and the anti-corruption measures proposed by the Government is not clear. In 2016, Azerbaijan adopted a new policy document combining the open government and anti-corruption action plan in one document, albeit, with only a limited focus on direct anti-corruption measures.<sup>18</sup>

In 2015, **Uzbekistan** adopted its first anti-corruption policy document. The Comprehensive Anti-Corruption Plan of Actions contains a limited number, yet important measures. This action plan is concentrated on selected anti-corruption policy and corruption prevention measures that are feasible and can be implemented in one year mostly in response to the recommendations of international organisations. Considering the local context that this is the first anti-corruption policy document for the country, the adoption of the action plan is indeed a positive development. Uzbekistan adopted its second anti-corruption action plan 2016-2017 in January 2016.

The Government of **Armenia** adopted its Anti-Corruption Strategy and Action Plan for 2015-2018 based on the assessment of the previous policy implementation. It includes more precise measures and featured an improved process of civil society participation, although only a few recommendations were taken into account. In **Mongolia**, the previous 2002-2010 National Anti-Corruption Programme expired and the new policy document has not yet been adopted. This time-gap is mainly attributed to the instability in the Parliament, as the draft of the programme was approved by the Government and submitted to the legislative body for consideration. In **Tajikistan**, the new anti-corruption strategy was developed on time, after the expiration of the previous strategy. Reportedly, it was based on the assessment of the previous document; however, there is no such indication in the text of the strategy itself, and the measures are not very clear and precise, which may make its implementation and monitoring challenging.

<sup>16</sup> Transparency International Georgia (2015), National Integrity System Assessment, page 19, <http://goo.gl/d82E2z>.

<sup>17</sup> Transparency International (2015), The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine, page 25, <http://goo.gl/iuqrFi>.

<sup>18</sup> Azerbaijan's National Action Plan for 2016-2018 on Promotion of Open Government, <http://antikorrupsiya.gov.az>.

**Box 1. Most recent anti-corruption policy documents in the ACN countries beyond IAP**

**Albania:** The Inter-Sectoral Strategy against Corruption 2015-2020, adopted by the Council of Ministers Decision (March 2015).<sup>19</sup>

**Croatia:** The 2015-2020 Anti-Corruption Strategy and the 2015-2016 Action Plan, adopted by the Government of Croatia (January and July 2015, respectively).

**Lithuania:** The National Anti-Corruption Programme for 2015-2025, approved by Parliament of Lithuania (March 2015).<sup>20</sup>

**Latvia:** Guidelines for Corruption Prevention and Combating 2015-2020, which contain both a strategy and an action plan, adopted by the Cabinet (July, 2015).<sup>21</sup>

Source: Secretariat research, information provided by the ACN national points of contacts.

In all IAP countries, anti-corruption policy documents are legally binding instruments adopted either by the president (**Tajikistan, Kazakhstan, Kyrgyzstan and Azerbaijan**) or the government (**Armenia, Georgia,**<sup>22</sup> **Kazakhstan, Uzbekistan**). For the first time, in October 2014, **Ukraine**'s Anti-Corruption Strategy was adopted by a law. In **Mongolia** too, the parliament is legally required to approve the national programme against corruption. This is also the general trend in the ACN region, where governments have adopted anti-corruption policy documents in **Estonia, Latvia, Romania**, while parliaments adopted them in **Croatia, Lithuania, Moldova, Serbia and Slovenia**. In the FYR of **Macedonia** and **Slovenia**, the anti-corruption prevention agencies adopted the anti-corruption programmes.<sup>23</sup>

**Box 2. UK Anti-Corruption Plan**

The first ever Anti-Corruption Plan of the UK, published on 18 December 2014,<sup>24</sup> brought together the UK's anti-corruption efforts under one cross-departmental plan. The 60-page plan contains 66 actions centred on the following areas:

- Understanding and raising awareness of the risks from Corruption;
- Tackling Corruption Risk in the UK;
- The UK Law Enforcement Response to Corruption;
- Recovering Stolen Assets and Tackling Illicit Financial Flows Linked to Corruption; and
- Leading the Fight against International Corruption.

The action plan is wide-ranging, including areas from local government to defence, sport, police, politics and overseas aid. It recognises some of the key structural problems existing in the government administration of the UK—such as lack of coordination, data, public and institutional awareness—and specifies the ways to address them.<sup>25</sup> The document draws widely on research and inputs from several government departments, law enforcement agencies, business and civil society. It recognises the importance of working with civil society as a key factor for implementing the plan and commits to regular dialogue with the private sector and enhanced engagement with civil society organisations.

Transparency International UK called the Plan ground-breaking for the UK and “a substantial and important step forward in the UK's fight against corruption [...] shifting the long-standing narrative that corruption happens overseas but not here in the UK.” Despite observing numerous strengths of the action plan, TI UK highlighted some weaknesses. For instance, some of the actions are vague, and some key areas are only included sporadically.

<sup>19</sup> For Albania's policy document: <http://goo.gl/mRLQar>.

<sup>20</sup> For Lithuania's policy document: <https://goo.gl/ZioM6m>.

<sup>21</sup> For Latvia's policy document: <http://goo.gl/uzRIOJ>.

<sup>22</sup> Following constitutional changes in Georgia in 2013, the anti-corruption policy documents are now adopted by the Government instead of the President.

<sup>23</sup> OECD/ACN (2015), Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, <http://goo.gl/DqrAcQ>.

<sup>24</sup> UK Anti-Corruption Action Plan, <https://goo.gl/FSyHYn>.

<sup>25</sup> TI UK, “Interpreting the UK Government's Anti-Corruption Action Plan”, <http://goo.gl/pZJo16>.



Box 2.UK Anti-Corruption Plan (*cont.*)

In addition, the role of the private sector is insufficiently acknowledged, which is a particular problem when public services are contracted out to or delivered by private sector companies operating to different standards of integrity.<sup>26</sup>

To oversee the implementation of the Plan, new structures were established:

- An *Inter-Ministerial Group on Anti-Corruption*,<sup>27</sup> jointly chaired by the Government Anti-Corruption Champion and the Home Office Minister who is responsible for organised crime, which brings together ministers and heads of operational agencies to oversee implementation of the commitments, and
- The *Cabinet Office's new cross-departmental Unit on international corruption*, which serves as a secretariat to the Government Anti-Corruption Champion, who is appointed by the Prime Minister and, working closely with the Home Office, leads the coordination of domestic corruption policy. The Government Anti-Corruption Champion helps hold the Government accountable to the Parliament and the public for its performance under the Plan and also has a mandate to engage with external stakeholders, including business and civil society organisations.

A progress update on the implementation of the UK Anti-Corruption Plan was published by the Home Office in May 2016, indicating that 62 out of 66 actions have been delivered or are on track to be delivered. The progress update singles out the following achievements as examples of results of implementation: introducing a new criminal offence of police corruption; establishing a new International Corruption Unit in the National Crime Agency to enhance the law enforcement response; and abolishing bearer shares to make it harder for criminals to launder the proceeds of corruption. According to the progress update, a new strategy will be finalised by November 2016.<sup>28</sup>

Source: ACN Secretariat Research.

### National and sectoral anti-corruption policy documents

Along with the national, centralised policy planning, sectoral integrity plans are becoming increasingly common in the region. National strategies, often accompanied by implementations plans, typically covering shorter period than the strategies, usually serve as overall frameworks for anti-corruption reforms. Sometimes they envisage the development of integrity plans for specific sectors or all government agencies as one of the listed measures (**Kyrgyzstan, Uzbekistan, Lithuania**). Sometimes specific sensitive areas are extensively covered in the general action plans (**Georgia**).

In **Kyrgyzstan**, the sectoral action plans are developed on the basis of risk analysis by the working group of the Defence Council in cooperation with civil society. Reportedly, around 30 state bodies have elaborated such institutional plans by mid-2016. **Uzbekistan's** Comprehensive Plan of Actions mentions the development of such plans based on risk analysis; more than 50 public institutions have elaborated such plans, according to the government. In **Azerbaijan**, separate anti-corruption action plans exist for the different agencies. In **Georgia**, the action plan covered some priority areas more extensively (such as defence, health sector, etc.), thus integrating some sectoral plans in the national action plan. In **Armenia**, the ministries of education and of health developed their own anti-corruption plans based on the 2009-2012 Strategy. For **Mongolia**, the IAP monitoring report recommended developing sectoral plans to address the most corruption-prone sectors based on the wealth of research available at the local level, showing that certain areas need greater attention: health, education, tax, inspection, customs, local administration, land allocation and licenses. No such plans have been developed in Mongolia, however, and only isolated measures have been carried out in an attempt to address existing risks.

It is up to the countries to decide which approach to take, as sometimes it is just a matter of technique rather than substance. At the same time, sectors where corruption continues to represent a persistent risk merit more extensive measures than others. In this case, countries might opt for separate, sectoral action

<sup>26</sup> Idem.

<sup>27</sup> UK Cabinet Office Policy Paper, "Inter-Ministerial Group on Anti-Corruption: members" (29 July 2015), <https://goo.gl/KI8fPD>.

<sup>28</sup> Source: <https://goo.gl/LSTT3q>.

plans. If the latter approach is chosen, there should be an integrated mechanism for monitoring the implementation and coordination of efforts among the implementing agencies.<sup>29</sup>

### Focus and scope of policy documents

The scope of anti-corruption policy documents in the region extends from prevention to prosecution of corruption. Some strategies follow the logic of the UNCAC and include a range of measures on prevention, criminalisation and law enforcement, public participation, awareness raising and anti-corruption education (**Georgia, Kyrgyzstan, Latvia**). The Latvian strategy explicitly states that the document is organized in line with the UNCAC since it uses as one of its sources an assessment conducted by the Corruption Prevention and Combating Bureau (CPCB) based on the UNCAC. Similarly, the Strategy of Georgia follows the UNCAC structure.

The IAP monitoring report on **Tajikistan** notes that the strategy seems to include all the essential dimensions of the fight against corruption and the scorecard for its implementations covers many vulnerable sectors on both national and local levels. **Armenia** has chosen to focus on several specific sectors in its strategy, while excluding other corruption-prone areas without providing any clear rationale for its choices. Whereas it is logical and advisable to prioritize certain goals for better resource management, it is important that the policy choice is based on evidence and that the reasons for the government's priorities are clearly explained.<sup>30</sup>

**Georgia's** policy document is structured around 14 priority areas that were identified using a combination of top-down and bottom-up approaches. In particular, the priorities were identified top-down: starting from discussion among the Council members who suggested priorities to be included in the policy documents. The process was complemented with the research and analysis of all available material regarding corruption situation in Georgia, as well as discussion and consultations with non-government stakeholders in the working group that submitted proposals to the Council. The latter subsequently discussed and approved the priorities. As a result of this comprehensive process, the measures in the action plan are more focused than in the previous policy documents.

**Uzbekistan's** action plan focuses on a very limited and concrete list of actions, mainly in the area of preventing corruption. **Mongolia's** draft anti-corruption programme provides a general overview of the implementation of the previous strategy, gives references to numerous surveys and studies that indicate positive changes in the level of corruption in different areas, and includes a section on corruption risk assessment. These features would provide an evidentiary basis for policy planning, if the draft programme were adopted.

Recent strategies in the ACN region offer some interesting illustrations in this regard. The latest Anti-Corruption Strategy for 2013-2020 of **Estonia** is a short and a concise document, including definitions, a situational analysis and the following main objectives: raising awareness, improving transparency of decision-making and actions, and developing the investigative capabilities of the investigative bodies and preventing corruption that could jeopardize the national security. The strategy also includes a list of result-oriented indicators to measure success of implemented measures, among them, the indicators of international indices as well as national surveys and evaluations.

**Croatia's** new strategy is organized in two main parts. The first part is dedicated to the horizontal objectives such as promoting integrity within the political system and governance, local and regional self-governance, public procurement, state owned enterprises, the prevention of conflict of interests, the

<sup>29</sup> RAI (2015), Monitoring and Evaluation of the Implementation of National Anti-corruption Strategies and Action Plans, methodology developed for the Regional Anti-corruption Initiative (RAI) by Tilman Hoppe, available at <http://goo.gl/E1LEs8>.

<sup>30</sup> EU (2015), Quality of Public Administration, a Toolbox for Practitioners, pages 29-46 and 479.

right of access to information, and the role of the civil society, public and media in the suppression of corruption. The second part is focused on special objectives for the judiciary, economy, public finances, agriculture, healthcare, science, education, sports, infrastructure, environment and transport. The Action Plan is for two years and includes 126 measures.

The **Latvian** strategy contains an extensive analysis of corruption-related data and indicators, as well as of the previous strategy implementation. The document is organized around the following main objectives: measures targeting the prevention of corruption in civil service, improved internal control systems, judiciary, private sector, public awareness, whistle-blower protection, criminal sanctions for corruption and strengthened enforcement, political party financing transparency, public engagement in policy development, etc. As one of its goals, the strategy emphasizes the implementation of international commitments including the recommendations of the OECD and GRECO.

The current anti-corruption programme of **Lithuania** has six objectives relating to the transparency, openness and accountability of public administration, reducing administrative burdens on economic entities, public procurement, healthcare, promoting zero tolerance to corruption and encouraging public engagement in anti-corruption activities. Assessment criteria/indicators are mainly based on international surveys (e.g., Eurobarometer). Furthermore, the sectoral corruption prevention programmes are foreseen to be drawn up by relevant agencies, such as those for public procurement, elections and political party financing, environmental protection, and healthcare.

### Sources of policy documents and corruption risk analysis

It is important that anti-corruption policy documents are evidence-based. The drafters should analyse a wide range of sources that may serve as a basis for strategies, use risk analysis where available and conduct such risk assessments where necessary and feasible.<sup>31</sup> At the same time, dedicated risk assessments for each sector can be resource consuming and not always affordable. In this case, a variety of available resources and consultations with the stakeholders should be used to fill the gaps.

The previous Summary Report notes that “to prepare a sound anti-corruption strategy, it is important to have sound analysis of corruption risks and problems that need to be solved, as well as an assessment of previous anti-corruption efforts. In addition to independent research, public institutions “should analyse corruption risks in their institutions and propose anti-corruption measures to address these specific risks to be included in the national strategy”<sup>32</sup>

**Latvia**’s anti-corruption strategy refers to the various sources that have been used to prepare the document, including surveys, studies and reports related to the corruption prevention and combating in Latvia, including information established during inspections carried out by the Corruption Prevention and Combating Bureau (KNAB) and in the framework of criminal cases. Additionally, for the first time, the KNAB has carried out a full assessment of the compliance of the Latvian institutional system with the requirements of the UN Convention against Corruption. This assessment was taken into account in developing the strategy.<sup>33</sup>

The anti-corruption strategy of **Georgia** has a special section listing its sources, among them: the evaluation of implementation of the previous policy documents, various international surveys and research, as well as the recommendations of international organisations, work of the NGOs and others. Notably, the government organised wide-ranging consultations focusing on the sources to be used for the policy documents development.

<sup>31</sup> Council of Europe (2013), *Designing and Implementing Anti-Corruption Policies*, pages 9-18, available at <http://goo.gl/gE3pBq>.

<sup>32</sup> OECD/ACN (2013), *Anti-Corruption Reforms in Eastern Europe and Central Asia*, page 30.

<sup>33</sup> Source: <http://goo.gl/tJttec>.



There are some instances of using independent research by public authorities to feed into the strategic planning process as well as risk assessments.<sup>34</sup> Good examples in this regard from IAP countries are **Kyrgyzstan** and **Georgia**. Thus, whereas dedicated risk assessments are rare, countries in the ACN region are increasingly relying on available evidence to devise their policies.

### Box 3. Corruption Risk Mapping in Germany

Under the Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration (2004), **Germany** requires using a risk-based approach to prevent corruption in public agencies. The Directive prescribes mandatory measures for all federal agencies to regularly identify areas of activity that are especially vulnerable to corruption. The need for changes in organization, procedures or personnel assignments are determined based on the risk analysis results. Various elements of the Directive focus on: greater scrutiny and transparency of administrative action; staff and duty rotation; appointing persons responsible for corruption prevention; raising staff awareness; providing basic and advanced training; constant administrative and task-related supervision; emphasis on the supervisor's function as a role model and duty to look after the staff.

Risk mapping is a valuable tool in the fight against corruption. It includes the following steps:

- Determining areas with a general risk of corruption and identifying core vulnerable processes and activities in the area;
- Collecting information on the safeguards in place; and
- Evaluating safeguards, identifying concrete risks and needs for the further safeguards.

Risks are identified based on the prescribed criteria. For example, criteria for identifying the risks in Customs are the following:

- Frequent outside contacts;
- Management of large budgets, awarding of public contracts or subsidies, grants or other funding;
- Imposing conditions, granting concessions, approvals, permits, setting and levying of fees; and
- Processing of transactions and operations using internal information not intended for third parties.

Risk mapping involves the important roles of the internal and external audit in the process of monitoring. The internal audit function audits the implementation and impact of the safeguards outlined in the risk atlas; audits the internal audit system of the administration (e.g. administrative and task-related supervision) according to an annual audit plan; supports the unit management in carrying out administrative and task-related supervision; detects breaches of the law; and advises the director. The external audit function includes: the annual report by the Federal Ministry of the Interior to Parliament on the implementation of the Directive in the federal administrations; as well as the audit by the Federal Court of Audit in the field of corruption prevention.

Source: ACN Secretariat research.

### Box 4. Example of “Risk Atlas” in Customs in Germany

Area	Processing of excise duty
Activity	Granting, amending and revoking permits and approvals
Existing Safeguards	Task-related supervision by the superior Subsequent review by the audit service in the company
Risk evaluation	Concrete, special corruption risk exists because large sums are involved, there is frequent contact with the same external third parties, and there are major material advantages for third parties. The safeguards that have been implemented do not constitute sufficient protection.
“To dos”	Audit of the implementation of concrete safeguards, e.g. limitation of the duration of deployment (rotation) Principle of greater scrutiny (four-eyes-principle)

Source: Power Point Presentation by Ms. Nadja Kammerzell, Customs Attaché of Germany, Corruption Prevention Seminar, Croatia, 18-19 May 2015.

<sup>34</sup> For details, see the section below *Surveys and Research on Corruption*.

## Process and inclusiveness

An inclusive and participatory process for developing anticorruption policy documents is important to ensure that all key corruption problems are brought up for discussion and that measures to address them are considered for inclusion in the policy documents. Knowledge and practical experience of diverse professionals bring added value to the process and contribute to the comprehensive, yet balanced policies. Co-designing the policies creates the sense of ownership and promotes government-civil society partnership later during the implementation process as well.<sup>35</sup> At the same time, a reasonable balance between the inclusiveness, proper process and efficiency should be sought to make the consultation process rationally swift. In this regard, clear steps and timeframes of the process should be set to avoid unnecessary delays.

Ultimately, responsibility for feasible, realistic and affordable policies lies upon governments, as they are ultimately responsible for the implementation. The governments should aim to plan resources and take commitments to the extent feasible, so that policy documents serve as operational tools stimulating prevention and fight against corruption as opposed to a wish list of unenforceable activities on paper.

Questions to be answered in this regard are: How inclusive is the process of policy development? At what stages are the stakeholders involved? To what extent are their recommendations taken on board? How much international expertise is used? Is sufficient time devoted to the process of preparing the strategic documents? Is the top-down approach, where pre-defined priorities are taken as a point of departure, supported by bottom-up approaches, where the grass-root level problems find their ways in the policy documents? Is the level of applied research satisfactory? How much is the strategic planning process based on the real corruption risks in various sectors? What are the sources of the strategy?<sup>36</sup>

The majority of the IAP countries have shown some improvement in the anti-corruption policy development process, making it more transparent, inclusive and diligent when compared with the previous planning cycles. **Georgia** went through a thorough process of development of the new anti-corruption policy documents with the broad and structured participation of all relevant stakeholders in preparation of its new policy documents and monitoring tool for evaluation of their implementation. All key stakeholders – civil society actors, academics, members of the business community and donors – were involved in the framework of the nine thematic and two *ad hoc* working groups co-chaired by Government and non-governmental organizations. At the same time, the development of the strategy took a relatively long time which was attributed to the lack of resources of the Anti-Corruption Council.<sup>37</sup>

In **Armenia**, the Ministry of Justice established two working groups comprising CSO representatives. The inter-agency working group, with the participation of TI Armenia, prepared the “Concept for the Fight against Corruption in Public Administration System”.<sup>38</sup> Public consultations were held at the regional level as well. The process was considered to be open but rather quick, having an unsatisfactory level of involvement of the civil society. In **Kyrgyzstan**, the civil society participation, including during the process of elaboration of sectoral action plans, was ensured through the public councils and public hearings. However, the consultation process lacked a structured approach. At the same time, the role of the civil society is clearer and more meaningful in the oversight of implementation of the strategy in Kyrgyzstan.<sup>39</sup> In **Azerbaijan**, while preparing the new anti-corruption action plans, the authorities held

<sup>35</sup> EU (2015), Quality of Public Administration, a Toolbox for Practitioners, <http://goo.gl/Hmectj>.

<sup>36</sup> More extensively, see below the sections on *Surveys and Research on Corruption* and *Public Participation in Fighting Corruption*.

<sup>37</sup> Transparency International (2015), Georgia National Integrity System Assessment, page 19, available at <http://goo.gl/dleZYB>.

<sup>38</sup> Transparency International (2015), The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine, page 12.

<sup>39</sup> OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, page 17, available at <http://goo.gl/Z3jcXU>.

round-table discussions in collaboration with the civil society in 2012, 2015 and early 2016. The preliminary draft of the new strategy was developed on the basis of the proposals from both the civil society stakeholders and relevant state bodies. In **Ukraine**, the CSOs played a vital role in the development of the anti-corruption policy documents; Transparency International even noted that the civil society was taking lead in the anti-corruption reforms and their voices were heard.<sup>40</sup>

It should be noted that the tools for engagement of the general public in the process of strategic planning are rather unexplored in the IAP countries. The methods could include public consultations through meetings or hearings at the local level or collecting feedback via e-tools.<sup>41</sup> Communicating with the general public in the process of policy development can serve as a good source for identifying problems and at the same time for raising awareness on anti-corruption. Among the IAP countries, **Georgia** is a good example where well-planned and coordinated process of public consultations took place in the process of the OGP action plan development in 2013 and 2016, mobilizing the CSOs and donors. The report on the public consultations was submitted to the Anti-Corruption Council and several important measures were included in the action plan. Another positive example in this respect was **Croatia's** OGP public consultation process.<sup>42</sup> **Ukraine** has conducted public consultations for its anti-corruption policy documents as well.<sup>43</sup>

### Monitoring of anti-corruption policy implementation

A well-functioning monitoring mechanism is critical for the efficiency of anti-corruption reforms. The mechanism in place should ensure collection and analysis of data needed to track progress and assess results, as well as the involvement of civil society in the process.<sup>44</sup> Monitoring should involve an element of independent evaluation, such as an external assessment or alternative evaluation performed by the civil society. The impact of implementation should be measured with result-oriented indicators. Assessments should focus on measuring whether the objectives has been met but also on the level of trust and perceptions of the general population.<sup>45</sup>

The previous Summary Report noted that there was little progress in the IAP countries in establishing efficient mechanisms for monitoring of implementation of anti-corruption programmes and measuring their impact.<sup>46</sup> Since the previous round most IAP countries have developed methodologies for monitoring the implementation of anti-corruption programmes. Some of them are part of the policy documents (**Georgia**), while others are adopted by separate normative acts (**Kazakhstan**<sup>47</sup>). Nevertheless, in most IAP countries monitoring involves simple reporting by implementing agencies to the coordinating body. The latter subsequently compiles the reports into the report on implementation. In most cases there is a lack of a verification mechanism or a tool to assess efficiency.

<sup>40</sup> Transparency International (2015), *The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine*, page 25.

<sup>41</sup> Interesting illustrations of public participation, including e-participation are provided for in the publication "Quality of Public Administration, A Toolbox for Practitioners", European Union, 2015, pages 46-51.

<sup>42</sup> See the page on OGP Croatia at <http://goo.gl/U3MoIq>.

<sup>43</sup> For good practices see: OECD/ACN (2015), *Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia*, pages 65-67.

<sup>44</sup> For the detailed analysis see: Tilman Hoppe (2015), *Methodology for Monitoring and Evaluation of the Implementation of National Anti-corruption Strategies and Action Plans*.

<sup>45</sup> UN (2003), *UN Guide for Anti-Corruption Policies*, available at <http://goo.gl/kjjaX6>.

<sup>46</sup> OECD/ACN (2013), *Anti-Corruption Reforms in Eastern Europe and Central Asia*, pages 31-32, cited above.

<sup>47</sup> Rules for the development, implementation, monitoring, assessment and control of sectoral programmes approved with the Government's resolution, March 2010.

One of the novel developments is **Georgia's** new tool for monitoring and evaluation of anti-corruption measures.<sup>48</sup> The tool has both elements of monitoring and evaluation: first, it allows for tracking progress and compliance with the action plan's timelines for implementing agencies; second, it has an element of evaluation of the level of implementation and impact. The tool envisages structured participation of civil society and discussions of the status of implementation at various stages of monitoring. The tool was developed together with the action plan in a consultative process and was adopted by the Anti-Corruption Council along with the policy documents.<sup>49</sup> The effectiveness of this relatively new instrument needs to be tested in practice. The ACC prepares regular progress and monitoring reports that include recommendations to the agencies on the implementation of the outstanding measures.

In **Kazakhstan**, until the recent changes in the anti-corruption policy coordination and prevention framework,<sup>50</sup> the Agency for the Fight against Economic and Corruption Related Crimes (the Financial Police) carried out the monitoring jointly with the public authorities involved in the implementation of the programme based on a defined methodology. However, the monitoring lacked comprehensive and critical performance assessment of the activities, their efficiency or the impact on the level of corruption. The new Anti-Corruption Strategy provides for a mechanism to monitor and assess its implementation. Its positive aspects are the involvement of the civil society in the monitoring and evaluation process and the publication of annual reports. According to the Action Plan, the reports about its implementation should be placed in the public domain for the purpose of receiving external public assessment and taking public opinion into account. The annual report for implementation should also be made public. Information has also been provided about the establishment of monitoring commissions responsible for analysing and assessing the Anti-Corruption Strategy, both internal (comprising representatives of the Ministry for Civil Service of the Republic of Kazakhstan) and external ones (representatives of the interested state authorities, the parliament, Nor Otan party, the public, and mass media). As this mechanism is newly established, its effectiveness will need to be tested in practice.<sup>51</sup>

In accordance with the Comprehensive Plan of Practical Actions for Implementation of Anti-Corruption Measures for 2015, **Uzbekistan** established an interagency working group with the task of monitoring the implementation of the action plan's measures. In 2016, it prepared the first monitoring report with the information collected from the institutions. Further, the Action Plan envisages the development of a methodology to measure the efficiency of anti-corruption efforts, the elaboration of legislative proposals on anti-corruption organizational-practical measures and awareness-raising. In **Armenia**, the new strategy established a slightly modified institutional structure for coordination and monitoring, namely an expert task force and the Monitoring Division of the Government Staff Office. The latter, however, have scarce resources. The civil society's role in the monitoring process is not clearly defined. The new Action Plan (for 2015-2018) seems to improve situation in this regard by envisaging a civil society partnership for the purpose of developing monitoring mechanism. Interestingly, Armenia conducted the assessment of implementation of the previous policy documents, concluding that only 66% of planned measures were implemented mostly due to the lack of financial resources to fully implement the long list of measures included in the Action Plan.

In **Kyrgyzstan**, the monitoring of the implementation of the anti-corruption policy documents is entrusted to the Defence Council's Working Group. On the operational level, the Ministry of Economy used to be in charge of collecting the reports, drafting a combined report and submitting it to the Defence Council. The Ministry of Economy has developed methodological materials for implementing agencies, including guidelines for preparing the reports, and conducted trainings on this. In 2015 Kyrgyzstan

<sup>48</sup> Tool is described in detail in the OECD/ACN (2015), Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, pages 63-64.

<sup>49</sup> OECD/ACN (October 2015), Progress Update on Georgia, available at <http://goo.gl/2PK4wX>.

<sup>50</sup> See the section on *Anti-corruption Prevention and Policy Coordination Institutions*.

<sup>51</sup> OECD/ACN (October 2015), Progress Update on Kazakhstan, page 4, available at <http://goo.gl/ykEoLG>.

introduced a new methodology for monitoring of effectiveness of anti-corruption measures adopted by the Government Resolution, envisaging a three-stage assessment of implementation, self-assessment by agencies, and assessment by the Ministry of Economy as well as alternative reports by CSOs. The reports, including the alternative monitoring by civil society, are published and discussed on existing anti-corruption forums. According to the latest information submitted by Kyrgyzstan, yet another system of monitoring was introduced recently (in 2016). The monitoring is now performed jointly by the Defence Council Working Group Secretariat, Government Administration and the Prosecutor General's Office with the mandatory involvement of the civil society. The respective units of the Government Administration compile monthly monitoring reports. Some related coordination functions are reportedly still left with the Ministry of Economy. Based on the monitoring reports the sectoral action plans are updated. The prosecutorial acts are used to require subsequent action by a particular agency when necessary.

There are several instances of **shadow/alternative monitoring** in the IAP countries. In **Armenia**, shadow monitoring is carried out by the Transparency International Anti-Corruption Centre (TIAC), Armenian Young Lawyers Association (AYLA), and Freedom of Information Centre of Armenia (FOICA). However, the results of this monitoring were not used in the official monitoring process, and no references were provided to the NGO monitoring reports in the government's assessment report either. According to the government, these reports were, however, used in elaborating the Anti-corruption Strategy and Action Plan. In **Kyrgyzstan**, the alternative monitoring is performed by NGOs and takes a more structured approach. The selected NGOs carry out alternative monitoring based on the MOU with the Ministry of Economy. However, as stated in the third round monitoring report, not all NGOs had the opportunity to participate in the process. Using the practical guide for civil society monitoring prepared by the OECD ACN,<sup>52</sup> the local NGO "Result" prepared (with support of the USAID) an alternative monitoring report on the implementation of the IAP recommendations by Kyrgyzstan, which was presented at the conference with the broad participation of government and non-governmental representatives.

**Mongolia's** IAAC commissions law firms to prepare an external assessment of anti-corruption efforts of government agencies. The assessment is based on the methodology developed by the IAAC, and the IAAC issues recommendations to the relevant public agencies based on the assessment. The results of the assessment are published. In **Azerbaijan**, NGOs conduct an alternative monitoring of the implementation of the national strategy. The results of such alternative monitoring and relevant NGO recommendations have been used in the Commission's annual evaluation.<sup>53</sup>

The Corruption Prevention and Combating Bureau (KNAB) of **Latvia** is responsible for implementing Latvia's anti-corruption policy documents by coordinating and assessing performance of the included measures. The responsible agencies provide mid-term and final reports throughout the period of implementation of the strategy. KNAB in turn reports to the Cabinet of Ministers and the Parliament. The reports are presented at a Cabinet of Ministers session, as well as at a press conference and are publicly available.<sup>54</sup> In **Croatia**, the Council for Combating Corruption is entrusted with regular monitoring of the implementation of the Action Plan, and submitting the report on its implementation, along with a proposal of any amendments to the Action Plan, at least once a year to the Government. In **Lithuania**, the development of the action plan for the implementation of the strategy is assigned to the Ministry of Justice in co-operation with the Special Investigative Service of Lithuania. The budget for the action plan is drawn from the existing allocations to the relevant institutions, which in turn are responsible for planning the budget in a way to include their respective anti-corruption measures. The Special Investigative Service (STT) is monitoring the implementation of the anti-corruption policy,

<sup>52</sup> OECD/ACN (2014) Practical Guide: How to Conduct Monitoring by Civil Society

<sup>53</sup> OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, available at <http://goo.gl/Yx3PkK>.

<sup>54</sup> Source: <http://goo.gl/bSo9gv>.



producing annual reports on implementation submitted to the Interdepartmental Commission for Coordination of fight against corruption under the Government of Lithuania, which subsequently reports to the Parliament. STT is additionally responsible for analysing the corruption situation in the country, to identify the most relevant corruption-related problems, corruption-prone sectors and risks with possible recommendations on the revision of the program.

The anti-corruption strategy of **Romania** has well-elaborated implementation and monitoring mechanisms, including particular sets of indicators that can serve as a good basis for monitoring. Apart from gathering information from relevant responsible agencies for the reports, the monitoring includes on-site missions to local government. The Romanian government regularly commissions an independent impact assessment of the previous anti-corruption strategies and makes the assessments public.<sup>55</sup> In **Estonia**, the monitoring under the new strategy is not made regularly. The ministries report to the Ministry of Justice, only when requested. Otherwise, the Ministry of Justice compiles the monitoring reports based on available information acquired on an informal basis by communicating with the anti-corruption contact points designated in various ministries/agencies.

#### Box 5. External evaluation of the Romanian strategy implementation

The Ministry of Justice of Romania, which is in charge of the anti-corruption policy coordination in Romania, performs the monitoring and evaluation of the strategy implementation according to a standard methodology. Furthermore, Romania started to use external evaluations of the strategy's impact in order to better shape the new policy documents. To exclude conflict of interest, the external evaluations have not been sought at the local level, as all key anti-corruption stakeholders would have been involved in designing the policy. The evaluation of the implementation of the 2005-2007 National Anti-Corruption Strategy and the Strategy on Fighting Corruption in Vulnerable Sectors and Local Public Administration 2008-2010 in Romania was carried out by independent experts with the assistance of the United Nations Development Program and the support of the Ministry of Justice and the relevant stakeholders in Romania.

The assessment involved collecting and summarizing data; conducting in-depth interviews on-site; reviewing and analysing the information gathered; preparing the assessment report with the recommendations for improvement; and communicating the summarized information with the relevant stakeholders.

In 2015, Romania asked ACN to support the external evaluation of the implementation of its 2012-2015 National Anti-Corruption Strategy. The evaluation included a desk research, an on-site exploratory mission, drafting of the report and presentation of its results back in the country. The report identified achievements and challenges in the implementation of the past national anti-corruption strategy, and it also provided recommendations for the development of a new one. Estonian and Latvian experts prepared the report and the recommendations under coordination of the ACN secretariat.

Source: Information provided by the Ministry of Justice of Romania (ACN national contact point).

### Cost of anti-corruption strategies

Proper budget planning and allocation of sufficient resources to anti-corruption measures remains a critical challenge in the IAP countries. In most instances, anti-corruption programmes do not have separate budgets and are covered through the budgets of the relevant line ministries (**Armenia, Georgia, Kyrgyzstan, Uzbekistan**). The fact that the strategic planning process often does not coincide with budget planning cycles raises additional questions about how realistic the planning actually is as well as the feasibility of the adopted measures (e.g., strategies are sometimes adopted in the middle of the year when the budgets are already approved). Some of the countries, in fact, name unrealistic budget planning or the lack of financial resources as reasons for the low level of implementation of the actions envisaged by action plans and strategies that their governments have formally committed to fulfil. **Kyrgyz** authorities indicated that the limited budget allocations are among the main obstacles for the low and

<sup>55</sup> OECD/ACN (2015), Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, pages 59-65.

inadequate fulfilment of certain anti-corruption measures.<sup>56</sup> Financial needs assessment is the weak point of Kyrgyzstan's anti-corruption policy planning. In **Armenia**, the lack of necessary resources was cited as the reason for the poor implementation of the previous policy documents. The new anti-corruption programme did not include budget allocations either, which raised doubts as to the feasibility of its implementation. The Government heavily relies on donor funding, specifically USAID grants, to support implementation.

In **Kazakhstan**, the Anti-Corruption Programme is allocated a separate budget, which includes substantial funding of almost EUR 29,000. **Albania**'s anti-corruption strategy includes budget calculations for each direction of the strategy.

This crucial element of strategic planning has to be further improved and looked at in more detail during the fourth IAP monitoring round.

## Surveys and research on corruption

The 2013 Summary Report and the Istanbul Action Plan third round monitoring reports encouraged countries to support corruption research and surveys of public opinion on corruption, increasing their use in development, assessment and review of anti-corruption policies and making their findings available to the public. In 2013–2015, a number of new studies about corruption and surveys tracking public opinion about it have been produced both in Eastern Europe and Central Asia by public authorities, non-governmental organisations, researchers and academia. Also many studies and rankings produced internationally addressed corruption and showed corruption trends in the ACN region in a global context.

**Mongolia** has perhaps the most comprehensive approach among the IAP countries in terms of research into corruption. There are regular studies on corruption by the Mongolian authorities or NGOs, funded by the state budget or international donors. As required by the Anti-Corruption Law of Mongolia, the IAAC regularly conducts corruption surveys and publicises them. Moreover, conducting such studies and surveys is included in the IAAC's action plans and there are separate budget lines for it. The IAAC prepares a biannual Mongolia's Corruption Index and a Survey on Integrity Level of Public Organisations (two surveys are conducted during different years). The IAAC also conducts regular Youth Integrity Surveys and Corruption Perception of Political and Law Enforcement Organisations. It has also commissioned sector-specific studies on national security and corruption, election campaign finance, corruption in the health sector.<sup>57</sup>

In 2014, **Kazakhstan** established a scientific-analytical centre within the Public Administration Academy under the President of Kazakhstan to conduct anti-corruption research, analysis, to coordinate research activities in this area and support the anti-corruption awareness raising.

There are some examples of general corruption studies. In 2011, **Tajikistan** prepared the "Sociological survey on perception and attitude towards corruption and anti-corruption activities in Tajik society", which was based on a comprehensive survey methodology. The study was conducted by the Centre of Strategic Researches of Tajikistan and financed by the OSCE Office in Tajikistan. The study covered such issues as the general overview of corruption, economic aspects of corruption, personal experiences with corruption, areas most vulnerable to corruption. In August 2015, Tajikistan launched a new study, using the same methodology as for the studies in 2005 and 2010, but this time it was financed by the state budget. In 2014, **Kyrgyzstan** carried out the study "Corruption in Kyrgyzstan: trends, causes and avenues for improvement" commissioned by the Ministry of Economy within a World Bank-financed

<sup>56</sup> OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, page 16, available at <http://goo.gl/Z3jcXU>.

<sup>57</sup> OECD/ACN (2015), The First and Second Joint Monitoring Rounds report on Mongolia, pages 23-24, available at <http://goo.gl/O3IFAz>; Progress update of Mongolia, October 2014, available at <http://goo.gl/utFrcZ>.

project. It shows the general awareness about corruption, role of political corruption, experience of citizens with corruption and frequency, how often business needs to use bribery and for what reasons, which state bodies mostly take bribes.

The IAP countries also conducted public opinion surveys on corruption. Since 2010, **Armenia** periodically orders public opinion surveys about economic and social issues, including corruption. These surveys are conducted by the Institute of Political and Sociological Consulting and provide a general view about different sectors, including perception of the citizens about corruption. For instance, the 2011 and 2012 surveys showed that the police and the judiciary are perceived as the most corrupt areas in Armenia. More recently in 2015, in **Ukraine** the USAID-funded UNITER Project issued results of a comprehensive survey on the perception of corruption in Ukraine, which built on the previous similar surveys conducted in 2007, 2009 and 2011. Starting from 2015, the National Reforms Council under the President of Ukraine has been commissioning the TNS polling company to conduct regular surveys, including on the perception of the most corrupt sectors. The results of such surveys are used in tracking progress of the anti-corruption reform as one of its key performance indicators. As mentioned above, **Mongolia** also conducts a number of regular surveys on corruption in politics, law enforcement, and other public organisations. Since 2012, **Kyrgyzstan** has regularly conducted the survey “Population Trust Index” on the level of trust towards the state executive and local self-governing bodies.<sup>58</sup>

From the ACN countries, Latvia is a good example as its Corruption Prevention and Combating Bureau has regularly commissioned corruption perception surveys since 1999, and they are all publicly available on its website. These surveys compare experience of citizens with corruption in different sectors, amounts of bribes paid, reasons for giving bribes, readiness to report corruption, as well as trust in different branches of power and public bodies. The 2015 survey concluded that in the health sector, traffic police, car registration and issuing of drivers licences there was the lowest level of corruption since 1999. Also the survey shows how the trust in different public bodies is changing.<sup>59</sup>

More studies on corruption in the ACN countries are produced by non-government organisations, researchers and academia. Their findings and recommendations could be more frequently used as a basis for anti-corruption reforms. Mostly Transparency International national chapters, but also other NGOs produce a number of comprehensive studies on trends in corruption, as well as opinion polls and studies about corruption in specific sectors. For non-governmental sectoral studies on corruption, the most popular topics seem to be public procurement, judiciary, healthcare and education. For example, Transparency International **Armenia** and Transparency International **Kyrgyzstan** have recently published studies on corruption in the judiciary and in the public procurement in their countries.<sup>60</sup> In **Latvia**, two NGOs – the Public Policy Centre “Providus” and the Transparency International Latvia-Delna – together with the University Children’s Hospital conducted a study in 2015 on corruption in healthcare through the example of this hospital; Public Policy Centre “Providus” in its regular publication and web-site Corruption °C provided independent analysis of statistics on corruption cases.<sup>61</sup> Transparency International **Georgia** published a study on corruption in Georgian hospitals in 2012<sup>62</sup> and a public opinion poll about healthcare in 2014.<sup>63</sup> Furthermore, in **Kyrgyzstan** Transparency International in 2013-2014 has carried out a sociological survey “Corruption risks in the system of secondary education: Informal payments in the schools”. In **Kazakhstan**, the Public Opinion Research Centre and the Sange Research Centre conduct regular surveys of the quality of services provided by tax and customs authorities. They provide information about corruption in these authorities, including specific

<sup>58</sup> Available at: <http://stat.kg/ru/indeks-doveriya-naseleniya/>.

<sup>59</sup> Source: <http://goo.gl/dI44Lq>.

<sup>60</sup> Source: <http://goo.gl/okUJtW>.

<sup>61</sup> Source: <http://goo.gl/MSc5Jo>.

<sup>62</sup> Source: <http://www.transparency.ge>.

<sup>63</sup> Source: <http://goo.gl/qLS2uh>.



corruption practices and bribe amounts. In **Ukraine**, in 2015 Transparency International Ukraine published results of the anti-corruption survey of business conducted jointly with the GFK, PwC and “Privatbank” (<http://corruption-index.org.ua>); two waves of the survey have been conducted so far.

There is a wealth of **international studies and rankings on corruption** and related issues providing a comparative perspective of corruption and anti-corruption reforms in the ACN countries. NGOs and independent centres, such as Transparency International, Freedom House, Basel Institute on Governance and U4 Resource Centre, or international organisations and financial institutions, like the World Bank, European Bank for Reconstruction and Development and the OECD, regularly produce comparative studies, rankings and policy publications on corruption and related areas like public governance, open government, business environment, criminal justice that can be used in developing anti-corruption policies and in their evaluation.

The latest European Bank for Reconstruction and Development and World Bank *Business Environment and Enterprise Performance Survey* produced in 2014 analyses corruption, informal payments and business-government relations among other issues affecting business climate. The survey identifies the areas in which entrepreneurs are mostly expected to make unofficial payments and how the situation is changing across the countries. The World Bank’s *Doing Business* reports rank countries on their overall “ease of doing business,” and analyses reforms in business regulation, identifying economies that are strengthening their business environment the most.<sup>64</sup>

Transparency International provides a number of publications such as the annual Corruption Perception Index, Bribe Payers Index or the Global Corruption Barometer. Also, Transparency International hosts the Anti-Corruption Research Network<sup>65</sup>, which includes a wealth of interesting studies and articles on corruption.

Transparency International’s National Integrity System country assessments are developed by local non-governmental stakeholders and are based on a common methodology developed internationally. These reports provide a broad picture about progress made and effectiveness of national anti-corruption systems. In 2014, the National Integrity System assessment was done in **Azerbaijan**<sup>66</sup>, in 2015 in **Ukraine**<sup>67</sup> and **Georgia**<sup>68</sup> – each time by the national chapters of TI.

In 2012, ANTICORRP, a large corruption research project funded by the European Union, was started. It includes researchers from such areas as anthropology, criminology, economics, history, law, public administration and has produced many academic articles and publications about various aspects of corruption, for instance, on causes and corruption risks in diverse European regions, political corruption, corruption in public sector, good governance. To trace corruption levels, the ANTICORRP project also aims to produce indicators.<sup>69</sup> In 2014, the European Union published its first Anti-Corruption Report. Its objective is to monitor efforts of EU member countries in fighting corruption and to promote higher anti-corruption standards across the EU. The EU Anti-Corruption Report provides a comprehensive analysis of the scope and nature of corruption in EU member countries and includes useful examples of anti-corruption measures from the EU member countries.<sup>70</sup> There are also regular Eurobarometer surveys of perception of corruption providing information on how widespread corruption is and also serving as a good reference for developing public opinion surveys on corruption at the national level.

<sup>64</sup> Source: [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>65</sup> Source: <http://corruptionresearchnetwork.org>.

<sup>66</sup> Source: <http://goo.gl/PLNImH>.

<sup>67</sup> Source: <http://goo.gl/kGnpbH>.

<sup>68</sup> Source: [www.transparency.ge](http://www.transparency.ge).

<sup>69</sup> Source: <http://goo.gl/lo76fE>.

<sup>70</sup> Source: <http://goo.gl/OyRbE1>.

Some countries include corruption research in their anti-corruption strategies and action plans. Conducting surveys is foreseen in **Mongolia's** National Programme on Combating Corruption, which states that surveys and assessments are a very important source for tracking the level of corruption. In **Uzbekistan's** Anti-Corruption Plan for 2015 national, regional and sectoral corruption studies and surveys of public opinion are included as a separate activity. In **Azerbaijan**, according to its Anti-corruption Action Plan for 2012-2015, the Corruption Combating Commission is in charge of specialised corruption research and regular opinion polls about the levels of corruption. In **Tajikistan**, the Anti-corruption Action Plan for 2013–2020 provides for performing, at least once in three years, comprehensive sociological research on corruption in all branches of power and using its results in developing anti-corruption policy. The first of these studies was launched in 2015.

To ensure that the surveys on corruption can reveal trends and levels of corruption, as well as specific corruption-risk sectors in a comprehensive manner, the IAP second round monitoring reports recommended developing and using a comprehensive methodology. A positive example was found during the review of **Mongolia** in 2014, where the country used a strong methodological and scientific basis for its Corruption Index survey.<sup>71</sup> The monitoring reports made similar recommendations to **Kazakhstan**, **Armenia** and **Azerbaijan**, but these countries achieved little progress in this regard. In many cases the problem is the lack of public access to the methodology or even the completed surveys.<sup>72</sup> In 2013, **Ukraine** approved a national system for evaluating corruption levels. It provides for a comprehensive survey of the spread of corruption by polling both citizens' perception and experience, but this methodology has not been used in practice. More recently Ukraine envisaged launching annual sociological surveys of the level of corruption using a methodology developed by the NGO Kharkiv Institute of Applied Humanitarian Research.<sup>73</sup> In 2015, Kazakhstan developed rules on conducting the internal and external risk assessments.

The publication and dissemination of corruption studies and public opinion surveys is crucial for ensuring that citizens have regular and accurate information about corruption and impact of their governments' anti-corruption reforms. **Kyrgyzstan's** study "Corruption in Kyrgyzstan: Trends, causes and avenues for improvement" was published in 500 copies and is available on the website of the Ministry of Economy.<sup>74</sup> The 2014 survey **Lithuanian** Map of Corruption can be found on the website of the Special Investigations Service.<sup>75</sup> The **Mongolian** Corruption Index is publicized on 9 December each year through the media and other channels. The reports are published in hard copies, posted on the website of the IAAC and distributed in CD format. The findings of the report are also communicated to the staff of the surveyed organizations. In **Azerbaijan**, the results of corruption surveys are announced at quarterly press conferences held by the Anti-Corruption Directorate, the Commission for Countering Corruption and civil society. For instance, a survey on irregularities and corruption in construction sector was presented in such press conference in 2015.<sup>76</sup> Nevertheless, during the third round monitoring **Kazakhstan** and **Uzbekistan** were criticised for not publishing either a corruption index in public institutions (Kazakhstan) or corruption studies and surveys (Uzbekistan).

It is important to use the available research on corruption in developing better anti-corruption policies and evaluating their effectiveness. For example, the **Armenian** government in its assessment report on implementation of anti-corruption strategy recognised that failure to conduct proper risk assessment and research into reasons of corruption prior to the development of anti-corruption measures (e.g. in the

<sup>71</sup> See Mongolia's Corruption Surveys Methodology at <http://goo.gl/qsBekM>.

<sup>72</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 21 and 23, <http://goo.gl/KHeFMs>.

<sup>73</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 29, <http://goo.gl/tV4kmM>.

<sup>74</sup> Source: <http://goo.gl/p5Z7KP>.

<sup>75</sup> Source: <http://goo.gl/uC19BH>.

<sup>76</sup> OECD/ACN (October 2015), Progress Report on Azerbaijan, <http://goo.gl/yqmj4U>.

education sector) was one of the reasons for poor design of these measures.<sup>77</sup> Also **Georgia** in 2013, following the recommendation to use comprehensive analysis of corruption when reviewing its anti-corruption policy, used surveys in the assessment of the implementation of its 2010-2013 Anti-Corruption Action Plan. Moreover, the use of research, international rankings and evaluations and other various sources of information is part of Georgia's Monitoring Tool of the Action Plan for 2015-2016.<sup>78</sup> In **Mongolia**, regular corruption surveys are foreseen in the Programme on Combating Corruption and the annual action plans of the IAAC as indicators for evaluating the results of the Programme and evaluating the work of this institution. In **Kyrgyzstan**, the recommendations from the study on Corruption in Kyrgyzstan were used in developing the Anti-corruption Action Plan for 2015-2017.<sup>79</sup> In **Armenia**, the findings of research studies were used in the Concept for the Fight against Corruption in Public Administration System, which the Government adopted in 2014. It proposed to focus anti-corruption reforms on education, health, tax and the police, reflecting some of the research findings. On the other hand, **Azerbaijan, Tajikistan** and **Ukraine** were criticised during the third round monitoring for not referring to or failing to show the link between surveys and research on corruption and anti-corruption measures proposed by the government.<sup>80</sup>

**Estonia's** Ministry of Justice carries out regular corruption studies of three target groups: public officials, business representatives and the general public. The studies look at the awareness of corruption, propensity to engage in corruption and contacts with corruption. They are used for policy planning and evaluation of policy impact. The raw data and methodology of the surveys are publicly available on the web-page ([www.korruptsioon.ee](http://www.korruptsioon.ee)) and have been used in academic articles. In addition, Estonia conducts studies in specific areas: studies on corruption risks in healthcare and on business-to-business corruption h, and a study on corruption risks in education is planned. Estonia also used its surveys to identify the most corrupt areas and reflected changes in attitudes towards corrupt behaviour in its Anti-Corruption Strategy for 2013–2020.<sup>81</sup> The strategy foresees using surveys, primarily the questionnaire survey "Corruption in Estonia: study of three target groups", as well as international assessments and recommendations given to Estonia (GRECO, OECD, UN, Transparency International) in the assessment of its results.

In **Lithuania**, the Anti-Corruption Programme for 2015-2025 adopted in March 2015 contains a separate section extensively analysing the existing data of sociological surveys, analytical reports on corruption, explaining what risks and trends they include. In **Latvia**, the Anti-Corruption Programme for 2015-2020, adopted in July 2015, includes an analysis of corruption prevention and combating environment based on the PEST analysis (analysis of Political, Economic, Social and Technological factors) which is based on existing sociological surveys in Latvia, Eurobarometer, TI CPI and the Global Corruption Barometer, EU Anti-Corruption report and other sources. A concrete example in the Latvian Anti-Corruption Strategy activities aimed at strengthening the whistle-blower protection are based on a survey by TI Latvia, findings of which are reflected in the policy document.

Research studies can also help to better plan sectoral anti-corruption work. For instance, in 2014, the Mongolian government before drafting the anti-corruption program for the health sector, which is perceived as the most corrupt and bureaucratic branch of public service in **Mongolia**, conducted a survey on corruption in the health sector in co-operation with a research institution and support from the Asia Foundation. In **Georgia**, the Civil Service Bureau conducted research into asset declaration verification systems as anti-corruption and monitoring systems in other countries. The results of the study were

<sup>77</sup> OECD/ACN (2014), Third Monitoring Round report on Armenia, page 20, <http://goo.gl/8ogJuN>.

<sup>78</sup> OECD/ACN (2013), Third Monitoring Round report on Georgia, page 18, <http://goo.gl/QEcNBf>; Progress update of Georgia, March 2015, page 12, <http://goo.gl/wLF8an>.

<sup>79</sup> OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, page 22, <http://goo.gl/61zev0>.

<sup>80</sup> OECD/ACN (2015), Third Monitoring Round report on Tajikistan, page 24, <http://goo.gl/iffQ4P>.

<sup>81</sup> Source: <http://goo.gl/2RMLUW>.

presented to the Anti-Corruption Council. A survey of best practices in using a “single window” model to provide public services was conducted by NGOs in **Azerbaijan** in 2013 in support of the establishment of ASAN service centres (one-stop-shop public service centres) in Azerbaijan.

There are several IAP countries where anti-corruption bodies conduct their own studies about corruption risks in sectors or on specific corruption problems. These reports are often not made public. In **Azerbaijan**, the Anti-Corruption Department, the central law-enforcement anti-corruption body, has produced reports about corruption risks in key sectors since 2013. For instance, in 2015 the reports included corruption in land registration, healthcare, banks, education, consumption of natural gas, municipalities. In **Kazakhstan**, the former Financial Police, which used to be Kazakhstan’s anti-corruption body, periodically conducted studies of corruption risks in sectors, identifying risks and proposing reforms. Similarly, in 2014, **Kyrgyzstan** conducted assessment of corruption causes and risks in 40 state bodies and for 30 of them adopted detailed plans for tackling corruption. This activity was conducted under the auspices of the Defence Council. The in-depth sectoral assessment is conducted on the bases of interviews, focus groups and functional analysis of the agency in question.

## Public participation in fighting corruption

The UNCAC calls on countries to implement anti-corruption policies that promote a wider participation of society and to encourage the participation of individuals, civil society groups, non-governmental organisations in the prevention of corruption. In 2013, the Summary Report found that the civil society’s involvement in the ACN region is often formalistic, and real partnerships between governments and civil society had not yet been achieved. It was therefore recommended to ensure more meaningful involvement of society in anti-corruption work, in particular in the decision-making process. Overall in 2013-2015, the role of civil society, at least formally, is quite commonly recognised in public statements and anti-corruption policy documents. In some countries NGOs are represented in anti-corruption and other public councils or have suggested measures to prevent corruption that have been taken into account. There are examples of shadow monitoring of anti-corruption reforms by the civil society. Civil society groups are involved in concrete anti-corruption activities, in particular, on anti-corruption awareness raising, information campaigns or public education. Civil society provides valuable contribution to research on corruption and promotes access to information.

In several countries there are examples of civil society being involved in developing anti-corruption strategies and anti-corruption legislation. In **Georgia**, NGOs were involved in drafting of the 2015-2016 Anti-Corruption Action Plan and are involved in its implementation and monitoring, in particular by contributing to elaboration of the new monitoring methodology. Georgian NGOs are involved through thematic working groups of the Anti-Corruption Council, which are co-chaired by civil society and include NGOs as members.<sup>82</sup> In **Armenia**, more than 50 discussions and consultations on the draft anti-corruption strategy were organised in 2015, including by NGOs Transparency International Armenia, Armenian Young Lawyers Association, Protection of Rights Without Borders and Freedom of Information.<sup>83</sup> TI Armenia contributed to Armenia’s concept paper preceding the new anti-corruption strategy. In **Ukraine**, civil society has played a crucial role in developing anti-corruption legislation and policies following the Euromaidan events in 2014. The 2014-2017 Anti-Corruption Strategy and the following legislation were written with a significant contribution of civil society which also actively advocated their adoption and implementation.<sup>84</sup> In 2014, Transparency International **Kazakhstan** was involved in developing anti-corruption strategy of Kazakhstan, but not other active civil society

<sup>82</sup> OECD/ACN, Progress Update of Georgia, March 2015, pages 7-8, <http://goo.gl/IUh3Hh>.

<sup>83</sup> OECD/ACN, Progress Update of Armenia, March 2015, <http://goo.gl/JhgogZ>.

<sup>84</sup> For more information see the IAP Third Monitoring Round report on Ukraine, adopted in March 2015, <http://goo.gl/eV0AwO>.

members. The ACN report later expressed concerns that the strategy was developed in a closed manner, without a thorough and open analysis of corruption and failures of previous strategies.<sup>85</sup> The development process for the new Strategy (2015-2025) was more open, included more non-government stakeholders and online comments to the draft. The 2012-2015 **Azerbaijani** Anti-Corruption Action Plan also envisages involvement of civil society in monitoring its implementation.

Practically all the anti-corruption programmes in the ACN countries provide for involvement of the civil society. Examples can be found in recent anti-corruption programmes of Albania, Croatia, Georgia, Kyrgyzstan, Latvia, Lithuania, Serbia, Ukraine and Uzbekistan. Particularly rich in references to civil society participation is the **Ukrainian** Anti-Corruption Strategy 2014-2017. It recognised that real partnership with civil society was not achieved with previous strategies and highlighted the importance not only to consult civil society, but also to really work together on the legal framework, for example, on public service, public procurement or lobbying, to jointly monitor implementation of legislation, to develop surveys on corruption perception and awareness-raising programmes for general public together with civil society. **Kyrgyzstan**, in a 2013 Presidential Decree, recognised that real co-operation with the civil society has not been achieved yet and that it was an essential task of the country to involve civil society in the fight against corruption.<sup>86</sup> The Kyrgyz Anti-Corruption Action Plan 2015-2017 subsequently included several measures aimed at further involving civil society and strengthening its role. In **Uzbekistan**, the 2015 Comprehensive Plan of anti-corruption measures included measures to be implemented with civil society (for instance, anti-corruption awareness raising) or with academia (for example, sociological surveys on corruption). Useful examples from other ACN countries are Serbia's 2013-2018 Anti-Corruption Action Plan and Latvia's 2015-2020 anti-corruption programme.

Since 2013, the civil society organisations increasingly carry out alternative or shadow monitoring of governments' anti-corruption reforms, helping to have a more complete picture on the effectiveness and level of implementation of anti-corruption legislation. To support alternative monitoring by NGOs, in 2014 the ACN and TI Georgia developed the "Practical Guide: How to Conduct Monitoring by Civil Society. Istanbul Anti-Corruption Action Plan".<sup>87</sup>

In 2014, a shadow report on the implementation of the IAP recommendations in **Ukraine** was prepared by a coalition of NGOs and independent experts led by Transparency International Ukraine. In **Kyrgyzstan**, alternative reports about anti-corruption work of the government are prepared by the Anti-Corruption Business Council and the NGOs-led Anti-Corruption Forum. Nevertheless, the monitoring report expressed some criticism that not all NGOs were given the chance to participate in the preparation of such alternative reports in Kyrgyzstan.<sup>88</sup> The OSCE Office in **Tajikistan** initiated and has supported the process of alternative reporting by Tajik NGOs since 2013. It initiated discussions on the OECD ACN among NGOs and organised roundtables to share experience on alternative reports. Tajik NGOs have so far prepared two alternative reports on implementation of the OECD ACN recommendations. The third report is in the process of preparation.

There has been a positive trend of involving NGOs in anti-corruption councils and forums. One good example is **Georgia** where its Anti-Corruption Council (ACC) has ten members from civil society and seven members representing international organisations. NGOs also co-chair the Working Groups of the ACC. NGOs in Georgia are also a part of the NGO Forum within the international initiative "Open Government Partnership", which has monthly meetings. In 2014, **Mongolia** established a public council under the Law on Anti-Corruption involving 15 members from academia, civil society, mass media,

<sup>85</sup> OECD/ACN, Progress Update of Kazakhstan, March 2015, pages 3-5, <http://goo.gl/xhaU9Z>.

<sup>86</sup> Kyrgyzstan President's Decree № 215 on Measures to Eradicate the Causes of Political and Systemic Corruption in Public Bodies, see IAP Third Monitoring Round report on Kyrgyzstan.

<sup>87</sup> OECD ACN (2014), Practical Guide: How to Conduct Monitoring by Civil Society. Istanbul Anti-Corruption Action Plan, available at <http://goo.gl/tBUzGV>.

<sup>88</sup> IAP Third Monitoring Round Report on Kyrgyzstan, page 19, <http://goo.gl/jIN285>.



chamber of commerce, environmental association. In **Armenia**, the Anti-Corruption Council was established in July 2015 to oversee anti-corruption reforms. As recommended by the IAP, NGOs have been invited to be members of this Council. Nevertheless, the government proposed to include two NGOs, which was not considered sufficient, and NGOs for the time being participate only as observers. **Azerbaijan** was encouraged to increase civil society's participation in the Commission on Combating Corruption (CCC). At present, two NGOs and one independent expert are permanent members in the Working Group on Legislation under the Commission and four NGOs participated in the CCC's meetings. In **Kyrgyzstan**, in 2013 a working group on the implementation of the National Anti-Corruption Strategy was created under the Defence Council, and it includes independent experts and civil society representatives of Kyrgyzstan. They participate in corruption risk studies and development of sectoral anti-corruption action plans. Another good practice from Kyrgyzstan is the development since 2012 of Anti-Corruption Forums under the auspices of public institutions. In **Tajikistan**, representatives of civil society are members of the National Anti-corruption Council; however there was no information about the actual work and meetings of this Council or whether the civil society representatives have ever attended them.<sup>89</sup>

There are a number of examples of public councils advising specialised anti-corruption institutions. In **Kazakhstan**, for example, the former Financial Police, which for many years was the central anti-corruption body, had a Public Council for the Fight against Corruption and the Shadow Economy that involved NGOs and held meetings to discuss implementation of the anti-corruption strategy. In 2014, the President of Kazakhstan included three civil society members in the Commission on the Fight against Corruption, including the Chair of the Board of Transparency International Kazakhstan, the President of the Civic Alliance of Kazakhstan and the Chairman of the Nur Otan (governing party) Anti-Corruption Council, as well as a Mazhilis (lower house of Parliament) Deputy.<sup>90</sup> In 2015, the new Law on Public Councils was adopted in Kazakhstan, and the new Ministry of Civil Service Affairs, as well as other agencies, has established a Public Council on the new legal basis. In **Latvia**, the Corruption Prevention and Combating Bureau is advised by a public council, which has existed since 2004 and involves civil society representatives.

Civil society representatives are involved in public councils at other public institutions, which exist in many countries and can at times contribute to anti-corruption work. For example, TI **Azerbaijan** is involved in working group under the Ministry of Taxes on issues of simplification and digitalization of tax procedures. In **Kyrgyzstan**, public councils at various individual ministries and state agencies carry out monitoring of how anti-corruption measures are implemented in these bodies. In **Kazakhstan**, many public councils in public authorities have NGOs on the board. A similar trend of creating public councils under specific ministries exists in **Armenia**, where the councils are used as a means of communicating with civil society.

Increasingly civil society is consulted on measures aimed at fighting and preventing corruption. For instance, in **Georgia** civil society was involved in discussing what information should be pro-actively published on the websites of state bodies. The Georgian Young Lawyers Association provided a list of information to be proactively published and it was reflected in the legal amendments.<sup>91</sup> Other examples of measures discussed with the civil society in Georgia: the Civil Service Reform concept and the new Civil Service Code, the launch of e-procurement platform by the State Procurement Agency or electronic asset disclosure system by the Civil Service Bureau. Key anti-corruption reforms are systematically discussed within the framework of the ACC and its working groups or outside these groups.

Joint activities by state authorities and civil society is a practical way to involve civil society in fighting corruption. In 2013, in **Armenia** the NGO Armenian Young Lawyers Association, the Prosecutor

<sup>89</sup> IAP Progress Update on Tajikistan, October 2015, <http://goo.gl/Q7hkIr>.

<sup>90</sup> For more information see <http://goo.gl/Y64qrx>.

<sup>91</sup> IAP Third Monitoring Round Report on Georgia, <http://goo.gl/Y27ZKs>.

General's Office and other national and local level authorities jointly organized awareness raising events in different regions. The NGO Freedom of Information Centre and the Civil Service Council in Armenia had organized joint trainings for officials responsible for freedom of information. Armenian NGO "The Future is Yours", the Ministry of Education and Science and the Yerevan State University conducted joint training activities as well.

Civil society itself should also play an active role advocating for stronger anti-corruption policies and more vigorous implementation and enforcement. Civil society in **Ukraine** since the 2014 Euromaidan events has become a driving force behind many important anti-corruption reforms. In **Mongolia**, civil society was opposed to the law on amnesty passed in 2015, which allegedly was supported by some powerful interests and could have resulted in termination of many corruption cases investigated in Mongolia. Transparency International and its national chapter in Mongolia issued a statement calling on the Mongolian president to veto this law.<sup>92</sup> The President partly vetoed the law and, in September 2015, the parliament accepted the veto by excluding from the amnesty those accused of corruption and financial crimes.

**Table 8. How to involve civil society: Practical examples from anti-corruption strategies in 2013-2015**

<p><b>Albania: 2015-2020 Action Plan of the Inter-sectoral Strategy against Corruption</b></p> <p>Objective: Encouraging cooperation with the civil society</p> <p>Activities:</p> <ul style="list-style-type: none"> <li>• Reviewing the legal framework for reporting corruption cases by the general public</li> <li>• Involving patient associations in drafting laws dealing with public health</li> <li>• Strengthening the cooperation of the People's Advocate with the media through study visits of journalists and meetings with a network of reporters</li> <li>• Approving the Order of the Prime Minister to establish a consultative group on anti-corruption policies</li> <li>• Publishing an Annual Monitoring Report on the implementation of the action plan in 2014</li> <li>• Assessing the legal framework against the chapters of the UNCAC.</li> </ul>
<p><b>Georgia: 2015-2016 Anti-Corruption Action Plan</b></p> <p>Measures: Secretariat of the Anti-Corruption Council implements in partnership with civil society:</p> <ul style="list-style-type: none"> <li>• Annual revision of the Anti-Corruption Strategy and Action Plan based on the assessment of implementation level and identified challenges</li> <li>• Elaboration of a corruption risk assessment methodology</li> <li>• Ensuring the involvement of civil society, including business sector in anticorruption policy elaboration and implementation</li> <li>• Ensuring the involvement of civil society in the monitoring and evaluation process of the implementation of the Anti-Corruption Action Plan.</li> </ul>
<p><b>Latvia: 2015-2020 Anti-Corruption Strategy</b></p> <p>Objective: Improving whistle-blowers protection and public awareness about whistleblowing</p> <p>Existing situation: "[T]he NGOs indicate that (see the study of Transparency International Latvia 'Legal protection of whistle-blowers in Latvia' in 2012) in Latvia today still persist deficiencies in legal framework for protection of whistle-blowers, encouraging to adopt a special law on protection of whistle-blowers"</p> <p>Measures:</p> <ul style="list-style-type: none"> <li>• Developing the draft law on the protection of whistle-blowers</li> <li>• Provide in legislation that rights for NGOs to be claimants in civil and administrative procedures in cases of public interest, where there is no specific person who is victim.</li> </ul>

<sup>92</sup> IAP First and Second Monitoring Rounds Report on Mongolia, <http://goo.gl/mxN5qE>.

**Table 8. How to involve civil society: Practical examples from anti-corruption strategies in 2013-2015 (cont.)**

<b>Lithuania: 2015-2025 National Anti-Corruption Programme</b>
Objective: "The Programme shall be implemented by the ministries, the Special Investigation Service (...). Non-governmental organisations, the groups of society concerned and private sector entities may contribute to the implementation of the Programme and achievement of its objectives and tasks."
Measures: Inviting non-governmental organisations to contribute to: <ul style="list-style-type: none"> <li>• Ensuring the quality of administrative and public service provision, increasing the transparency and openness of decision making and procedures, accountability to the public and making the civil service more resilient to corruption</li> <li>• Developing anti-corruption education in the public and private sectors.</li> </ul>
<b>Ukraine: 2014-2017 Anti-Corruption Strategy</b>
Measures: Inviting non-governmental organisations to contribute to: <ul style="list-style-type: none"> <li>• Adopting, in cooperation with civil society, the legal framework to set up the body responsible for development and implementation of anti-corruption policy. This body shall have sufficient assurances of its independent operation. Representatives from civil society shall be eligible to contribute to the operation of this body</li> <li>• Engaging civil society in the development, implementation and monitoring of anti-corruption policy;</li> <li>• Carrying out (in partnership with civil society) an annual survey on corruption perception</li> <li>• Running pilot projects on "integrity pacts" in infrastructure projects or other projects entailing significant budget expenses through the creation of a trilateral (government – business – civil society) control mechanism over planning and implementation of such projects, including efficient cost delivery.</li> </ul>

## Awareness-raising and education

Informed citizens can indeed become strong allies for governments in their efforts against corruption. Well-planned, structured and targeted anti-corruption awareness and education measures are especially critical in the countries with systemic corruption, where society remains largely tolerant of bribe solicitation, conflict of interests or other forms of corruption and is even complicit in these practices.<sup>93</sup> Informing the public about the different forms of corruption, its causes and consequences as well as the measures undertaken by the government in response to it, can shape the citizens' attitudes, create intolerance of society to corruption, increase trust in the reforms, and stimulate society to join the anti-corruption effort. The table below shows the perception of citizens on how their governments are performing in the fight against corruption and the role of the citizens in the process. In the IAP countries, the percentage of citizens who agree that ordinary people can make difference in the fight against corruption is significant. Thus, well-designed awareness-raising activities and education could increase their engagement in the process of preventing and fighting corruption.

**Table 9. Global Corruption Barometer (2013), IAP countries**

	ARM	AZ	GE	KAZ	KGZ	MNG	UKR
How effective are the government actions against corruption (very effective, effective)	21%	69%	54%	59%	31%	25%	20%
Ordinary people can make difference in fight against corruption (strongly agree, agree)	37%	70%	72%	74%	38%	54%	29%

Source: [www.transparency.org/gcb2013](http://www.transparency.org/gcb2013). Note: Data is not available for Tajikistan and Uzbekistan.

<sup>93</sup> UN Guide for Anti-Corruption Policies (2003) offers some useful illustrations and a list of various activities for targeted audiences, pages 69-77, available at: <http://goo.gl/UmZ8jn>.



The UNCAC (Art. 13) obliges the state parties to “raise public awareness regarding the existence, causes and gravity of and threat posed by corruption” with the aim of engaging society in the process of preventing and fighting corruption. Governments have implemented various measures in response to this treaty obligation. The most recent anti-corruption policy agendas in the region (**Lithuania, Latvia, Estonia, Romania, Serbia**) contain dedicated objectives and measures on anti-corruption education and awareness.<sup>94</sup>

The ACN has been promoting awareness raising and education activities through the IAP monitoring and its thematic work.<sup>95</sup> The 2013 Summary Report from the second round of monitoring under the IAP showed that governments carried out a large number of anti-corruption education and awareness raising measures. However these activities were marred by the lack of a structured and systematic approach and assessment of the impact of these measures.<sup>96</sup>

The third round of monitoring therefore explored the following questions: Is the anti-corruption public education and awareness part of the government’s policy agenda? Are the activities systemic, structured and targeted, aiming at particular set of objectives or are they conducted spontaneously? Are the activities financed by the state budget or donor funding? Are the results of activities measured? Are the lessons learned taken into account for the next cycle of the policy planning?

The results of the third round monitoring showed increased volume and diversity of awareness-raising measures. Typically, the anti-corruption policy coordination or prevention bodies (or the line ministries in charge of anti-corruption policy) carry out relevant activities, often with donor support. There are several instances of joint government/NGO actions as well (**Armenia, Georgia, Kyrgyzstan**). The IAP countries have used variety of awareness-raising tools: trainings, seminars, meetings, roundtables, conferences, public discussions, competitions, hotlines, printed and mass media sources, and complaints websites. Sometimes these efforts have also included anti-corruption education in schools, universities’ curricula and even summer school programmes. Apart from the general anti-corruption topic, campaigns are designed to inform the public about specific policy reforms or initiatives—such as new legislation, new services or tools introduced in the public administration—and to facilitate their use. However, a major common challenge is still the lack of proper planning and targeting of these activities to the objectives contained in the action plans. The awareness-raising activities are also conducted in a scattered, non-systematic way, without assessing their impact.<sup>97</sup>

In **Georgia**, the new anti-corruption strategy and the action plan include a special section on anti-corruption education and awareness-raising efforts. Previously, awareness-raising activities were covered only in relation to specific areas of reforms, such as procurement, civil service reform, etc. New reforms accompanied by awareness-raising activities include, for example, newly adopted whistle-blower protection legislation, open data portal, various government services, etc. The development of the new Open Government Partnership Action Plan in 2014 featured a commendable campaign to foster public awareness and engagement. This campaign, which was conducted in cooperation with NGOs, used various materials to target different groups and regions. However, in so far as general anti-corruption reforms are concerned, the Georgian NGOs noted that the information provided to general public about

<sup>94</sup> The anti-corruption action plan of Romania includes a chapter on awareness-raising activities, such as public debates at the national and local levels, an anti-corruption program at schools, the training of teachers in anti-corruption in education, a portal for online notifications and an institutional mechanism for verification. Estonia’s Anti-corruption strategy makes anti-corruption awareness raising one of its three broad objectives. Likewise, Lithuania’s strategy includes awareness raising as one of the six objectives.

<sup>95</sup> OECD/ACN (2015), Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, pages 73-77.

<sup>96</sup> OECD/ACN (2013), Anti-Corruption Reforms in Eastern Europe and Central Asia, pages 38-40.

<sup>97</sup> With the exception of Mongolia, where external assessment of the public awareness campaign of IAAC has been commissioned and conducted by an NGO with the donor funding.

anti-corruption efforts is limited to media coverage of the ACC's activities and the publication of materials on the official web-page of the Ministry of Justice of Georgia. The government, however, pointed to its awareness raising campaign for students, which the Secretariat of the ACC launched in co-operation with the Civil Service Bureau and Training Centre of the Ministry of Justice of Georgia. As part of this campaign, public lectures and discussions on Anti-Corruption Policy and the new Civil Service Reform in Georgia have been held in 13 universities in Georgia.

In **Ukraine**, public participation and awareness raising on anti-corruption prior to 2014 was largely formalistic and ineffective. The Ministry of Justice organized several trainings, public events, round-table discussions and conferences. There were various mechanisms for involving the public in the decision-making process, but little is known about their actual implementation and effectiveness.<sup>98</sup>

**Azerbaijan** conducts a number of anti-corruption awareness-raising activities, including: newspaper articles, regular TV appearances and press conferences, regional roundtables and public discussions by NGOs with the support of the CCC, as well as a hotline and complaints mechanism. At the sector level, awareness-raising activities targeted corruption in social security, education and municipalities. A number of other awareness-raising activities are foreseen in the National Anti-Corruption Action Plan for 2012-2015: conducting an annual evaluation of the implementation of the Action Plan and publishing its results; organising special TV and radio programs and debates; launching awareness-raising campaigns to promote public trust in state institutions; including anti-corruption modules and competitions in secondary and tertiary educational institutions; leaflets and similar promoting materials. However, surveys suggest that there is still a need to seriously improve the awareness of Azerbaijani citizens in the fight against corruption.<sup>99</sup>

In **Armenia**, public education campaigns are mainly donor-driven. There are also some examples of joint actions of NGOs and the state bodies against corruption. Several state bodies conducted awareness-raising campaigns to inform the citizens about public services. However, there is still a lack of any government-led proactive and practical awareness raising campaigns, which is considered a clear shortcoming in light of the wide-spread pessimism and passive acceptance of corruption in the country and the low level of trust in the government's intention to fight corruption.<sup>100</sup>

In **Kazakhstan**, a massive amount of anti-corruption awareness-raising materials are produced (in 2013, the total number reached 7,103). Measures aimed at generating "zero tolerance to corruption among general public" is one of the objectives provided by the anti-corruption program for 2011-2015.<sup>101</sup> There are also campaigns focused on specific sectors, such as promoting "clean exams" in the education sector. At the same time, the government does not carry out any impact assessments on its awareness campaigns.

**Kyrgyzstan** has made good use of donor support to carry out meaningful awareness-raising and education activities, sending clear messages to the population about the harmful effects of corruption through various printed, broadcast and Internet media sources. It organised interactive radio-shows and broadcasted and launched interactive platform against corruption.<sup>102</sup> It has also developed good quality video and printed materials, including a short video about the alarming consequences of corruption and a manual entitled "How to defend rights and blow a whistle about officials' corrupt practices with the use of the internet".<sup>103</sup> The campaigns also included competitions among media representatives, poster contests and trainings. With donor support, authorities have regularly organised anti-corruption summer

<sup>98</sup> OECD/ACN (2015), Third Monitoring Round Report on Ukraine.

<sup>99</sup> OECD/ACN (2013), Third Monitoring Round Report on Azerbaijan.

<sup>100</sup> OECD/ACN (2014), Third Monitoring Round Report on Armenia, page 24.

<sup>101</sup> OECD/ACN (2014), Third Monitoring Round Report on Kazakhstan; Anti-Corruption Program of Kazakhstan for 2011-2015.

<sup>102</sup> See: <https://www.facebook.com/CorruptionKG>.

<sup>103</sup> Draft of the manual is available at <http://goo.gl/4rHsIS>.

schools for representatives of states bodies responsible for anti-corruption. As a result, subsequent changes have been introduced in the sectoral action plans of various public agencies. At the same time, these activities were not based on a clear methodology and justification for choosing the target groups and the types of activities, timeframe and sequences of “communication waves”.

**Tajikistan** carries out a number of anti-corruption education measures as well, among them seminars, training in secondary and vocational schools, meetings, conferences. However, these activities are *ad hoc* and not based on risk analysis. Most of the awareness-raising activities in Tajikistan are for the civil servants rather than the general public. They also tend to have a general nature and do not provide concrete information on either corruption risks or how to avoid corruption or conflict of interests. Awareness-raising activities have also been linked to the publication of survey results, which are widely disseminated throughout Tajikistan. There is no assessment of the effectiveness and efficiency of anticorruption measures in education and awareness raising of the public. Thus it is highly unlikely that these type of measures have any material effect on minimization of corruption risks in high-risk sectors.

In **Uzbekistan**, the Inter-institutional Council for Coordination Legal Awareness Raising and Education conducts a number of anti-corruption awareness-raising and education measures in collaboration with donor organisations. In this regard, the 2015 Action Plan includes measures to be implemented by the Ministry of Education, in particular: the development and implementation of training programs on anti-corruption issues at institutions of secondary, specialised secondary, vocational and higher education as well as the development and introduction of measures on legal awareness and legal education.

In **Mongolia**, awareness raising is included in the IAAC’s annual work programme and has a dedicated budget. The Prevention and Public Awareness Department of the IAAC planned and implemented the two most recent anti-corruption campaigns, with clear target groups and activities. These campaigns used various handbooks and manuals, TV programmes and other audio-visual materials. While an NGO conducted, with donor funding, an external assessment of the campaigns, this assessment seemingly concerned the process and management of the campaigns instead of their actual impact.

An ACN thematic study on the prevention of corruption highlighted successful awareness-raising campaigns in the region. Among them, **Serbia’s** awareness-raising campaign used a variety of communication methods and materials, including print, electronic media and social networks targeted to general public, state and local administration and business sector. **Latvia** had a targeted campaign on the health sector; **Georgia** organised public consultations on the OGP action plan, which included well-planned awareness-raising campaign across the country, conducted in cooperation with the civil society, academia and local media for specific target groups, such as media, local government, NGOs, political parties, students, teachers and professors. This effort was also notable for its use of a variety of tools, including online consultations, to reach these target groups. The ACN thematic study also provided examples on how to measure the impact of awareness-raising activities, along with quantitative indicators, such as the number of people reached by the campaign with breakdowns by various categories. Other measures include *ex post* evaluations using surveys, as in **Serbia**, to determine the percentage of citizens who are familiar with the campaign and remember the messages, etc. For its part, **Lithuania** used the increased number of persons reporting corruption () as another indicator to assess the success of its awareness-raising campaign.<sup>104</sup>

The countries are encouraged to make anti-corruption education a part of their anti-corruption policy agendas, conduct awareness-raising campaigns based on proper planning, target them to specific objectives, measure their impact and use the results of the campaign in the policy planning. Where specialised anti-corruption agencies exist, their role should be to implement such activities. For example, the STT of **Lithuania** promotes anti-corruption education and awareness-raising activities at schools,

<sup>104</sup> OECD/ACN (2015), Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, pages 73-74.

higher education and for general public.<sup>105</sup> The effectiveness of awareness-raising campaigns could be increased by adapting them to the targeted institutions, sectors or social groups and aligning them to the desired outcome. It is also worthwhile to conduct periodic assessments of awareness-raising activities to determine the effectiveness of such campaigns and their impact on corruption.<sup>106</sup>

#### Box 6. Examples of anti-corruption awareness-raising and education measures in the recent policy documents

Most recent anti-corruption policy documents in the region include anti-corruption awareness raising and education measures as one of the primary objectives.

##### **Lithuania: Anti-Corruption Programme (2015-2025)**

Measures: public anti-corruption education as an integral part of education; encouraging the private sector and non-governmental organisations to contribute; anti-corruption education of target groups of society and the fields of the public and private sectors at risk; reviewing, updating and carrying out anti-corruption education programmes at schools; formal education programmes in all schools; drawing up recommendations on anti-corruption education in the fields of the public and private sectors at risk; informal adult anti-corruption education programmes; creating and disseminating anti-corruption social advertising and anti-corruption social information; municipal bodies providing information on the reasons underlying corruption, the damage caused by corruption and their activities in tackling corruption through the media and by other means; implementing other anti-corruption education development measures in the public and private sectors.

Indicators: Share of respondents who have paid a bribe for public services within the last 12 months; not more than the indicated percentage. Share of respondents who tolerate corruption; not more than the indicated percentage.

Responsible Agencies: Special Investigation Service as an institution monitoring the achievement of the objective, also cooperating with the relevant state and municipal agencies to implement the task.

##### **Georgia: Anti-Corruption Action Plan (2015-2016)**

Measures: develop public relations strategy on anti-corruption issues; plan and implement campaigns; organize round tables, seminars, competitions and other activities; develop and implement anti-corruption curriculum in educational institutions.

Indicators: number of activities, number of participants, number of research available on anti-corruption issues.

Responsible Agencies: ACC, CSB, MoES

##### **Albania: Anti-Corruption Action Plan (2015-2017)**

Measures: developing a curriculum for secondary school; promoting professional ethics among the teaching personnel, organize national conference on combating corruption; raising awareness in relation to specific legislation, elections, and in the prison system; and designing and implementing an anti-corruption awareness campaign.

Indicators: number of participants in the activities, relevant draft documents and adopted regulations.

Responsible Agencies: Ministry of Education and Sports, MSLI.

Source: Anti-corruption policy documents made available to the OECD/ACN Secretariat.

## Anti-corruption preventive and policy coordination institutions

The UNCAC (Art. 6) obliges the State parties to ensure the existence of a body (or bodies) that prevent corruption, including by implementing, overseeing and coordinating anti-corruption policies. States should grant such bodies the necessary independence and resources to carry out their duties effectively, free from any undue influence.

There is no single model for the successful anti-corruption institutions.<sup>107</sup> In practice, preventive and coordinating functions can either be combined in one body or entrusted to different bodies. Countries are

<sup>105</sup> Source: <http://goo.gl/ZHDxYo>.

<sup>106</sup> OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, page 26.

<sup>107</sup> For detailed overview of the models see: OECD/ACN (2013), Specialised Anti-Corruption Institutions. Review of Models, revised edition, available at <http://goo.gl/1c8nKL>.

free to choose the model that fits their national political and legal systems. At the same time, whichever model is chosen, the necessary level of independence and resources for efficiency must be ensured. Sometimes, prevention and coordination functions are combined with repressive functions in multi-purpose anticorruption agencies, such as the Hong Kong Independent Commission against Corruption and the Singapore Corrupt Practices Investigation Bureau, which have been replicated in a number of other countries of the world such as Lithuania, Latvia, Poland, Moldova, Australia, etc.. In other cases, these functions are unified in a dedicated corruption prevention and policy coordination body (Albania, France, India, Netherlands, etc.). Finally, countries may also choose to spread these functions among a policy coordinating body and other agencies tasked with preventing corruption. Most of the IAP countries follow this model.

The IAP countries have made efforts to comply with their conventional obligation by assigning anti-corruption policy coordination and prevention function to a specific body or bodies. The previous Summary Report noted that “[s]ince 2008, the institutional framework for anti-corruption policy coordination and prevention has evolved in most IAP countries.”<sup>108</sup> By the time of the second monitoring round, all the IAP countries had designated national authorities entrusted with the above-mentioned functions. Therefore, the third round monitoring looked at how efficient these bodies are in practice by analysing the following aspects: their mandate and functions, their independence, capacity and resources, including secretariat support, their expertise, effectiveness and efficiency, their engagement with non-governmental stakeholders, and the transparency and visibility of their work. It is evident that most of these aspects are still challenging in the monitored countries.

The general trend in the IAP countries has been the interagency policy coordination or consultative councils with the functions of anti-corruption policy development, coordination and monitoring of implementation of anti-corruption policy, with only few aspects of prevention work. Two of the IAP countries departed from this general trend and have dedicated anti-corruption bodies: the Independent Authority against Corruption of **Mongolia** and the National Agency for Corruption Prevention of **Ukraine**.

As regards the mandate and independence, in **Azerbaijan, Georgia** and **Kazakhstan**<sup>109</sup> the legal basis for these bodies lie in primary legislation, whereas in **Kyrgyzstan** and **Tajikistan**, policy coordination bodies are created based on the executive decrees. In most cases, the decisions of these bodies do not have binding force and need to be validated by the decisions of the executive, such as cabinet of ministers, in order to be mandatory. In **Kyrgyzstan**, sectoral action plans elaborated by the Defence Council Working Group are normative acts. Based on the monitoring of their implementation, prosecutors issue orders for subsequent action that are mandatory for the agency in question. The statutory independence of **Ukraine’s** new national corruption prevention agency is provided for in the law that created it.

Capacity, resources, secretariat support and funding are challenging elements for most of the anti-corruption policy coordination agencies in the IAP region. Most of these institutions are supported by secretariats based in one of the government agencies (e.g., the Ministry of Justice in **Georgia**, the Government Staff in **Armenia**, the Defence Council Secretariat in **Kyrgyzstan** etc.) Most of these bodies do not have dedicated budgets and instead operate within the budgets allocated to the implementing agencies for anti-corruption programmes. Two exceptions in this regard are **Kazakhstan** and **Azerbaijan**,<sup>110</sup> where the anti-corruption agencies have their own budgets. In most of the agencies, there is a need for anti-corruption training to increase the specific anti-corruption expertise of the staff

<sup>108</sup> OECD/ACN (2013), Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges, 2009-2013.

<sup>109</sup> After the adoption of a new law on countering corruption in November 2015.

<sup>110</sup> It should be noted that the Anti-Corruption Directorate in Azerbaijan is a law-enforcement agency with only limited preventive functions.

with the analytical duties. At the same time, there are examples of good performance with limited resources and innovative solutions in such areas as coordination and monitoring of implementation of the anti-corruption policy documents (**Georgia, Kyrgyzstan**).

The main operational tools for these bodies are working group meetings or expert level task force sessions. Some of these working groups are quasi-institutionalized as they exist on a formal basis, have appointed chairs and even their own rules of procedure. This is the case for **Georgia**, where the Expert Level Working Group of the ACC as well as the thematic working groups and the Open Government Georgia's Forum are structured groups, co-chaired by the government agencies and the representatives of NGOs. The terms of references and procedures of their work are approved by the ACC. **Armenia** has recently restructured its system and regulated the operations of the Expert Task Force and the Monitoring Division of the Government Staff. In other instances, such working group meetings are not held regularly, and sometimes are even chaotic with no pre-defined procedural requirements (**Tajikistan**). In addition, governments need to further strengthen the transparency and visibility of these bodies.

In general, the composition of these policy coordination institutions includes government agencies that are responsible for various aspect of the anti-corruption work. Some of them also include non-governmental organisations as well. Strong non-governmental representation in the policy coordination bodies is important to ensure a sufficient level of policy dialogue and to come up with the meaningful, evidence-based programmes. Accordingly, these bodies should include not only relevant authorities from all branches of power, but also meaningfully involve NGOs, academia, business associations, international organizations, donors and other key players. The general trend for the IAP countries so far is limited or formalistic involvement of non-governmental entities. There are, however, positive examples where NGOs are permanent members of the councils and even co-chairs of the working groups (**Georgia** and **Tajikistan**). Additionally, some governments have attempted to include NGOs in the monitoring process on a structured systematic basis (**Kyrgyzstan** and **Georgia**). In some IAP countries, one or more civil society organisations are permanent members of the anti-corruption councils (in **Georgia, Armenia**), while in others they only participate in working groups. The level of civil society engagement is increasing; however, the criteria for selection and procedures for membership are still not sufficiently clear, transparent or objective.

Along with general coordination bodies, most of the IAP countries have public councils attached to the public agencies, which serve as forums for discussing policy and legislative initiatives (as described in the section above on public participation in fighting corruption).

It is indeed difficult to come up with the indicators of efficiency for anti-corruption policy coordination bodies other than a decreased level of corruption or the level of implementation of a country's policy documents. However, it is important that each body has a set of measureable objectives and is evaluating the impact of its work against specific indicators. In general, there is a lack of any performance evaluation or monitoring mechanisms to measure the efficiency of these bodies' work.<sup>111</sup>

---

<sup>111</sup> OECD/ACN (2013), *Specialised Anti-Corruption Institutions. Review of Models*, revised edition, page 15.

Table 10. Dedicated anti-corruption policy and prevention institutions in the IAP countries (as of July 2016)

Country	Institution	Brief description
Armenia	Anti-Corruption Council	Inter-agency policy coordination institution chaired by the Prime Minister; has NGO representation (NGO representatives not determined yet). Secretariat: Monitoring Division of the Government Staff Office.
Azerbaijan	Commission on Combating Corruption	Policy coordination and prevention institution under the President with wide statutory functions, including policy development, awareness raising and asset declaration monitoring. Consists of 15 appointed members from three branches of power. Secretariat: unit under the President.
Georgia	Anti-Corruption Interagency Council	Inter-agency policy coordination institution; includes representatives of NGOs, business sector and international organisations. Secretariat: Analytical Department of the Ministry of Justice.
Kazakhstan	National Anti-Corruption Bureau of the Ministry for Civil Service Affairs	Law-enforcement agency with preventive and investigative powers. Ministry also includes Department of Anti-Corruption Policy.
	Presidential Commission for the Fight against Corruption	An advisory body tasked with developing proposals on sectoral and regional anti-corruption issues.
Kyrgyzstan	Defence Council Working Group under the President	In charge of policy development, co-ordination and monitoring; has a Secretariat.
	General Prosecutor's Office and its Anti-Corruption Interagency Co-ordination Council	Co-ordinates anti-corruption work of law-enforcement and other state bodies.
Mongolia	Independent Authority against Corruption	Specialised anti-corruption agency; functions include: policy coordination, prevention, corruption research, public awareness-raising and education, investigation of corruption offences and monitoring assets declarations.
Tajikistan	Agency for State Financial Control and Fight against Corruption	Law enforcement agency with some preventive functions, including awareness raising, strategy and action plan monitoring.
	National Anti-Corruption Council of the Republic of Tajikistan	Inter-agency consultative body including civil society chaired by the Prime Minister.
Ukraine	National Council on Anti-Corruption Policy	High-level co-ordination mechanism, an advisory body to the President; includes representatives of civil society, business sector and local self-government.
	National Agency for Corruption Prevention	The Agency's functions include: anti-corruption policy development and monitoring; enforcement of anti-corruption restrictions; verification of asset declarations; anti-corruption screening of draft legal acts; protection of whistle-blowers; public awareness raising and international co-operation.
Uzbekistan	Department for Fighting Economic Crime and Corruption of the Prosecutor General's Office	Co-ordinates policy development and supports monitoring through an inter-agency working group.

Source: information provided by the governments, IAP monitoring reports and OECD/ACN secretariat research.

### Country specific overview

As mentioned above, all monitored countries have to some extent developed or transformed their anti-corruption policy coordination and prevention bodies. Some major changes as well as some remaining challenges are described below.

In **Kyrgyzstan**, anti-corruption capacities have improved since the previous monitoring round. However, efficiency and coordination remain a challenge. The anti-corruption institutional set-up in Kyrgyzstan is fairly complex, involving various agencies with overlapping mandate and often duplicating each other's work in practice. Furthermore, the framework is extremely unstable and subject to frequent changes



without any particular rationale. At least six different structures/institutions are dealing with anti-corruption policy co-ordination and prevention in Kyrgyzstan as of mid-2016: a) a Defence Council Working Group under the President and its Secretariat; b) the Government Administration's special unit dealing with anti-corruption among other issues;<sup>112</sup> c) the Prosecutor General's Office, which is mandated by law to co-ordinate the anti-corruption work of the law enforcement and other state agencies and has recently established an anti-corruption interagency co-ordination mechanism/council under the Prosecutor General; d) an Anti-Corruption Co-ordination Council under the Government Administration, which was established in late 2015, reportedly as a permanent consultative-coordinating body<sup>113</sup> involving CSO representatives working on the proposals on anti-corruption measures; e) the Anti-Corruption Service of the Security Committee, which together with enforcement functions has the mandate for corruption prevention and awareness raising;<sup>114</sup> and f) the Ministry of the Economy—which used to have anti-corruption policy unit in charge of developing methodological material and raising capacity on anti-corruption as well as coordination between the focal points of various agencies—was reassigned anti-corruption functions that were previously transferred from it to the Government Administration. Further, there are numerous anti-corruption public councils, forums and platforms exist for NGOs and businesses.

The Agency for the State Financial Control and Fight against Corruption of the Republic of **Tajikistan** is the main corruption prevention and policy body in Tajikistan. Following an IAP recommendation, a 2010 Presidential Decree established the National Anti-Corruption Council of the Republic, which is chaired by the Prime Minister. The council reports to the President of the Republic and functions as a consultative body on coordination of activities of the state authorities and engagement of the civil society in the prevention and fight against corruption. It includes representatives of the legislative, judicial and executive authorities (at the level of ministers), as well as law enforcement bodies. However, in practice, the role of the Council is limited and it has only met a few times, most recently in December 2015.<sup>115</sup> The procedure for NGOs to apply for membership in the Council is unclear.

Until recently, the Agency for the Fight against Economic and Corruption-Related Crimes (the Financial Police) of **Kazakhstan** has performed anti-corruption policy and prevention functions. A major change in the country's institutional framework took place in August 2014, when the Financial Police was dissolved and the new Agency for Civil Service and Anti-Corruption Affairs was established through a Presidential Decree.<sup>116</sup> The newly created Agency was tasked with corruption prevention and anti-corruption policy development, as well as the law enforcement functions related to the detection and investigation of corruption crimes.<sup>117</sup> In December 2015, this Agency was dissolved yet again and a new Ministry for Civil Service Affairs of the Republic of Kazakhstan was established. It also serves as a body responsible for fighting corruption under the law and the Presidential Decree. The new Ministry included in its structure the National Anti-Corruption Bureau – a law enforcement agency that has both preventive and investigative powers.<sup>118</sup> In addition, a separate Department of Anti-Corruption Policy was established within the Ministry with some analytical and preventive functions. According to Kazakhstan's authorities, these institutional changes are supposed to strengthen the fight against

<sup>112</sup> With the recent changes the Ministry of Economy's Anti-Corruption Policy Unit was moved to the Government Administration. However, the unit was soon abolished and coordination of anti-corruption work was transferred to another unit that has less staff.

<sup>113</sup> Decree of the Government of Kyrgyz Republic of 15.09.2015 no 454.

<sup>114</sup> Decree of the President of the Kyrgyz Republic on "Establishment of the Anti-Corruption Service in the State Committee of National Security".

<sup>115</sup> Presidential Decree no. 968 of 14 December 2010 prescribes that the Council shall meet at least once per year.

<sup>116</sup> President's decree of 6 August 2014, No. 883, "On measures to improve further public administration in the Republic of Kazakhstan".

<sup>117</sup> Regulations of the Agency.

<sup>118</sup> See news article in Russian at <http://goo.gl/GveYfR>.



corruption in the corruption. Furthermore, an advisory body to the President, an Anti-Corruption Commission, has existed since 2002 and is tasked with developing proposals on sectoral or regional anti-corruption issues. The commission, however, does not work on the general anti-corruption policy.

In **Ukraine**, the institutional framework for prevention and fight against corruption was substantially reshuffled by legislation adopted in October 2014 by the new authorities that came into power after the Euromaidan revolution. The third monitoring round report noted that establishing the legal basis for the National Agency for Corruption Prevention and the National Anti-Corruption Bureau (a specialised investigative agency for high level corruption cases) “presents a major breakthrough in the reform of the anti-corruption institutions in Ukraine. However, as neither of these bodies is created in reality yet, it is too early to assess the effectiveness of this reform.”<sup>119</sup> Prior to these changes, anti-corruption policy coordination and prevention functions were divided between the National Anti-Corruption Committee; a Government Agent on Anti-Corruption Policy, which was placed within the Government Secretariat and only had three supporting staff members; and the temporary anti-corruption policy coordination functions of the Ministry of Justice, which were implemented by a unit of 11 staff members. Not only was the previous institutional set up ineffective on paper, but none of these institutions proved to be efficient in practice. Some cosmetic changes were introduced in the institutional framework throughout the period of the third monitoring round, but they did not make the framework efficient. The Ministry of Justice was the only state body that worked on the anti-corruption policy with the narrow mandate of reporting on implementation of the anti-corruption Programme.

The IAP monitoring evaluation considered the lack of progress up through 2014 to reflect a lack of strategic vision and political will for change. In October 2014, the dysfunctional National Anti-Corruption Committee was abolished. The new National Council on Anti-Corruption Policy, a high-level coordination mechanism, including representatives of civil society, the business sector and local self-government, was established as an advisory body to the President. More importantly, the 2014 Law on Prevention of Corruption envisaged establishment of a new body, the National Agency for Corruption Prevention (NACP), with important guarantees for the independence of its members (concerning their selection, appointment and dismissal, as well as funding procedures and remuneration levels) and oversight by the Public Council. The Agency’s functions include: anti-corruption policy (corruption research and analysis; developing, coordinating and monitoring implementation of the anti-corruption policy); verification of asset declarations (monitoring of submission of electronic declarations and the lifestyle of persons authorized to perform state or local self-government functions, as well as the verification and publication of these declarations on a single web-portal); protection of whistle-blowers; methodological support to anti-corruption work of other state and local self-governance bodies; endorsement of anti-corruption programmes to be adopted in all public agencies; public awareness raising and international cooperation. An additional function of supervising political party and election financing was added in October 2015. These bodies remained dysfunctional for some time. The Anti-Corruption Policy Council was only launched in September 2015, and it has held several meetings without any tangible results so far. It took a lot of time for the Government to form the minimum composition of the five-member NACP; as of March 2016, the NACP only had four members, while the selection process for the fifth member was on-going. The Agency is expected to become operational during the summer of 2016. Meanwhile, the post of the Government Agent has not been abolished and the anti-corruption units/officers in the executive bodies have not yet been subordinated to the NACP.

The anti-corruption policy and coordination mechanism has remained largely unchanged in **Armenia** since 2011. The third monitoring round assessed the Anti-Corruption Council of Armenia, with its Monitoring Commission, as largely inefficient. The Government agreed with this conclusion and planned

<sup>119</sup> OECD/ACN (2015), Third Round Monitoring Report on Ukraine, page 25.

to change the existing framework, in particular by increasing the Council's administrative support.<sup>120</sup> A slightly remodelled Anti-Corruption Council, chaired by the Prime Minister of Armenia, started its operation in February 2015. The Monitoring Division of the Government Staff Office now serves as the secretariat of the Council, with only three staff members. The Council is also supported by an expert task force. One major change is that two seats in the Council have been granted to NGO representatives; however, various NGOs have reported that these seats have not been filled due to the very strict criteria for membership. Several CSOs believed that the Council in its current form cannot effectively lead the coordination and monitoring of the anti-corruption policy in Armenia, mainly due to the lack of a sufficient budget. One of its major weaknesses was considered to be the lack of a formally defined role for NGOs in the process of monitoring. The efficiency of the Council remains to be assessed in the future.<sup>121</sup>

In **Azerbaijan**, the Cabinet of Ministers and the Commission on Combating Corruption (CCC) are the coordinating institutions for the implementation of the country's anti-corruption strategy. The 2013 Summary Report stated that "The Commission is considered a well-established and operational body with permanent yet small secretariat." However, as noted in the third round monitoring report, the capacity of the Commission on Combating Corruption could be further strengthened and more resources provided to its Secretariat. It is important to include civil society in the work of the CCC on a permanent basis, and the verification of asset declarations have to be strengthened as well. Although the CCC is established by law, its membership (mainly comprised of high-ranking public officials and politicians) and the lack of the clear procedures for appointment or dismissal of the members raises questions as to its independence from potential political influence. The CCC has not achieved visible results in such important spheres as measuring or conducting surveys on corruption, assessing corruption risks and the integrity of public institutions, or organising effective awareness-raising work.

**Georgia's** Anti-Corruption Council (ACC) has been operating since 2008, with its legal basis provided in the Law on Conflict of Interests and Corruption in Public Service. It is an interagency coordination body that is currently accountable to the Government of Georgia (after the changes in the powers of the President in the constitution and the subsequent amendment of legislation in 2013). The composition of the Council includes public agencies, NGOs, businesses and international partner/donor organizations. The Minister of Justice of Georgia chairs the Council. It operates through an Expert Level Working Group, which mirrors the composition of the Council and has a broader representation of the non-governmental sector. The third round monitoring report on Georgia noted that the "ACC has been a leading body in co-ordinating the formulation and implementation of the anti-corruption policy, but its efficiency appears to be low." Major changes took place on the operational level, and the dedicated thematic working groups co-chaired by the government and civil society representatives carried out intense and substantial work in the process of defining the new anti-corruption policy by drafting the anti-corruption strategy and the action plan. The Secretariat of the Council is provided by the Analytical Department of the Ministry of Justice. While it has been slightly expanded and its expertise has been strengthened, it still suffers a major shortcoming in the lack of dedicated personnel and resources, which could seriously undermine its efficacy. Other deficiencies remain the capacity of its secretariat and its dependence on the political leadership, as well as its lack of power to issue binding decisions and weak accountability. At the same time, during the third round of monitoring, the Secretariat demonstrated high efficiency, despite its limited resources. For example: it coordinated the working process of nine thematic working groups, drafted the assessment report of the anti-corruption strategy and the action plan with the involvement of civil society, streamlined the ACC's procedures for operation, developed and made operational the model for a coordination mechanism for the Open Government Partnership Georgia's Forum, conducted a large-scale public consultation process on the Open Government

<sup>120</sup> Transparency International (2015), *The State of Corruption: Armenia, Azerbaijan, Georgia, Moldova and Ukraine*, page 12.

<sup>121</sup> OECD/ACN, *Progress Update of Armenia*, October 2015, available at <http://goo.gl/CIkG6H>.

Partnership Action Plan throughout the whole country, drafted the Freedom of Information Law and developed a simple and operational mechanism for monitoring of implementation of anti-corruption policy. Taking into account its powers and resources, the ACC has reached higher level of efficiency and has shown good performance in terms of inclusion, transparency, high quality of strategic policy development and monitoring of its implementation.

In **Uzbekistan**, the anti-corruption policy and coordination is entrusted to various authorities (the President, the Parliament, and the Cabinet of Ministers and other public institutions at the national and local levels) as well as the Department for Fighting Organised Crime and Corruption of the Prosecutor General's Office. The latter provides support to anti-corruption efforts on daily basis. The IAP monitoring recommended a stronger mechanism to coordinate development and implementation of anti-corruption programme.<sup>122</sup>

In **Mongolia**, the Independent Authority against Corruption (IAAC) is a specialised agency in charge of the fight against corruption, including: prevention, corruption studies, public awareness-raising and education, investigation of corruption offences, reviewing assets and income declarations of public officials. The IAP monitoring criticised the allocation of all the mentioned functions in one agency, which it cited as one of the reasons for agency's inefficiency. It recommended narrowing the mandate of the IAAC to focus on investigations of high-level corruption crimes. In addition, the need to increase its resources and to abstain from political interference in the appointment of its leadership has been emphasized.

Similar arrangements of anti-corruption policy coordination can be found in other ACN countries such as **Lithuania's** Interdepartmental Commission for the Coordination of the Fight against Corruption (functioning since 2003), the Inter-ministerial body for coordination of activities against corruption of the FYR of **Macedonia**, and the Anti-Corruption Agency of **Serbia**.<sup>123</sup> In **Romania**, the coordination functions are performed by the Ministry of Justice through high-level coordination meetings and five cooperation platforms, which function like the working groups found in the IAP countries. A similar arrangement exists in **Croatia**, where the Independent Anti-Corruption Sector in the Ministry of Justice coordinates the implementation of the Anti-Corruption Strategy and Action Plan. In **Estonia**, the Ministry of Justice also performs the anti-corruption policy coordination function. In other cases the dedicated corruption prevention institutions perform coordination functions, e.g., in **Latvia** the Corruption Prevention and Combating Bureau has the task of coordinating the cooperation of state institutions that have been assigned tasks in the anti-corruption programme.<sup>124</sup>

Overall, the third round monitoring reports demonstrated the remaining challenges in the functioning of the anti-corruption policy coordination and prevention agencies in the region. Some of the challenges are of institutional or legislative nature, while others are related to the political leadership and proper resource allocation to ensure higher efficiency. As noted in the ACN Thematic Study on Prevention these institutions "often struggle with lack of real political support, administrative resources and qualitative implementation of anti-corruption measures that often does not depend from them directly."<sup>125</sup> At the same time, some existing mechanisms can be efficient without any need for further institutional reforms if they receive a decent level of political and administrative support.

<sup>122</sup> OECD/ACN (2012), IAP Joint First and Second Monitoring Rounds report on Uzbekistan, pages 20-22, <http://goo.gl/vno99d>.

<sup>123</sup> For detailed information see Chapter 14 in the OECD/ACN Thematic Study on Prevention of Corruption in the Public Sector; OECD/ACN (2013), Specialised Anti-Corruption Institutions.

<sup>124</sup> The Law of the Corruption Prevention and Combating Bureau, Item 2, Paragraph 1, Section 7.

<sup>125</sup> OECD/ACN (2015), Thematic Study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, page 23.

## Conclusions and recommendations

The previous Summary Report concluded that “in the ACN region there seems to be space to increase efficiency of corruption prevention work, developing a more clear vision what needs to be done, giving sufficient resources to implement preventive measures and more systematically assessing their results.”<sup>126</sup> Since the second monitoring round, visible improvements can be seen in the anti-corruption policy development, coordination and monitoring mechanisms in the region. Strategies and action plans became more focused, some of them are evidence-based and take into account the evaluation of existing corruption situation and corruption risks in various sectors. Coordination mechanisms have been improved. Operational tools have been elaborated and enhanced. Civil society involvement in policy development has increased. There are positive examples of including a wide range of stakeholders in the process of policy documents development, yet participation in the process of the policy implementation monitoring is mostly limited. Anti-corruption awareness raising and education measures have been increased and diversified, though they still lack a targeted approach. New tools emerged allowing civil society to participate in the process of monitoring. Nevertheless, these tools are yet to be tested. In the future civil society, the business community and academia could play a more meaningful role and could be more actively involved in the anti-corruption reform.

Major challenges for the IAP countries remain the lack of a solid basis for strategic documents, the lack of any assessment of the measures’ feasibility, deficient budget planning, the absence of specific timelines and measurable indicators to assess the level of implementation. The efficiency of existing programmes is not properly assessed, and the effects of the measures against corruption are not evaluated. Anti-corruption policy development and coordination institutions also still lack necessary resources and independence to perform their functions.

Visible improvements can be noted in various policy sectors, such as service delivery or regulatory simplification. Whereas the trend can be regarded as positive, the level of implementation by the governments of their own programmes still remains low, and overall the level of corruption in the region remains high.

In the fourth monitoring round it will be crucial to place emphasis on how much the policy documents address existing corruption risks and challenges, including at the local level; to follow up on the efficiency of the operation of the newly elaborated monitoring instruments in practice; and to assess how existing mechanisms promote higher performance. Furthermore, assessing the sources and contents of the strategies vis-a-vis existing corruption risks as documented in the available literature or reported by interlocutors, as well as the budgetary resources accompanying policy documents, would be important for the monitoring.

### Recommendations:

#### Anti-corruption policy documents

- Develop anti-corruption policy documents through a meaningful consultation with a wide range of the relevant stakeholders from civil society, academia, international partners and donors, business and the general public.
- Ensure that anti-corruption policy documents are realistic, affordable and enforceable, accompanied by necessary budget for implementation.
- Ensure that policy documents are practical instruments, with clear measures and specific time frames and measurable result-focused indicators.

---

<sup>126</sup> OECD/ACN (2013), *Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges, 2009-2013*.

- Ensure that anti-corruption policy documents are based on a needs assessment and target the actual risks of corruption; to achieve this, conduct assessments of existing challenges using a wide range of sources, including risk analysis.
- Regularly review and update anti-corruption policy documents taking into account changing context, challenges and needs.
- Ensure an operational mechanism for co-ordinating and monitoring the implementation of measures and for assessing the efficiency of the anti-corruption policy documents with the involvement of the civil society. Publish the results of the monitoring to ensure accountability.

### **Anti-corruption research**

- Conduct corruption research on a regular basis in order to measure the level of corruption, perceptions and experience of corruption, trust in public institutions and the impact of anti-corruption measures.
- Use the results of corruption research in anti-corruption policy making, monitoring and evaluating impact of anti-corruption measures.
- Publish and widely disseminate the results of corruption studies.

### **Public awareness raising and education**

- Make anti-corruption public information and education campaigns a part of the anti-corruption policy documents.
- Organise well-planned and targeted public awareness campaigns to ensure broad public engagement in the process of the development and wide support for implementation of the anti-corruption reforms. Engage civil society in the process of development and implementation of the awareness-raising campaigns.
- Send strong messages to citizens about intolerance of corruption and encourage public participation in the fight against corruption.
- Incorporate anti-corruption education at various stages of the education process.
- Support implementation of policy documents with a regular public information campaigns about practical solutions and the rights and duties of citizens facing corruption, as well as with targeted awareness-raising activities aimed at the most corruption-prone sectors and assess their outcomes.

### **Anti-corruption policy co-ordination and prevention institutions**

- Ensure that the body responsible for the anti-corruption policy co-ordination and monitoring be provided with a clear mandate, adequate powers, as well as the human and financial resources necessary for effective and independent work, including at the local level. Strengthen the reporting obligations of such institutions.
- Provide permanent dedicated secretariat with the staff specialised in anti-corruption.
- Designate persons responsible for reporting and co-ordination with the central body/secretariat in each implementing agency.
- Strengthen the capacity of public authorities in the development and implementation of sectoral anti-corruption measures, provide them with analytical and methodological support, ensure co-ordination among the anti-corruption focal points.

- Establish a donor co-ordination mechanism to ensure effective support of the donors to the implementation of the anti-corruption strategy and other anti-corruption, integrity and good governance programmes.
- Increase visibility of the anti-corruption policy co-ordination mechanism, in particular by preparing and publishing regular reports on its work and by reporting regularly to the parliament.

*Chapter 3.***CRIMINALISATION OF CORRUPTION AND LAW ENFORCEMENT**

This Chapter analyses the state of play with criminalisation of corruption in Eastern Europe and Central Asia, including bribery and other corruption offences, corporate liability, the definition of a public official, sanctions and confiscation, statute of limitation and immunities, international cooperation and mutual legal assistance. It notes that countries in the region have achieved significant progress in bringing their national legislation in compliance with international anti-corruption standards. However, as a result of conservative legal thinking and the traditionally slow development of the criminal law, these countries have not yet achieved full compliance with international standards. As a result, bribery offences often lack necessary elements, trading in influence is not always criminalised, confiscation of corruption proceeds is not always possible and immunity provisions often provide disproportionate protections against prosecution. The Chapter also examines the capacity of law-enforcement bodies to fight corruption. Many countries have demonstrated progress in meeting international standards concerning anti-corruption law-enforcement bodies, but adequate specialisation, institutional and procedural autonomy, and resources remain an issue. Concerning the investigation and prosecution of corruption cases, countries need to continue building up their capacity to use modern investigative methods and to conduct financial investigations. There is also a poor track record in prosecution of high-level corruption in practice that has to be addressed by the countries.

The third round of monitoring under the Istanbul Action Plan revealed that further progress had been made in meeting international standards in the area of criminalisation of corruption, especially in **Armenia, Azerbaijan, and Ukraine**. However, despite all their previous efforts, several countries have yet to fully align their criminal law with the relevant well-established international standards.

**Criminalisation of corruption and harmonisation of legislation**

International standards require the criminalisation of corruption. Criminal sanctions provide the necessary level of deterrence and punishment of such serious wrongdoing as corruption. Through a range of investigative tools, criminal law and procedures allow for the most effective means available to detect and prosecute corruption.

Therefore, systems in which administrative and criminal sanctions for bribery and other corruption offences exist in parallel have been consistently criticised in the Istanbul Action Plan monitoring reports. From the IAP countries, only **Kazakhstan** and **Tajikistan** preserve administrative liability for core corruption offences like bribery, along with sometimes competing criminal law provisions. **Ukraine** initially had similar provisions, but gradually removed them to comply with IAP and GRECO recommendations. The last competing provisions were revoked in October 2014, when the law removed the administrative sanctions for receiving illegal gifts by a public official (which could also qualify as accepting a bribe).

While relevant provisions (either general covering all administrative offences or relating to the specific corruption-related administrative offence) often state that the administrative offence is applicable only

when the criminal one is not, this is not a satisfactory delineation of two types of infringements. Such an arrangement may itself facilitate corruption because it assigns discretion to the prosecution or courts in qualification of the offence.

In some cases, the two types of offences are separated through a threshold approach, i.e. the offence becomes criminal when it involves a benefit in excess of a certain threshold. The goal is supposedly not to punish minor offences with a criminal sanction. However, such an approach fails to meet the international standard that requires criminalisation of bribery regardless of the value of the benefit. Moreover, all countries in the region use the concept of *de minimis* crime, which allows authorities to drop prosecutions of misdeeds that have all the formal elements of a crime but are considered negligible. Another way to address this is to reform the criminal and administrative law and introduce the concept of minor criminal offences (misdemeanours) that will cover some minor crimes and serious administrative offences (which are often of criminal nature anyway).

#### Box 7. Administrative liability for bribery offences

**Kazakhstan** revised its Code of Administrative Offences in 2014, but kept the administrative offences that compete with the criminal bribery offences. For example, Articles 676 and 677 sanction the provision by a natural person to a person authorised to exercise state functions (or the latter's receipt of) illegal material benefits, gifts etc., if such action does not contain the elements of a criminal act. This is mirrored in the Criminal Code (also revised in 2014; Articles 366-367), which explicitly excludes the first-time receiving of a gift by a public official if there was no prior agreement and if such gift was provided for prior legal action (inaction) and was less than about EUR 11 (in 2016).

The Code of Administrative Offences of **Tajikistan** provides for administrative liability for officials who receive additional remuneration or for anyone who gives such remuneration to the official. No separation with the criminal offence of passive/active bribery is envisaged.

Source: Code of Administrative Offences of Kazakhstan, 2014, as amended; Code of Administrative Offences of Tajikistan; IAP monitoring reports.

For the purposes of Article 367 of the **Kazakhstan** Criminal Code (discussed in Box 7 above), the definition of “gift” is broad and includes money gifts. This provision is intended to cover low-value gifts presented as a gratitude to public officials after a public service was provided, but it could be seen as contradicting international standards, because it encourages the culture of corruption in the public institutions (allowing monetary gifts distorts the understanding that no gratitude should be due for the provision of public services).

Most IAP countries also have special laws on the fight against corruption, which define the notion of “corruption” and provide a list of corruption and/or corruption-related offences. Such laws usually establish a framework for anti-corruption measures and, when it comes to liability for corruption offences, refer to special provisions – e.g. administrative and criminal codes. The latter approach allows, in most cases, to avoid contradictions, because administrative and criminal liability is based solely on the specific codes.

#### Box 8. Definition of corruption

The new law of **Kazakhstan** on Countering Corruption (enacted in January 2016) defines corruption as:

The “illegal use by [public officials] of their official (service) powers and related opportunities in order to obtain or extract personally or through intermediaries property (non-property) benefits and advantages for themselves or third parties, as well as bribery of such officials by providing them benefits and advantages”.

The new law of **Ukraine** on Corruption Prevention (enacted in April 2015) defines corruption as:

“[T]he use by a [public official] of granted to him official authorities or associated with them opportunities to obtain unlawful benefit or receipt of such benefit or receipt of a promise / offer of such benefit for himself or others, or respectively the promise / offer or giving of an unlawful benefit to the [public official] or upon his request to other persons or entities with a view to persuade the person to unlawfully use granted to him official authorities or associated with them opportunities”.

Source: Law of Kazakhstan on Countering Corruption (2015); Law of Ukraine on Corruption Prevention (2014).



However, general anti-corruption laws may bring about unnecessary confusion by providing, for instance, different definitions of public officials subject to liability or definitions of undue advantages, etc. Such definitions may also contradict other laws regulating specific sectors of public administration (e.g. laws on civil service). The IAP monitoring reports therefore recommended harmonising general anti-bribery laws with other legislation, most notably with administrative and criminal codes.

A new trend in the IAP countries is to establish a category of “corruption crimes” that attract special general rules about sanctioning, release from liability, statute of limitations, etc. For instance, **Ukraine** in 2014 introduced for the first time a list of “corruption crimes” which included the following offences: Misappropriation or embezzlement of property by abuse of service position; Misappropriation of weapons using one’s office; Misappropriation of various types of drugs using one’s office; Misappropriation of documents using one’s office; Misappropriation of weapons by military servicemen; as well as the “core” bribery or abuse of office offences and the diversion of budgetary funds. Not all of these crimes constitute “corruption” in a strict sense or may not be even related to corruption.

Such “corruption crimes” are excluded from a number of Ukrainian Criminal Code provisions that allow for the release from criminal liability or punishment, in particular: provisions on effective regret; conciliation with the victim; transfer of person to one’s bailment; change of situation; the possibility to impose a milder sanction than the one provided for in the law, if a person is recognized as not socially dangerous; release from serving the punishment with probation; conditional release from serving the sentence; replacement of the unserved part of a sentence with a milder sanction; release from serving the punishment due to amnesty; etc. These provisions were often used to release persons convicted of corruption from serving real sentences, rendering criminal liability ineffective in Ukraine (see also section on sanctions below).<sup>127</sup>

The concept of “corruption crimes” was introduced in the Criminal Code of **Kazakhstan** back in 2003. The new Criminal Code enacted in 2015 revised the list of “corruption crimes”, which now includes: Misappropriation or embezzlement of other person’s property entrusted to a public official; Fraud by a public official; Fake entrepreneurship by a public official; Issuing of fake invoice by a public official; Creation and leadership of a financial pyramid when committed by a public official; Money laundering by a public official; Smuggling when committed by a public official; Raidership of a legal entity when committed by a public official; Organisation of illegal gambling business by a public official; Abuse of office; Excess of authority in order to obtain benefits; Illegal participation in the commercial activity; Hindering of entrepreneurial activity; Passive and active bribery; Intermediation in bribery; Forgery in office; Official inaction; Abuse and excess of office by a military serviceman. The 2015 Criminal Code also prohibited applying to corruption crimes provisions concerning: conditional release; release from the criminal liability due to conciliation with the victim; release from the liability due to bailment; and release from the liability due to expiration of the statute of limitations.

The IAP Third Monitoring Round report criticised the lack of coherent criteria in Kazakhstan for identifying crimes as ones involving corruption. Unlike the previous Criminal Code, the new Code does not contain the condition of “obtaining by the offenders of material benefits and advantages” to identify a “corruption crime”. In addition, the new Criminal Code (like the previous one) does not consider as corruption offences those committed in the private sector (e.g. offences in Chapter 9 “Criminal offences against the interests of service in commercial and other organisations”, including commercial bribery). Nor is the offence of “Obtaining illicit remuneration” (Art. 247 2014 CC), which effectively covers bribery of employees who are not officials (i.e. do not perform managerial, administrative or financial functions), deemed corruption.<sup>128</sup>

<sup>127</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 42, <http://goo.gl/nYQrkc>.

<sup>128</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 34-36, <http://goo.gl/fyZRq4>.

### Box 9. Criminalisation of corruption in Kyrgyzstan

**Kyrgyzstan** is the only IAP country which has a specific offence called “Corruption”; it exists in addition to ‘traditional’ bribery offences. Under Criminal Code (Art. 303), corruption is ‘an intentional act of creating a stable illegal nexus of one or several officials who have authority with separate persons or groups in order to illegally obtain material or any other benefits and advantages, as well as provision by them of such benefits and advantages to natural and legal persons, when it creates a threat to interests of society or state’. It is punished with severe sanctions – imprisonment of 8-15 years with mandatory confiscation for basic offence and 15-20 years of imprisonment with confiscation for aggravated offence.

The IAP Second Monitoring Round report concluded that this offence overlapped with other corruption-related crimes (e.g. bribe-giving and receiving of a bribe, elements of organised crimes) and was contrary to the rule of law principle of legal certainty. “Despite the convenience, which such a broadly formulated offence may bear for the law enforcement bodies, it goes against fundamental principles of fair trial to keep it in the law and use in practice. If there are loopholes in other corruption offences, they should be filled but not compensated with such a “catch-all” offence.” The Third Monitoring Round report confirmed the concern with the regard to this offence which was used in practice. “Its vague wording overlaps with other corruption crimes creates conditions for abuse, selective application and corruption.”

Source: IAP monitoring reports on Kyrgyzstan.

## Bribery offences and their elements

Active and passive bribery is criminalised in all IAP countries. However, the relevant offences often lack elements required by international standards and have other deficiencies that may hinder their effective enforcement. A number of IAP countries have revised their criminal legislation to comply with these standards and recommendations offered by the monitoring mechanisms, including the Istanbul Action Plan.

### *Offer, promise or giving / acceptance, request*

According to the OECD Anti-Bribery Convention, the CoE Criminal Law Convention and the UN Convention against Corruption, an active bribery offence should cover the intentional offer, promise<sup>129</sup> or giving of an undue advantage to a public official. Each element should be criminalised as a complete and autonomous active bribery offence. This is mirrored by the requirement to criminalise as complete and autonomous offences the request (solicitation) of an undue advantage and acceptance of an offer/promise of such advantage, as well as the receipt of the undue advantage as such. The request (solicitation) is different from extortion, i.e. situations where the bribe-taker coerces another person to give a bribe under threat of adverse consequences.

Such requirements are explained by the need to clearly denounce such acts and eliminate any possible legal loopholes. The autonomous nature of such offences means that, for example, the request of an undue advantage, offering or promising of an undue advantage do not require the other side to respond positively to or even to have knowledge of such request, offer or promise.

"Promising" occurs where the briber commits himself to give an undue advantage later (for instance, after the official performed the act requested by the briber) – whether solicited by the bribe-taker or not. "Offering" may cover situations where the briber shows his readiness to provide the undue advantage. "Giving" occurs when the briber actually transfers the undue advantage. "Requesting" (or "soliciting") occurs when an official indicates to another person, explicitly or implicitly, that he will have to pay a

<sup>129</sup> GRECO in some of its Third Evaluation Round reports (e.g. on Croatia, §48, <http://goo.gl/OGQWvd>; and Estonia, §69, <http://goo.gl/jupDH9>) accepted that “promise” may cover “offer” of an undue advantage, but only when unambiguous court practice was provided to prove it. At the same time in its Third Evaluation Round report on Slovakia (§104; <http://goo.gl/VOSVGV>) GRECO noted that “the ‘offering’ is a particularly important element in that it covers bribes which are proposed (but not accepted) and often leads to the actual “giving” or “promising” of an undue advantage (e.g. thus referring to situations where potential offenders “test” their interlocutor)”.

bribe in order that the official act or refrain from acting. “Acceptance of an offer or promise of a bribe” occurs when the official, in response to such offer or promise, indicates his willingness to accept the future bribe. “Receiving” means the actual taking of the undue advantage by the official or someone else.<sup>130</sup>

The offence of promising or offering a bribe should not require the acceptance of such an offer or promise from the bribe-taker. Otherwise, the offence of offering or promising would not be a completed offence in its own right, as it would require reciprocal action on the part of the intended recipient. This would also violate the general criminal law understanding of bribery that should not require mutual agreement of the both parties: the actions of the person initiating bribery in any form should be sufficient and should be prosecuted. For instance, in its Third Round Evaluation report on **Latvia** GRECO recommended deleting the words “if the offer is accepted” from the active bribery incriminations and this recommendation was implemented with amendments enacted in 2013.<sup>131</sup>

The OECD WGB explained the difference between “offer” and “promise” in the following way: An offer occurs when a bribe-giver on his/her own initiative expresses his/her readiness to pay the public official. A promise is broader and includes a bribe-giver’s definitive commitment to pay that is prompted by the public official.<sup>132</sup> A “promise” also covers situations where the briber commits him/herself or agrees with the official to give an undue advantage later, e.g. after the public official has performed the act requested by the briber. An “offer” may cover situations where the briber shows his/her readiness to give the undue advantage at any moment.<sup>133</sup> In **Lithuania**, in addition to “promise/offer/acceptance”, the situations when the briber “agreed to give” bribe in response to solicitation or when the bribe-taker “promises to accept” a bribe are also explicitly covered.<sup>134</sup>

All IAP countries have criminalised the giving and receiving of a bribe in public sector. Since the second round of monitoring three more IAP countries have criminalised the other required offences: in 2012, **Armenia** criminalised request and acceptance of offer/promise of undue advantage; in 2013-2014, **Ukraine** criminalised promise of undue advantage and acceptance of offer/promise, as well the request of undue advantage, in all bribery offence (in the public and private sectors). Armenia and Ukraine are now fully compliant with the relevant requirements.<sup>135</sup> In its new Criminal Code adopted in 2015 (to be enacted in 2016), **Mongolia** also criminalised the offering and promising of a bribe, as well as acceptance (but not solicitation) of the bribe. See the table below for an overview of all IAP countries.

**Ukraine** is the only IAP country that defined the terms “offer” and “promise” in the Criminal Code: *an offer* means expressing to the person who is an employee of an enterprise, institution or organization, or a person providing public services, or to a service person [public official] of an intention to give unlawful

<sup>130</sup> See Explanatory Report to the CoE Criminal Law Convention, §§ 36, 41-42, <http://goo.gl/iamLFu>, and OECD Publication “Corruption. Glossary of International Standards in Criminal Law”, 2008, pages 26-27, <http://goo.gl/dnOodh>. A different interpretation of “promising/offering” can be found in the UNCAC Legislative Guide, according to which promising implies an agreement between the bribe giver and the bribe taker and offering does not imply the agreement of the prospective bribe taker (§197; available at <https://goo.gl/8zTV6l>).

<sup>131</sup> GRECO (2014), Addendum to the Second Compliance Report on Latvia, Third Evaluation Round, page 3, <http://goo.gl/9n2loK>.

<sup>132</sup> OECD/WGB (2014), Phase 1 Report on Latvia, 2014, §12, <http://goo.gl/nxkMo6>.

<sup>133</sup> OECD/WGB (2015), Phase 2 Report on Latvia, 2015, §198, <http://goo.gl/DqmTPO>.

<sup>134</sup> Criminal Code of Lithuania, Article 227, cited from GRECO (2013), Second Compliance Report on Lithuania, Third Evaluation Round, pages 4 and 7, <http://goo.gl/abHwU4>.

<sup>135</sup> The Russian Federation which, as other former Soviet Union countries, has opposed criminalization of offer/promise, their acceptance, request of a bribe as completed offences, developed a draft law that would introduce most of the respective provisions in its Criminal Code. The draft law, however, had not been adopted as of March 2016. See GRECO (2014), Compliance Report on the Russian Federation, Third Evaluation Round, pages 6-7, <http://goo.gl/Gf09a5>.

benefit, while *a promise* means – an expression of such intent with indication of the time, place and manner of giving unlawful benefit (note to Art. 354 CC).

**Table 10. Criminalisation of elements of bribery offences in the IAP countries**

	Offer	Promise	Request (solicitation)	Acceptance of offer or promise
Armenia	✓	✓	✓	✓
Azerbaijan	✓	✓	✓	✓
Georgia	✓	✓	✓	✓
Kazakhstan	—	—	—	—
Kyrgyzstan	—	—	—	—
Mongolia	✓	✓	—	✓
Tajikistan	—	—	—	—
Ukraine	✓	✓	✓	✓
Uzbekistan	—	—	—	—

Source: IAP monitoring reports, OECD/ACN secretariat research.

Countries lacking relevant provisions often refer to inchoate (incomplete) offences – attempt and preparation – which in conjunction with active/passive bribery offence are supposed to cover offer/promise, their acceptance, as well as the request of a bribe. However, such approaches have generally not been accepted by the IAP monitoring. This was confirmed in the third round of the IAP monitoring.

The IAP monitoring is based on the conclusion that the inchoate offences in case of bribery are not functionally equivalent for the following reasons:

Firstly, preparation of a bribery offence is typically only prosecutable as an inchoate offence with regard to bribery offences of certain gravity (e.g. in **Kazakhstan** and **Tajikistan** – only grave and especially grave offences).

Secondly, attempted bribery takes place when the offence was not completed due to reasons beyond the person's control. In addition, some criminal codes also provide for the exclusion of liability in case of voluntary abandonment of the crime, i.e. ceasing by perpetrator's own will of preparation or attempt at the bribery. This means that, for instance, if a person requests a bribe, but then withdraws his request before receiving payment, he is exempted from liability. Equally, a person will avoid criminal liability if he withdraws his offer or promise of a bribe before receiving an unambiguous refusal from a potential bribe-taker.<sup>136</sup>

Thirdly, incomplete crimes often draw lower sanctions. In **Tajikistan** for example, the term or amount of sanction cannot exceed half (for preparation) or three-fourths (for an attempted crime) of the maximum term or the amount of the most severe sanction envisaged by the respective article of the Special Part of the Criminal Code for the completed offence. In **Uzbekistan**, the sanction for both preparation and attempt will only be three-fourths of the penalty foreseen for the crime. In **Mongolia**, the sanction cannot exceed half (for preparation) or two-thirds (for attempted crime) of the most severe sanction envisaged for the offence. As noted in one of the IAP second monitoring round reports, such a 'discount' is disproportionate to the gravity of the offence in the form of promise or offer of a bribe (since it concerns

<sup>136</sup> See e.g. IAP Second Round report on Kazakhstan, page 28; <http://goo.gl/gqiE0m>; IAP Joint First and Second Monitoring Rounds report on Mongolia, page 33, <http://goo.gl/8IKeV3>.

an intentional attempt to bribe an official, which was not completed due to circumstances beyond the control of the offender).<sup>137</sup> The OECD Working Group on Bribery, with regard to similar provisions in the Criminal Code of the **Russian Federation**, noted that such criminal penalties might not be effective, proportionate and dissuasive.<sup>138</sup>

Fourthly, liability for the promise or offering of a bribe is much more effective than trying to cover the same acts through attempt. It is sufficient to prove the intentional promise or offer of a bribe, rather than trying to prove intention to give a bribe which was not realised due to circumstances beyond the person's control. The same is true concerning the request (or the acceptance of an offer or promise) of a bribe.

Finally, the prosecution of a promise or offer of a bribe as an incomplete crime does not cover all practical situations. For example, an oral promise or offer alone, without the performance of minimal actions that may be needed to constitute preparation for bribery or attempted bribery, will go unpunished.<sup>139</sup>

One of the arguments used against criminalising the offer or promise of a bribe (or its request) as an autonomous offence is that the simple offer or promise shows only an intention on which the persons has not acted yet. And such intention does not bear sufficient danger to be fully criminalised.<sup>140</sup> But this goes directly against the international standards, which treat the promise, offer, solicitation, and acceptance of a bribe (as well as the acceptance of the promise or offer itself) as actions that pose sufficient public danger to be treated as complete offences and punished accordingly. For instance, in its report on the third evaluation round of the **Russian Federation**, the GRECO noted that “the offer and the promise, the request and the acceptance of an offer or promise which are key components of the bribery offences established under the Convention need to be explicitly criminalised in order to clearly stigmatise such acts, submit them to the same rules as the giving and receiving of a bribe and avoid loopholes in the legal framework”.<sup>141</sup>

Interestingly, a slightly different approach can be found in the explanatory materials to the UNCAC. The Legislative Guide for the Implementation of the UNCAC states that some national legislation might cover the promise and offer under provisions covering the attempt to commit bribery. In this view, separate offences for promising or offering a bribe would only be needed when this is not the case.<sup>142</sup> At the same time, in a later UNODC publication, it was noted that it may be possible to cover related acts under the provisions of the general part of the national penal code, for example, regarding preparation for or attempt to commit a crime, “although it may warrant further study as to whether this approach can be a substitute for full criminalization. Moreover, one should be aware of the fact that the use of such general provisions runs the danger of applying significantly lower sanctions and raises issues of disparate sentencing regarding comparable transgressions. This is the reason why the autonomous incrimination of the different forms of basic corrupt behaviour is generally viewed as a better practice. Having said that, the provisions on attempt and preparation that are used should be clearly delineated and not contain

<sup>137</sup> IAP Second Round report on Kazakhstan, page 29.

<sup>138</sup> OECD/WGB (2012), Phase 1 Report on Russia, §12, <http://goo.gl/RTqKmn>. See also GRECO (2012), Third Evaluation Round report on Russia (§55, <http://goo.gl/KAUu9d>), which criticises reliance on inchoate offences to cover offer, promise, request of bribe and their acceptance.

<sup>139</sup> Contrast, for example, an Belgian judgment of 18 May 2001, where the Oudenaarde criminal court considered that the question put by a person to the policeman accompanying him in the police car for a breathalyser test after a serious road accident (“Couldn't something be arranged? It's just the two of us”) could be deemed to be an offer. The individual was convicted of active bribery. (GRECO Third Evaluation Round report on Belgium, page 25; <http://goo.gl/68idU1>).

<sup>140</sup> See OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 36-37, <http://goo.gl/k0Y1Pn>.

<sup>141</sup> GRECO (2012), Third Evaluation Round Report on Russia (Theme I), pages 22-23, <http://goo.gl/J3zacr>.

<sup>142</sup> Legislative Guide for the Implementation of the UNCAC, §197; available at <https://goo.gl/8zTV6l>.



limitations (e.g. ‘subject to the condition that public danger results from the act’) or make exceptions (e.g. for ‘crimes of lesser gravity’) that restrict criminal liability as foreseen by the Convention.”<sup>143</sup>

None of the four IAP countries that have criminalised these offences are currently enforcing them actively; countries continue to rely on the traditional offences of giving and receiving of a bribe, while being reluctant to prosecute the mere offer or promise of a bribe. For example, the Third Round Monitoring report on **Azerbaijan** noted that the authorities reported about four cases that had been opened under this qualification. However, the discussions held with the practitioners met at the on-site visit highlighted the fact that the practice of investigating bribery offences is rather traditionally oriented to proving the offence of giving or receiving a bribe, and not instances when the transaction – or pact – is incomplete. The prosecutors and investigators also pointed out that, in practice, the stages of this offence are difficult to qualify, and they are faced with evidentiary challenges. Although there is no legal requirement for the prosecutor to prove the existence of a “pact” between the bribe-giver and the bribe-taker, it appears that, in practice, the bribery offence is only considered proven when the bribed public official is caught in the act of receiving the bribe. The courts seem to expect this level of evidence.<sup>144</sup>

### *Directly or indirectly*

According to international instruments, active and passive bribery should be explicitly criminalised when committed either directly or indirectly, *i.e.* through intermediaries. Intermediaries are often used as a conduit to deliver a bribe or otherwise arrange a bribery act. Therefore the fact that an undue advantage was promised, offered, or given (or requested or accepted) indirectly, via an intermediary, should not preclude the liability of the bribe-giver or bribe-taker.

When the words “directly or indirectly” or their equivalent are not included in the bribery offence, bribery through intermediaries may still be covered through provisions on complicity. In such cases, it should not matter whether the intermediary acted in good or bad faith, (*i.e.* whether the intermediary was aware that the benefit was intended to bribe or not). The use of complicity provisions should also not lead to the exclusion of the liability of the main offenders – the briber and bribe-taker. Therefore, to eliminate any loopholes and inconsistent enforcement, it is recommended to include words “directly or indirectly” in the text of the relevant offences.

The criminal codes in all the IAP countries, except for **Ukraine** and **Mongolia** (for passive bribery), explicitly cover bribery committed directly or indirectly through intermediaries. At the same time, for Ukraine the IAP monitoring report accepted the conclusion of GRECO that situations involving indirect commission of corruption offences are criminalised in Ukraine through general rules on complicity. In particular, Article 27.2 of the Criminal Code of Ukraine provides that a criminal offence can be committed by the principal offender “directly or through other persons, who cannot be criminally liable”. If the intermediary knows about the bribery, he is regarded as an accomplice according to Article 27 of the Criminal Code.<sup>145</sup>

Though not required by international standards, active and passive bribery through intermediaries can be supplemented with a special offence of mediation in bribery. This exists in **Armenia, Kazakhstan, Kyrgyzstan, Uzbekistan**, as well as in other ACN countries, such as **Belarus, Croatia, Estonia, Latvia, and Russia**. However, in this case, the legislators should avoid creating an overlap with provisions on complicity in the bribery offences, in particular, avoiding the possibility of applying different

<sup>143</sup> Study on the state of implementation of the United Nations Convention against Corruption under the topics of Corruption Criminalization, Law Enforcement and International Cooperation, page 15, available at <https://goo.gl/zlM9SP>.

<sup>144</sup> OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, page 29, <http://goo.gl/8aWNU8>.

<sup>145</sup> GRECO (2011), Third Evaluation Round report on Ukraine (Theme I), §66, <http://goo.gl/7dZ1RT>; OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 45.

sanctions.<sup>146</sup> While providing a useful tool to prosecute the acts of intermediaries, such an approach should not lead to focus being shifted away from the main acts of bribery.

### *Third party beneficiaries*

Another necessary element of bribery offences is that the intended recipient of the undue advantage (namely, for the official himself or another person or entity) should not matter, as long as the advantage is provided in exchange for the official to act or refrain from acting in the exercise of official duties. The goal of this requirement is to cover situations when the official solicits an advantage for a relative, a political party, trade union, charity, company, or even a third party to whom the official owes a debt, etc. The third party beneficiary can be a natural person or an entity, and it should also be immaterial whether the third party beneficiary had a criminal intent or participated in the corruption offence.

Criminal code provisions on bribery in **Armenia, Azerbaijan, Georgia** and **Ukraine** explicitly cover bribery for other persons; the Criminal Code of **Kazakhstan** includes this element only in the passive bribery offence. As for other IAP countries, **Mongolia's** criminal code does not specifically include third party beneficiaries. **Kyrgyzstan's** criminal code also does not address third party beneficiaries, with regard to passive bribery, excluding the extortion of a bribe. At the same time, third party beneficiaries are partly covered in these countries through explanatory resolutions of the respective Supreme Courts.<sup>147</sup> These resolutions establish that a bribe may be intended for persons close to an official (e.g., relatives, friends, etc.) rather than for the official *per se*. However, such a clarification is not fully compliant with international instruments, which state that third party beneficiaries can be any persons, natural or legal, close to the official or otherwise.<sup>148</sup> A similar resolution of **Uzbekistan's** Supreme Court provides a different clarification and states that bribery should cover situations where a bribe is received by “other persons” with an official’s knowledge or upon the official’s instruction.

Finally, the criminal codes of some IAP countries (**Kyrgyzstan, Tajikistan, and Ukraine**) specify that a bribe may be received by an official in exchange for an action or omission for the benefit of the bribe-giver or persons represented by him. However, this concept of the third party beneficiaries is different from what is required by international standards and relates rather to the bribery through intermediaries.

### *Undue advantage*

One of the elements of bribery offences required by international standards, which IAP countries have difficulty transposing into their law, is the concept of an “undue advantage”.<sup>149</sup> Namely, their laws often do not capture the broad scope of the notion “advantage”, which includes a benefit that is intangible (i.e. a benefit not constituting or represented by a physical object and having a value that cannot be precisely measured) and/or non-pecuniary (not relating to or consisting of money). As noted in the Explanatory Report to the CoE Criminal Law Convention, the key aspects of the term “undue advantage” is that the offender (or any other person, for instance a relative) is placed in a better position than he was before the commission of the offence and that he is not entitled to the benefit.<sup>150</sup> According to another explanation,

<sup>146</sup> See, for example, GRECO Third Evaluation Round report on Armenia (§82, <http://goo.gl/rYzbny>) and Estonia (§71, <http://goo.gl/jMyCUH>).

<sup>147</sup> Such resolutions, usually issued by the Plenary of the Supreme Court, constitute an established practice in most of the IAP countries. They summarise judicial practice in certain area and, while not being formally binding, are authoritative and usually are strictly followed by lower courts.

<sup>148</sup> See, among others, the GRECO Third Evaluation Round report on Russia (§57, <http://goo.gl/7u1Sxq>).

<sup>149</sup> According to the OECD Anti-Bribery Convention (Art. 1), “any undue pecuniary or other advantage”.

<sup>150</sup> Explanatory Report to the Council of Europe Criminal Law Convention on Corruption (ETS No. 173), §37, <http://goo.gl/qiu9KG>.



the term “advantage” is intended to apply as broadly as possible and to cover all instances “insofar as they create or may create a sense of obligation on the side of the recipient towards the giver”.<sup>151</sup>

Examples of intangible advantages include: sexual relations; any form of preferential treatment, such as handling a case within a swifter timeframe than normal; better career prospects, including promotion and horizontal transfer to another post within the organisation; symbolic or honorific advantages like titles or distinctions; positive mass media coverage; scholarships; unremunerated internships; passing school or other selection procedures; etc. Practice in some ACN countries extends the notion of an advantage to include any benefit as long as it can have a market value, thus, in principle, including some intangible benefits. However, such an approach hardly satisfies the full extent of international requirements, because there is no legal market for some benefits (e.g. prostitution) and some are difficult to assess in terms of the market value (e.g. an honorary distinction).<sup>152</sup>

The definitions in ACN countries vary considerably. Some in fact define “advantage” broadly. Thus, in **Lithuania**, after amendments adopted in 2011, a “bribe” was defined to mean “any unlawful or undue advantage in the form of any property or other personal benefit (whether material or immaterial, of an identifiable market value or without such value) ...”. From the IAP countries, **Armenia** (“money, property, property right, securities or any other advantage”), **Azerbaijan** (“any material or other values, privileges or advantages”), **Georgia** (“money, securities, property, material benefit or any other undue advantage”) and **Ukraine** (after amendments in February 2015: “monetary funds or other property, advantages, privileges, services, intangible assets, any other benefits of non-tangible or non-pecuniary character”) cover tangible and intangible, pecuniary and non-pecuniary benefits. Other IAP countries, however, exclude non-material and non-pecuniary advantages either directly in the criminal code or in the explanatory resolution of the Supreme Court.

The advantage treated as an object of a bribery offence should also qualify as “undue”. For the purposes of the CoE Criminal Law Convention “undue” means “something that the recipient is not lawfully entitled to accept or receive”. Therefore, “undue” aims at excluding advantages permitted by the law or by administrative rules as well as gifts of very low value and socially acceptable gifts.<sup>153</sup> This allows countries to authorise acceptance of small value gifts not exceeding certain amount that are not being given in exchange for an act or omission by an official. In other words, if an advantage is aimed at influencing a public official it should be qualified as an “undue” one and trigger liability. The limit for acceptable gifts is usually set in the civil service laws, laws on prevention of corruption and conflict of interests (See section of this report on acceptable gifts – chapter on integrity in the civil service).

### ***Other elements***

According to international instruments, bribery offences are committed in order for the official “to act or refrain from acting in the exercise of his or her official duties” (UNCAC).<sup>154</sup> The intention is to encompass situations when an official, in exchange for a bribe, acts outside his competence (duties, functions). Such acts or omissions are made possible in relation to the official’s function (duties), but not necessarily included in his formal scope of authority. Therefore, laws that limit bribery to situations

<sup>151</sup> Study on the state of implementation of the United Nations Convention against Corruption, page 16, available at <https://goo.gl/zIM9SP>.

<sup>152</sup> See, for example, GRECO Third Evaluation Round report on Lithuania, §70, <http://goo.gl/l73O7y>.

<sup>153</sup> Explanatory Report to the Council of Europe Criminal Law Convention on Corruption (ETS No. 173), §38, <http://goo.gl/20PCcR>.

<sup>154</sup> UNCAC, Articles 15 and 16. CoE Criminal Law Convention – “to act or refrain from acting in the exercise of his or her *functions*”; OECD Anti-Bribery Convention – “act or refrain from acting in relation to the *performance of official duties*”.

when an official is induced to act (or refrain from acting) within the scope of his powers (competence) are considered to not be compliant with international standards.<sup>155</sup>

From the IAP countries, criminal codes of Azerbaijan and Georgia use the wording similar to that of the conventions. Other countries use provisions which, if taken literally, narrow the scope of the bribery offences<sup>156</sup> (see the table below).

**Table 11. “To act or refrain from acting in the exercise of his or her official duties”**

Country	Criminal Code provisions
<b>Armenia</b>	“...for the purpose of carrying out or not carrying out an action by an official, within the scope of powers thereof ...”
<b>Kazakhstan</b>	“... for actions (inaction) ... , if such actions (inaction) are included in the official powers of the person authorised to exercise state functions ... or if such person due to his official status can facilitate such actions (inaction) ...”
<b>Kyrgyzstan</b>	“... for action (inaction) ... if such action (inaction) is included in the official powers of the official or if due to his official status he can facilitate such action (inaction) ...”
<b>Mongolia</b>	“in exchange of implementing his/her official duty in the interest of giver of the bribe”
<b>Tajikistan</b>	“... for actions (inaction) ... , if such actions (inaction) are included in the official powers of the official... or if due to his official status he can facilitate such actions (inaction) ...”
<b>Ukraine</b>	“... for carrying out or not carrying out ... of any action with the use of authority or official status granted to him ...”
<b>Uzbekistan</b>	“... for carrying out or not carrying out ... of a certain action which an official should have or could have committed with the use of his official status ...”

Source: IAP monitoring reports, OECD/ACN secretariat research.

The IAP countries of **Armenia, Kazakhstan, Kyrgyzstan, Mongolia** and **Tajikistan** provide for aggravated bribery offences when they involve illegal actions (or inaction) committed by officials. This partly addresses possible problems with definition of bribery, which is narrower than provided in the international standards.

The Criminal Code of **Kyrgyzstan** (Articles 310 and 311) previously contained two separate passive bribery offences – “bribe-reward” and “bribe-subornation” – which were distinguished by the existence of prior agreement between the briber and the bribe-taker. “Bribe-reward” usually took place when the benefit was given to the official after the act was committed without any prior agreement as a kind of “thank you”. The Second Round Monitoring Report for Kyrgyzstan under the IAP criticised the use of “prior agreement” as an element for triggering different sanctions and thus creating possibility for abuse through the use of various passive bribery offences. In 2012, both articles were repealed.

The wording of international instruments (“in order that”, “for him or her to”) refers to situations when an undue advantage is provided (offered or promised) before the act or omission by the official. Legislation of most of the IAP countries (in some cases through interpretative resolutions of the judicial

<sup>155</sup> See, among others, GRECO Third Evaluation Round reports on Croatia (§51, <http://goo.gl/39iXTs>), Romania (§101, <http://goo.gl/D5t6V2>), Slovenia (§80, <http://goo.gl/2dBXxV>), the FYR of Macedonia (§69, <http://goo.gl/JFMmE5>). See also Commentaries to the OECD Anti-Bribery Convention, §19, <http://goo.gl/zZ8mfo>.

<sup>156</sup> GRECO in its Third Round Evaluation reports on Armenia (§83, <http://goo.gl/Mhd6ql>) and Ukraine (§68, <http://goo.gl/AFsPTO>) accepted assurances of the authorities that despite wording of relevant provisions, bribery offences are, in practice, interpreted broadly to include situations when an official performs acts lying outside his/her scope of competence.

bodies<sup>157</sup>) goes further and also covers bribery committed after the act (omission) has already taken place. For example, Article 268 in the previous Criminal Code of **Mongolia** (a new Code was adopted in 2015 and no longer includes such provision) explicitly covered passive bribery whether action (omission) was carried out “with or without an advance promise to do so”.

The IAP countries also commonly include—again either directly in the criminal law or through interpretative judicial resolutions—alternative elements in the bribery offences such as “patronage or connivance” carried out by the official in exchange for a bribe. The intention is to cover situations when the official receives a bribe from a subordinate or another person under his control for providing support or protection of interests of the latter during an extended period of time or for non-reaction to wrongdoing, bad performance of the bribe-giver. While not strictly required by the international instruments, such a concept allows for broadening of the scope of bribery offences and should therefore be welcomed.

## Other corruption offences

### *Private sector bribery*

The UNCAC (Art. 21) includes bribery in the private sector as a non-mandatory offence. The CoE Criminal Law Convention (Art. 7-8) contains similar provisions, but they are binding on the State-Parties to the Convention that did not use their right to make a reservation when signing or ratifying the Convention.<sup>158</sup> Since the IAP monitoring mechanism is not formally limited to any of the conventions and covers broad international anti-corruption standards, it considers bribery in the private sector as a standard that should be implemented in all IAP countries.

The criminalisation of bribery between two private entities is a reaction to the privatization of public services and important sectors of the economy. It addresses harm caused by corruption to economic development, business relations and society in whole.

The IAP countries, coming from the former Soviet Union, which did not recognise private property, had already criminalised private sector bribery, as bribery offences did not differentiate between officials of public and private entities. However, the enforcement of bribery provisions against officials of private entities was almost non-existent. Recently, most of the IAP countries have introduced a separate private-sector bribery offence (sometimes called “commercial bribery”). In August 2015, for instance, **Uzbekistan** amended its Criminal Code and introduced a separate offence of commercial bribery. Now, only **Azerbaijan and Mongolia** continue to cover private sector bribery through a broad definition of an official in the general bribery offence.

The criminalisation of private sector bribery through general provisions on bribery that do not differentiate between officials of the private and public sectors does not formally contradict international standards. However, it raises an issue of clarity and visibility. Stand-alone criminal offences of private sector bribery appear to better address non-public corruption.<sup>159</sup>

In this regard, it is interesting to note that GRECO recommended to **Azerbaijan and Bosnia and Herzegovina** in its Third evaluation round reports to consider including specific provisions on bribery in the private sector in the Penal Code. The GRECO evaluations expressed the view that the system would

<sup>157</sup> Kazakhstan, Kyrgyzstan, Ukraine, Uzbekistan.

<sup>158</sup> From 45 State-Parties to the CoE Criminal Law Convention, only Andorra and Belgium made a reservation with regard to relevant provisions. See <http://goo.gl/YmSBnd>. Belgium reserved the right to establish as a criminal offence under its domestic law the conduct referred to in Articles 7 and 8 of the Convention only if such conduct was committed in view of the accomplishment or the omission of an act, without the knowledge and without authorisation, as the case may be, of the board of directors or of the general meeting, of the principal or of the employer.

<sup>159</sup> OECD (2015), IAP Joint First and Second Rounds Report on Mongolia, page 35, <http://goo.gl/rLKEap>.

doubtless benefit from the introduction of separate and clearly identifiable provisions designed specifically to cover private sector bribery, along the lines of Articles 7 and 8 of the Council of Europe Criminal Law Convention on Corruption.<sup>160</sup> However, GRECO was satisfied with the Azerbaijan authorities' decision not to introduce separate offences despite its recommendation (the Azerbaijan authorities also provided statistics on a number of cases of private sector corruption prosecution proving that it had been enforced).<sup>161</sup>

Another feature of private-sector bribery criminalisation is that all IAP countries extend these offences to any non-public entity, commercial or not (thus covering charities, citizen associations, other organisations). Even when the offence is called “commercial bribery” it often goes beyond the for-profit sector (as in **Armenia, Georgia, Kazakhstan, Mongolia, Tajikistan, Ukraine**). This is more than required by the UN and CoE conventions, which deal with private-sector bribery “in the course of economic, financial or commercial activities” (UNCAC) or “in the course of business activity” (CoE Criminal Law Convention<sup>162</sup>). Such an approach is not unique for the IAP countries, as other ACN states employ it too, for instance: **Albania, Croatia, Latvia, Lithuania, Moldova, Romania and Slovakia**.

In addition, the IAP countries often omit in their criminal codes another element contained in the relevant provisions of the international treaties, namely that the private sector bribery be committed in breach of the duties of the perpetrator working for the private entity. Since both of these approaches extend the scope of the bribery offences, they do not breach international standards.

According to international standards, the bribery offences in the private sector should also include other elements, similar to public sector offences: the promise, offer or giving of a bribe (active bribery); the request, receipt, and acceptance of an offer or promise of a bribe (passive bribery); intangible and non-pecuniary undue advantage; directly or indirectly; and third party beneficiaries.

One additional element is that private sector offences concern active or passive bribery of “any person who directs or works, in any capacity, for a private sector entity”, which includes low-level and auxiliary employees and such people as consultants and agents working for the private entity. Most IAP countries do not include this element, extending relevant provisions to bribery of or by persons exercising managerial, administrative or other similar functions. In 2014, however, **Ukraine** revised its offence of private sector bribery (Article 354 CC, “Bribery of an employee of an enterprise, institution or organisation”) to cover not only employees of a company or other organisation but also “persons who work in favour of the enterprise, institution or organisation” (meaning persons who carry out work or provide a service in accordance with an agreement with such enterprise, institution or organisation).

Below is the table reflecting IAP countries' compliance with the necessary elements of private-sector bribery offences.

<sup>160</sup> GRECO (2010), Third Round Evaluation Report on Azerbaijan, page 19, <http://goo.gl/C4IJK3>. See also GRECO (2011), Third Round Evaluation Report on Bosnia and Herzegovina, §93, <http://goo.gl/IjeH9B>.

<sup>161</sup> GRECO (2012), Compliance Report on Azerbaijan, Third Round Evaluation Report, page 6, <http://goo.gl/V1NMsY>.

<sup>162</sup> According to the Explanatory Report to the Council of Europe Criminal Law Convention on Corruption (§53), this “choice was made to focus on the most vulnerable sector, i.e. the business sector. Of course, this may leave some gaps, which Governments may wish to fill: nothing would prevent a signatory State from implementing this provision without the restriction to “in the course of business activities”.

Table 12. Elements of private-sector bribery offences

Elements of private-sector bribery offences	ARM	AZ	GEO	KAZ	KGZ	MNG	TAJ	UKR	UZB
Active bribery: promise, offer	✓	✓	✓	—	—	—	—	✓	—
Passive bribery: request, acceptance of offer/promise	✓	✓	✓	—	—	—	—	✓	—
Undue advantage (intangible and non-pecuniary)	✓	✓	✓	—	—	—	—	✓	—
Directly or indirectly	✓	✓	✓	—	—	—	—	✓	—
Third party beneficiaries	✓	✓	✓	—	—	—	—	✓	—
“any person who directs or works, in any capacity, for a private sector entity”	✓	✓	✓	—	—	—	—	✓	—

Source: IAP monitoring reports, OECD/ACN secretariat research.

A special approach to prosecution of private-sector bribery is found in the **Russian Federation**, where for “commercial bribery” that has caused harm exclusively to the interests of a commercial organisation that is not a governmental or municipal enterprise, prosecution can only be instituted upon the organisation’s request or with its consent. According to Russian authorities, this provision was introduced to serve as a safeguard against, in particular, groundless interference with the economic activity of small and medium-sized companies.

In its report on Russia, GRECO found this arrangement problematic, as this formal requirement may constitute an obstacle to prosecution which is against the spirit of the CoE Convention. Also according to GRECO report, there is no justification for subjecting the prosecution of corruption in the private sector to a regime different from the general regime applicable to other corruption offences.<sup>163</sup> Similar provisions were criticised also with regard to **Austria, Italy** and **Switzerland**.<sup>164</sup> It is, therefore, important that countries can engage in *ex officio* prosecution of private sector bribery (i.e., without requiring a complaint for, or the consent of, the aggrieved entity or other such restrictive conditions).

None of the IAP countries apply such a limitation to private sector bribery offences, although some countries (e.g. **Kazakhstan, Ukraine**) restrict the prosecution of abuse of powers in the private sector to situations when an aggrieved entity lodges a relevant request.

Several IAP countries (**Armenia, Kyrgyzstan, Tajikistan, Ukraine**) established a separate offence of bribery in sport and/or commercial contests (e.g., bribery of participants and organisers of professional sport events and commercial competitions). This is a good practice which allows the countries to cover a broad range of persons who may not be included in the public- or private-sector bribery offences, such as sportspersons, referees, trainers, team managers, organisers and jury members of commercial competitions (e.g. television contests, beauty pageants), etc. In November 2015, **Ukraine** established a new criminal offence (Art. 369-3 CC) of “Illegal influence on results of official sport competitions”, which sanctions influence in the form of bribery, coercion or incitement, collusion with regard to official

<sup>163</sup> GRECO (2012), Third Evaluation Round Report on Russia, §61, <http://goo.gl/INWsrc>.

<sup>164</sup> Source: GRECO (2011), Third Evaluation Round Report on Austria, §91, <http://goo.gl/Mb6Kfl>; GRECO (2014), Compliance Report on Italy, Third Evaluation Round, §23, <http://goo.gl/dYXXF1>; GRECO (2011), Evaluation Round Report on Switzerland, §86-87, <http://goo.gl/mvFcsk>.

sport competition's results "in order to obtain an undue advantage for oneself or a third person" or the obtaining of an undue advantage as such as a result of the above mentioned acts.<sup>165</sup>

Notably, in September 2014, the Council of Europe adopted a new Convention on the Manipulation of Sports Competitions that requires from its parties to criminally sanction "manipulation of sports competitions when it involves either coercive, corrupt or fraudulent practices".<sup>166</sup> Manipulation of sports competitions means an intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the aforementioned sports competition with a view to obtaining an undue advantage for oneself or for others. From the IAP countries **Armenia, Azerbaijan, Georgia and Ukraine** signed the new Convention (the other IAP countries are not members of the Council of Europe).

**Ukraine** has established a separate offence of active and passive bribery of persons who are not public officials but who provide public services, namely auditors, notaries, appraisers, experts, bankruptcy administrators, labour arbitrators, etc.

Enforcement of private sector bribery offences remains low in the IAP countries. Some available statistics are presented below.

**Figure 10. Statistics on enforcement of private sector bribery in some IAP countries**

	Number of investigations opened				Number of cases sent to court				Number of convictions			
	2012	2013	2014	2015	2012	2013	2014	2015	2012	2013	2014	2015
<b>Armenia</b> (Art. 200 CC)	25	9	n/a	n/a	15	3	n/a	n/a	21	6	n/a	n/a
<b>Georgia</b> (Art. 221 CC)	17	4	6	7	25	1	4	9	19	n/a	5	22
<b>Kazakhstan</b> (Art. 253 in CC 2014; Art. 231 in the previous CC)	2	7	0	7	0	6	2	0	n/a	n/a	n/a	n/a
<b>Ukraine</b> (Art. 354 CC, until 2013 the offence covered only active/passive bribery of state enterprise officials; Art. 368-3 and 368-4, bribery of official of private law entity and bribery of person providing public services)	n/a	112	11 7	10 3*	n/a	99	87	87	4	75	63	46

Notes: n/a – not available; \* - proceedings where suspicion was delivered. Columns "Number of cases sent to court" for Georgia reflects the number of prosecutions.

Source: IAP Third Round Monitoring reports; OECD/ACN secretariat research; comments by countries.

Compare the data above with the prosecution of the private sector bribery in some of the EU countries, which are also members of the ACN.

<sup>165</sup> Amendment of the Criminal Code accompanied adoption of a special Law of Ukraine on Preventing the Influence of Corruption Offences on the Results of Official Sports Competitions (Law no. 743-VIII of 3 November 2015).

<sup>166</sup> Council of Europe Convention on the Manipulation of Sports Competitions, CETS No.215, <http://goo.gl/J4MC3Y>. The Convention was opened for signature on 18 September 2014 and, as of March 2016, was signed by 20 states and ratified by two.



Table 13. Statistics on enforcement of private sector bribery in some EU countries

	Number of opened investigations			Number of indictments			Number of final convictions		
	2011	2012	2013	2011	2012	2013	2011	2012	2013
Bulgaria	3	6	3	2	5	3	0	1	1
Croatia	3	2	0	5	3	2	0	5	0
Hungary	469	617	645	413	510	456	41	39	35
Poland	59	58	44	37	105	371	12	24	n/a
Slovakia	56	25	14	n/a	n/a	n/a	n/a	n/a	n/a
Slovenia	8	9	11	3	3	3	1	1	4

Source: EU (2016), Collection of official data on corruption offences, available at <http://goo.gl/gBRmrb>.

### Trading in influence

Trading in influence is another corruption offence that is binding under the CoE Criminal Law Convention (Art. 12) but optional under the UNCAC (Art. 18).<sup>167</sup> Trading in influence, according to the CoE Convention, is one of the provisions to which states are allowed to make a reservation when signing or ratifying the treaty and exclude or attach certain conditions to its application.<sup>168</sup> From the IAP, of countries that are Parties to the Convention, **Armenia** and **Azerbaijan** had originally reserved their right not to establish as a criminal offence trading in influence, but later both countries did criminalise this offence in 2008 and 2006 respectively and withdrew their reservations. Since the IAP monitoring mechanism is not formally limited to any of the conventions and covers broad international anti-corruption standards, it considered trading in influence as a mandatory standard which should be implemented in all of the IAP countries.

#### Box 10. Trading in influence offence in Armenia

Armenia has criminalised passive trading in influence by establishing in 2008 a criminal offence “Use of real or supposed influence for mercenary purposes” (Art. 311-2 CC). Also trading in influence is supposed to be covered by active and passive bribery offences, since they include the element of “favouring the action or refraining from action by an official or a public servant in the exercise of his or her official functions”. The active side of the trading in influence was criminalised in 2012 through the new Article 312-2 CC.

The IAP monitoring reports noted a number of deficiencies of the available provisions: Article 311-2 CC refers only to acts committed for “mercenary purposes”; request and acceptance of offer/promise, third party beneficiaries are not covered in Art. 311-2. These deficiencies are not compensated by broad scope of bribery offences, because they cover only situations when influence peddler is a public official. The Third Monitoring Round report recommended bringing provisions on the offence of trading in influence in full compliance with international standards.

Source: IAP monitoring reports on Armenia.

As the bribery, the trading in influence offence also includes active and passive sides and covers situations when an undue advantage is given (promised, offered) to anyone who asserts or confirms that he is able to exert an improper influence over the decision-making of a public official, as well as when such advantage was received (its offer or promise accepted) in consideration of that influence – whether

<sup>167</sup> Under the UNCAC, States Parties are obliged to consider establishing the offence, so there must be some showing that the matter was considered in an official manner.

<sup>168</sup> Of 45 State Parties to the CoE Criminal Law Convention, 10 countries made reservations, either to fully exclude the application of Article 12 on trading of influence or attaching certain conditions and clarification to its application. See <http://goo.gl/rARonA>. For instance, France reserved the right not to establish as a criminal offence the conduct of trading in influence, in order to exert an influence, as defined by Article 12, over the decision-making of a foreign public official or a member of a foreign public assembly.

or not the influence is actually exerted and whether or not the supposed influence leads to the intended result.<sup>169</sup>

As noted in one of the UNCAC reviews, Article 18 of the Convention is intended to encourage the creation of a separate and distinct offence and its emphasis is not so much on actual bribery, be it direct or indirect, but rather on the personal influence that a public official or any other person has by virtue of his or her position or status.<sup>170</sup>

In the active part, a person gives an undue advantage to the influence peddler who claims, by virtue of his professional position or social status, to be able to exert an improper influence over the decision-making. In the passive part, the influence peddler receives the undue advantage for influencing the decision-making. In both cases the undue advantage goes to the influence trader, not the public official, and not for the influence trader to act or refrain from acting as in the bribery offences. As described in a judgment of the French Court of Cassation, the offence of trading in influence is committed if the person concerned “is considered or describes himself or herself as an intermediary whose actual or supposed influence is such as to be able obtain an advantage or a favourable decision from a public authority”.<sup>171</sup>

As was noted in the Explanatory Report to the CoE Criminal Law Convention on Corruption, “[c]riminalising trading in influence seeks to reach the close circle of the official or the political party to which he belongs and to tackle the corrupt behaviour of those persons who are in the neighbourhood of power and try to obtain advantages from their situation, contributing to the atmosphere of corruption”.<sup>172</sup> Examples of trading in influence include: a leader or functionary of a political party trading influence over the party regarding a vote in the parliament; an official selling influence over the awarding of honorary decorations; an individual receiving money in exchange for promising to exert influence over the award of a public procurement contract by the ministry where the individual’s friend is working in the senior position, etc.

Influence trading should be separated from legitimate lobbying activity. The CoE Convention achieves this by using the concept of “improper influence” meaning that lawful lobbying activity aims to exert “proper”, i.e. not prohibited, influence.<sup>173</sup> The UNCAC provides that in exchange for an undue advantage an official or any other person “abuse” his or her real or supposed influence with a view to obtaining from a public authority an undue advantage. However, the line between acknowledged lobbying

<sup>169</sup> A slightly different definition of trading in influence is contained in the UNCAC (Art. 18): (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person; (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

<sup>170</sup> Study on the state of implementation of the United Nations Convention against Corruption, page 37, available at <https://goo.gl/zIM9SP>.

<sup>171</sup> Judgment of 01.10.1984, case no. 277. Cited from: Experience with criminal offence of trading in influence in France, by M.Segonds and A.Riberolles, published in GRECO’s Tenth General Activity Report (2009), <http://goo.gl/s8mdCV>.

<sup>172</sup> Explanatory Report to the Council of Europe Criminal Law Convention on Corruption (ETS No. 173), §64, <http://goo.gl/S89a7M>.

<sup>173</sup> In its Third Evaluation Round report on Latvia (§94, <http://goo.gl/SHnFh6>) GRECO noted that offence of trading in influence which did not include the element of “improper”, and thus covering professional lobbying activities, results in a broad and far-reaching transposition of Article 12 of the Convention and may frustrate the actual purpose of the criminalization of trading in influence.



activities and trading in influence is rather thin.<sup>174</sup> As noted in one of the GRECO reports, it is only when the lobbying or the attempt to exert influence results in holding out the prospect of specific advantages to public officials who are involved in the decision-making process, that the bounds of propriety are overstepped.<sup>175</sup>

Out of the IAP countries, trading in influence has been criminalised by **Armenia** (active side only), **Azerbaijan**, **Georgia** and **Ukraine**.

In most of the IAP countries, interpretative resolutions by the supreme courts (or, occasionally, as in the case of **Armenia**, the criminal codes themselves) extend bribery offences to situations when the official does not have the powers to carry out the act (or omission) in exchange for a bribe, but can facilitate such an act (or omission) through his official position. It may be argued that such a broad understanding of the bribery offences in fact covers trading in influence offence. However, such approach is deficient and cannot be considered as functionally equivalent to trading in influence offence, in particular because it covers only officials (in most cases – public officials), excluding other persons.<sup>176</sup>

As to enforcement of the trading in influence offence in the IAP countries, **Ukraine** has had a number of prosecutions (see statistics in the table below), while **Armenia**, **Azerbaijan** and **Georgia** had none or very few prosecutions in 2013-2015. In **Georgia**, there were two prosecutions resulting in three persons convicted in 2014, and three prosecutions resulting in two convictions in 2015.

**Table 14. Enforcement of trading in influence offence in Ukraine**

	Number of investigations (suspicions notified)			Number of indictments sent to court			Number of final convictions (convicted persons)		
	2013	2014	2015	2013	2014	2015	2013	2014	2015
<b>Ukraine</b> (Art. 369-2 CC)	80	120	176	61	108	160	41	63	107

Source: IAP Third Round Monitoring report on Ukraine; OECD/ACN secretariat research.

Below are several examples of real-life cases<sup>177</sup> of trading in influence in Ukraine, which prove that this offence happens quite often and should be actively pursued. It should also be noted that Ukrainian courts tend to impose relatively mild sanctions for this offence.

<sup>174</sup> Some states even contend that criminalization of trading in influence might come into conflict with the fundamental right in a democracy to influence people in power or others through exercising the right to freedom of expression. See GRECO (2009), Third Evaluation Round report on Sweden, §54, <http://goo.gl/8auH9U>.

<sup>175</sup> GRECO (2008), Third Evaluation Round report on the Netherlands, §61, <http://goo.gl/CDuprn>.

<sup>176</sup> According to the Study, a serious deviation from the spirit of the Convention concerns the fact that some States parties only criminalise trading in influence acts by or vis-à-vis public officials, i.e. the offer or acceptance of advantages in order that a public official abuses his or her influence over another public official. Article 18, however, addresses the conduct of private individuals abusing their real or supposed influence over the exercise of public administration. See: Study on the state of implementation of the United Nations Convention against Corruption, page 38, available at <https://goo.gl/zlM9SP>.

<sup>177</sup> Based on the IAP Third Monitoring Round report on Ukraine, pages 43-44, and search of the Registry of Court Decisions available at <http://www.reyestr.court.gov.ua>.

**Box 11. Examples of trading in influence cases in Ukraine**

- A student of a university was charged with attempted active trading in influence and an assistant professor of one of the university's departments with attempted passive trading in influence. The assistant professor demanded a payment from the student for successful presentation of her master's research paper and passing of the state exam.
- A state inspector of the tax control department of the regional state tax inspection demanded and received illegal benefit for influencing an official of the regional state tax inspection in order to accelerate the adoption of a positive decision on the on-site inspection of the individual entrepreneur. The tax inspector was convicted and sentenced to four years of imprisonment and conditionally released with the probation period of 18 months.
- A therapist of a medical expert commission demanded and received an illegal benefit in order to influence a positive decision concerning the assignment of a life-long disability to the individual. The court sentenced the offender to 3 years of imprisonment with conditionally release during the probation period.
- Several convictions of judicial assistants (judge's clerks) of the local courts who received illegal benefits in order to influence the decision of the judge in civil or criminal cases.
- A CEO of a private company operating in the area of land surveying was found guilty of receiving illegal benefit for exerting influence on the local office of the State Agency of Land Resources in order to obtain a permit for land development (passive trading in influence). The person was sanctioned with a fine based on the plea agreement with the prosecutor.
- A person was convicted of passive trading in influence for receiving an illegal benefit in exchange for the promise to exert influence on his acquaintance – the head of the local military enlistment office – to postpone the conscription of a third person. The person was convicted to a fine and a special confiscation.
- A person was convicted of passive trading in influence for receiving illegal benefit in exchange of the promise to influence a judge in a criminal case (to obtain a milder sanction); the convicted did not actually plan to exert the influence and intended to appropriate the money. He was convicted and fined.
- A head of the local criminal police unit was convicted of receiving several payments from the local entrepreneur who organised poker games for the promised influence over the leadership of the local police and prosecution office. Gambling is prohibited in Ukraine under threat of criminal sanction, so the policeman promised to use his influence to ensure that the criminal prosecution is not started. He was convicted, and fined, and a special confiscation was also imposed.
- The deputy head of the department in the Ministry of Justice was convicted of passive trading in influence for receiving an illegal benefit from a businessman for using her influencing and arranging the sale of several vehicles by the regional bailiff's service at a reduced price. She exerted her influence over the head of the regional office of the Ministry of Justice. She entered plea agreement with the prosecutor and was sanctioned with a fine.

Source: IAP Third Round Monitoring report on Ukraine; OECD/ACN secretariat research.

See also the data below about prosecution of the trafficking in influence in some of the EU countries.

Table 15. Statistics on enforcement of trafficking in influence in some EU countries

	Number of opened investigations			Number of indictments			Number of final convictions		
	2011	2012	2013	2011	2012	2013	2011	2012	2013
Bulgaria	6	16	17	8	5	5	8	1	0
Croatia	16	2	29	10	25	9	11	31	10
Estonia	10	2	0	0	0	0	0	1	0
France	103	95	108	n/a	n/a	n/a	39	46	38
Hungary	107	148	142	58	79	113	34	38	39
Lithuania	15	38	48	8	5	14	9	6	7
Poland	101	106	99	-	-	-	187	218	n/a
Romania	662	590	614	26	72	82	107	88	140
Slovakia	16	3	9	1	6	12	3	14	5
Slovenia	8	4	6	6	8	2	0	3	3

Source: EU (2016), Collection of official data on corruption offences, available at <http://goo.gl/gBRmrb>.

### *Illicit enrichment*

The UN Convention against Corruption (Art. 20) provides for the non-mandatory offence of illicit enrichment—that is, a significant increase in the assets of a public official that cannot be reasonably explained in relation to the official’s lawful income. An offence of illicit enrichment may be a powerful tool in prosecuting corrupt officials, as it does not require proving that the corruption transaction actually happened and instead allows the court to draw inferences from the fact that an official is in possession of unexplained wealth, which could not have been gained from lawful sources.

Table 16. Offence of illicit enrichment in Lithuania, Moldova, Mongolia and Ukraine

<b>Kyrgyzstan</b>	<p>In 2012, Kyrgyzstan introduced in its Criminal Code the offence of illicit enrichment (Article 308-1):</p> <p>(1) Significant increase of the assets of an official that exceeds his legal income and that he cannot reasonably justify – shall be punished by imprisonment for the term from three to five years.</p> <p>(2) The same offence when committed: 1) in a significant amount; 2) by an official who holds a responsible position, - shall be punished by imprisonment for the term from six to eight years with confiscation of property.</p> <p>Note. Significant increase of assets in this Article means an amount of money, value of securities, other property or benefits of material or immaterial nature that 3,000 times exceeds the estimate indicator established by the Kyrgyz legislation at the moment when the crime was committed.</p> <p>The act, as provided in this Article, is considered to be committed in a significant amount, if the amount of money, value of securities, other property or benefits of material or immaterial nature exceeds 5,000 times the estimate indicator established by the Kyrgyz legislation at the moment when the crime was committed.</p>
<b>Lithuania</b>	<p>In 2010, Lithuania established offence of illicit enrichment in its Criminal Code (Article 189-1): “A person who, by right of property, possesses property in the amount exceeding 500 minimum subsistence levels [about EUR 18,000] and was aware or ought to have been aware and could have been aware that the property could not have been acquired legitimate income, shall be punished by a fine or by arrest or by imprisonment for a term of up to four years.</p> <p>A person, who has taken over the property specified in Paragraph 1 of this Article, shall be exempted from criminal liability for illicit enrichment if, until the delivery of the notice on being suspected, he informed about that the law and order institutions and actively participated in establishing the origin of this property.”</p> <p>Such property is subject to mandatory confiscation. A legal entity can also be held liable for the acts provided for in this Article. If the property’s value is less than the established threshold for</p>

	<p>the criminal liability, the person will be ordered to pay taxes from the assets and may be sanctioned in administrative proceedings with a fine from 10 to 50% of the property's value. Under Article 190 CC, the legitimate income referred to in Article 189-1 means income derived from activities not prohibited by legal acts, irrespective of whether or not it has been accounted for in accordance with the procedure laid down by legal acts.</p>
<b>Moldova</b>	<p>Article 330-2 CC "Illicit enrichment" was enacted in February 2014 and it provides that possession by a public official, personally or through third parties, of property the value of which significantly exceeds the funds he received and with regard to which it was established based on evidence that it could not have been received in a legal way, shall be punished with a fine of 6,000-8,000 standard units or deprivation of liberty for a term from 3 to 7 years with the deprivation – in both cases – of the right to hold certain offices or engage in certain activities for a term of 10 to 15 years. Higher sanctions are established for aggravated offence committed by responsible officials. The amount of "significant" excess is not defined in the Criminal Code.</p>
<b>Mongolia</b>	<p>Article 270-1 CC "Improvement in the financial state by illegal means" was introduced in 2012: "1. If it is established that an official received material and pecuniary income in a large amount by illegal means, besides the lawful income, this official shall be punished with the deprivation of the right to hold certain offices for the term of 3 to 5 years and a fine of 51-250 minimum salaries or deprivation of liberty up to 3 years." Higher sanctions are established for aggravated offence of receiving by an official of material and pecuniary income in especially large amount by illegal means, besides the lawful income.</p> <p>In December 2015, Mongolia adopted a new Criminal Code (entered into force on 1 September 2016), Article 22.10 of which provides:</p> <p>"Article 22.10. Illicit Enrichment</p> <p>1. If a public official cannot justify major increase of his/her income and assets as lawful, such income and assets shall be confiscated and the relevant official's right to be appointed shall be suspended for up to 2 years and he shall be fined in an amount equivalent to from 450 units to 14000 units or the official's right to travel shall be suspended from one month to three years or be imprisoned for a period from one month to three years.</p> <p>2. If this crime is committed by a person who has influence in politics, such income and assets shall be confiscated and the relevant person's right to be appointed or elected to the public office shall be suspended from two to five years and he shall be fined in an amount equivalent to from 5400 units to 27000 units or the person's right to travel shall be suspended from one year to five year or be imprisoned for a period from one year to five years."<sup>178</sup></p>
<b>Ukraine</b>	<p>The offence was first introduced in 2011 and then revised twice (see below for more details). The current wording (as amended in February 2015) reads:</p> <p>"1. Acquiring by a person authorised to perform functions of the state or local self-government in ownership of assets in significant amount, the lawful grounds of acquiring of which was not confirmed by evidence, as well as transfer by such person of such assets to any other person shall be punishable by deprivation of liberty for the term of up to two years with the deprivation of the right to occupy certain offices or engage in certain activities for the term of up to three years with forfeiture of property."</p> <p>Two additional aggravated offences when committed by high-level officials attract higher sanctions.</p> <p>Assets in the significant amount mean monetary funds and other property, as well as proceeds from them, if their amount (value) exceeds 1,000 untaxed minimum personal incomes [about EUR 23,000]. The transfer of assets means concluding any agreements based on which right of ownership or right of use of assets emerges, as well as providing other person with monetary funds or other property to conclude such agreements.</p>

Source: information of Government of Lithuania; IAP monitoring reports on Mongolia, Ukraine; OECD/ACN secretariat research.

<sup>178</sup> 1 unit equals 2,000 Mongolian Tughriks (about EUR 1).

**Ukraine** was the first among the IAP countries to introduce the offence called “illicit enrichment” in 2011 (new Article 368-2 CC). However, despite its name, the offence had nothing in common with the illicit enrichment offence recommended by the UN Convention Against Corruption.<sup>179</sup> In its original wording, the offence was very similar and overlapped with incrimination of passive bribery of public official. The IAP monitoring report found that this in itself was unsatisfactory as it created legal uncertainty as well as the conditions for corruption, because law enforcement authorities and courts could apply the different articles to produce different sanctions.<sup>180</sup> In October 2014, Ukraine introduced new wording for the offence; the offence was amended yet again in February 2015. The IAP monitoring report concluded that the final wording seemed to reflect the concept promoted by the UNCAC.

The introduction of an illicit enrichment offence can pose a number of legal problems, as it may be seen as contradicting human rights standards. The IAP monitoring has, however, held that these obstacles can be overcome by a careful wording of the offence. The elements of this crime should be formulated in such a way that the fundamental human rights to the presumption of innocence and the guarantee against self-incrimination are not violated.<sup>181</sup> For this purpose, it is necessary to put the burden of proof on the prosecutor to ascertain the existence of certain assets, the absence of lawful sources of income, which could have explained them, criminal intent to acquire the assets, etc. (thus creating a rebuttable presumption of illicit enrichment). In case of sufficient evidence, the court has the right to infer person’s guilt, in particular, from the absence of explanation of such person with regard to legality of the mentioned assets.<sup>182</sup>

The provisions on illicit enrichment have been recently challenged in the Constitutional Court of **Moldova**.<sup>183</sup> The Constitution of Moldova includes an explicit presumption of the legality of assets in possession of the person (Art. 46). Despite such strong presumption that is absent in most of the European countries’ constitutions, the Constitutional Court of Moldova concluded that such presumption is not absolute and is rebuttable and that the public authorities have the duty to trace and confiscate criminal proceeds. The offence was found to be constitutional and not in violation of either the constitutional principle of the presumed legality of assets or the general presumption of innocence. The Court also stated that the interests of public security and the fight against corruption justified the offence. The Court, however, noted that the wording of the offence was not sufficiently clear (as the notion of “significantly exceeding” the legally received funds was not defined anywhere in the law) and that this may obstruct its application.<sup>184</sup>

An interesting approach to establishing criminal liability for acts comparable with the illicit enrichment can be found in **Georgia**. While the Georgian Criminal Code does not contain a separate offence of illicit enrichment, its elements can be found in the money laundering offence (Article 194 CC). Money laundering is defined in Georgia as “the legalization of illicit income, *i.e.* giving a legal form to illegal and/or undocumented property (use, acquisition, possession, conversation, transfer or other action) for

<sup>179</sup> Original article read: “Receiving by a service person of an unlawful benefit in substantial amount or transfer by such person of such benefit to her close relatives in the absence of the elements provided in Article 368 of the present Code”.

<sup>180</sup> OECD/ACN (2015), Third Monitoring Round Report on Ukraine, page 48, <http://goo.gl/dAxYji>.

<sup>181</sup> Case-law of the European Court of Human Rights should be taken into account in this regard, e.g. *Salabiaku v. France*, *Pham Hoang v. France* and others.

<sup>182</sup> OECD/ACN (2012), Joint First and Second Monitoring Rounds report on Uzbekistan, p. 26, <http://goo.gl/3kAUEk>.

<sup>183</sup> In 2012, relevant provisions were also challenged in the Constitutional Court of Lithuania. The latter, however, did not provide a judgment on the substance of the complaint, refusing it due to the fact that it concerned the interpretation of the law (which should be settled by ordinary courts) rather than its constitutionality. See: Constitutional Court of the Republic of Lithuania, Resolution of 25 June 2012, available at <http://goo.gl/1tn4kW>.

<sup>184</sup> Constitutional Court of the Republic of Moldova, Resolution no. 6, 16 April 2015, available at <http://goo.gl/6qrlpR>.

purposes of concealing its illegal and/or undocumented origin and/or helping any person to evade the legal consequences, as well as concealing or disguising its true nature, originating source, location, allotment, circulation, ownership and/or other related property right.” The “undocumented property” is defined as “property, also the income derived from that property, stocks (shares) [in relation to which] an offender, his/her family members, close relatives or the persons affiliated with him/her are unable to present a document certifying that the property was obtained legally, or the property that was obtained by the monetary funds received from the realization of the illegal property.” Under Georgian system there is no legal requirement to prove any predicate criminal act. According to Georgian authorities, the offence can apply when the prosecutor is able to show that there is no evidence to establish the legitimate source of the property.<sup>185</sup>

From the few countries that have criminalised the illicit enrichment, **Lithuania** has the best track record in enforcing the offence. According to the EU, there were 164 convictions in 2011, 159 in 2012 and 159 in 2013.<sup>186</sup> This is an impressive result of enforcement. In **Ukraine**, as of March 2016, there were no convictions for illicit enrichment based on the offence revised in 2014 to align it with the international standards.<sup>187</sup>

### *Embezzlement, misappropriation or other diversion of property, abuse of powers*

The UN Convention against Corruption defines the embezzlement, misappropriation or other diversion of property by a public official (Article 17) as a mandatory offence, whereas the embezzlement of property in the private sector (Article 22) is merely an offence that State Parties have to consider adopting. Both these offences are criminalised in all the IAP countries.

Another optional<sup>188</sup> offence under the UNCAC is **abuse of functions or position**, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity. All the IAP countries have established an offence of abuse of functions (powers, office), including in the private sector.

Unlike the UN Convention, the abuse of function (powers or office) offences in IAP countries typically include elements such as causing substantial harm to rights and legitimate interests of citizens or organizations or other interests of the society or state protected by law. This “substantial harm” element, which may be non-pecuniary, is defined in the codes only with regard to material, pecuniary damages. There is also no need to obtain an undue advantage – the abuse of power is considered committed when it pursued private interests or interests of other persons. These additional elements may be seen as narrowing down incrimination contained in the UNCAC and also raise issue of legal certainty.<sup>189</sup>

A special feature of the IAP countries is that besides having an offence concerning the abuse of functions, there is a separate offence of exceeding one’s authority, which includes: the commission of acts that belong to the competence of a superior official in the same public institution or an official of another institution; the commission of acts that are only allowed in specific circumstances, or with special permission, or under special procedure without fulfilling the necessary conditions; the

<sup>185</sup> MONEYVAL (2012), Anti-Money Laundering and Combating the Financing of Terrorism in Georgia, Report on Fourth Assessment Visit, page 50, <http://goo.gl/AQ07sd>.

<sup>186</sup> Source: EU (January 2016), Collection of official data on corruption offences, page 24, available at <http://goo.gl/gBRmrb>.

<sup>187</sup> Source: Judicial statistics, State Judicial Administration, available at <http://goo.gl/D8Eyqm>.

<sup>188</sup> Under the UNCAC, the obligation is for States parties to consider establishing the offence, so there must be some showing that the matter was considered in an official manner.

<sup>189</sup> Study on the state of implementation of the United Nations Convention against Corruption, page 44, available at <https://goo.gl/zIM9SP>.



commission individually of actions which may only be committed collectively; and the commission of actions which no one has the right to commit.<sup>190</sup>

In the IAP countries, this offence contains the same condition as the abuse of functions offence (‘causing substantial harm to rights and legitimate interests of citizens or organizations or protected by law interests of a society or state’), but also another element – that the actions must be patently outside of official’s scope of powers. These two elements may also raise issue with regard to compliance with the legal certainty requirement as they can be interpreted broadly and inconsistently. As noted in the IAP report on **Kyrgyzstan**, such vague wording may itself instigate corruption, as it allows wide discretion in criminal prosecution.<sup>191</sup>

In 2014, **Ukraine** revised its abuse of office offence by replacing the element that it had to be committed for “mercenary motives or other personal interests or interests of third persons” with the requirement that it is committed for “the purpose of obtaining any unlawful benefit for oneself or for other natural or legal person”. This approximated the incrimination to the UNCAC definition, although the element of “significant harm” was preserved.

In Romania, Article 297 of the Criminal Code defines the abuse of office offence as “*the deed of the public official who, in the exercise of his/her duty attributions, does not fulfil an act or he/she fulfils the act in a defective manner and thus produces a damage or a violation of the rights or of the legitimate interests of a natural or a legal person*”. Such offence is punished with imprisonment from 2 to 7 years and the deprivation of the right to hold a public office. Additionally, Article 13-2 of the Law no 78/2000 on prevention and sanction of corruption provides for an aggravated abuse of office offence, that is the offence where, by committing the offence of abuse of office, the public official obtained for himself or for another person a material or non-material advantage. The latter offence attracts higher sanction and it is also closer in definition to the UNCAC.<sup>192</sup>

### **Money laundering**

Both the CoE Criminal Law Convention (Art. 13) and the UN Convention against Corruption (Art. 23) cover the offence of money laundering. The CoE Convention refers to the conduct determined in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Products from Crime. It requires the criminalisation of such conduct when the predicate offence consists of any of the corruption crimes established in accordance with the CoE Criminal Law Convention against Corruption. The UNCAC sets forth the necessary elements of the money laundering offence and urges its application to “the widest range of predicate offences” and makes it mandatory to apply it to corruption offences established in accordance with the UNCAC.

All IAP countries have criminalised the laundering of proceeds from bribery or other corruption offences (on corporate liability for money laundering, see the next section of this report). **Armenia, Azerbaijan, Georgia** and **Ukraine** are parties to the Council of Europe’s anti-money laundering convention and are

<sup>190</sup> Resolution No. 15 of the Plenary of the Supreme Court of Ukraine on court practice in cases on excess of authority or official powers, 26.12.2003, <http://goo.gl/TXPhky>.

<sup>191</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 21, <http://goo.gl/wimIKB>.

<sup>192</sup> In May 2016, the Constitutional Court of Romania considered the constitutionality of the offence and found that the phrase “fulfils the act in a defective manner” is not predictable enough and it should be read as “fulfils the act by infringing the law”. The “law” should mean only the acts issued by the Parliament or the Emergency Ordinances issued by the Government, which have the same power as the law. The Constitutional Court did not nullify the Criminal Code provision but the courts will have to interpret the provision in line with the new finding. According to the Romanian authorities, it was not clear how this would affect the case law and whether any of the hundreds of abuse of office previous convictions would be overturned as a result.

subject to mutual evaluations by the MONEYVAL.<sup>193</sup> **Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan and Uzbekistan** undergo mutual evaluations as members of the Eurasian group on combating money laundering and financing of terrorism (EAG).<sup>194</sup>

One of the issues reviewed during the IAP monitoring was the autonomous nature of money laundering, which means that the laundering of corruption proceeds should be a stand-alone crime that is not dependent on a prior conviction for the predicate offence. Almost all IAP countries have difficulty in achieving this standard. Although not legally required under relevant criminal law provisions, court practice in money laundering cases usually requires a conviction for the predicate offence or that at least the predicate and money laundering offences should be prosecuted and tried jointly. Therefore, often only self-laundering is prosecuted and other forms of laundering of corruption proceeds are not enforced.

However, **Ukraine and Georgia** has had successful autonomous prosecutions of money laundering cases. **Tajikistan** and Ukraine are the only IAP countries that explicitly allow money-laundering prosecution separately from the predicate offence (see the box below).

#### Box 12. Autonomous nature of money laundering offence in Tajikistan and Ukraine

In Tajikistan, Article 262 of the Criminal Code specifically states (Note no. 8) that the criminal liability under the money laundering offence ensues regardless of whether the perpetrator was held criminally liable for the main (predicate) crime that resulted in the criminal proceeds.

In October 2014, the Parliament of Ukraine adopted new wording for the AML/CFT Law, which entered into force in February 2015. The new law introduced important changes in the Criminal Procedural Code (Article 216), providing that the investigation of money laundering should be carried out without prior or simultaneous bringing to liability of the perpetrator of the predicate offence in cases, in particular, when: 1) the predicate offence was committed outside of Ukraine, while the money laundering – on the territory of Ukraine; 2) the fact of the predicate offence was established by court in the relevant procedural decisions.

Source: IAP Third Monitoring Round report on Ukraine, page 55.

## Liability of legal persons

Corruption offences are often committed for the benefit of legal persons. Complex governance structures and collective decision-making processes in corporate entities make it difficult to uncover and prosecute such offences. Perpetrators and instigators are able to hide behind the corporate veil and evade liability. Also, individual liability of company officers is not an effective deterrent of corporate wrongdoing.

As was noted in the recent OECD/ACN Thematic Study on Corporate Liability, “it is not self-employed entrepreneurs, but mostly commercial entities that compete for public procurement contracts, apply for different licences and contest government authorities’ regulations or determinations in various supervision procedures. Large corporations, often having global operations, typically dominate transportation, construction, telecommunication, mining, energy, production of chemicals, and many other sectors of the economy. Therefore, it is a reality that high-level corruption in most cases serves the interests of legal persons. In such a world, it is not adequate for the criminal law to only reach the wrongdoing of natural persons.”<sup>195</sup>

The liability of legal persons for corruption offences is a well-established international standard included in the mandatory provisions of international anti-corruption instruments: from the 1997 Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Communities (Art. 3)

<sup>193</sup> Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), <http://goo.gl/3jqvqS>.

<sup>194</sup> See <http://www.eurasiangroup.org/mers.php>.

<sup>195</sup> OECD/ACN (2015), Thematic Study, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 11, <http://goo.gl/8qDDB2>.



and the OECD Anti-Bribery Convention (Art. 2), to the 1999 CoE Criminal Law Convention (Art. 18) and the 2003 UNCAC (Art. 26). See all relevant provisions below in the table.

None of the aforementioned instruments require a specific form of liability for legal entities. They allow states to choose from criminal, administrative and civil liability. However, the CoE Convention and UNCAC impose a specific obligation to establish liability for criminal corruption offences as described by the conventions (under CoE Convention for active bribery, trading in influence and money laundering; under UNCAC, for all offences established in accordance with that Convention). This means that even if administrative corporate liability is established, it should refer to criminal offences complying with conventional requirements or administrative offences should copy relevant criminal offences.<sup>196</sup>

**Table 17. Provisions on corporate liability in international legal instruments**

<p><b>OECD Instruments</b></p>	<p><b>Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997</b></p> <p>Article 2: Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.</p> <p>Article 3.2: In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.</p> <p><b>Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Annex to OECD Council Recommendation, 2009)</b></p> <p><i>B) Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons</i></p> <p>Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.</p> <p>Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:</p> <p>a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or</p> <p>b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;</li> <li><input type="checkbox"/> A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and</li> <li><input type="checkbox"/> A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.</li> </ul>
<p><b>Second Protocol to the EU Convention on the Protection of</b></p>	<p><b>Article 3 - Liability of legal persons</b></p> <p>1 . Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading</p>

<sup>196</sup> GRECO (2010), Compliance Report on Russia, Joint First and Second Round of Evaluation, §122, <http://goo.gl/wam9VI>.

<p><b>the Financial Interests of the European Communities, 1997</b></p>	<p>position within the legal person, based on</p> <ul style="list-style-type: none"> <li>— a power of representation of the legal person, or</li> <li>— an authority to take decisions on behalf of the legal person, or</li> <li>— an authority to exercise control within the legal person,</li> </ul> <p>as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.</p> <p>2 . Apart from the cases already provided for in paragraph 1 , each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.</p> <p>3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.</p> <p><b>Article 4 - Sanctions for legal persons</b></p> <p>1 . Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:</p> <ul style="list-style-type: none"> <li>(a) exclusion from entitlement to public benefits or aid;</li> <li>(b) temporary or permanent disqualification from the practice of commercial activities;</li> <li>(c) placing under judicial supervision;</li> <li>(d) a judicial winding-up order.</li> </ul> <p>2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) is punishable by effective, proportionate and dissuasive sanctions or measures.</p>
<p><b>Council of Europe Criminal Law Convention on Corruption, 1999</b></p>	<p><b>Article 1.d:</b> ... "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.</p> <p><b>Article 18 – Corporate liability</b></p> <p>1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:</p> <ul style="list-style-type: none"> <li>– a power of representation of the legal person; or</li> <li>– an authority to take decisions on behalf of the legal person; or</li> <li>– an authority to exercise control within the legal person;</li> </ul> <p>as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.</p> <p>2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.</p> <p>3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.</p>

	<p><b>Article 19 – Sanctions and measures</b></p> <p>... 2 Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.</p>
<p><b>United Nations Convention against Corruption, 2003</b></p>	<p><b>Article 26 - Liability of legal persons</b></p> <p>1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.</p> <p>2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.</p> <p>3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.</p> <p>4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.</p>

The initial review and assessment within the Istanbul Action Plan recommended that countries consider how to introduce effective liability of legal persons for corruption-related criminal offences into their legal system. During the second round of monitoring, the IAP states were recommended to introduce corporate liability in line with international standards. The third round monitoring assessed the implementation of such recommendations, as well as the practice of the corporate liability enforcement.

There are overall three main forms of corporate liability in the ACN and OECD countries (see the table below):

- administrative punitive liability as a part of the general administrative offences act or a special law on administrative corporate liability (e.g. Bulgaria, Germany, Greece, Italy, Russia). This type of liability does not concern such administrative sanctions as debarment from the public procurement (hence the “punitive” element);
- criminal liability with relevant provisions included in the criminal code (e.g. Estonia, Georgia, Latvia, Lithuania, Moldova, Romania) or as a separate law (e.g. Albania, Croatia, Hungary, Montenegro, Serbia, Slovenia);
- quasi-criminal (*sui generis*) liability, which is not considered to be a criminal liability as such because the *mens rea* element is not attributed to legal persons, but it is applied for the commission of criminal offences by courts dealing with criminal matters according to the criminal procedure (e.g. Poland<sup>197</sup>, Slovakia until 2015<sup>198</sup>, Sweden<sup>199</sup>).

<sup>197</sup> Act on Liability of Collective Subjects for the Acts Forbidden under a Penalty, 2003.

<sup>198</sup> Sanctions (“protective measures”) against legal persons were originally included in the Criminal Code, although legally criminal liability of legal persons was not recognised. They were considered as result (or “collateral effect”) of criminal liability of a natural person. See in this regard concern of the OECD Working Group on Bribery that such arrangement may fall afoul of the legality principle pursuant to which there is no crime and therefore no criminal sanction without law. (OECD/WGB (2012), Phase 3 report on Slovakia, §42, <http://goo.gl/uTQXat>). In 2015, Slovakia adopted a stand-alone Act on Criminal Liability of Legal Persons. The new Act directly imputes a criminal act to the legal person. Source: <http://goo.gl/vyyZKJ>.

<sup>199</sup> Although included in the Swedish Criminal Code, provisions on liability of legal persons are viewed as quasi-criminal, because only natural persons can commit crimes in Sweden. Liability is applied to legal persons for a “crime committed in the exercise of business activities” by a natural person belonging to the legal person. There is no requirement that a natural person has to be convicted or even prosecuted for a corporate fine to be applied. A “corporate fine” is described as a “special legal effect of crime”.

The latter form of the corporate liability is chosen to avoid the main stumbling block in establishing corporate liability – the issue of attributing guilt to entities that by definition do not have psychological attitude to the committed act. The quasi-criminal liability model allows incorporating corporate sanctions in the criminal law without calling corporations direct perpetrators (subjects) of the crime.

### Box 13. Imputation of guilt to legal persons

The usual objection against the introduction of corporate liability is the reference to the individual nature of criminal liability. Guilt in traditional understanding (psychological attitude to the committed) indeed cannot be attributed to legal persons, which are fictional entities. However, the legislation of some countries, which find it difficult to establish criminal liability of legal persons due to that reason, provides for the “guilt”-based liability of legal persons for administrative offences. For example, relevant codes of **Tajikistan** and **Kyrgyzstan** establish that legal persons are liable for administrative offences (though not for corruption ones), which require establishment of guilt; legal persons enjoy the presumption of innocence guarantees. The standard of liability is that a legal person is subject to liability where it has been established that it had the possibility to observe requirements whose violation triggers administrative liability, but did not take all possible measures to observe them. A similar model is used in the Code of Administrative Offences of **Russia**.

Other countries (like **Georgia**) provide for the corporate liability when relevant acts were directly committed by a company’s responsible (leading) persons or through the negligence of such persons (e.g. a lack of supervision or control). A crucial element that links personal wrongdoing to a corporate entity is that such offences have to be committed for the benefit of the legal person. In **Moldova**’s Criminal Code, legal entities are held liable for a criminal offence if one of the following conditions is present: 1) the legal person is guilty of non-compliance or undue enforcement of the direct instructions of the law, which establish duties or prohibitions with regard to carrying out certain activities; 2) the legal person is guilty of carrying out activity that is not provided for in the statutory documents or its declared goals; 3) an act that inflicts or creates a serious risk of infliction of damage in significant amount to the individual, society or the state was committed in the interests of such legal person or it was made possible, authorised, endorsed or used by the body or person with the management functions in the legal person.

The models above provide for the objective imputation of guilt, or strict liability that does not require guilt as such, thus showing how traditional concepts of legal liability can be adjusted to accommodate new realities and establish effective corporate liability.

Source: IAP monitoring reports; OECD/ACN secretariat research.

Administrative corporate liability is considered to be weaker than criminal liability because it has a narrow set of available investigative tools (which generally excludes coercive and covert measures) as compared with those available under criminal procedures. Also, administrative sanctions are usually not sufficiently dissuasive. For example, in its monitoring reports on **Kazakhstan**, the IAP found that administrative liability under the Kazakh Code of Administrative Offence was not effective and dissuasive for a number of reasons: the liability applies only for one offence (active bribery of a public official); the liability only arises if the offence was committed, authorised, endorsed by the managing body/person; the sanctions are neither dissuasive, nor proportionate (a fine up to USD 5,000 for the first offence, but dissolution for a repeated offence); the administrative liability is triggered if there are no elements of a criminal offence, while no criminal liability of a legal person is provided in the Kazakh law. Finally, the liability does not refer to criminal corruption offences as established by the international instruments while also not providing for similar administrative offences.<sup>200</sup>

<sup>200</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 50-51, cited above. See also conclusions on Bulgaria in the Phase 3 Report by the OECD/WGB (2011), §31, <http://goo.gl/mFb4GY>.

**Table 18. Form of corporate liability in the ACN countries**

Criminal liability		Administrative punitive liability	Quasi-criminal liability
Albania Bosnia and Herzegovina Croatia Estonia Georgia Lithuania	FYR of Macedonia Moldova Montenegro Romania Serbia Slovenia	Bulgaria Russia	Azerbaijan Latvia Ukraine
12		2	3

Source: OECD/ACN, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, 2015, pp. 20-21, cited above.

There are four basic models of corporate liability:

- 1) The **Identification model** where the liability of a legal person can be triggered only by the offence committed by its controlling officer, i.e. the person belonging to company's top management or having representative powers;
- 2) The **Expanded identification model** where the liability of a legal person can also be triggered by management's failure to supervise its employees ('lack of supervision rule');
- 3) The **Vicarious liability model** where the liability of a legal person can be triggered by an offence of any employee acting within the scope of his employment and with the intent to benefit the corporation;
- 4) The **Organisational model** where the liability of a legal person is established through deficiencies in its corporate culture.

Among the ACN countries, the majority of States (14) use some version of the identification model (see the table below). Nine of them – Azerbaijan, Bosnia and Herzegovina, Georgia, Latvia, Lithuania, the FYR of Macedonia, Slovenia, Serbia and Ukraine – have explicitly established in their law that lack of supervision by the management can trigger the corporate liability as well. The Russian and Bulgarian systems of administrative punitive liability follow the vicarious liability model, and Romania is the only country where the corporate liability has been developed in the light of the organisational model.

**Table 19. Models of corporate liability in the ACN countries**

Identification model	Expanded identification model	Vicarious model	Organisational
Albania Croatia Estonia Moldova Montenegro	Azerbaijan Bosnia and Herzegovina Georgia Latvia Lithuania FYR of Macedonia Serbia Slovenia Ukraine	Bulgaria Russia	Romania

Source: OECD/ACN, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, 2015, pp. 20-21, cited above.

The recent OECD/ACN study on the corporate liability made the following policy recommendations with regard to the model of the liability:

- Ensure the effectiveness of the corporate liability regime, by covering the actions of lower level agents. The liability model combining vicarious liability ("*respondeat superior*") with a due diligence defence is an effective tool in fighting corporate crime. It minimises the risk that corporate liability can be evaded because of a complex corporate structure, while enabling legal persons to

defend themselves. It also motivates corporations to develop proper compliance rules and corruption prevention mechanisms.

- Alternatively, if the circle of agents who can trigger the corporate liability is restricted to “responsible persons” (*e.g.*, directors, managers, etc.), the following points should be ensured: a) the legal person should be liable when a responsible person’s lack of proper supervision made the commission of the offence possible; b) the definition of “responsible person” should be broad enough to cover all persons who are *de facto* authorised to act on behalf of the legal person, as well as persons who can be reasonably assumed to be authorised to act on behalf of the legal person or who are effective controllers of the legal person (such as a “shadow”, a directing mind, or a beneficial owner). The definition should not be restricted to formal appointments defined by the business law or the company’s statutes.<sup>201</sup>

---

<sup>201</sup> OECD/ACN (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, page 65.

Table 20. Liability of legal persons (LP) for corruption offences in the ACN countries

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Albania</b>	Criminal, 2007 (Criminal Code, Law on Responsibility of Legal Persons)	-	-	Fine up to about EUR 360,000.	Dissolution; suspension or prohibition of certain activity; submission to administrative control; debarment from public procurement; exclusion from receipt or use of licences, authorisations, concessions or subsidies; publication of the judgment; confiscation.
<b>Armenia</b>	<b>Absent</b> (draft Criminal Code and draft Code of Administrative Offences provide for liability of LPs)	-	-	-	-
<b>Azerbaijan</b>	Quasi-criminal, "criminal law measures", 2012 (Criminal Code)	+	-	Fine from about EUR 52,000 to EUR 156,000 or of one to five times the damage inflicted (income obtained) as a result of commission of the crime.	Confiscation; deprivation of the right to engage in certain activities; dissolution.
<b>Bosnia and Herzegovina</b>	Criminal (Criminal Codes)	+	-	Fine from EUR 2,550 to EUR 2.5 million	Dissolution; confiscation; debarment from public procurement; publication of the judgment.
<b>Bulgaria</b>	Administrative, 2005 (Law on Administrative Offences and Sanctions)	-	-	If the advantage that the LP has or would obtain as a result of the crime is in the nature of "property", then fine is up to approx. EUR 510,000, but not less than the value of the advantage. If the advantage is not in the nature of "property" or if the value of the advantage cannot be ascertained, the fine is approx. EUR 2,600 to 51,000.	Confiscation
<b>Croatia</b>	Criminal, 2003 (Law on Responsibility of Legal Entities for Criminal Offences)	-	-	Fine from EUR 650 to about EUR 680,000.	Dissolution; professional bans; bans on transactions with beneficiaries of the national or local budgets; ban on obtaining licences, authorisations or concessions; publication of the judgment; confiscation.
<b>Czech Republic</b>	Criminal, 2012 (Act on Criminal Liability of Legal Persons and Proceedings against Them)	+	-	Fine from EUR 800 to EUR 58.6 million.	Debarment from public procurement, prohibition from receiving public endowments and subsidies; dissolution; prohibition of activity; publication of a judgment;

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
					confiscation.
<b>Estonia</b>	Criminal, 2002 (Criminal Code)	-	-	Fine from 4,000 to EUR 16 million	Confiscation; debarment from public procurement
<b>Georgia</b>	Criminal, 2006 (Criminal Code)	+	-	Minimum fine of EUR 44,000, no upper limit of fine.	Dissolution; deprivation of the right to exercise an activity; confiscation of property.
<b>Hungary</b>	Criminal, 2004 (Act on Measures Applicable to Legal Persons under Criminal Law)	+	-	Minimum fine of EUR 1,585, no upper limit of fine.	Winding up the LP; limiting the LP's activities; debarment from public procurement. Confiscation
<b>Kazakhstan</b>	<b>Absent</b> (draft amendments in Criminal Code, later withdrawn)	-	-	-	-
<b>Kyrgyzstan</b>	<b>Absent</b> (draft amendments in Criminal Code)	-	-	-	-
<b>Latvia</b>	Quasi-criminal, "coercive measures applicable to legal persons", 2005 (Criminal Code)	+	-	From 10 to 100,000 times the minimum monthly wage (in 2015: from EUR 3,600 to EUR 36 million).	Liquidation; limitation of rights; confiscation of property. Debarment from public procurement.
<b>Lithuania</b>	Criminal (Criminal Code)	+	-	Fine from EUR 38 to EUR 1.9 million.	Restriction of operation; liquidation. Confiscation
<b>Moldova</b>	Criminal, 2003 – for a number of offences, 2012 – for corruption offences (Criminal Code)	-	-	From 500 to 20,000 of "standard units" (1 unit equals 20 Moldovan Leu or EUR 1.05; i.e. from EUR 525 to EUR 21,000).	Deprivation of the right to engage in certain activities; dissolution.
<b>Mongolia</b>	<b>Absent</b> (new Criminal Code adopted in 2015, to enter into force on 1 September 2016, introduced corporate liability, but not for corruption offences)	-	-	-	-
<b>Montenegro</b>	Criminal, 2007 (Criminal Code and Law on Liability of Legal Entities for Criminal Offences)	-	-	A fine from two times the amount of the caused damage or acquired illegal material benefit to 100 times the amount of the caused material damage or acquired illegal material benefit. If no damage was caused or no illegal material benefit was acquired through the criminal offence,	Dissolution of legal entity; suspended sentence; and as a security measures - design and implementation of a program of effective, necessary and reasonable measures; confiscation of objects;



Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
				or if it is difficult to set the amount of such the damage or material benefit within a reasonable period of time, given the nature of the committed criminal offence as well as other circumstances, the court shall impose the fine in the amount from EUR 1,000 to EUR 5 million.	publication of the judgment; prohibition to conduct certain business or other activities.
<b>Poland</b>	Quasi-criminal, 2002 (Law on Liability of Collective Entities for Acts Prohibited under Penalty)	+	-	Fine from around EUR 242 to EUR 1.21 million (but no more than 3% of the revenue generated in the tax year when the offence which is a ground for the LP's liability was committed).	Bans on activity; confiscation.
<b>Romania</b>	Criminal, 2006 (Criminal Code)	+	-	Fine from EUR 4000 to EUR 334,000	Dissolution; suspension of the activity from 3 months to 3 year, or suspension of one of the activities related to the offence committed; closing of a workstation from 3 months to 3 years; ban on the participation to public procurement procedures for a period from 1 to 3 years; placement under judicial supervision; publication of the conviction decision. As a safety measure, confiscation of the proceeds of crime and extended confiscation can be ordered.
<b>Russia</b>	Administrative, 2011 (Code of Administrative Offences)	-	-	For bribes less than EUR 13,900 - fine up to 3 times the amount of bribe (but not less than EUR 13,900); for bribes from EUR 13,900 to 277,000 – fine up to 30 times the amount of bribe (but not less than EUR 277,000); for bribes of more than EUR 277,000 – fine up to 100 times the amount of bribe (but not less than EUR 1,390,000). No upper limit of fine.	Confiscation of bribe.
<b>Serbia</b>	Criminal, 2008 (Criminal Code, Law on the Liability of Legal Entities for Criminal Offences)	+	-	From EUR 9,000 to EUR 4.4 million.	Prohibition of certain registered activities or operations; confiscation; publication of the judgment.
<b>Slovak Republic</b>	Quasi-criminal, "protective measures" to LPs, 2010	+	-	Under 2010 law: Confiscation of all property of the LP and forced bankruptcy or a fine from EUR 800	Under 2015 law: dissolution of the legal person, confiscation of assets,

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
	(Criminal Code) A new Act on Criminal Liability of Legal Persons, 2015			to EUR 1.66 million. Under 2015 law: Fine up to EUR 1.6 million.	ban on trade or other activities requiring an authorization or license, temporal ban on participation in public procurement tenders, disqualification from the ability to receive grants, subsidies or other benefits such as contributions from EU structural funds, publication of a sentencing judgment.
<b>Slovenia</b>	Criminal, 1999 (Legal Persons' Liability for Criminal Offences Act)	+	-	Amount of fine depends on sanctions for the natural person under relevant offence: - in case where imprisonment up to three years is prescribed for natural person, fine from EUR 10,000 to EUR 500,000 or – if material damage was caused or property benefit was gained through criminal offence – up to 100-times the amount of damage caused or property benefit obtained; - in case where imprisonment more than three years is prescribed for natural person, fine from EUR 50,000 EUR to 1 million or – if material damage was caused or property benefit was gained through criminal offence – up to 200-times the amount of damage caused or property benefit obtained; instead of fine confiscation of property can be applied to the legal person.	Dissolution; debarment from public procurement; exclusion of from officially supported export credits (for foreign bribery).
<b>Tajikistan</b>	<b>Absent</b> (administrative liability of LPs is provided in the Code of Administrative Offences but not available for bribery offences)	-	-	-	-
<b>The FYR of Macedonia</b>	Criminal, 2004 (Criminal Code)	+	-	Fine from EUR 1,600 to EUR 478,500.	Temporary or permanent ban on LP to perform certain professional activities; dissolution. Confiscation.
<b>Turkey</b>	Administrative, 2009 (Code of Misdemeanours). Also "special security measures" to LPs under Criminal Code "in relation to offences	-	-	Fine from approx. EUR 4 830 to 966 000 (in 2014).	Debarment from public procurement.

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
	committed for the benefit of such entities.”				
<b>Ukraine</b>	Quasi-criminal, “measures of a criminal law nature” applied to LPs, April 2014 (Criminal Code)	+	-	Fine in the amount twice the undue benefit received. If no benefit was received or if it is not quantifiable, a fine from about EUR 4,250 to about EUR 64,000 (depending on the gravity of offence)	Confiscation of proceeds and instrumentalities of corruption offences (but only in the proceedings against natural persons)
<b>Uzbekistan</b>	<b>Absent</b> (draft new Code of Administrative Offences includes liability of LPs)	-	-	-	-

Source: OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, Annex 2, <http://goo.gl/8qDDB2>; Research by the OECD/ACN Secretariat.

Only three IAP countries have introduced corporate liability for corruption crimes so far: **Georgia**, **Azerbaijan** and **Ukraine**.

**Georgia** was the first IAP country to introduce the liability of legal persons in line with international standards. In 2006, Georgia amended its Criminal Code to establish criminal liability of legal persons for money laundering, private sector bribery and active bribery in the public sector where the act was “committed by a responsible person<sup>202</sup> on behalf of or through a legal person and/or for the benefit of it”. In 2008, the Criminal Code was further amended to add corporate liability for the lack of supervision or control on behalf of the ‘responsible person’, which led to the commission of the offence. However, very few cases of corporate liability were initiated in Georgia, e.g. in 2010-2012 there were only two proceedings (both ended with convictions), although neither were for corruption offences. In both cases, legal persons were only held liable after the conviction of the natural person who perpetrated the offence. In 2013-2015, one legal entity was prosecuted for a corruption-related offence; in 2015, one legal entity was convicted for the crime other than corruption.

In March 2012, **Azerbaijan** passed amendments in the Criminal Code establishing criminal liability of legal persons (see the box below).

#### Box 14. Liability of legal persons in Azerbaijan

In March 2012, Azerbaijan introduced amendments in the Criminal Code that established liability of legal persons for a number of offences, including corruption. According to new Chapter 15-2 of the Criminal Code, “criminal law measures” may be applied to legal persons for commission in its favour and interests of a crime by the following natural persons: official authorised to represent the legal person; official authorised to make decision on behalf of the legal person; official authorised to oversee the activity of the legal person; and any employee of the legal person when the offence was committed as a result of failure to oversee such employee by the mentioned officials.

The following “criminal law measures” are applicable to legal persons: fine; special confiscation; deprivation of the legal person of the right to engage in certain activity; dissolution of a legal person. The fine is provided in the amount of 50,000 to 200,000 Manats [about EUR 27,000 to 110,00 in 2016] or at the rate of one to five times of the damage inflicted (income obtained) as a result of the commission of the crime. Fine applied to a legal person shall not exceed in value more than half of the property belonging to the legal person.

Case specific sanctions will depend on the following circumstances: nature and degree of public endangerment; size of the gain of the legal person as a result of crime commission as well as nature or degree of realization of its interests; number of perpetrated offences and gravity of their consequences; contribution by the legal person to the clearance of crime, dismantling the participants thereof, as well as tracing and discovering of the crime proceeds; voluntary compensation or settlement of the material and psychological damage, measures taken by the legal person to reduce the damage inflicted to the victim; characteristics of the legal person, including whether “criminal law measures” have been previously applied to it, benevolent or other publicly useful activities it was involved in.

However, the corporate liability in Azerbaijan cannot be applied in practice for the lack of procedural enforcement rules.

Source: information of the Government of Azerbaijan, IAP Third Monitoring Round report on Azerbaijan, pp. 29-32.

**Ukraine** introduced a *sui generis* liability of legal persons for criminal corruption offences in a separate law in 2009; however, the law was abolished in January 2011, having been effective only for five days. In May 2013, the new amendments in the Criminal Code of Ukraine introduced “measures of criminal-law nature applicable to legal persons”. The amendments were supposed to enter into force on 1 September 2014, but then the date was changed and the amendments became effective in April 2014 (the provisions were again changed in May 2014). For description see the box below.

<sup>202</sup> Person authorised to manage, represent a legal person, take a decision on behalf of a legal person and/or member of supervisory, control and revision body of the legal person.

**Box 15. Liability of legal persons in Ukraine**

In 2014, Ukraine enacted a quasi-criminal corporate liability for corruption: relevant provisions are included in the Criminal Code but legal persons are not considered as subjects of criminal offences on par with natural persons, instead “measures of criminal law nature” are applied to them in the following cases:

- commission by its authorised person on behalf and in the interests of the legal person of any of the designated crimes (active bribery of a public official, active bribery of official of the private law entity or a person providing public services, trafficking in influence);

- failure to carry out duties assigned to its authorised person by law or statutory documents with regard to taking measures to prevent corruption, which resulted in commission of any of the designated crimes.

An “authorised person” of a legal entity means service persons of a legal person, as well as other persons who according to the law, statutory documents of the legal person or contract have the right to act on behalf of the legal person. The above-mentioned corruption offences are considered committed in the interests of legal persons if they resulted in obtaining by the legal person of undue benefit or created conditions for obtaining such benefit, or were aimed at avoiding liability provided for in the law.

For corruption offences, only one type of “measures of criminal nature” – a fine – applies to legal entities; other sanctions – confiscation and liquidation – are not applicable for corruption crimes. The amount of fine was originally established in absolute terms depending on the gravity of crime committed by the “authorised person” and ranged from about EUR 4,400 to EUR 67,000. It was revised in May 2014 establishing as the main rule for sanctioning that a fine is applied in the amount twice the “illegally obtained unlawful benefit”; if the benefit cannot be calculated or was not obtained – then a range of fines is applied depending on the gravity of offence (from about EUR 3,000 to 44,000 according to March 2016 currency exchange rate).

Source: IAP Third Monitoring Round report on Ukraine, pp. 50-53.

Several other IAP countries have contemplated the introduction of corporate liability for corruption. In **Kazakhstan**, –a draft law to amend the Criminal Code was adopted in the first reading in 2010, but it was later withdrawn and no new proposals were made). In **Kyrgyzstan**, amendments in the Criminal Code have been contemplated so that “criminal law measures [can be] applied to legal persons”, while **Armenia** has explored amending the Code of Administrative Offences and the Criminal Code.

**Autonomous liability**

One of the main issues in establishing an effective corporate liability is ensuring its autonomous nature. The autonomy of corporate liability includes two dimensions.<sup>203</sup> First, corporate liability should not be dependent on prosecution and conviction of the natural person who committed the criminal act. Second, there should be a possibility of separate proceedings with regard to the natural person and the legal entity.

The Good Practice Guidance for implementing the OECD Anti-Bribery Convention<sup>204</sup> states that the liability of legal persons should not be “restrict[ed] ... to cases where natural persons who perpetrate offences are prosecuted or convicted”. According to the OECD Working Group on Bribery, “a regime that requires the conviction and punishment of a natural person fails to address increasingly complex corporate structures, which are often characterised by decentralised decision-making.”<sup>205</sup> The conviction of a natural person as a prerequisite to the liability of a legal person also prevents the application of effective, proportionate and dissuasive sanctions to legal persons. Back in 1988, the Council of Europe’s

<sup>203</sup> For the detailed analysis see: OECD/ACN, *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, 2015, pp. 26-29.

<sup>204</sup> Annex I to the OECD Council Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 2009, <http://goo.gl/LCbNvt>.

<sup>205</sup> OECD/WGB (2012), Phase 3 Report on Hungary, §21, <http://goo.gl/P32n29>. See also OECD/WGB (2007), Phase 2 Report on Poland, §161-163, <http://goo.gl/SyBUuU>.

Committee of Ministers recommended that its Member States should hold enterprises liable, “whether a natural person who committed the acts or omissions constituting the offence can be identified or not”.<sup>206</sup>

Similarly, in its evaluations GRECO, has expressed a similar concern about liability regimes that require the identification of “a physical perpetrator” before holding an enterprise liable because “in large corporations, the sheer potential for persons being responsible for only a fraction of the completed offence as well as collective decision-making processes could make it impossible to identify with certainty a particular natural person as a suspect and/or prosecute him/her”.<sup>207</sup>

Therefore, any legal regime that makes the conviction of the natural person a necessary condition for proceedings against the legal person would contradict international standards. On the contrary, the regime with the highest level of autonomy (which would, arguably, also be the most effective) would be the one that does not even require the identification of the perpetrator.

A good practice in this regard is the Criminal Code of **Georgia** (Art. 107-1), which provides that a legal person shall be subject to criminal responsibility if a crime is committed on its behalf, for its benefit and/or through it, whether the perpetrator is identified or not. In **Latvia**, a separate proceeding against a legal person can be initiated “if the circumstances have been determined that do not allow ascertaining or holding criminally liable a concrete natural person.”<sup>208</sup> Fully autonomous liability should be possible also in **Romania**, because corporate liability is not necessarily linked to the responsibility of any one person under the organisational model.<sup>209</sup> Finally, to take an example from the Working Group on Bribery, **Italy**, under Article 8 of Legislative Decree No. 231/2000, provides for corporate liability when either (a) the offender has not been identified or is not chargeable, or (b) the offence extinguishes for a reason other than amnesty.<sup>210</sup>

Such an approach makes corporate liability possible in cases where it was established that a crime has been committed in the interest of the corporation, but it is impossible to ascertain the full course of events. This could occur, for instance, where the criminal decision was made by the management board, but it remains unclear which members participated in the decision. Such an approach also adapts to large corporations, in which policies or decisions are often, due to their complex structure and delegation of powers, the product of several individuals acting collectively. Therefore, it may happen that no human being would qualify as a perpetrator when analysing a particular case from the perspective of criminal law.<sup>211</sup>

Other ACN countries provide for a lower level of autonomy of corporate liability. Some require – in one way or another – the identification of the individual perpetrator. For instance, a legal person can be declared to be liable even if the individual perpetrator “is not criminally liable” (**Bosnia and Herzegovina, Bulgaria, the FYR of Macedonia**), “has not been convicted” (**Montenegro, Russia**), “is not guilty” or acted “under the force or threat by legal person” (**Slovenia**). All these provisions presume that the responsible person has been identified and, at least to some extent, investigated.<sup>212</sup>

<sup>206</sup> Recommendation No. R (88) 18 concerning liability of enterprises having legal personality for offences committed in the exercise of their activities, 1988, <https://goo.gl/RywwGe>.

<sup>207</sup> GRECO (2009), Addendum to the Compliance Report on Latvia, Second Evaluation Round, §39, <http://goo.gl/UOKBve>. At the same time GRECO’s position has been that such situation, while unsatisfactory, is not in contravention of the letter of Article 18 of the CoE Criminal Law Convention.

<sup>208</sup> Section 439, paragraph 3, point 2, of the Latvian Criminal Procedure Law.

<sup>209</sup> OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 28.

<sup>210</sup> Other countries where identification of the perpetrator is not necessary are, for example, the United States, Finland, Switzerland, the Netherlands.

<sup>211</sup> OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 27.

<sup>212</sup> *Idem*, page 28

In **Serbia, Azerbaijan and Croatia**, the principle of autonomy is established through procedural rules. According to **Serbian** law, a legal person shall be held accountable “even though criminal proceedings against the responsible person have been discontinued or the act of indictment refused”. The Criminal Code of **Azerbaijan** establishes that the “termination of criminal prosecution in respect of the physical person shall not prevent application of the criminal law measure to the legal person.”<sup>213</sup> In **Croatia**, the law provides an exceptional possibility of initiating and conducting the proceeding against the legal person “if no criminal proceedings may be initiated or conducted against the responsible person for legal or any other reasons whatsoever.”<sup>214</sup>

The quasi-criminal form of corporate liability may be problematic in terms of its autonomous nature, unless there are explicit provisions that separate the investigation and prosecution of the legal entity from those against the natural person offender. For example, while it is not directly stated in the new provisions on corporate liability in the Criminal Code of **Ukraine**, it is clear that corporate liability is linked to that of the “authorised person” who committed the offence. The very model used (“measures of a criminal nature”) presumes that such measures are secondary to individual liability. This model requires the “commission of the crime” by the authorised person on behalf and in the interests of the legal entity. The court, when applying such measures to a legal entity, must take into account, *inter alia*, the gravity of the crime committed and the degree of the perpetrator’s criminal intent. Under the CPC, the proceedings with regard to the legal entity are carried out simultaneously with the proceedings concerning natural person and should be closed if criminal proceedings against the natural person have been closed or relevant person was acquitted.<sup>215</sup>

An example of regulation that separates the two proceedings can be found in **Latvia**, where the Criminal Procedure Law specifies that the proceedings for the application of coercive measures to the legal person may be separated in the following cases: 1) criminal proceedings against a natural person are terminated for non-exonerating reasons; 2) if the circumstances have been determined that do not allow to ascertain or hold criminally liable a concrete natural person, or the transfer of the criminal case to court is not possible in the near future (in a reasonable term) due to objective reasons; 3) in the interests of solving in timely manner criminal-legal relations with a natural person who has rights to defence; 4) it is requested by a legal person’s representative.<sup>216</sup>

In conclusion, there should be no general rule requiring that the legal person and the individual perpetrator have to be investigated and tried jointly, as this unreasonably complicates the proceedings in a complex case. It should be possible to investigate, prosecute, convict and punish a legal person regardless of what procedural decision has been taken with respect to the individual perpetrator. In such separate proceedings, all investigation techniques should be available.<sup>217</sup>

### Legal entities covered

According to international standards, the liability should cover the broadest possible range of entities, not only those that have legal personality, but also funds, associations, partnerships and other unincorporated entities lacking legal personality. As long as such entities have the legal capacity to perform legal actions, conclude agreements, etc., they should be liable for corruption. The liability should cover both commercial and non-profit organisations, private companies as well as enterprises that are wholly or partially owned or controlled by states or municipalities. Many ACN countries exclude from the scope of liability public authorities and international organisations, which is an acceptable exception.

<sup>213</sup> Article 99-4.4 of the Azerbaijan’s Criminal Code; see also IAP Third Monitoring Round report on Azerbaijan, page 30.

<sup>214</sup> OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 28.

<sup>215</sup> See OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 52.

<sup>216</sup> Section 439, paragraph 3, of the Latvian Criminal Procedure Law. Cited from: OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 29.

<sup>217</sup> OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 66.



### “In the interests”

Corporate liability should be triggered only when the underlying offence was committed in the interests of the entity; the legal person is not liable for the actions of its agents that are committed solely in their own private interests. Usually, this connection is established by the interest criterion, which means that the acts of a representative can be attributed to the legal person only if they have been committed, at least in part, in the interest of the legal person. The ACN countries use different wording (“on behalf of”, “in the name of”, “in the interest of”, “for the benefit of”, “for the sake of”, “in favour of”, etc.), but “in the interest of” or “for the benefit of” are the most adequate ones, as others may excessively narrow down the liability.<sup>218</sup> To cover affiliated entities, it is important to ensure that a legal person can be held liable not only for offences that were committed in its interest, but also for offences that its relevant agent committed in the interest of any other entities that are associated or related to the legal person.

### Sanctions

Legal persons should be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. The effectiveness and dissuasiveness often depends on the amount of monetary measures imposed on the legal person, which may include a fine and the confiscation of the profit or proceeds obtained as a result of the offence. Monetary sanctions should be sufficiently severe to have an impact on large corporations. According to the OECD WGB, to ensure a level playing field of commerce and prevent “regulatory arbitrage” monetary sanctions have to be compared on an international level. The OECD WGB considered maximum sanctions of EUR 1 million (**Germany, Italy**, Phase 2 reports), EUR 1,660,000 (**Slovakia**, Phase 3 report) and EUR 700,000 (**Austria**, Phase 2 report) to be insufficient. On the other hand, the OECD WGB found the maximum criminal sanctions of about EUR 16 million (**Estonia**, Phase 2 report) and EUR 10 million (**Belgium**, Phase 2 report) to be sufficient. It should be kept in mind that confiscation of the bribe and its proceeds was also available in both of the above cases. In the ACN countries, the minimum fine ranges from EUR 38 (**Lithuania**) to EUR 1,000 (**Montenegro**) and the maximum from EUR 21,000 (**Moldova**) to EUR 36 million (**Latvia**). See Table 21 above for details on other countries.

A better approach is to set the monetary sanction in proportion to the bribe involved, damaged caused or other value (*e.g.* the company’s turnover). Some countries have a default fine, which is set at a fixed amount or range, as well as an alternative, proportionate sanction, which can be imposed if the circumstances call for a higher sanction. In addition, several ACN countries distinguish between offences that result in a property benefit or material damage and crimes that cause harm whose value cannot be ascertained. In the first case, the fine depends on the amount of the benefit gained or damage caused, while the punishment for the latter crimes is determined by a fixed sum of money.<sup>219</sup> See Table 22 below for details on the combined system of fines.

<sup>218</sup> In its Third Monitoring Round report on Ukraine the IAP monitoring noted that the element “on its behalf”, which is required to trigger the corporate liability **in addition to** “in the interests of the legal person”, is excessive and is also not provided in any international standards (*e.g.* the CoE Convention). See: OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 52.

<sup>219</sup> For more details see: OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, pages 35-36.

**Table 21. Mixed (fixed/proportionate) corporate fines for corruption offences in the ACN countries**

Country	Minimum (EUR)	Maximum (EUR)	Alternative minimum	Alternative maximum	
<b>Azerbaijan</b>	52 000	156 000	Or	The value of the illicit benefit obtained or damage inflicted	5 times the value of the illicit benefit obtained or damage inflicted
<b>Bulgaria</b>	2 600	51 000	Or	Not less than the value of the benefit obtained	EUR 510 000
<b>FYR of Macedonia</b>	1 620	972 500	But		Not more than 10 times the value of the illicit benefit or damage
<b>Montenegro</b>	1 000	5 000 000	Or	Two times the value of the illicit benefit or damage	100 times the value of the illicit benefit or damage
<b>Russian Federation</b>	12 900	-		3 times the value of the bribe <sup>220</sup>	100 times the value of the bribe
<b>Slovenia</b>	10 000	1 000 000	Or	-	200 times the value of the illicit benefit or damage
<b>Ukraine</b>	2 900	44 000	Or		2 times the value of the illicit benefit (The fixed amount fines are used only when the benefit was not received or is not quantifiable)

Source: OECD/ACN (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, page 36.

With regard to **Azerbaijan**, the IAP report stated that, in theory, fines that can be calculated up to five times the damage caused, or the income obtained, could establish an effective and dissuasive deterrent.<sup>221</sup>

In **Georgia**, the lower limit is also determined by a fixed sum of money (EUR 44,000). However, the law does not set a maximum fine, and it does not provide any instruction on how the maximum should be calculated by the court.<sup>222</sup>

When the monetary fine is calculated by multiplying the value of the benefit obtained by the legal person, such “benefit” should be understood broadly to include the value of the contract obtained as result of bribery, tax relief, subsidies, licenses, etc.<sup>223</sup> Also the calculation of the fine should not be limited to the benefit “obtained”, because it would exclude offences of offer/promise of the bribe and their acceptance: it should also cover the benefit that could have been obtained, if it can be calculated.<sup>224</sup>

The fine is only one type of monetary sanction; the confiscation of the instrumentalities and proceeds of the offence is another important monetary sanction. Effective and robust confiscation can complement the fine and make the sanctions effective overall. For more details on what effective confiscation measures should include, see the section below on “Confiscation”.

<sup>220</sup> The multiplier depends on the amount of the bribe: for bribes less than RUB 1 million the fine is up to 3 times the amount of the bribe; for bribes from RUB 1 million to 20 million - a fine up to 30 times the amount of the bribe; for bribes above RUB 20 million - a fine up to 100 times the amount of the bribe.

<sup>221</sup> OECD/ACN (2013), *Third Monitoring Round report on Azerbaijan*, page 31.

<sup>222</sup> OECD/ACN (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*.

<sup>223</sup> OECD/WGB (2012), *Phase 3 report on Greece*, §49, <http://goo.gl/BvYILn>.

<sup>224</sup> See OECD/ACN (2015), *Third Monitoring Round report on Ukraine*, page 53.

In addition to monetary sanctions, countries often employ various restrictions of the company's rights as criminal sanctions or additional administrative consequences of the criminal sanctions. Below is the list of possible additional sanctions used in the ACN countries<sup>225</sup>:

- 1) A prohibition on obtaining permits, licenses, concessions, authorisations or any other right prescribed by a special law;
- 2) A prohibition on participating in public bidding procedures or on the awarding of public procurement agreements and agreements for public-private partnerships;
- 3) A prohibition on establishing new legal entities;
- 4) A prohibition on using subsidies and other favourable credits;
- 5) The revocation of a permit, license, concession, authorisation or other right regulated by a special law;
- 6) The temporary or permanent prohibition on conducting certain activity.
- 7) The development and implementation of a programme of effective, necessary and reasonable measures;
- 8) The closing of a legal person's branch office;
- 9) Placing the legal entity under judicial supervision;
- 10) The prohibition of transactions with the beneficiaries of the national or local budget;
- 11) The prohibition of trading with securities belonging to the legal person.

### Exemption from liability

Corporate liability for the lack of supervision or control committed by leading persons (i.e., persons with the highest level of managerial authority) promotes implementation in companies of adequate internal control, ethics and compliance programmes or measures.<sup>226</sup> Existence of such internal control systems may be established as a defence exempting company from liability for actions of its employees. For example, in **Italy** a legal person is not liable for an offence committed by a person holding a managing position or persons who are under their direction or supervision if it proves that before the offence was committed (i) the body's management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that occurred; (ii) the body had set up an autonomous organ to supervise, enforce and update the model; (iii) the autonomous organ had sufficiently supervised the operation of the model; and (iv) the natural perpetrator committed the offence by fraudulently evading the operation of the model.

Among the ACN countries, only **Montenegro** provides for a "due diligence defence": the court may exempt a legal entity from punishment if the entity has undertaken all effective, necessary and reasonable measures aimed at preventing and revealing the commission of the criminal offence.<sup>227</sup> In some other ACN countries the presence of internal control and compliance programme may be taken into account during sentencing of a legal person (e.g. in **Latvia, Montenegro, Serbia and Ukraine**).

The IAP monitoring has recommended to the countries to implement such defence or at least to consider it (e.g. **Azerbaijan, Georgia**). An additional measure could be to establish provisions that allow the court to defer the application of sanctions imposed on a legal person if the latter complies with organisational measures to prevent corruption as determined by the court. The legal person is punished in this case only if it fails to implement relevant measures or if it commits a new offence.

<sup>225</sup> Source: OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, pages 43-44.

<sup>226</sup> See Good Practice Guidance on internal controls, ethics, and compliance, contained in OECD Council Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 2009, <http://goo.gl/G8FX3I>.

<sup>227</sup> Article 23, paragraph 3, of the Law on Criminal Liability of Legal Entities.

There can be also other grounds for exemption from the liability: 1) the legal entity reveals and reports a criminal offence before finding out that criminal proceedings have been initiated (**Croatia, Montenegro, the FYR Macedonia, Slovenia**<sup>228</sup>, **Romania**); 2) the legal entity voluntarily and immediately returns the illegally obtained material gain or rectifies the harmful consequences caused, or delivers data significant for liability of another legal entity with which it is not connected organizationally (**Montenegro, the FYR Macedonia, Slovenia**).<sup>229</sup>

### Other standards

- Corporate liability, be it administrative or criminal, should allow for effective use of mutual legal assistance.
- The liability of legal persons should not be limited to cases when the legal person has actually obtained a benefit from bribery. Such restriction may exclude liability when, for instance, a company won a contract due to bribery, but the contract did not generate any revenues because it was a poor business decision or the scheme was uncovered before operations commenced.<sup>230</sup>
- Corporate restructurings, such as dividing the legal person or merging it with another legal person, cannot be used to avoid liability. This can be achieved either through special provisional or security measures applicable during the criminal proceeding, or through a general rule that ensures that the successor entity or the reorganised body or bodies will inherit the original legal person's liability.

### Enforcement

Enforcement of corporate liability provisions remains low in the region and is absent in those few IAP countries that have introduced it. See available enforcement data below in the table.

**Table 22. Legal and natural persons prosecuted for bribery in the ACN countries in 2010-2013**

Country	Legal persons			Convictions of natural persons
	Indictments	Convictions	Acquittals	
Bosnia and Herzegovina	0	0	0	17
Croatia	1	0	0	n/a
Estonia	27	16	3	263
Latvia	2	1	0	222
Lithuania	7	7	0	2064
Romania	14	1	0	1071
Serbia	1	0	0	n/a
Slovenia	3	0	0	56
Total	55	25	3	3693

Source: OECD/ACN, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, 2015, p. 34, cited above.

It is clear that the countries continue to rely on the traditional prosecution of natural offenders and are reluctant to pursue legal persons. The recent OECD/ACN study on the corporate liability noted that in almost all the countries that were reviewed, instructional materials, such as commentaries, official guidelines, and academic writings were available and extensive training was conducted. This suggests that trainings and guidelines alone are not enough to encourage the policemen and prosecutors to go after

<sup>228</sup> In Slovenia, this defence is possible only for liability based on the “lack of supervision rule”.

<sup>229</sup> Source: OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, page 49.

<sup>230</sup> OECD/WGB (2012), Phase 3 report on Greece, §34, <http://goo.gl/BvYILn>.

legal persons. A more detailed study of high-enforcement countries will be needed to identify precisely which factors have encouraged active implementation in those countries.<sup>231</sup>

To address this, the IAP monitoring reports recommended raising awareness of corporate crime and the liability of legal persons among law enforcement officers, prosecutors and judges, conducting regular legal training to explain corporate liability provisions, their purpose, their enforcement, and the added value of prosecuting legal persons. Trainings should be as practical as possible and target various groups of officials, such as investigators, prosecutors, and judges. Combined trainings, featuring the participation of different groups of officials, may be especially beneficial.

For **Georgia**, the IAP monitoring report recommended including practical training exercises focusing specifically on liability of legal persons for corruption offences in the curriculum for newly appointed investigators and prosecutors, as well as for further in-service training; providing investigators and prosecutors with manuals on effective investigation and prosecution of corruption cases involving legal persons; ensuring that the enforcement of the liability of legal persons for corruption offences is included in the policy priorities in the criminal justice area.<sup>232</sup> Similar recommendations were given to **Azerbaijan**.<sup>233</sup>

## Definition of an official

### *Domestic public official*

International standards require that bribery offences cover a broad range of public officials. The definition of a national public official should include any person who:

- Holds a legislative, executive or administrative office, including heads of state, ministers and their staff.
- Is a member of a domestic public assembly.
- Holds a judicial office, including prosecutors and investigative magistrates.
- Holds an office in local self-government bodies.
- Performs a public function, including for a public agency. A public agency may include an entity constituted under public law to carry out specific tasks in the public interest.
- Performs a public function for a public enterprise, whether as an executive, manager or employee. A public enterprise should include any enterprise in which the government holds a majority stake, as well as those over which a government may exercise a dominant influence directly or indirectly. It should also include an enterprise that performs a public function and which does not operate on a normal commercial basis (i.e., in a manner is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges) in the relevant market.
- Performs any activity in the public interest delegated by a public authority, such as the performance of a task in connection with public procurement.
- Provides a public service as defined in the domestic law and as applied in the pertinent area of law of that country, e.g. domestic arbitrators, jurors, notaries, forensic experts.

<sup>231</sup> OECD/ACN (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, pages 33-34.

<sup>232</sup> OECD/ACN (2013), *Third Monitoring Round report on Georgia*, page 29.

<sup>233</sup> OECD/ACN (2013), *Third Monitoring Round report on Azerbaijan*, page 34.

- Meets the definition of a “public official” in the domestic law of the country, including the definitions for “official”, “public officer”, “mayor”, “minister” or “judge”. It also includes law enforcement officers and the military.<sup>234</sup>

#### Box 16. Definition of a public official in Azerbaijan

In June 2011, in response to recommendations by the IAP and GRECO, Azerbaijan amended its Criminal Code and provided for an autonomous definition of an official subject to liability for bribery offences. The previous provision of the Criminal Code referred to the Law on Combating Corruption and did not cover certain categories of persons, such as auxiliary employees in public authorities, officials of the local self-government, or foreign public officials.

Source: IAP monitoring reports, information of the Government of Azerbaijan.

In determining whether a person is a national public official, it is irrelevant whether that person is: appointed or elected; permanent or temporary; paid or unpaid, a low-level or high-level official; or in a core or auxiliary position.

A common problem for IAP countries is the dispersed definition of the “officials” subject to bribery offences, as some elements of definition may refer to various laws, e.g. on the civil service, on the fight against corruption, on various public authorities. For the sake of legal certainty, it is preferable to have an autonomous definition included in the Criminal Code.

In several IAP countries (**Armenia, Tajikistan, Ukraine**), “officials” are limited to public employees with managerial, administrative, organisational or financial functions, thus excluding auxiliary employees (e.g. clerks, secretaries, typists, couriers, drivers, archivists). This falls short of international standards. As was noted in the IAP monitoring of **Kazakhstan**, the definition of public officials should also cover jurors, because they perform important public functions.

#### Box 17. Definition of public official in Ukraine

The 2011 reform of anti-corruption legislation in Ukraine amended the definition of an official relevant for bribery offences. The new framework law on the prevention and combating of corruption contained a list of persons liable for corruption offences and included a broad range of domestic and foreign officials and public employees. Domestic officials and public employees were in general defined as “persons authorised to perform functions of the state or local self-government”. At the same time, the Criminal Code preserved an autonomous definition of officials (“service persons”), in particular, referring to (1) “persons who perform functions of representatives of power or local self-government” and (2) persons who hold in state authorities, local self-government bodies, state and municipal enterprises, establishments and organisations offices connected with organisational, managerial, administrative or economic functions. According to the Ukrainian Supreme Court’s Resolution on judicial practice in bribery cases, first category means, in particular, “employees of public organs and their establishments who are entitled to set demands and make decisions binding on natural and legal persons regardless of their departmental affiliation or subordination”. Such definition of officials, as used in the Ukrainian Criminal Code (“service persons”), was limited to employees with managerial, administrative, organisational or financial functions, thus excluding auxiliary employees.

This deficiency was addressed in May 2014 by amendments to Article 354 CC. The amended provision covers active and passive bribery of an employee of an enterprise, institution or organization, who is not a service person, or a person who works for the benefit of an enterprise, institution or organization. According to the definition included in the Note to Article 354, person who works for the benefit of an enterprise, institution or organization should mean a person who carries out work and has labour relations with such enterprise, institution or organization. The definition of the “person who works for the benefit” created an inconsistency as it referred to labour relations, which were already covered by the reference to “employee”. To correct this, yet another amendment was adopted in February 2015, which provided that a person who works for the benefit of an enterprise, institution or organization should mean a person who carries out work *or provides service according to an agreement with such enterprise, institution or organization*. The Third Monitoring Round report found the final provisions, as amended, to be compliant with international standards.

Source: IAP monitoring reports on Ukraine; OECD/ACN secretariat research.

<sup>234</sup> OECD, “Corruption. Glossary of International Standards in Criminal Law”, 2008, pages 31-32, <http://goo.gl/jSIJxG>.

Some IAP countries (e.g. **Azerbaijan, Georgia, Kazakhstan**) extend the definition of an official even to candidates for political offices, like the President, members of the parliament and local representative bodies. This is a good practice that should be spread. In fact, the IAP's report from the second round of monitoring recommended that **Georgia** cover candidates for political offices, which was done in 2011.

#### *Foreign official*

According to international standards, corruption offences should also cover officials of foreign states and officials of public international organisations. The definition of a foreign public official is comparable with that of a domestic public official with reference to a foreign state. A "foreign public official" is defined in the UNCAC (Art. 2) as "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise."

According to international instruments, the foreign official definition should cover the following groups:

1. Persons holding legislative, administrative, or judicial office in a foreign country (regardless of whether appointed or elected, permanent or temporary, paid or unpaid, and irrespective of seniority);<sup>235</sup>
2. Officials and agents of public international organisations (including those authorised by such organisations to act on their behalf);<sup>236</sup> and
3. Persons who perform public functions (such as for a public agency or enterprise);<sup>237</sup>
4. Members of parliamentary assemblies of international and supranational organisations;<sup>238</sup>
5. Holders of judicial office or officials of an international court;<sup>239</sup>
6. Persons who provide a public service (such as a notary, attorney, or auditor);<sup>240</sup>
7. Domestic and foreign arbitrators;<sup>241</sup> and
8. Jurors in the judicial system of another country.<sup>242</sup>

It is important that the term "foreign official" have an autonomous meaning within the prosecuting country's legal system, that is, determining whether an individual is a foreign official should not depend on an external legal source (such as proof of law of the foreign official's country). While most ACN

<sup>235</sup> OECD Convention Article 1.4(a); COE Convention Articles 1 and 6, Explanatory Report, §28; UNCAC Article 2(a)(i), (b).

<sup>236</sup> OECD Anti-Bribery Convention, Article 1.4(a); UNCAC, Article 2(c).

<sup>237</sup> OECD Anti-Bribery Convention, Article 1.4(a); UNCAC, Article 2(a)(ii), (b).

<sup>238</sup> CoE Criminal Law Convention, Article 10. The CoE Convention includes a qualifying condition that the country should be a member of such international or supranational organisation. However, the OECD Anti-Bribery Convention does not have this limitation.

<sup>239</sup> CoE Criminal Law Convention, Article 11; Explanatory Report to the CoE Criminal Law Convention, §63. The CoE Convention includes a qualifying condition that that the country should accept the jurisdiction of such court. To the extent that an international court is an "international organisation", the OECD Anti-Bribery Convention does not have this limitation.

<sup>240</sup> UNCAC, Article 2(a)(ii). Note that the idea of a person performing a "public service" being a public official is part of UNCAC's definition of "public official," but not an express part of UNCAC's definition of "foreign public official."

<sup>241</sup> Additional Protocol to the CoE Criminal Law Convention, Articles 1, 2 and 4; Explanatory Report to the Additional Protocol, §9. From the IAP countries, Armenia, Azerbaijan, Georgia and Ukraine are Parties to the Additional Protocol.

<sup>242</sup> Additional Protocol to the CoE Criminal Law Convention, Article 6; Explanatory Report to the Additional Protocol, §37.



countries use an autonomous definition, **Albania, Armenia and Bosnia and Herzegovina** do not. For example, under Armenian law “foreign officials are persons performing functions of public official of a foreign state in accordance with the internal law of the state concerned, as well as members of legislative or other representative body of a foreign state exercising administrative authorities” (Article 308 CC).<sup>243</sup>

**Table 23. Definition of foreign public officials in the IAP countries**

	Foreign public officials	Officials of international organisations
Armenia	✓	✓
Azerbaijan	✓	✓
Georgia	✓	✓
Kazakhstan	✓	✓
Kyrgyzstan (2012)	✓	✓
Mongolia	—	—
Tajikistan (2013)	✓	✓
Ukraine	✓	✓
Uzbekistan (2015)	✓	✓

Source: IAP monitoring reports, OECD/ACN secretariat research.

International standards allow the bribery of foreign public officials to be covered either through separate offences or by extending the definition of persons covered by bribery offences to encompass foreign public officials. All the IAP countries that have already criminalised the bribery of foreign public officials (see Table 24 above) have chosen the latter approach and extended the definition of an official to cover foreign public officials.

#### Box 18. Definition of foreign officials in Kazakhstan

The definition of “foreign public official” in Kazakhstan’s law was reviewed as part of the monitoring process under the OECD/ACN Istanbul Anti-Corruption Action Plan. The Second Monitoring Round reported that in 2007 a note was added to Article 311 of the then applicable CC to indicate that the term “official” in the bribery crimes also includes officials of foreign states or international organisations. No further details were provided. The report deemed this insufficient for several reasons. First, in the bribery offences “officials” were only covered by qualified (aggravated) offences; other offences in those articles referred to other subjects (e.g., “a person authorised to perform public functions or a person equated to them” or “a person holding a responsible public office”). Second, the term was not defined according to international standards.

This was partly resolved with adoption of a new Criminal Code of Kazakhstan in 2014. However, the new code did not define the term “official of a foreign state or international organization” either. The general definition of “official” (“a person who permanently, temporarily or under special authorisation carries out functions of the power representative or carries out organisational and managerial or administrative and economic functions in state agencies, bodies of local self-government, as well as in the Armed Forces of Kazakhstan, other military formations of Kazakhstan”) concerns only national employees, as is clear from the definition itself.

Source: OECD/ACN (2015), Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, page 21, <http://goo.gl/IXbRru>.

## Sanctions

International conventions consider corruption offences to be serious offences and require that sanctions for such offences, when committed by natural or legal persons, be effective, proportionate and dissuasive.<sup>244</sup> For natural persons, the CoE Criminal Law Convention (Art. 19) and the OECD Anti-Bribery Convention (Art. 3) specifically require that the offence be punishable by a deprivation of liberty

<sup>243</sup> OECD/ACN (2015), Thematic Study, Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, pages 21 and 53, <http://goo.gl/IXbRru>.

<sup>244</sup> The UN Convention against Corruption (Art. 30) provides for sanctions that take into account the gravity of offence.

sufficient to enable effective mutual legal assistance and extradition. The UN Convention against Corruption (Art. 30) also provides for the possibility of disqualifying persons convicted of corruption offences from holding a public office or office in a state-owned enterprise. Sanctions against legal persons can be penal, administrative or civil in nature and should include monetary sanctions (see the discussion above concerning the effective sanctions against legal persons).

When evaluating whether established sanctions comply with international standards, the following issues must be taken into account: the level of sanctions for bribery offences compared with other economic crimes (fraud, embezzlement, etc.); differences between sanctions for private and public sector bribery offences; sanctions for various bribery offences, including the promise, offer, and giving of a bribe (and the request, receipt, and acceptance of a promise or offer of a bribe); whether minimum and maximum limits of sanctions for bribery offences are sufficiently dissuasive without being so excessive as to breach proportionality principle; differences between sanctions for active and passive bribery offences; whether sanctions provide for a term of imprisonment sufficient to allow extradition; and if the statute of limitations is linked to the severity of sanctions, that the sanctions enable a statute of limitations that does not render liability ineffective; etc.

As shown in Table 24 below, bribery and other corruption offences in most IAP countries provide for a wide range of sanctions that are effective, proportionate and dissuasive. The level of penalties often depends on whether a legal or illegal act or omission by the official is involved. A number of other aggravated offences are provided as well. At the same time the sanctions provisions in several IAP countries fall short of the international standards.

In **Kyrgyzstan**, the sanctions of public service or a fine of about EUR 80 to EUR 325 for receiving an undue benefit by employees of state authorities, who are not officials (Art. 225 CC), were found to be not sufficiently dissuasive to punish the taking of bribes by employees of state authorities, which may cause significant harm.<sup>245</sup> Consequently, Kyrgyzstan amended this provision raising the sanction for this offence to a fine between EUR 270 to EUR 675 or 70 to 100 times the amount of the bribe.

In **Ukraine**, the sanctions for basic, non-aggravated offences of active and passive bribery, active trading in influence, active and passive bribery in the private sector did not provide for imprisonment and in general were too lenient to be considered effective and dissuasive. They were also too lenient to support extradition for these corruption offences since under the Ukrainian Criminal Procedure Code extraditable offences must be punishable by imprisonment of at least 1 year. The level of sanctions also conditioned the duration of the statute of limitations, which could not exceed 3 years if the sanction is restriction of liberty or imprisonment less than 2 years. Another shortcoming was that offering a bribe resulted in a less severe sanction than giving a bribe. In 2013-2014, Ukraine revised the relevant sanctions and significantly increased them. In particular, the sanction of deprivation of liberty was included in all basic (non-aggravated) offences as an optional sanction, which made these offences extraditable. In addition, fines were increased and special confiscation introduced. Also importantly, the sanctions for offering and promising a bribe (as well as for the acceptance of the offer or promise or requesting an unlawful benefit) were equalised with the sanctions for giving and receiving an unlawful benefit in compliance with international standards.<sup>246</sup>

The sanctions should not only be sufficiently strong to be dissuasive, but also be proportionate. In **Georgia**, the minimum sentence for basic passive bribery is 6 years of imprisonment. This was found to be disproportionate, not leaving room for an appropriate sanction for small value bribes. It was noted that there was a risk that the case would not be brought to the attention of a court because the minimal sentence was inappropriate.<sup>247</sup>

<sup>245</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 29, <http://goo.gl/uvzlyyy>.

<sup>246</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 46.

<sup>247</sup> OECD/ACN (2010), Second Monitoring Round report on Georgia, page 22, <http://goo.gl/qYFOPf>.

While most IAP countries provide dissuasive sanctions (if sanctions for aggravated offences are taken into account), their enforcement is uneven. In practice, courts often apply conditional release from imprisonment and tend to apply sanctions closer to the lower margins. For example, the IAP Third Monitoring Round report on **Ukraine** noted that the courts often release perpetrators of corruption on parole, apply sanctions below the minimum punishment provided by the specific offence or release convicted persons after they serve a short period of imprisonment, or even simply impose other sanctions instead of imprisonment. According to experts, only about a quarter of the corruption cases detected by law enforcement result in an indictment and only very few of those result in a conviction with “real” imprisonment terms. To address this policy of leniency, the parliament of Ukraine amended the Criminal Code in October 2014 to introduce the category of “corruption crimes”, to which a number of provisions on discharging liability or punishment are not applicable. This was found to be a welcome development and should be used as a best practice.<sup>248</sup>

**Kazakhstan** recently carried out a significant revision of sanctions for corruption and other offences. Its new Criminal Code, which was enacted in 2015, introduced the following changes:

- 1) Fixed amounts of fines (fixed number of monthly calculation rates) have been replaced by fines calculated by multiplying the amount of the bribe (e.g. the basic offence of bribe taking is fined with 50-fold amount of the bribe; the basic offence of bribe giving, with 20-fold amount). In view of the definition of the “large” and “particularly large” amount of bribes, the minimum fine for the basic offence will be about EUR 182,500; for the basic offence of bribe giving – about EUR 73,000; the minimum fine in case of aggravated bribe-taking (by a criminal group or in a particularly large amount) would equal to about EUR 5,840,000; and a similar offence of the bribe-giving – about EUR 3,650,000.
- 2) The fine (a multiplier of the bribe amount) is applied as an alternative sanction for all offences of bribe taking or giving, whereas previously aggravated offences were only punished with custodial sentences.
- 3) Instead of bans on holding certain offices or being engaged in certain activities for a period of time, all corruption offences entail mandatory life-time deprivation of the right to hold office or be engaged in certain activities.
- 4) The thresholds for the “large” and “particularly large” bribes were changed: the “large” amount was raised from a sum of approximately EUR 3,650 to any amount between approximately EUR 21,900 and approximately EUR 73,000; while the “particularly large amount” was increased from approximately EUR 14,600 to an amount that is at least a sum equivalent to approximately EUR 73,000.
- 5) It is prohibited to apply conditional sentencing, or discharge of criminal liability on grounds of bail, or discharge against surety, or use statute of limitations to release from the criminal liability for corruption offenders.
- 6) For minor and medium gravity crimes (which include several corruption offences) the Code prohibits the imposition of imprisonment if the person had voluntarily compensated property damages or “mended moral and other harm” caused by the crime.

The IAP Third Monitoring Round report on Kazakhstan noted that the overall result of the reform described above was a relative lessening of sanctions for bribe taking and giving, particularly with regard to officials and persons holding a responsible public office. The latter include members of the Government, members of Parliament, judges, political public servants, i.e. top public officials. Taking or giving bribes by such officials inflicts serious public harm and must be punished seriously. While the above sanctions are reinforced by other punishments (confiscation and a life-time ban on holding certain offices), it may send a wrong signal concerning corruption in the public sector and undermine the effectiveness of the sanctions. Besides, it creates an environment where punishment could become

<sup>248</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 73.

exclusively financial: for some corruption offences, the compensation of pecuniary damages will allow the offender automatically to avoid imprisonment.<sup>249</sup>

The IAP countries, as many other countries in the ACN region, continue to apply lower sanctions for active bribery, compared with the passive bribery, considering that passive bribery of public officials is more detrimental and deserves stronger punishment.<sup>250</sup>

---

<sup>249</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 54-55.

<sup>250</sup> As was noted in the Study on the state of implementation of the United Nations Convention against Corruption under the topics of Corruption Criminalization, Law Enforcement and International Cooperation, this reflects “the traditional view (in both civil law and common-law systems) that corruption primarily constitutes a misuse of power or an offence linked to the extortion of money during the administration of public authority (*crimen repetundarum* or *crimen extraordinarium concussionis* in Roman law)”. Source: <https://goo.gl/zlM9SP>; page 11.

Table 24. Maximum sanctions for basic (non-aggravated) offences in the IAP and ACN countries

	Active bribery of public official	Passive bribery of public official	Active trading in influence	Passive trading in influence	Active private-sector bribery	Passive private-sector bribery	Money laundering	Embezzlement	Abuse of powers
Istanbul Action Plan countries									
<b>Armenia</b>	Up to 3 years	Up to 5 years	n/a	Up to 3 years	Up to 2 years	Up to 3 years	2-5 years	Up to 2 years	Up to 4 years
<b>Azerbaijan</b>	2-5 years	4-8 years	2-5 years	3-7 years	2-5 years	4-8 years	6-9 years	n/i	Up to 3 years
<b>Georgia</b>	Up to 3 years	6-9 years	Up to 2 years	3-5 years	Up to 3 years	2-4 years	3-6 years	3-5 years	Up to 3 years
<b>Kazakhstan</b>	Up to 3 years	Up to 5 years	n/a	n/a	Up to 5 years	Up to 5 years	Up to 3 years	Up to 3 y.	Up to 2 years
<b>Kyrgyzstan</b>	2-3 years	3-5 years	n/a	n/a	Up to 2 years	3 to 5 years	2-4 years	Up to 1 year	1-3 years
<b>Mongolia</b>	1 month to 3 years	1 month to 3 years	n/a	n/a	1 month to 3 years	1 month to 3 years	Up to 1 year	Up to 5 years	Up to 5 years
<b>Tajikistan</b>	Up to 5 years	Up to 5 years	n/a	n/a	Up to 2 years	Up to 3 years	Up to 4 years	Up to 2 y.	Up to 2 years
<b>Ukraine</b>	2-4 years	2-4 years	Up to 2 years	2-5 years	Up to 2 years	Up to 3 years	3-6 years	Up to 4 y.	Up to 3 y.
<b>Uzbekistan</b>	Up to 5 years	Up to 5 years	n/a	n/a	Up to 3 years	Up to 3 years	5-10 years	Up to 6 m.	Up to 3 years
Anti-Corruption Network countries									
<b>Albania</b>	6 months to 3 y.	2-8 years	6 months to 2 y.	6 months to 4 y.	3 months to 2 y.	6 months to 3 y.	3-10 years	n/i	n/i
<b>Belarus</b>	Up to 5 years	Up to 7 years	n/a	n/a	n/a	Up to 3 years	2-4 years	Up to 4 y.	2-6 years
<b>Bulgaria</b>	Up to 6 years	Up to 6 years	Up to 3 years	Up to 6 years	Up to 3 years	Up to 5 years	1-6 years	n/i	n/i
<b>Croatia</b>	6 months to 5 y.	1-8 years	6 months to 3 y.	6 months to 3 y.	Up to 3 years	6 months to 5 y.	6 months to 5 y.	n/i	n/i
<b>Estonia</b>	Up to 5 years	Up to 5 years	n/a	Up to 3 years	Up to 5 years	Up to 5 years	Up to 5 years	Up to 5 years	n/i
<b>Latvia</b>	Up to 6 years	Up to 8 years	Up to 1 year	Up to 2 years	Up to 3 years	Up to 3 years	Up to 3 years	Up to 5 y.	Up to 3 y.
<b>Lithuania</b>	Up to 2 years	Up to 4 years	Up to 4 years	Up to 5 years	Up to 2 years	Up to 4 years	Up to 7 years	Up to 2 y.	Up to 5 y.
<b>Moldova</b>	Up to 6 years	3-7 years	n/a	Up to 5 years	Up to 3 years	Up to 3 years	Up to 5 years	n/i	Up to 3 y.
<b>Poland</b>	6 months to 8 years	6 months to 8 y.	6 months to 8 y.	6 months to 8 y.	3 months to 5 y.	3 months to 5 years	6 months to 8 y.	n/i	n/i
<b>Romania</b>	2-7 years	2-7 years	2-7 years	2-7 years	8 -28 months	8 -28 months	3-12 years	1-15 years	6 months to 5 y.
<b>Russia</b>	Up to 2 years	Up to 3 years	n/a	n/a	Up to 3 years	Up to 7 years	Fine	Up to 2 y.	Up to 4 years
<b>Slovenia</b>	6 months to 3 years	1-5 years	Up to 3 years	Up to 3 years	Up to 3 years	3 months to 5 years	Up to 5 years	Up to 5 y.	Up to 5 y.

\* Number of years refers to term of deprivation of liberty (imprisonment) unless specified otherwise. Sanctions for relevant offences may also include additional elements, like mandatory confiscation and disqualification from holding an office or performing certain activity.

"n/a" – not applicable (offence not established); "n/i" – no information available

Source: prepared by the OECD/ACN secretariat based on IAP monitoring reports, GRECO Third Evaluation Round reports and MONEYVAL reports (except for Belarus and Russia whose legal texts were reviewed directly).

## Confiscation

International anti-corruption instruments typically require ensuring the possibility of confiscating the proceeds of corruption crimes (or of property of equivalent value) and of the instrumentalities used in such offences.<sup>251</sup> International instruments contain the following definitions:

- “confiscation” means a final deprivation of property ordered by a court in relation to a criminal offence (EU Directive 2014/42/EU<sup>252</sup>);
- “proceeds” means any economic advantage, derived from or obtained, directly or indirectly, through the commission of a criminal offence, including any savings by means of reduced expenditure derived from the crime. It may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits (EU Directive 2014/42/EU);
- “instrumentalities” means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence<sup>253</sup> (CoE Convention, CETS No. 198<sup>254</sup>);
- “property” includes assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such property (UNCAC, Art. 2).

### Box 19. The EU Directive on the freezing and confiscation of instrumentalities and proceeds of crime

In April 2014, the EU adopted a new instrument regulating the freezing and confiscation of instrumentalities and proceeds of crime. Directive 2014/42/EU covers a number of criminal offences, including public and private sector corruption, and money laundering. According to the Directive, the EU Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of **instrumentalities and proceeds** of crime (or property the value of which corresponds to such instrumentalities or proceeds), subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

**Non-conviction based confiscation:** Where confiscation on the basis of a final conviction is not possible, the Directive provides that, at least where such impossibility is the result of illness or the absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to an economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

**Extended confiscation:** For public sector corruption, the Member States are also required to adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

**Confiscation from third parties:** Under the Directive, Member States shall also take the necessary measures to

<sup>251</sup> UN Convention against Corruption (Art. 31), CoE Criminal Law Convention (Art. 19), OECD Anti-Bribery Convention (Art. 3; as an alternative to confiscation of the bribe and the proceeds of the bribery, provides for “monetary sanctions of comparable effect”).

<sup>252</sup> Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Available at <http://goo.gl/boL5DP>.

<sup>253</sup> This may include not only the bribe itself, but any property used in any way during preparation or commission of a crime. For example, if a briber calls an official on his/her mobile phone and offers a bribe, then phone could be subject to confiscation. At the other extreme, if a briber takes his/her private jet to meet an official and delivers the bribe, then the jet might also be subject to confiscation. (OECD Publication “Corruption. Glossary of International Standards in Criminal Law”, page 45, <http://goo.gl/uJVidG>)

<sup>254</sup> Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), available at <https://goo.gl/1cn3GX>.

enable the confiscation of proceeds (or other property the value of which corresponds to proceeds), which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value. This shall not prejudice the rights of *bona fide* third parties.

Source: <http://goo.gl/PWZNgC>.

The legislation in several IAP countries provides for two types of criminal confiscation. First, as a punishment under specific articles of the Criminal Code (as a mandatory or an optional sanction), and, second, procedural confiscation under the Criminal Procedure Code, which is applied irrespective of the confiscation as a criminal sanction and can be imposed for any type of crime. Criminal confiscation as a punishment in some countries (e.g. **Ukraine**) is represented by two measures: confiscation of all property of the convicted person, and special confiscation of instrumentalities and specific proceeds of the crime.

Confiscation provisions usually cover the instrumentalities and proceeds of bribery. However, they often do not explicitly cover proceeds that were transformed into other assets (e.g. residential property bought using proceeds from bribery) or were intermingled with property acquired from legal sources (converted or mixed proceeds). Several IAP countries also do not allow for a value-based confiscation, which permits the confiscation of proceeds that were hidden, destroyed, spent or transferred to a *bona fide* third party. It is also often impossible to confiscate benefits that were derived from crime proceeds (e.g. profit derived from a business permit obtained through bribery, profit from investment of the bribe).

**Table 25. Provisions on confiscation in IAP countries**

	ARM	AZ	GEO	KAZ*	KGZ	MNG	TAJ	UKR	UZB <sup>255</sup>
Confiscation of instrumentalities and proceeds of bribery	✓	✓	✓	✓	✓	✓	✓	✓	✓
Value-based confiscation	✓	✓	✓	✓	✓	—	—	✓	✓
Confiscation of converted or mixed proceeds	—	✓	✓	✓	—	—	—	✓	—
Confiscation of benefits derived from proceeds	✓	✓	✓	✓	—	—	—	✓	—
Confiscation from a third party	✓	—	✓	✓	—	—	—	✓	—

\* Not for all corruption offences and to be enacted on 1 January 2018.

Source: IAP monitoring reports; OECD/ACN secretariat research.

In addition to the “traditional” confiscation of the instruments and proceeds of the crime, the new standards also advocate for establishing **extended confiscation** (see e.g. Box 19 above on the EU Directive), which allows the confiscation of a convicted person’s property when its legal origin cannot be proven. This type of the confiscation does not require proof that the assets subject to confiscation were actually acquired through the crime for which the owner was convicted. The illegal origin of the property is assumed due to the certain facts (including the disproportionality between the value of the property in a person’s possession and his lawful income). Thus, the burden of proof to rebut this assumption is placed on the owner,<sup>256</sup> and the court will make inferences from the accused’s failure to explain the origin of the assets at issue.

<sup>255</sup> In its comments to the draft report Uzbekistan noted that its Anti-Money Laundering Law was amended in April 2016 to extend the definition of the criminal proceeds that now includes benefits obtained from such proceeds, as well as converted or mixed proceeds. However, these amendments do not concern confiscation applied under bribery offences under the Criminal Code or Criminal Procedure Code.

<sup>256</sup> OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, pages 40-41, <http://goo.gl/8qDDB2>.



The reversal of the burden of proof in confiscation proceedings is one of the effective instruments to deprive the perpetrator of corruption offences of ill-gotten proceeds. The UN Convention against Corruption (Art. 31) recommends State Parties to consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation.

This mechanism is similar to the offence of illicit enrichment, as it leads to confiscation measures due to possession of unexplained wealth, albeit linked to a specific crime. It allows presumption of illicit origin of assets if a person, who has been convicted or even just charged with a certain crime, cannot explain their lawful origin. Such mechanism, when properly construed (through a rebuttable presumption), was found to be compatible with the European Convention of Human Rights.<sup>257</sup>

For instance, according to amendments introduced in 2010 in **Lithuania**<sup>258</sup>, extended confiscation is applied if the following conditions are met: 1) the perpetrator committed a less grave, grave and especially grave crime, from which he had obtained or could have obtained a pecuniary advantage; 2) the perpetrator possessed (or transferred to third parties) property which was gained during, after or 5 years before commission of the offence and such property is disproportionate to his lawful income and the difference exceeds about EUR 18,000; 3) the perpetrator fails to justify the lawfulness of acquiring the property.

Similarly in **Poland**, according to the Criminal Code (Art. 45), if the offender was convicted of a crime as a result of which he acquired, even indirectly, a property-related benefit of considerable value, it is assumed that the property he obtained during, or after the commission of the offence, but before the judgment, constitute property acquired through a crime, unless the offender or another interested party shows evidence to the contrary.<sup>259</sup>

In **Portugal**, in the case of a conviction for certain offences (including passive bribery, embezzlement, money laundering) the discrepancy between the value of defendant's actual property and one that is consistent with his lawful income is considered a benefit from a criminal activity and is subject to confiscation.<sup>260</sup>

In **Turkey**, the Law on Declaration of Assets in the Fight against Bribery and Malversation provides for the reversal of burden of proof in specific situation, including when a person possesses property which is disproportionate to his income. In such cases, possession may be considered unlawful and subject to confiscation (including value confiscation), unless the person proves its legitimacy.<sup>261</sup>

In 2012, **Romania** introduced extended confiscation in its criminal law.<sup>262</sup> It provides for the mandatory confiscation of assets when: 1) the person is found guilty for having committed an act punishable with imprisonment of at least 5 years which falls under the 21 categories of offences designated in the new legislation (including corruption, money laundering); 2) the accused has, over the last 5 years preceding the criminal act, accumulated property which exceeds what he has earned in a legitimate manner (confiscation is applicable to those additional assets); 3) the court is convinced that the property in question has been derived from one or more of the designated offences. This new mechanism includes

<sup>257</sup> See, among others, judgments of the European Court of Human Rights in cases of *Salabiaku v. France* (10519/83), *Phillips v. UK* (41078/98), *Welch v. UK* (17440/90), *Raimondo v. Italy* (12954/87), *Minhas v. UK* (7618/07).

<sup>258</sup> Article 72-3 of the Criminal Code of Lithuania.

<sup>259</sup> See MONEYVAL (2007), Third Round Detailed Assessment report on Poland, pages 36-38, <http://goo.gl/eH5uJz>.

<sup>260</sup> The Extended Power of Confiscation of Crime-Related Proceeds, by Rafal Kierzyńska, Proceedings of the Expert Seminar for Eastern Europe and Central Asia on Criminalisation of Corruption, OECD, March 2007, page 72, <http://goo.gl/6q1iqs>.

<sup>261</sup> GRECO (2006), Joint First and Second Evaluation Round report on Turkey, page 21, <http://goo.gl/dgtHX6>.

<sup>262</sup> Law No. 63/2012 on amending the Criminal Code, adopted in March 2012.

third-party and value-based confiscation, and it allows for the confiscation of assets derived from the criminal proceeds.<sup>263</sup>

In addition to confiscation (of instrumentalities, proceeds of crime, extended confiscation) based on the final conviction of the offender, international standards also allow the **non-conviction based confiscation** (see e.g. Box 19 above). Sometimes such confiscation is implemented through civil proceedings.

For example, this mechanism was introduced in **Bulgaria** in 2012.<sup>264</sup> It provides for the possibility of confiscation when it has been proven to a reasonable degree that assets were acquired through criminal activity and that a substantial “lack of correspondence relating to the assets of a natural person” exists. This means that the value of person’s assets substantially exceeds the net income of the natural person and of their family members over the period of examination and no other legal source thereof has been established.<sup>265</sup>

In **Slovenia**, a special financial investigation can be launched, if a person suspected of a listed crime owns, possesses, uses or enjoys assets that are reasonably suspected (1) to be of illegal origin, (2) to be held by or have been passed to such person’s legal successors, (3) to have been transferred to related parties without adequate consideration, or (4) to have been commingled with the legal successor’s or related person’s assets. Such an investigation can also be launched against a convicted person as well as against a person against whom pre-trial or trial proceedings have been stopped due to his death, or for whom there are grounds for suspicion that he has committed a criminal offence. If the financial investigation finds sufficient evidence to conclude that property has an illegal origin, the Specialised State Prosecutor's Office brings a civil suit against the owner of the suspicious property. The latter can prevail in the lawsuit by proving that the assets were not illegally obtained or, in the case of a related person, that the actual value was paid in exchange for the assets. If the owner is not able to do that, the assets are forfeited by the civil court. It is important to point out that this regulation also applies to legal persons suspected or convicted of bribery.<sup>266</sup>

The IAP countries have started introducing relevant instruments as well. **Georgia** was the first to introduce in its Civil Procedure Code (Chapter XLIV-1) provisions on confiscation of illegal property and unexplained wealth of public officials, as well as their family members, close relatives and other “related persons”. Such confiscation is possible after criminal conviction, when a prosecutor may apply to the court for confiscation of property supposedly derived from the proceeds of crime. After prosecutor has established *prima facie* evidence of unexplained property, the burden of proof shifts to the convicted (or related persons). If the latter fail to prove the lawful origin of the property and court concludes that there is a reasonable doubt as to its lawful origin, it orders the confiscation of such property.<sup>267</sup>

The new Criminal Procedures Code of **Kazakhstan**, enacted in 2015, introduced confiscation without a sentence (Section 15 CPC “Confiscation prior to sentencing”). Under the new CPC, in the event that the

<sup>263</sup> 2nd Assessment Report of the Conference of the Parties to CETS No. 198 on Romania, 2012, §43, <http://goo.gl/nx41D2>.

<sup>264</sup> Report from the European Commission to the European Parliament and the Council on the Progress in Bulgaria under the Co-operation and Verification mechanism, Technical report, COM(2012) 411 final, 2012, pages 34-35, <http://goo.gl/balw93>.

<sup>265</sup> See also Venice Commission Opinion No. 563 on the Sixth Revised Draft Act on Forfeiture of Assets Acquired through Criminal Activity or Administrative Violations of Bulgaria, 2011, <http://goo.gl/eJkFtL>.

<sup>266</sup> Forfeiture of Assets of Illegal Origin Act. See also OECD/WGB (2014), Phase 3 Report on Slovenia, §§ 56 *et seq.*, <http://goo.gl/oVzewv>. Cited from: OECD/ACN (2015), Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, pages 41-42.

<sup>267</sup> See also information on previous provisions of administrative confiscation of unexplained wealth, allowed even before the conviction: GRECO (2006), Second Evaluation Round report on Georgia, pages 4-5, <http://goo.gl/ksM70M>.

suspect or the accused is put on an international arrest warrant, or if criminal charges are dismissed following an act of amnesty, expiration of the statute of limitations or with respect to a deceased, given evidence of property obtained by illicit means, the person conducting the pre-trial investigation starts the confiscation proceedings before sentencing. The confiscation before sentencing is ordered by the court if the following elements are proved: 1) that the property in question belonged to the suspect, or the accused, or a third party; 2) the link between the said property and the crime which serves the grounds for the confiscation; and 3) that the circumstances of the acquisition of that property by a third party give reasons to believe it was acquired illicitly.<sup>268</sup>

The IAP Third Monitoring Round report recommended that **Ukraine** introduce extended (civil or criminal) confiscation of assets of perpetrators of corruption crimes in line with international standards and best practice.<sup>269</sup> Such confiscation – both civil and criminal conviction-based confiscation – was indeed introduced in 2015. After an amendment to Criminal Procedure Code, Article 100.9, provides that when a person is convicted of a criminal offence, the court should also order confiscation of assets (including proceeds from them) belonging to the convicted person or to a legal entity related to the 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, authorising proceedings to recognise assets as unjustified 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 recognise the assets as unjustified 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>270</sup>

## Statute of limitations, immunities and effective regret

### *Statute of limitations*

A statute of limitations provides a term during which a person can be held liable for the commission of a crime. Expiration of this term is a ground for releasing the perpetrator from liability. It may become an obstacle to effective prosecution of corruption offences when it is too short or cannot be interrupted or suspended in certain circumstances. Even when sanctions for corruption offences are dissuasive, the possibility of exemption from liability due to expired statute of limitations makes liability for such offences ineffective, taking into account long pre-trial and court proceedings in complicated cases, especially involving cases with an international dimension (*e.g.* requiring MLA). Similarly, when, for instance, immunity of a person does not interrupt statute of limitations for committed crime, the offender may avoid responsibility. Prosecution in these situations becomes futile and a waste of resources.

The UN Convention against Corruption (Art. 29) provides that each State Party shall establish a long statute of limitations period in which to commence proceedings for corruption offences and establish a longer period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice. According to the OECD Anti-Bribery Convention (Art. 6), any statute of limitations applicable to the offence of bribery of foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

In the IAP countries, the statute of limitations period is tied to the gravity of the crime, which is in turn determined by the applicable sanction (its type and amount/duration). In most cases, the statute of

<sup>268</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 56-57.

<sup>269</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 61.

<sup>270</sup> OECD/ACN (2015), Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, pages 40-41, <http://goo.gl/IXbRru>

limitations is sufficiently long to allow effective investigation and prosecution of corruption offences (see Table 27 below).

**Table 26. Statute of limitations for corruption offences in the IAP countries**

	ARM	AZ	GEO	KAZ	KGZ <sup>271</sup>	MNG	TAJ	UKR	UZB
Active bribery (basic offence)	5	7	15	No limit	3	5	6	5	3
Active bribery (aggravated offence)	10	12	15	No limit	7	20	10	10	5-10
Passive bribery (basic)	5	12	15	No limit	3*	5	6	5	5
Passive bribery (aggravated)	10-15	12	25	No limit	7	20	6-10	10-15	5-15
Active trading in influence (basic)	n/a	7	15	n/a	n/a	n/a	n/a	3	n/a
Passive trading in influence (basic)	5	7	15	n/a	n/a	n/a	n/a	5	n/a
Active private-sector bribery (basic)	2	7	6	5	1	5	2	3	3
Passive private-sector bribery (basic)	5	12	6	5	3	5	6	5	5
Money laundering (basic)	5	7	10	5	7	5	6	10	5-10
Money laundering (aggravated)	10-15	12	10-25	15	7	20-30	10	15	n/a
Abuse of powers (basic)	5	7	15	No limit	3	1	2	5	3
Abuse of powers (aggravated)	10	12	15	No limit	7-10	5	6-10	10	5
Embezzlement (basic)	2	2	6	No limit	7	1	2	5	3

*Note:* Numbers indicate duration of statute of limitations in years. When a range of years is provided, it shows statute of limitations for various aggravated offences. Aggravated offences may include crimes committed by a high-level official, for illegal action (or inaction), by a group of persons, in large amount, repeatedly, through extortion, etc.

\* 3 and 7 years statute of limitations is for the offence “bribe-award” (Art. 310 CC), that is bribery without prior agreement. “Bribe-subornation” (Art. 311) is bribery with prior agreement, has statute of limitations of 7 years for basic offence and 10 years for aggravated ones. Passive bribery by an employee of a public institution or private organisation (Art. 225 CC) has a statute of limitations of 1 year.

n/a – not applicable (offence not established); n/i – no information available.

Source: IAP monitoring reports; OECD/ACN secretariat research.

The IAP monitoring found that a statute of limitations period of 2 years or less is insufficient.<sup>272</sup> GRECO reports on **France, Hungary, Latvia, Monaco, and Russia**<sup>273</sup> and OECD WGB reports on **France,**

<sup>271</sup> According to amendments introduced in 2014 in Kyrgyzstan, the statute of limitations is not applied to the crimes “Corruption” (Art. 303 CC) and “Abuse of official position” when committed by an official holding a responsible position (Art. 304 CC).

<sup>272</sup> See, for instance, the IAP Second Monitoring Round report on Armenia, page 33, <http://goo.gl/HbBaVh>.

<sup>273</sup> Third Evaluation Round report on France, §95, <http://goo.gl/EitKke>; Third Evaluation Round report on Hungary, §96, <http://goo.gl/aB34cE>; Third Evaluation Round report on Latvia, §95, <http://goo.gl/FQOYjz>; Third Evaluation Round report on Monaco, §116, <http://goo.gl/tpnwkY>; Third Evaluation Round report on Russia, §64, <http://goo.gl/6t5kjB>. However, in the reports on Slovenia (§88, <http://goo.gl/VvjGJY>) and the former Yugoslav Republic of Macedonia (§72, <http://goo.gl/KECRF8>) GRECO found limitations period of 3 years to be sufficient for some offences taking into account lack of practical problems in prosecution of corruption crimes due to statute of limitations.

**Japan**, and **Spain**<sup>274</sup> have found that statute of limitations of 3 years or less is also insufficient. Arguably, a limitation period of at least 5 years should provide adequate time for the investigation and prosecution of corruption offences, at least if it provides for the possibility of suspending or interrupting the period in certain situations.<sup>275</sup>

A special approach to corruption offences is applied in **Georgia**, where it is specifically provided that, regardless of sanctions, statute of limitations for bribery and some other corruption offences is 15 years (unless it is an especially grave crime, *i.e.* when the maximum sanction is more than 10 years of imprisonment, then the limitations period is 25 years).

The criminal codes of the IAP countries usually establish an exception for certain serious crimes (e.g. against national security and against peace and humanity), for which the statute of limitations is not applied at all. Recently, **Kazakhstan** extended this exception in its new Criminal Code (enacted in 2015) to corruption criminal offences. This could be seen as a good practice. (Although, as explained above in this Criminalisation Section, not all corruption offences are actually defined as such in Kazakhstan).

In **Armenia**, **Tajikistan**, **Ukraine**, **Uzbekistan**, the statute of limitations is not suspended if the alleged perpetrator is a person with immunity. **Azerbaijan** Criminal Procedure Code (Art. 53) provides for the suspension of the statute of limitations in cases when procedures for lifting immunity are initiated. Similarly in **Georgia**, the statute of limitations is suspended as long as person enjoys immunity (Art. 71 of the Criminal Code). In **Kazakhstan**, even though the Criminal Code does not envisage a possibility of interrupting the statute of limitations period in the case of a failure to lift immunity from the person, the IAP monitoring did not find this to be a problem since the agreement to lift immunity is not required for grave and especially grave crimes, to which most of the corruption crimes belong.<sup>276</sup> In 2013, **Kyrgyzstan** amended its Criminal Code, in response to the IAP monitoring recommendation, to establish that the statute of limitations is suspended if the criminal proceedings were suspended due to the immunity of the relevant person.

An insufficient statute of limitations may also present an obstacle for effective mutual legal assistance in countries having dual criminality requirements because MLA requests may not be satisfied if the limitations period has expired for the crime under the legislation of the requested country.<sup>277</sup>

To ensure that the statute of limitations does not hinder effective investigation and criminal prosecution, countries employ various provisions. For example, in **Croatia**, **Czech Republic**, **Finland**, **Latvia**, **Netherlands**, **Poland**, **Slovakia** and other countries, the limitations time period is interrupted by procedural actions taken in order to institute criminal prosecution (*e.g.* decision to prosecute). Interruption means that the statute of limitation begins to run anew after a certain event. In **Germany**, the statute of limitations is interrupted by the following facts: the first interrogation of the accused, the notice of the initiation of an investigation against him/her, a judicial order of search and seizure, an arrest warrant, a public indictment, the institution of trial proceedings, a judicial request of an investigative act abroad, etc. However, the prosecution is barred by the absolute lapse, which is ten years for bribery offences.<sup>278</sup> In **France**, for “concealed” crimes (which currently does not include corruption offences) the

<sup>274</sup> Phase 1 report on France, page 31, <http://goo.gl/QQSt34>; Phase 2 report on Japan, page 55, <http://goo.gl/kvMtYd>. Phase 2 report on Spain, page 32, <http://goo.gl/xkjfkV>. See also Phase 1 report on Russia, §81, <http://goo.gl/5Yh6mM>.

<sup>275</sup> It appears that the OECD Working Group on Bribery practice calls for even stricter standard for foreign bribery offence. For instance, 12 of 22 countries with limitations periods of 5 to 10 years received recommendations on this issue, whereas none of the 10 countries with at least 10 years limitation period received a recommendation on this point.

<sup>276</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 42, <http://goo.gl/QnWjcr>.

<sup>277</sup> See, for instance, OECD/WGB (2000), Phase 1 report on Denmark, page 27, <http://goo.gl/3vt3E1>.

<sup>278</sup> See OECD/WGB (2003), Phase 2 report on Germany, §151, <http://goo.gl/q4JP0J>.



statute of limitations begins to run not from the day of commission of the offence, but from the time it was discovered.

### **Immunities**

Immunity from investigation, prosecution or arrest is often granted to various public officials in order to exempt them from liability during their time in office and ensure in this way independence of certain institutions/officials who may otherwise face the risk of politically motivated prosecution. This, however, may prevent the effective investigation or prosecution of corruption offences and foster impunity among high-level officials, especially in the states with high level of corruption.

International standards, therefore, call for a limited scope of immunities and efficient procedures to lift them. The UN Convention against Corruption (Art. 30) mandates State Parties to establish “an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting or adjudicating” corruption offences. The Council of Europe’s Committee of Ministers Resolution No. (97) 24, recommends limiting immunity from the investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society.<sup>279</sup>

A number of standards can be formulated with regard to immunities, which should:

- be functional, that is concern actions (or inaction) committed during or in relation to the exercise of the official’s duty;
- not cover situation *in flagrante*, when perpetrator is apprehended during the commission of a crime or immediately after;
- not extend beyond the period when the public official is serving in office;
- allow investigative measures to be carried out against those with immunity;
- provide for swift and effective procedures for lifting the immunity, with clear criteria based on the merits of the request to lift immunity. For persons with absolute immunity (like Presidents in many countries) there should be an effective impeachment procedure.

The IAP countries preserve a wide scope of immunities for various officials (see Table 28 below), which can be explained by the transitory stage of their development and the risk of political abuses of power.<sup>280</sup> While immunity remains a concern in terms of ensuring effective prosecution of corruption offences, the general trend in the region is towards limiting immunity.

In 2010, **Armenia** limited the number of categories of persons enjoying immunity by revoking the privilege for parliamentary candidates, members of the Central, Regional and Local Election Commissions, mayoral candidate, candidates to the local councils, members of the Special Investigative Service.<sup>281</sup> Also, the Armenian Constitution was amended in 2005 to allow for the apprehension of members of parliament who are caught in the act (with immediate notification of the parliament). According to the Government, the scope of immunities was further limited in 2015, when constitutional amendments limited the immunity of judges to their opinions expressed and decisions adopted while

<sup>279</sup> Council of Europe’s Committee of Ministers Resolution No. (97) 24 on the twenty guiding principles for the fight against corruption, 6 November 1997, <https://goo.gl/CnJY6f>.

<sup>280</sup> The IAP Third Monitoring Round report on Ukraine (page 64) noted that in the Ukrainian context immunity of parliamentarians has been considered as an important guarantee against repression of the opposition MPs. As the prosecution service and courts lack genuine independence and often operate through political instructions and “phone law”, broad immunity of MPs and difficult procedure for its lifting have been viewed as a safeguard.

<sup>281</sup> OECD/ACN (2011), Second Monitoring Round report on Armenia, page 34, <http://goo.gl/1YhAIQ>.

administering justice; the scope of the immunity of members of parliament (MPs) was similar limited to the opinions expressed and votes made in parliament.

**Azerbaijan** limited the range of individuals enjoying immunity (by excluding members of the government, while preserving immunity for the Prime Minister) and limited the duration of immunity for MPs to their term of office.<sup>282</sup> At the same time, there has not been any reform of the immunity of judges, despite the IAP monitoring report's recommendation. In particular, it is still impossible to investigate a judge unless the immunity is lifted.<sup>283</sup>

**Georgia** has reduced the categories of persons enjoying immunity by excluding prosecutors and investigators; in 2004, Constitution of Georgia was amended to allow arrest of MPs caught committing crimes. In **Kazakhstan**, immunity does not apply in cases where the offender is apprehended at the scene of crime or when the offence committed is grave or especially grave (this covers most corruption offences).<sup>284</sup>

Table 27. Persons with immunities in the IAP countries

Persons enjoying immunity	ARM	AZ	GEO	KAZ	KGZ	MNG	TAJ	UKR	UZB
President	☐*	☐	☐	☐	☐	☐	☐	☐	☐
Members of Parliament	☐	☐	☐	☐	☐	☐	☐	☐	☐
Ministers	—	Prime Minister only	—	—	☐**	☐	—	—	—
Judges	☐	☐	☐	☐	☐	☐	☐	☐	☐
Prosecutors	—	—	—	Prosecutor General only	☐**	☐	—	—	☐
Ombudsman	☐	☐	☐	—	☐	—	—	—	☐
Other persons	Candidates for President	Election candidates	Auditor General; election candidates; Board members of the National Bank	—	Investigators**	—	Election candidates	—	Deputies of local councils

\* Including after termination of office for actions related to office.

\*\* May not be apprehended or arrested, subjected to search, interrogation or personal examination, except for cases when caught *in flagrante* for commission of a grave or especially grave offence.

Source: IAP monitoring reports; OECD/ACN secretariat research.

The IAP monitoring raised the issue of extensive immunities in **Ukraine**. The Second Monitoring Round report recommended, as a matter of priority, that the country review the effectiveness of its legislation and regulation on immunities of judges and parliamentarians in order to ensure that the procedures for lifting immunities are transparent, efficient, based on objective criteria and not subject to misuse. It also recommended limiting the immunity for judges and parliamentarians to a certain extent, e.g. by introducing functional immunity and allowing arrest in cases of *in flagrante delicto*. Ukraine has yet to comply with these recommendations. The law still provides that a judge or a parliamentarian, unlike all other persons, may not be apprehended at the time when he/she commits a crime. They also cannot be apprehended immediately after the crime has been committed or during the pursuit of a person suspected

<sup>282</sup> GRECO (2006), Joint First and Second Evaluation Round report on Azerbaijan, §62, <http://goo.gl/FqJk3U>.

<sup>283</sup> OECD/ACN (2010), Second Monitoring Round report on Azerbaijan, page 47, <http://goo.gl/imXZg0>.

<sup>284</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 42, <http://goo.gl/vp4szg>.



of a crime. A judge may not be apprehended or subjected to pre-trial detention without the consent of the parliament. A member of Ukraine's parliament may not be "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 (either in the form of detention or house arrest) without the consent of the parliament. Restriction of these immunities would require an amendment of the Constitution of Ukraine. Such an amendment, however, was adopted in June 2016 for judges. (It should enter into force in September 2016). Once the amendment is enacted, the High Council of Justice must give consent to lift immunity in order to apprehend or arrest or detain a judge, except when the judge is apprehended during or immediately after commission of a grave or especially grave offence.

The Criminal Procedure Code of Ukraine, as well as the Law on the Status of People's Deputies of Ukraine, provides additional immunities which are absent in the Constitution. These immunities prohibit 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. In addition, the imposition of other measures, including covert investigative actions, which, according to the law, restrict the rights and freedoms of an MP, may only be applied 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 Third Monitoring Round report urged Ukraine to revoke these provisions, as they present serious obstacles for effective investigation of corruption and are not required by the Constitution of Ukraine.<sup>285</sup>

### *Effective regret and other defences*

A number of countries provide for special defences exempting from liability perpetrators of active bribery and trading in influence offences. One defence arises when a person was solicited or extorted (forced under duress) to give a bribe. A second defence arises when a person denounces the bribe-giving he committed by coming forward to the law enforcement authorities. The latter defence is often called "effective regret" or, under another translation, "active repentance". While most IAP countries make this a general defence applicable to all crimes,<sup>286</sup> this report will use the term "effective regret" for the defence of denouncing the offence of active bribery by the bribe-giver.

While the effective regret exemption stimulates the reporting of bribery and allows for the prosecution of public officials who receive bribes (a crime considered in some countries as being more dangerous than active bribery), it creates potential for abuse. This is especially the case when the defence is automatic, leaving no discretion for the prosecutor or judge to assess specific circumstances of the case. A briber may misuse this defence by blackmailing or exerting pressure on the bribe-taker to obtain further advantages or by reporting the crime long after it was committed when he found out that law enforcement authorities might uncover the offence on their own.<sup>287</sup>

<sup>285</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, pages 61-62.

<sup>286</sup> For example, under Article 72 of the Armenian Criminal Code, "a person having committed a criminal offence of minor or medium gravity for the first time may be released from criminal liability where, following the committal of an offence, he or she has voluntarily surrendered by acknowledging guilt, has assisted in disclosing the crime, has compensated or otherwise settled the damage caused as a result of the crime." Similarly, under Article 65 of the Criminal Code of Kazakhstan, "a person having committed a criminal misdemeanour or having committed for the first time a crime, may be released from criminal liability taking into account the personality of the perpetrator, his surrender with acknowledgement of guilt, if he facilitated in disclosing and investigation of the criminal offence, compensated the damage caused by the criminal offence".

<sup>287</sup> See, among others, GRECO Third Evaluation Round reports on Croatia (§57, <http://goo.gl/4jsE26>), Latvia (§96, <http://goo.gl/gNVcFZ>), the former Yugoslav Republic of Macedonia (§74, <http://goo.gl/mZ6FOU>), Moldova (§64, <http://goo.gl/bnPtRC>), Poland (§70, <http://goo.gl/ZwUYjZ>), Romania (§112, <http://goo.gl/ZQ8YT0>).

The defence of extortion may also be seen as problematic if it is allowed even in cases when the extorted briber did not report it.<sup>288</sup> In its report on **Latvia**, the OECD WGB was concerned that many individuals who commit foreign bribery could qualify for immunity from prosecution as extortion victims. Latvian criminal law “defines extortion to cover bribe demands associated with threats to harm the “lawful interests” of a person, which could conceivably include interests of an economic nature. A threat by a foreign official to breach a contract or to deny participation in a tender might thus be sufficient. Extortion may also cover bribe demands in order that an official perform “legal acts”. This would thus cover the mere solicitation of bribes by an official to perform his/her duties.”<sup>289</sup>

If a country decides to retain an effective regret provision, this defence should provide for certain guarantees against possible abuse:

- it should not be applied automatically – the court should have the possibility to take into account different circumstances, *e.g.* the motives of the offender;
- it should be valid only during a short period of time after the commission of a crime and in any case, before the allegation was brought to the attention of the law enforcement authorities through other sources;
- the briber who denounces the crime should be obliged to co-operate with the authorities and assist in the prosecution of the bribe-taker<sup>290</sup>;
- it should not be applicable in cases when bribery was initiated by the briber; in other words, should apply only in cases of solicitation or extortion;
- the bribe should not be returned to the perpetrator and should be subject to mandatory confiscation.<sup>291</sup>

The OECD WGB has categorically objected to applying effective regret to foreign bribery offences. While in cases of domestic bribery, the effective regret defence may allow uncovering the bribery and prosecuting domestic public officials, in case of bribery of a foreign official there is no guarantee that the official who took the bribe will be prosecuted. “If this occurs the defence serves no useful purpose: the crime may come to light, but the offenders remain unpunished and the ends of justice remain unserved”.<sup>292</sup> As it prepares its candidacy to become an OECD member, **Lithuania** has introduced amendments to remove the possibility of release from criminal liability for bribery of a foreign officials and for trading in influence, even in the event where the person was demanded or provoked to give the bribe or the person notifies a law enforcement institution after giving the bribe (and before a notice of suspicion is raised against the person).<sup>293</sup> From the IAP countries, only **Ukraine** (in 2015) explicitly excluded foreign bribery from the defence of reporting active bribery to investigative authorities.

All IAP countries provide for release from liability of perpetrators of active bribery offences. And in most cases, this defence falls short of the standards mentioned above, except for mandatory confiscation of the bribe which is applied in all IAP countries in such cases.

<sup>288</sup> See, for instance, GRECO (2010), Third Round Evaluation Report on Armenia, §90, <http://goo.gl/FTPOnB>.

<sup>289</sup> OECD/WGB (2014), Phase 1 report on Latvia, §76, <http://goo.gl/Oh8U5I>.

<sup>290</sup> In its Third Round Evaluation report on Russia (§66, <http://goo.gl/GJNkkQ>), GRECO noted that May 2011 amendments in the Russian law requiring the briber to actively facilitate the detection and/or investigation of the crime (to be eligible for the effective regret defence) might limit the risks of abuse of this defence. At the same time, GRECO had misgivings about other aspects of this defence present in the Russian law.

<sup>291</sup> See, among others, IAP Second Monitoring Round reports on Kazakhstan (pages 30-31) and Kyrgyzstan (page 22).

<sup>292</sup> OECD WGB (2005), Phase 2 report on Slovakia, §160, <http://goo.gl/Yw2Mxe>.

<sup>293</sup> OCD/ACN (2015), Thematic Study, Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, page 24, <http://goo.gl/IXbRru>. Relevant amendments entered into force in November 2015.

In **Armenia**, for commercial bribery offences, the effective regret defence is applied not only to active bribery, but to passive bribery as well (and it is an exemption from punishment, not liability, unlike a similar defence for active bribery in the public sector). Under offences for the active bribery of public officials, the person giving a bribe is released from criminal liability if he has voluntarily informed the law enforcement authorities that he has given a bribe. If a briber would only come forward when she or he had a realistic fear that law enforcement authorities would soon learn of the offence, this would not be considered as “voluntarily informing law enforcement bodies”. GRECO found a number of deficiencies in the relevant provisions: that no specific time frame existed within which a report had to be submitted to the law enforcement authorities; that in respect of commercial bribery the bribe giver as well as the bribe taker could enjoy the defence, even without an element of extortion, etc.<sup>294</sup> Armenia amended its Criminal Code in 2014 to address these issues. GRECO was satisfied with the amendments, as the law now allows for the defence of effective regret only in respect of active bribery, the bribe must in all circumstances be linked to conditions of extortion, the bribe giver is now obliged to report the offence before the law enforcement authorities have been made aware of it and such a report must be made not later than within three days from the commission of the crime. GRECO concluded that “a number of limitations have been introduced in order to avoid abuse of this instrument and that the current provisions have become uniform.”<sup>295</sup>

In **Azerbaijan**, the effective regret defence is provided for private and public sector active bribery. This defence may be applied in situations where the briber reports the offence either before it is discovered or before he learns that the offence has already been discovered. GRECO recommended revising the automatic – mandatory – exemption.<sup>296</sup> The IAP Second Monitoring Round also recommended that Azerbaijan exclude application of this defence to foreign bribery.<sup>297</sup> These recommendations have so far not been addressed.<sup>298</sup>

In **Georgia**, for active bribery in the private and public sectors, as well as for trading in influence, a perpetrator is exempted from liability if he voluntarily informs law enforcement authorities before authorities become aware of the offence. Another requirement is that the facts reported by the briber must be sufficient to build a ‘*prima facie*’ case of bribery.<sup>299</sup> The Criminal Code provisions on effective regret were amended in November 2011 to accommodate concerns expressed in the GRECO report.<sup>300</sup> Namely, a provision was added that the decision to exempt a person from the criminal liability is made by the prosecuting body. According to the Georgian authorities, this means that the prosecutor is given discretion whether or not to apply effective regret exemption making it no longer automatic. Later the Ministry of Justice also prepared mandatory guidelines for prosecutors for the application of provisions on effective regret. The guidelines are supposed to prescribe that the decision on the release from criminal liability in cases of effective regret will not be automatic but depend in each case on an assessment of the following criteria: the offender shall report voluntarily, plead guilty and regret committing the offence; the offence must be reported immediately or in a reasonable time; the offence is to be reported before it is discovered or the offender has to believe that the offence has not been discovered; the facts reported must be sufficient to start a prosecution; the offender must reimburse the proceeds, etc. The law enforcement agency will also need to assess whether the offender is the instigator

<sup>294</sup> GRECO (2010), Third Round Evaluation report on Armenia, pages 24 and 31, <http://goo.gl/iD7z04>.

<sup>295</sup> GRECO (2014), Second Compliance report on Armenia, Third Round of Evaluation, §9, <http://goo.gl/vCDZrw>.

<sup>296</sup> GRECO (2010), Third Round Evaluation report on Azerbaijan, §61, <http://goo.gl/JFp49Z>.

<sup>297</sup> OECD/ACN (2010), Second Monitoring Round report on Azerbaijan, page 22.

<sup>298</sup> See OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, pages 36-37; GRECO (2014), Second Compliance report on Azerbaijan, Third Round of Evaluation, §16, <http://goo.gl/wny5IU>.

<sup>299</sup> GRECO (2011), Third Round Evaluation report on Georgia, §80, <http://goo.gl/frHv2w>.

<sup>300</sup> OECD/ACN (2010), Second Monitoring Round report on Georgia, page 18, <http://goo.gl/4iT5N2>.

of the crime. Benefit obtained through the offence will not be returned to the bribe-giver unless this benefit is “legitimate”.<sup>301</sup>

In **Kazakhstan**, if the briber voluntarily informed the body, which has the right to initiate a criminal case, about the briber he is released from criminal liability. In this regard, the IAP report noted that provision of such a significant “indulgence” as release from criminal liability, especially when granted automatically without obligating the person to provide further assistance to law enforcement bodies in the course of prosecution of the bribe-taker, will not always be justified since a briber who initiates the crime can evade liability using this provision.<sup>302</sup> The IAP Third Monitoring Round report on Kazakhstan also noted that the provisions stipulating liability for bribery in Kazakhstan tend to aim at detecting the fact of a bribe taken by officials, whereas those who incite bribery and give bribes, under certain circumstance, avoid prosecution, which undermines efforts to prevent such crimes.<sup>303</sup>

In **Kyrgyzstan**, “a person who gave a bribe” is released from criminal liability if the official extorted the bribe or if the person voluntarily informed the agency authorised to open a criminal case “about upcoming giving of a bribe”. A Resolution of the Supreme Court of Kyrgyzstan contains an important commentary that information about bribe giving cannot be considered as voluntary if the law enforcement authority had already become aware of the bribe giving. As noted in the IAP report, it is not clear from the Criminal Code’s wording whether the release from liability due to effective regret is applicable only when the reporting took place before the bribe-giving had taken place. If it were the case, then there is a contradiction in the wording of this provision (which refers to a person who “gave” a bribe and also to “upcoming” bribe-giving).<sup>304</sup>

In **Ukraine**, as of November 2012, the effective regret defence could be applied for active private and public sector bribery when the briber reports the offence before he is formally notified of a suspicion of crime by the relevant official. In 2014, the Criminal Code of Ukraine was amended to exclude application of the general effective regret defence to corruption crimes. Also, in 2015, the special defence for active bribery (both in the public and private sectors) and active trafficking in influence was revised to provide that a person who offered, promised or gave unlawful benefit will be discharged from criminal liability if that person (1) comes forward to voluntarily report the crime after committing the offence – but before the relevant law enforcement agent obtained information about this crime from other sources and (2) actively facilitated the solving of the crime committed by the person who received unlawful benefit or accepted its offer or promise. The 2015 amendments also explicitly prohibited application of this defence to foreign bribery.

In **Uzbekistan**, the briber will be released from liability for active bribery under the following conditions: the bribe was extorted, he voluntarily reports the crime within 30 days after the criminal act, shows “open-hearted remorse” and actively facilitates the solving of the crime.

Similar issues are raised in other ACN countries. For example, in 2013 **Latvia**, to comply with the OECD standards, amended the relevant provisions of its Criminal Code so that the exemption from liability would be discretionary, not automatic. The provision has also been narrowed by requiring an individual to actively further the disclosure and investigation of the offence in order to benefit from the

<sup>301</sup> GRECO (2015), Second Compliance report on Georgia, Third Round of Evaluation, §13, <http://goo.gl/SyDFoU>.

<sup>302</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 31, <http://goo.gl/xaGZpY>.

<sup>303</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 48-49, <http://goo.gl/bCMzTa>. Kazakhstan noted in its comments that the new Criminal Code of Kazakhstan (Article 65), enacted in 2015, stipulated that the perpetrator may be released from liability due to effective regret for the first commission of a crime, taking into account the personality of the perpetrator, his confession, facilitation to the detection and investigation of the crime, compensation of the damage caused by the crime. However, monitoring reports’ conclusions concerned provisions on the release from liability included in the bribery offences, which do not include conditions mentioned in Article 65 CC.

<sup>304</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 22, <http://goo.gl/o5o2s7>.

defence.<sup>305</sup> In 2014, KNAB issued guidelines for investigators to ensure that this provision is applied consistently. “These guidelines require investigators to consider specific factors such as whether the bribe-payer provided information not known to investigators, whether obtaining such information in another way would have been difficult or impossible, the motives for engaging in bribery and for reporting the crime etc.”<sup>306</sup>

### International co-operation and mutual legal assistance

The IAP third round of monitoring focused on selected issues of international cooperation in corruption cases as a follow-up to the previous monitoring round recommendations to examine the level of implementation and to highlight major existing challenges in the monitored countries. Accordingly, this section contains new trends, achievement and challenges to the extent covered by the monitoring. Analysis of the legislative frameworks of the IAP countries to some extent is provided in the previous Summary Report on the second monitoring round as well.<sup>307</sup> In addition, an overview of the mutual legal assistance and law enforcement cooperation conducted by ACN in 2013 is also available for GUAM countries (Georgia, Ukraine, Azerbaijan and Moldova).<sup>308</sup>

International cooperation becomes critical for the success of investigation and prosecution of complex corruption cases as corruption takes more sophisticated forms and involves foreign elements. In fact, efficient international cooperation largely depends on the political decisions of the jurisdictions concerned. Even when political interference is not a barrier, there are other significant obstacles that can impede the process, including: gaps in legislation and differences between legal systems; an absence of international agreements as a basis for cooperation; a lack of resources, capacity or training; bureaucratic burdens that slow down the process of executing requests at the local or national level; weak law enforcement ties; and poor communication between the jurisdictions.

International and regional organisations support international cooperation in criminal matters through monitoring implementation of international standards and by offering guidance on how to improve the legislation and practices for more efficient international cooperation through manuals, reports and analytical studies.<sup>309</sup> International and regional platforms and mechanisms may also facilitate cooperation in criminal matters, for instance the European Judicial Network (EuroJust), Interpol, Europol, the International Association of Prosecutors, the Stolen Asset Recovery Initiative (StAR) of the World Bank and the UNODC, the Prosecutors Network of Western Balkans, the Commonwealth Network of Contact Persons, the European Contact Point Network against Corruption, the South Eastern European Prosecutors Advisory Group, and others. However, challenges still persist.

A recent OECD initiative, the Global Network of Law Enforcement Practitioners (GLEN), had its first meeting at the OECD headquarters in Paris on 8-9 December 2015. The meeting brought together more than 100 law enforcement practitioners from more than 50 countries to discuss challenges practitioners

<sup>305</sup> OECD/WGB (2014), Phase 1 report on Latvia, §28, <http://goo.gl/Oh8U5I>.

<sup>306</sup> OECD/WGB (2015), Phase 2 report on Latvia, §158, <http://goo.gl/jrv4jg>.

<sup>307</sup> OECD/ACN (2013), Anti-Corruption Reforms in Eastern Europe and Central Asia, pages 78-85.

<sup>308</sup> OECD (2013), Mutual Legal Assistance and Other Forms of Cooperation Between Law Enforcement Agencies, available at <http://goo.gl/ot0zCH>.

<sup>309</sup> See OECD (2012), Typology on Mutual Legal Assistance in Foreign Bribery Cases, OECD Working Group on Bribery, available at <http://goo.gl/HF3z3J>; UNODC (2013), Implementation of Chapter III (Criminalization and Law Enforcement) and IV (International Cooperation) of the UNCAC, 2013, available at <http://goo.gl/YqCyPj>; UNODC (2012), Manual on Mutual Legal Assistance and Extradition, available at <https://goo.gl/QLWk3J>; and other sources.



face in international cooperation on corruption cases. A survey of participants indicated that challenges related to international cooperation negatively affect their ability to carry out anti-corruption work effectively (70% of the participants), and 98.5% of the participants indicated that international cooperation should be improved. The survey also revealed the top five systemic barriers countries face globally in providing international cooperation in foreign bribery cases to be as follows:

- The use of slow methods of transmitting information, e.g. through formal diplomatic channels.
- Different legal systems or criminal justice standards, such as dual criminality or due process requirements.
- Burdensome legal procedures, such as difficult processes for obtaining bank records.
- Poor communication or weak law enforcement ties/networks between the countries involved.
- Insufficient resources, expertise or capacity for countries to respond to requests for MLA.

The participants also emphasised the need for better contacts between law enforcement authorities and the importance of direct cooperation to bypass burdensome and lengthy bureaucratic procedures. According to the participants, the top five measures to improve the MLA in corruption cases were:

- Increasing direct bilateral communications and personal contact between law enforcement officials or central authorities in both requesting and responding countries.
- Using informal consultations and exchange of preliminary information between countries before seeking MLA.
- Creating a shared international electronic system that allows (a) secure exchange of information and documents, including submitting, managing and responding to MLA requests and (b) full information on MLA procedures, rules, forms and contact points.
- Utilising international networks to exchange experiences and good practices, as well as to foster relationships between practitioners.
- Providing clear and accessible information on procedural requirements and rules for providing MLA in all countries.

Challenges reported by the IAP countries are similar to those listed above, including poor communication and delays in responding the requests, language barriers and translation issues, difficulties at the local level related to the low level of cooperation among law enforcement, a lack of skills and training, especially in the area of asset recovery;<sup>310</sup> lengthy procedures for cooperation; lack of legal basis for cooperation; pre-conditions impeding cooperation, such as dual criminality;<sup>311</sup> incomplete requests.<sup>312</sup> Additionally, countries noted the difficulties of international cooperation with specific states that do not respond to the requests at all.<sup>313</sup>

Recognizing the significance of the topic, the ACN Steering Group mandated the secretariat to work further on the issue of international cooperation in corruption cases.<sup>314</sup> Consequently, research is under

<sup>310</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, pages 52-56, <http://goo.gl/DxXYOk>.

<sup>311</sup> In the Mongolian legislation there are no provisions on dual criminality. The Mongolian authorities held that the mutual legal assistance can be provided in the absence of dual criminality. See the IAP Review Report on Mongolia (2014), page 35, <http://goo.gl/OLp5zT>.

<sup>312</sup> Presentation by Georgia at the 6<sup>th</sup> Meeting of the Law Enforcement Network of ACN, 7 December, 2015.

<sup>313</sup> Third round monitoring questionnaire responses by the Government of Kazakhstan.

<sup>314</sup> A Regional Thematic Study on International Cooperation in Corruption Cases was included in the ACN's Work Programme for 2013-2015, adopted by the Steering Group at its meeting on 11 December 2012.

way as a part of the ACN's thematic work and will result in a regional thematic study on International Cooperation in Corruption Cases with the conclusions on achievements, existing challenges and regional recommendations.

The third round of monitoring has encouraged more efficient international cooperation and has suggested ways to address existing cooperation challenges through country-specific recommendations, for instance: acceding to relevant regional and international instruments, ensuring implementation of UNCAC review recommendations, overhauling domestic legislation, increasing the capacity of central authorities, removing barriers for cooperation related to time-limits for the investigation and prosecution of corruption cases, promoting cooperation between law enforcement agencies through inter-agency cooperation agreements, using tele-video conferencing and spontaneous cooperation provided by the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and other instruments.

### **International treaty basis for cooperation**

There are a number of multilateral treaties that can serve as a basis for international cooperation in the region. ACN countries are parties to international and regional instruments with the provisions addressing various forms of international cooperation (see Table 29 below). Further progress was made in recent years in the process of accession to multilateral instruments regulating international cooperation, in particular:

- The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters entered into force for **Georgia, Moldova and Slovenia**.
- The CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime entered into force for **Kazakhstan**.
- The CoE Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism entered into force for **Georgia and Bulgaria**; and
- An Additional Protocol to the CoE Criminal Law Convention on Corruption entered into force for **Azerbaijan, Georgia and Belarus**.

Another interesting recent development is the entry into force of the Third (2012) and Fourth (2014) additional protocols to the European Convention on Extradition, which seek to modernise existing international instruments and provide for accelerated and simplified procedures for extradition when the person in question consents. From the IAP countries, the Third Additional Protocol is in force only for **Azerbaijan** (2015) and several ACN countries. Whereas the Fourth Additional Protocol has so far only limited number of parties (in force for **Albania, Latvia, Serbia and Slovenia**), accession process is ongoing and should be further encouraged.

Furthermore, regional co-operation agreements have been concluded between the GUAM countries (**Azerbaijan, Georgia, Moldova and Ukraine**).<sup>315</sup> ACN governments also continue to prioritise concluding bilateral treaties and interagency agreements of cooperation with countries that have no treaty basis for international cooperation and needs for intensive cooperation. The number of these agreements increased during the third round of monitoring.

Further participation in international and regional instruments should be encouraged to diversify the range of international cooperation tools and the countries that can offer international cooperation to each other. Bilateral treaties, including interagency cooperation agreements should be promoted as well, as the basis for international cooperation in corruption cases.

---

<sup>315</sup> See more details for the GUAM countries: OECD (2013), Mutual Legal Assistance and Other Forms of Cooperation Between Law Enforcement Agencies.



Table 28. International co-operation in the ACN countries: treaties in force

	European Convention on Mutual Assistance in Criminal Matters	Additional Protocol	Second Additional Protocol	European Convention on Extradition	Second Additional Protocol	Third Additional Protocol	Fourth Additional Protocol	European Convention on the Transfer of Proceedings in the	CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	CoE Convention on the Laundering, Search, Seizure and Confiscation of Crime and on the Financing of	Minsk Convention On Mutual Legal Assistance in Civil, Family and Criminal Matters	Protocol	Chisinau Convention On Legal Assistance and Legal Relations in Civil, Family and	UN Convention Against Corruption	UN Convention against Transnational Organized Crime	CoE Criminal Law Convention on Corruption	Additional Protocol
<b>Istanbul Anti-Corruption Action Plan Countries</b>																	
Armenia							*										
Azerbaijan						2014		*									2013
Georgia			2014			*				2014							2014
Kazakhstan									2015								
Kyrgyzstan																	
Mongolia																	
Tajikistan							*										
Ukraine						*											
Uzbekistan																	
<b>Other ACN Countries</b>																	
Albania						2012	2014										
Belarus																	2015
Bosnia and Herzegovina						2015											
Bulgaria						*				2013							

	European Convention on Mutual Assistance in Criminal Matters	Additional Protocol	Second Additional Protocol	European Convention on Extradition	Second Additional Protocol	Third Additional Protocol	Fourth Additional Protocol	European Convention on the Transfer of Proceedings in the	CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	CoE Convention on the Laundering, Search, Seizure and Confiscation of Crime and on the Financing of	Minsk Convention On Mutual Legal Assistance in Civil, Family and Criminal Matters	Protocol	Chisinau Convention On Legal Assistance and Legal Relations in Civil, Family and	UN Convention Against Corruption	UN Convention against Transnational Organized Crime	CoE Criminal Law Convention on Corruption	Additional Protocol
Croatia						*		*									
Estonia										*							
FYROM						2014											
Latvia						2012	2014										
Lithuania						*				*							
Moldova			2013			*											
Montenegro																	
Romania						*	*										
Russian Federation							*			*							*
Serbia						2012	2014										
Slovenia			2013			2014	2015	*									
Turkmenistan																	

Source: ACN Secretariat research. Note: treaties in force are shaded, dark shading marks the entry into force during the third monitoring round, star stands for treaties that are only signed by respective countries.

**Box 20. International instruments regulating international co-operation relevant for the ACN region**

- European Convention on Mutual Assistance in Criminal Matters (1959)
- Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (1978)
- Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001)
- European Convention on Extradition (1957) and its four additional protocols
- European Convention on the Transfer of Proceedings in Criminal Matters (1972)
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990);
- Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)
- Minsk Convention on Legal Assistance in Civil, Family and Criminal Matters (1993)
- Protocol to the Minsk Convention on Legal Assistance in Civil, Family and Criminal Matters (1997)
- Chisinau Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (2002)
- UN Convention Against Corruption (2003)
- UN Convention Against Transnational Organized Crime (2000)
- Council of Europe Criminal Law Convention on Corruption (1999)
- Addition Protocol to the Criminal Law Convention on Corruption (2003)
- Council of Europe Civil Law Convention against Corruption (1999)
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1999).

Source: ACN Secretariat research.

**National legislation**

The third monitoring round noted further progress in reforming the legislative framework for international cooperation in several IAP countries. For example, amendments to the Criminal Procedure Code of **Ukraine**<sup>316</sup> incorporate a separate Section IX on International Co-operation during Criminal Proceedings. This section includes provisions concerning: the scope of international co-operation during criminal proceedings; the procedural actions that can be taken as a part of international legal assistance; the presence of representatives of the competent authorities of the requesting state; temporary transfer; the role of the Central Authority of Ukraine; appeals against decisions, actions or omissions of government authorities, their executives or officials; compensation for the inflicted damage and costs involving international legal assistance provision on the territory of Ukraine; procedures for fulfilling a request (instruction) for international legal assistance on the territory of Ukraine; interrogations on request of a competent authority of a foreign state by video- or telephone conferencing; search, arrest and confiscation of property; controlled supply; establishment and operation of joint investigation teams; and confidentiality.

Similarly, **Georgia** aligned its legislation with the Second Additional Protocol after its ratification and **Kazakhstan** introduced several changes to its Criminal Procedure Code to respond to the IAP second round recommendation on asset recovery (see below). Moreover, **Ukraine** adopted a separate law regulating asset recovery, also discussed below.

Despite this progress, the relevant legislative framework of IAP countries is still unevenly developed, and further efforts are needed to bring legislation of several countries in line with international standards.<sup>317</sup> Some countries have more advanced national frameworks and as a result received fewer recommendations under the IAP monitoring or UNCAC review (**Georgia** or **Ukraine**), while others are less developed and received more recommendations (**Mongolia**). For instance, **Georgia's** international

<sup>316</sup> In force since November 2012.

<sup>317</sup> Provisions regulating international cooperation are part of the criminal procedure legislation in most IAP countries (Armenia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Ukraine and Uzbekistan).

cooperation framework is well developed and flexible. Stand-alone Law on International Co-operation in Criminal Matters incorporates international standards covering all aspects of judicial cooperation. Even if the law does not expressly permit certain types of procedural actions, assistance can still be provided based on the *ad hoc* or reciprocity agreements with the appropriate foreign authorities. In addition, Georgia enacted a separate law in 2013 to regulate international law enforcement cooperation (see the box below). As another example, **Azerbaijan** has provisions in its Criminal Procedure Code to regulate international cooperation, but has also passed two acts specifically geared towards regulating mutual legal assistance and extradition, respectively, the Legal Assistance in Criminal Matters Act of 2001 and the Surrender of Criminal Offenders Act of 2001.

The need for flexible time limits in complex anti-corruption investigations (in particular those involving mutual legal assistance) was one of the issues noted in the third round of monitoring. For example, in **Georgia**, there is no time limit for conducting an investigation, but there is a 9 month limit on the length of time an indicted person can hold the status of defendant before trial begins. The evaluators considered that this could be an obstacle in the prosecution of corruption cases and thus recommended that Georgia review the relevant provisions of its CPC and, if necessary, amend them to allow flexibility in post-indictment prosecutions.

Another challenge observed at the legislative level is the difficulty of facilitating international cooperation in cases involving legal persons, where cooperation is not provided because the requested country does not have corporate liability for corruption offences. Thus, for example, in **Mongolia** any request involving legal persons would be denied, as Mongolia does not have relevant domestic legislation.<sup>318</sup>

Countries should be encouraged to progressively develop their national legislation on international cooperation to comply with international treaties and incorporate emerging international standards aimed at efficient international cooperation.

### **Institutional framework**

International instruments require that states designate relevant authorities responsible for international cooperation. All IAP countries already have such central authorities. The authority responsible for international cooperation in the region is usually the ministry of justice or the prosecution service, depending on the stage of the criminal proceedings. As a rule, prosecution offices are responsible for cooperation at the stage of pre-trial investigation, whereas ministries of justice deal with judicial cooperation during trial.

In **Mongolia**, there seems to be no clear division of functions of international cooperation on criminal cases between the Ministry of Justice and the Prosecutor General's Office. In **Georgia**, as the Prosecution Service is part of the Ministry of Justice, the central authority responsible for judicial co-operation is the department of the Chief Prosecutor's Office. A recent interesting novelty is the change in the institutional set-up in **Ukraine**. Under the new Law on the National Anti-Corruption Bureau,<sup>319</sup> which amended the Criminal Procedure Code of Ukraine, the NAB may independently issue and receive MLA requests without the involvement of the General Prosecutors Office, which is the central authority for all pre-trial MLA issues. This is seen as a good shift in terms of relieving some bureaucratic barriers, and helping to ensure independence of investigations, especially when it comes to cases involving high-level corruption or other sensitive cases.

---

<sup>318</sup> The IAP Review Report on Mongolia (2014).

<sup>319</sup> Adopted in October 2014, enacted in January 2015.

Table 29. Central Authorities in the IAP countries

Institution	ARM	AZ	GE	KAZ	KGZ	MNG	TAJ	UKR	UZB
General Prosecutor's Office	*	*		*	*	*	*	*	*
Ministry of Justice		*	*			*		*	
Judicial Administration					*		*		
Specialised Anti-Corruption Agencies							*	*	
Ministry for Foreign Affairs	*								

Source: IAP monitoring reports; OECD/ACN secretariat research

The institutional set-up in the Working Group on Bribery members is similar to the one described above: the central authorities are mostly hosted by ministries of justice or prosecutor general's offices. In a few instances, foreign ministries may also act as central authorities for international cooperation on foreign bribery cases.<sup>320</sup>

Information regarding the staffing, capacity, needs and challenges of central authorities has not been made available during the third round of monitoring. Some countries reported on the work of their central authorities to improve international cooperation by issuing guidelines and manuals, and other countries adopted standard requirements for MLA requests as bylaws. In **Mongolia**, the GPO's Department for International Co-operation, which serves as a central authority, developed guidance on preparing and writing MLA requests based on the UNCAC as well as a handbook on developing, sending and handling mutual legal assistance requests in criminal matters. Although Mongolia did not provide systematic information on trainings and needs regarding these publications, central authority staff underwent training after Mongolia joined the StAR initiative, so that they could learn how to draft MLA requests and work with local agencies.

Major challenges and needs of the authorities responsible for international cooperation in criminal cases should be further explored through regional thematic or monitoring work, so that policy recommendations and possible assistance projects can be developed aimed at enhancing capacity, thereby contributing to the improved international cooperation in corruption cases in the region.

### Asset recovery

Return of stolen assets is a fundamental principle of the UNCAC. The Convention provides that "the parties shall afford one another the widest measure of cooperation and assistance in this regard." At the same time, asset recovery is associated with various challenges because of the practical difficulty of establishing a link between proceeds of corruption in a requested state and a crime committed in a requesting state. Major challenges include differences between legal systems, the complexity of multi-jurisdictional investigations and prosecutions, a lack of familiarity with the mutual legal assistance procedures of other states, and difficulties in identifying the flow of corruption proceeds.<sup>321</sup>

According to the UNCAC, typical steps for asset recovery include tracing, identifying and locating assets (Art. 52, 55(2-3) 56, 58); seizing, freezing and confiscating assets (Art. 54-55); returning assets (Art. 57) and the direct recovery of stolen assets (Art. 53). In addition, the Council of Europe instruments such as Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime, offering a comprehensive basis for cooperation in asset recovery, is in force for five IAP countries (Armenia, Azerbaijan, Georgia, Kazakhstan, and Ukraine) as well as in most of the countries in the ACN region.

<sup>320</sup> For the complete list of the MLA authorities see: OECD (2012) Typology on Mutual Legal Assistance in Foreign Bribery Cases, pages 93-103.

<sup>321</sup> Conference of the States Parties to the United Nations Convention against Corruption, resolution 4/4, available at <https://goo.gl/E5uOZU>.

The previous Summary Report noted a lack of relevant provisions in the domestic legislation of the IAP countries. The third monitoring round, in particular, looked into implementation of Articles 53 (direct asset recovery) and 57 (return of the confiscated assets to the foreign state), where only a minor progress could be noted. For instance, **Kazakhstan** amended its criminal legislation to implement Articles 54 and 57 of the UNCAC. Regarding Article 53 (measures for direct recovery), **Kazakhstan** and **Uzbekistan** still assert that the national legislation implicitly permits direct asset recovery. However, no examples of the practical application seem to support this assertion. **Ukraine** adopted dedicated legislation on the asset recovery and designated special units in the Ministry of Justice and General Prosecutor's office for asset recovery (more detailed information is provided in the box below).

Not all of the IAP countries are able to track, seize and confiscate property in response to MLA requests. For example, **Mongolia** has no legislation on asset recovery<sup>322</sup> and does not grant cooperation in such requests in the absence of a bilateral treaty, unless the requesting country has acceded to the UNCAC. This is in spite of the fact that Mongolia's legal system allows seizing, arresting and confiscating property according to an MLA request.<sup>323</sup>

The IAP third round monitoring has continued to encourage the countries to amend their laws to ensure that the asset recovery provisions are unambiguously included in the national legislation.

#### Box 21. Asset recovery in Ukraine

The recovery of assets stolen by officials of the Yanukovich regime has been a major anti-corruption issue in Ukraine since 2014. The government of Ukraine has initiated efforts to recover the stolen assets including by cooperating with international organizations (EU) and initiatives (StAR).<sup>324</sup> The government sought assistance from more than 136 FIUs worldwide to trace and freeze stolen assets. The Ukraine Forum on Asset Recovery was jointly organised by the US and UK to support these efforts. The Prosecutor General's Office (PGO) also signed a cooperation agreement with the Basel Institute on Governance's International Centre for Asset Recovery (ICAR) to obtain assistance in financial investigations and the prosecution of corruption and money laundering cases and to liaise with foreign jurisdictions to locate stolen assets, obtain evidence to enable confiscation and return of these assets to Ukraine. The EU and several countries have taken action to ensure administrative freezing of the assets; however, these efforts have not been followed by efficient criminal proceedings in Ukraine to secure confiscation and return of the assets.

The lack of tangible progress in repatriation of the illegal proceeds to Ukraine is largely attributed to inefficiency of the investigation, but is also explained by ineffective procedures of asset recovery, a lack of capacity and expertise in Ukraine.<sup>325</sup> Accordingly, the third round monitoring report called upon Ukraine to step up its efforts for efficient asset recovery, in particular, by reviewing the relevant procedures, increasing the capacity of the PGO and other agencies and establishing a national mechanism for independent and transparent administration of stolen assets.

Ukraine has made efforts to improve its asset recovery legislation. It has established the separate asset recovery units in the GPO and MoJ and the Interdepartmental Working Group for coordination of the return of assets received by former high-ranking public officials, which is chaired by the Deputy General Prosecutor of Ukraine and is assigned to analyse and improve MLA legal and operational issues.

Ukraine adopted a **Law on National Agency for Detection, Tracing and Management of Proceeds from Corruption and Other Crimes** in 2015. According to the law, the National Agency is a legal entity of public law formed by the Cabinet of Ministers and accountable to the Parliament and the Cabinet of Ministers of Ukraine. The law provides for competitive selection of the Chairman of the Agency. The law was later amended to align it with the EU recommendations under the Visa Liberalisation Action Plan.

Source: IAP Third Monitoring Round report on Ukraine, OECD/ACN Secretariat research.

### Law enforcement co-operation

<sup>322</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, pages 52-56, available at <http://goo.gl/5uMVmC>.

<sup>323</sup> OECD/ACN (2014), Review Report on Mongolia, page 35, available at <http://goo.gl/iufln0>.

<sup>324</sup> Detailed information can be found at <http://goo.gl/pVqC3D>.

<sup>325</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, pages 65-66.

The previous Summary Report emphasised the importance of new cooperation tools, such as special investigative measures, joint investigative teams, spontaneous information sharing and law enforcement cooperation for increasing the efficiency of international cooperation.<sup>326</sup> The treaty basis for such cooperation is provided by Articles 49, 46(4) and 56, as well as 48-50 of the UNCAC and the provisions of the Second Additional Protocol to the European Convention on Mutual Assistance. Additionally, there are some bilateral interagency agreements concluded between relevant authorities. For example, cooperation agreements were signed by the Ministries of Internal Affairs and Ministry of Finance of **Georgia** with their counterparts in 27 countries.<sup>327</sup>

While the benefits of operational cooperation are clear and countries increasingly resort to it, IAP countries did not report much about the actual use of operational cooperation in practice during the third round of monitoring. Interestingly, out of the countries under monitoring, only **Azerbaijan** allows information obtained as a result of law enforcement cooperation outside the MLA framework to be used as evidence and only under specific conditions.<sup>328</sup> The operational information that can be obtained much more easily outside the formal MLA channels can also serve as the ground for subsequent MLA requests in all countries.

#### Box 22. Law of Georgia on International Law Enforcement Cooperation (2013)<sup>329</sup>

The recent development of an international cooperation framework in Georgia was marked by the adoption of a dedicated law regulating law enforcement cooperation. In contrast to the Law on International Cooperation in Criminal Matters (2010), which deals with international judicial cooperation through the central authority, the law on International Law Enforcement Cooperation (the Law) regulates cooperation between law enforcement agencies and international organizations, such as Interpol. In order to insure compliance with international instruments in force for Georgia, elaboration of the law was supported by the EU program (TAIEX), which reviewed the draft law.

In line with the relevant international instruments, the Law provides for various types of assistance, including requesting, providing and exchanging information; searching for persons and objects to determine their whereabouts; controlled delivery; joint investigative teams; deployment of operative agents; trans-border visual control; protecting participants of a criminal case or other persons; covert investigative measures. It also includes a general requirement of experience sharing and peer learning.

Further, the Law sets out safeguards to protect the personal data and state secrets. *In abstracto* dual criminality is a precondition for cooperation under the law. Grounds for refusal of cooperation include potential interference with an on-going investigation, state interests, political offences, and contradiction with human rights. Information shared on the basis of direct law enforcement cooperation cannot be used as evidence, but can serve as the basis for MLA request.

*Ad hoc* decisions for cooperation and decisions on cooperation based on reciprocity in the absence of the treaty can be taken by the head or the deputy head of the respective law enforcement agency. Additionally, oral requests are allowed in cases of urgency. Spontaneous cooperation is also envisaged: the law includes an obligation of law enforcement to encourage spontaneous cooperation with law enforcement in other jurisdictions or international organizations, using existing contacts as well as establishing new contacts and forums.

Source: Law of Georgia on International Law Enforcement Cooperation available in Georgian at matsne.gov.ge.

### Tele-video conferencing

The third monitoring round encouraged the use of modern tools, such as tele-video conferencing to facilitate mutual assistance (Georgia, Uzbekistan). Article 46(18) of UNCAC provides that upon request a state party may provide a hearing of a person by video conference conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party, if it is not

<sup>326</sup> OECD/ACN (2013), Anti-Corruption Reforms in Eastern Europe and Central Asia, page 85.

<sup>327</sup> Presentation by Georgia at the 6<sup>th</sup> Meeting of the Law Enforcement Network of ACN, 7 December 2015.

<sup>328</sup> See more details for the GUAM countries: OECD (2013), Mutual Legal Assistance and other Forms of Cooperation between Law Enforcement Agencies, page 12, cited above.

<sup>329</sup> Law of Georgia on International Law Enforcement Cooperation (2013).



possible or desirable for the person to appear in the territory of the requesting state. Additionally, Articles 9-10 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters provide for a hearing by video or telephone conference.

None of the monitored countries have reported using this tool, although the use of tele-video conferencing is explicitly provided for in the **Georgian** and **Ukrainian** (Art. 567 of the CPC) legislation. Article 9 of the law of Georgia on international cooperation in criminal matters provides a detailed regulation for the use of tele-video conferencing. In **Uzbekistan**, a regulation permits the use of this modern technique for domestic proceedings purposes by commercial courts. A technical support system is currently being piloted, and there are plans to extend it to criminal and civil proceedings as well. Uzbekistan explained that draft bilateral treaties with the US, Spain, Vietnam and other countries include provisions on video conferencing. This is a welcome development, but countries should be encouraged to make use of these available tools – not just to implement them.

## Conclusions

Overall, there is progress in expanding the treaty basis for international cooperation. Improvements in national legal frameworks can be noted as well, in response to IAP recommendations, UNCAC reviews and implementation or as a part of the ratification process of new instruments. A number of monitored countries have future plans to continue signing bilateral agreements, accede to new instruments, introduce electronic case management systems, establish more contacts for direct cooperation, or take other measures to enhance their cooperation capabilities.

Countries are further encouraged to remove the barriers to efficient international cooperation in corruption cases. Additionally, international and regional organisations could play more active roles in facilitating cooperation and stimulating mutual assistance, where needed.

## Specialised law-enforcement bodies

Legally binding international standards on anti-corruption specialisation are established by the UN Convention against Corruption and the Council of Europe Criminal Law Convention on Corruption. The requirement of specialisation does not mean that each prosecutor's office or each investigative body should have a special unit or expert for corruption offences. At the same time, it implies that there should be dedicated law-enforcement units or personnel wherever it is necessary for effectively combating corruption. Exact arrangements for building the anti-corruption specialisation in law enforcement should be decided by each state, taking into account its legal and administrative systems, as well as other relevant considerations.

### Box 23. Provisions of international treaties on anti-corruption specialisation in law enforcement

#### UN Convention against Corruption – Article 36

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

#### CoE Criminal Law Convention on Corruption – Article 20

Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against corruption. They shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. The Party shall ensure that the staff of such entities has adequate training and financial resources for their tasks.

It is equally important that there are not only specialised units/persons, but that “those in charge of the prevention, investigation, prosecution and adjudication of corruption offences, enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations”.<sup>330</sup>

### *Models of specialisation*

The IAP countries have used various approaches to the specialisation, and an even broader range of models can be found in the ACN region (see Table 31 below). They can be nominally divided into the following three groups.

**Table 30. Specialised anti-corruption law enforcement bodies in the ACN countries**

	Specialised anti-corruption investigative bodies	Specialised anti-corruption prosecution bodies	Specialised units/ personnel within investigative agencies	Specialised units/ personnel within prosecution bodies	Specialised anti-corruption multi-purpose agencies
<i>Istanbul Anti-Corruption Action Plan countries</i>					
Armenia					
Azerbaijan					
Georgia					
Kazakhstan					
Kyrgyzstan					
Mongolia					
Tajikistan					
Ukraine					
Uzbekistan					
<i>Other ACN countries</i>					
Albania					
Belarus					
Bosnia and Herzegovina					
Bulgaria					
Croatia					
Estonia					
The FYR of Macedonia					
Latvia					
Lithuania					
Moldova					
Montenegro					
Romania					
Russia					
Serbia					
Slovenia					

Note: Shaded cells indicate that corruption cases fall within competence of such institution/s in the country.  
Source: IAP monitoring reports; information by the governments; OECD/ACN secretariat research.

<sup>330</sup> Principle no. 3, Twenty Guiding Principles for the fight against corruption, Council of Europe Committee of Ministers’ Resolution (97)24, <http://goo.gl/ITcRsp>. For more information on anti-corruption specialization, see “Specialised Anti-Corruption institutions: Review of Models”, Study by the OECD/ACN, 2013 Edition, <http://goo.gl/rNldBz>, and “Anti-Corruption Specialization of Prosecutors in Selected European Countries”, Working paper by the OECD/ACN, 2011, <http://goo.gl/ca7h7g>.

The first group covers countries which have established specially designated anti-corruption bodies with repressive functions. They are either specialised anti-corruption agencies with investigative powers, which is the case in **Kazakhstan** (Agency of the Republic of Kazakhstan for Combating Economic and Corruption Crimes, since 2015 – National Bureau to Counteract Corruption), **Kyrgyzstan** (Anti-Corruption Service), **Ukraine** (National Anti-Corruption Bureau of Ukraine); or have prosecutorial powers, as the case is in **Azerbaijan** (Anti-Corruption Directorate within the Prosecutor General’s Office) and **Ukraine** (Specialised Anti-Corruption Prosecutor’s Office).

The second group is countries with anti-corruption specialisation within the existing law-enforcement and prosecution bodies. Some of its variations can be found in most IAP countries, in particular, in **Armenia, Georgia and Uzbekistan**.

And finally, the third group is the countries with multi-purpose anti-corruption specialised agencies, combining preventive and repressive powers. Among the IAP countries, such a model can be found in **Tajikistan**, which established an Agency for State Financial Control and Fight Against Corruption in 2007 in line with the IAP recommendation of the first round of monitoring, and **Mongolia** - Independent Authority Against Corruption.

#### Box 24, Anti-Corruption Directorate under the Prosecutor General of the Republic of Azerbaijan

The Anti-Corruption Directorate (ACD) is an autonomous department with the special status and direct subordination to the Prosecutor General. It was created (as a Department) in 2004 and has the competence to detect, investigate and prosecute corruption. In 2011 the Department was restructured, the number of its divisions was increased from three to seven divisions. The ACD received almost exclusive jurisdiction to investigate corruption offences. It is staffed with more than 150 prosecutors and investigators, as well as designated detectives from the Ministry of Internal Affairs and the Ministry of National Security; financial, accountancy and other specialists are also seconded to ACD. It can also engage external experts on business, accounting, IT, forensics, etc. from other specialised institutions when necessary. In 2011, the Anti-Corruption Department was authorised to conduct the operational-search activity. In March 2014, the name of the Anti-Corruption Department was changed to the Anti-Corruption Directorate and its status and competence were upgraded.

In 2009, the ACD established a National Corruption Crimes Database with information extracted from all criminal cases on corruption offences. The database is confidential, but the analysts of the ACD can use the data to prepare analytical reports on corruption trends. Gradually, the ACD received access to the main databases of public authorities, including those of the Ministry of Internal Affairs (convictions, citizen registration, arms registration, vehicle registration), Ministry of Justice (register of movable and immovable property, etc.). Ministry of Emergency Situations, etc. The ACD has introduced a new e-crime database, which is wider in scope than the National Corruption Crimes Database. The ACD runs a hotline to collect signals about corruption from the public.

Source: IAP monitoring reports and country’s progress updates, available at <http://goo.gl/Pk3Wm4>: comments by the country.

The absence of genuine specialisation, however, remains to be a serious concern in some IAP countries. For example, prosecutors in the region often do not specialise in specific types of crime, such as corruption, but rather in different stages of the investigation and prosecution procedure. Responsibility for corruption cases is based on the procedural specialisation, then divided among an investigator of the prosecution office who conducts pre-trial investigation, a prosecutor who oversees the legality of investigation, and another prosecutor who is responsible for supporting the accusation in court. Such fragmentation fails to ensure consistency and continuity in the corruption cases, leads to lack of personal investment in the success of the case by each individual investigator and prosecutor, and makes it challenging to provide meaningful specialised training.<sup>331</sup> For example, the third monitoring round report on **Armenia** noted that the monitoring team formed an impression that because of the existing dispersed and loose specialisation model in Armenia none of the law enforcement agencies are placed under

<sup>331</sup> OECD/ACN (2012), Training Manual on Investigation and Prosecution of Corruption Offences in Ukraine, available at <http://goo.gl/QdMGES>.

pressure to take on corruption cases, especially complex ones or those involving high-level public officials.<sup>332</sup>

### *Compliance with international standards*

While noting some examples of good practice emerging in the region, the IAP second monitoring round has also identified serious deficiencies in the countries' capacity to successfully detect, investigate and prosecute corruption.

Positive developments can be identified in regard to autonomous status and institutional independence of the specialised anti-corruption institutions in selected IAP countries. For instance, the second round of monitoring noted that **Azerbaijan's** Anti-Corruption Department "has sufficient autonomy in the prosecutorial system" and was "directly subordinated to the Prosecutor General"<sup>333</sup>. The third monitoring report welcomed the further strengthening of the ACD and recognised that not only its structure was built up, but also the methodology of its work has improved. Now the investigation of corruption is carried out in a holistic manner by a team composed of investigators, detectives and analytical officers under the supervision of a prosecutor. Another improvement in the ACD's capacity to detect and investigate corruption offences was achieved through the establishment of a group of specialists who have expertise in various fields and offer their expert assistance in the preliminary review of information in criminal investigation on corruption offences. Additionally, ACD may invite experts from any state institution as member of the investigation team.<sup>334</sup>

A major breakthrough in the area of specialisation of the law enforcement agencies took place recently in **Ukraine**. It has set up or envisaged creation of several agencies that will deal with investigation and prosecution of corruption criminal offences (see the box below for details).

In general, a lack of independence of the law enforcement specialised agencies from undue interference remains to be one of the primary concerns in most IAP countries. In varying degrees, investigators and prosecutors in these countries are exposed to various forms of pressure from above, experience regular interferences with their investigations and prosecutions and are vulnerable to persecution themselves. Procedures on appointment, promotion and removal from the office are poorly regulated and do not provide for necessary safeguards across the IAP countries (see, however, the example of **Ukraine** above). There is no random assignment of cases, and even after the assignment, the case can be taken away from one investigator/prosecutor and handed over to another by their superiors; or the case can be taken away from the investigative institution altogether.

Overlapping jurisdiction is another problem identified in many IAP countries during the monitoring. It is often reasonable to have a system of several law enforcement bodies involved in the fight against corruption, however, in most IAP countries, such models are hindered by duplicate roles and fragmentation of functions. They lack a clear, overarching designated agency which would ensure co-ordination. This is of special concern in the area of operational and investigative activities and leads to some cases falling through the cracks or being investigated simultaneously by more than one agency. Accountability also presents a real challenge in such models, as each agency is pointing fingers at the others and assigning blame for high level of corruption or failed investigations and prosecutions to someone else.

<sup>332</sup> OECD/ACN (2014), Third Monitoring Round report on Armenia, page 44, <http://goo.gl/FHtZ5l>. In its comments to the draft Summary Report, the Government of Armenia noted that the Department of Corruption and Crimes against Economic Activities functions in the structure of the prosecution services; Corruption, Organised and Official Crimes Department functions in the structure of the Special Investigation Service. In addition, the Action Plan for the Anti-Corruption Strategy envisages a number of measures directed at the enhancement of abilities and specialisation of the law enforcement bodies.

<sup>333</sup> OECD/ACN (2010), Second Monitoring Round report on Azerbaijan, page 25, <http://goo.gl/fzwt3g>.

<sup>334</sup> OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, pages 48-50.

**Box 25. New specialised anti-corruption law enforcement institutions in Ukraine**

After the Euromaidan events in 2013-2014, Ukraine has launched a number of significant anti-corruption reforms and one of the most far-reaching ones is the overhaul of the law enforcement institutions. A set of anti-corruption laws adopted in October 2014 envisaged the creation of separate specialised institutions – a prevention agency and the investigative agency for high-level corruption. In 2015 the specialised prosecutor's office was established by the law. Later that year, the parliament adopted laws on two additional new institutions that will deal with the corruption offences. The reform has not stopped here, as an idea to set up specialised anti-corruption courts (or divisions within existing courts) was brought up and already included in the new Law on the Judiciary that was adopted in June 2016 and provided for setting up a Higher Specialised Anti-Corruption Court acting as a first instance court (its creation requires adoption of a separate law that will define its competence and modalities of formation and operation).

**National Anti-Corruption Bureau (NAB).** The NAB jurisdiction includes pre-trial investigation of corruption crimes committed by high-level officials or involving a high amount of undue benefits or damages. The Bureau has a high level of institutional and procedural autonomy. It has its own technical and physical protection units. The first director of the NAB was appointed in April 2015 after an open competition for this post conducted by an independent panel of experts and dignitaries. All of the Bureau's staff were also recruited through an open competitive selection. This was the first time in the Ukrainian history when a law enforcement agency's staff was recruited through an open merit-based selection. In December 2015, the NAB started its first investigations with the first cases sent in court in March 2016. The overall number of detectives as of March 2016 was 135 with the overall number of staff of 350 persons (out of 700 allowed by the law). The NAB received access to main databases run by the state authorities and has set up a strong analytical department. The only issue in terms of functional independence is the lack of powers to directly intercept communications without relying on the Security Service to provide technical support.

**Specialised anti-corruption prosecutor's office (SAPO).** In 2015, the Law on the Prosecutor's Office was amended to introduce for the first time a specialised unit of prosecutors to deal with the prosecution of cases under jurisdiction of the NAB. The specialised unit was provided with sufficient level of autonomy; its chief prosecutor was also selected by a special commission through an open competitive process (the panel chose two candidates from the 70 candidates who applied and Prosecutor General appointed one of them to the post). The SAPO will have 45 prosecutors overall.

**State Bureau of Investigations (SBI).** The new Criminal Procedure Code of Ukraine, enacted in 2012, mentioned a new investigative agency – the State Bureau of Investigations, without providing details on the scope of its authority. The CPC also provided that once the SBI was functional the prosecution service was supposed to lose the power to investigate crimes, as required by the European standards. The Law on the SBI was adopted in November 2015. A special panel was established in March 2016 to select the SBI's senior staff, including its Director, through an open competition. The SBI will investigate: 1) all crimes committed by the senior public officials, judges, prosecutors, law enforcement officers, except those that are included in the NAB's jurisdiction; 2) all crimes committed by the officials of the NAB and SAPO, except those that are investigated by internal control unit of the NAB (namely corruption crimes committed by the NAB's officers, when they are detected by the internal control unit); 3) military crimes.

**National Agency for Recovery and Management of Criminal Assets.** To fulfil its commitments to the EU under the Visa Liberalisation Action Plan, the Government proposed a set of amendments to improve provisions on confiscation of corruption proceeds and establish a new agency to trace, seize, manage and confiscate criminal proceeds. The Law on the asset recovery and management office (National Agency for Detection, Tracing and Management of Assets Received from Corruption and Other Crimes) was adopted in November 2015 (and then revised in February 2016 to align with the EU standards). The law stipulates that a new agency will be established under the Government with a high level of autonomy, competitive selection of its head and extensive powers to detect, trace, seize, manage and dispose of confiscated assets, cooperate with other jurisdictions to trace and recover criminal assets. The new agency will act as a hub to assist investigators in law enforcement agencies to find and effectively confiscate corruption and other criminal proceeds.

Source: OECD/ACN secretariat research.

The problem persists even after recent reforms. For example, in **Ukraine** a high level of specialisation was introduced in 2014-2015 with the Specialised Anti-Corruption Prosecutors Office authorised to take over practically any case from other agencies and to transfer it to the National Anti-Corruption Bureau if this is required for the investigation and prosecution of offences in the NAB's core competence. However, in practice tensions emerged with the Prosecutor General who was reluctant to allow the transfer of high profile cases from the GPO's own investigators.

In most IAP countries, the notion of a joint inter-institutional investigation task force involving representatives of various law enforcement and control bodies is not employed in practice, although it is allowed by law. Interagency co-operation is often formally put in place, but in practice, varies from case to case. Law enforcement agencies in many IAP countries are not obliged to provide feedback on reports made by other public institutions, in order to assist them in improving their capabilities to detect and report corruption.

A field that remains not sufficiently explored is the qualifications, skills and training of the specialised personnel who deal with corruption cases. More attention should also be paid to the issue of evaluating the personnel's performance, including the factors that should be taken into account; which indicators should be developed to properly reflect good performance, and the best ways to move beyond antiquated practices when only the number of opened/completed investigations or prosecutions with convictions have been accepted as criteria for success? For example, **Kyrgyzstan** during the second round of IAP monitoring reported an initiative of measuring public satisfaction with the work of law enforcement agencies through surveys with the intent to use this information for their performance evaluations.

With the exceptions of **Azerbaijan**, **Kazakhstan** and – since recently – **Ukraine**, the material and technical resources of the law-enforcement and prosecution authorities involved in anti-corruption were reported as very limited and sometimes non-existent. In **Kyrgyzstan**, forensic capabilities remained insufficient; some important types of forensic analysis could not be carried out at all since there was no appropriate equipment and knowledge.<sup>335</sup>

In most IAP countries, training for prosecutors, including anti-corruption training, is provided by the specialised institutions. Training institutes and academies for prosecutors exist in **Armenia**, **Kazakhstan**, **Kyrgyzstan**, **Tajikistan**, **Ukraine** and **Uzbekistan**. **Georgia** and **Azerbaijan** also have special training departments within the prosecution's offices. Training for investigators is conducted by the training institutions of the Ministries of Interior and Security Services. The Specialised Agency of **Tajikistan** also has its own training facilities and reported to conduct regular trainings for its staff. The IAP authorities provided a lengthy list of training activities for prosecutors and law enforcement officials that had been conducted since the first round of monitoring. Some trainings covered general areas, such as team investigations and investigative efficiency. Others focused on more specific topics, such as links between corruption and money laundering, international judicial co-operation, new types of corruption offences, etc. Monitoring reports noted that there is a need to further encourage joint trainings, as well as trainings on areas where capacity seems to be lacking, such as financial investigations, forensic accounting, new technologies in SITs, etc. It would also make sense to take a more systematic approach to training, developing a series of comprehensive anti-corruption courses, as opposed to *ad hoc* trainings and see what results such approach may yield.

<sup>335</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 38.



**Box 26. Reform of the specialised anti-corruption agency in Moldova**

In 2012, Moldova started the reform of its specialised anti-corruption agency – the Centre for Combating Economic Crimes and Corruption, which was set up in 2002. It was transformed into National Anti-Corruption Centre (NAC). Its mandate included preventive functions and combating corruption and corruption-related crimes, money laundering and terrorism financing crimes; other functions will be transferred to other specialised state agencies. According to the Moldovan authorities, the independence of the new agency was guaranteed by placing the NAC under the parliamentary control; the agency's director is appointed for the term of office not corresponding to that of the government, Parliament and president, from among candidates who meet professional criteria and are not affiliated to political parties; job security for the NAC staff; raised salaries of the staff combined with increased accountability and strengthened disciplinary measures up to dismissal. Agency's staff will be subjected to integrity tests, polygraph testing and "monitoring of lifestyle" – failure to pass relevant tests will result in disciplinary sanctions. The appointment of the new NAC's Director was carried out based on professional and non-political affiliation criteria by the Parliament through a transparent and competitive procedure. 18 candidates applied for the post and the parliamentary committee held public hearings before deciding on the nomination, which was then confirmed by the plenary parliament.

The NAC is authorised to conduct operative and detective activity, carry out criminal prosecution of crimes under its jurisdiction. The agency will also deal with preventive tasks: anti-corruption screening of draft legal acts, corruption risk assessment, anti-corruption awareness raising and education, monitoring of anti-corruption policies, research and studies.

In 2013, through amendments in the law, the NAC was effectively subordinated to the Government. This was reversed in October 2015 when the new amendments put the Centre back under supervision of the parliament.

Source: information by the Moldovan authorities; media reports; text of the law available at <http://goo.gl/jxXybl> (in Russian).

**Investigation and prosecution of corruption cases**

The second round of the IAP monitoring shed some light on the procedural issues of investigations and the prosecution of corruption. It also examined what investigative tools were available, which were the most commonly used, what capacities law enforcement agencies in the region lacked, how well they co-operated, what statistical data was collected on corruption cases and what methods were used to collect that data. The third round monitoring continued to analyse the tools and methods used for effective investigation and prosecution of corruption in the IAP countries.

***Conduct of investigations and prosecutions***

In most IAP countries, pre-trial proceedings must be initiated by a body of inquiry, an investigator or a prosecutor if there is a statutory ground and sufficient information about an alleged crime. Whether there is sufficient information to start pre-trial proceedings depends on whether a reasonable assumption can be made that a crime has been committed. When there is no sufficient information, as a rule, relevant authority or official is obliged to conduct preliminary checks, either personally or through the competent authorities. The quality of such checks differs greatly from one case to another in most IAP countries, and the diligence exercised often depends on the willingness of the investigator or prosecutor to pursue the case.

For instance, while media reports, according to legislation of all IAP countries, constitute "statutory grounds", very few investigations are triggered by reports of alleged corruption in the media. This seems to be happening for a variety of reasons. They range from unwillingness to pursue historic (reactive) investigations of the crime that has already happened to high workload of law enforcement officers and prosecutors. This greatly undermines public trust in law-enforcement and prosecution bodies and seriously hampers the ability of law-enforcement to have success in investigating high-profile cases. Proactive means of investigation should be encouraged in IAP countries, drawing on the experience from other countries in ACN and OECD.



Given the extent of corruption and the constraints of human and financial resources, it might be useful for other IAP countries to consider prioritising corruption cases for investigation and prosecution. This is particularly effective in ensuring that serious corruption cases receive the necessary attention. Well-regulated discretion can be a solution, especially for countries with limited resources. With such an approach, criteria for the selection of cases should be clearly prescribed in the law, internal regulations, guidelines or policy papers and strictly followed.

According to the new Criminal Procedure Code of **Ukraine** (enacted in the end of 2012), the stage of “opening a criminal case” was eliminated, if there is information about possible crime it is automatically registered by the law enforcement authority and criminal proceedings commence (if the initial review of the complaint/information shows no signs of the crime, the proceedings are closed).

#### Box 27. Prosecutorial discretion in the ACN countries

In the ACN countries, the principle of mandatory prosecution generally prevails. There are only four countries – **Georgia, Estonia, Romania** and **Montenegro** – where prosecutorial discretion is available to a considerable extent. The new Criminal Procedure Code of Romania provides for prosecutorial discretion, which is applicable regardless of whether the suspect is a natural person or a legal person. Article 318 of the Criminal Procedure Code allows the prosecutor to discontinue the investigation or to end the criminal action when an offence is sanctioned by law with no more than 7 years imprisonment or a fine, if there is no public interest in pursuing the case based on the circumstances of the case, the purpose of the offender and the consequences of the offence committed. The prosecutor may then impose alternative obligations on the defendant. In addition to those rather broad models, prosecutorial discretion is available to a more limited extent in **Croatia**, the FYR of **Macedonia** and **Slovenia**. **Serbia**'s criminal procedure code (Article 283) allows a prosecutor to defer prosecution of crimes of certain gravity if the suspect agrees to certain conditions, such as agreeing to rectify the damages caused by the crime, paying a certain amount of money to charity, and/or observing other obligations or court restrictions. If the suspect fulfils the obligations within the prescribed time limit (which may not exceed a year), the public prosecutor will dismiss the criminal complaint.

**Georgia** is the only IAP country following the common law tradition by providing that “while deciding upon initiation or termination of a criminal prosecution, a prosecutor shall enjoy discretionary powers which shall be governed by the public interests” (Art. 16 CPC). Under the Guidelines on Criminal Justice Policy (issued by the Minister of Justice, binding for prosecutors), the prosecutor has the right either to not initiate or to terminate a criminal prosecution if the requirements of public interest are not met. The prosecutor while deciding on whether to prosecute a person shall analyse whether and to what extent the initiation of prosecution serves the public interest and shall not initiate the prosecution when the public interest in not initiating prosecution obviously overrides the interest in punishing a person. The public interest is defined through consideration of different relevant factors including, but not limited to: state priorities, the nature and gravity of crime, the preventive effect of prosecution, the personal characteristics of defendant, the defendant's willingness to co-operate with law-enforcement bodies, the expected sanction, etc. Accordingly, the prosecutor can decide to terminate a prosecution if the public interest test is not satisfied. However, as the prosecution of corruption related crimes is criminal justice policy priority for Georgia, this discretionary power is less likely to be used in such cases.

Prosecutorial discretion has its advantages and risks. On the one hand, it enables prosecutors to control their caseload and ensure that the necessary resources are available for more important cases. On the other hand, as it is far easier for the prosecutor to terminate the case than to bring it to court for a full-scale trial, there is always a risk that discretionary powers will be overused or abused. Whenever prosecutorial discretion is allowed in any form, it is important that the decision to pursue a case may not be motivated by political considerations, such as the country's national economic interests, the potential effect of a criminal proceeding's relations with another country, or the identity of the natural or legal persons involved.

Source: OECD/ACN (2015), Liability of Legal Persons in Eastern Europe and Central Asia, pages 49-51; OECD/ACN (2015), Foreign Bribery Offence and Its Enforcement in Eastern Europe and Central Asia, pages 27-28; IAP Third Round Monitoring report on Georgia, page 33.

One of the areas where the prosecutorial discretion may be used is the plea bargaining with the defendants. Until recently **Georgia** was the only IAP country that allowed such agreements. Despite its effectiveness, the plea agreements system in Georgia has been criticised for vesting too much discretionary power in prosecutors. While a plea agreement has to be ultimately approved by the court, it is believed that judges are not sufficiently independent and in most cases follow the submissions made

by prosecutors.<sup>336</sup> This would undermine the effectiveness of judicial control over plea bargaining and may result in abuse of prosecutorial authority. Reportedly 95% of defendants in passive bribery cases were taken into custody pending trial, which puts them under enormous pressure to reach a plea agreement with the prosecution and agree to relatively small imprisonment term and a fine. According to the statistics provided by the Government, 4,400 proposals of plea agreements in all criminal cases were presented to courts in 2010 and only 18 agreements were refused (16 and 19 refusals accordingly in 2011 and 2012). To address these concerns, Georgian Government initiated a reform of its criminal and in 2014 adopted amendments to change the system of plea bargaining, in particular to:

- Increase the role of judge in the proceedings;
- Revoke the ability to have a plea agreement on sentence (*nolo plea*);
- Enhance the role of the victim in the plea-bargaining process and ensuring that the victim will have a right to be heard regarding the damage he/she had suffered;
- Require the prosecutor to make a protocol for the plea agreement reflecting the process of negotiation between prosecutor and defendant as prescribed by law;
- Require the prosecutor to present an exhaustive list of circumstances and evidence, which will be sufficient to render a judgment without substantial consideration of case;
- Require the prosecutor to inform the defendant of the legal consequences of the plea bargain agreement;
- Explicitly define the factors that prosecutors should consider when determining the public interest (for example, when deciding whether to reduce the sentence or to drop or to reduce the charges being considered), namely: the state's legal priorities, the gravity of the offense committed and the likely sentence, the defendant's risk to public security, the level of infringement and guilt, the defendant's personal characteristics, criminal record, cooperation with investigation, behaviour in compensating the victim for damages incurred as a result of the crime;
- Expand the right to appeal a court judgment on the plea agreement –so that convicted persons will have a right to appeal and request annulment of the judgment approving a plea agreement, if plea agreement was concluded without sufficient evidence for rendering a judgment without substantial consideration of a case.

The amendments seem to be successful because, according to the Georgian Government, between January and June 2015, there was a 5.2 % decrease in the number of cases completed with plea bargain as compared to 2014, while in 2014 there was a 19.5% decrease as compared to 2013.<sup>337</sup>

The new Criminal Procedure Code of **Ukraine** introduced an agreement between the prosecutor and the suspect/accused for the acknowledgement of guilt. Such an agreement is possible only with regard to criminal offences with certain gravity (misdemeanours, low- and medium- gravity crimes, as well as grave crimes). An exception was made in 2015 for especially grave crimes – agreements in this case are possible only for offences within jurisdiction of the National Anti-Corruption Bureau (see above section on specialised agencies) on condition that the suspect/accused exposed other person who committed a crime within the NAB's jurisdiction and the crime of the latter person was confirmed by evidence. When

<sup>336</sup> See, for example, National Integrity System report by TI Georgia, 2011, chapter on Judiciary, available at <http://transparency.ge/nis>. However, in its more recent report on the National Integrity System (2015, page 45, <http://goo.gl/Ek3Zdi>) TI noted that judges became more independent and no longer approve automatically prosecutor's motions.

<sup>337</sup> OECD/ACN (2015), Progress updates of Georgia, October 2015, pages 36-37, 29, available at <http://goo.gl/m6QZIT>.

concluding the agreement. the prosecutor should take into account: the level and nature of assistance of the suspect/accused in criminal proceedings against himself or other persons; the nature and gravity of the accusation (suspicion); the public interest in swift pre-trial proceedings and trial, and the exposure of additional criminal offences or offences of a more serious nature. Any agreement has to be endorsed by the court. The CPC provides for a number of guarantees of the defendant's rights. While such a new instrument can be very useful in prosecution of complex corruption crimes, it is also prone to abuse and should be closely monitored. For instance, independent analysis showed that courts and prosecutors often approved agreements with unjustifiably low sanctions (e.g. sanctions below the lowest punishment allowed by the offence, conditional release from serving the sentence, etc.), especially in proceedings concerning drugs, tax and office-related offences including abuse of office and bribery.<sup>338</sup>

### *Special investigative techniques*

While most of these techniques are highly intrusive and should be used with both great caution and consideration, it is widely recognised that SITs are very effective tools to detect and investigate corruption. This is especially true because corruption is a latent crime for which it is difficult to find witnesses or direct evidence.

#### **Box 28. Special investigative techniques**

Special investigative techniques (SITs) are measures applied by competent judicial, prosecuting and investigating authorities in the context of criminal investigations for the purpose of detecting and investigating serious crimes and suspects, aiming at gathering information in such a way as not to alert the target persons (*Council of Europe Committee of Ministers' Recommendation Rec(2005)10 on "special investigation techniques" in relation to serious crimes including acts of terrorism*).

According to the UNCAC (Art. 50) in order to combat corruption effectively, SITs should be used, in particular, controlled delivery, electronic or other forms of surveillance and undercover operations, and evidence gathered by these means should be admissible in court.

In all IAP countries, the production of evidence gained from the use of special investigative techniques is permitted before courts and strict procedural rules governing the production and admissibility of such evidence are established by their national legislations.

However, in some countries, the inability for specialised anti-corruption agencies to independently conduct SITs undermines their success. In **Azerbaijan**, ACD initially had to ask the appropriate law enforcement agency to perform detective and operative activities, which limited the ability of the ACD to detect high-level corruption (e.g. involving senior management of law-enforcement bodies such as the Ministry of Interior, or the Ministry of National Security). However, in 2011 the laws were amended and the ACD was vested with the authority to carry out all types of special investigation measures in respect of corruption offences. The amendments went even further and excluded all other law enforcement agencies from carrying out such measures in respect of corruption offences, except when the ACD issues them mandatory written instructions to carry out such measures.<sup>339</sup>

Another problem was noted in **Kyrgyzstan**. While the Law on the Operative and Detective Activity allows use of special investigative methods even before a criminal case is opened, in practice, the use of results of operative measures as evidence is problematic since courts will rarely accept them. This is explained by the restriction set in the Criminal Procedures Code, according to which, only crime scene examination and forensics analysis are permitted before the criminal case is opened. When the corruption case is opened, the risk of information leaks becomes high, which can render any covert operative activities, like imitated bribery, ineffective. Therefore, as was noted in the IAP report, law enforcement

<sup>338</sup> Banchuk and others (2014), 35 Informal Practices in the Criminal Proceedings of Ukraine, page 48, available at <http://goo.gl/GZuXjC>.

<sup>339</sup> OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, page 42, <http://goo.gl/mI5xFG>.

personnel and judges need clear guidelines on how materials resulting from special operative measures can be used as evidence in court. It was also recommended to amend the relevant legislation to allow use of operative results as evidence.<sup>340</sup> Subsequently, Kyrgyzstan amended its Criminal Procedure Code to allow the use of information obtained from operative and detective work, in accordance with the lawful procedure, as evidence in the criminal case.

### *Provocation of bribery*

Several IAP countries (**Kazakhstan, Kyrgyzstan, Tajikistan, Ukraine**) have established a special criminal offence prohibiting the provocation of bribery in the private or public sectors. It aims to prevent entrapment committed by law enforcement officers to uncover corrupt officials. The criminalisation of bribe provocation is supposed to reinforce this prohibition in countries with high levels of corruption, which consider law enforcement authorities highly susceptible to the temptation of provoking bribery. In other IAP countries, such a practice is forbidden as well, but through other mechanisms, such as court practice and internal regulations.

While the provocation of a bribe is prohibited, it does not mean that simulated bribery is off limits as an investigative measure. The latter is a legitimate technique to document bribery that enables law enforcement officers, after having learnt of an on-going or soon-to-happen bribery scheme, to “join” the offence either as undercover agents or through a collaborating person (often a person who was solicited for a bribe by an official) in order to catch the perpetrator *in flagrante*.

Offence of bribery provocation is often cited by law enforcement practitioners as an obstacle to effective fight corruption. However, such a measure, were it allowed to the law enforcers – would clearly violate human rights standards. No matter how effective this measure may appear to practitioners, society’s interest in ensuring a fair trial should prevail. As the European Court of Human Rights has noted, the right to a fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience.<sup>341</sup> While the use of undercover agents may be tolerated provided that it is subject to clear restrictions and safeguards, “the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement, as to do so would expose the accused to the risk of being definitively deprived of a fair trial from the outset”.<sup>342</sup>

Police incitement occurs where the officers involved or persons acting on their instructions do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed. In the case of *Bannikova v. Russia*, the European Court of Human Rights summarized the criteria for distinguishing entrapment from permissible conduct: 1) substantive test (whether the offence would have been committed without the authorities’ intervention; whether the undercover agent merely “joined” the criminal act or instigated it; whether person was subjected to pressure to commit the offence); 2) procedural test (the way the domestic courts dealt with the applicant’s plea of incitement).<sup>343</sup>

Whether provocation of bribery is criminalised or not, countries should establish in the law (and not in the secondary legislation) clear procedures and guarantees against abuses that may occur when using

<sup>340</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 39, <http://goo.gl/UpklbW>. See also OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, pages 61-62, <http://goo.gl/nOMwrt>.

<sup>341</sup> Teixeira de Castro v. Portugal, application No. 25829/94, judgment of 9 June 1998, §36, <http://goo.gl/u4xxU3>.

<sup>342</sup> Ramanauskas v. Lithuania, application No. 74420/01, judgment of 5 February 2008, §54, <http://goo.gl/6bjdKc>; Khudobin v. Russia, application No. 59696/00, judgment of 26 October 2006, §128, <http://goo.gl/46kWeW>.

<sup>343</sup> Bannikova v. Russia, application No. 18757/06, judgment of 4 November 2010, §37-65, <http://goo.gl/ALlISl>.

imitated bribery as an investigative tool. Law enforcement authorities should also adopt clear guidelines setting apart entrapment and legitimate bribery simulation.<sup>344</sup>

### *Access to financial information and databases*

In most IAP countries, law enforcement agencies have access to bank information. However, in **Kyrgyzstan** and **Armenia**<sup>345</sup>, the inability of law enforcement officers involved in corruption cases to access bank data before initiating a criminal case remains a problem.

Even when there are procedures to access information about bank accounts of the suspects, law enforcement officials often face a problem of locating accounts of the suspect/accused in the specific banks or other financial institutions. For example, in **Ukraine**, to obtain such information, if not already known from the case file, a law enforcement agency must send out requests to all banks based on a court order (only tax authorities have the right to request information about existence of accounts in banks directly).

Establishing whether a person owns an account is only the first step in the possible further freezing and seizing of the relevant assets. It should therefore be simplified and provide law enforcement agencies with possibility of establishing the list of accounts a person owns (without accessing further details). There is a good practice in some EU countries, which could be used in the IAP countries as well. At least seven EU countries have established centralised bank account registers (Croatia, France, Germany, Italy, Portugal, Romania, Slovenia).<sup>346</sup> This would also comply with the FATF revised Recommendation 31: “...In addition, countries should have effective mechanisms in place to identify, in a timely manner, whether natural or legal persons hold or control accounts.”

#### **Box 29. Centralised bank accounts register**

The Asset Recovery Platform, which is co-chaired by the European Commission, Directorate General on Home Affairs and Europol, recommended in 2012 that:

- each country should consider establishing a national centralised bank account register. Registers should be managed by a competent public authority (the national Financial Supervisory Authority, the National Central Bank, the Tax Authority or another government authority);
- the centralised bank account register should include all information on the financial relationship of banks with their customers - including all forms of bank accounts, such as checking accounts, savings accounts, corresponding accounts, all financial products, loans, mortgages, and bank safes. This information should provide the identification details of the account holder, the account number, the bank, the opening date and (where applicable) the closing date. It should also include data on the signatories and on the beneficial owners.
- information provided to law enforcement from the centralised bank account register should not include any details on the transactions or the balance of accounts, unless already provided for by a country. Its main purpose is to swiftly identify bank accounts in the course of financial investigations and if appropriate, to obtain court orders to freeze the bank account or to get access to the relevant financial transactions within the bank account.
- law enforcement agencies should be able to consult the register without the need for prior authorisation by judicial authorities.

Source: Europol (2012), Report on the Establishment of Centralised Bank Account Registers as an Effective Tool for Financial Investigations and Asset Recovery, <http://goo.gl/RKQUcG>.

<sup>344</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 23.

<sup>345</sup> See OECD/ACN (2014), Third Monitoring Round report on Armenia, page 39; Progress update by Armenia, October 2015, pages 24-26, <http://goo.gl/MzTdrU>.

<sup>346</sup> Europol (2012), Report on the Establishment of Centralised Bank Account Registers as an Effective Tool for Financial Investigations and Asset Recovery, <http://goo.gl/RKQUcG>. See also Communication from the European Commission to the European Parliament and the Council on “Proceeds of organised crime: ensuring that “crime does not pay”, COM/2008/0766 final, <http://goo.gl/jdBs99>.



**Uzbekistan** is the only IAP country that has already established such register, but it only concerns the accounts of legal entities and private entrepreneurs.

In **Ukraine**, amendments adopted in February 2015, extended the powers of the National Anti-Corruption Bureau with regard to access to financial data by introducing a new covert investigative measure of monitoring of bank accounts. According to the new procedure, banks will be obliged to inform the NAB about transactions in the specified accounts before the relevant transaction occurred (or, if that is not possible, immediately thereafter). This measure must be ordered by a court. According to the NAB Law, the new agency will also have direct access to databases and information banks of state and local self-government authorities.<sup>347</sup> The new measure was introduced based on the example of Georgia, where similar provisions are included in the CPC.

It becomes more and more important to provide access to various databases held by the public authorities, including those of the tax and customs. In some IAP countries (e.g. **Kyrgyzstan, Ukraine**), law enforcement authorities faced difficulties in accessing data held by tax and customs authorities. One positive practice is to allow specialised law enforcement agencies to have direct access to databases (registers) of real estate, land cadastre, vehicles, other property, companies, tax, customs, border crossings, notarised powers of attorneys, etc. Such access has recently been provided in **Azerbaijan** to the Anti-Corruption Department in the Prosecutor's General Office and in **Ukraine** to the National Anti-Corruption Bureau. In Ukraine, in particular, the law explicitly requires that the NAB is given direct access, meaning that they do not need to request information from the respective agency but have direct remote access via electronic means.

### *Complex financial investigations*

The ability to conduct complex financial investigations remains a concern in the IAP countries. Corruption investigations often involve the examination of numerous financial transactions to determine the flow of funds, or to trace and quantify the bribes and the proceeds of bribery. These investigations also often require gathering of a copious amount of material, frequently in electronic form. All the IAP countries continue to struggle in conducting complex financial investigations.

Officials in the IAP countries often are not aware of the importance of expertise in forensic accounting or information technology in corruption investigations. It is also difficult to identify prosecutors or investigators with such expertise for presentation of their experience in the relevant regional trainings.

This could be hampering the ability of specialised anti-corruption bodies to investigate complex corruption cases and may also have contributed to the lack of confiscation of the proceeds of bribery. The building up of such a capacity is necessary and will require commitment of serious resources in all IAP countries.

Specialised experts can play a significant role in financial investigations. Best practices show that there are various models of drawing on specialised expertise. In some countries, anti-corruption investigation and prosecution offices try to build-up their own in-house expertise on various subject matters; such approach has been already tried in **Kazakhstan** and is now implemented in **Ukraine** (with the establishment of the National Anti-Corruption Bureau).

Other countries, often those with more limited resources, opt to involve external experts. Law-enforcement bodies have numerous avenues to financial expertise: they can employ financial experts in specific cases as required, request assistance or co-operation from other public agencies that may possess such expertise, e.g. financial inspections and public auditors.

**Azerbaijan** has combined both approaches: it has both in-house experts and involves outside expertise. Similarly, the **Lithuania**'s Prosecutor's Department on combating organised crime and corruption and

---

<sup>347</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 72.

Poland's District and Appellate Prosecution Offices have a limited number of in-house financial and other specialised experts with the rest being commissioned on the *ad-hoc* basis.<sup>348</sup>

### **Corruption cases and statistics**

It is difficult to make any meaningful conclusions in regard to the types of corruption cases investigated in the IAP countries or to identify any real trends. Very limited information on actual cases and criminal statistics has been provided by the countries in the framework of the second and third rounds of the IAP monitoring.

Nevertheless, a general assertion can be made that, based on the information collected, IAP law enforcement authorities tend to investigate petty corruption far more often than high-profile cases. Also, simple cases of bribery as opposed to complex ones comprise the majority of corruption investigations and prosecutions in IAP countries. For example, Table 31, which has statistics obtained during the third monitoring round of **Ukraine**, shows that anti-corruption investigations have mainly focused on low- or mid-level national officials, officials of local self-governments, and persons in the private sector.

**Table 31. Statistics of corruption and related offences of public officials in Ukraine (2013-2014)**

Perpetrators of corruption crimes	2013	2014 (Jan-Nov)
Civil servants of:		
- 1 <sup>st</sup> - 2 <sup>nd</sup> category (highest level)	2	2
- 3 <sup>rd</sup> category	23	3
- 4 <sup>th</sup> category	31	23
- 5th-7th categories	245	225
Members of regional (oblast) councils	1	1
Members of village and city councils	21	10
Officials of local self-government of:		
- 1st-2nd category (highest level)	0	1
- 3 <sup>rd</sup> category	8	4
- 4 <sup>th</sup> category	80	89
- 5th-7th categories	74	51
Persons providing public services (notaries, auditors, attorneys, etc.)	96	78
Officials of private companies	290	252

Note: number of cases sent to courts with indictment.

Source: Prosecutor's General Office statistics (cited from: OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 73)

The establishment of specialised institutions with jurisdictions limited to the highest categories of officials (**Armenia**, **Kyrgyzstan** and **Ukraine**) may give hope for better results. A number of high-profile cases were reported in the press in **Kazakhstan**, **Kyrgyzstan** and **Armenia**.

It is worth mentioning that many of the IAP countries are working on improving their statistical databases and methodologies. For instance, **Tajikistan** reported that its specialised Anti-Corruption Agency and the Prosecutor's office were in the process of developing efficient mechanisms for statistical monitoring of corruption and corruption-related offences in all spheres of the civil service, police, the public prosecutor's offices, and the courts built on the basis of a harmonised methodology.<sup>349</sup>

Some countries have already updated their statistical databases since the first round of monitoring. In **Azerbaijan**, a National Corruption Database became operational in 2009. It provided a mechanism for the monitoring of corruption and corruption related offences.

The third monitoring round confirmed that credible and comprehensive statistics remained an issue in IAP countries. **Mongolia** was recommended to compile and analyse statistics on the application of

<sup>348</sup> For more information see: OECD/ACN (2011), Anti-Corruption Specialisation of Prosecutors in Selected European Countries, available at <http://goo.gl/wXtyPH>.

<sup>349</sup> OECD/ACN (2010), Second Monitoring Round report on Tajikistan, page 33, <http://goo.gl/76md7S>.



sanctions for corruption offences to see how effective they are in practice (e.g. how often conditional release is applied, whether imprisonment is the main sanction for serious offences).<sup>350</sup> In **Kazakhstan**, the lack of statistics or the classified nature of statistics on the types of corruption offences detected, investigated, or prosecuted prevents any independent assessment, in particular by civil society, of how effective law enforcement and judicial authorities are in this area or of corruption trends in the country. Kazakhstan was therefore recommended to ensure free access via the Internet to regularly updated, detailed statistical 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 and criminal prosecution, and the outcome of trial (among other things, data on sanctions imposed and categories of the accused depending on their position and place of work). The above data should be accompanied by analysis of current trends and causes of changes in trends.<sup>351</sup>

### Conclusions and recommendations

The criminalisation of corruption is an area where all IAP countries have achieved incremental progress in aligning their laws with international standards. Notably, even countries that previously refused to make necessary adjustments have gradually introduced amendments to comply with binding international standards on criminalising corruption. This shows that conservatism in legal doctrine can be overcome. For instance, the introduction of corporate liability for corruption in several IAP countries proves that the traditional approach can and should be reformed when it is required to ensure the effective fight against corruption. This—along with other examples of best practices—should encourage other IAP countries to continue the implementation of reforms in the area of criminalisation of corruption offences.

However, poor implementation and ineffective law enforcement practice remain obstacles to achieving tangible results in the investigation and prosecution of corruption. The level of criminal prosecution of corruption remains low, especially with regard to high-profile cases and cases involving political officials. Prosecutions of trafficking in influence, foreign bribery and illicit enrichment either do not exist or are very rare. Too many officials remain immune from prosecution by law or in practice. Few companies are held liable for corruption offences. Prosecutors and courts continue to rely on direct evidence and do not take full use of the financial investigations to expose and punish corruption. The judiciary is also frequently a weak point in countries' anti-corruption frameworks. Only a handful of countries have credible and open statistical data that can be used to track trends and detect problems in how the criminal justice sector is responding to corruption.

While more and more countries in the region have developed anti-corruption specialisation in their law enforcement agencies, the specialised institutions remain quite weak and their institutional, functional and financial independence is not guaranteed in practice. They do not have the necessary autonomy to pursue high-profile cases or to attack systemic or high-level, political corruption. Countries also lack institutional capacity to effectively track, seize and manage frozen or confiscated criminal assets, or to recover such assets from abroad. At the same time, encouraging examples of competitive and transparent merit-based selection of heads of specialised anti-corruption agencies have appeared in the IAP countries during the reporting period.

The fourth round monitoring should strengthen focus on the enforcement measures to analyse how the existing legal frameworks are applied in practice, including the outcomes of law enforcement activities and the reasons those results were obtained in corruption cases. The independence and capacity of the judiciary and public prosecution service should also be a focus of future monitoring.

Recommendations:

- Criminalisation of corruption:

<sup>350</sup> OECD/ACN (2014), Review report on Mongolia, page 32, <http://goo.gl/SHxoRS>.

<sup>351</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 64-65, <http://goo.gl/zDtAyH>.

- Eliminate provisions on administrative liability for corruption offences to ensure that corruption is pursued with criminal law measures without any duplication and regardless of the value of the undue benefit in question.
- Complete reform of the substantive criminal law to make it fully compliant with respective international standards on criminalisation of corruption, in particular by:
  - criminalising all elements of the offences of bribery (in public and private sectors) and trafficking in influence, including the offer or promise of a bribe, the request or acceptance of an offer or promise of a bribe, the use of intermediaries, third party beneficiaries, undue advantage in intangible and non-pecuniary form;
  - broadening the definition of national public officials liable for corruption offences, in particular, to include all employees of public institutions and candidates for elected office regardless of their functions;
  - properly covering foreign officials of various categories either through an autonomous definition or by extending the definition of national officials.
- Review offences of abuse (exceeding) of office to ensure that they are not formulated too broadly, violating the requirement of legal certainty.
- Through legislative amendments and/or changes in practice, explicitly state that conviction for a predicate offence is not required for prosecution and conviction for money laundering, and raise awareness of prosecutors and judges on this issue.
- Consider establishing an offence of illicit enrichment through a rebuttable presumption of the illegal origin of any assets that cannot be explained by the official with reference to legitimate sources.
- Establish the effective liability of legal persons for corruption offences with proportionate and dissuasive sanctions, including liability for the lack of proper supervision by management which has made the commission of an offence possible, and ensure that corporate liability is autonomous and does not depend on detection, prosecution or conviction of the actual perpetrator.
- Review sanctions for corruption offences to ensure that they are effective, proportionate and dissuasive and also qualify for extradition.
- Strengthen provisions on confiscation of instrumentalities and proceeds of crime, which should be mandatory for all corruption offences and cover converted or mixed proceeds, benefits derived from proceeds and allow value-based confiscation; consider reversing the burden of proof in confiscation proceedings (criminal or civil); introduce conviction-based extended confiscation and non-conviction based confiscation of instrumentalities and proceeds of corruption with guarantees of the defendant's right to a fair trial; collect and analyse statistics on the application of all available confiscation measures.
- Ensure that the statute of limitations period for corruption offences, if one exists, is sufficient to allow for the effective investigation and prosecution of corruption and also ensure that any statute of limitations period can be interrupted by bringing of charges or other procedural actions, as well as by the period when person has enjoyed immunity.
- Further limit the immunity of public officials by narrowing down its scope and the list of relevant officials to the extent necessary in a democratic state; ensure that any remaining immunities should be functional, cover only period in office, exclude situations in flagrante,

allow effective investigative measures into persons with immunity; and establish swift and effective procedures for lifting immunity based on clear criteria.

- Revise provisions on effective regret by providing that it should not be applied automatically; that it should be valid only during the short period of time after the commission of the crime and, in any case, before law enforcement bodies became aware of the crime; that the bribe-giver who reports the offence must actively co-operate with the authorities; that the defence does not apply in cases when bribery was initiated by the bribe-giver; and ensure that bribe is not returned to the person who made use of the effective regret to be exempted from liability.
- International co-operation and mutual legal assistance:
  - Expand the treaty basis for international co-operation by acceding to relevant global and regional instruments and concluding bilateral agreements, including inter-agency cooperation agreements.
  - Ensure full implementation of the relevant provisions of the UNCAC and other international conventions into domestic legislation with a view of creating a flexible national framework that allows for efficient international co-operation in corruption cases, including asset recovery.
  - Encourage various forms of direct co-operation and make good use of the available mechanisms for co-operation under the umbrella of regional and global organisations.
  - Intensify law enforcement co-operation, including the use of special investigative techniques, joint investigative teams and other methods.
  - Ensure adequate resources, means of communication and capacity of central authorities, including by providing any necessary training.
  - Collect and analyse data about the practical application of available international co-operation instruments during the investigation and prosecution of corruption cases, identify relevant challenges to co-operation (e.g., dual criminality in cases involving legal persons, asset recovery in countries with no national provisions regarding asset recovery, evidentiary value of information obtained from another state, authorisations for intrusive investigative measures).
- Specialised law-enforcement bodies:
  - Strengthen capacity for fighting corruption by establishing specialised anti-corruption bodies, units, or persons and by guaranteeing their institutional, functional and financial independence; put in place effective mechanisms to prevent various forms of hierarchical pressure and undue interferences with corruption investigations and prosecutions; and introduce competitive and transparent merit-based selection of heads of specialised anti-corruption agencies.
  - Clearly delineate the responsibilities of various law-enforcement bodies and ensure that mechanisms for inter-agency co-operation and co-ordination are in place and functioning properly; and equip specialised anti-corruption institutions with adequate resources and provide their staff with consistent, needs-tailored training.
- Investigation and prosecution of corruption cases:
  - Further improve procedural legislation and step up efforts to detect, investigate and prosecute high-profile and complex corruption cases; establish clear procedures and guarantees in the law against abuses that may occur when using imitated bribery as an

investigative tool, in particular, by adopting clear guidelines setting apart entrapment and legitimate bribery simulation; ensure effective access to bank and other financial information, information held by tax and customs authorities; and provide direct access to public registers, notably registers of ownership and companies with due protection of personal data.

- Consider establishing a centralised register of bank accounts, including information about beneficial owners of accounts, and making it accessible for investigative agencies without court order in order to swiftly identify bank accounts in the course of financial investigations.
- Require disclosure of beneficial ownership in legal persons in a central register and publish this information online; extend the definition of Politically Exposed Persons in the anti-money laundering legislation to national public officials and their affiliated persons.
- Build the capacity of investigators and prosecutors to conduct financial investigations and use circumstantial evidence; encourage the use of in-house or outsourced specialised expertise; use IT systems to compile and analyse data for detection and investigation of corruption offences, identify corruption prone areas.
- Introduce efficient procedures for identification, tracing, seizure and management of corruption proceeds; set up a special unit/agency responsible for tracing, seizing property and managing assets that may be subject to confiscation.
- Consider introducing plea agreements in corruption cases with strict procedural guarantees of the defendant's rights.
- Provide adequate training and resources to investigators, prosecutors and judges to ensure the effective enforcement of new criminal law provisions, in particular with regard to such offences as private sector bribery, illicit enrichment (if available), trafficking in influence, offer and promise of unlawful benefit, definition of unlawful benefit including intangible and non-pecuniary benefits, the liability of legal persons, new types of confiscation, and conducting financial investigations; provide relevant practitioners with guidelines and manuals on the above issues.
- Collect and analyse data on corruption cases to identify trends in the types of corruption detected, investigated and prosecuted, to determine what practical challenges arise and how they can be tackled, including how new types of corruption offences are being investigated and prosecuted; improve statistical databases and methodologies for collecting, organising and analysing case-related information, in particular by compiling and publishing regular statistics on the investigation and prosecution of corruption offences, application of sanctions for such offences to see how effective they are in practice (e.g. how often conditional release is applied, whether imprisonment is the main sanction for serious offences).



*Chapter 4.***PREVENTION OF CORRUPTION**

This Chapter examines a broad range of measures taken by countries in Eastern Europe and Central Asia to prevent corruption in the public administration and in the private sector. The Chapter examines progress in strengthening integrity in public service, preventing political influence on professional civil service and sanctioning conflict of interest, reporting obligations and whistle-blower protection. The Chapter analyses progress achieved by the countries in preventing corruption in public procurement through the introduction of review systems, e-procurement and debarment. The Chapter further examines how legislation on access to information can be further improved to promote transparency of public administration. The Chapter analyses integrity in judiciary, including independence, integrity and accountability of judges. It concludes by exploring measures that governments and the private sector in the region took to prevent corruption in the business sector and proposes recommendations for further strengthening these measures.

**Integrity in the public service**

In December 2012, the ACN High-Level Meeting adopted a statement committing to "Prevent corruption in public administration and protect professional public servants from undue political pressure, ensure merit based recruitment and promotion, enact ethical rules, adopt and enforce effective conflict of interest and asset disclosure regulations, promote reporting of corruption and protect whistle-blowers" and calling upon the ACN to support these efforts. To address this call, the ACN focused one of the three main pillars of the Istanbul Action Plan monitoring on integrity in the public service in order to identify achievements and shortcomings, and to recommend further reforms. The ACN also conducted a thematic study on the prevention of corruption in the public sector, which identified good practices that should be promoted across the region. The findings of this chapter are based primarily on the monitoring reports and the thematic study.

**Preventing politisation and ensuring impartiality**

The protection of professional civil servants from undue political influence enables them to serve the interests of the society as a whole, and not of the government of the day. The 2013 Summary Report<sup>352</sup> established the following benchmarks for preventing politisation of civil service: clear legislative delineation of political and professional servants' positions and effective mechanism for the protection of professional civil servants from undue political pressure in practice; merit based and competitive recruitment and promotion; and transparent and objective remuneration system.

The results of the third round of monitoring show progress in establishing delineation of political and professional position in legislation: such delineation has been established in **Armenia, Georgia, Kazakhstan, Kyrgyzstan** and **Ukraine**. But undue pressure from political officials on professional civil servants in practice remains common in many countries. Dismissals of public servants after change of

<sup>352</sup> Available at <http://goo.gl/NzVBPY>.

governments, e.g. in Georgia and Ukraine, undermine the stability of the service and leads to the loss of experience. Further efforts are needed to ensure the autonomy of civil servants in their decision-making in order to develop a truly professional civil service and to protect civil servants from abuse by political interests.

### *Delineation of professional and political civil servants*

In **Armenia**, the list of high-ranking officials was already established before the third round of monitoring, but it was further broadened by a legislative amendment introduced in June 2014. The list of high-ranking officials includes both the political positions and senior executive positions; the total number of high-ranking officials was increased to include 744 positions.

**Azerbaijan** was only planning to reform its legal framework for civil service at the time of the third round of monitoring. In accordance with the National Anti-Corruption Action Plan for 2012-2015, the Cabinet of Ministers and the Civil Service Commission developed a draft new Civil Service Code, and the Civil Service Commission drafted public administration human resources development strategy, which are supposed to address the IAP recommendations. While drafts of these documents have been prepared, they were not adopted yet.

The government in **Georgia** that was in office until the 2012 parliamentary elections made reforming public management its main policy priority. It aimed to introduced private sector management into the public administration. The Government that took office after the elections opted for a more classical, career-based civil service. In November 2014, the Government approved the Civil Service Reform Concept, which embraced European principles of public administration and the values underpinning merit-based civil service, such as legal predictability and accountability, impartiality, integrity, meritocracy and political neutrality. It provides uniform standards for all civil servants and reduces discretion of managers with regard to employment and salaries of civil servants. The new Civil Service Law was drafted on the basis of this Concept after extensive consultations with local and international organisations, including the EU – OECD SIGMA programme. The parliament adopted the new law in October 2015; the Law will enter in force on 1 January 2017.

While there has been progress in establishing legal delineations between the political and professional positions in the public administration, there is little improvement regarding the protection of professional servants from political pressure in practice, such as dismissals among civil servants after a change in government. For instance, after the October 2012 parliamentary elections in Georgia, the new government dismissed a large number of civil servants from different administrative bodies and replaced them with acting civil servants – often without carrying out open competitions. This may adversely affect the neutrality and impartiality of the civil service. According to Transparency International Georgia, at least 5,149 employees have been dismissed from public institutions following the elections, including 3,301 from central state authorities and 1,869 from local self-government bodies. Subsequently, the acting civil servants had to take part in the competitions in order to retain to their positions. Besides, until now the employees of Legal Entities of Public Law (LEPLs) – many of which perform state functions – have been employed under the Labour Law and have not enjoyed the protections provided by the Law on Civil Service. It will be important to examine if the new Law on Civil Service is able to provide effective protection to civil servants in the future.

In 2013, **Kazakhstan** adopted important amendments in the civil service legislation that introduced a new model of civil service. The new model is composed of three categories: (i) “corps A” comprising senior executive administrative public offices; (ii) “corps B” comprising other lower level administrative public offices; and (iii) political public offices whose appointment, dismissal and performance are of a political nature and who are responsible for the implementation of political objectives. Corps A was set up to make the public service professional. It contains 493 public offices that undergo a new, distinct procedure for recruitment, performance assessment, rotation and training. The register of political and administrative positions is adopted by the President upon the proposal of the body responsible for civil



service management. The number of political offices has been drastically reduced (as recommended by the IAP monitoring), but there are still some important positions that are unreasonably included in the political group, such as: the Chairman and member of the Constitutional Court; the Chairman, Deputy Chairman, Secretary and members of the Central Election Commission; Chairman of the Supreme judicial Council; Human Rights Ombudsman and some others. Besides, the Civil Service Register that establishes which positions belong to which of the three categories is approved by the Presidential Decree, and not by law, and therefore there is still much left to discretion.

**Table 32. Civil service of the Republic of Kazakhstan**

	As of the Second Round of Monitoring, September 2011	As of the Third Round of Monitoring, March 2015	As of January 2016
Political civil servants	3,116	439	422
Administrative civil servants of which:	84,273	97,392	98,886
Corps A senior/executive level	-	539	493
Corps B lower level	-	96,853	97,971

Source: IAP monitoring reports; Government of Kazakhstan information.

In **Kyrgyzstan**, the Law on the Public Service from 2004, as amended in 2012, remained in force until recently. During the third round of monitoring, the number of political officials has almost doubled. In May 2016, the parliament adopted a new Law on State Civil Service and Municipal Service. It envisages building a professional and transparent public service that is stable and independent. One of the key principles undergirding the new law is the exclusion of political and illegal interference with professional public officials. The law also envisages decreasing the number of political officials and focusing on training, performance evaluation and practical results of the work of public service employees.

**Table 33. Trends in the numbers of administrative and political public officials, Kyrgyzstan, 2012 -2014**

	Total number of public officials	Number of political officials	Number of administrative officials
As of 1 January 2011	17355	375	16980
As of 1 January 2012	18098	537	17561
As of 1 January 2013	13753	377	13376
As of 1 January 2014	15211	697	14514

Source: Government of Kyrgyzstan information.

The Law on Civil Service in **Mongolia** establishes four categories of public officials: (i) political; (ii) administrative; (iii) special (such as uniformed services, diplomatic posts and the judiciary); and (iv) support (employed under labour agreements for delivery of state services such as education and health). The Law provides a clear list of political posts, including: the president, the chief of the president's chancellery and advisors, the speaker, deputy speaker and members of parliament and local councils, the prime minister, ministers, deputy ministers, the head of the cabinet and political advisors to prime minister, as well as local governors and their deputies. However, the Law contains an ambiguous provision that "Other posts specified by law" can be classified as political, while no further clarification is provided regarding such other posts.

The Civil Service Central body plays an important role in protecting the professional civil service from political influence. It has powers to select candidates for administrative and special services, to resolve civil service related disputes, and to assess the performance and qualification levels of the core civil servants. However, the composition of the body creates risks of politicisation: it consists of a chairman and six members, where the chairman is proposed by the president and appointed by the parliament, two permanent members are nominated by the parliament and the government, and other *ex officio* members

include the head of the parliament secretariat and the Vice-Chiefs of the President's Chancellery, Secretariat of the Government and the General Court Council.

At the end of 2014 there were 183,601 civil servants in Mongolia, including 2,985 political civil servants, 19,522 administrative civil servants, 35,070 special civil servants and 126,024 support civil servants. In 2014, 19,969 civil servants left the civil service. Reportedly, after the change of political leadership as a result of elections the whole administration is often changed (up to 75-90 %) – not just the senior administrative positions but also middle and lower levels, which can have devastating effect on the efficacy and stability of the public administration.

The Law of **Tajikistan** on the Civil Service establishes three categories of positions, including: (i) state positions: the President, MPs and judges; (ii) political officials: the Prime Minister, Ministers and heads of state committees and bodies, the Ombudsman, the head of the Central Election Commission, the Prosecutor General, the chair of the Supreme Audit Institution, presidents of regions, cities and districts; and (iii) administrative positions. The total number of public officials in Tajikistan was stable during the third round of monitoring; in January 2016, there were 18,902 positions in total, including 148 political and 18,754 administrative positions.

In **Ukraine**, needed reforms to modernise the civil service legislation were extremely delayed due to the lack of the attention of the past governments. A new Civil Service law was adopted in 2011 but never entered into force. A new draft Law on Civil Service, developed in December 2014, introduced main principles and regulations in line with European principles of public administration, including the clear delineation of political and professional positions.

However, facing major reform challenges and impressed by the achievements of the previous Georgian government, the new political leadership in Ukraine reopened the debate over the possibly of introducing performance-based pay systems and other elements of modern public management to increase the effectiveness of the bureaucracy. After some debates, the parliament went forward with the original draft law and adopted a new Law on Civil Service in line with European standards in December 2015 (the new law entered into force on 1 May 2016).

Besides, the Law of Ukraine on Cleansing the Government (or “Lustration Law”), adopted in September 2014, 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 may affect up to one million persons holding civil service posts. This Law was a response to the acute political situation, and indeed it forced many notoriously corrupt officials out of office. But large-scale dismissals and resignations that could be caused by its enforcement could lead to the loss of experienced personnel that cannot be replaced in a short time.

**Uzbekistan** remains the only country in the region that does not have a special provision establishing a legal framework for the civil service. The main body that regulates the activities of public servants is the Ministry of Labour and Social Protection. The Presidential Administration and the Cabinet of Ministers also have relevant services. Labour relations, including the status, rights and duties of persons employed in public institutions in Uzbekistan, are regulated by the Labour Code and a number of sector-specific laws, including the Law on Courts, the Law on the General Prosecutor’s Office, the Law on Advocacy, the Law on Notary, the Law on Customs Service, the Law on Tax Service. The status of elected officials, namely, deputies of the Legislative Chamber and the Senate of the Parliament, the President, members of the Cabinet of Ministers, is also regulated by the relevant legislation. Increasingly public service reform is being discussed among academia and various state bodies. The concept of the Law on Civil Service and the draft Law on Civil Service have been developed, but there is no specific timeframe for their adoption.

One other important obstacle for the professionalism of civil servants in the IAP countries is the lack of autonomy of civil servants in their decision-making. Ministers and heads of state bodies have full power to take all decisions in their institutions. The duties and responsibilities of individual public officials, and their decision-making powers are not well defined. While there is no sound data to support this argument, there is abundant anecdotal evidence showing that mid-level and junior officials have little, if any, opportunity to initiate decisions, and are only expected to execute orders from above. Apart from politicising the decisions-making process, this system also reduces the attractiveness of civil service. Skilled and creative individuals who may wish to serve their countries will not be motivated to join the civil service, where the pay is low and individuals cannot make any difference.

### *Merit-based recruitment, evaluation and promotion*

The 2008 Summary Report noted that "basic elements of merit-based and competitive recruitment of public officials are in place in most countries in the region". The 2013 Summary Report noted progress such as adoption of competitive procedures, unified rules, requirement of publishing of vacancies, establishing selection and appeal commissions. During the third round of monitoring further progress was identified regarding merit-based recruitment: **Georgia** expanded its merit-based competitive requirement to all public service positions; **Ukraine's** new Law on Civil Service included the same approach; and a special selection procedure was also adopted for senior positions in **Kazakhstan**. Other countries also improved procedures related to recruitment, but the competitive merit-based selection still only applies to lower-level positions. Despite legislative improvements, the discretion of heads of state bodies or political leadership in the recruitment process remains broad, and recruitment without competition in practice is still common.

Regarding evaluation and promotion, the 2013 Summary Report noted the efforts to modernise evaluation and promotion procedures in several IAP countries. Information collected during the third round of monitoring indicates that all countries – except **Tajikistan** and **Uzbekistan** – are making efforts to introduce performance evaluations, and to develop procedures and criteria that will allow evaluating the performance of civil servants in an objective manner. However, to date there are no reliable data about the actual results of these efforts, and much discretion remains in the hands of the senior managers concerning the evaluation and promotion of civil servants.

For example, in **Armenia** all civil service positions within the civil service system, including senior positions – from the heads of divisions and departments and the heads of staffs, up to deputy minister level – s have to be filled according to the Law on Civil Service. Besides, Armenia introduced several incremental improvements in the recruitment systems, such as a new scoring evaluation system and centralised testing system. However, the number of civil servants employed through competition remains small: in 2011, 635 persons (8.9% from all employed persons) were recruited through competition; in 2012, 788 persons (11.6% from all employed persons); in 2013, 781 persons (11.6% from all employed persons); and in the first half-year of 2014, 387 persons (5.9% from all employed persons). The Government of Armenia argued that these low figures reflect small numbers of vacancies during those time periods. Temporary contracts can still be concluded with employees using labour law rules, without competitive procedures for certain cases; however, statistics are not available to analyse the spread of this practice. This situation highlights the importance of improving statistics on recruitment to enable sound analysis in this policy area.

The Law on amendments in the Law on Civil Service, adopted in June 2014, envisaged the introduction of new systems of performance evaluations for civil servants, while the old attestation system was to be abolished. The Law will enter into force by the end of 2017.

**Azerbaijan** reported similar improvements of the recruitment system: electronic applications and tests were introduced, software and test templates for examination were upgraded. Topics for discussion during interviews and references for further reading are published several months before the competition

to help the applicants to prepare for the tests. According to the government, competitive procedures are increasingly used in recruitment, e.g. the judicial employees, detectives and officials at the Anti-Corruption Directorate and the Prosecutor's Office are now recruited through a multi-stage competition-based procedure. An Appellate Commission was established to review applicants' complaints. According to the Civil Service Commission of Azerbaijan, in 2014, the Appellate Commission received 131 complaints and found eight of them grounded; for 16 other complaints, a new interview was ordered. In 2015, the Commission received 149 complaints and found three of them grounded, while for 30 other complaints it ordered a new interview.

The Law on Civil Service of Azerbaijan requires that the promotion of civil servants should be carried out through an open competition; announcements of such a competition should be published on the websites of the relevant agencies; one of the promotion criteria is successful and fair performance of duties. In 2014, the Civil Service Commission adopted Rules on performance evaluation of civil servants having tested the draft rules in two institutions.

**Georgia** introduced important changes in the legislation during the third round of monitoring: all vacancies in the civil service, including high level positions, should be filled through competition; all vacancies are published at the online recruitment portal [www.hr.gov.ge](http://www.hr.gov.ge); temporary appointments without competition are limited for high-ranking officials by one year and for other public servants by three months. However, these new legal provisions have not been fully implemented in practice. After the 2012 elections and widespread dismissals of civil servants, about 50-90% of all civil servants working in ministries have been appointed as acting officials, and had to undergo open competition at a later stage in order to stay in their positions. According to the new Georgian law on civil service, appraisal of civil servants will be introduced starting from 2017 and will be conducted once per year by direct supervisor. As regards promotion, the new Law sets general rules that will be specified in the secondary legislation. Promotion from lower to the higher position in the civil service (above the entry level) will be possible within the civil service through internal competitions.

**Kazakhstan** has significantly reformed its recruitment system during the third round of monitoring. Centralised testing was introduced for the entry to civil service candidates to Corps B or lower positions. This helped increase the number of applicants: in 2011, 1,950 persons took the tests monthly; this number increased to 2,300 in 2012 and to 4,700 in 2013. A separate procedure was introduced for filling vacancies in Corps A, or senior and executive positions. The applicants willing to be recruited in the Corps A must submit their application to the National Human Resources Policies Commission, which is led by the Head of the Presidential Administration. The applications are screened by the Civil Service Agency, and eligible candidates are invited to sit for the test. The National Commission studies the results and holds interviews, after which it recommends whether to admit the applicant to the human resources reserve. State agencies seeking to hire a Corps A official then organise separate competitions among those included in the reserve. However, former members of Parliament, full-time members of maslikhats (local councils), political public servants and judges may be appointed to administrative public positions by the President without any competition, which is not compliant with the merit-based principle.

A Presidential Decree issued in 2013 sets out a new procedure for the annual performance evaluation and attestation of civil servants; the new performance evaluation methodologies for Corps "A" and Corps "B" public servants became effective in 2014. The new evaluation rules link incentives and performance results such as bonuses, training or career planning. If a civil servant's performance is deemed unsatisfactory, that civil servant will have to undergo an evaluation ("attestation") to determine whether he or she will be kept. Each public agency is responsible for evaluating their civil servants. When deciding on promotion, the opinion of the manager and colleagues (subordinates) will be taken into account.

No major developments regarding merit-based recruitment were identified during the last round of monitoring of **Kyrgyzstan**. However, the new Law on State Civil Service and Municipal Service that was adopted in May 2016 aims to improve the recruitment and promotion systems. In particular, it provides for the creation of a national and internal reserve, performance appraisals, trainings and career planning. With respect to performance appraisals, the Kyrgyz authorities introduced a new evaluation system that examines various aspects of achievements and results, as well as ethics and discipline. In the future, promotions and salary increases will be connected with the evaluation results. However, these reforms are at the early stages and have not been implemented in practice yet.

Recruitment to the civil service in **Mongolia** is regulated by the Law on Civil Service. It is organised through a centralised qualification exam conducted by the civil service agency. Individuals who pass the exam are included in the reserve list. When there is a vacancy in the core civil service, another person holding a core civil service position can be appointed; if there is no suitable candidate, then a person from the reserve list can be selected. Political civil servants may be included in the reserve list without an exam, which undermines the merit-based principle for professional civil service. No further information was provided about the procedures for selecting a person from the reserve list. In 2014, around 1600 posts were filled through an examination, of which 606 posts (about 40%) were filled from the reserve list. Despite this selection system, it is widely believed in Mongolia that civil servants are appointed to the posts based on political affiliation rather than on merit.

The Law on Civil Service of Mongolia states that the evaluation of core civil servants' performance and qualification levels shall provide a basis for their promotion; training; changes in remuneration; receipt of degrees, ranks, rewards or incentives; and demotion. However, it appears that there are no yet clear procedures for the evaluations, and decisions related to evaluation and promotion is in full discretion of the managers.

At the time of the third round of monitoring, the Law on Public Service of **Tajikistan** envisaged two types of competitive selection for public service: open (for all citizens) and internal (for career promotion within a public institution). The form of the competition was chosen by the head of the public institution, and there were no criteria to determine in which cases an open or internal competition should be held. While an interview was an obligatory part of the competition, written or other tests were optional. The head of a public institution was supposed to appoint the candidates recommended by the competition commission, but still had the right to overrule the commission or schedule a new competition. The monitoring concluded that these provisions were against the merit-based principle. To address the ACN recommendations, a Presidential Decree from March 2016 introduced new recruitment rules: now all vacancies should be filled through an open competition; job announcements should be published on the Civil Service Agency's web-site, and applications can be submitted in an electronic form. The head of the employing body can refuse to hire the candidate selected by the recruitment commission only if there were violations in the procedure. However, these rules do not apply to the higher categories of officials. In 2012, Tajikistan started implementing performance assessment of public officials. This procedure also does not apply to the higher categories of officials.

The new Law on Civil Service of **Ukraine** (enacted in May 2016) establishes that entry into the civil service shall be through a competitive selection process that is based exclusively on merit. In addition, civil servants can, according to the Law, only be promoted according to the results of a merit-based competition. It is worth noting that, in stark contrast with past practice, many senior appointments in the Ukrainian administration have been conducted on the basis of open and transparent competitions. While it is too early to judge if these procedures have helped retain the best people for the jobs and have prevented political interferences, they represent a good approach that should be supported. One of such examples is the selection and appointment of the first Head of the National Anti-Corruption Bureau of Ukraine (see Box 30 below).

**Box 30. Competitive selection of the leadership of anti-corruption institutions in Ukraine**

As a part of its anti-corruption reform Ukraine has introduced a new approach to the appointment of leadership of the new anti-corruption bodies. The goal is to ensure transparency, objectivity and competitiveness of the process, as well as to reduce political discretion in the appointment.

Under the 2014 Law on the National Anti-Corruption Bureau of Ukraine (NABU), a special commission selects the Director of the National Anti-Corruption Bureau through an open competition. The Parliament, the President and the Government each appoint three members of the Commission from independent experts and persons with high reputation. After the competition and review of the applicants, the Commission chooses “two or three” best-fit candidates and proposes them to the President, who makes the final decision and appoints the Director of NABU. The original draft law, which was developed with assistance of the OECD/ACN project for Ukraine (funded by the US) in 2008-2009, provided that the commission would select only one candidate having the best qualifications, experience and skills and that the President would appoint him or her to the position. This was later changed based on political considerations.

The selection of the first Director of the NABU was held in January – April 2015. The public had access to the Commission’s work through real-time, online broadcasting of all the commission’s sessions, access to competition announcements, information about candidates, regulations and meeting minutes, interviews and updates throughout all stages. The Selection Commission received 176 applications in total, out of which 21 applicants passed the first stage of interviews. Finally, the Selection Commission recommended two candidates to the President, who then appointed one of them as the first Director of the NABU. Civil society played a very proactive role in the process, trying to ensure the transparency and independence of the selection process and the appointment itself. An open and competitive selection process was also used to recruit the first Chief Anti-Corruption Prosecutor of Ukraine (the head of the Specialised Anti-Corruption Prosecution Office). The selection was also conducted in a transparent way by a commission that was composed of representatives from the various branches of the government, and the Prosecutor General had the final decision on the appointment.

Since then, similar open competitive selection processes were introduced for a number of other institutions, for example: the five commissioners of the National Agency for Corruption Prevention, the leadership of the National Agency for Detecting, Tracing and Management of Criminal Proceeds, and the State Bureau of Investigations.

Source: OECD/ACN secretariat; IAP Third Monitoring Round report on Ukraine.

In **Uzbekistan**, in the absence of a civil service system, each ministry and agency is responsible for selecting employees for the public service on the basis of their internal regulations. In ministries and agencies, HR departments together with the heads of the structural departments are responsible for recruiting personnel, with the final decision resting with the top management. Job openings are often published on the sites of government agencies, in accordance with the new Law on Openness of Activities of State Authorities and Government Bodies. While there are no common principles or rules for selection of personnel, in many departments employees are replaced based on the results of a competition. However, the scale of this practice is not known. In 2015, the Ministry of Labour and Social Protection, in cooperation with government agencies and several non-governmental partners such as the Trade Unions, Institute for Strategic Studies and the UNDP, developed a draft Resolution of the Cabinet of Ministers on Measures for Further Improvement of Recruitment in Public Administration and Local Executive Authorities, as well as for Improvement of Their Skills and for Creation of Candidate Pools in Uzbekistan. This draft Resolution provides for the introduction of uniform rules concerning the competitive selection of candidates for recruitment in the public administration and provisions on public administration careers based on meritocracy. The draft Resolution was sent by the Ministry of Labour and Social Protection to the Cabinet of Ministers for approval, and its consideration is still pending.

***Transparent and objective remuneration for civil servants***

Systems for remunerating civil servants were examined in the second round of monitoring; the 2013 Summary Report established regional benchmarks, including that proportion of fixed or variable salary components should be reasonable and that there should be an objective and transparent system for establishing the variable portion. In addition, the 2013 report stressed the importance of providing a decent level of pay to civil servants to make sure that they can live decently on their official salary without the need to seek illicit income.

The third round of monitoring identified limited progress concerning remuneration. **Armenia** was the only country that has improved its legal framework for remuneration. Overall, the countries in the region still lack clear and transparent criteria for determining the variable part of salaries, and senior managers retain broad discretion. Many countries attempt to link bonuses and other incentives to the results of performance evaluations, but the outcomes of these efforts are not clear. While a performance pay system may appear a promising tool to increase staff motivation, it can be difficult and costly to implement in practice, especially when the civil service is going through major transformation. It may also increase politisation.

In **Armenia**, in 2013, the National Assembly adopted the Law on Remuneration for Persons Holding State Positions, which establishes a unitary pay system of public service. The Law covers all public officials, including high-ranking officials, and provides for transparency and predictability of remuneration. It regulates bonuses and social benefits for public officials. Bonuses can be provided to public officials based on the results of the performance evaluation –conducted twice a year for public officials, and once a year for judges – and for the performance of special tasks. According to the Government, performance appraisals are regulated by a 2011 Government Decision. Statistics on the number of appraisals and the amount of bonuses for 2014-2015 were reportedly collected by the Government Staff. However, these regulations and statistics were not provided to the ACN during the third round of monitoring, and thus were not available for analysis. The amount of bonuses is fixed, and decisions on bonuses should be reflected in a governmental decision to ensure transparency. Bonuses can be as high as one monthly salary; each public official can receive not more than two additional monthly salaries per year. The salary fund for the public official includes a 10% reserve for bonuses. If there are savings in the salary fund, these savings can also be used for additional bonuses, which are decided by the head of each state body. In addition to salaries and bonuses, public officials – unlike political or high-ranking officials – are entitled to pensions and an insurance package. The remuneration rates were also increased significantly.

In **Azerbaijan**, the main concern during the second round was the large share of bonuses and allowances as well as the amount of discretion allowed in granting them. The third round of monitoring and follow-up progress updates noted only a few reforms: in 2011, the Cabinet of Ministers issued a decision on the payment of additional wages to the personnel of the Anti-Corruption Directorate of the Office of the Prosecutor Central in the amount of 50 per cent of their actual salary and a President's Decree was adopted approving a 25% increase in the wages of military officers.

In **Georgia**, the minimum and maximum levels of the base salary for civil servants are now adopted by the Government, instead of by the President previously. The law on the budget sets annual limitations on remuneration, including bonuses. The 2014 Government's Decree provides that bonuses can be paid four times a year on a quarterly basis, plus three more times in connection with holidays. The head of the institution decides on bonuses and has to justify the decision. The maximum amount of the bonus should not exceed the civil servant's monthly salary. According to the Law on Civil Service, the head of the administrative body has the right to determine any additional pay during the fiscal year, taking into consideration the civil servant's workload, including overtime. Georgian NGOs reported that while the total amount of remuneration of higher public officials is transparent and published in asset declarations, the criteria for determining the different parts of the total salary remain opaque. The share of bonuses in the overall pay of civil servants has varied greatly between different agencies and officials. There have been frequent and documented cases where bonuses made up half of a public official's annual income or more. Of particular concern is that heads of public agencies, e.g. the ministers, decide on the size of their own bonuses, which tend to exceed basic salaries. According to the analysis carried out by the Institute for the Development of Freedom of Information, ministers received more money in bonuses in 2011 than they did in salaries. According to the new Law on Civil Service (to be enacted on 1 January 2017), a separate special law on remuneration has to be elaborated.



In **Kazakhstan**, the Presidential Decree of 2004 established the Uniform System of Remuneration of Employees of the Kazakh state agencies. As this document is classified, only certain information about it is available. The Government Resolution of 2001 established the rules on bonuses, allowances and supplements payable to public agencies' employees. According to these rules, the heads of state agencies have the discretion to give bonuses, pay assistance allowances and introduce supplements to position salaries of civil servants from the budget savings. While official information about the salary levels and the amounts of supplementary payments is not available, it appeared that the basic salaries were not very high, and there was no ceiling on the share of bonuses in the total pay. The remuneration system remained non-transparent, providing fertile ground for political abuse. In 2013, the Presidential Decree introduced a new system where bonuses were linked to the annual performance evaluation of administrative public servants. However, no information is available about the functioning of this system in practice.

In 2013, the Government of **Kyrgyzstan** adopted a Program for Improvement of the Remuneration System for the Public and Municipal Employees of the Kyrgyz Republic for 2013-2020 aiming to increase the salary level. At the time of the third round of monitoring, remuneration was increased in 15 ministries, though this only covered inflation. The payment of bonuses and additional pay to the public officials is regulated by the 2013 Governmental Decree "On remuneration for the work of state and municipal officials", but this Decree will be updated in light of the new Civil Service Law of 2016. As noted earlier, in future promotion and salary increase will be connected with the evaluation results. Only some information about salaries in the public sector is publicly available, while in some authorities this information is considered confidential.

In **Mongolia**, civil servants' remuneration system remains complex. The salary consists of a basic salary, plus various allowances such as those for special working conditions as well as the civil servant's length of service, title, rank, and any doctoral or other qualification degrees. Though the Law on Civil Service states that the same amount of salary shall be fixed for the same civil service post, some elements of pay allow discretionary managerial decisions, for example, the bonuses for civil servants can comprise up to 40% of total of the basic salary and additional remuneration. No clear and transparent guidelines are available for awarding bonuses, which are left to the management's discretion. The Civil Service Council has reported that the system for bonuses will be revised to reflect performance evaluations.

At the time of the third round of monitoring **Ukraine**, the existing legal framework for remuneration has led to a situation where the basic salary constituted 20-30% of the total salary. The existence of granting supplements on top of the basic salary, e.g. a supplement for additional workload and bonuses, premiums on the occasion of personal or state anniversaries, the "thirteenth salary" for Christmas and the "fourteenth salary" for the summer holidays, has given rise to managerial discretion and unfairness in salaries. As a consequence, there is a risk for nepotism and loyalty to the manager rather than to public interest, as well as arbitrariness and corruption. The new Law on Civil Service aims to improve the remuneration system by providing that the total amount of all bonuses per year shall not exceed 30% of the civil servant's annual salary. According to the new law, there are two types of bonuses: 1) a bonus based on the results of the annual evaluation of the civil servant's performance; 2) monthly or quarterly bonuses in accordance with the "personal contribution of the civil servant in the general performance results of the state authority". Regulations on the payment of bonuses have to be approved by the head of each institution based on the model regulations adopted by the Ministry of Labour (after approval of the Civil Service Agency). The decision on the payment of bonuses to a specific employee is also in the discretion of the head of the institution. The bonus fund of each governmental body cannot exceed 20% of total salary budget each year, plus the amount of savings of the unpaid salaries due to vacancies. Interestingly, the new Law of Ukraine for the first time allowed payment of salaries from the funds donated to the state budget by the EU, other international organisations and donors, and foreign states.

The basic salary for public officials in **Tajikistan** is established by the unified tariff table mandatory for all positions. The level of the basic salaries was raised in 2016. However, no information is available about the variable part of the pay.

No steps have been taken in **Uzbekistan** since the last monitoring round to introduce a more transparent system of remuneration for public service employees, rules and criteria for allocating the variable part of the salary. As in the past, wages are set on the basis of sectoral or local salary grids and include the base salary as well as bonuses and additional payments which can reach 20-25% of gross salary. While the minimum wage was increased and salaries of judges, prosecutors and mahalla (local self-government) officials were doubled, the overall level of pay to public officials remains low.

#### Box 31. Civil service reforms in several new EU members - professionalism, merit-based and remuneration

**Latvia:** In 2014 a new Public Service Law was submitted to the Parliament, defining common standards for public sector hiring, career development, assessment, motivation and training. However, local governments will be exempted, and the changes may face significant resistance in the Parliament. On the positive side, a centralised selection of senior public officials is due to start from September 2015 and a consistent training strategy for civil servants and law enforcement agencies is to be implemented from late 2015. Insufficient pay, when compared to the responsibilities and private sector salaries, results in high staff rotation. Remuneration levels appear low for qualified staff in the public sector, especially for senior level positions, and thus pose a challenge for modernising and improving public administration capacities. In this context, retaining talented and well-trained public servants after the end of the EU Presidency will be a challenge. Source: European Commission (2015), Country Report on Latvia, available at <http://goo.gl/G9xL11>.

**Romania:** "Administrative capacity in Romania is low, fragmented, and with unclear delegation of responsibilities. Public institutions are perceived as favouring bureaucracy, over-regulation and limited transparency, weighing on the competitiveness of the economy. The lack of trust among political and administrative layers is not conducive to a real empowerment of professional civil servants, resulting in weak ownership of decisions and policies (Government of Romania, Strategy for Strengthening Public Administration 2014-2020)". Romania scores below the regional average in many key areas of governance. Perceptions on the quality of public services, civil service, policymaking and implementation, as well as the credibility of the government's commitment to policies, which are captured by the 'government effectiveness' indicator, are well below the EU average (World Bank, Worldwide Governance Indicators). Romania also scores poorly in other relevant indicators including accountability, regulatory quality, and political stability, rule of law and control of corruption. Source: European Commission (2015), Country Report on Romania, available at <http://goo.gl/MXNdHE>.

**Slovakia:** The low efficiency of the public administration ultimately affects the allocation of resources in the economy. High staff turnover and weak human resource management persist, while poor analytical capacities impair effective policy-making. The use of evidence-based instruments is not widespread in the public administration. The government is committed to amending the Public Service Act by mid-2015, with the aim of improving the independence of public servants. In parallel, a strategy on human resources is being developed, with adoption expected in 2015. This should standardise performance evaluations, unify ethical codes and reform the general competitions for graduates entering public service. Source: European Commission (2015), Country Report on Slovakia, available at <http://goo.gl/ftsFmH>.

Source: European Commission reports (cited above).

### Management of conflict of interests

Conflicts between the private and the public interests of public officials are wide spread in many countries in Eastern Europe and Central Asia. The 2013 Summary Report established several benchmarks including on: defining conflict of interests; establishing rules to manage conflict of interest situations in practice; and training about the rules and enforcing these rules in practice, including effective sanctions.

The third round of monitoring revisited legal and institutional frameworks for the management of conflict of interest and noted that **Armenia** has made its Ethics Commission for High-Ranking Officials operational, which should become an important step towards the enforcement of conflict of interest rules. **Ukraine** introduced new and strong conflict of interest regulation, which also foresees the creation of a

centralised body to control the implementation. However, it has not yet started its operation. **Georgia** already had conflict of interest regulations in the past, but it still lacks practical guidelines and strong institutions necessary for its effective enforcement. **Kazakhstan** and **Kyrgyzstan** were still reforming their regulations in this area. There is no progress in establishing effective conflict of interest regulations in **Azerbaijan, Tajikistan** and **Uzbekistan**.<sup>353</sup>

In **Armenia**, the legal framework for managing conflicts of interest was established by the Law on Public Service in 2011, but a number of deficiencies remain: the definition is restricted to the actual conflicts of interest and does not cover potential or apparent conflict of interest; the conflict of interest rules apply only to high-ranking officials in the executive branch; the list of persons related to a public official for conflict of interest purposes is limited to the spouse, parents and children living in the same household; and there are no sanctions for taking decisions in a situation of conflict of interests.

The Law also provided for the establishment of a new body – the Ethics Commission for High-Ranking Officials – that is responsible for detecting conflict of interest violations and preparing recommendations for their prevention. By the time of the third round of monitoring, this Commission became operational. While further efforts are needed to strengthen the independence of the Commission and to broaden its mandate – currently, the Commission does not have the right to verify the declarations and sanction non-compliance – the fact that institution became functional is an important achievement. The new Anti-Corruption Strategy includes measures to enhance the Commission’s capacity and to improve the conflict of interest regulations. According to the Commission’s report on its activities for 2012-2015, the launching of an electronic system of declarations of income and property has been the main achievement to date, together with the development of a system for analysing declarations on the basis of risk indicators. During this period, the commission received 83 applications from citizens, journalists and NGOs. About 10 of these applications related to violations of the rules on ethics and conflict of interest; as a result, the Commission initiated four proceedings.<sup>354</sup> At the same time there is no mechanism for implementing conflict of interest rules for other categories of public officials (apart from high-ranking officials), as the ethics commissions established in each state body remain dysfunctional, and it remains unclear if they should be responsible for such enforcement.

**Azerbaijan** still does not have a legally established definition of a conflict of interest, though some of elements are dispersed across several legal acts. The Law on Combating Corruption contains a prohibition on working with relatives, and it has some rules relating to gifts. The Law on Civil Service sets out limitations on holding additional paid positions in other state bodies, on taking part in political activities, etc. The Law on Rules of Ethical Conduct of Civil Servants has an article on preventing conflicts of interest. Rules to prevent conflicts of interest are also established at the level of individual public administration institutions, such as the Financial Monitoring Service, the Tax Service and the Police. To address the inefficiency, the Cabinet of Ministers and the Civil Service Commission planned – in accordance with the National Anti-Corruption Action Plan for 2012-2015 and the new National Action Plan on “Open government and prevention of corruption” for 2016-2019 – to develop proposals on improvement of legislation related to the prevention of conflict of interests by 2013. As of April 2016, the draft law “On prevention of conflict of interest in performance of public officials” has been prepared and submitted for review by relevant state agencies.

Despite Azerbaijan’s intention, as reported during the previous monitoring round, to establish a specific agency to enforce conflict of interest regulations, no such body had been established by the third monitoring round. It is not known if the draft legislation on prevention of conflict of interests mentioned above provides for a centralised body. In the meantime, the Civil Service Commission intends to develop

---

<sup>353</sup> Uzbekistan reported that in March 2016 the Government adopted Model Rules of Ethical Conduct of Employees of Public Management Bodies and Local Executive Bodies that regulate the issue of conflict of interests.

<sup>354</sup> Source: <http://goo.gl/Nvz284>.

a network of ethics commissioners in public institutions, but it is not clear if they will have a role in the management of conflict of interest.

In **Georgia**, the Law on Civil Service and the Law on Conflict of Interests and Corruption in the Civil Service, which were in place already during the previous monitoring round, provide a good legal basis for the management of conflicts of interest. However, no secondary legislation or guidelines regarding the prevention and resolution of conflicts of interests were elaborated during the time of the third monitoring round, despite an IAP recommendation on this point.<sup>355</sup> As in the past, there is no separate state institution responsible for the enforcement of conflict of interest rules in civil service in Georgia. Civil servants have an obligation to disclose information regarding their own conflict of interest, and state agencies are supposed to take appropriate measures based on this disclosure. Inspectorates General (IGs) of the Ministry of Justice and Ministry of Interior, and Internal Audit Units of other ministries, have been established to verify legal compliance, detect fraud and investigate unethical behaviour. However, there is no information about the capacity and the role of these units in the management of conflicts of interest, or about the results of their work in this area.

NGOs reported major problems regarding the application of conflict of interest rules in practice in Georgia. For example, a considerable number of members of parliament and local self-government councils have links with business, but there is no mechanism for ensuring that these links do not negatively affect the work of these legislative bodies. With regard to post-employment restrictions, the Law on Conflict of Interest and Corruption does establish some rules, but there is no enforcement or monitoring mechanism. There have been cases where former public officials have directly abused these flaws and moved to firms or sectors which they had directly dealt with in their official capacity.

The 2010 Civil Service Law of **Kazakhstan** includes provisions regulating conflicts of interest for civil servants, which were examined in detail during the previous monitoring round. The draft anti-corruption law, which was prepared in 2013, also has provisions on conflicts of interest. It provided a new definition of conflict of interest, a new procedure for the resolution of conflicts of interest, and stipulated that conflicts of interest would be resolved by the conflict of interest commission of the authorised civil service agency. However, the discussion of the draft law was suspended pending a new draft anti-corruption strategy of Kazakhstan. The draft Anti-Corruption Strategy of Kazakhstan for 2015-2025 and Action Plan for its implementation provide for development of Rules on preventing and resolving conflict of interests taking into account the specific nature of work of different agencies. Implementation of this measure is planned for 2015. A model practical guide on the prevention and resolution of conflicts of interest was drafted by the Civil Service Agency in co-operation with the UNDP.

The Civil Service Agency reviewed violations of conflict of interest provisions in 2012, 2013 and five months of 2014 and determined that the disciplinary boards of various state institutions took in a total of 14 disciplinary actions in such cases. After the monitoring, the Agency was transformed into another body that merged it with some of the former functions of the former Financial Police. It is not known if the new body has a mandate for managing conflicts of interest, the number of staff dedicated to this task, or the results of their work.

In **Kyrgyzstan**, the legal basis for the management of conflicts of interested was provided by the 2012 Laws on Countering Corruption and on Public Service. Recognising the importance of this issue in the aftermath of the change in the regime, in 2014, the Government approved the “Temporary Guidance on Management of Conflicts of Interests at the Public and Municipal Service of the Kyrgyz Republic”. The Guidance defines the term “conflict of interest”, creates an obligation to disclose and report about a conflict of interest, and specifies liability for non-compliance and procedure in such cases. The Government entrusted the control over the implementation of the Guidance to the Presidential

<sup>355</sup> The Government of Georgia has subsequently informed the ACN that it has developed a handbook on “*Ethics and General Rules of Conduct for Civil Servants*”. See relevant section below in this Chapter.

Administration, but no information is available about the results. The new law “On Public Service and Municipal Service” was adopted in 2016. It includes slightly revised provisions on conflicts of interest and states that the management of conflicts of interest will be regulated by a separate law on conflicts of interest. The Ministry of Economy has developed a draft Law “On Conflicts of Interest”, which was passed by the Kyrgyz Parliament in January 2016 in the first reading; it had yet to be adopted in its final reading as of the time of writing of this report. This draft Law envisages another definition of “conflicts of interest”, thus possibly creating different or contradicting provisions.

In addition to the general provisions on conflicts of interest described above, the Law on Public Procurement of Kyrgyzstan, Article 6, establishes conflict of interest regulations specific to this sector, including prohibitions on public officials’ exerting influence on public procurement decisions in the interests of any parties and on their participation in the procurement procedures as a supplier or an affiliated body. The Law also prohibits procuring organisations from concluding agreements with suppliers that involve political and special state officials at the national and municipal level. The intention of these provisions is positive, but it is not known how effective their implementation is in practice.

There are no bodies with the mandate to monitor and sanction conflict of interest situations in Kyrgyzstan. However, there are commissions on ethics of the employees of the state authorities and local self-government bodies as well as the Central Commission on Ethics. These commissions mainly consider particular cases and issue brochures with texts of the laws. In 2014, Kyrgyzstan has also created an institution of authorised corruption prevention officials in state authorities, local self-government bodies and other public bodies. By February 2015, such officials were appointed in 47 institutions including: 15 ministries, 10 agencies, 2 city halls, 7 authorised representations of the Government in regions, 6 services and inspections, and 7 agencies. It is not known, however if these corruption prevention officials have a mandate to control conflict of interest regulations, or how they cooperate with the ethics commissions.

In **Mongolia**, the Law on Conflict of Interest provides the legal framework in this area, but it has some gaps that can hinder its effective implementation. For example, the definition of “private interest” and “related persons” appears too narrow. The Law does not cover apparent conflict of interests, and there are no clear restrictions on working together with related persons. There are no explicit regulations for high-risk sectors such as public procurement, licensing and others, and it does not clearly cover issues related to public officials’ political relations. The Law establishes basic regulation regarding “revolving door”, but does not provide for an enforcement mechanism.

Private interest declarations are the main tool for implementing the Law on Conflict of Interest. The Law requires three types of interest declarations: “Form of official’s declaration of private interests and declaration of assets and income”, “Form for a preliminary declaration of private interests of a candidate to a public office” and “Form for non-conflict of interest statement and the report on occurrence of conflict of interest”. The parliament approves the list of officials who must submit private interest declarations, based on the proposal of the Independent Authority Against Corruption. The latter examines the preliminary private interest declaration of the candidate for a public office. Regular declarations are examined by the management of each public body. If the management detects a violation, they should turn the case over to the Independent Authority Against Corruption for investigation. Sanctions related to conflict of interest may involve administrative sanctions, such as fines, dismissal from the illegally obtained public office, nullification of the illegally obtained agreement, contract or license, as well as disciplinary sanctions ranging from a warning or a pay decrease to demotion or dismissal. The private interest declarations are available to the public and public officials have to provide free access to them, but they are not published. Decisions on sanctioning are not published either, which is a shortcoming.

In 2014, out of 13,226 preliminary declarations of candidates for public posts, the IAAC identified potential conflicts of interest in 3,344 declarations, and 1,000 declarations were sent back to the employer due to the impossibility to process. Furthermore, 1,225 decisions on appointment of public officials were annulled due to failure to submit the preliminary declarations to the IAAC, and 162 conclusions on conflict of interest were delivered to the employing organisation. In 2014, 90 cases were sanctioned, including 45 cases of falsified declarations and 45 violations of Conflict of Interest legislation. Sanctions included the following: 27 officials were dismissed from work, 5 officials were demoted, and 41 officials' salaries was lowered by 30% for up to 3 months period and 17 officials were reprimanded.

At the time of the third round of monitoring, no improvements were made in the regulation of conflict of interest in **Tajikistan**. Amendments introduced to the Law on Civil Service in 2011 established the definition of conflict of interest, as well as of state and private interests; however, these definitions did not meet international standards. Following ACN recommendations, new definitions were prepared, but they have not yet been adopted. The third monitoring report stated that the system of preventing and sanctioning conflicts of interest was non-existent in this country. While the report welcomed the creation of commissions on ethics in each public institution for monitoring compliance with ethical norms for public servants, these commissions did not deal with conflicts of interest. Besides, the decisions of these commissions were not mandatory as the head of a public institution had the right to overrule them. However, the government had elaborated the draft Law on Prevention of Conflicts of Interest in Public Institutions of the Republic of Tajikistan and their Agencies.

In **Ukraine**, the Law on Principles of Corruption Prevention and Counteraction and the Law on the Rules of Ethical Conduct regulated conflicts of interest until April 2015, when the new Law on Prevention of Corruption entered into force (adopted in October 2014). The new Law defines "conflict of interest", including real and potential conflicts, but not apparent conflicts. The Law provides for the management of conflict of interest situations including prevention, reporting, abstaining from decision-making, and resolving such situations, including suspension from specific tasks, the use of external monitoring and restricting access to certain information, reviewing the scope of powers, reassignments to another position, or discharging the person. The Law provides that all professional and political public officials should follow the general conflict of interest regulation established by this law, while the special laws may establish certain special procedures for resolving conflicts of interests. Sanctions for the violations of the conflict of interest provisions are established in the Code of Administrative Offences. The liability for failure to notify the direct superior of a conflict of interests results in a fine of about EUR 15 to 230. The failure to take measures, which are provided for by the law, by an official of a state authority, a local self-government body, of a legal entity, which includes supervisors is punished by a fine in the amount of about EUR 80 to 190. The adoption of this new legal framework is a major step in the anti-corruption legal reform in Ukraine. However, there are no results of its application yet.

From 1 January 2014, the monitoring of implementation of conflict of interest regulations in Ukraine should have been exercised by the internal anti-corruption units in each public authority. But according to the Law on Prevention of Corruption, the National Agency for Corruption Prevention will be responsible for monitoring and control over implementation of legislation on ethical behaviour, the prevention and settlement of conflicts of interest in the activities of persons authorised to perform the functions of the state or local self-government. In case of identifying violations of this Law, the National Agency will send to the heads of any body, enterprise, or institution where violations occur, a notice requiring them to eliminate the violations, to conduct internal investigation, and to discipline the perpetrator. The order issued by the National Agency is binding. Additional amendments were adopted in February 2015 to extend the powers of the National Agency. The agency is now authorised to bring to administrative liability for violation of the rules on conflict interests (namely draw up infringement protocols and refer them to the court for sanctioning). Creation of this enforcement mechanism is a major achievement for Ukraine; however, the National Agency had not been established yet at the time of the

third round of monitoring; its operations were delayed for at least one year and were to start only in August 2016.

The legislation of **Uzbekistan** does not have general rules to prevent conflicts of interest. As in the past, the 1992 Resolution of the Cabinet of Ministers prohibits employees of government agencies, law enforcement agencies and senior officials with decision-making powers related to their field of business from engaging in entrepreneurial activities. The Labour Code prohibits the joint service of relatives or people in relationship at the same public company, if their service is connected with direct subordination or supervision of one by the other. No new regulations have been introduced since the last reporting period. However, it is worth noting that the 2015 Comprehensive Plan of Anti-corruption Measures includes the following measure: "Study the possibility of legal regulation of the issue of conflicts of interest of employees of state bodies." In addition, the draft new Code on Administrative Liability was developed, which contains four norms that aim to regulate conflicts of interest in the public service. In March 2016, the Government adopted Model Rules of Ethical Conduct for Civil Servants: it includes a section on conflicts of interest that explains how a conflict of interest situation may arise, possible conflicts of interest in making official appointments, possible conflicts that may arise during the performance of duties, and the duty to inform about conflicts of interest.

### **Asset declarations**

The 2008 Summary Report noted that "the majority of Istanbul Action Plan countries have established the systems for declaration of assets of public officials", but that these systems were not yet effective for the purposes of preventing corruption. In 2011, the ACN together with the OECD-EU SIGMA programme published a study "Asset Declarations for Public Officials, A Tool to Prevent Corruption". This study provided a systematic analysis of asset declaration systems in all ACN countries and included recommendations for further improvement of these systems in the region, in particular with regard to their legal and institutional basis, the scope and subjects of declarations, as well as sanctions and disclosure. The 2013 Summary Report highlighted further reforms of asset declarations systems in several countries and identified a number of remaining shortcomings stressing the lack of verification or publication of declarations.

Further improvements were identified during the third round of monitoring: Ukraine adopted a new and strong legal and institutional framework for asset declarations; the Ethics Commission for High-Ranking Officials in Armenia started collecting declarations; Georgia decided to introduce a verification mechanism for asset declarations; Kyrgyzstan took several attempts to broaden the scope of declarations and to introduce verification. However, many shortcomings still persist across the region, and there is no evidence yet that asset declarations systems have reduced conflicts of interest or prevented illicit enrichment. At the same time in some countries, e.g. in Slovenia, effective verification and publication of asset declarations has led to a complete overhaul of the government showing the potential power of this tool.

In **Armenia**, the Ethics Commission for High-Ranking Officials is responsible for collecting asset declarations. In total, 720 high-ranking officials are required to submit declarations. In 2013, high-ranking officials submitted their declarations through the new electronic system for the first time. During 2012-2015, the Commission received in total 5,230 declarations of high-ranking officials and their related persons. The Commission has the right to analyse the declarations in terms of timeliness of submission, but it cannot verify them to detect false or incomplete information. There are no sanctions either for not submitting a declaration, or for the submission of false or incomplete information. In addition, the asset declarations have narrow scope: they do not require declarations of interests including business and other interests, and they only cover a limited number of an official's relatives. The Commission publishes the declarations on its web-site ([www.ethics.am](http://www.ethics.am)). The Commission has developed proposals on the further development of the system. These proposals foresee the introduction of administrative sanctions for late submission for declarations and criminal sanctions for non-submission



and submission of false information. The Commission has already secured access to some of the databases and has signed MoUs about data exchange with different ministries and agencies that may facilitate the verification of declarations in the future.

The 2004 Law on Combating Corruption obliges public officials in **Azerbaijan** to submit annual asset declarations. The 2005 Presidential Decree required the Cabinet of Ministers to also submit the asset declaration form. However, even though all these legal requirements have remained on paper for more than 10 years, the asset declaration requirements have not been implemented in practice. The asset declaration form has not been adopted; declarations are not being submitted and, hence, cannot be verified or made public. Asset declarations of public officials were included in the National Anti-Corruption Action Plan for 2012-2015, which called for the “preparation of proposals on electronic submission of financial declarations by officials” by the Cabinet of Ministers and the Commission on Combating Corruption in 2013. The 2007 Anti-Corruption Action Plan also provided a similar measure – namely, to approve a financial disclosure declaration form for public officials in 2007-2008 – but the measure was not implemented. Azerbaijan reported that similar measures were included in the yet another action plan - the 2016-2019 National Action Plan “On Open Government and prevention of corruption”.

In **Georgia**, only senior officials are obliged to submit asset declarations. On 1 February 2010, an Online Asset Declaration System was launched to replace the paper declaration system. Officials are required to submit the following information regarding both themselves and their immediate family members: real estate, movable property including cars, jewellery and other expensive belongings valued over GEL 10,000 (approximately USD 6,200), bank accounts, cash, gifts, contracts, expenditures and shares. At present, there are now about 5,600 senior officials who are obliged to submit on-line asset declarations, which represents twice the number of senior officials who previously had to report (2,800 senior officials). More than 59,000 declarations have been uploaded on-line. The submitted declarations are public and are available on the web-site <https://declaration.gov.ge>. However, many important public decision-makers at the local level are presently exempted from the asset disclosure requirement. These include city council members and heads of municipal services, even though they supervise the spending of large amounts of public money. Regarding the verification of the declarations, which ACN recommended to Georgia in the second monitoring round, the previous government considered that the mere publication of asset declarations was sufficient as interested citizens and the media would investigate their contents. The new government recognised the need for a formal verification system and took action to introduce it. In October 2015, the parliament amended the Law on Conflict of Interests and Corruption in Public Service (amendments should enter into force on 1 January 2017) to introduce the monitoring of asset declarations by the Civil Service Bureau (CDB). According to the amendments, the monitoring of declarations will take place in the following cases: 1) mandatory verification of the declarations of top-level officials exposed to high risks of corruption; 2) random selection of declarations in a transparent manner based on specific risk-criteria to be determined by the Independent Commission (the list of selected declarations will be published in the beginning of each year by the CSB); and 3) verification on the basis of well-grounded written complaints or information submitted to the CSB. The submission of incomplete or false information is sanctioned with administrative fines or criminal sanction.

At the time of the third round of monitoring, **Kazakhstan** did not have an asset declaration system for anti-corruption purposes. Under the Anti-Corruption Law, all persons in public office should declare their assets and income for tax purposes, but this system did not intend and did not in practice facilitate the detection of corruption offences committed by civil servants. Recognising this shortcoming, and pursuant to the Sectoral Programme on fighting corruption, Kazakhstan committed to implement assets declarations as an anti-corruption measure, including declarations of large expenditures by civil servants and universal income declaration for all citizens. In November 2015, Kazakhstan adopted the Law on Amendments to the Legal Acts of Kazakhstan concerning Income Declarations for Natural

Persons that will introduce universal income declarations for all citizens. The Law will be implemented in two phases: starting in 2017, all civil servants and employees of state-owned enterprises will be obliged to submit their income declarations; starting in 2020, all citizens will be obliged to submit income declarations. However, this reform aims to reduce the shadow economy and does not aim to control assets and interests of public officials as a part of corruption prevention efforts.

The Law of **Kyrgyzstan** “On Declaration and Publication of Information on Incomes, Liabilities and Assets of Persons Holding Political and Other Special Public Positions as well as Their Close Relatives” was adopted in 2004. The Law “On the Public Service”, which was also adopted in 2004, provides that public employees must file asset declarations. These Laws provide for various sanctions. For administrative officials, the sanctions include termination of service for failing to submit declarations, for the deliberate concealment of assets and income or the deliberate provision of incorrect information. For political officials, the sanctions include the publication of information about them in mass media and transmitting materials to the Prosecutor’s Office. Both Laws provide that the State Personnel Service (SPS) will analyse the information provided in the declarations. However, the Government only approved a procedure for verification and publication of declarations in 2012.

In 2013, the SPS established an Interdepartmental Commission to verify the declarations. The Commission is composed of ten state authorities (SPS, State Tax Service, State Customs Service, etc.) In May 2013, the Commission started to verify asset declarations. It has verified 312 out of 1,854 declarations of income for 2012. The information provided in the declarations was compared with information requested from the state authorities, for example, on property status, transactions, etc. Violations (incorrect information) were identified in 100 declarations. The Interdepartmental Commission was supposed to present information on the detected violations to the country’s leadership and subsequently transfer the materials to the Prosecutor’s Office. But this was not done because the Commission’s work was suspended when the Law “On Preparation for Submission of the Uniform Tax Declaration by the Citizens of the Kyrgyz Republic” entered into force. This new Law legalises incomes and assets received before the end of 2012. In addition, the SPS only published the aggregated declarations of certain political and special officials, while the declarations of other officials are not publicly available.

Based on the experience of the Interdepartmental Commission, the SPS drafted a Law envisaging new provisions on verifying the expenses of public officials and submitted it for the Government’s consideration. In July 2015, this Law entitled “On Declaration and Publication of Information on Incomes, Liabilities and Assets of Persons Holding Political and Other Special Public Positions as well as Their Close Relatives” was adopted; it introduced mandatory disclosure of expenses, whether in Kyrgyzstan or abroad, of the specified categories of officials and their relatives. The Law requires disclosure of lump sum expenditures in excess of 300 times the amount of the estimate indicator (about EUR 390).

The system of declarations in **Mongolia** is quite complex. In addition to the declarations of private interests required by the Law on Conflict of Interest described above, the Law on Anti-Corruption requires “Form for declaration of assets and income of an election candidate”. The General Election Committee and its territorial Sub-Committees collect and register the Asset and Income Declarations of election candidates and transfer them to the IAAC within 14 days after the official announcement of the election results. The list of the declarants is included in the Law, additional lists may be approved by the parliament upon a proposal from the Independent Authority Against Corruption. There are no mandated criteria for selecting the declarants, as the legislation does not include such factors as positions or areas that have high risks of corruption. The asset declaration system is decentralised as the IAAC receives declarations of the President, Prime-Minister, members of the parliament, as well as members of the Government and officials appointed by them. The parliament receives the declarations of officials of the IAAC. The General Council of Courts receives the declarations of the members of the Constitutional

Court and of judges at all levels, and the locally elected councils receive declarations of officials at the local level. Each of these bodies collects declarations and makes inquiries within their competencies about breaches of law and transfers such cases to the IAAC for further investigation. In 2014, 51,579 public officials (99.99% of all declarants) submitted their declarations; 6 public officials were sanctioned for violations related to their declarations. The IAAC verifies declarations based on complaints or in accordance with its monitoring plan. In 2014, the IAAC verified 2,528 declarations, including 361 declarations on its own initiative. The asset and income declarations of senior officials are published.

There are sanctions for either failing to submit or belatedly submitting declarations, as well as sanctions for the submission of false information in asset declarations. These sanctions include: a warning for the failure to declare income and assets equal to the declarant's monthly salary; the reduction of salary by 30 per cent for up to three months, if the declarant failed to declare income and assets worth up to one-half of the official's annual salary; demotion from the position or reduction of salary by 30 per cent for up to three months, if the declarant failed to declare income and assets worth more than his one-half of, but less than, the official's annual salary; dismissal if the declarant failed to declare income and assets with a value equal to or exceeding in the official's annual salary. The above sanctions also apply for the submission of false information.

While overall the system of asset declaration is functioning in Mongolia, it appears that the verification is not effective; the system's impact on the level of conflicts of interest and corruption in the country is not clear.

According to the law on Combating Corruption, **Tajikistan** has two types of asset declarations for public servants: (1) annual declaration of income submitted to tax authorities by candidates to public positions; and (2) annual property declarations, which a public body is entitled, but *not obliged*, to request from a public official during his/her appointment. According to the Law on Public Service, however, "public officials *must* annually submit ... to their public authority a declaration of property status." The declarations do not cover personal interests or the public official's family members, and the declarations are only made in paper form and are not published. The HR services in state bodies have the right to verify the declarations, but verification is not obligatory and is carried out only when there are doubts concerning the reliability of the presented information. During the third round of monitoring, a proposed amendment to the Law on Public Service concerning the special verification of public officials' income tax and property declarations (including their family members) was under review. The draft amendments were still under review in various ministries and state bodies as of mid-2016.

The system of asset declarations in **Ukraine** underwent some major changes during the third round of monitoring. The Law on Principles of Preventing and Counteracting Corruption adopted in 2011 established the obligation for all public officials to declare their assets, income, expenses and financial liabilities. Declarations had to be submitted at the place of work in paper form. The first set of declarations were filed by 1 April 2012. The Law broadened the scope of officials required to declare to cover: candidates for public posts had to submit declarations for the previous year, and the persons who left public office had to file a declaration the year after their departure. Up to 1 million officials are covered by the obligation to submit their declarations under the 2011 Law. The scope of the information required was broadened as well: public officials are required to name banks and other financial institutions where they or their relatives have accounts, companies in which they or their relatives own shares or have financial liabilities. These changes significantly increased the possibility of detecting conflicts of interests. The Law also required public officials to declare any expenses exceeding 80 minimum salaries (about EUR 4,000 in 2015), which was still several times more than annual average salary in the public administration. In 2014, the law was amended to introduce mandatory verification of all declarations by the tax authorities.

The Law of Ukraine on the Prevention of Corruption, which was adopted in October 2014, introduced new important changes. It made the National Agency for Corruption Prevention (NACP) responsible for

the asset declaration system. All declarations have to be submitted in an electronic form via the NACP's web-site, where they will also be automatically published, 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, however, will be published). The new law extended the scope of disclosure 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 National Agency for Corruption Prevention is responsible for monitoring and verifying these declarations as well as for 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. The list of these high-risk positions has to be approved by the National Agency. The new law also introduced an additional disclosure requirement: all declarants have to file notifications of significant changes in their assets during the year (i.e. within 10 days after they received an income or made a purchase in the amount exceeding about EUR 2,300). These notifications will also be submitted electronically and will be available on-line on the NACP web-site for public scrutiny.

The Law establishes sanctions for either failing to submit or belatedly submitting declarations, as well as sanctions for the deliberate submission of false information, including criminal, administrative, civil and disciplinary liability. The Administrative Offences Code punishes the violation of financial control requirements, including the untimely filing of a declaration, failure to notify or untimely notice about opening of a foreign bank account or about significant changes in assets with a fine. The wilful non-submission of a declaration or the knowing provision of false information will be punished as a criminal offence. The provisions on liability were amended and somewhat weakened in March 2016. The criminal liability will arise 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.

Regarding the practical implementation of the above provisions, the National Agency was expected to start its full operation during the summer of 2016. The web portal for submitting declarations was supposed to be ready by the time when the Law on Prevention of Corruption entered into force (i.e. April 2015), but there was apparent delay. Meanwhile, the donors (UNDP, World Bank, DFID) supported the development of software for the new e-declarations system that will be used for submission, publication and verification of declarations. The NACP decided to launch the electronic disclosure system in two stages: on 15 August 2016 for high-level officials and on 1 January 2017 for the rest.

The 2015 ACN thematic study on Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia<sup>356</sup> in Chapter 12 provides an overview of "Innovative approaches and measures to prevent conflicts of interest" in the ACN region. The Study presents several examples of good practice related to asset declarations which can be promoted in the region, including: declaration of conflicts of interest on a case-by-case basis in **Albania**; *ex-ante* verification of declarations in **Romania** and in **Italy**; institutional approach to the conflict of interest in **Croatia**, where a new public procurement law establishes the prohibition for the contracting authority to conclude public procurement contracts with economic entities with which it is in a situation of conflict of interest; an effective communication of rules in **Estonia** and in **Latvia** using practical manuals based on actual cases. The Study also presents the **Slovenian**

---

<sup>356</sup> OECD/ACN (2015), Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, available at <http://goo.gl/bCovJ0>.

experience of using databases to enhance control of compliance of public officials with limitations regarding business activities.

### Box 32. Breakthrough with asset declaration system in Slovenia

An asset declaration system was introduced more than two decades ago in Slovenia, and in 2004 a new independent state body – the Commission for the Prevention of Corruption (Commission) – has been established to, among other competencies, conduct supervision of the financial situation of functionaries.<sup>357</sup> Nonetheless, oversight was weak and only few cases were investigated. It was not until after 2010, when the new anti-corruption law – Integrity and Prevention of Corruption Act<sup>358</sup> (IPCA) – came into force, substantially expanding the powers and mandate of the Commission, that the approach to the monitoring of asset declaration changed and proper investigations into financial disclosures of public officials were initiated.

In 2012, the Commission initiated what later became its most prominent investigation. It was a year-long investigation into the holders of the highest political offices in relation to their assets declaration and financial disclosure laws. The investigation covered politicians who were, at the time the investigation commenced, the heads of the seven parliamentary parties, including the President of the Republic, the Prime Minister and the President of the Parliament.

In January 2013, the Commission published a report in which it revealed that the Prime Minister and the Mayor of the capital Ljubljana, who was also head of the opposition, systematically and repeatedly violated the law by failing to properly report to the Commission. Neither the Prime Minister nor the Mayor of Ljubljana assumed responsibility. It was the President of the Parliament and the leader of one of the coalition parties who called on both the Prime Minister and the Mayor of Ljubljana to resign from their offices. After the Prime Minister refused to resign, the President of the Parliament resigned from his office and his party left the coalition. Later, two more coalition parties left the coalition, and Slovenia was governed by a minority government until it fell after receiving a vote of no confidence. After the publication of the report, the Commission called for the improvement of Slovenia's anti-corruption legislation as it, *inter alia*, lacked the legal powers to enforce the accountability of the highest-level public and political officials.

The Prime Minister and the Mayor of Ljubljana both denied all the findings in the report and challenged it first before the Administrative Court and later before the Superior Court of the Republic of Slovenia, which repealed the report in parts relating to the assets of the then-Prime Minister in February 2015 and the Mayor of Ljubljana in July 2015. The court decided that the Commission failed to guarantee equal protection of rights. The court, however, did not rule on the merits of the case.

Following the decision of the court, the new senate of the Commission adopted the decision to continue oversight of asset declaration and financial status of the mentioned politicians, which resulted in reports published in June<sup>359</sup> and November<sup>360</sup> 2015. Both reports revealed systematic and repeated violations of the anti-corruption legislation.

Source: [www.kpk-rs.si](http://www.kpk-rs.si).

<sup>357</sup> Chapter IV of the Prevention of Corruption Act.

<sup>358</sup> Official Gazette of the Republic of Slovenia, No. 45/2010, 26/2011 and 43/2011.

<sup>359</sup> Source: <https://goo.gl/QbH9C1>.

<sup>360</sup> Source: <https://goo.gl/t8d8ZJ>.

Table 34. Summary of asset declarations systems in the ACN countries

Country	Categories of officials who submit declarations	Number of officials	Body responsible for collection and verification of asset declarations	Number of staff dealing with declarations	Form of public disclosure
<b>Albania</b>	High level legislative and executive officials, civil servants of high and middle management level, judges and prosecutors	4 200	- The High Inspectorate of Declaration and Audit of Assets (for all branches of power)	20	Access to individual files upon request
<b>Armenia</b>	High level officials	no data	- Ethics Commission for High Ranking Officials	no data	no data
<b>Azerbaijan</b>	All public officials [Asset declarations are not implemented in practice, as the declaration form has not been approved to date]	no data	- Commission on Combating Corruption - For MPs – authority identified by the parliament - Accounting authority determined by heads of state authorities	no data	No public disclosure
<b>Belarus</b>	Civil servants and candidates to civil service positions	no data	- The Ministry of Taxes and Revenue - Personnel departments of state bodies - Heads of superior bodies	no data	No public disclosure
<b>Bosnia and Herzegovina</b>	High level legislative and executive officials and their advisors	6 000	- The Central Election Commission	3	Access to individual files upon request
<b>Bulgaria</b>	High level officials	7 073	- Public Registry Department unit in the National Audit Office	9	Electronic publication
<b>Croatia</b>	High level legislative and executive officials, judges and prosecutors	1 850	- Commission for the Prevention of Conflict of Interest (for public officials) - State Attorney' Office and Ministry of Justice (for attorneys) - Ministry of Justice (for judges)	5 (Commission for the Prevention of Conflict of Interest)	no data
<b>Estonia</b>	High level officials	About 6 000	- Parliamentary Committee - Depositary of declarations is appointed by the head of an agency or authorised body (e.g. local government body)	2	Electronic publication
<b>Georgia</b>	High level officials	5,600	- Department in the Civil Service Bureau	5	Electronic publication
<b>Kazakhstan</b>	High level legislative officials, judges, civil servants, candidates to civil service positions, persons released from prison and persons dismissed from civil service	470 000	- The Tax Committee of the Ministry of Finance	450	No public disclosure

Country	Categories of officials who submit declarations	Number of officials	Body responsible for collection and verification of asset declarations	Number of staff dealing with declarations	Form of public disclosure
<b>Kosovo</b>		800	- Anti-corruption Agency	4	No public disclosure
<b>Kyrgyzstan</b>	Political, special state officials and political municipal officials	1350	- Agency responsible for civil and municipal service affairs	4	Electronic publication of summary information only
<b>Latvia</b>	All public officials, except for public employee such as teachers or doctors	70 800	- Department in the State Revenue Service - Corruption Prevention and Combating Bureau	66	Electronic publication
<b>Lithuania</b>	Political officials; civil servants; judges; heads of state owned enterprises, heads of political parties and their deputies; Candidates to elected positions.	150 000	- The State Tax Inspection (for all branches of power) - Chief Official Ethics Commission (for members of parliament) - Specialised public officials or units in each state body		Paper or electronic publication (for certain senior officials and politicians)
<b>Macedonia</b>	Elected and appointed officials (they submit declarations to the SCPC and PRO) and civil servants (they submit declarations to the institutions where they are employed).	4 000	- State Commission for Prevention of Corruption (SCPC) - Public Revenue Office (PRO)	5 in the SCPC and 4 in the PRO	Electronic publication (except civil servants)
<b>Mongolia</b>	Public officials of political, administrative and special civil posts as well as executive officials of support civil service	39 850	- Standing Committee on Legal Affairs of the Parliament - Independent Authority Against Corruption - Judicial General Council - Secretariat of Citizens' Representatives Hural - Central Administrative Organisations	22	Electronic publication of high ranking officials and written disclosure upon the request according to the approved format
<b>Montenegro</b>	Elected, appointed or assigned to a post in a state authority, state administration body, judicial authority, local self-government body, local government body, independent body, regulatory	4 411 <sup>361</sup>	- Agency for Prevention of Corruption	10	Electronic publication on the website of the Agency

<sup>361</sup> In addition to the mentioned number of public officials, the Register of public officials of the Agency for Prevention of Corruption also contains 1,064 civil servants (from the Administration for Inspection Affairs, Police Authority and the Ministry of the Interior, Tax Administration and Customs Administration), who are also required to submit the Report on income and assets to the Agency.



4. PREVENTION OF CORRUPTION

Country	Categories of officials who submit declarations	Number of officials	Body responsible for collection and verification of asset declarations	Number of staff dealing with declarations	Form of public disclosure
	body, public institution, public company or other business or legal person exercising public authority, i.e. activities of a public interest or state-owned (hereinafter - authority), as well as the person whose election, appointment or assignment to a post is subject to consent by an authority, regardless of the duration of the office and remuneration.				(except for information relating to personal information, but the names and surnames; address of immovable assets; children of public officials under age of 16; alimony and other income or payments on the basis of social and child welfare)
<b>Romania</b>	High-level legislative and executive officials, judges and prosecutors; persons with leading and control positions; members of the boards of state owned companies; candidates to elected positions.	300 000	- The National Integrity Agency (NIA)	57 (NIA integrity inspectors)	Electronic publication and access to individual files upon request
<b>Slovenia</b>	High level elected and executive officials, judges and prosecutors, managers of state owned/controlled enterprises	5 264	- The Commission for the Prevention of Corruption	2	No public disclosure
<b>Tajikistan</b>	All public officials	18 609	- Civil Service Agency - Tax Committee - Personnel departments of state institutions	no data	No public disclosure
<b>Ukraine</b>	All public officials (state and local self-government) and officials of public law entities	Up to 1 mln.	Under 2011 Law: - Personnel departments of employing institutions (control of	no data (Under 2014 Law will be	2011 Law: Paper, publication for senior officials on

Country	Categories of officials who submit declarations	Number of officials	Body responsible for collection and verification of asset declarations	Number of staff dealing with declarations	Form of public disclosure
			submission) - Tax authorities (verification of accuracy of information) Under 2014 Law (enacted in April 2015, but not enforced yet): - Personnel departments of employing institutions (control of submission) - National Agency for Corruption Prevention (control of submission, verification of information submitted)	dealt by the NACP, its overall staff will be up to 311 persons, department dealing with verification of declarations will have 56 employees)	the web-sites of employing agencies. 2014 Law: Electronic submission in centralised register, automatic publication on the web-site of the NACP of all declarations.
<b>Uzbekistan</b>			no asset declaration system		

Source: IAP monitoring reports, OECD/ACN secretariat research, information provided by ACN National Coordinators.

### Codes of ethics and ethics training for public officials

The 2008 Summary Report noted that all IAP countries have developed general or sector specific codes of ethics, and it stated that in the future "[t]he main focus should be disseminating these codes of ethics, and ensuring high-quality ethics training programmes as a part of both academic curricula and in-service training for public officials."<sup>362</sup> The 2013 Summary Report further insisted that the quality of the codes needed further improvements because some of them only provided very general guidance on good behaviour, while others were either legalistic or duplicative of provisions found in civil service or anti-corruption laws. The 2013 Summary Report also stressed that "it is equally important to train public officials about the established rules and to promote their implementation".

To help countries improve their ethics trainings, in 2013, the ACN Secretariat (together with the OECD-EU SIGMA Programme and in cooperation with the OECD Public Sector Integrity Network) prepared a study "Ethics Training for Public Officials"<sup>363</sup> that analysed the existing approaches for ethics training in Eastern Europe and Central Asian countries and selected OECD member countries. This study proposed recommendations on how to improve the effectiveness of ethics training, which were illustrated with case studies from Austria, Estonia, Turkey and the United States. The policy recommendations suggest the following approaches:

1. Making ethics training a part of a comprehensive anti-corruption and integrity policy.
2. Including practical demonstrations of political support and "leadership from above" in the ethics training.
3. Creating a legal requirement to provide and receive ethics training, at least for certain categories of officials.
4. Clearly identifying the lead agency and ensuring coordination of ethics training.
5. Targeting the training for specific groups of public officials.
6. Making ethics training practical.
7. Training about rules, values and "grey" areas.
8. Evaluating the effectiveness of the training.

The 2015 ACN Study on Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia<sup>364</sup>, in Chapter 10, provides an overview of good practices on anti-corruption and ethics training and education in the region, including a case-study of Estonia.

---

<sup>362</sup> Istanbul Anti-Corruption Action Plan, Summary Report, An assessment of progress in the period 2003-2007, p. 13, [www.oecd.org](http://www.oecd.org).

<sup>363</sup> Available at <http://goo.gl/CYBtWL>.

<sup>364</sup> Available at <http://goo.gl/6CcbGF>.

### Box 33. Public service ethics training in Estonia

In Estonia, the preference to attend the training programme on public service has been given to officials who are responsible for developing measures on anti-corruption at the organisational level, or who face situations involving ethical dilemmas or corruption more frequently – namely, inspectors, heads of departments, accountants, personnel officials, etc. As a considerable part of learning takes place through a discussion of real-life cases, the suggested group size is 20 participants. The aim of the training is to raise the competence of officials in recognising ethical problems in practical life and making ethically reasoned decisions. The focus is not so much on requirements included in the regulations but on the essence of public service values and officials' competence to recognise and analyse ethically problematic situations. Those situations are often outside the scope of the laws or are only partially regulated – e.g. using frequent flyer bonus points that have been earned via work-related meetings abroad, accepting gifts, etc.

The participation in the training programmes on public service ethics is voluntary. Despite this, the demand and interest in attending the programme has constantly been very high. Between 2005 and 2011, 758 state and local government officials and 129 employees of other public-sector target groups have completed central training programmes on ethics. Three main pillars have substantially contributed to the training programmes: (1) political commitment, (2) focus on value-based reasoning (instead of introducing regulations) and (3) the competence of ethics trainers to actively involve participants and moderate discussions. Although it is difficult to make conclusions about real impact of training programmes on values and attitudes, the survey conducted among officials in 2009 showed that the officials who had completed training courses on public service ethics are more critical towards ethically questionable activities compared to those officials who had not attended any such kind of courses.

Source: abridged from OECD (2013), *Ethics Training for Public Officials*, Chapter 3.2, pages 34-39, available at <http://goo.gl/u33kSu>.

The third round of monitoring showed that many countries are updating their general codes of ethics and developing codes for some specific sectors, but the impact of these codes on the practical behaviour of civil servants is limited. There are some examples of codes for sectors with high corruption risks of corruption: for example, codes for tax officials and the judiciary are relatively common. Institutions that are responsible for the promotion of ethics – ethics commissions in state bodies – are only now being developed in countries. Training for civil servants has been improved in some countries (e.g. there are standard or mandatory trainings that include anti-corruption or ethics); however, in most cases there is no special institution that would take the lead in developing and delivering such training or in studying its impact. Though little is known about the quality of the training, there is anecdotal evidence that training remains formalistic and not practical.

The 2011 Law on Public Service of **Armenia** established new public service principles, rules on ethics and limitations for public officials, leading to multiple contradictions and inconsistencies between the new rules and the old codes of ethics in various sectors. Recognising this shortcoming, Article 28.2 of the Law specifically notes that the ethics rules for public servants and high-ranking officials are not exhaustive, and supplementary ethics rules can be established through sector-specific codes. The third round monitoring report noted that the impact of the sector-specific codes was limited, especially in the view of the ineffectiveness of ethics commissions in the state bodies. The Action Plan for the new Anti-Corruption Strategy envisages measures to improve the capacity of sectoral ethics commissions and their co-operation, including the following: establishing ethics commissions or entities responsible for ethics-related issues in the selected sectors of public service, defining norms for their establishment, activities and reporting, setting up a body responsible for co-ordinating the activities of these commissions, providing them with methodological guidelines and training, introducing efficient mechanisms for co-operation between the ethics commissions, and strengthening units responsible for the implementation of anti-corruption programmes in all state bodies.

Several bodies are engaged in ethics training in Armenia. In 2013, the Civil Service Council approved a 72-hour programme “Fight against corruption”, which is a part of the mandatory training program for civil servants. This is a positive development. However, the number civil servants who received this training was low: in 2013, training was provided to 107 officials and to only 38 officials in the first half of 2014. The Public Administration Academy (together with the Ethics Commission and the Justice

Academy) provides ethics and anti-corruption trainings to judges. The Academy also provides anti-corruption training to community chiefs and council members. At the time of the third round of monitoring, the Ethics Commission for High-Ranking Officials in a framework of a regional project supported by GTZ was developing a manual on ethics that will include case studies for practical trainings, and should be ready in October 2014. The Commission was also engaged in the development of the code of conduct for the high-ranking officials, with the advice from the SIGMA programme.

The 2007 Law of **Azerbaijan** on Rules of Ethics Conduct of Civil Servants contains rules on ethical behaviour. Implementation of the law is the duty of the head of the public administration body, the individual civil servants, and a supervisory body. There were also codes of ethics and conduct in many public institutions. However, in practice these rules had little impact. At the time of the third round of monitoring, the Civil Service Commission intended to develop a network of ethics commissioners in public institutions that would have the responsibility for promoting the codes. Since the second round of monitoring Azerbaijan took limited steps to establish a permanent system for educating public officials on ethics. The Civil Service Commission developed a training course, which covers, among other issues, the prevention of corruption. This general training course was designed for all civil servants. However, it is not known if this course was actually delivered in practice. The Academy of Public Administration under the President of the Republic of Azerbaijan performs functions of the Specialised Training Centre for Civil Servants and regularly holds trainings for civil servants on various aspects of public administration, as well as on prevention of corruption.

According to the Government of **Georgia**, it has established a working group to develop ethical conduct rules for civil servants. The Code of Ethics will include a detailed regulation of conduct in the civil service and will apply to all civil servants (with certain exceptions). The initial draft code was submitted for consideration to the Civil Service Bureau. Georgian authorities plan to finalise this work in September 2016. Additionally, a handbook on “Ethics and General Rules of Conduct for Civil Servants” was developed, presented officially and published online, as well as sent out to all central and local governmental institutions. It is organised in the so-called “read with pencil format”, contains exercises, activities, instructions and situational analysis. The CSB, civil servants from several governmental institutions, experts from the academic sector and trainers developed this handbook through an interactive method. Together with the handbook, they also prepared a detailed training model and a curriculum. In 2016, the training on ethics will cover three main groups: civil servants from the central governmental institutions, employees of the Legal Entities of Public Law (whether they are independent or under the supervision of the ministries), and civil servants from the local self-governmental institutions. By June 2016, civil servants from nearly all LEPLs have been already trained (188 participants from over 210 LEPL). The ethics training on the local self-governmental level will cover 350 civil servants in 2016.

In **Kazakhstan**, in 2012, the Civil Service Law was supplemented with a chapter on “Ethics of civil servants”. It sets out requirements for civil servants on service ethics and personal integrity. The 2013 Presidential Decree amended the 2005 Decree “On the Code of Honour of civil servants of the Republic of Kazakhstan”. The Code dictates the need “to be guided by the principle of legality, requirements of the Constitution, laws and other normative legal acts of the Republic of Kazakhstan, and “to improve one’s professional qualities and qualifications to be able to perform efficiently one’s duties”. In December 2015, the President approved by a decree "Rules of Service Ethics for Public Officials" as well as a Resolution about Ethics Officers. Ethics officers have been set up at the Civil Service Agency and its territorial branches, as well as in all other state bodies and at the local councils. Their key mission is to engage in the prevention of corruption or ethical wrongdoing, as well as to advise and facilitate compliance by civil servants with the legislation on civil service, corruption, and the Code and rules of ethics, and to monitor the implementation of these norms.

The Institute of Extended Education of the Academy of Public Administration under the President offered civil servants in 2011-2013 bi-annual courses and seminars on ethics. In addition, the calendar for judicial in-service training in 2011-2013 offered a module on personal competences, which included basics of work ethics. The financial police devoted a part of the on-going vocational training to ethical standards, with lectures on anti-corruption topics and Code of Ethics. The third round of monitoring report recommended that Kazakhstan make this training in ethics and prevention of corruption of civil servants more practically useful.

**Kyrgyzstan** has started drafting a Code of Ethics of Public Sector Employees during the second monitoring round. It envisaged measures on the prevention of corruption risks as well as on sanctions of moral and administrative nature with respect to the public and municipal employees for unethical behaviour. The Code of Ethics was expected to be adopted in February 2015. With the adoption of the Law on Civil Service in 2016, however, the authority to adopt the Code of Ethics was entrusted to the Council on civil and municipal service. It was expected that the Council would consider the code in July 2016. Commissions on ethics of the employees of the state authorities and local self-government bodies have been established. There is also the Central Commission on Ethics, but it did not function properly at the time of the third round of monitoring. Overall, it was not clear if these commissions played any significant role in promoting ethics. It was also not known how they cooperated with the authorised corruption prevention officials who were created in 2014 in state authorities, local self-government bodies and other public bodies.

In **Mongolia**, the Civil Service Council delivers lectures on Codes of Ethics upon the request of public organizations. Mongolia also informed about extensive training activities carried out by the IAAC, but they are related rather to the anti-corruption legislation in general than specifically to the Codes of Ethics.

At the time of the third monitoring round, **Tajikistan** reported the development of a new Decree amending the Code of Ethics in view of improving its implementation. Following the ACN recommendations, a new Code of Ethics was adopted in December 2015. The Code is mandatory for all public officials, whether political or administrative. It establishes various civil service principles and rules. To implement the Code, the heads of state bodies should establish commissions that will investigate violations that can entail disciplinary sanctions. The Civil Service Agency is responsible for monitoring the Code's implementation. There was also a plan to establish commissions in all public institutions, subordinate to the heads of those institutions. It was not clear if there is any mechanism for the Civil Service Agency to work with the ethics commissions. So far, there is no information about the results of this monitoring of Code's implementation. Already in 2011, sector-specific codes were approved in the Ministry of Internal Affairs, Tax Committee, Custom Service and the Office of the Prosecutor General; the Code of Ethics of the Agency for State Financial Control and the Fight against Corruption was under development during the third round monitoring. However, no information was provided about efforts to train public officials about these codes or about the Codes' impact on behaviour.

In **Ukraine**, "General Rules of Civil Servant's Conduct" were established in 2010 by the predecessor of the National Agency of Civil Service. The 2011 Law on Principles of Corruption Prevention and Counteraction included a separate article on codes of conduct. The separate Law on the Rules of Ethical Conduct was enacted in 2012. The Office of the Prosecutor's General approved its Code in 2012. There is also a Code for employees who are responsible for preparing and issuing personal identification documents at the Ministry of Internal Affairs, Ministry of Foreign Affairs, Ministry of Infrastructure and Main Department of Civil Service adopted in 2011. A new version of the Code of Judicial Ethics was adopted in 2013. However, there are no Codes for other sectors with high risks of corruption.

Ukraine reported that the State Programme on Prevention and Counteraction of Corruption for 2011-2015 provided for a centralised training programme for both new hires and current officials, on the

prevention of and fight against corruption, ethical conduct and resolution of conflicts of interest. The National Agency on Civil Service developed a model training programme, trained 200 trainers and expanded the network of educational institutions providing such training from 1 to 32. In 2012, this mandatory training was provided to 29,917 employees (8% of the total number of civil servants). The Law on Prevention of Corruption in 2014 first assigned the power of approving the rules of ethical conduct for civil servants to the National Agency for Corruption Prevention. Later, it was amended to re-assign this power to the National Civil Service Agency. The National Agency for Corruption Prevention will deal with providing clarifications, guidance and consulting on issues of application of legislation on ethical conduct.

Several new Codes of Conduct were adopted in **Uzbekistan** since the previous monitoring round, including: Rules for Ethical Conduct of Judges and the Code of Ethics (Professional Ethics) for employees of prosecution bodies (2013); the Code of Ethics of the employees of the Accounts Chamber (2014); and the Rules of Ethics of Deputies of the Legislative Chamber approved (2015). The Comprehensive Plan of anti-corruption measures in 2015 provides for the adoption and implementation of ethical norms for its employees in every state body. In addition, the General Prosecutor's Office developed a draft Code of Ethics of Employees of State Bodies that aims to establish common ethics rules for all public servants. The draft was developed using the Council of Europe's Model Code of Conduct for Public Officials, as well as other international practices, and it was adopted by the Cabinet of Ministers in March 2016. Regarding the training on public sector ethics, so far the Public Service Academy does not teach either countering corruption or ethics as a separate subject. Several ministries and public institutions, however, provide ethics and corruption prevention training to their employees. For example, in 2014, the Ministry of Finance organised anti-corruption training for 2,101 persons from the government financing institutions, including regional financial centres and the Treasury. The Comprehensive Plan of anti-corruption measures for 2015 includes measures to strengthen the anti-corruption themes in the teaching of disciplines at institutions for training and retraining of employees of public bodies.

### **Role of leadership in promoting integrity**

The role of leadership of state bodies in preventing corruption and ensuring integrity was not examined during earlier rounds of monitoring. However, during the third round it emerged as one of the important preconditions for strengthening integrity in the public administration. The ACN Study on Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia<sup>365</sup> in Chapter 13 provides good practices where responsibility and expertise in the area of prevention of corruption is decentralised across the public administration. The Study focused on the role that anti-corruption or integrity units inside various state bodies can play in helping a minister or the head of the state body to: identify risks and develop remedies; support and monitor the implementation of national anti-corruption policies in state bodies; and counsel civil servants on various anti-corruption and integrity issues. The study "Ethics Training for Public Officials", prepared by the ACN together with SIGMA and the OECD Public Integrity Network in 2013, also stressed the role of the leadership in promoting integrity by setting personal example for the staff and by giving priority to ethical activities, such as trainings.

For examples, **Bulgaria** has set up inspectorates within ministries and government agencies. The inspectorates assess corruption risks and propose measures to limit the risks, to collect and analyse information as well as to carry out verifications on occurrences of corruption, to conduct checks under the Law on the Prevention and Detection of the Conflict of Interest. The Chief Inspectorate coordinates and guides activities of the inspectorates.

<sup>365</sup> Source: <http://goo.gl/nI8MVu>.



In **Croatia**, the head of each state body shall appoint an ethics commissioner who shall, among other things, supervise the implementation of the code of ethics, provide advice to civil servants and review complaints by citizens regarding possible misconduct.

**Estonia** appointed anti-corruption contact persons in each ministry. Their task is to oversee implementation of the anti-corruption strategy and propose new anti-corruption measures in their field of activity. These contact points, however, do not counsel colleagues on specific integrity matters. In the long run, the government plans to nominate integrity officials who will have a broader mandate.

In **Germany**, the Federal Government Directive Concerning the Prevention of Corruption in the Federal Administration requires that a contact person for preventing corruption be appointed based on the tasks and size of the agency.

In **the Netherlands**, the regulation on reporting of suspected wrongdoing requires that the competent authority shall designate one or more confidence persons in the organization. In the **United States**, the head of each federal executive agency is personally responsible for establishing, maintaining, and carrying out the agency's ethics program. The head of each agency shall appoint an individual to serve as the agency's designated ethics official, who ensures the management of the agency's ethics programs, including the review of financial disclosure reports, ethics education and training programs, and the monitoring of administrative actions and sanctions.

In **Denmark, Norway and Sweden**, which lack central, independent anti-corruption bodies, responsibility for ethics is largely placed on the management of public institutions. The Council of Ethics for Public Service of **Turkey** has created a network of certified ethics trainers throughout the public service.

The third round of the IAP monitoring showed that appointment of dedicated anti-corruption and ethics contact persons was becoming common in the ACN region. Anti-corruption contact points and ethics commissions were established in **Armenia**. **Azerbaijan** introduced ethics commissioners in some public bodies. There are Inspector Generals in some state bodies in **Georgia**. The institute of corruption prevention official was created in **Kyrgyzstan**. The Agency for State Service Affairs of **Kazakhstan** appointed ethics advisors in other state agencies and at the local councils, in addition to disciplinary commissions. Anti-corruption contact points were also established in **Ukraine**.

In addition to the ethics commissions or anti-corruption contact points, many countries are in the process of creating internal audit units in state bodies. While this approach can be useful in ensuring the leading role of the leadership of state bodies in preventing corruption, most of the monitoring reports stressed that these institutions are often weak with unclear mandates and poor capacity, their independence is not ensured, and there is no proper coordination among various related bodies.

### **Reporting of corruption and protection of whistle-blowers**

The 2008 Summary Report noted that "[i]mproved reporting of corruption-related crimes and other misconduct by public officials and ordinary citizens will increase the chances of detecting these offences. Stronger legal obligation to report is one approach; however, this should be supported by other measures, such as the protection of whistle-blowers, and removal of overly strict provisions against defamation."<sup>366</sup> The 2013 Summary Report further noted that while some IAP countries took steps to strengthen the legal obligation of public officials to report corruption and other related crimes, such reporting was not common in practice and no meaningful statistics was available on this issue.

During the first round of monitoring, none of the IAP countries had legislation concerning the protection of whistle-blowers. By the time of the second round, several countries have introduced new legal

<sup>366</sup> OECD/ACN (2008), Summary Report, An assessment of progress in the period 2003-2007, page 13, <http://goo.gl/hCEdNN>.

provisions to protect whistle-blowers. This is a positive development, but prescribing protection of whistle-blowers in law alone is not sufficient. Awareness-raising and practical measures to support the implementation of legislation are needed across all IAP countries.

The third round of monitoring confirmed the trend: several countries already have some basic legal provisions regarding reporting and whistleblowing, such as laws on public service or anti-corruption, but they are not effective in practice, and not supported by training or specialised institutions. Several countries have new and more elaborate legal frameworks, such as the Law on Whistle-blower protection in **Georgia**, and corresponding provisions in the law on the prevention of corruption in **Ukraine**. **Kazakhstan** has introduced the practice of rewarding whistle-blowers, which is unique in the ACN region.

The obligation for public officials to report suspicions related to corruption is established in **Armenia** by the Law on Public Service; failure to comply with this obligation may entail criminal responsibility. The Government's 2011 Decision established procedures for reporting and for guaranteeing the security of the reporting officials. However, no information was provided by the Government about enforcement of these rules; none of institutions surveyed by civil society (TIAC) reported any cases of whistle-blowing. The third round monitoring report concluded that these rules did not function because of citizens' lack of trust in the fight against corruption and in law enforcement bodies as well as the fear that the reporter may be pursued for defamation. To address this challenge, the Anti-Corruption Strategy for 2015-2018 provided for improving the whistle-blowing legislation in co-operation with civil society organisations. More specifically, the Action Plan for the Strategy foresees establishing guarantees of legal protection of persons reporting corruption crimes by 2018.

The third round of monitoring report on **Azerbaijan** states the following: "It appears that no steps were taken to introduce a legal obligation to report corruption or regulation on protection of whistle-blowers. The NACAP 2012-2015 foresees the Development of the draft Corruption Whistle-blowers Act. For reporting of corruption, hotlines seem to be promoted and working well in Azerbaijan. There is the hotline 161 operated by the ACD in the Prosecutor General's Office, as well as hotline section on the official website of the Ministry for Education and hotlines also in other public institutions."

**Georgia** is the frontrunner among the Istanbul Action Plan countries regarding whistle-blowers' protection. It has introduced new legislation during the last monitoring cycle and has launched awareness-raising efforts to promote its implementation.

#### Box 34. Whistle-blower protection in Georgia

During 2014-2015, the Government of Georgia amended Chapter VI (on protection of whistle-blowers) of the Law on Conflict of Interest and Corruption in Public Service in order to increase the effectiveness of whistle-blower protection system in the country and to bring it into compliance with international standards. Amendments introduced in 2014 allowed anonymous and confidential whistleblowing. According to Article 203 of the Law whistleblowing may be made anonymously. According to Article 204, the body that received the whistle-blower's report is obliged to keep the whistle-blower's identity confidential unless the whistle-blower provides written express permission for disclosure. Violation of this Article by a civil servant entails a disciplinary sanction, unless it is a criminal act or administrative offence. The protection provided for the whistle-blower is monitored by head of the appropriate public institution. The guarantees of whistle-blowers protection include prohibition of intimidation, oppression, coercion, humiliation, moral or material damage, use of violence or threat of violence, discriminatory or any other illegal act with regard to the whistleblowing incident against the whistle-blower or close relatives. In addition, the whistle-blower may not be subjected to administrative procedures, civil action, prosecution, retaliatory measures or be otherwise held responsible for the circumstances related to the facts of whistle-blowing.

In 2015, further amendments were introduced to the Law to strengthen the protection of whistle-blowers. The amendments increased the scope of definition of a whistle-blower and enabled not only "active or former public official" but "any person" to inform a reviewing body, police, prosecutor or/and public defender about the infractions of the law or, if applicable, the rules of Code of Ethics committed by the civil servant, which caused or may cause harm to public interests or reputation of public institutions. Furthermore, according to the amendments, whistle-blower will be able to inform civil society or mass media directly after the decision is made by the state body that received the report, police, prosecutor or public defender as opposed to the previous regulation which required the

whistle-blower to wait for two months after the decision was made by the state body. Besides, the electronic appeal mechanism allowing for a confidential appeal in case of doubt over misconduct by civil servants was introduced. The appeal mechanism will be operated by the Civil Service Bureau (CSB).

In early 2015, the CSB with the support of international partners launched the project “Strengthening the Whistle-blower Protection Institution in Georgia” to raise awareness of civil servants on the whistle-blower protection regulations and their rights. An international expert prepared a training manual and a curriculum and conducted training of trainers for the 12 local experts from governmental and non-governmental institutions who will conduct trainings for Georgian civil servants. Furthermore, the CSB, together with the local experts, organised individual meetings with the representatives of Human Resource and Internal Control Departments at all the line ministries to help civil servants to better understand existing regulations, procedures and their rights. Promotional materials (such as brochures and graphic video) were developed and round table discussions were organised and broadcasted by the main Georgian media channels. The CSB plans to continue this campaign on the local self-governmental level and schedule trainings for at least two representatives from all central and local governmental institutions by the end of the year. After the amendments were introduced to the Law, several whistleblowing cases were reported.

Source: Georgian Ministry of Justice, National Coordinator to the ACN.

In 2012, the Civil Service Law of **Kazakhstan** was supplemented with a chapter on “Ethics of civil servants”, which stipulates the obligation of the leadership of the public agency to ensure protection for civil servants who have disclosed credible evidence of corruption. However, there are no regulations that would implement such protection for any whistle-blower in practice. The number of whistle-blowers among civil servants remains low, and the situation did not change after the new regulation: 43 allegations in 2011, 49 in 2012 and 46 in 2013. To stimulate whistle-blowing among citizens, the Government, in 2012, adopted “Rules on rewarding those who disclose facts of corruption offences or otherwise assist in the fight against corruption”. In 2013, 172 persons helped to initiate 216 criminal prosecutions leading to trial, and they were awarded a total of KZT 19 million under this procedure.

Since the second round of monitoring, **Kyrgyzstan** has not taken steps aimed at implementation of the recommendation on reporting and whistle-blowing. At the time of the third round of monitoring, the draft Action Plan on Implementation of the State Strategy of the Anticorruption Policy of the Kyrgyz Republic for 2015-2017 envisaged the adoption of a law on the protection of whistle-blowers and the identification of the body that would be responsible for implementing this Law. After the third round of monitoring, the Kyrgyz Parliament initiated the development of whistle-blower legislation and adopted the Law "On Protection of Persons Reporting about Corruption Violations" in the first reading in May 2016. The Law establishes that information about the person informing about a corruption violation constitutes a state secret and should be protected by the public prosecution service and other state bodies. It should be noted that effective whistle-blower legislation normally focuses on protection of such persons from retaliation in the work place. This aspect, however, has not yet been addressed in Kyrgyzstan.

The Anti-Corruption Law of **Mongolia** requires certain specified persons to immediately report to the Independent Agency Against Corruption any corruption-related information obtained while performing their official duties. Under the Anti-Corruption Law, this obligation is imposed on the following persons: a) those in executive or managerial positions in the political, administrative or special office of the state and the public service; b) managers or authorised employees of legal entities in which the state or the local administration has full or partial equity interest; c) managers and executive officers of non-governmental organizations, temporarily or permanently performing particular state functions in compliance with legislation; d) electoral candidates; and e) public officials included in the list approved by an authorised entity. Despite this legal provision, no information is available on internal and external reporting, or on the outcomes of such reports. There is no legislation on the protection of whistle-blowers. No initiatives of facilitating whistleblowing by the state authorities were reported, and statistics on the whistleblowing cases is not available.

In accordance with the Law on the Fight against Corruption of **Tajikistan**, any person reporting an offence related to corruption or rendering any other form of support in the fight against corruption shall

be granted protection of the State. The Code of Administrative Offences stipulates that the non-provision of information on corruption-related offences to law enforcement bodies constitutes a violation of the law and is penalised with a fine. The Criminal Code prohibits the criminal prosecution of a person in connection with his or her informing of law enforcement bodies, thus partially decriminalising defamation. The Law on Public Service provides guarantees to public servants, including a guarantee of protection of the public servant against violence, threats and other illegal actions in connection with his official functions, but this does *not constitute* a protection from the harassment of whistle-blowers. No information is available to assess how these provisions are applied in practice.

Previously, the “Law on Principles” created an obligation for public officials to report corruption as well as protections for whistle-blowers in **Ukraine**. Since 2014, reporting and the protection of whistle-blowers are regulated by the Law on the Prevention of Corruption. This law establishes a definition of a whistle-blower and procedures for protecting the whistle-blower from personal harm (similar to the witness protection) and from negative measures by a supervisor or employer. The Law also provides that information about the whistle-blower may be disclosed only with his or her consent. It also provides that anonymous reports can be accepted. The National Agency for Corruption Prevention is supposed to monitor the implementation of the law regarding the protection of whistle-blowers. It is also supposed to conduct an annual review and revision of state policy in this area. So far, no respective training programmes have been conducted to promote the application of the new regulations. No information is available about any application in practice.

Chapter 19 of the ACN Study on Prevention of Corruption in the Public Sector presents good practices regarding both the reporting of corruption and whistle-blower protections. The report notes that many countries use special telephone hotlines for the reporting of corruption and/or specially designed online reporting tools. For example, in **Slovenia**, an online form guides the user by first asking the user to identify which of nine pre-defined categories the report relates, and then asking the user to describe details about what happened, where and when it occurred, and the offender who committed a violation.

Virtually all ACN countries have either criminal legislation that contains obligations to report crime and liability for a failure to do so or special government regulations on reporting. One of important provisions in such regulations is the possibility for a reporter to remain anonymous. In the case of **Austria**, the online service established in 2013 allows for the submission of anonymous reports while prohibiting the authorities from tracing the identification data of the whistle-blower.

Many ACN countries also have legal provisions for the protection of reporters. **Romania** has a dedicated law for the protection of whistle-blowers, namely the “Law on the protection of personnel from public authorities, public institutions and from other units, notifying infringements of the law”. In **Slovenia**, the legal basis for reporting corruption is established in the Integrity and Prevention of Corruption Law. According to this law the Commission for the Prevention of Corruption is the designated body for the protection of whistle-blowers. A Whistle-blower Protection Law exists also in **Bosnia and Herzegovina**. Certain provisions for the protection of whistle-blowers are found also in other countries of the region. These may be provided in labour laws (e.g. **Croatia, Latvia**), civil service laws (e.g. **Croatia**), laws on anticorruption, prevention or corruption, and conflicts of interest (e.g. **Latvia, Montenegro**), or special government regulations (e.g. **Moldova**).

**Box 35. Protection of whistle-blowers in Montenegro**

Since 1 January 2016, the Law on Prevention of Corruption (Official Gazette of Montenegro, 53/15) regulates the protection of whistle-blowers in Montenegro. Part III of the Law provides a comprehensive framework for the whistle-blower protection (Articles 44-70). Relevant provisions, among others, regulate in detail the following: filing of corruption reports by a whistle-blower to a public authority, company, other legal person or entrepreneur (“authority/company”); the contents of the report; data confidentiality; actions or proceedings of the authority/company, including designation of persons for receiving and acting upon reports, notifications on measures taken; reporting corruption to the Agency for the Prevention of Corruption; acts of the Agency upon the report and *ex officio*; opinions and recommendations of the Agency; protection of whistle-blower’s identity and rights; filing of criminal charges and assignment of proceedings to competent authorities for the protection of whistle-blowers; obligations of the Agency with respect to the whistle-blower’s right to protection; the burden of proof; third parties involvement; assistance by the Agency; compensation of damage and awards for whistle-blowers.

The provisions on the protection of whistle-blowers are also included in the Criminal Code and the Law on Free Access to Information.

The provisions of the Labour Law and Law on Civil Servants and Employees concerning the protection of whistle-blowers ceased to apply once the Law on Prevention of Corruption entered into force.

Source: Information by the Government of Montenegro.

Financial compensation for whistle-blowers can be an important part of a protection scheme. As already mentioned above, **Kazakhstan** is probably the only country in the ACN region with a functioning mechanism for financially awarding those who report corrupt acts. The Law on Countering Corruption provides that persons reporting about corruption facts or co-operating in countering corruption in other form, are protected by the state and should be rewarded. The rules for rewarding such reports and co-operation are established by the Government Resolution adopted in 2015. The reward is provided only if the reported facts are confirmed and after a court has imposed a sentence on the offender. The identity of the persons reporting about corruption facts is a state secret. The amount of individual reward varies depending on the gravity of the reported corruption case. During 2012 – 2015, this provision has resulted in 343 persons being rewarded a total of 40,7 million tenge (about EUR 100,000). Well-functioning mechanisms for providing financial awards to whistle-blowers also exists among OECD countries (e.g. **South Korea** and the **United States**).

Effective whistle-blower protection systems, however, are rare even in the OECD countries. The question of the effectiveness of measures of whistle-blower protection remains a matter of controversy even in countries with advanced regulations. However, some countries show success: 86% of UK senior executives said they felt free to report cases of fraud or corruption, compared to 54% in the rest of Europe.<sup>367</sup> Reporting and protection of whistle-blowers in the **United Kingdom** is based on the Public Interest Disclosure Act, which was adopted in 1998. The Act provides for a vast coverage of reporting options and protects disclosures concerning a vast range of wrongdoings. Furthermore, if a whistle-blower is fired, the burden of proof is on the employer to demonstrate that the dismissal was not related to the act of whistleblowing. Whistle-blowers who suffer from retaliation can be compensated financially.

<sup>367</sup> See Thematic Report.

Table 35. Scope of whistle-blower protection in the public and private sector, 2014

	Public and private sector					
	Employees	Consultants	Suppliers	Temporary employees	Former employees	Volunteers
Australia	●■	●■	●□	●□	●□	○
Austria	●□	○□	○□	●□	●□	●
Belgium	●□	○□	○□	●□	○□	○
Canada	●□	●□	●□	●□	●□	○
Chile	●□	○□	○□	○□	○□	○
Czech Republic	●■	○□	○□	○□	○□	○
Estonia	●■	●■	●■	●■	●■	●
France	●■	●■	●■	●■	●■	●
Germany	●■	●■	●■	●■	●■	○
Hungary	●■	●■	●■	●■	●■	●
Iceland	●□	○□	○□	●□	○□	○
Ireland	●■	●■	●■	●■	●■	○
Israel	●■	●□	○□	●■	●■	○
Italy	●□	●□	○□	●□	●□	○
Japan	●■	○□	○□	●■	○□	○
Korea	●■	●■	●■	●■	●■	●
Mexico	●■	●■	●■	●■	●■	●
Netherlands	●■	○□	○□	●■	●■	○
New Zealand	●■	●■	●■	●■	●■	●
Norway	●■	○□	○□	○□	○□	○
Slovak Republic	●□	○□	○□	○□	○□	○
Slovenia	●■	●■	●■	●■	●■	●
Switzerland	●■	○□	○□	●■	○□	○
Turkey	●□	●□	○□	●□	○□	○
United Kingdom	●■	●■	●■	●■	○□	○
United States	●■	●□	○□	●■	●■	○
<b>OECD total</b>						
Yes: ● (Public), ■ (Private)	26, 18	16, 11	12, 10	22, 15	16, 12	8
No: ○ (Public), □ (Private)	0, 8	10, 15	14, 16	4, 11	10, 14	18
Brazil	●□	○□	○□	●□	○□	○
Colombia	●■	●■	●■	●■	●■	○
Latvia	●■	●□	○□	○□	○□	○
Russia	●□	○□	○□	○□	○□	○

Source: OECD (2014), Survey on Managing Conflict of Interest in the Executive Branch and Whistle-blower Protection; cited from OECD (2015), "Whistle-blower protection", in Government at a Glance 2015, OECD Publishing, Paris. Available at <http://goo.gl/f1TW2y>.

## Conclusions and recommendations

Promoting integrity in civil service is often one of the priorities of national anti-corruption strategies, public administration reform and other national policies in the ACN countries. At the same time, objectives and measures to promote civil service integrity are not always based on risk assessments or other evidence. Besides, the coordination of the implementation and monitoring of civil service integrity measures are often dispersed between various institutions and do not focus on measuring their impact. Ensuring a systematic approach to the development and implementation of public integrity policies – in line with forthcoming OECD Recommendation on Public Integrity<sup>368</sup> – will strengthen their impact.

<sup>368</sup> A draft of this recommendation, which was posted for public comment in the first quarter of 2016, can be found at <http://goo.gl/hvOEZ7>.

The leading role of ministers, heads of state agencies and local administrations and other managers of public institutions is crucial for successful public integrity policies. Such leadership can be promoted by various means from leading by example and developing sectoral anti-corruption action plans and allocating resources for their implementation, to strengthening accountability and reporting by the heads of state bodies on anti-corruption and integrity issues. The ACN Study on Prevention of Corruption in the Public Sector provides examples of good practices where prevention of corruption is decentralised across the public administration. The third round of the IAP monitoring showed that the appointment of anti-corruption contact persons and ethics commissioners and creating internal audit units in state bodies have become common. These units can indeed help the heads of state bodies demonstrate leadership in preventing corruption; however, to achieve this objective, these units need to be strengthened.

The results of the third round of the IAP monitoring show progress in implementing specific recommendations regarding the integrity of the civil service. Many countries have delineated political and professional positions by legislation in order to protect professional civil servants from politisation. However, undue pressure from political officials on civil servants in practice remains common. Dismissals of public servants after changes in government undermine the stability of the service. The lack of autonomy of civil servants in their decision-making is a serious challenge.

Further progress was identified regarding merit-based recruitment: in several countries merit-based competitive procedures were extended to all public service positions, improvements were made in the recruitment procedures. But discretion of heads of state bodies or political leadership in the recruitment process remains broad, and recruitment without competition in practice is still common.

There was only limited progress concerning remuneration. In many countries, there are still no clear and transparent criteria for the allocation of the variable part of the salary, and senior managers retain broad discretion. Many countries have attempted to link bonuses and other incentives to the results of performance evaluations, but the outcomes of these efforts are not well known. While introducing a performance-based payment system may appear a promising tool to increase staff motivation, it can be difficult and costly to implement in practice, especially when the civil service is going through major transformation. It may also increase politisation.

The third round of monitoring revisited legal and institutional frameworks for the management of conflict of interest and noted important progress in several countries. While legal provisions have been clarified and supervision mechanisms were strengthened, including systems of asset and interest declarations, there is no evidence yet that these efforts have led to the decline of conflicts of interests in practice.

Many countries have updated general codes of ethics and developed codes in some sectors, but the impact of these codes on the practical behaviour of civil servants is limited. There are some examples of codes for sectors with high risks of corruption, e.g. codes for tax officials and judiciary are relatively common. Institutions that are responsible for the promotion of ethics (e.g. ethics commissions in state bodies) are only now being developed in countries. Training for civil servants has been improved in some countries, but little is known about the quality of the training and its impact.

The third round of monitoring showed that many countries have some basic legal provisions regarding reporting and that some countries have introduced regulations for the protection of whistleblowing. To promote the implementation of these regulations in practice, specialised training and institutions responsible for their enforcement are needed.

While there is progress in introducing new regulations and establishing bodies responsible for public sector integrity, efforts to measure the impact of these regulations and bodies are quite limited across the ACN countries. Only a few countries use regular specialised surveys or conduct other studies in order to obtain the evidence that is necessary for the development and enforcement of effective policies.



Based on the above conclusions, the following **recommendations** are proposed for further promoting integrity in the civil service in Eastern Europe and Central Asia:

- Develop and implement public sector integrity policy, e.g. as a part of anti-corruption, sectoral, local or other policies, including risk-based objectives, measures and sanctions and mechanism for control and monitoring of implementation.
- Strengthen the role of leadership of public institutions in promoting integrity.
- Ensure professionalism and prevent politisation in civil service:
  - Ensure legal separation of political and professional public service positions.
  - Protect and monitor stability of professional public service.
  - Strengthen the decision-making autonomy of professional public officials.
- Promote merit-based civil service:
  - Ensure in law and practice merit-based appointments for all professional civil servants regardless of their rank.
  - Introduce merit-based promotions and demotions.
- Guarantee fair and transparent remuneration:
  - Provide transparent and fair remuneration to all civil servants.
  - Establish rules for transparent and objective allocation of bonuses and other benefits, and monitor their enforcement.
- Define and enforce restrictions and conflict of interest rules:
  - Further clarify rules on prohibited conflicts and restrictions, and categories of officials covered by these rules, with the focus on high level officials and officials working in corruption-risk areas.
  - Provide practical training and technical guides to the concerned officials.
  - Enforce these rules by setting up a body responsible for controlling compliance with the rules and sanctioning.
- Strengthen asset declaration systems:
  - Further strengthen the systems of asset and interest declarations especially for high level officials and officials working in corruption-risk areas.
  - Provide bodies responsible for implementation of asset declarations with the duties, rights and resources necessary to ensure publication, verification, sanctioning, collecting statistics and measuring impact
- Improve codes of conduct:
  - Adopt modern codes of conduct for all civil servants, for selected sectors and for high risk areas.
  - Provide practical advice and guidance on request, written guidelines, training and counselling.
  - Monitor enforcement.
- Boost reporting and whistleblowing:

- Monitor reporting by civil servants, provide training, improve reporting channels.
- Further develop whistleblowing legislation, provide practical training, designate responsible authority, collect statistics.
- Measure impact of integrity policies:
  - Commission and use perception surveys about trust of citizens to various branches of public administration, about conflict of interest and integrity of the civil servants.
  - Commission and use surveys about attitudes of civil servants.

## Public procurement

Public procurement is one of the areas of public administration that is highly prone to corruption. Fierce competition for government contracts makes public procurement “a hotbed for bribery”.<sup>369</sup> This is especially the case in the context of an economic downturn and the resulting scarcity of available resources. Bribery and other forms of corruption can occur at all stages of the public procurement cycle: from assessment and formulation of procurement needs, the determination of tender requirements, the choice of award procedure and procurement contract management to the review of complaints. The UN Convention against Corruption (Art. 9) provides that each State Party shall take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective in preventing corruption.

The second round of monitoring of IAP countries showed that, while a number of significant reform efforts have been undertaken to improve public procurement legal framework and practices, public procurement remains a cause of serious concern and requires further action. The general trend has been to simplify procurement procedures, increase their transparency, introduce e-procurement systems or their elements, reinforce complaint and strengthen supervision mechanisms. Several countries, while trying to introduce relevant reforms, faced significant challenges in building capacity and providing necessary resources to implement in practice new legal rules.

Since the start of the third monitoring round, a number of the IAP countries carried out further reforms aimed at streamlining relevant procedures, ensuring competition and moving procurement operations in the electronic environment. The most comprehensive reforms took place in **Kazakhstan, Kyrgyzstan, Mongolia and Ukraine**.

The national public procurement systems should be compared against a number of international benchmarks, in particular: the revised 2014 European Union procurement directives, the revised 2011 UNCITRAL Model Law on Public Procurement, the WTO Government Procurement Agreement, and the EBRD Core Principles on an Efficient Public Procurement Framework. Two other international benchmarks are especially relevant in the anti-corruption context: the OECD Principles for Enhancing Integrity in Public Procurement<sup>370</sup> and TI’s Minimum Standards<sup>371</sup>.

<sup>369</sup> OECD (2007), Bribery in Public Procurement: Methods, Actors and Counter-Measures, page 9, <http://goo.gl/QqzIQX>.

<sup>370</sup> Principles annexed to the OECD Council Recommendation of 16 October 2008, <http://goo.gl/BehGD4>. See also an overview of international standards in: “Report on Anti-Corruption Measures in Public Procurement. International Best Practices”, 2015, report by the EU-funded project “Harmonisation of Public Procurement System in Ukraine with EU Standards”, available at <http://goo.gl/msx24N>.

<sup>371</sup> Available at <http://goo.gl/RvUWrf>.

Table 36. Accession to the WTO Government Procurement Agreement

Country	Status
Armenia	June 2015 (accession)
Azerbaijan	-
Georgia	In the process
Kazakhstan	Commitment to accede
Kyrgyzstan	In the process
Mongolia	Commitment to accede
Tajikistan	In the process
Ukraine	May 2016 (accession)
Uzbekistan	-

Note: «In the process» means that the country has started the accession procedure for the GPA; «Commitment to accede» means that the country in its WTO accession protocol committed to initiate accession to the GPA.

Source: WTO, <https://goo.gl/A8u1WZ>.

### Procurement system and functions

Until recently, all IAP countries used decentralised procurement systems. As was recognised in the previous IAP Summary Report, while decentralising purchasing powers is supposed to result in higher efficiency of public procurement, it also brings additional corruption risks as it requires more effective accountability mechanisms, including better supervision and control.<sup>372</sup> Since then, Mongolia and Kazakhstan established central purchasing authorities. This goes in line with the trend in the OECD countries. In 2013, **Mongolia** enacted amendments that established the Government Procurement Agency (GPA), which is responsible for organising and implementing procurement operations instead of the line ministries. The GPA is in charge of all procurement of large projects (such as inter-regional roads and power plants) and of establishing framework agreements for common use items (such as office supplies) that are purchased by line ministries.<sup>373</sup> In 2014, **Kazakhstan** introduced amendments that allowed the Government to designate a single organiser of procurement for central authorities, while local governors were supposed to do the same for local procurement beginning in 2015.<sup>374</sup> This arrangement was preserved in the new Law on Public Procurement enacted in January 2016. In **Tajikistan**, the Public Procurement Agency carries out procurement for organisations lacking the status of “qualified purchasing organisation”. (The vast majority of public organisations lack this status.)<sup>375</sup> In its new PPL (enacted in 2016), **Ukraine** provided for possibility to designate centralised procuring organisations; the Government or local self-government authorities can designate such organisations to conduct procuring procedures and framework procurement for procuring entities.

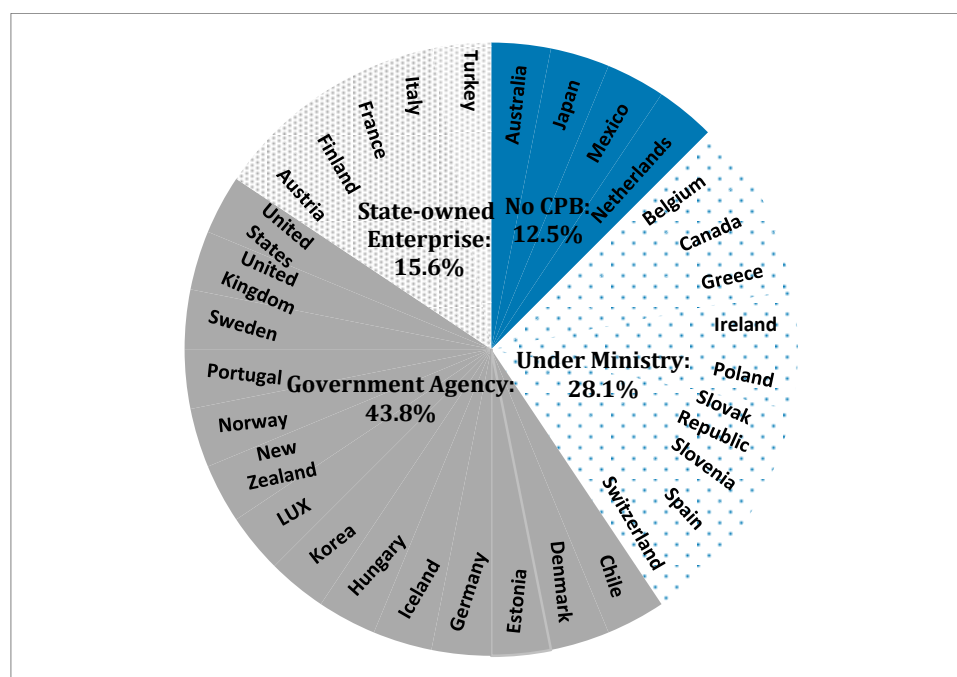
<sup>372</sup> OECD/ACN (2013), Anti-Corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2009-2013, page 128, available at <http://goo.gl/2Cz7dx>.

<sup>373</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, page 76.

<sup>374</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, page 95.

<sup>375</sup> OECD/ACN (2014), Third Monitoring Round report on Tajikistan, pages 85-86.

Figure 11. Legal status of central purchasing bodies in the OECD countries



Source: OECD (2014), Survey on Public Procurement. Cited from: OECD (2015), Government at a Glance 2015, OECD Publishing, Paris, available at <http://goo.gl/QQGxUL>.

As was noted in the 2015 Government At Glance OECD publication, Central Purchasing Bodies (CPBs) have been established in an increasing number of the OECD countries. In fact, with the exception of Australia, Japan, Mexico and the Netherlands, all the OECD countries that responded to the survey have established CPBs.<sup>376</sup> The reasons for establishing CPBs in OECD countries include obtaining better prices for goods and services (100%), lowering transaction costs (96%), improving capacity and expertise (81%), increasing legal, technical, economic and contractual certainty (81%), and ensuring greater simplicity and usability (78%).<sup>377</sup>

Table 37. Role of central purchasing bodies in the OECD countries

	Contracting authority aggregating demand and purchasing	Manager of the national system awarding framework agreements or other consolidated instruments	Coordinate training for public officials in charge of public procurement	Establish policies for contracting authorities
<b>Austria</b>	●	●	○	○
<b>Belgium</b>	○	●	○	○
<b>Canada</b>	●	●	○	○
<b>Chile</b>	○	●	●	●
<b>Denmark</b>	○	●	○	●
<b>Estonia</b>	○	●	○	○
<b>Finland</b>	●	●	○	○

<sup>376</sup> OECD (2014), Survey on Public Procurement. Cited from: OECD (2015), Government at a Glance 2015, OECD Publishing, page 142, available at <http://goo.gl/QQGxUL>.

<sup>377</sup> Idem, page 142.

	Contracting authority aggregating demand and purchasing	Manager of the national system awarding framework agreements or other consolidated instruments	Coordinate training for public officials in charge of public procurement	Establish policies for contracting authorities
France	•	•	•	○
Germany	•	○	○	○
Greece	•	•	•	•
Hungary	•	•	○	○
Iceland	○	•	•	○
Ireland	•	•	•	•
Italy	•	•	○	○
Korea	•	•	•	○
Luxembourg	•	○	○	○
New Zealand	•	•	•	○
Norway	•	○	○	○
Poland	•	○	○	○
Portugal	•	•	○	○
Slovak Republic	•	○	○	○
Slovenia	•	•	○	○
Spain	•	•	○	•
Sweden	○	•	○	○
Switzerland	•	•	•	•
Turkey	•	○	○	○
United Kingdom	•	•	•	•
United States	•	•	•	•
OECD Total				
Yes •	22	22	10	8
No ○	6	6	18	20

Source: OECD (2014), Survey on Public Procurement. Cited from: OECD (2015), Government at a Glance 2015, OECD Publishing, Paris, available at <http://goo.gl/QQGxUL>.

The decision on the distribution of various procurement functions among public authorities has an important effect on the integrity of the procurement system. In the report on **Georgia**, IAP monitoring criticised the fact that the then-existing State Procurement Agency of Georgia combined the functions of policy regulation, supervision and the review of complaints. It was considered to create a conflict of interests, which could undermine integrity of the system.<sup>378</sup> The system in Georgia was subsequently reformed. A similar issue was raised with regard to **Tajikistan**, where the IAP monitoring report noted its concern that the Public Procurement Agency of Tajikistan carries out public procurement of goods, works and services on behalf of purchasing organisations that do not have the status of “qualified

<sup>378</sup> OECD/ACN (2010), Second Monitoring Round report on Georgia, page 36, <https://goo.gl/WmGZwQ>.

purchasing organization”, together with qualified purchasing organisations within joint tender commissions. In addition, the Public Procurement Agency is responsible for implementation and improvement of the state policy on public procurement and control over observance of the statutory requirements and other functions of the authorised body on public procurement. This situation, when the same entity is responsible for both public procurement and supervision thereof, was found to be harmful from an anti-corruption standpoint as such functions should be separated institutionally.<sup>379</sup> Tajikistan noted that it has drafted a new PPL that would establish an independent review body.

In **Azerbaijan**, the IAP Third Monitoring Round report noted that the accumulation of responsibilities in the State Procurement Agency (SPA) also creates a conflict of interest. According to the legislation, single-source procurement can be made in certain circumstances but requires the SPA’s approval. Since the criteria for the exceptional use of single-source procurement are suitably restrictive and reasonably clear, the responsibility for complying with them should rather lie squarely with the contracting authorities themselves, subject to review and sanctions as appropriate. Also, although it is never a voting member of the tender commissions that have to be set up by the contracting authorities, the SPA routinely participates in their deliberations, especially for high-value contracts. In both cases, its ability to independently review complaints and sanction the party at fault is compromised.<sup>380</sup>

### **Non-competitive procurement and exemptions**

One of the main sources of corruption in public procurement systems is the lack of competition. It may be efficient to allow non-competitive (single-source) procurement for low-cost purchases, but it opens up broad possibilities for abuse and should therefore be limited to the bare minimum and properly supervised. Single-source procurement should be an exception, allowed only in a limited number of narrowly defined situations. In 2007, the OECD identified non-competitive procurement as a source of concern for reasons of transparency, democratic oversight, value for money and corruption risks.<sup>381</sup> The OECD Council recommended that governments should consider setting up procedures to mitigate possible risks to integrity through enhanced transparency, guidance and control, in particular, for exceptions to competitive tendering, such as extreme urgency or national security.<sup>382</sup> The extensive use of no-bid procedures remained a cause of concern in some IAP countries. For example, in Ukraine the number of competitive procurement procedures has been falling since 2010 (see the chart below).

Another major concern in terms of preventing corruption in public procurement are exemptions from the Public Procurement Law (PPL). No matter what transparency and accountability provisions the PPL contains, they are ineffective if a significant portion of public contracts is excluded altogether from the procurement regulations or is governed by a special set of (inadequate) rules. The monitoring report on **Kazakhstan** found that the PPL contained 67 exemptions from the scope of its regulation. Some of them were unjustified and did not comply with international standards and best practices. The number of exempt areas increased compared with the second round of monitoring, despite the IAP monitoring recommendation to the contrary.<sup>383</sup> In January 2016, Kazakhstan enacted a new law on public procurement, which changed the regulation in this regard. Now, almost all public procurement has been included within the law, but many categories were moved under the single-source procurement procedure (54 categories). The next round of monitoring will assess these changes.

<sup>379</sup> OECD/ACN (2014), Third Monitoring Round report on Tajikistan, page 85.

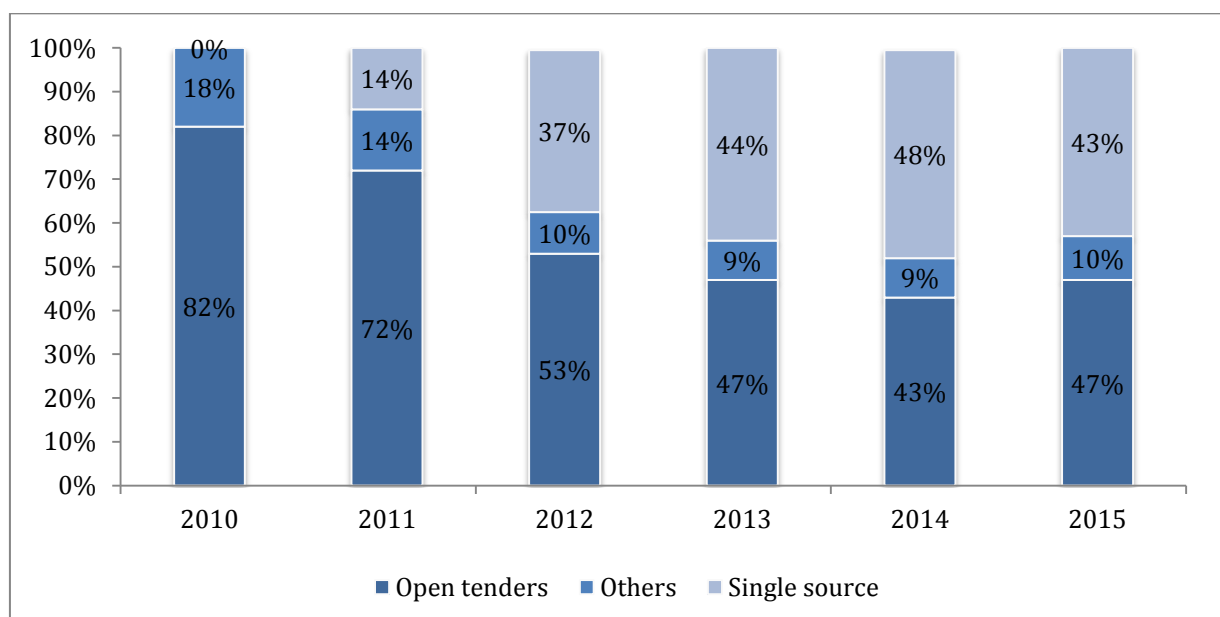
<sup>380</sup> *Idem*, page 70.

<sup>381</sup> OECD (2007), *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, page 21.

<sup>382</sup> OECD (2008), *Principles for Enhancing Integrity in Public Procurement*.

<sup>383</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, page 96.

Figure 12. Volume of procurement methods used in Ukraine (number of procurement, 2010-2015)



Source: OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 131; State Statistics Service of Ukraine data ([www.ukrstat.gov.ua](http://www.ukrstat.gov.ua))

In **Ukraine**, the PPL of 2010 was recognised to be generally in line with international standards. However, since then the law has been gradually eroded by numerous amendments, which purposely excluded whole sectors or types of entities from its regulation: state-owned companies, defence sector, procurement under the green investment programme, utilities sector, etc. In 2010, changes in the laws allowed for the use of single-source procurement for all purchases related to preparation of the 2012 European Football Championship. The changes left purchasing up to the discretion of the special agency tasked with preparing this event, which was co-hosted by Ukraine, and the procurement of the agency was marred with numerous allegations of corruption. The number of exemptions from the PPL increased from five in 2010 to 37 at the end of 2013. The list of procurement objects regulated by special rules increased from 10 items in 2010 to 28 in 2013.<sup>384</sup> The situation significantly improved after the reforms carried out in 2014-2015. The new Law on Public Procurement (enacted on 1 April 2016) includes 16 types of procurement objects when the PPL is not applied. In addition, there are eight areas where procurement is regulated by special laws.

In **Tajikistan**, some large infrastructure projects, like the construction of an important hydroelectric power station, are in practice excluded from the PPL regulation and therefore fall short of meeting relevant standards.<sup>385</sup> Tajikistan noted in its comments that some progress has been achieved since 2014-2015 and that only a small number of state-owned enterprises continue to carry out their procurement outside of the PPL; furthermore, the procurement that is not regulated by the PPL does not concern large infrastructure projects.

In **Georgia**, TI-Georgia concluded that unreasonable exceptions to open bidding were a serious matter of concern as they made it possible for a significant portion of government contracts to bypass the transparent e-procurement system. For example, in 2012, non-competitive contracts accounted for about

<sup>384</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 131.

<sup>385</sup> OECD/ACN (2014), Third Monitoring Round report on Tajikistan, page 85.



45% of all funds spent through public procurement.<sup>386</sup> There are also extensive exemptions from the PPL, for example procurement from reserve funds of the Government, the President and the Tbilisi city hall, procurement connected with national security, and procurement that is urgent. As noted by TI-Georgia, some of these exemptions were unnecessarily excessive and had been misused to keep contracts out of the public eye for political reasons, increasing the risk of corruption, misuse and excessive spending. Similar concerns were raised with regard to rules allowing the President or the Government to classify a tender of any value as a simplified procurement (which is not subject to e-procurement) because they are required to organise an event of state or public importance. TI-Georgia stated that this rule was abused for personal enrichment and should therefore be abolished.<sup>387</sup> The share of simplified (direct) procurement constituted 39% of total value of the public procurement budget in 2013 and 32% in 2014.<sup>388</sup> In a positive move, since mid-2013, even contracts that are not awarded through e-procurement system and procurement that is not covered by the PPL have been published in the electronic platform, thus allowing for public scrutiny.

In 2015, Georgia amended its law and established that any simplified procurement should be agreed with the State Procurement Agency via the eProcurement system. All applications for simplified procurement are public information, and all interested parties may publicly express their objections. Before making a decision, the SPA takes into consideration both the submitted application and any objections expressed by interested parties, including civil society and business society actors. The SPA has developed criteria for the simplified procurement and rules for providing consent to such procurement. The simplified procurement is allowed, for instance: (i) if the value of procurement is below the monetary thresholds defined by the Law, (ii) if supply of goods, rendering service or conducting construction services is an exclusive right of one entity, (iii) in the case of urgent necessity, in order to prevent the deterioration of the quality of an object, etc.

In **Mongolia**, a substantial volume of public sector contracts is exempted from the application of the Law in view of its exemptions, especially in respect of the procurement financed by the Development Bank of Mongolia (DBM) and in the road sector. For example, the volume of potential procurement under two projects carried out by the DBM in 2015 was MNT 124.5 billion, while the entire volume of the public procurement in Mongolia in 2014 was MNT 1,046.7 billion.<sup>389</sup>

### Procurement by public companies

In accordance with international standards and the OECD countries' best practices, state-owned enterprises of an industrial or commercial nature, which are not controlled by the Government directly and act as independent economic agents on competitive markets, must be managed like private businesses and compete on equal terms and conditions. Therefore, they should be excluded from the scope of general rules of public procurement that apply to government authorities. However, if state-owned enterprises have been set up for a specific public purpose such as utility services and concessions, or if they use public resources and are in the operational control of the State, or if they depend greatly on various forms of government support and the like, they must apply the general public procurement rules or special rules established by the Parliament or the government such as a special law or regulation.

This standard was applied by the IAP monitoring in **Kazakhstan**, where state-owned enterprises account for a large part of the economy and public procurement, and Samruk-Kazana, the national holding group, is by far the largest purchaser. In Kazakhstan, the state-owned enterprises are controlled by the government, and their managers are appointed at the highest political level. These companies make use

<sup>386</sup> TI-Georgia (2015), National Integrity System Assessment 2015, page 61, <http://goo.gl/7WwOmy>.

<sup>387</sup> OECD/ACN (2013), Third Monitoring Round report on Georgia, page 64.

<sup>388</sup> OECD/ACN, Progress updates by Georgia, pages 79-90, <https://goo.gl/gM2pEK>; information by the Government.

<sup>389</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, page 77.

of important public resources, enjoy preferences in licensing and free access to funding at state-owned banks and credit facilities, and often receive various forms of subsidies. It is essential that such companies are subject to effective outside control, with proper transparency, including in public procurement rules and practices.

The PPL in Kazakhstan (including the new 2016 law) did not cover procurement conducted by national management holdings, national companies and other similar establishments. These organisations determine their own procurement rules. As was noted in the Second Monitoring Round report, exempting such entities that operate with substantial capital or assets from the government from the scope of regulation is a serious deficiency, potentially leading to corruption. Kazakhstan was thus received a recommendation to establish a competitive public procurement procedure for such entities, which is based on the law and in line with international standards. Procurement of such entities can be regulated in a separate special law. In 2014, Kazakhstan started drafting the law that would regulate procurement of economic entities with participation of the state.<sup>390</sup>

In **Georgia**, the PPL provides that publicly owned companies, i.e. enterprises with more than 50% of shares owned by the state or the local self-government, may be excluded from the PPL scope for a maximum of two years if the Government establishes “a special rule” for procurement by such entities. A number of companies were excluded from the PPL this way and were thus allowed to arrange for their own procurement. The Third Monitoring Round report raised concern in this regard. It noted that while the EU and WTO standards provide that SOEs should be exempted from the general public procurement rules, this relates to companies operating independently (*i.e.* not micro-managed by a public authority) in a competitive market, being subject to bankruptcy, etc. Some SOEs also serve public interests and/or use public resources, similar to utilities entities, and as such require some level of public scrutiny. Therefore, taking into account the high corruption risks inherent in procurement, it is not advisable to fully exclude the SOEs, especially those that operate as monopolies or control important public resources (e.g. companies in extractive industries), from the public oversight and procurement regulations.<sup>391</sup> While they may be exempted from the general PPL, their basic rules on procurement should be regulated by law or government regulations, which should require, as a minimum, increased transparency and disclosure of the procurement operations. It is also problematic that the Government of Georgia has full discretion in deciding which companies should be exempted from the PPL, without any criteria provided in the law as this creates additional corruption risks.<sup>392</sup>

### Review system

Effective and transparent review mechanisms for public procurement are important instruments to prevent and fight corruption in this area. The UNCAC Article 9(1)(d) calls for an effective system of domestic review, including an effective system of appeals, to ensure legal recourse and remedies in the event that the rules or procedures established are not followed.

The complaint mechanism can be used to report and uncover corruption in public procurement and also act as a deterrent. Conversely, it can also be misused to delay the process or harm successful bidders. The review mechanism should therefore be balanced to address these issues. It is particularly important to ensure an impartial review by a body with enforcement capacity that is independent of the respective procuring entities and provides adequate remedies.<sup>393</sup>

<sup>390</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, page 97.

<sup>391</sup> The Government of Georgia noted that even though these procuring entities are excluded from the law, they generally use electronic procurement methods and transparent, competitive procedures. For example, the biggest SOEs, such as JSC “Georgian Railway” or LTD “Georgian Post” which are excluded from the PPL, generally use e-procedures.

<sup>392</sup> OECD/ACN (2013), Third Monitoring Round report on Georgia, page 65.

<sup>393</sup> See, among other standards, OECD (2008), Principles for Enhancing Integrity in Public Procurement.

From the IAP countries, **Georgia, Armenia and Kyrgyzstan** have chosen comparatively unusual models for a review body, comprising of civil society representatives in addition to public officials. This is a commendable development; direct involvement of civil society in procurement procedures should be encouraged. See an overview of review bodies in the IAP countries in Table 39 below.

The possibility of appeal should cover all major decisions with regard to procurement, including on the procurement method selected.<sup>394</sup> That is why the monitoring report on **Georgia** criticised restrictions preventing appeals against decisions on the type of procurement chosen by the procuring agency.<sup>395</sup> Similar restrictions existed in **Azerbaijan, Kazakhstan, and Kyrgyzstan**. The PPL should also guarantee procedural rights, similar to fair trial requirements found in court proceedings, including the right to be heard, the right to have access to the review procedures and documents, and the right provide evidence. The costs of review procedures (e.g. complaint filing fees) should not be so prohibitive as to discourage legitimate complaints.

**Table 38. Public procurement review systems in the IAP countries**

Review mechanism for public procurement	
<b>Armenia</b>	Procurement Complaint Review Board consisting of representatives of state authorities, local communities, Central Bank of Armenia and NGOs who apply for membership. Members should have knowledge of procurement legislation. Ministry of Finance decides on the composition of the board. Term of office of the board's members is five years (with possibility of one extension). The list of the Board members is published (in 2014, it included more than 70 members). For each individual complaint, an <i>ad hoc</i> three-person commission is formed from the board members by a random selection. Before consideration of each appeal selected Board members sign a declaration on the absence of conflict of interests. Decision of the complaint commission is binding (and may nullify procurement contracts) but may be appealed in court. Procurement Support Centre under the Ministry of Finance functions as the Board's secretariat and provides preliminary assessment of complaints and recommendations. Decisions of the Board are published on the Ministry of Finance's web-site. However, in 2013, Transparency International chapter in Armenia criticised the arrangement, as the Board lacked institutional independence, the rotation principle was not fully followed in practice, the Board was dominated by government representatives.
<b>Azerbaijan</b>	The State Procurement Agency (SPA), which combines functions of review with policy regulation and supervision. The SPA is a part of the executive; its head is accountable to the Cabinet of Ministers. The PPL does not allow access of the complainant to the procurement documents or to an oral hearing. <sup>396</sup>
<b>Georgia</b>	Board for the resolution of procurement related disputes at the State Competition and Procurement Agency (later became the State Procurement Agency - SPA) was set up in 2010. It operates independently. The board is composed of six members: three members represent the SPA (Chairman of the SPA is ex officio head of the board, he also appoints two other members of the board from among SPA's staff members) and three other are representatives of the civil society, selected by the civil society sector itself. Board members nominated by NGOs rotate every year; their work is not reimbursed. Decisions of the board are binding and can include revision or revocation of the decision made by the procuring entity. The Disputes Resolution Board (DRB) takes a decision by the majority of votes of present members. An appeal to the Board can be filed electronically free of charge. Regulations on the Activity of the Procurement-Related Disputes Resolution Board provide fair proceedings guarantees. Decisions of the board can be appealed in court. The DRB accepts complaints not only from the parties to the procurement but from any person who monitored the procurement through electronic platform (and was therefore a registered user in the system). The dispute review procedure is optional and a complainant can either address the procuring entity or directly the DRB or lodge an application with the court.  The IAP Third Monitoring Round report stated a number of concerns with regard to the complaint mechanism: the DRB cannot be considered as independent from the Government, namely the

<sup>394</sup> Although the 1994 UNCITRAL Model Procurement Law allowed such exception from the review, it was abolished by the new 2011 wording of the Model Law.

<sup>395</sup> OECD/ACN (2010), Second Monitoring Round report on Georgia, page 37, <http://goo.gl/YCGg7v>.

<sup>396</sup> EBRD (2012), Legal Diagnostic Report on Azerbaijan, <http://goo.gl/W69STC>.

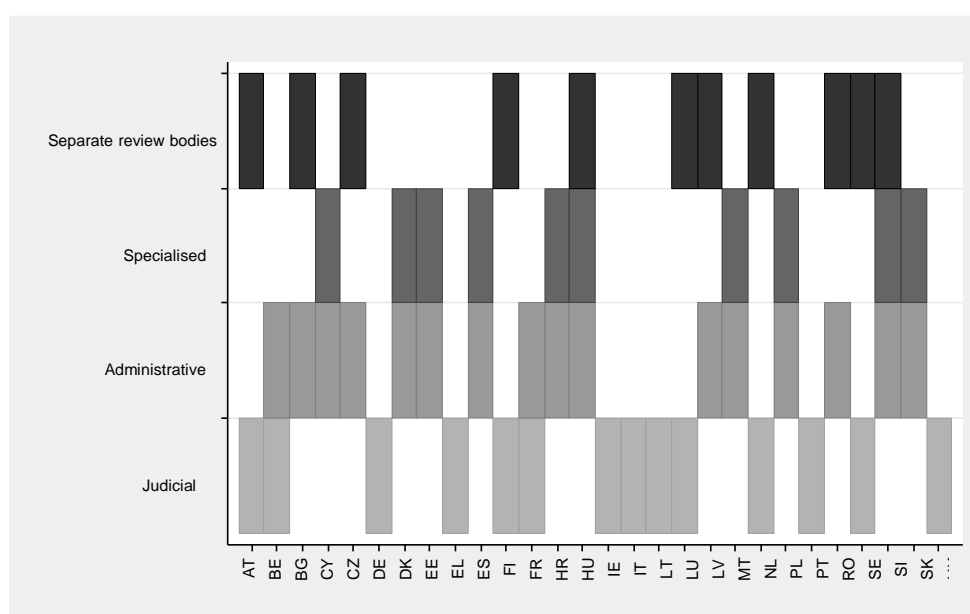
Review mechanism for public procurement	
	<p>SPA; there are no qualification requirements to the DRB members from the “non-governmental” side, which raises the issue of their professionalism; rules on the quorum and voting in the DRB shift balance in favour of the governmental part of the Board who are not independent as such; annual rotation of the civil society DRB members prevents building of institutional memory and experience; low capacity of the Board to review the increasing number of complaints.</p> <p>Since then, Georgia addressed some of these concerns. Relevant procedures and regulations were amended in 2014-2015 to introduce qualification requirements for DRB members representing the civil society, to establish that the election of DRB members from the civil society is conducted independently without intervention of the SPA. The SPA also developed Guidelines on Remedies Procedures.</p>
<b>Kazakhstan</b>	<p>According to the PPL enacted in 2016, the review body is the Public Procurement Committee under the Ministry of Finance of Kazakhstan. The Ministry of Finance is responsible for policy issues in this area. The complaint against decisions of the procuring entity, central organiser of the procurement, other bodies involved can be made within five days after publication of the protocol on the procurement results (such complaint suspends the conclusion of the procurement agreement until the review is over). Complaint can be filed through e-procurement web-portal. The complaint should be considered within 10 days. The review decision can be appealed in court.</p>
<b>Kyrgyzstan</b>	<p>A new complaint mechanism was introduced by the new PPL adopted in 2015. Bidders can file a complaint at any stage of the procurement process through the e-procurement web-portal. The review body is the «independent interdepartmental commission on review of complaints and challenges». It consists of representatives of the civil society, experts and certified specialists in the public procurement. The executive agency designated by the Government for the PP policy issues acts as secretariat to the review commission; importantly, the division in charge of complaints in the agency is subordinated to the commission. According to the Regulations on the Commission, its composition is approved by the Government and has to include an odd number of members, but not less than nine. The law or regulations do not provide for any other details on the formation of the Commission.</p> <p>The complaint is considered within seven business days. The commission can quash decisions of the procuring entity, stop the procurement, etc. The commission can also review complaint after the procurement was concluded (with regard to compliance with the requirements of the law); in this case the agreement is suspended for duration of the review (up to seven days as well).</p>
<b>Mongolia</b>	<p>The complaint procedure depends on the procurement stage: complaints received before the deadline for submission of bids are reviewed by the Government Procurement Agency; after the deadline, but before the contract award – by the Legal and Public Procurement Policy Department of the Ministry of Finance; and after the contract was signed – by court. At any procurement stage before the contract is signed, prior administrative complaint is mandatory before applying to court. Complaints about unfair or restrictive technical specifications, minimum qualification requirements or bidding conditions or collusion may be referred to the Authority for Fair Competition and Consumer Protection. Data on resolution of procurement complaints is not published. The World Bank noted the lack of representation from the private sector and civil society on the complaints bodies.<sup>397</sup></p>
<b>Tajikistan</b>	<p>Agency for Public Procurement of Goods and Service was set up in 2010 and reports directly to the Government (its predecessor was part of the Ministry of Finance). Government appoints Director of the Agency. Complaint should be lodged primarily with the procuring entity and only in case of unsatisfactory decision can be further filed with the Agency or, alternatively, a commercial court. Agency’s decisions are binding but can be appealed in court.</p>
<b>Ukraine</b>	<p>Since 2010, the Antimonopoly Committee has been the review body for complaints related to procurement procedures. The Antimonopoly Committee is a body primarily responsible for competition issues, it is mentioned in the Constitution and has a special status, not being subordinated to the Government. The Head of the Committee is appointed and dismissed by the President upon agreement of the Parliament. To review procurement complaints, the Antimonopoly Committee set up a permanent administrative panel comprising of three state antimonopoly agents (staff members of the Committee). No prior appeal to the procuring entity is required. Decisions of the administrative panel are binding and can be appealed in court.</p>

<sup>397</sup> World Bank (2015), Public Financial Management Performance Report on Mongolia, page 6, <http://goo.gl/pcpZnB>.

Review mechanism for public procurement	
	Under the new PPL enacted in 2016, the complaint is submitted in an electronic form via the e-procurement system. The complaint, once filed, is published on the procurement web-portal. The Law sets different deadlines for submission of complaints depending on the procurement process stage. Once the procurement agreement was concluded, the complaint can be reviewed only by court. Within three days after submission of the complaint the review body decides on the start of the proceedings. The 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 take part in the consideration of the complaint, including via telecommunications in real time. The consideration of the complaint is open for 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.
<b>Uzbekistan</b>	A unit for control over procurement procedures was established in 2011 in the Ministry of Finance's Main Control and Inspection Division. Complaints related to the electronic procurement are reviewed by the Special Commission set up under the Republican Commodities Exchange.

Source: IAP monitoring reports and progress updates; OECD/ACN secretariat research.

Figure 13. Types of review bodies in the EU Members States



Source: European Commission (2015), Study on Economic efficiency and legal effectiveness of review and remedies procedures for public contracts, page 59, <http://goo.gl/IFgRtV>.

### Transparency of public procurement

Transparency is crucial for integrity and corruption prevention in the public procurement system. According to the OECD Principles for Enhancing Integrity in Public Procurement, governments should promote transparency in potential suppliers and other relevant stakeholders, such as oversight institutions, not only regarding the formation of contracts, but in the entire public procurement cycle. They should also ensure that public procurement rules require a degree of transparency that enhances corruption control while not creating 'red tape' to ensure the effectiveness of the system. Article 9(1)(a) of the UNCAC calls for, *inter alia*, the public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and pertinent information on the award of contracts.

Procurement information should be published proactively and provided upon request. It should cover all stages of the procurement cycle and include the publication of procurement plans, tender notices, qualification requirement, information on tender awards. Maximum disclosure is necessary for effective civil society oversight and to ensure a level playing field for suppliers competing for government contracts.

The existing trend in the IAP countries to open up procurement-related information continued with the new examples of best practices. **Georgia** continued providing wide public access to the principal information concerning procurement in the e-procurement system and even for procurement carried out outside of the e-procurement government platform (see the box below). **Kyrgyzstan** removed from its law a threshold on the tender price for its public announcements. A procuring organisation has to publish information on the results of the conducted procurement within 5 days of concluding the procurement contract. The new PP laws of **Ukraine** (adopted in 2014 and 2015) require on-line publication of all essential information about procurement, including tender announcements and detailed information on the procurement results (see the box below).

National legislation and even some international standards mention confidentiality of some procurement-related information. There is sometimes a legitimate interest that may justify the restriction of access to such information, *e.g.* in order to ensure a level playing field for potential suppliers and to avoid collusion.<sup>398</sup> However, such interests should be clearly balanced with the public's right to know how public resources are being allocated and used, which includes access to procurement information. It should not be up to the commercial entity to decide what information should be restricted; instead, the public authority should make the determination using the "harm and public interest test", considering whether the possible harm to private interests outweighs the public interest in disclosure.

#### Box 36. 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 at the central procurement web-portal:

- procurement announcement and tender documentation (not later than 15 days before opening 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 limits);
- amendments in 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 decision on the procurement procedure winner);
- information about rejection of the participant's tender proposal (within one day after 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).

Tender procedures cannot be carried out before or without publication of the announcement about the procurement procedure on the central web-portal. Procurement announcement should also be published in English on the web-portal if the procurement exceeds the limits mentioned above. Information is published on the central web-portal free of charge via authorised electronic platforms (which are used to organise e-procurement – see below another box). Public access to the web-portal is provided for free without any limits. Information on the web-portal is published also in a machine-readable format (as open data).

Source: OECD/ACN secretariat research.

<sup>398</sup> See *e.g.* OECD Principles for Enhancing Integrity in Public Procurement, Principle 1.



In any case, legislation should specifically determine which categories of procurement information should be made accessible in the circumstances. In the second round report on **Kyrgyzstan**, the IAP monitoring recommended that the confidentiality principle be well balanced with the needs of public access to information on procurement, in particular to ensure that tender documentation, procurement procedure protocol, and other essential information on single-source procurement can be obtained upon request by any person. Since 2013, the public procurement portal disseminates the procurement plans, bidding opportunities, contract awards and latest news about changes in the legislation and other normative legal acts regulating public procurement in the Kyrgyz Republic.

### Electronic procurement

E-procurement is another instrument that significantly enhances the transparency of public procurement and allows for better competition and places more effective control over procurement procedures. It was recognised that the use of e-procurement not only increases efficiency by facilitating access to public tenders, thereby increasing competition and decreasing administrative burdens, but it can also improve transparency by holding public authorities more accountable.<sup>399</sup>

**Table 39. Functionalities provided in e-procurement systems in the OECD countries**

	Mandatory and provided	Not mandatory but provided	Not provided
<b>Publishing procurement plans (about forecasted government needs)</b>	AUS, BEL, CHL, DMK, GRC, HUN, IRL, KOR, MEX, NLD, NZL, NOR, PRT, GBR, USA	AUT, CAN, FIN, DEU, ISL, ITA, JPN, POL, SVN, ESP, SWE, CHE, TUR	EST, FRA, LUX, NLD, SVK
<b>Announcing tenders</b>	AUS, AUT, BEL, CAN, CHL, DNK, EST, FIN, FRA, DEU, GRC, HUN, IRL, ITA, KOR, LUX, MEX, NLD, NZL, NOR, POL, PRT, SVK, SVN, ESP, SWE, CHE, TUR, GBR, USA	ISL, JPN	
<b>Provision of tender documents</b>	AUS, AUT, BEL, CHL, EST, FIN, FRA, DEU, GRC, HUN, IRL, KOR, MEX, NLD, NZL, NOR, POL, PRT, SVK, SVN, SWE, CHE, TUR, GBR, USA	CAN, DNK, ISL, ITA, JPN, LUX, ESP	
<b>Electronic submission of bids (excluding by e-mails)</b>	BEL, CHL, EST, FRA, GRC, ITA, MEX, PRT, USA	AUS, AUT, DNK, FIN, DEU, IRL, JPN, KOR, LUX, NLD, NZL, NOR, SVK, SVN, ESP, SWE, TUR, GBR	CAN, HUN, ISL, POL, CHE
<b>e-tendering</b>	BEL, CAN, CHL, EST, GRC, IRL, ITA, MEX, CHE, USA	AUT, DNK, FIN, FRA, DEU, JPN, KOR, NLD, NZL, NOR, PRT, SVK, SVN, ESP, SWE, TUR, GBR	AUS, HUN, ISL, LUX, POL
<b>e-auctions (in e-tendering)</b>	GRC, MEX, SVK, SVN, USA	AUT, DNK, EST, FIN, FRA, DEU, IRL, ITA, NLD, NZL, NOR, PRT, SWE, CHE, GBR	AUS, BEL, CAN, CHL, HUN, ISL, JPN, KOR, LUX, POL, ESP, TUR
<b>Notification of award</b>	AUS, AUT, BEL, CAN, CHL, DNK, EST, FIN, DEU, GRC, HUN, IRL, KOR, MEX, NLD, NZL, NOR, POL, PRT, SVK,	FRA, ITA, JPN, GBR	ISL, LUX

<sup>399</sup> OECD (2015), Government at a Glance 2015, OECD Publishing, page 40, available at <http://goo.gl/OQGxUL>.



	Mandatory and provided	Not mandatory but provided	Not provided
	SVN, ESP, SWE, CHE, TUR, USA		
<b>Ordering</b>	CHL, ITA, NLD, CHE, USA	AUT, BEL, CAN, DNK, FIN, FRA, DEU, JPN, KOR, NZL, NOR, SVN, ESP, SWE, TUR, GBR	AUS, EST, GRC, HUN, ISL, IRL, LUX, MEX, POL, PRT, SVK
<b>Electronic submission of invoices (excluding by e-mails)</b>	AUT, DNK, FIN, ITA, NLD, ESP, SVN, SWE, CHE, USA	FRA, DEU, ISL, JPN, KOR, NZL, NOR, GBR	AUS, BEL, CAN, CHL, EST, GRC, HUN, IRL, LUX, MEX, POL, PRT, SVK, TUR
<b>Ex-post contract management</b>	CHE, TUR, USA	DNK, FIN, DEU, ITA, JPN, KOR, NZL, NOR, SVN, SWE	AUS, AUT, BEL, CAN, CHL, EST, FRA, GRC, HUN, ISL, IRL, LUX, MEX, NLD, POL, PRT, SVK, ESP, GBR

Source: OECD (2014), Survey on Public Procurement. Cited from: OECD (2015), Government at a Glance 2015, available at <http://goo.gl/QQGxUL>.

Almost all IAP countries have either launched full e-procurement systems or selected elements of varying scope. **Georgia** was the first to completely replace paper procurement with electronic procurement, achieving significant savings and drastically improving transparency of the system (see Box 37 below). **Armenia** launched e-procurement in 2011 and has moved its main procurement procedures into electronic form since then. In 2011, **Uzbekistan** established mandatory electronic procurement for all purchases between amounts equivalent to USD 300 and USD 100,000 according to the list of goods and service determined by the Government; electronic procurement (in the form of reverse auction) is organised by the Republican Commodities Exchange.

#### Box 37. E-procurement in Georgia

In 2010, Georgia introduced an electronic procurement system for all types of contracts, irrespective of their size and nature. It meant that 100% of all procurement operations (except for simplified procurement) were moved into an electronic format and paper tenders were abolished. An EU report acknowledged that at the time there was no other public procurement system in Europe that would allow such an extensive use of e-auctions. In 2012, the Georgian e-procurement system received the UN Public Service Award.

All information related to procurement is open and available online through a single internet portal, including: annual procurement plans, tender notices, tender documentation, bids and bidding documents, decisions of tender commissions, contracts. The new system provides for web-payment of tender participation fees, online submission of guarantees, online submission of appeals to Dispute Review Board, etc. All procurement-related interaction was moved online, only one physical visit to a procuring entity is required – for the tender winner to sign the contract. In 2011, the e-procurement system was made bilingual (Georgian/English).

In 2013, the facility for framework agreements was introduced in the electronic procurement system. Modules e-PLAN and Contract Management Registry (CMR) were integrated into the Unified Electronic Government Procurement system (Ge-GP) in 2012-2013. E-PLAN allows for the electronic submission and registration of state procurement annual plans. Announcement of a tender through the system is not allowed if the procuring entity had not previously registered its procurement plan in the e-PLAN module. Procuring entities are obliged to upload the information on the contracts awarded through simplified procurement, any changes to contracts, their fulfilment and actual payments, as well as relative documents in the CMR module. Information that is uploaded in CMR is available for all registered users. In 2015, the e-procurement system was further extended by integrating a newly adopted electronic module of design contest. The e-Contest module enables suppliers to take part in the design contest through the e-Procurement. Also, in 2015, the Simplified Procurement Module was integrated into the Ge-GP: procuring entities are obliged to apply for the SPA's consent on conducting a simplified procurement through this module; information regarding the simplified procurement is public and all the interested parties may publicly express their objections through the module.

Source: IAP monitoring reports and progress updates; OECD/ACN (2013), Anti-Corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2009-2013, page 133.

**Box 38. Innovative e-procurement system in Ukraine («ProZorro»)**

In 2014-2015 Ukraine has introduced an innovative system of e-procurement. The new eProcurement reform in Ukraine was led by civil society activists and Transparency International-Ukraine; it was also the result of cooperation among civil activists and local businesses. In September 2014, a group of volunteers, e-platforms, the regulator and experts signed a memorandum on the creation of a new system and thus started the ProZorro Project. “ProZorro” means “transparent” in Ukrainian. Because of regulatory limitations that existed at the time, in February 2015, the ProZorro was launched for voluntary use by contracting authorities for micro value procurements (under about EUR 5,000). The pilot project involved initially 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 (in the Ministry of Economy that had become the leader of the reform and the National Reforms Council under the President that supported the process).

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), and the process stakeholders (procuring entities, suppliers and contractors) are accessing 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 impact of the eProcurement reforms on the market, a decision was made to fully open the central database code using the most flexible open-source Apache 2.0 license (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.” 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 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; it funded development of the single database software. Afterwards, international donors contributed USD 230,000 towards IT services necessary for development of the single database unit, help desk and project office. The EBRD funded the eProcurement experts and the EU-funded project contributed with advice of the EU consultants and legal support on the EU policies. Plus private donations (qlik.com) and volunteers from Ukrainian IT companies, business schools, and individuals who worked and continue working *pro bono* for the ProZorro Project.

The piloting exercise proved that the “hybrid” concept was operational, it produced first savings and business community engagement far beyond the initial expectations. 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.

In a crucial move, in December 2015, the parliament of Ukraine adopted a new PPL that extended the electronic system to all public procurement covered by the PPL. The law was enacted on 1 April 2016 for central executive authorities and publicly owned companies operating in the utilities sector (companies with 50% or more shares or voting rights belonging to the state or local self-government bodies); and from 1 August 2016 - for all other procuring entities. See text of the Law in English at <http://goo.gl/xyXc12>.

## Box 38. Innovative e-procurement system in Ukraine («ProZorro») (cont.)

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. The ProZorro will also develop 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.

Source: prepared based on the following: EBRD (2015), «Are you ready for eProcurement? Guide to Electronic Procurement Reform», pages 77-84, <https://goo.gl/ufRCqr>; Open Contracting Partnership (2015), Tato Urjumelashvili and David Marghania, «Open Contracting in Ukraine: a collaborative effort for procurement reform», <http://goo.gl/BxRuZ0>.

Internet portals are being increasingly used to provide information on public procurement, but they also serve as platforms for electronic procurement procedures (for example, <http://procurement.gov.ge> in Georgia, [www.armeps.am](http://www.armeps.am) in Armenia, <http://goszakup.gov.kz> in Kazakhstan, [www.zakupki.okmot.kg](http://www.zakupki.okmot.kg) in Kyrgyzstan, <https://prozorro.gov.ua> in Ukraine).<sup>400</sup> Consolidated web-portals for e-procurement (in contrast with placing relevant information and tools on the individual web-sites of purchasing entities) are useful tools for allowing easy public access to procurement information and organise effective electronic procurement. Such web-portals are also widely used in the OECD and ACN countries for providing various services.

Table 40. Main challenges to the use of e-procurement systems in the OECD countries

	Low knowledge/ ICT skills	Low knowledge of the economic opportunities raised by this tool	Low innovative organizational culture	Difficulties to understand or apply the procedure	Difficulties in the use of functionalities	Do not know
Australia	○	○	○	○	○	X
Austria	X	X	X	X	X	◆◆
Belgium	○	○	◆◆	○	○	X
Canada	◆◆	●	●	●	●	X
Chile	○	●	○	●	●	◆
Denmark	○	○	○	●	●	◆
Estonia	○	◆◆	○	○	○	X
Finland	X	X	X	X	X	◆◆
France	X	X	X	X	X	◆◆
Germany	◆	◆◆	◆	○	●	X
Greece	●	◆◆	◆◆	○	○	X
Hungary	◆◆	○	◆	●	●	X
Ireland	○	○	○	●	○	◆
Italy	◆◆	○	◆◆	●	●	X
Japan	◆◆	◆◆	○	●	●	X
Korea	◆◆	○	◆◆	○	○	X
Luxembourg	X	X	X	X	X	◆◆
Mexico	◆	◆	◆	○	○	●
Netherlands	◆◆	◆◆	○	●	●	X
New Zealand	◆◆	◆◆	○	○	○	X
Norway	○	◆◆	●	●	○	X

<sup>400</sup> See other examples from OECD and ACN countries at <http://goo.gl/10VMnm>.

	Low knowledge/ ICT skills	Low knowledge of the economic opportunities raised by this tool	Low innovative organizational culture	Difficulties to understand or apply the procedure	Difficulties in the use of functionalities	Do not know
Poland	◆◆	○	◆	●	●	X
Portugal	◆◆	○	○	●	○	X
Slovak Republic	●	◆	○	○	●	X
Slovenia	◆◆	◆◆	◆◆	●	●	X
Spain	●	◆◆	◆◆	○	○	X
Sweden	X	X	X	X	X	◆◆
Switzerland	X	X	X	X	X	◆◆
Turkey	○	○	◆◆	○	○	X
United Kingdom	◆	●	◆	○	●	X
United States	◆◆	○	◆◆	●	●	X
OECD total						
◆ Procuring entities	14	11	13	X	X	10
● Potential bidders/suppl iers	14	12	10	13	13	8
○ Not a major challenge	8	11	10	12	12	X

Source: OECD (2014), Survey on Public Procurement. Cited from: OECD (2015), Government at a Glance 2015, OECD Publishing.

### Box 39. Electronic procurement in Uzbekistan

Since 1 April 2011 Uzbekistan has implemented a more effective, open and transparent mechanism for conducting public procurement under one contract in the amount equivalent from USD 300 to USD 100,000 by using electronic tenders that are organised by the Uzbek Republican Commodity Exchange. There are quotas for small business. Organisation of the electronic procurement (state and corporate) by the Commodity Exchange is carried out according to the procedure established by the Cabinet of Ministers' regulation of June 2013.

Through the web-site of the Commodity Exchange ([www.uzex.uz](http://www.uzex.uz)) the potential bidders are informed about public contracts for procurement of goods (works, services). Budgetary organisations and receivers of budgetary funds that carry out public procurement are obliged to publish at the special information portal ([www.dxarid.uz](http://www.dxarid.uz)) announcements of upcoming procurement at least 10 days in advance (starting from 1 January 2014; earlier – 30 days) of the date when the contractor is determined.

Since 2013 stock companies that have state shares (corporate procurement) are obliged to use electronic procurement system. In 2015, to improve the system, a new electronic platform was introduced – «E-catalog». Here suppliers can make their proposals. The e-catalog is used to procure certain types of goods according to four categories: “Components and spare parts for computer equipment”, “Spare parts for vehicles”, “Building materials”, “Other equipment”, if the amount under one contract does not exceed equivalent of USD 100,000. To facilitate participation of small business entities in the public procurement, in 2015, more than 30 new trading platforms and 20 brokerage firms have been established in the regions (the overall amount of brokerage firms and trading platforms reached 811 and 189 respectively).

Source: Information provided by the Government of Uzbekistan.

### Prevention of conflicts of interests

As public procurement is an area highly susceptible to corruption, it requires robust mechanisms to maintain its integrity, including the management of conflict of interests. It is a good practice to complement the general conflict of interests rules contained in anti-corruption legislation with specific

requirements in the procurement law.<sup>401</sup> According to the new EU Directive on public procurement (no. 2014/24/EU, enacted in April 2016), Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators. The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority (or of a procurement service provider acting on behalf of the contracting authority) who are involved in the conduct of the procurement procedure or who may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.<sup>402</sup>

For instance, the PPL of **Ukraine** introduced the notion of “related persons” and established some restrictions to avoid possible conflicts of interests of such persons. Members of the Antimonopoly Committee’s administrative panel (a review body) are not allowed to take part in the consideration of complaint if he or she is “related” to the complainant or the procuring entity. The Ukrainian Law uses concept of “related persons” also to prevent bid rigging by prohibiting an entity that is “related” to another bidder (or the procuring organisation) from participation in the procurement. The definition of the “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 in the civil service) and disclosure of beneficial owners of all legal persons (see below chapter on access to information). However, the IAP Third Monitoring Round report noted that none of the above-mentioned laws seems to identify a conflict of interest, which may occur in the procurement process due 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 as a part of tender submissions.<sup>403</sup>

The 2011 PPL of **Armenia** provides that after the bid opening meeting, a member of the commission, who has a conflict of interests related to the given procurement procedure, must halt participation in that procedure. Otherwise, the chairperson of the tender commission should dismiss the member. In cases of conflict of interests of the commission’s chairperson, he or she is to be replaced by another commission member. Members of the commission must sign a statement confirming the absence of any conflict of interest. Similar regulations are provided for members of the complaint review board.

According to legislation in **Uzbekistan**, a member of the commission has to withdraw from the commission if the procurement bidder is his or her close relative (if the participant is a natural person or the owner or executive of the legal entity) or if the member of the commission has been employed by participant within certain timeframe. Members of the commission, before starting the evaluation and decision process, must sign a declaration that they are not in a conflict of interest situation. Also, experts invited by the commission to assist in elaboration of technical specifications and evaluation of tenders and offers should also sign such a declaration.<sup>404</sup>

### Debarment

A strong deterrent against corruption is the temporary or permanent debarment from participation in the public procurement of persons or entities found liable for corruption-related offences. In 2009, the OECD Council recommended that member countries’ laws and regulations should permit authorities to suspend enterprises determined to have bribed foreign public officials from competition for public

<sup>401</sup> See, among other, TI (2013), Conflict of Interests in Public Procurement, available at <http://goo.gl/JlyFkY>.

<sup>402</sup> Source: <http://goo.gl/Y9z6xZ>.

<sup>403</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 134.

<sup>404</sup> OECD/ACN (2012), Joint First and Second Monitoring Rounds report on Uzbekistan, pages 49-50, <http://goo.gl/75SpWq>.



contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance.<sup>405</sup> It is a good practice to provide such disqualification from public procurement as a possible sanction for legal persons for corruption offences or as an administrative consequence of the company or its officer being held liable for corruption.

**Box 40. Debarment under the EU Directive 2014/24/EU**

<p>Article 57:</p> <p>«1. Contracting authorities <u>shall exclude</u> an economic operator from participation in a procurement procedure where they have established ... that that economic operator has been the subject of a conviction by final judgment for one of the following reasons:</p> <p>(a) participation in a criminal organisation...;</p> <p>(b) <i>corruption</i>...;</p> <p>(c) fraud ...;</p> <p>(d) terrorist offences or offences linked to terrorist activities...;</p> <p>(e) <i>money laundering</i> or terrorist financing...;</p> <p>(f) child labour and other forms of trafficking in human beings ... .</p> <p>The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein. ...</p> <p>4. Contracting authorities <u>may exclude</u> or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:</p> <p>(a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2) [obligations in the fields of environmental, social and labour law];</p> <p>(b) where the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings...;</p>	<p>(...continued)</p> <p>(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of <i>grave professional misconduct, which renders its integrity questionable</i>;</p> <p>(d) where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into <i>agreements with other economic operators</i> aimed at distorting competition;</p> <p>(e) where a <i>conflict of interest</i> within the meaning of Article 24 cannot be effectively remedied by other less intrusive measures;</p> <p>(f) where a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure ... cannot be remedied by other, less intrusive measures;</p> <p>(g) where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract...;</p> <p>(h) where the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information ...; or</p> <p>(i) where the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.</p>
--	---

Only few IAP countries have a debarment system compliant with the above-mentioned standards.

**Georgia** has established a register of “unreliable persons, contenders and providers participating in the procurement”, but it includes companies which failed to perform properly under a procurement contract. Debarment for commission of corruption or other related offences (fraud, money laundering, etc.) was neither automatic nor mandatory. The IAP monitoring report noted concern about the right of the procuring entity to debar a company without any guidelines and strict criteria raises, as it may lead to arbitrary debarment and exclusion of competitors. In addition to court appeal, there should also be a possibility for the company to challenge and reverse its debarment through administrative procedure (e.g. to the SPA or the DRB).<sup>406</sup> The procedure was subsequently changed; now, the decision on debarment is made by the SPA after hearing the procuring entity and the company. The SPA has discretion to register

<sup>405</sup> OECD (2009), Council Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, <https://goo.gl/yIF3gn>.

<sup>406</sup> OECD/ACN (2013), Third Monitoring Round report on Georgia, page 71.

the company in the “black list” depending on the circumstances of the cases (e.g., effect on competitiveness, balance of public and private interests, damages caused). The SPA has two months to decide on the debarment request and has to issue a justified decision. The possibility to debar was also introduced in case of corruption or fraud. The debarment procedure was included in the e-procurement system.<sup>407</sup>

The new PPL of **Ukraine** (enacted in 2016) established a new system of debarment. The procuring entity is now obliged to reject the bid in the following cases:

- 1) 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;
- 2) information on the legal entity that is a tenderer is included in the Unified State Register of Perpetrators of Corruption or Corruption-related Offences;
- 3) an officer (official) of a tenderer authorised 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;
- 4) 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;
- 5) an individual tenderer, an officer (official) of tenderer who signed the tender was convicted of a crime committed with mercenary motives, for which the conviction has not been lifted or cancelled;
- 6) 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, authorised person(s) of the contracting authority;
- 7) a tenderer has been declared bankrupt;
- 8) the Unified State Register of Legal Entities and Sole Entrepreneurs contains no information on the ultimate beneficial owner (controller) of the tenderer;
- 9) a legal entity that is a tenderer has no anti-corruption programme or no authorised officer in charge of the implementation of the anti-corruption programme, if the value of the procurement contract equals to or exceeds UAH 20 million.

### Conclusions and recommendations

Public procurement is one of the areas where IAP countries have launched a number of meaningful reforms aimed, in particular, at increasing transparency and integrity of relevant procedures, launching various electronic procurement platforms. **Armenia, Georgia, Kazakhstan and Ukraine** have achieved significant progress in establishing electronic procurement systems, which make public procurement much more accountable and less prone to corruption. Other IAP countries have also started relevant efforts. At the same time, low capacity and a lack of resources in institutions involved in public procurement, a poor record of prosecuting corruption in the area of public contracts and a lack of or ineffective integrity instruments (notably, on conflicts of interest and debarment) still make public procurement one of the most corrupt activities of the public administration.

Procurement remains an area in the IAP countries where corruption is widespread and persistent despite the reform efforts. The following problems or practices can be highlighted and should be further monitored during the next round of monitoring:

<sup>407</sup> OECD/ACN, Progress updates by Georgia, pages 79-90, <https://goo.gl/gM2pEK>.



- an excessive number of procurement contracts awarded outside of competitive procedures (negotiated or direct procurement);
- a significant number of exemptions from the PPL;
- public companies and development funds that operate with large resources are excluded from the general regulation;
- splitting the price of a contract in order to decrease the contract value and thus avoid a competitive bidding procedure;
- technical specification often favour certain contractors;
- unclear selection criteria;
- insufficient time for bid preparation;
- competitive tenders are cancelled in order to use a non-competitive procedure;
- bid rigging by companies affiliated with public officials in charge of the procurement;
- procurement contract conditions are changed after award of the contract and such changes are not commercially justified or violate legislation;
- important information about procurement process is withheld;
- ineffective complaint systems;
- conflicts of interest among procurement officials and bidders, contracts awarded to contractors related to the managers of public authorities, conflict of interests provisions do not cover sub-contractors;
- lax supervision by public officials of contract implementation;
- extortion by public officials of undue benefits by delaying payments under the contract.

#### **Recommendations:**

- Limit the number of exemptions from the public procurement law (in terms of sectors and entities subject to the law's regulation), restrict to the minimum use of single-source (negotiated/direct) procurement and eliminate other rules inhibiting competition (e.g. unjustified privileges for local suppliers). Ensure that publicly owned companies use competitive and transparent procurement rules established by a law.
- Prevent conflicts of interest in procurement procedures, in particular, by: (a) separating functions of policy making, complaint review and supervision; (b) providing specific rules for managing conflict of interests of public officials and other persons taking part in the procurement procedures (including members of the selection panels and review boards), including their declarations of interests.
- Strengthen the review mechanisms by ensuring an adequate level of independence of relevant bodies, transparency of their procedures and guarantees of fair proceedings. Allow appeals against any procurement-related decisions, in particular against decision on the procurement method selection.
- Provide sufficient resources to properly implement procurement legislation by procuring entities, supervision and complaint bodies; provide integrity training for procurement officers.
- Further enhance transparency of public procurement by proactive publication of all main procurement-related information, including the results of the procurement and procurement

contracts and their changes. Create a single-entry government web-portal for disclosure of procurement information, including in the machine-readable formats.

- Extend electronic procurement systems to cover all public procurement at all levels and stages.
- Encourage and provide for possibility of a direct civil society participation in the procurement procedures as an important oversight and accountability instrument. Introduce civil society monitoring of procurement and integrity pacts, especially in the procurement of infrastructure projects.
- Establish the effective sanction of mandatory debarment from public procurement of natural and legal persons who have been involved in the corruption-related offences (regardless of whether the offence was connected with the procurement); compile and make publicly available lists of such persons. Ensure that other sanctions for procurement-related violations are dissuasive.
- Collect and regularly publish comprehensive statistics on public procurement and complaints.
- Review the public-private partnership and concession award procedures to ensure clear regulations in the law, fair competition, efficiency, integrity and transparency of the procedures.

## Access to information

### *Laws on access to information*

Access to information is an important means for ensuring government accountability and to control corruption by making it more difficult to conceal it. Ensuring effective public access to government-held information should be a part of any corruption prevention mechanism. The UN Convention against Corruption (Art. 13) mentions it as one of the measures necessary to strengthen civil society participation in the prevention and the fight against corruption. It also calls for measures to enhance transparency in public administration, including with regard to organisation, functioning and decision-making process (Art. 10).

Countries, when endorsing the OECD Istanbul Anti-Corruption Action Plan in 2003 and later, committed to ensure public access to information especially information on corruption through the development and implementation of:

- Requirements to give the public information that includes statements on government efforts to ensure lawfulness, honesty, public scrutiny and corruption prevention in its activities, as well as the results of concrete cases, materials and other reports concerning corruption;
- Measures which ensure that the general public and the media have the freedom to request and receive relevant information in relation to [corruption] prevention and enforcement measures;
- Information systems and data bases concerning corruption, the factors and circumstances that enable it to occur, and measures provided for in governmental and other state programmes/plans for the prevention of corruption, so that such information is available to the public, non-governmental organisations and other civil society institutions.

The second round of the IAP monitoring provided an in-depth evaluation of the available legal frameworks and highlighted their deficiencies, while also pointing out problems in enforcement of the laws. The third monitoring round examined the enforcement of the laws and other remaining legal issues.

IAP countries employ various mechanisms to guarantee access to public information. While most of the states have specific laws on freedom of information (some even have two laws or three like **Uzbekistan**),

which may formally be assessed as being of good quality, their practical implementation generally remains very weak. Below is a table comparing the quality of the laws with their implementation.

**Table 41. Access to information laws in the IAP and ACN countries**

	Name of the Law(s)	Year of the Law	Rank in the Global Right to Information rating <sup>408</sup>	Rank in Open Government Index (Right to Information) <sup>409</sup>
<b>Serbia</b>	Law on Free Access to Information of Public Importance	2003	<b>1</b>	61
<b>Slovenia</b>	Access to Public Information Act	2003	<b>2</b>	30
<b>Croatia</b>	Right of Access to Information Act	2013	<b>4</b>	33
<b>Azerbaijan</b>	On the Right to Obtain Information	2005	<b>11</b>	-
<b>Macedonia</b>	Law on Free Access to Information of Public Character	2006	<b>13</b>	34
<b>Moldova</b>	Law on Access to Information	2000	<b>16</b>	46
<b>Ukraine</b>	On Access to Public Information	2011	<b>19</b>	43
<b>Bosnia and Herzegovina</b>	Law on Freedom of Access to Information	2000	<b>25</b>	31
<b>Kyrgyzstan</b>	On Guarantees and Freedom of Access to Information	1997	<b>28 (for the 2006 Law)</b>	64
	On Access to Information Within the Competence of State Bodies and Local Self-government Bodies	2006		
<b>Georgia</b>	Administrative Code, Chapter 3 “Freedom of Information”	1999	<b>31</b>	29
<b>Armenia</b>	On Freedom of Information	2003	<b>33</b>	-
<b>Estonia</b>	Public Information Act	2000	<b>37</b>	14
<b>Bulgaria</b>	Access to Public Information Act	2000	<b>41</b>	49
<b>Romania</b>	Law on Free Access to Public Information	2001	<b>53</b>	51
<b>Mongolia</b>	Law on Information Transparency and Right to Information	2011	<b>57</b>	75
<b>Poland</b>	Act on Access to Public Information	2001	<b>59</b>	20
<b>Czech</b>	Freedom of Information Act	1999	<b>71</b>	22

<sup>408</sup> Global rating assessed laws in 102 countries; the rating does not measure quality of implementation. It is based on six indicators: Right of access; Scope; Requesting procedures; Exceptions; Appeals; Sanctions; Promotional measures. Compiled by the Access Info and Centre for Law and Democracy. See [www.rti-rating.org/country\\_data.php](http://www.rti-rating.org/country_data.php).

<sup>409</sup> World Justice Project (2015), Open Government Index (<http://goo.gl/iVHYY0>). Indicator “Right to information” measures whether requests for information held by a government agency are granted, whether these requests are granted within a reasonable time period, if the information provided is pertinent and complete, if requests for information are granted at a reasonable cost and without having to pay a bribe, whether people are aware of their right to information, whether relevant records – such as budget figures of government of officials, ombudsman reports, and information relative to community projects – are accessible to the public upon request.

Republic				
<b>Latvia</b>	Freedom of Information Law	1998	<b>73</b>	-
<b>Slovakia</b>	Act on Free Access to Information	2000	<b>77</b>	-
<b>Albania</b>	Law on Right to Information of The Official Documents	1999	<b>80</b>	54
<b>Lithuania</b>	Law on the Provision of Information to the Public	1996	<b>90</b>	-
<b>Uzbekistan</b>	Law on Guarantees and Freedom of Access to Information	1997	<b>94 (for the 2002 Law)</b>	101
	Law on Principles and Guarantees of Freedom of Information	2002		
	Law on Transparency of Activities of State Authorities	2014		
<b>Tajikistan</b>	Law on the Right for Access to Information	2008	<b>100</b>	-
<b>Kazakhstan</b>	Law on Access to Information	2015	-	85

Source: IAP monitoring reports; OECD/ACN secretariat research.

**Kazakhstan** was the latest IAP countries to adopt a dedicated access to information law. Its Law on Access to Information was adopted in November 2015 after a long period of preparation and discussion. Adoption of the law follows the IAP recommendation from the second and third rounds of monitoring. The new law provides a legal basis for access to information right but has a number of deficiencies, and some provisions fall short of international standards.<sup>410</sup> See below an analysis of some provisions of the law.

In 2014, **Georgia** has started the process of a comprehensive revision of its access to information framework and the elaboration of a Freedom of Information Act, as the IAP monitoring recommended. A draft was developed by a working group under the Ministry of Justice, taking into account input from civil society and international experts.<sup>411</sup>

#### *Scope of entities covered*

According to international standards, the requirement to provide access to information should extend to all branches and levels of state power (including legislative and judicial authorities) and local self-government, as well as public corporations and private organisations, insofar as they carry out public functions (e.g. a bar association or medical board vested with public regulation of the profession; a private utility company providing water or electricity) or receive public funding (e.g. a political party receiving state funding; a company implementing a government contract; a museum or archive receiving public subsidies).

The IAP countries' laws cover state and local self-government authorities. However, other public institutions and private-sector entities are covered to varying degrees. In **Armenia**, "administrators of information" that are subject to the access of information requirements include organisations funded from the budget, as well as "organisations of public significance". These include private organisations that have a monopoly or dominating position on the market, organisations in the area of health protection, sport, education, culture, social security, transport and communications, private companies providing utilities.

<sup>410</sup> See various expert opinions on the relevant draft law (in Russian) at <http://goo.gl/u1vJPI>. See also statement by the OSCE Representative on Freedom of the Media, <http://goo.gl/THKXor>.

<sup>411</sup> OECD/ACN (2015), Progress update by Georgia, October 2015, page 98, <https://goo.gl/1qS9te>.

In **Azerbaijan**, the law extends to legal entities implementing public functions, as well as to private legal entities and individuals engaged in education, healthcare, cultural and social fields based on laws, other legal acts as well as contracts (concerning information produced or acquired as a result of public duties carried out, or services provided in the mentioned fields); legal entities with a dominant market position, as well as those holding a special or exclusive right in the market, or a natural monopoly (in relation to the information on provided services or goods and their price); fully or partially state-owned or subordinate non-commercial organisations, off-budget funds, as well as the trade associations where the state has a presence (in relation to information on the use of the state budget funds or state property).

In **Georgia**, entities of private and public law are covered if they receive funding from the state budget.

In **Mongolia**, the Right to Information Law covers a broad range of organisations subject to the requirement to provide information (either proactively and upon request): the Secretariat of the State Great Hural (Parliament); the office of the President; the Government's Cabinet; the Administrative office of the National Security Council; state central administrative or other state administrative organisations; the judiciary and prosecutor's offices of all instances; institutions established by the State Great Hural with exception of the Government Cabinet; administrative offices of local municipal and self governing bodies, legal entities owned (partially or fully) by the local or national governments;; non-governmental organisations executing specific functions of the executive branch in accordance with the Law on Government; and the Mongolian National Public Radio and Television. The Law, however, does not apply "in ensuring transparency in operation of the armed forces, border protection and internal troops, and intelligence organization". According to the IAP Review Report on Mongolia, such a broad exclusion is not justified – all public entities without exception should be covered by provisions on transparency and access to information; exemptions should not be based on the type of institution, but rather on the content of specific information. They should also be governed by the general rules on the restriction of information in access. The Parliament and the President should be covered by the Law as such, not only their offices (secretariat), as this may exclude from the Law's scope information related to legislative work that is produced by the MPs or the President without the use of their secretariats.<sup>412</sup>

The 2015 Law of **Kazakhstan** on access to information covers all public authorities and institutions, as well as all state enterprises, any company in which the state has shares and their affiliated entities. It also covers legal persons that receive budgetary funds (with regard to information about the use of such funds), entities that dominate market or are monopolies (with regard to information about prices on goods or services), other legal entities with regard to information about environment, emergencies, catastrophes, fire safety, epidemic and radiation situation, safety of products and other factors that can be harmful for population. This is quite a broad range of entities covered, which should be welcomed.

**Ukraine's** law has the most extensive list of entities that are obliged to provide information upon request. In addition to all state and local self-government bodies, these are entities which receive funding from the state or local budgets, entities to whom public functions have been delegated, natural monopolies, companies with dominant market share or companies with exclusive or special rights. It also covers any economic entity if the relevant information is of public interest. The latter includes a broad and non-exhaustive range of issues, including, in particular, the state of environment, quality of food and household products, catastrophes, emergencies, violation of human rights. In addition, a draft law was submitted in the parliament in 2015 that would further extend the scope of the law to: 1) all legal entities of public law and public companies which will be subject to the access to information provisions with regard to all information in their possession (not just information about the use of public funds as before); and 2) legal entities that use public property at least with regard to information about the use and disposal of such property.

<sup>412</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, pages 84-85, <https://goo.gl/h48OYI>.

*Restrictions and the ‘harm and public interest test’*

Many laws in the IAP countries automatically exclude classified or confidential information from the access to information regime. For instance, in **Kyrgyzstan**, which has a progressive provision in its Constitution about the right of access to information, the Law does not extend to information “access to which is restricted in compliance with legislation of the Kyrgyz Republic”. This significantly undermines the efficacy of the whole Law, which is supposed to establish basic provisions with respect to access. It should also set up grounds for exceptions and should prevail over other laws that regulate certain kinds of classified information (*e.g.* state secrets). The reference to the “legislation” is also problematic, because it includes secondary legislation. The Law therefore allows exceptions from the general regime by adopting secondary legislation and, consequently, making provisions of the Law hollow.<sup>413</sup>

Similarly, the new law of **Kazakhstan** on access to information (2015) explicitly limits its scope to information “that is not information of restricted access” (Art. 3) and allows denial of access if the requested information was restricted in access (Art. 11).

In **Mongolia**, the list of prohibitions from disclosure is open-ended, and it can be extended by other laws or even “legislation”, which can mean secondary legislation approved by administrative and other authorities. This allows unlimited and unchecked extension of types of information subject to non-disclosure.<sup>414</sup>

The effective implementation of specific access to information laws is often undermined by legislation on state and official secrets, which establishes a separate regime for classifying information that is not subject to general access to information provisions.

According to international standards, any request of information should be considered on a case-by-case basis and access may not be denied just because certain category of information is concerned (*e.g.* classified or official information). The denial of access to information should be based on a narrow list of interests protected by law and should only be done after balancing the potential harm of disclosure to such interests against the public interest in obtaining access. Restrictions on access to information should be limited to those necessary in a democratic state and be proportionate to the protected interest. Therefore, in each case when the public body seeks to deny access, it should justify such restriction on a case-by-case basis by applying the following “harm and public interest tests”: 1) restriction of the access falls under a legitimate interest listed in the law; 2) disclosure would cause real substantial harm to that interest; and 3) the harm to the interest is greater than the public interest in obtaining access to the information. Only when all three elements are in place should access be denied. Even then, only the specific information that passed the test should be withheld (redacted) – not the whole document).

Such an approach to restricting access to information stems from the fundamental principle of maximum disclosure, meaning that all information held by public authorities and similar entities is presumed to be open and should be provided upon request, unless the public authority proves that disclosure would cause substantial harm to the protected interest (*e.g.* national security or privacy) and such harm overrides the public interest in disclosure. This approach is considered to be the best practice and is supported by various international instruments, *e.g.* the Council of Europe Convention on Access to Official Documents.<sup>415</sup>

<sup>413</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, pages 61-62, <http://goo.gl/1oCL5H>.

<sup>414</sup> OECD/ACN (2014), Review Report on Mongolia, p. 53, <https://goo.gl/TesxHR>.

<sup>415</sup> Article 3 of the Convention, <http://goo.gl/TfNWZz>. Other standards: Model Inter-American Law on Access to Public Information, 2010; Model Law on Access to Information for Africa, 2011; Article 19 Model Freedom of Information Law; Global Principles on National Security and the Right to Information (“The Tshwane Principles”), 2013; General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights, 2011, Human Rights Committee. See also, among others, IAP Second Monitoring Round reports on Armenia (page 64, <http://goo.gl/rPNbk8>), Kazakhstan (pages 91-92, <http://goo.gl/Jjv0Y0>), Kyrgyzstan (page 62, <http://goo.gl/Z0Sq5L>).

The IAP monitoring has recommended implementing the harm and public interest test into the region's laws. For example, the review report on **Mongolia** recommended that the country stipulate that no category of information should be absolutely exempt from disclosure; that any restriction of access to information, including state secrets, should be based on the law, be necessary and proportionate; and that such restrict should only be possible once the "harm and public interests" test is satisfied, on a case-by-case basis, in line with international best practice.<sup>416</sup>

From the IAP countries, only **Ukraine** provides a specific requirement to apply the three-part harm and public interest test for any restriction of access to information in its Access to Public Information Law (Art. 6). This law permits a restriction of access under the following conditions: 1) the restriction corresponds to interests of national security, territorial integrity, public order, protection of health of the population, protection of reputation and rights of other persons, prevention of disclosure of information obtained confidentially or sustaining authority and impartiality of the judiciary; 2) disclosure of information may inflict substantial harm to these interests; and 3) such harm outweighs the public interest in accessing the information.

Similar provisions exist in some other ACN countries. In **Bulgaria**, certain types of restricted in access information (but not state or official secrets) should be provided on request if there is an overriding public interest. The latter exists when the information: a) gives opportunity to the citizens to form their own opinion and to take part in on-going discussions; b) improves or facilitates the transparency and accountability of public bodies with regard to the decisions they make; c) guarantees the lawful fulfilment of the legal obligations of public bodies; d) reveals corruption and abuse of power, poor management of state or municipal property, or other unlawful actions (or inaction) of administrative bodies or officials by which state or public interests, rights or legal interests of other people are affected; e) disproves dissemination of false information which concerns vital public interests; and f) is related to the parties, subcontractors, the subject, the price, the rights and obligations, conditions, terms, and sanctions specified in public procurement contracts.<sup>417</sup> In **Serbia**, the right of access may, in exceptional circumstances, be subject to limitations, to the extent necessary in a democratic society to prevent a serious violation of an overriding interest based on the Constitution or law.<sup>418</sup>

The access to information law should also establish a list of information whose access may not be restricted on any grounds. In this way, the legislator conducts the harm and interest tests when adopting the law and determines that certain information should always be disclosed as the public interest prevails over any other considerations. Such a list should include information about corruption offences or other violations of anti-corruption requirements.

#### *Processing of information requests*

The main avenue of access to information is through filing a request for information with an information holder (public authority or other entity). The requestor should not be obliged to provide reasons or any explanation as to why he or she needs certain information. The right of access should not be conditioned on the existence of a legitimate interest in obtaining information.<sup>419</sup>

There should also not be any requirement to provide the real name of the requester (anonymous requests should be allowed), as it does not matter who asks what information – every person has the right to access information and the public authority has the duty to disclose it. Requiring the requestor's identity violates the principle of maximum disclosure because formalities for requests should not exceed what is

<sup>416</sup> OECD/ACN (2014), Review Report on Mongolia, p. 57.

<sup>417</sup> Access to Public Information Act of Bulgaria, Additional provision, <http://goo.gl/NELHEJ>.

<sup>418</sup> Law on Free Access to Information of Public Importance of Serbia, Article 8, <http://goo.gl/qtrGOs>.

<sup>419</sup> See e.g. Article 4 of the Council of Europe Convention on Access to Official Documents, <http://goo.gl/BnkUAp>.



essential in order to process the request.<sup>420</sup> The only exception could be for access to one's own personal data, when it is reasonable to require some form of identification to confirm identity of the individual.

The law should explicitly state that information requests may be lodged in any form suitable for the person (in writing, orally, by e-mail or other technical means). The form of the reply should be chosen by the requester as well: the public authority should provide information in the form requested, unless the information does not exist in such form and transferring it to the requested form is unreasonably burdensome.

As the right of access concerns information which already exists, the response time should be generally quite short. Requests to create new information (*e.g.* provide analysis or explanation of the law) or take certain actions (*e.g.* recognise a legal right, react to a complaint) should be dealt with under a separate administrative procedure (not regulated by the access to information law) and may require more time to process.

The range of time limits allowed by law to reply to an information request in the IAP countries is provided in the table below. When the possibility for an extension exists (*e.g.* due to the request of a significant amount of documentation or the need to search within a large quantity of documents), the applicant should be notified within the initial time period for replying to a request that the time for processing has been extended.

**Table 42. Time allowed for processing information requests in the IAP countries**

Country	Basic time for processing a request	Possibility of extension
<b>Armenia</b>	5 working days	Up to 30 days overall ("If additional work is needed to provide the information required")
<b>Azerbaijan</b>	7 working days	Additional 7 working days ("if information owner ... needs the additional time for preparation of the information, or if there is a need to define the essence of the request or to investigate a lot of documents to clear up the information")
<b>Georgia</b>	Immediately	Up to 10 working days if the information a) is located in another territorial unit or public agency; or b) requires consultations in any of the cases mentioned in (a); or c) there is a need to collect and work on the information retrieved from various unrelated documents and the volume of information is big.
<b>Kazakhstan</b> (2015 Law)	15 calendar days	Additionally up to 15 calendar days if requested information is within competence of several information-holders and the reply requires obtaining of information from other holders.
<b>Kyrgyzstan</b>	14 calendar days	Up to 14 calendar days
<b>Mongolia</b>	7 working days	«If necessary» can be extended additionally up to 7 working days
<b>Tajikistan</b>	30 calendar days	Additionally up to 15 calendar days
<b>Ukraine</b>	5 working days	20 working days ("if request concerns provision of a large volume of information or requires search within a significant mass of data")
<b>Uzbekistan</b> (2014 Law)	15 calendar days (7 days for mass media)	-

Source: IAP monitoring reports; OECD/ACN secretariat research.

### *Review mechanism*

There may be several complaint (appeal) mechanisms when it comes to alleged violations of the right to information: appeal before the agency which denied access, appeal before a higher administrative

<sup>420</sup> OECD/ACN (2014), Review Report on Mongolia, p. 53.

agency, court appeal, address to an ombudsman or complaint to a designated information agency (commissioner).

Judicial and general administrative remedies are often ineffective. Administrative authorities are usually reluctant to find a violation committed by the subordinate institution or official, while a judicial appeal takes a lot of time and may be costly. Therefore, international standards require an independent complaint mechanism in the form of an information commissioner (commission or agency) or another equivalent body. Its responsibilities should include the monitoring and supervision of compliance with the provisions on access to information. Such institutions also play an important role in raising awareness and educating public officials. In reaction to a complaint, such bodies should be able to issue binding decisions and impose fines or other sanctions for non-compliance.

There are several models of such institutions. In some countries, this mandate has been assigned to a special commission (or commissioner): Belgium, France, Italy (Commission on Access to Administrative Documents), Ireland (Office of the Information Commissioner), Macedonia (Commission for Protection of the Right to Free Access to Public Information). Several countries have merged this institution with the personal data protection authority (*e.g.* Estonia, Germany, Hungary, Latvia, Malta, Serbia, Slovenia, Switzerland, the United Kingdom). There are also countries where the general institution of Ombudsman is in charge of protecting the right of access to information (all IAP countries, Bosnia and Herzegovina, Croatia, Denmark, Norway, Poland, Spain, Sweden), but this is usually not a satisfactory arrangement, because in most cases the Ombudsman lacks binding enforcement powers.

A special office of information commissioner (even when merged with the data protection authority) is usually best suited to exercise an effective and independent control over access to public information. General ombudsman institutions may not have the necessary resources and focus, as they have to deal with the wide range of human rights violations. This is why IAP monitoring has consistently advised countries to create a separate independent review mechanism.

The IAP report on **Armenia** noted that there is no special mechanism for administrative appeals to a “Commissioner on Freedom of Information” or a similar institution. Such a body, according to international standards, should have a certain level of independence from the executive branch, have powers to consider complaints and make instructions to authorities in case of violations, as well as to prepare annual reports on freedom of information. It is an important institution to monitor situations with access to information and proactively respond to violations.<sup>421</sup> The Armenian Government reported that it has been drafting a Concept for modernisation of the freedom of information sector following the model of having Commissioner on Freedom of Information.

In **Georgia**, the IAP monitoring found that no public authority has the mandate to systematically verify the implementation of the law on access to information (*e.g.* random checks on the submission of information within the required time-limits, reviews of complaints). The Public Defender’s Office has no proper resources so far to perform this role. It was recommended that powers of the Public Defender’s Office be strengthened in this regard, or that an independent “Information Commission” (Commissioner) be set up. It should have the authority to receive explanations and additional information from public bodies to review and rule upon on complaints, issue mandatory instructions to such bodies concerning the disclosure of information, apply to the courts on behalf of the plaintiff and to sanction officials.<sup>422</sup> The draft of the stand-alone law on access to information in Georgia provides an independent authority for supervising enforcement of the right.<sup>423</sup>

<sup>421</sup> IAP Second Monitoring Round report on Armenia (page 65). See also IAP Second Monitoring Round reports on Azerbaijan (page 43), Kazakhstan (page 91), Kyrgyzstan (page 62) and Ukraine (page 62, <http://goo.gl/qFjnKc>).

<sup>422</sup> OECD/ACN (2010), Second Monitoring Round report on Georgia, page 39, <http://goo.gl/R38UsX>.

<sup>423</sup> OECD/ACN (2015), Progress update by Georgia, October 2015, page 98, <https://goo.gl/lqS9te>.

In **Azerbaijan**, the Access to Information Law initially provided for a special Authorised Agent on Information Matters (Information Ombudsman). However, this role was later assigned to the general Human Rights Defender.<sup>424</sup>

In **Ukraine**, the Law on Access to Public Information does not provide for a separate supervisory mechanism. In 2015, a draft law was submitted in the parliament to assign to the Ombudsman institution additional powers of enforcement supervision on access to information. These powers will include the right to issue binding orders on disclosure (or non-disclosure) of information and on compliance with other access to information provisions. The first step in assigning the Ombudsman relevant powers has already been made. In 2014, the Ombudsman's office was given powers to draw up administrative protocols on the violation of the right to access to information and to send them to court for sanctioning. This power previously belonged to the prosecutor's office.<sup>425</sup> The monitoring report noted in this regards that the crucial point for ensuring genuine guarantees of the right of access to information is providing necessary resources for the supervisory authority – the supervisory function will remain ineffective until it is supported with necessary resources, which should be provided from the State Budget.<sup>426</sup>

### *Proactive publication*

To ensure transparency of their activities, public authorities have to publish a wide range of information on their own initiative, without waiting for an information request to be lodged. This can decrease the number of information requests by pre-empting calls for disclosure. Proactive publication is often required by legislation and includes key information concerning activities of public bodies, organisations, structure and contacts, annual reports and accounts, information on how the public can influence decision-making or provide input, what public services are available, procedures to access information and contacts of information officers, decisions of the body and their drafts, public procurement information and disclosure of asset and conflict of interest declarations of public officials. Many recent national access-to-information laws provide for mandatory publication and regular updates on the public bodies' web-sites.

In several IAP countries, access to information laws provide for the proactive publication of several categories of information: **Armenia** (13 categories, including the list of information available at the public entity), **Azerbaijan** (34 categories, including information on salary rates, salary payment guidance, bonus payment policies and special benefits effective at the state authorities and municipalities), **Kyrgyzstan** (36 categories), and **Ukraine** (18 categories, including a system of document registration in the public agency).

The **Mongolia's** Law on the Right to Information has extensive provisions on the proactive disclosure of certain information in a separate chapter of the law. The Law mandates the publication of information in four areas: operational transparency; human resources transparency; budget and financial transparency; and transparency in the public procurement. It includes a detailed list of information that should be disclosed under each area, including through official web-sites.

In **Georgia**, the law was amended in September 2013 to require the proactive publication of information. The list of specific categories of information to be published was approved by a governmental decree. This decree is mandatory for administrative bodies operating under the Government's control. Other state institutions and independent agencies, such as the Parliament, the Public Defender's Office, and the Civil Service Bureau are responsible for adopting their own standards for proactive publication. The Government's decree includes the following categories for mandatory proactive publication: general

<sup>424</sup> Handbook on Freedom of Information in the South Caucasus Countries, report by Transparency International chapters in Armenia, Azerbaijan and Georgia, 2012, pages 48-49, <http://goo.gl/adtQ3d>.

<sup>425</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 142.

<sup>426</sup> Idem, page 142.

information on the administrative body, including information on its structure, functions, documents concerning its policies, main principles and directions, contact information, etc.; a freedom of information page which shall be created on an official web-site of the relevant administrative body and include contact details of the freedom of information officers, legislative acts and regulations related to public information, complaint forms, and annual reports; information on the human resources of the administrative body; information on public procurement and privatization; information on state financing and expenditures of the administrative body; information on legislative acts adopted or related to the functions of the administrative body; as well as information on public services and fees, tariffs and rates established by administrative body.<sup>427</sup> The monitoring report noted that it would be preferable if the list of information subject to proactive publication was included in the law and not in secondary legislation as it would assist its implementation in practice and would also result in immediate enforcement without the need for additional decisions. Moreover a unified list could then be extended to all public entities, not only bodies in the executive branch.<sup>428</sup>

### Defamation

Defamation and insult laws aim to protect an individual's reputation, which in principle is one of the legitimate interests that can justify restrictions on the freedom of expression. However, the law providing for the protection of someone's reputation must strike the right balance between protecting reputations and curbing free expression and legitimate criticism; it must not restrict freedom of expression further than is "necessary in a democratic society".

Strict defamation laws discourage debate about public institutions and their scrutiny by prohibiting criticism of the head of state, other public bodies and officials, and by imposing higher penalties when a defamatory statement concerns public officials or bodies. Defamation laws are often abused by public officials, politicians who use them to protect themselves from criticism or from the disclosure of embarrassing facts, including revelations of corruption and maladministration. Draconian defamation laws and their application encourage self-censorship among the media and individual citizens.

As noted in one of the IAP reports, the mere existence of criminal liability for libel, insult and other similar acts has a chilling effect on freedom of speech and activity of the mass media, which leads to self-censorship and hinders investigative journalism that can expose corruption. Moreover, enforcing sanctions connected with the restraint of liberty or the threat of imprisonment further exacerbates this problem and is unacceptable in a democratic state. More severe sanctions for libel and insult of public officials also do not comply with international standards, according to which such persons may, on the contrary, be subject to a much higher level of criticism than an ordinary citizen would be. Such sanctions are extremely detrimental for the fight against corruption since they significantly suppress social activity aimed at detecting and disclosing information about illegal acts.<sup>429</sup> Journalists and whistle-blowers (both important actors in exposing corruption) should not be intimidated by possible penalties for defamation.<sup>430</sup>

The existence of criminal defamation laws and their application in practice was found by the IAP monitoring to be a serious obstacle to free media, which cannot exercise their role as a watchdog properly under such conditions. The IAP monitoring thus strongly recommended that countries repeal the general criminal liability for defamation and insult, as well as special crimes related to insult or infringement of honour of the president, members of the Parliament and other public officers, and to rely only on civil law to protect such reputational interests.

<sup>427</sup> OECD/ACN (2013), Third Monitoring Round report on Georgia, page 78.

<sup>428</sup> *Idem*, page 79.

<sup>429</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 94.

<sup>430</sup> OECD/ACN (2011), Second Monitoring Round report on Armenia, page 66.

**Azerbaijan, Kazakhstan, Mongolia**<sup>431</sup>, **Tajikistan** and **Uzbekistan** continue to punish defamation with criminal sanctions. The IAP monitoring recommended that all of these countries should decriminalise defamation and insult.

In **Kyrgyzstan**, according to the Law on Guarantees of Activities of the President of the Kyrgyz Republic, in cases of the dissemination of information that tarnishes the honour and dignity of the President, the Prosecutor General is obligated, where other measures taken by the prosecutor have failed to deliver the desired outcome, to apply to the court on the President's behalf to protect his or her honour and dignity. The IAP monitoring report concluded that a Prosecutor General acting as the President's personal attorney does not comply with democratic standards. The honour and dignity of the President should be protected in a civil court following a general legal procedure and without any privileges. The existence of such a provision, even if it is not vigorously enforced, has a chilling effect on freedom of expression and investigative journalism.<sup>432</sup>

Several IAP countries have introduced important reforms in this area. **Ukraine** decriminalised defamation in 2001 and then, in 2003, introduced changes in the legislation aimed at, *inter alia*, limiting excessive monetary claims to the media in civil proceedings, differentiating between fact and opinion and exempting value judgments from liability, and establishing a defence of reasonable publication (exempting from liability dissemination of false information if the court rules that a journalist had acted in good faith and attempted to verify the information). **Georgia** decriminalised defamation in 2004.

**Kyrgyzstan** became the first country in the Central Asia to decriminalise defamation in 2011. Also, the 2010 Constitution of Kyrgyzstan (Art. 33) provided that no one may be criminally prosecuted for disseminating information tarnishing or humiliating one's honour and dignity. This an exemplary provision, which should be used as a best practice. While defamation was decriminalised, criminal liability for insult remained (Art. 128 CC), but it was found unconstitutional in 2013 and formally repealed in the Criminal Code in 2015. Also, in 2014 Kyrgyzstan repealed administrative liability for insult of a customs officer. However, in 2014 Kyrgyzstan amended its Criminal Code to penalise "Knowingly false information about a crime" (instead of the "Knowingly false denunciation of a crime"). The OSCE Representative on Freedom of the Media found that this would "de facto criminalize defamation via a loophole".<sup>433</sup>

In 2010, **Armenia** decriminalised the general insult offence and insult of public officials (special offences for slandering a judge, prosecutor, investigator or officer of the court, however, remain in the Criminal Code).

Other ACN countries have also repealed criminal defamation laws during the last few years, e.g. FYR **Macedonia** (2012), **Montenegro** (2011), **Serbia** (2011), and **Romania** (2009). In 2012, **Albania** abolished prison sentences for defamation offences. In 2015, **Lithuania** decriminalised insult.

Civil lawsuits that demand compensation of moral damages filed against journalists and mass media and relevant court decisions awarding compensation in substantial monetary amounts also constitute a problem. They have an adverse effect on the freedom of mass media and their ability to inform society about corruption and, in this way, to facilitate exposure and prevention of corruption. Exorbitant monetary sanctions result in insolvency and the closure of independent publications. The IAP monitoring, therefore, recommended that countries should revise respective legislation, in particular, to set court fees in proportion to the amount of compensation sought in such cases, to introduce a short

<sup>431</sup> In July 2015 a journalist was arrested in relation to a criminal defamation procedure. See the statement by the OSCE Representative on Freedom of the Media at <http://goo.gl/H3vuug>.

<sup>432</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 64.

<sup>433</sup> The problem with the new wording is that it extends the offence to the mass media, going beyond just a wilful false reporting of a crime to the law enforcement authority. See statement and analysis by the OSCE at <http://goo.gl/GFHUwQ>

statute of limitation period for such lawsuits, to exempt expression of value judgments from liability and to conduct awareness-raising in courts.<sup>434</sup> Excessive civil damages remain a problem in the region and relevant reforms have not been implemented. Recent examples of excessive civil damages were reported in **Azerbaijan, Kyrgyzstan and Kazakhstan**.<sup>435</sup>

**Kazakhstan** introduced a new Civil Procedure Code (enacted on 1 January 2016) that established that the court fee for submitting lawsuits seeking compensation of moral damages caused by dissemination of defaming information should depend on the amount of monetary compensation sought. The Tax Code of Kazakhstan sets such court fee at the amount of 1% from the lawsuit's demands if filed by a natural person and 3% if filed by a legal person. Under previous law, such lawsuits required payment of a small court fee in a fixed amount.<sup>436</sup> This is a very positive development that conforms with the IAP recommendation to Kazakhstan given in the second round of monitoring. However, despite these changes, according to reports of independent NGOs, this has not resulted in the decrease of the number of lawsuits and their compensation claims.<sup>437</sup> So additional measures are required to stop excessive demands for compensation, which have a chilling effect on the media.

### Media ownership transparency

One of the new issues raised by the third round monitoring is the transparency of media ownership. The media cannot perform their watchdog role properly and, in particular, uncover corruption if the government or businessmen supporting the government control them directly or indirectly. That is why transparency of the media, especially influential broadcasters, is important for the prevention of corruption.<sup>438</sup>

#### Box 41. Media ownership transparency law in Ukraine

In September 2015, the Ukrainian parliament adopted amendments in the legislation to ensure transparency of ownership of the broadcasting companies. Among the adopted measures:

- companies registered in offshore jurisdictions are not allowed to establish broadcasters in Ukraine;
- when applying for a broadcasting license the applicant company has to disclose its major shareholders, beneficial owners, a detailed chart of ownership of the applicant and affiliated with it entities and persons. If the documents do not establish a transparent ownership structure of the company, the license should be denied;
- the ownership structure of the broadcasting or rebroadcasting company is considered to be transparent if the information published on the company's web-site and provided to the National Broadcasting Council allows establishing all persons who have a direct or indirect substantial participation in the company or the possibility of exerting significant or decisive influence over its management/activity, including relations of control among all persons in the chain of corporate rights ownership with regard to such company, as well as allows establishing final beneficiary owner of the company;
- broadcasters should annually submit information about their ownership structure to the National Broadcasting Council under the threat of sanctions (fine of 5 % of the licensing fee).

Source: OECD/ACN secretariat research.

<sup>434</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 94.

<sup>435</sup> See: statements by the OSCE Representative on Freedom of the Media about excessive fines for defamation in Kyrgyzstan, December 2015, <http://goo.gl/HZW09J>, and Kazakhstan, September 2015, <http://goo.gl/nbRuxg>; OECD/ACN (2013), Third Monitoring Round report on Azerbaijan, page 77, <https://goo.gl/vvLBUA>.

<sup>436</sup> Information provided by Internews-Kazakhstan.

<sup>437</sup> According to Kazakhs NGO Adil Soz, in January-February 2016 there were 14 lawsuits against the mass media and journalists with compensation claims of more than 600 million tenge (about EUR 1,5 million). This exceeds statistics for the whole first half of 2015 (compensation claims in the amount of more than 352 million tenge). Source: <http://goo.gl/ONbfK4>, <http://goo.gl/dhwoC2>.

<sup>438</sup> OECD/ACN (2015), Joint First and Second Rounds of Monitoring of Mongolia, page 88, <https://goo.gl/6TJOkU>.



The IAP monitoring recommended that **Mongolia** urgently adopt amendments to its legislation to introduce ownership transparency requirements. “Such provisions should establish a robust mechanism of making public and verifying ownership structure of the media, including their beneficial owners and major shareholders (direct or indirect). The law should make issuing of broadcasting licences to the media contingent on the full disclosure of their ownership structure with all its levels and beneficiaries and regular publication of detailed financial reports of the broadcasters”. Standards on media transparency can be found in the Ten Recommendations on Transparency of Media Ownership by Access Info Europe.<sup>439</sup> Good practice in this regard can be found in **Georgia** and **Ukraine** (see the Box 41).

### Transparency of public budgets and registers, open data

Information about how public budgets are formed and spent is important for the prevention and detection of corruption. More and more countries in the region are introducing measures to disclose as much information as possible about public funds and their use, and they are doing this in a user-friendly way. Equally important for anti-corruption is the openness of public registers, especially those containing data about ownership rights (real estate, land, vehicles, etc.) and companies. This information is essential to prevent illicit enrichment of public officials and protect ownership rights.

#### Box 42. Transparent (“Glass”) Accounts Law of Mongolia

In 2014, **Mongolia** adopted a Law on Transparent (“Glass”) Accounts (entered into force on 1 January 2015). The purpose of the law is to create a transparent system (“glass accounts”) to enable public monitoring and disclosure regarding decision making processes and activities related to budget management. The law extends to public authorities, legal entities owned by the state or local administrations, state owned enterprises, companies whose controlling shares are vested in the state, local government administration or their affiliated entities, enterprises and organisations carrying out investment, projects, programmes, activities, works and services with state or local administration budget and contractors carrying out state functions on the basis of law and agreement. The organisations covered by the law should disclose on their web-sites: annual budgets, procurement plans and local development fund plans; half-year annual budget performance reports, previous year annual budget performance report, monthly and quarterly performance reports; budget for the following year; year-end financial reports and half-year financial report; audit reports).

The Ministry of Finance, in addition to the above mentioned information, shall also disclose: income, outcomes and investments of the state budget, social security fund budget, human development fund budget and unified budgets; information on government’s loans and grants; information on foreign and domestic debt (on a quarterly basis); state budget savings, surplus and their reasoning; monthly performance information of unified budget; budget performance and audited consolidated financial report; information regarding securities issued by the government; concession agreements; all details, except those regarded as confidential, about the parties to the concession agreements, works to be carried out or services to be provided. The National Audit Office is supervising implementation of the Law.

The IAP monitoring report welcomed adoption of the law and recommended that Mongolia publish information covered by the law in open data (machine-readable) formats and use visualisation tools to better present information.

Source: OECD/ACN (2015), Joint First and Second Rounds of Monitoring of Mongolia, page 87.

In 2015, **Ukraine** also adopted a comprehensive law on the transparency of public funds. It provides for mandatory publication of detailed information on budgetary transactions on a single web-site and publication of all Treasury transactions (except for classified expenses) in real time on-line, as well as publishing of information on budget expenses and revenues in open data format (in bulk and machine-readable format). In September 2015, the Ministry of Finance launched the web-portal (<http://e-data.gov.ua>) of public expenditures which will include more than 90,000 datasets on state and local budget expenditures, as well as on expenses of public companies. Eventually, the web portal will also disclose Treasury’s transactions in real time.

<sup>439</sup> Access Info Europe (2013), Ten Recommendations on Transparency of Media Ownership, available at <http://goo.gl/ufUeBo>.



**Kazakhstan**, in its new 2015 Law on Access to Information, established an internet portal of open budgets where public authorities will publish their budgetary and financial reports, results of the public audit and financial control and carry put discussion of draft budgetary programmes and reports on their implementation.

In 2014-2015, **Ukraine** also adopted a number of laws to open to the public various registers kept by the authorities. The amendments provided on-line access to the State Register of Immovable Property, including information on persons who hold rights to real estate with the possibility to search by the name of the person, not just by the property address. New laws also provided access to information on land owners kept in the land cadastre and owners of vehicles kept in the relevant Ministry of Interior register.

**Uzbekistan**, in its Budgetary Code of 2014, provided that procedures for preparing and adopting state budget and budgets of state targeted funds should be open to the public and mass media; information about adopted budgets and their implementation should be published in the mass media and on the official web-site of the Ministry of Finance ([www.mf.uz](http://www.mf.uz)). The web-site of the Ministry of Finance provides open access to annual budget information, which is published weekly in the form of text, infographics, tables, and charts. The open data web-portal of Uzbekistan (<https://data.gov.uz/ru>) also includes indicators of execution of local budgets in the regions of Uzbekistan.

The publication of government-held information as open data (datasets in machine-readable electronic format that allow their automatic processing) has become a global standard. Several IAP countries have adopted or are developing relevant regulations. In April 2015, the Parliament of **Ukraine** adopted amendments in the Access to Public Information Law and other laws to introduce the open data concept. It provided for mandatory publication of information in the possession of public authorities in open data formats with the right to re-use such information free of charge. Several other laws were amended to require publication in open data of certain information of public interest, e.g. database of public procurement, company register, register of government-owned property, and budgetary information. In October 2015, the Government of Ukraine adopted regulations to implement amendments on open data and set procedures for publication of open data information. The regulations defined a list of more than 300 datasets to be published by the public agencies on their web-sites and on the central government open data web portal.

In its 2015 Law on Access to Information, **Kazakhstan** introduced the concept of open data. The Law requires all information-holders to regularly publish open data information on the dedicated open-data internet-portal. The public agency in charge of IT issues may also obtain open data information from the authorities and publish it on the portal, if a public opinion poll showed that relevant information is of interest to the public. A separate portal of open budget data and open legal acts data will be established.

### **Transparency of beneficial ownership of companies**

Disclosure of beneficial ownership in companies is important to ensure business integrity and to prevent conflicts of interest and illicit enrichment of public officials. In 2014, the G20 recognised that improving the transparency of legal persons and their arrangements is important to protect the integrity and transparency of the global financial system. The G20 called for preventing the misuse of these entities for illicit purposes such as corruption, tax evasion and money laundering and adopted High-Level Principles on Beneficial Ownership Transparency.<sup>440</sup>

The IAP monitoring recommended that **Georgia** and **Mongolia** introduce recording and disclosure of beneficiary owners of all legal entities during their state registration .

<sup>440</sup> Available at <http://goo.gl/T6hceF>.

**Box 43. Disclosure of beneficial ownership in companies in Ukraine**

Ukraine has become the first country in the region (if not beyond) to establish the mandatory universal disclosure of beneficial ownership of legal entities. In February 2015, Ukraine enacted a law requiring all legal persons (with exception for some non-profit associations) to disclose their beneficial owners when registering the entity with the State and to update this information in case of changes. Such information is entered in the unified state company register and published automatically on-line and is accessible to anyone (for a fee). While the law provides administrative sanctions for the non-submission of relevant data, the companies face no liability for providing false information. The law was seen as a first step in introducing beneficial ownership disclosure, with verification mechanisms to follow in different areas (e.g. by the National Bank with regard to banks, National Agency for Corruption Prevention with regard to asset disclosure of public officials, National Broadcasting Council concerning disclosure of ownership structure of broadcasting companies).

Beneficial owner (“ultimate beneficial owner – the controller”) is defined as a natural person who, regardless of the formal ownership, has the power to exert decisive influence over the management or economic activity of the legal entity directly or through other persons, or has the power to exert decisive influence through direct or indirect ownership of 25 or more % in the company’s capital. A person is not considered a beneficial owner if he has a formal right to 25 or more % in the company’s capital, but is an agent, nominal holder (owner) or an intermediary with regard to such right.

In February 2015, the Parliament extended the scope of information to be disclosed by public officials in their electronic annual declarations. Public officials will also have to disclose the legal entities in which they or their family members are beneficial owners. There is a criminal sanction for submission of false information in the asset declaration. Ukraine plans to launch the new electronic asset declaration system for public officials in 2016.

Source: OECD/ACN (2015), Third Monitoring Round report on Ukraine; OECD/ACN secretariat research.

**Table 43. IAP and ACN countries in global transparency and media freedom ratings**

	Open Budget Survey (2015), Rank	Global Open Data Index (2015), Rank	WJP Open Government Index (2015), Rank	World Press Freedom Index (2015), Rank
Albania	73	37	54	82
Armenia	-	-	-	78
Azerbaijan	42	78	-	162
Bosnia and Herzegovina	60	-	31	66
Bulgaria	18	16	49	106
Croatia	36	-	33	58
Czech Republic	14	21	22	13
Estonia	-	-	14	10
FYR of Macedonia	77	69	34	117
Georgia	16	47	29	69
Hungary	45	-	56	65
Kazakhstan	41	50	85	160
Kosovo	-	35	-	87
Kyrgyzstan	34	34	64	88
Latvia	-	31	-	28
Lithuania	-	-	-	31
Moldova	-	22	46	72

	Open Budget Survey (2015), Rank	Global Open Data Index (2015), Rank	WJP Open Government Index (2015), Rank	World Press Freedom Index (2015), Rank
Mongolia	39	-	75	54
Montenegro	-	-	-	114
Poland	22	-	20	18
Romania	9	13	51	52
Russia	11	61	67	152
Serbia	47	-	61	67
Slovakia	30	50	-	14
Slovenia	15	-	30	35
Tajikistan	83	83	-	116
Turkey	58	47	82	149
Ukraine	56	54	43	129
Uzbekistan	-	-	101	168

Source: International Budget Partnership (2015), Open Budget Survey, <http://goo.gl/ISjJ8k>; Global Open Data Index (2015), <http://index.okfn.org>; World Justice Project (2015), Open Government Index, <http://goo.gl/0GO0R2>; Reporters Without Borders (2015), Press Freedom Index, <http://index.rsf.org>.

## Conclusions and recommendations

All IAP countries have a legal framework for accessing information held by public authorities. Its scope and effectiveness varies. Most of the laws, however, fall short of international standards in several important aspects (scope, restrictions, procedures for access, handling of complaints, etc.) and need to be revised to make access to information an enforceable right. Public administration transparency is a powerful tool to prevent corruption and access to information laws should be designed to achieve this through proactive disclosure of a wide range of information and speedy processing of information requests. As with other areas, the enforcement of the legal framework remains a major problem in the region.

A number of IAP countries still retain provisions on criminal defamation and insult, which have an adverse effect on the freedom of information. At the same time, several countries have totally (Georgia, Kyrgyzstan, Ukraine) or partly (Armenia) decriminalised these offences. Excessive civil damages for defamation remain a problem in the region.

There is an expanding movement to disclose various information of public interest and to also do it in open data formats. Several IAP countries have implemented important reforms to provide extensive access to budgetary information. Ukraine introduced far-reaching measures to make public databases with information on ownership rights and companies, including their beneficial ownership. Georgia and Ukraine introduced transparency of the media ownership laws; such measures should become a universal standard and be supported by strong enforcement.

### Recommendations:

- Revise legal regulations on access to information to bring them in line with international standards and best practices. In particular, review laws on state and official secrets to align them with the primary access to information law and to ensure that they are not used to unjustifiably exclude information from the public's reach.

- Establish explicitly in the law, as a fundamental principle, that all information held by public authorities is presumed to be open to the public and, therefore, access to such information may be exceptionally limited only when the authority justifies that non-disclosure of information is necessary to protect a legitimate interest and that the possible substantial harm to such interest outweighs the public's right to know such information. Certain types of information, e.g. information related to budget revenues and expenses, the administration of public property and resources on national and local levels, should be determined to be of high public interest and should therefore be even harder to restrict or prohibited from restriction altogether.
- Laws should provide clear guidelines on how the right of access to information can be balanced with the right to privacy and on how to exclude certain types of information from being protected under the latter, e.g. access to information on assets and income of public officials should be guaranteed.
- Strengthen requirements with regard to proactive disclosure of information about the decision-making, functioning and organisation of public authorities. There should be an especially strict set of rules on the publication of draft decisions (e.g. deadlines), notably those concerning human rights and freedoms, administration of public property, budgets, and so on.
- The provision of information to the public should be viewed as an important function of the state and local authorities and should therefore be supported with the necessary financial, material and human resources, including creation of information officers (offices) in such authorities.
- Establish an independent review mechanism with adequate powers, which should include the power to impose sanctions and issue binding decisions regarding access to information.
- Provide for the release from any liability for disclosing classified or other information whose access is restricted if it was required by an overriding public interest.
- Decriminalise all offences based on defamation and insult, as they have a strong chilling effect on media freedom and investigative journalism in particular. Civil courts should provide the only legal forum for remedying harm caused to one's honour and dignity. At the same time, the civil law should also provide necessary constraints to ensure that the freedom of information is not stifled by unjustified lawsuits or excessive demands. This can be done by setting court fees in proportion to the amount sought in compensation, introducing a short statute of limitation period for such lawsuits, exempting the expression of value judgments from liability, and requiring the aggrieved party to demonstrate malice on the part of the alleged defamer. Establish a defence of reasonable publication, which exempts a defendant from liability for disseminating false information if the journalist who published the statement acted in good faith and attempted to verify the information.
- Adopt comprehensive measures to disclose information of public interest that is important to prevent and combat corruption. Establish ownership transparency requirements for broadcasting media and an effective supervision mechanism. Provide effective access, including on-line and in the open data formats, to public registers of movable and immovable property, land, companies, licenses granted to use public resources, etc. Opening public data registers to scrutiny makes it much harder to hide ill-gotten gains. Provide a requirement to disclose beneficial ownership in all legal persons and to publish such information on-line.
- Provide wide access to information about the use of state and local budgets (including information about treasury transactions), budgets of state and municipal companies, financial reports.

- Introduce legislation about on-line publication in open data formats of information held by public authorities and ensure the regular publication of high-interest datasets with the guaranteed right to re-use them.
- Join and ensure full compliance with international transparency and good governance initiatives, notably the Extractive Industries Transparency Initiative, Construction Sector Transparency Initiative, and the Open Government Partnership.

## Integrity in judiciary

The judiciary plays a crucial role in democracies and in sustaining the rule of law. Judicial corruption erodes the legitimacy of public authorities, undermines the judicial system of the country and fosters impunity. Effective anti-corruption efforts are impossible in a system where judicial institutions lack integrity and are vulnerable to undue influence. A “clean” judiciary requires robust safeguards of judicial independence, integrity and accountability.

There are a number of international instruments establishing standards in this area, which are used by the IAP monitoring as a benchmark. The UN Convention against Corruption (Art. 11) states, that bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. The independence and impartiality of the courts is part of the fundamental human right to fair trial as outlined in global and regional binding international treaties<sup>441</sup> and their interpretation by relevant bodies, notably in the case-law of the European Court of Human Rights<sup>442</sup>. Council of Europe’s Committee of Ministers<sup>443</sup>, Venice Commission<sup>444</sup>, Consultative Council of Europe<sup>445</sup> and other bodies<sup>446</sup> laid down detailed guidelines on judicial independence and integrity. The same concerns other organisations, notably UN<sup>447</sup> and OSCE<sup>448</sup>.

<sup>441</sup> Universal Declaration of Human Rights (Art. 10), International Pact on Civil and Political Rights (Art. 14), European Convention of Human Rights (Art. 6), etc.

<sup>442</sup> See, among many others, judgments in cases of *Campbell and Fell v. UK* (applications no. 7819/77, 7878/77), *Incal v. Turkey* (no. 22678/93), *Kyprianou v. Cyprus* (no. 73797/01), *Sovtransavto Holding v. Ukraine* (no. 48553/99), *Brumarescu v. Romania* (no. 28342/95), *Ryabikh v. Russia* (no. 52854/99), *Henryk Urban and Ryszard Urban v. Poland* (no. 23614/08).

<sup>443</sup> See, in particular, Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, 17 November 2010, <http://goo.gl/Dn2VHL>.

<sup>444</sup> See, in particular, reports on the Independence of the Judicial System (<http://goo.gl/qhN5gC>), on Judicial Appointments (<http://goo.gl/sc15q5>) and numerous country-specific opinions, including on Armenia, Azerbaijan, Kyrgyzstan, Georgia and Ukraine (<http://goo.gl/bDCORh>).

<sup>445</sup> See opinions of the CCJE (<http://goo.gl/wz1SS9>), especially Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, Opinion No. 3 (2002) on ethics and liability of judges, Opinion No. 10 (2007) on "Council for the Judiciary in the service of society". See also Magna Carta of Judges (Fundamental Principles), 17 November 2010, <https://goo.gl/0OhtMu>.

<sup>446</sup> See, e.g., the Parliamentary Assembly of the Council of Europe Resolution 1703 (2010) on judicial corruption, 27 January 2010, <http://goo.gl/KGxCyW>; European Charter on the Statute of Judges, July 1998, <https://goo.gl/3s4Wsn>.

<sup>447</sup> Basic Principles on the Independence of the Judiciary, endorsed by the UN General Assembly resolutions no. 40/32 of 29 November 1985 and no. 40/146 of 13 December 1985, <http://goo.gl/rlzxyB>; Bangalore Principles of Judicial Conduct, 2002, <http://goo.gl/59kAdV>. See also report on the judicial corruption by the UN Special Rapporteur on the independence of judges and lawyers, 2012, <https://goo.gl/73sD56>.

## Independence of judiciary

“A judiciary that is not independent can easily be corrupted or co-opted by interests other than those of applying the law in a fair and impartial manner. Strengthening the judiciary from within, as well as providing all the safeguards for its independence vis-à-vis other public officials and private actors, is essential in combating and preventing instances of judicial corruption.”<sup>449</sup>

The independence of individual judges is safeguarded by independence of the judiciary as a whole. Judicial independence should be enshrined in the constitution, with more specific rules being provided at the legislative level.<sup>450</sup> Judicial independence should be statutory, functional and financial. It should be guaranteed with regard to other powers of the state, to those seeking justice, other judges and society in general.<sup>451</sup> Judicial independence thus involves independence from actors external to the judiciary (e.g., executive and legislative branches, or other institutions) and internal independence within the judiciary (e.g. court presidents, courts of higher instance, judicial councils, judicial administration, etc.).<sup>452</sup>

### *Constitutional guarantees*

All IAP countries guarantee the independence of the judiciary in their constitutions. For example, the Constitution of Azerbaijan (Art. 127) proclaims that judges are independent. They are subordinate only to Constitution and laws of the Republic of Azerbaijan and cannot be replaced during the term of their authority. In consideration of legal cases, judges must be impartial and fair. They should ensure the equality of parties, act based on facts and according to the law. Direct and indirect restrictions of legal proceedings – e.g. illegal influence, threats, interference – are not allowed. At the same time, the IAP report criticised another provision of the Azerbaijan’s Constitution which declares the President to be the guarantor of judicial independence. This was seen as an encroachment on the separation of powers and the institutional independence of the judiciary.<sup>453</sup>

### *Tenure of judges*

Tenure of judges and guarantees of their irremovability (i.e. guaranteed tenure until a mandatory retirement age) is an important aspect of judicial independence. Several IAP countries use *de facto* probationary periods by appointing judges for an initial term (e.g. five years in **Azerbaijan, Tajikistan, and Ukraine**). According to international standards, such arrangements may be seen as problematic, if judges have to be re-confirmed at the end of their initial appointment and there are no clear criteria for confirming them in office. According to the European Charter on the statute for judges, the existence of probationary periods or renewal requirements presents difficulties, if not dangers, for the independence and impartiality of the judge in question, who is hoping to ultimately obtain a post or to have his or her contract renewed.

However, in countries with relatively new judicial systems, there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before obtaining a

<sup>448</sup> See, among others: documents of Copenhagen, Moscow, Istanbul meetings of the OSCE Conference on the Human Dimension; Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, OSCE/ODIHR (<http://goo.gl/ojWYmE>).

<sup>449</sup> “Corruption in the judiciary threatens the rule of law and protection for human rights”, Press-release, United Nations Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, October 2012.

<sup>450</sup> Recommendation CM/Rec(2010)12 on judges: independence, efficiency and responsibilities, §§4 and 7 of the Appendix.

<sup>451</sup> Magna Carta of Judges, §3.

<sup>452</sup> Recommendation CM/Rec(2010)12, §22 of the Appendix: “In their decision-making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary”.

<sup>453</sup> OECD/ACN (2010), Second Monitoring Round report on Azerbaijan, page 45, <http://goo.gl/w3TN3B>.



permanent appointment.<sup>454</sup> Therefore, in the Venice Commission's opinion, if probationary appointments are considered indispensable, a refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.<sup>455</sup> With regard to **Ukraine**, the IAP monitoring report particularly criticised the fact that its law on courts and judges at the time did not provide for a list of grounds on which the High Qualification Commission of Judges could recommend that a judge not receive life tenure.<sup>456</sup> This issue was not addressed when the law was revised in 2014. However, in June 2016 the Parliament adopted in the final reading amendments to the Constitution of Ukraine to remove the power of the Parliament to appoint judges and to repeal the probationary appointment of judges; under the new provisions, all judges would be appointed for life by the President upon a binding submission of the High Council of Justice following a competitive selection; the President will no longer have the power to dismiss judges (as this power will also be transferred to the High Council of Justice).

In **Georgia**, the Constitution was amended in 2013 to establish that judges should be appointed for life, but the law may provide for a probationary period of not more than three years. Also the provision on the appointment of Supreme Court judges for a limited term (not less than 10 years) was preserved. This provision concerning Supreme Court judges, as well as possibility of establishing a three-year probationary period, was criticised by the Venice Commission. It noted that whereas it is generally accepted to limit the tenure of Constitutional Court judges, this does not apply to Supreme Court judges. The Venice Commission therefore recommended extending life tenure, in unequivocal terms, to Supreme Court judges. It also criticised the provision that all judges of the Supreme Court have to be proposed by the President; it would be preferable to transfer the right to propose candidates to the High Judicial Council.<sup>457</sup> As for other judges, under the Organic Law on Common Courts of Georgia, the judges of the district and appeal courts are appointed for three years. After expiration of this term, the High Council of Justice makes a decision on whether to grant a life-time appointment based on specific criteria. Relevant criteria were introduced in the law in 2014, establishing the following procedure:

- The judge is evaluated based on two basic criteria – good faith and competence. During the three-year probation period, the judge is evaluated every year for one month by one judge and one non-judge member of the High Council of Justice. All three assessments are conducted by different members of the Council.
- During the evaluation period, the evaluators study five judgments delivered by the judge, attend the trials, meet with the judge in person and obtain other information according to the rules prescribed by law.
- The competence of the judge is measured by scores. As for the good faith, the evaluation clarifies whether the judge meets the requirement or not. The results are filled in the forms and submitted to the High Council of Justice.
- After interviewing the judge and considering the results of the evaluation, the High Council of Justice makes a reasoned decision on the life-time appointment of the judge by two thirds of votes.
- The judge has the right to appeal any refusal of life-time appointment to a special board that is set up on an ad hoc basis within the Supreme Court of Georgia. The appealing judge has to prove that there was a procedural violation that affected the High Council of Justice decision.

<sup>454</sup> Venice Commission, Report on Judicial Appointments, §41.

<sup>455</sup> Venice Commission, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the Former Yugoslav Republic of Macedonia”, §23, <http://goo.gl/TcOZ0y>.

<sup>456</sup> OECD/ACN (2010), Second Monitoring Round report on Ukraine, page 66, <http://goo.gl/fUY4OE>.

<sup>457</sup> Venice Commission (2010), Opinion No. 543/2009 on the Draft Constitutional Law on Amendments and Changes to the Constitution of Georgia, pages 14-15, available at <http://goo.gl/WI3Xjc>.



- If the Board finds that there was a sufficient procedural violation, the decision on the refusal is annulled and the High Council of Justice has an obligation to consider the issue again while taking into account the findings of the Board.<sup>458</sup>

In **Tajikistan**, a judge's term of office is ten years (previously – five years). Such term limits can give rise to problems when there is discretion on whether to extend a judge's term in office. The same is true, in **Kazakhstan**, where the chairperson of the Supreme Court (upon consent of the Supreme Judicial Council) may decide on the extension of the tenure of a judge who reached 65 years (for not more than five years).<sup>459</sup>

In **Mongolia**, all judges are appointed for permanent tenure, i.e. until retirement.

Irremovability guarantees should not only be fixed in the law, but should also be observed in practice. For example, there should be no arbitrary dissolution or reorganisation of courts which would lead to the dismissal of judges, or to dismissal due to redundancy. In **Kazakhstan**, following the decision to reduce the number of all public servants in 2010, 65 judges were made redundant. The IAP monitoring noted that not only did that appear to have violated the Constitution and the laws of Kazakhstan itself (which establish an exhaustive list of grounds for dismissal of judges, which does not include redundancy), but also did not comply with international standards. Therefore, judges should enjoy a special status and guarantees of irremovability that are different from other public servants. Redundancy of judges, if it is absolutely necessary for economic reasons and when the current judicial workload permits, can be done through gradual non-filling in of new vacancies, but not through dismissal of existing judges.<sup>460</sup>

A similar situation of mass dismissals of judges in violation of relevant procedures was noted in **Kyrgyzstan**, where more than 60 judges were dismissed following the events of 2010. This was in particular exacerbated by the fact that the Prosecutor's General Office played a leading role in compiling the list of judges to be removed. IAP monitoring concluded that such a practice violated the principle of judicial irremovability and will have an extremely adverse effect on real judicial independence in future.<sup>461</sup> A welcomed example of a proper approach to regulation of the court system occurred in 2011. Kyrgyzstan adopted a special law that detailed the exact structure of local courts and number of local courts judges. This means that establishment of new courts, reorganisation or liquidation of the existing ones, as well as changes in the number of judges in specific courts, will require legislative approval.

After the Euromaidan revolution in **Ukraine** in 2014, there were a number of proposals to remove from office either all or the majority of judges as their credibility was compromised by allegations of corruption and human rights violations. Such emergency measures to address corruption and incompetence in the judicial system were first proposed in the law adopted in July 2015. Following the Venice Commission's recommendation, the President of Ukraine proposed to amend the Constitution to provide grounds for such an extraordinary review of the judicial corps. The amendments would establish that if a judge was appointed or elected to the office before the amendments, the judge's suitability for office should be assessed in accordance with the procedure prescribed by the law. If after such an assessment, it is established that a judge does not possess suitability for office based on the criteria of competence, professional ethics or integrity, or if the judge refused to undergo the assessment, this would constitute a ground for the dismissal of such a judge. The Venice Commission considered that "dismissing all the judges, outside very exceptional situations such as constitutional discontinuity, is not in line with European standards and the Rule of Law. In addition, the Venice Commission finds that replacing all the judges (more than 8,000) would not be feasible without jeopardising the continued administration of justice." It, however, recognised that exceptional measures such as the qualification

<sup>458</sup> OECD/ACN, Progress updates by Georgia, page 107, <https://goo.gl/J7edk6>.

<sup>459</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 104, <http://goo.gl/kti8yU>.

<sup>460</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 107, <http://goo.gl/kti8yU>.

<sup>461</sup> OECD/ACN (2012), IAP Second Monitoring Round report on Kyrgyzstan, page 71, <https://goo.gl/NI9AFa>.

assessment of the judges could be taken, provided that they were limited in time and carried out swiftly and effectively.<sup>462</sup>

**Armenia** has also introduced amendments in the Constitution to strengthen the independence of judges and the separation of powers. The December 2015 amendments limited the President to a ceremonial role in terms of the appointment of judges. Judges of the first instance courts and appellate courts will be appointed by the President upon the nomination of the Supreme Judicial Council. A special procedure is provided for the appointment of judges to the Cassation Court. The Supreme Judicial Council will present to the National Assembly three candidates for each vacant position based on the results of a competitive selection process, and the candidate elected by at least majority of three fifths of the total number of members of the National Assembly will be appointed by the President of the Republic.<sup>463</sup>

### *Judicial Councils*

The judicial council is an important institution for ensuring the independence of the judiciary, as well as the integrity and accountability of judges.<sup>464</sup> Such a council, itself independent from legislative and executive interference, should be endowed with broad powers for all matters concerning the status of judges as well as the organisation, the functioning and the image of judicial institutions. The council shall be composed either exclusively or substantially of judges elected by their peers.<sup>465</sup> All IAP countries have a judicial council or a similar body, although not all them comply with the relevant international standards.

Back in 2006, **Georgia** conducted an important reform of its High Council of Justice (HCOJ), which had previously been an advisory body to the President of Georgia. It was reorganised as an independent agency of the judicial branch. The HCOJ became directly responsible for appointing and dismissing judges of the regional (city) and appellate courts, whereas it previously only made recommendations to the President. The HCOJ was restructured and expanded from 9 to 15 members. In conformity with international standards, more than half of the members are judges (namely, the Chairman of the Supreme Court and eight other common court judges elected by the Conference of Judges). The Chairman of the Supreme Court now chairs the HCOJ (previously it was the President of Georgia). In **Armenia**, until recently the Council of Justice consisted of 9 justices elected by the General Assembly of Judges, 2 legal scholars appointed by the President and 2 members appointed by the National Assembly. After the 2015 constitutional reform, the Supreme Judicial Council of Armenia will consist of ten members, five of whom to be elected by the National Assembly and the other five to be elected by the General Assembly of Judges.

Supreme Judicial Council (SJC) in **Kazakhstan** was found to not be in compliance with international standards, which seriously affected the judiciary's independence. It is hand-picked by the President. The body itself is defined as a consultative and advisory body to the President, and not an institution of the judiciary. The staff of the SJC's secretariat are employees of the President's Administration; the latter also provides technical and material resources for its operation. IAP monitoring report therefore recommended that the SJC should be transformed into a judicial body (i.e. part of the judiciary); be

<sup>462</sup> Venice Commission (2015), Opinion on the Proposed Amendments to the Constitution of Ukraine regarding the Judiciary as approved by the Constitutional Commission on 4 September 2015, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), page 8, available at <http://goo.gl/wxcFRN>. See also Venice Commission 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, available at <http://goo.gl/K7ThAq>.

<sup>463</sup> OECD/ACN, Progress updates by Armenia, page 76, <https://goo.gl/qySLaC>.

<sup>464</sup> See standards on the Councils for the Judiciary, in particular, in the CCJE Opinion No. 10 (<https://goo.gl/jrbkt5>), Council of Europe's Committee of Ministers Recommendation CM/Rec(2010)12 (<http://goo.gl/Dn2VHL>) and the OSCE/ODIHR Kyiv Recommendations on Judicial Independence (<http://goo.gl/ojWYmE>).

<sup>465</sup> Magna Carta of Judges, §13.

independent from the legislative and executive bodies and even from the head of state; and that the majority of its members should be judges elected by their peers.<sup>466</sup> This situation was not addressed since the second monitoring round.

In **Kyrgyzstan**, there are two judicial bodies responsible for the careers of judges and other matters concerning the administration of the judiciary. The Council for Selection of Judges carries out selections. Various matters, including the early dismissal of a judge from office, disciplinary responsibility, lifting of judicial immunity, and preparing the courts' budget, are decided by the Council of Judges, which is an elected body of judicial self-government. Only one-third of the Council for Selection of Judges is composed of judges (who are elected by the Council of Judges); the rest are selected by the parliamentary opposition and the parliamentary majority from a pool of civil society representatives. Such an approach was criticised in the IAP monitoring report, although it is partly compensated by the fact that the Council of Judges comprises 15 members elected by the congress of all judges from among members of the judicial community (judges and retired judges).<sup>467</sup> The concern was confirmed during the third monitoring rounds, which noted that the Council for Selection of Judges is not perceived as an independent body and is very much dependent on the Parliament; since the representatives of the civil society in the Council for Selection of Judges are elected by the Parliament, the dominating political forces control appointment of judges.<sup>468</sup>

In **Mongolia**, the General Judicial Council (GJC) consists of a head and four other members who represent judicial councils of the first instance courts, appellate courts and cassation court, the Association of Lawyers, and the governmental body in charge of legal affairs. All the GJC members are appointed by the President of Mongolia. The IAP report found this to be generally in line with international standards with regard to the composition of the judicial council. The only issue that was raised was whether the President has discretion in the appointment of the GJC members nominated by judges.<sup>469</sup>

In **Ukraine**, the High Council of Justice (HCJ) includes only three members selected by the judiciary itself. The other members are appointed or elected by the parliament, the President, congress of attorneys, congress of legal universities, national conference of prosecutor. In addition, the Supreme Court's President, the Minister of Justice and the Prosecutor General are *ex officio* members. In reality, such an arrangement has led to a situation when for some time, the Head of the Security Service was a member of the HCJ; in addition to the *ex officio* member Prosecutor General, there were also two Deputy Prosecutors General in the HCJ composition. In 2010-2013, several members of the HCJ had strong links to the governing party and the President. Therefore, the legal and *de facto* composition of the HCJ did not ensure its independence and falls short of international standards. Citing constitutional obstacles to the reform of the HCJ in 2010, Ukrainian authorities introduced changes in the law whereby entities entitled to elect or appoint members of the Council had to select some of their candidates from among judges. Such an approach, however, was recognised as not being fully in line with international standards as judicial members of the Council should be elected by other judges representing different levels of the judicial system.<sup>470</sup> According to draft constitutional amendments proposed in 2015 in Ukraine, the High Council of Justice would consist of 21 members, from whom 10 would be selected by the congress of judges from among judges or retired judges, two would be appointed by the President of Ukraine, two would be elected by the parliament, two would be elected by the congress of attorneys, two would be elected by the national conference of prosecutors, and two more would be elected by the congress of

<sup>466</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, pages 103 and 111, <http://goo.gl/kti8yU>.

<sup>467</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, pages 68-69, <https://goo.gl/NI9AFa>.

<sup>468</sup> OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, page 88, <https://goo.gl/dAp3fH>.

<sup>469</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, page 98, <https://goo.gl/5sHlbX>.

<sup>470</sup> OECD/ACN (2010), Second Monitoring Round report on Ukraine, page 66, <http://goo.gl/xSX4SR>.

representatives of law schools and law academic institutions. The President of the Supreme Court would be an ex officio member of the HCJ.

In **Uzbekistan**, the main role in the selection, disciplining and dismissal of judges belongs to the Higher Qualification Commission for Selecting and Recommending to Judicial Positions under the President of Uzbekistan. President approves its composition. The IAP monitoring criticised such an arrangement and noted that the composition, status and functioning of the council should be regulated by law and guarantee necessary independence from political institutions.<sup>471</sup>

#### *Appointment procedures*

Independence of the judiciary can be undermined if political bodies (*e.g.* the parliament or the president) play a decisive role in judicial appointments. As noted in one of the IAP monitoring reports, it is advisable to remove such bodies from the process for appointing and removing judges. If it is impossible to do so, it is then necessary to configure the procedure in such a way that the principal decision is adopted by a judicial council (constituted in accordance with international standards discussed above), while the political bodies would only endorse the judicial council's decision.<sup>472</sup>

In **Mongolia**, the President appoints all judges upon the proposal of the Judicial General Council; nominations for the Supreme Court judges must first be cleared by the parliament. Before nomination, judicial candidates are selected by the Judicial General Council and its Judicial Qualification Commission; vacancies are announced on the Council's web-site. The Judicial Qualifications Commission assesses the candidates; then the General Council conducts interviews with each candidate and votes to determine whom it will nominate; the candidates with the most votes are submitted to the President. The President is not bound by the Council's recommendation and may reject a candidate. The IAP monitoring noted that the involvement of the political branches (President, Parliament) in the appointment of judges causes concern, as it undermines judicial independence.<sup>473</sup> The report also mentioned that if such institutions cannot be fully removed from the selection process, then it is necessary to formalise the procedure to ensure that it is aligned with international standards. Thus, the political bodies should only endorse the decisions made by an appropriately constituted judicial council and have no discretionary decision-making powers with regard to the appointment or dismissal of a judge. However, if that is not possible, one option would be to allow the President to veto the judicial council's recommended candidate but the President will have to accept the candidate if the judicial council resubmits the candidate for appointment).<sup>474</sup>

In **Kyrgyzstan**, the President appoints judges of local courts, upon recommendation of the Council for Selection of Judges. The President also submits to the parliament recommendations on candidates for the Supreme Court and the Constitutional Chamber of the Supreme Court. The President has the right to return the nominated candidacy to the Council for Selection of Judges along with a reasoned opinion. If the Council submits the same candidate once again, the President is required to approve it (or, if applicable, submit it to parliament) within 10 days. However, no such limitation of discretion is provided for decisions on judicial appointments and dismissals by the parliament.<sup>475</sup> As noted by the Venice Commission, the appointment of ordinary judges are not an appropriate subject for a vote by

<sup>471</sup> OECD/ACN (2012), IAP Joint First and Second Monitoring Rounds report on Uzbekistan, page 59, <http://goo.gl/vno99d>.

<sup>472</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 104, <http://goo.gl/7g8MZq>.

<sup>473</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, page 96.

<sup>474</sup> *Idem*, pages 96-97.

<sup>475</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, pages 69-70, <http://goo.gl/6Xsc6m>. See also Venice Commission report on Judicial Appointments (§14): "As long as the President is bound by a proposal made by an independent judicial council ..., the appointment by the President does not appear to be problematic."

Parliament, because the danger of political considerations prevailing over the objective merits of a candidate cannot be excluded.<sup>476</sup>

Therefore the best model for judicial appointments and dismissals is to have the judicial council directly decide such matters, provided that the law ensures the independence and proper composition of the council. From the IAP countries, the Judicial Council directly appoints and dismisses judges of general courts only in **Georgia**. (Even in Georgia, however, the justices of the Supreme Court are still appointed by the Parliament upon the President's proposal).

In a number of other European countries, including several ACN members, the judicial council makes a direct appointment of judges (rather than merely nominating a candidate). In **Italy** and **Portugal**, the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In **Bulgaria**, the Supreme Judicial Council appoints judges, prosecutors and investigating magistrates. In **Croatia**, the State Judicial Council appoints and dismisses judges. In **Cyprus**, the appointment, promotion, transfer, termination of appointment, dismissal and disciplinary matters of judicial officers fall exclusively within the competence of the Supreme Council of Judicature. In the Former Yugoslav Republic of **Macedonia** the Judicial Council elects and dismissed judges and court presidents. In **Turkey**, the Supreme Council of Judges and Public Prosecutors is competent to appoint judges, transfer them to other posts, and to decide on their promotion and disciplinary matters.<sup>477</sup>

#### *Court presidents*

Presidents of courts may have an adverse impact on the internal independence of judges, by having excessive administrative powers, deciding the distribution of cases, allocating resources within the court and influencing the career growth of judges. It is therefore recommended to limit their powers. The best way to ensure a maximum level of independence of court chairpersons, is to elect them either by judges of the respective court or by a judicial self-government body (e.g., conferences of judges or even an appropriately constituted judicial council).<sup>478</sup> Court chairpersons should be appointed for a limited term with the option of only one renewal.<sup>479</sup> In **Kyrgyzstan**, presidents of courts and their deputies are elected by gatherings of the respective courts' judges. In **Ukraine**, after the 2014 reform of the Law on the Judiciary, most court presidents and their deputies are also appointed by gatherings of the respective court's judges by a secret ballot for a two-year term. The Supreme Court president, however, is appointed by the plenary assembly of the Court.<sup>480</sup>

#### *Case assignment*

The arbitrary distribution of cases among judges creates the conditions for corruption and undue influence on the administration of justice. This function should not belong to the court's chairperson. Case assignments should either be random or be made on the basis of predetermined, clear and objective criteria determined by a board of judges of the court.<sup>481</sup> It should not be influenced by the wishes of a party to the case or by anyone otherwise interested in the case's outcome.<sup>482</sup> Laws in some IAP countries

<sup>476</sup> Venice Commission, Report on Judicial Appointments, §12.

<sup>477</sup> *Idem*, §16.

<sup>478</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 104, <http://goo.gl/7g8MZq>.

<sup>479</sup> OSCE Kyiv Recommendations on Judicial Independence, 'The Role of Court Chairpersons', §15. OSCE Recommendations also provide (§11): "They [court chairpersons] may have representative and administrative functions, including the control over non-judicial staff. Administrative functions require training in management capacities. Court chairpersons must not misuse their competence to distribute court facilities to exercise influence on the judges."

<sup>480</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 172, <https://goo.gl/a5H53J>.

<sup>481</sup> OSCE Kyiv Recommendations on Judicial Independence, 'The Role of Court Chairpersons', §12.

<sup>482</sup> Council of Europe's Committee of Ministers Recommendation CM/Rec(2010)12, §24.



(*e.g.* **Azerbaijan, Kazakhstan, Kyrgyzstan**<sup>483</sup>, **Ukraine**) have formally introduced automatic case assignment, but there are concerns that automatic systems may be tampered with (*e.g.* through fake specialization of judges, or assigning certain court districts to the judges of the appellate courts, thus narrowing down the pool of judges to whom specific cases may be assigned). It is therefore important to ensure that the parties and the general public have access to information on how cases are assigned through the automated system (either by publishing the results proactively or providing them upon request). In **Kazakhstan**, the protocol for automatic case assignment is included in the case-file and is accessible for the parties. (The electronic system also keeps a log of all operations). There should also be liability for illegally interfering with the electronic system of distribution.<sup>484</sup> Oversight over the case-distribution system can be given to the judges of the relevant court, but not to the court president.

#### *Financial autonomy*

The judiciary may not be independent if it is not properly funded from the state budget, when its funding depends on the discretion of the executive branch or when it has to rely on charitable donations from private parties. The judiciary should also have the opportunity to prepare its own budget and defend it before the parliament.

An example of a good approach to legal rules on funding can be found in **Kyrgyzstan**, where the Government has to incorporate proposals made by the Council of Judges into the draft state budget without any changes. (However, it can attach its separate opinion to such proposals, if it objects to the request). The Chairman of the Council of Judges personally participates in the debate on the state budget in the parliament.<sup>485</sup> However, in practice the financial and material situation of Kyrgyzstan's judiciary is not satisfactory. For instance, the judiciary lacks the funds needed to introduce an automated case-assignment system as prescribed by the law. Each year the judiciary's budget shrinks, and the judges' pensions are reduced in violation of the law.<sup>486</sup>

In **Mongolia**, the General Judicial Council also has the right to present a proposed budget directly to the parliament. This, however, has not protected the judiciary from budgetary cuts so far. The final decision on the judiciary's budget rests with the parliament, which usually follows the positions of the Government and the Ministry of Justice. The provision of the law that the judiciary's budget cannot be reduced year on year is not followed in practice.<sup>487</sup>

Remuneration commensurate with the status and duties of judges is another important aspect for ensuring financial independence and for reducing incentives for corruption. A good approach can be found in **Ukraine**, where the 2010 reform set directly in the law the salary rates for judges while providing their gradual increasing, and eliminated bonuses (which constituted a significant part of the judicial remuneration and served as an instrument of influencing judges by the court presidents). The 2011 Law on Court Fees provided that the fees collected should be directed to a special fund of the State Budget and should only be allocated to the judiciary. However, the IAP monitoring report highlighted that Ukraine's judiciary has scant resources in reality. Insufficient funding from the state budget (up to 50%

<sup>483</sup> During the third monitoring round, the system of automated assignment of cases in the courts of Kyrgyzstan was not functioning yet and the court chairpersons continued forming the judicial panels and assigning all cases. Even more, the court chairpersons used assignment of cases as a punishment tool or a method of influence: they gave easy but at the same time beneficial cases to their "favourite" judges, while "disliked" judges dealt with "moneyless", complicated, or otherwise problematic cases. The judges deliberately did not use computers for assignment of cases referring to the technical problems or lack of support staff. See: OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, page 92.

<sup>484</sup> See IAP Second Monitoring Round reports on Kazakhstan (page 110) and Kyrgyzstan (page 70). See also OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, pages 123-124.

<sup>485</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 68.

<sup>486</sup> OECD/ACN (2015), Third Monitoring Round report on Kyrgyzstan, pages 93-94.

<sup>487</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, page 99.

of the required annual funding), untimely payment of salaries, insufficient staff, lack of adequate court premises and equipment are often compensated by private contributions and assistance from the local self-government authorities. This undermines the judiciary's integrity and independence and fosters corruption.<sup>488</sup> Also the salary increase scheduled for 2014 and 2015 was revoked, as it was argued that such an increase (which would cost UAH 600 million) was not economically possible. The basic salary rate for judges was initially set at 10 minimum salaries and then reduced to 7 minimum salaries.<sup>489</sup> For 2016, the law on the state budget went even further and delegated decision-making on the judicial salaries to the Government, which contradicts international standards and represents a regression when compared with Ukraine's previous achievements in this area.

In **Mongolia**, the General Judicial Council determines the amount of judicial remuneration. In addition to the base salary, a judge can receive bonuses of up to 50% of the base salary depending on seniority and "level of professional activity". The amount of bonuses is calculated based on the number of years of service (after the first five years of service, a judge receives a 2% increase in salary for each subsequent year). There is no procedure to take into account the performance of the judge.<sup>490</sup>

When the executive branch controls issues related to the allocation of financial resources or status (e.g., salaries, the assignment of qualification ranks, etc.), it creates a serious challenge to genuine judicial independence.<sup>491</sup> Paying bonuses to judges may also negatively affect judicial independence and lead to abuses.<sup>492</sup> Therefore, IAP monitoring recommended that the remuneration rates for judges should not only be sufficient but also be fixed directly in the law. Laws concerning remuneration should address the amount of wage and possible increments, for example, for the judicial length of service, qualification class, extra payments for special employment conditions (e.g., for working overtime during consideration of election disputes, judges on duty) and holding of an administrative position in a court.<sup>493</sup>

### **Integrity of judges**

Ensuring the integrity of judges is an important condition for preventing judicial corruption. There are a number of relevant techniques that can be used to promote integrity: merit-based recruitment and promotion, rules on judicial ethics, guarantees of impartiality (in particular, through rules on recusal), incompatibilities, as well as provisions on conflicts of interests, gifts and other instruments.

#### *Procedures for selection and promotion*

Decisions concerning the selection and careers of judges should be based on objective criteria established beforehand either in the law or by the responsible authorities. Such decisions should be based on merit, including factors such as qualifications, skills and capacity.<sup>494</sup>

After the 2011 reform, all vacancies within the judiciary of **Kyrgyzstan**, including those in the Supreme Court and in the Constitutional Chamber of the Supreme Court, are filled by a competitive selection. However, the selection process consists solely of an interview, without having any established selection criteria, and without a provision that the successful candidate be the person who best meets the criteria. While conducting an interview, the Council for Selection of Judges "has the right" to request the

<sup>488</sup> OECD/ACN (2010), Second Monitoring Round report on Ukraine, page 66.

<sup>489</sup> OECD/ACN (2015), Third Monitoring Round report on Ukraine, pages 164-165.

<sup>490</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, pages 98-99.

<sup>491</sup> See, for example, the IAP Second Monitoring Round reports on Kyrgyzstan (page 71) and Tajikistan (page 59).

<sup>492</sup> According to Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec(2010)12 of 17 November 2010 (§55): "Systems making judges' core remuneration dependent on performance should be avoided as they could create difficulties for the independence of judges".

<sup>493</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 109.

<sup>494</sup> Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec(2010)12, §44.



candidate's income declaration and "other information as a proof of the candidate's integrity". The IAP monitoring concluded that this might lead to a selective approach in the assessment of candidates.<sup>495</sup>

A 2010 Law on the Judiciary in **Ukraine** introduced a complex competitive selection system for first-instance court judges: candidates have to pass an anonymous test on their knowledge of law, undergo a vetting procedure, study for 6 months at the National School of Judges, and then pass another qualification examination, consisting of an anonymous written test and practical assignment. Successful candidates are then included in the judicial "reserve"; when a vacancy appears, it is filled with the reserve candidate who scored the highest on the qualification examination.

A merit-based system was also introduced in **Georgia**, where the High Council of Justice appoints candidates to vacant positions based on a person's qualification shown in written and oral examinations, professional and moral reputation, ability to assess issues freely and impartially, professional work experience and physical health. The criteria for selecting candidates for judges are set in the decision of the High Council of Justice and include: decision-making ability, effective communication skills, managerial skills, impartiality, morality, personal skills, professional work experience, the candidate's rank in the qualification list of the High School of Justice (only for school listeners), judicial temperament, statistical data about decided cases (if the candidate already has experience working as a judge), and the ability to manage trial effectively. The Criteria for promoting judges have not been established in the law, despite the recommendation of the IAP Third Round Monitoring report.<sup>496</sup>

A system of oral and written examination is also used in **Azerbaijan**, where successful candidates then undergo initial long-term training in the Legal Training Centre under the Ministry of Justice. There exists a "Judicial Selection Committee Chart" with criteria for selecting judicial candidates.<sup>497</sup> Judicial selection in **Armenia** is administered by the Judicial School, which submits lists of pre-selected candidates to the Council of Justice for oral interviews. Notably, the Judicial Code of Armenia provides for a list of criteria that are taken into account when the Council of Justice decides on the promotion of a judge.<sup>498</sup>

In **Kazakhstan**, competitions are used to select judges for local and regional courts. (Starting from 2016, competitions will also be used for Supreme Court justices). One of the requirements is to pass the qualification exam, which consists of a computerised test and an interview conducted by the commission. Under the law, district courts judges must have a "high standard of knowledge, moral and ethical qualities and impeccable reputation". The law also provides that priority is given to candidates who have passed the qualification exam in the specialised Master's programme (*i.e.* in the Institute of Justice); who have at least five years of legal experience in the state authorities supporting the judiciary's activities, law enforcement bodies or the bar.

<sup>495</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, pages 68 and 70.

<sup>496</sup> See OECD/ACN, Progress updates by Georgia, <https://goo.gl/J7edk6>. See also Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft Law on Amendments to the Organic Law on General Courts of Georgia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), pages 13-14, available at <http://goo.gl/v4jepT>.

<sup>497</sup> OECD/ACN (2010), Second Monitoring Round report on Azerbaijan, page 45.

<sup>498</sup> Professional knowledge of a judge, including the judge's professional activities and professional and post-university education; professional reputation; work skills; quality of judicial acts made by the judge; judge's respect for the reputation of the judiciary and judges and compliance with the Judicial Code of Conduct; oral and written communication skills, based on the minutes of court sessions and the judicial acts made by the judge; judge's participation in educational and professional training programs; participation in the self-governance of the judiciary; participation in legislation development projects; attitude towards colleagues during performance of judicial duties; organizational skills and qualities displayed by the judge in the performance of managerial duties.

In **Mongolia**, the selection process is based on the candidates' merits and is competitive. It includes the publication of vacancies on the web-sites of the General Judicial Council (GJC) and the relevant court, as well as in the media. The vacancy note includes information on the selection criteria and the documents to be submitted. Applicants must apply to the Judicial Qualification Commission (JQC) – a body attached to the General Judicial Council. The JQC reviews and verifies the submitted information, conducts examination tests of the candidates and other evaluations. Tests cover professional skills, ethics, case simulation, knowledge of Mongolian language as well as writing, public speaking, and IT skills. A special ethics test includes case simulation on the ethics standards, an interview with the candidate and a survey of the candidate's colleagues. The JQC short-lists the candidates who are then interviewed by the GJC. The association of attorneys is invited to provide their opinion on the candidates as well. The President of Mongolia approves the regulations on the selection of judges. The IAP monitoring found that the main problem with the judicial recruitment procedure lies at the final stage, when the GJC refers its recommendation for appointment to the President. The final decision-making by the President is problematic from the point of view of international standards, especially because the President can reject the GJC's nominees without any explanation.<sup>499</sup>

The IAP report found that the criterion related to the length of experience is questionable as it does not necessarily reflect the knowledge and skills of the candidate (while service in law enforcement bodies could have a rather a negative impact for the future judge). Also, it is unclear what weight is given to each of these criteria. While the introduction of electronic tests was a positive step, the oral interview gave rise to concern as it may have a subjective effect on the evaluation of the candidate. It was recommended to Kazakhstan to limit the possibilities for subjective influences on the procedure for selecting judges as much as possible and to consider introducing an obligatory training in the specialised institution for judges, as a pre-condition for holding the position of a judge.<sup>500</sup> No tangible progress has been made since the second round of monitoring.

Independence standards for the judicial councils also apply to the institutions responsible for judicial selection. They should also consist of a majority of judges elected by their peers.<sup>501</sup> For example, in **Kyrgyzstan**, a Council for Selection of Judges is formed by the congress of judges exclusively from active and retired judges. In **Ukraine** (after the 2014-2015 reform), the High Qualification Commission of Judges consists of 14 members separated into two chambers – Qualification and Disciplinary. The congress of judges elects four members to each chamber. The congress of the representatives of law schools and law academic institutions as well as the congress of attorneys each elect one member to each chamber. The Ombudsman and the Head of the State Court Administration each elect one non-judge to the disciplinary chamber. All members of the High Qualification Commission of Judges perform their functions on a full-time basis for a four-year term (with the possibility of one extension).<sup>502</sup> In **Mongolia**, the Judicial Qualification Commission (JQC) consists of nine members, including four judges of the Supreme Court, two chief judges of the appellate courts and three law professors. The General Judicial Council determines the composition. The members of the JQC work part-time and are remunerated based on hours worked.

### *Ethics rules*

According to international standards, judges should be guided in their activities by the ethical principles of professional conduct. These principles not only include duties that may be sanctioned by disciplinary

<sup>499</sup> OECD/ACN (2015), Joint First and Second Monitoring Rounds report on Mongolia, page 97.

<sup>500</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, pages 108 and 111.

<sup>501</sup> See, for example, OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 108.

<sup>502</sup> The new Law on the Judiciary that was adopted in June 2016 (entering into force on 30 September 2016) changed the HQCJ composition. It will be composed of 16 members: the congress of judges will elect 8 members, while the congress of the representatives of law schools and law academic institutions, the congress of attorneys, the Ombudsman and the Head of the State Court Administration will appoint each two members.

measures, but offer guidance to judges on how to conduct themselves. These principles should be laid out in codes of judicial ethics. Judges should play a leading role in the development of such codes. Judges should be able to seek advice on ethics from a body within the judiciary.<sup>503</sup>

While judiciaries in all IAP countries have developed codes of judicial ethics, their enforcement is often weak and there is often a lack of awareness about their requirements. In several countries, there is no enforcement mechanism to provide judges with advice on how to apply ethics rules and how to deal with violations of these rules by judges.<sup>504</sup> In **Kyrgyzstan**, in addition to the Judicial Code of Honour, judges should comply with the ethics rules for civil servants set by law, which was found to be an interference with the judicial independence by the IAP report, as civil servants ethics standards are established by the executive power and not all of them are applicable to judges (*e.g.* the obligation to retain loyalty to the administrative authority).<sup>505</sup>

A good approach to the enforcement mechanism can be found in **Kazakhstan**, where each regional court functions as a judicial ethics commission of the Union of Judges of Kazakhstan (a professional association of judges). These commissions are separate from the body responsible for conducting disciplinary measures against judges (Disciplinary and Qualification Board); the latter may request the ethics commission to issue an opinion on whether a judge's behaviour can be considered in violation of the Code of Judicial Ethics. However, there is no requirement for the judicial ethics commission to first establish a violation before a judge can be disciplined for an ethics violation.<sup>506</sup> It is also a good practice to have separate rules of conduct for non-judicial court staff (*e.g.* **Armenia, Ukraine**).

In 2014, **Armenia** reformed the body in charge of judicial ethics by transferring the relevant powers to the Ethics and Disciplinary Commission of the General Assembly of Judges. The new Commission consists of seven members including two judges from the first instance courts of the capital city, two judges from the regional first instance courts, and three judges from the courts of appeal. Members of the Council of Judges and court presidents cannot be members of the Commission.<sup>507</sup>

### *Training*

The initial and in-service training of judges are both crucial for building integrity as well as to raise their awareness about ethics rules and anti-corruption legislation. According to international standards, judicial training should be conducted by a dedicated institution, which is subordinated to the judiciary (*e.g.* judicial council) and not to the executive (*e.g.* ministry of education or justice). An independent authority (*e.g.*, the judicial council), should ensure that training programmes for judges satisfy the requirements of openness, competence and impartiality inherent in judicial office.<sup>508</sup> In the following IAP countries, judicial schools are subordinated to the judiciary: **Armenia, Georgia, Kyrgyzstan and Ukraine**.

### **Accountability**

Even most independent and ethical judiciary is susceptible to corruption when judicial actions remain unchecked. It is therefore necessary to set up effective mechanisms for judicial accountability. Creating an accountability system that does not impair judicial independence and impartiality is a challenging task. It should include preventive (transparency of various procedures related to the administration of justice and judicial careers, asset and conflict of interests disclosure, etc.) and punitive instruments (disciplinary liability, effective procedures for lifting judicial immunity, prosecution of misconduct by judges).

<sup>503</sup> Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec(2010)12, §§72-74.

<sup>504</sup> See, for example, IAP Second Monitoring Round report on Tajikistan, page 59.

<sup>505</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 70.

<sup>506</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, pages 109-110.

<sup>507</sup> OECD/ACN, Progress updates by Armenia, pages 73-74, <https://goo.gl/qySLaC>.

<sup>508</sup> Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec(2010)12, §57.

### *Transparency*

All procedures related to the selection, promotion, dismissal, and disciplining of judges should be transparent and open to public scrutiny. It should include publication of vacancies, results of tests and other competitive selection procedures, open records of meetings and decisions of the relevant bodies. Also, the public should be aware of how the relevant procedures are regulated (criteria for recruitment, promotion, etc.). The IAP monitoring report noted in this regard that the lack of information about the reasons for appointing or dismissing judges as well as for reorganising the courts might have lowered the public's trust in the courts.<sup>509</sup>

In **Kazakhstan**, vacancy notices for judges of local and other courts is published on the web-site of the Supreme Court and in the national press. Likewise, the Supreme Court web-site provides information about the candidates who have successfully passed the qualifications tests as well as those who are running for vacant positions in local and other courts. Information about candidates nominated as chairmen of local courts and chairmen of local court panels, or as chairmen of Supreme Court panels, is published on the Supreme Court's web-site and in the national press. Local official press outlets and web-sites of regional courts publish details of candidates for the position of a judge who take traineeship at courts as well as candidates who entered the competitive selection for a judicial vacancy.<sup>510</sup>

In **Georgia**, the process of selecting judges is transparent as the High Council of Justice (HCOJ) publishes information on each step of the process on its web-site, such as the qualification exam as well as the interview of students at the High School of Justice and judicial candidates. Civil society representative are allowed to attend the HCOJ meetings when the interviews of listeners of the High School of Justice are conducted. Since 2013, the qualification exam for judges is conducted electronically.

It is also important to ensure transparency of court proceedings – from distribution of cases among judges and physical access to court premises or hearings to the publication of court decisions. In **Kazakhstan**, there is a publicly accessible database of electronic texts of judicial decisions on the official web-site of the Supreme Court. Also in 2011 public access was granted to information provided by courts regarding the status of cases, including the date of proceedings, copies of judicial decisions, and the name of the judge. In addition, information on the judiciary, addresses and contact details of the courts is also available online. At the same time, the IAP monitoring took note of that problems had been reported concerning access to court sessions, which typically should be open, as well as concerning prohibitions on recording proceedings with technical devices.<sup>511</sup> All judicial decisions are also available on-line in **Armenia** and **Ukraine**.

### *Disciplinary liability*

Weak disciplinary rules and lack of their enforcement may foster impunity among judges, while too broad provisions and arbitrary application may seriously encroach on the judicial independence. It is therefore important to find a necessary balance.

In **Ukraine**, the definition of grounds for disciplinary liability of judges was extended in 2010. IAP monitoring, however, found the revised provisions to be problematic, as they lacked clarity. In particular, one ground (breaching the judge's oath) was not clearly defined, thus leaving open possibilities for

---

<sup>509</sup> OECD/ACN (2010), Second Monitoring Round report on Georgia, page 45.

<sup>510</sup> OECD/ACN (2014), Third Monitoring Round report on Kazakhstan, page 121.

<sup>511</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 110.

abuse.<sup>512</sup> A similar issue of overly broad grounds for imposing disciplinary liability on judges, including dismissal from office, was identified in **Kyrgyzstan**<sup>513</sup> and **Kazakhstan**<sup>514</sup>.

Disciplinary proceedings should also include guarantees against arbitrariness to ensure that judges are protected from persecution for political or other ulterior motives. For example, as was noted in the IAP monitoring reports, the functions of initiating disciplinary proceedings, conducting an investigation, and deciding a case should be separated. Otherwise there would be a violation of the principles of a fair trial.<sup>515</sup> A system in which a member of the judicial council is in charge of the disciplinary inquiry and presentation of the case to the full panel of the council affects the impartiality of the proceedings, as the same person will perform the roles of a “prosecutor” and a “judge”.<sup>516</sup> Furthermore, a lack of any possibility for appeal against decisions on disciplinary liability would contravene the human right to a fair trial.<sup>517</sup>

### Conclusions and recommendations

The independence and integrity of the judiciary are crucial for anti-corruption efforts and proper democratic governance. A number of IAP countries have conducted reforms in this area, but much remains to be done to align their legal frameworks with the applicable international standards. There are also many cases when legal safeguards are ignored in practice, *e.g.* when judges are dismissed under the pretext of reorganisation or job cuts contrary to irremovability guarantees enshrined in the law. The financial independence of courts is often undermined in practice, *e.g.* when judicial budgets and salaries are reduced contrary to the legal guarantees. Creating a judicial accountability system that does not impair the independence and impartiality of the judiciary remains a challenging task in the region.

#### Recommendations:

- Continue necessary reforms of the judiciary and public prosecution bodies to ensure their independence, impartiality, integrity and accountability in line with international standards (including through constitutional amendments, if required).
- Strengthen and strictly abide by the guarantees of independence of the judiciary, including provisions on the irremovability of judges and safeguards against the undue influence of judges. Consider abolishing the initial temporary appointment of judges where it exists; if it is retained, non-confirmation of judges already in office should be based on clear and transparent criteria. Minimise as much as possible or remove the involvement of political bodies in the appointment and dismissal of judges. Determine the system of existing courts and number of judges in each court directly in the law.
- Reform judicial councils or similar institutions in line with international standards (including composition, status, powers, and procedures) and make them responsible for judicial careers, disciplining, training of judges, etc.

<sup>512</sup> OECD/ACN (2010), Second Monitoring Round report on Ukraine, page 68.

<sup>513</sup> Regarding such ground as breaching the ‘impeccability’, *e.g.* violating such duties as “remaining true to the judge’s oath”, “avoiding anything which could tarnish the judge’s authority and dignity”, etc. See IAP Second Monitoring Round report on Kyrgyzstan, page 70.

<sup>514</sup> The IAP monitoring concluded that the requirements to the judge are stated vaguely (for example, the wording “doubts in honesty, fairness, objectiveness and impartiality” of a judge may cover many situations, likewise violation of the requirement to adhere to the judge’s oath). Such terms as “professional unfitness”, “low rates in delivering justice”, “violation of legality” were found to be ambiguous as well. See IAP Second Monitoring Round report on Kazakhstan, page 105.

<sup>515</sup> OECD/ACN (2011), Second Monitoring Round report on Kazakhstan, page 105.

<sup>516</sup> OECD/ACN (2010), Second Monitoring Round report on Ukraine, page 68.

<sup>517</sup> OECD/ACN (2012), Second Monitoring Round report on Kyrgyzstan, page 70.

- Introduce a system of to assign cases among judges automatically based on objective criteria, preferably agreed upon by the judges of the court. To prevent abuse, ensure that information on case assignments is open to judges, parties and the public.
- Revoke the powers of court presidents related to judges' careers (including their salaries and other benefits, disciplinary liability, etc.), as such powers could affect judicial independence; court presidents should be elected by judges of the relevant court for a limited term.
- Ensure in law and in practice the financial autonomy of the court system, in particular, by allowing the judiciary to be responsible for drafting and defending its own budget before the parliament, and by establishing that judicial bodies (e.g. judicial council) are responsible for controlling the administration of the judiciary's budget. Ensure that remuneration rates and all wage increments of judges are fixed directly in the law and prohibit payment of bonuses to judges.
- Introduce effective instruments for ensuring the integrity of judges, in particular, through merit-based competitive recruitment and promotion, rules on ethics, incompatibilities, conflict of interests management, gifts, etc. Training on ethics, anti-corruption and integrity should be an important part of the training curricula for judges at all phases of their career. A dedicated training institution subordinated to the judiciary should be put in charge of training judges.
- Ensure the accountability of the judiciary, first and foremost, through transparency of all issues related to judicial careers (publication of vacancies and candidates who applied, results of various stages of the competitive selection, etc.), court proceedings and decisions. Asset and income disclosure of judges should be important tools for preventing and detecting corruption among judges; publish asset declarations of judges online (excluding certain sensitive personal data).
- While judicial bodies should have adequate means to effectively discipline judges, disciplinary liability should not be used to arbitrarily persecute independent judges. To this end, the grounds for disciplinary liability should be clear and established in the law in line with the principle of legal certainty; disciplinary proceedings should comply with fair trial guarantees (in particular, by separating the investigation, prosecution and decision-making functions in such proceedings, affording judges with adequate means to defend themselves, and ensuring the right to appeal adverse decisions in court).

## Business integrity

In December 2012, the ACN High-Level Meeting adopted a statement committing to “engage in a dialogue with the business sector, NGOs and media to prevent corruption, work with public and private companies and with business associations to raise awareness on risks of corruption, and support them in their efforts to promote internal control, ethics and compliance programmes and collective actions against corruption” and calling upon the ACN to support these efforts.

Responding to this call, the ACN has included a new project on business integrity in its Work Programme for 2013-2015. This project included a series of expert seminars on this subject and the preparation of the Business Integrity Thematic Study. The ACN has also strengthened the business integrity section of the IAP monitoring process and involved the private sector and business associations in the monitoring.

According to the ACN Business Integrity Study, companies and business associations in the ACN countries acknowledge that corruption is widespread in the region. To address this business risk, many – especially large – companies have introduced anti-corruption procedures and instruments; however, most companies never use them in practice. According to the Study, poor enforcement of anti-bribery laws in

the region is the main reason for the lack of integrity actions by the private sector. Companies that were surveyed during the preparation of the Study claim that “the main reasons for the ineffective fight against corruption seem to be the lack of cooperation between business organisations and the public domain, absence of trust between the public and private sectors, clashes of understanding about who shall take the primary initiative and leadership”.

The IAP monitoring reports also highlight the governments’ lack of understanding about the role that they can play in promoting business integrity. Monitoring reports note that the private sector, while complaining about high levels of corruption, does not seem ready to engage in anti-corruption and integrity work. Many country recommendations urge countries to develop meaningful public-private dialogue in order to identify most effective business integrity measures and commit to their implementation.

Policy recommendations and good practices presented in the ACN Business Integrity Study as well as the IAP recommendations identify measures that governments, companies and business associations can take to further promote business integrity in the region.

### Assessing business integrity risks

Risk assessment is an important tool for both the public and the private sector to identify the challenges that policy measures need to address. Many ACN countries report that they are studying business integrity risks at the national level: 75% of governments that responded to the survey (which included 10 ACN governments, but only 1 IAP country) stated that they were studying such risks. For instance, the recent national anti-corruption strategies of **Estonia**, **Lithuania** and **Romania** refer to the assessments of corruption risks in the business sector.

In contrast, the third round of monitoring shows that the IAP governments do not conduct such studies, confirming an important shortcoming in this part of the region. For instance, in **Georgia**, there are many surveys on various aspects of corruption conducted by public and private sector, but no similar surveys were conducted in the area of private sector integrity, apart from the TI National Integrity System assessment report. While there are business integrity risk studies conducted by the business associations and other non-governmental partners, e.g. by EBA and AmCham in **Ukraine**, governments in the region do not use them for policy planning or monitoring purposes.

Some surveys not only help identify priority problems, but also track the evolution of the situation over time. In this way, such surveys monitor the impact of anti-corruption efforts in the country or in a sector. For example, according to a survey conducted by the American Chamber of Commerce in **Ukraine** in 2014, 99% of companies stated that corruption was wide-spread, 81% of companies confirmed that they faced corruption on a regular basis, and 73% believed that corruption increased in 2013.

Regarding the types of integrity risks, the 2013 Summary Report noted that “a general lack of legal certainty is the fundamental challenge for business development and investment in many Istanbul Action Plan countries.” According to the Business Integrity Study, legal uncertainty, selective application of the law by the law-enforcement and judiciary and poor protection of property rights remains the top corruption-related risk for doing business in the region. The summary of all risks identified by the survey is provided below.



Table 44. Business integrity risks in the ACN countries

	What forms of business integrity risks are most to important your company	Average score: from 5 (the most important) to 1 (the least important)	
		Companies	Associations
1	Legal uncertainty and selective application of the law by the law-enforcement and judiciary	3,79	4,40
2	Insufficient development of competitive environment	3,58	3,20
3	Poor protection of property rights	3,53	3,80
4	State capture by business, including illegal lobbying and other forms of influencing the state decisions in favour of business interests	3,26	3,87
5	Business capture by state, including illegal corporate raiding and other forms of takeover of companies by the state officials	3,21	3,07
6	Offering, promising and giving bribes and other illegal advantages to the public officials by companies	3,16	3,17
7	Bribe solicitation by public officials and other ad-hoc demand of bribes in individual cases	3,06	3,93
8	Private-to-private corruption between companies	3,05	3,14
9	Rent seeking by public officials and other regular claim of official for economic benefits produced by companies	2,89	3,40
10	Bribe solicitations by foreign public officials while doing business abroad	2,89	2,80
11	Financing of political parties by companies, political donations and contributions	2,53	3,33

Source: OECD/ACN Business Integrity Study, upcoming (2016).

### Ensuring legal certainty

Ensuring legal certainty is a challenging task that goes beyond anti-corruption and business integrity work, cutting across many governance sectors and issues. Improving legal drafting practices and the quality of legislation is an important prerequisite. Preventing undue relations between businessmen and policy-makers and state capture is another important condition. Cleaning up the public administration from red tape and corruption, ensuring integrity in regulatory and law-enforcement bodies in order to build trust in them is another solution. Finally, the role of the judiciary in ensuring legal certainty is extremely important, including the integrity of judges and uniform court practice. Some countries have opted for specialised bodies, sometimes known as Business Ombudsmen, that are responsible for protecting companies from various illicit encroachments.

### Developing business integrity policy

It is important to develop business integrity policy in order to set the objectives, identify and implement measures to achieve those objectives, and establish an adequate monitoring mechanism. Business integrity policy can be promoted in different frameworks. For instance, regulations on corporate governance can provide a useful framework for improving transparency and accountability in the business sector, and thus create conditions for better integrity. However, corporate governance regulations in the ACN region usually do not focus sufficiently on anti-corruption issues. Business integrity provisions can also be incorporated in sectorial policies, such as business promotion, procurement, and others. Please see the section on corporate governance below for more details.

It is also possible to address business integrity through anti-corruption policy. According to the 2013 report, anti-corruption policies typically targeted the corruption of public officials and did not include measures to promote business integrity. According to the survey, 78% national anti-corruption strategies or another policy documents in the ACN countries included business integrity provisions. As mentioned above, anti-corruption strategies in **Estonia**, **Lithuania** and **Romania** include chapters on measures for

preventing corruption in the business sector. The third round of monitoring determined that only several IAP countries, notably **Georgia** and **Ukraine**, have developed business integrity sections in their anti-corruption strategies. The accession of several ACN countries to the OECD Working Group on Bribery as well as the third round of monitoring under the IAP were key processes for including business integrity in national policy agendas.

#### Box 44. Business integrity in the Anti-Corruption Strategy of Ukraine

Section 6 of the Anti-Corruption Strategy of Ukraine for 2014-2017 concerns the prevention of corruption in private sector. This section was developed in consultations with the private sector. It identifies the following main problems: “merger of business and government”; illicit lobbying of business interests; complicated procedures for business regulations; corruption in controlling authorities and in the judicial system. The section further includes several measures to reduce corruption risks for the private sector, including the following:

- Simplification of business regulations and promoting free market competition;
- Preventing corruption in public administration and the judiciary, law enforcement and state control bodies;
- Debarment of companies involved in corruption offences from the use of public resource such as public procurement, state loans, subsidies, and tax benefits;
- Establishing obligations for external and internal auditors to report about corruption offences;
- Raising awareness of companies about the law on liability of legal entities for corruption offences and enforcing this law in practice;
- Disclosure of beneficiary owners of companies through the Unified state registry of legal entities and individual entrepreneurs;
- Establishing the office of business Ombudsman who would represent the interests of business community in the government;
- Engaging representatives of business community into development of strategy to promote the implementation of anti-corruption standards in private sector (OECD recommendations on best practices of internal control, ethics and observance of the law and Business principles of Transparency International to combat corruption) and facilitate the development of self-regulation in private sector;
- Ensuring access of entrepreneurs to necessary information, in particular about administrative procedures, rights and responsibilities of entrepreneurs; and
- Running pilot projects on “integrity pacts” in infrastructure projects or other projects entailing significant budget expenses through creating trilateral (government – business – civil society) mechanism of control over planning and implementation of such projects.

Source: OECD/ACN (2015), Third Monitoring Round report on Ukraine, pages 181-182, available at <http://goo.gl/I3Mzz8>.

In the ACN countries, there are state bodies responsible for preventing corruption, as well as for promoting business development, investments and competition, but there are no persons or bodies in the governments that would have a clear mandate for promoting business integrity. One of the advantages of addressing business integrity through anti-corruption policy is that it provides an institutional mechanism for monitoring and coordinating the implementation. This approach is pursued by **Georgia**, where the Anti-Corruption Council, which monitors the implementation of the Anti-Corruption Strategy (including the business integrity portion), includes business representatives. Other bodies can also perform this role, such as investment promotion or business development agencies, but experience shows that they often shy away from anti-corruption and integrity issues.

#### Public-private dialogue on corruption

Many countries report various forms of public-private dialogue. Public Councils established under various ministries in **Armenia** provide a platform for discussing proposed legislation or other regulations. For example, the Public Council under the Chairman of the State Revenue Committee addresses various issues related to business environment. Ministry of Economy sends its draft laws for comments to more than 1,000 entities, including the most active business associations. Armenia has also established sectoral boards consisting of representatives from the public and private sectors to support the development of strategies for exporting industries. Pharmaceutical, biotechnological, precise engineering, wine and brandy making, textile, jewellery, diamond and watch-making sectoral boards are operational. Taking into account the corruption risks in the private sector, the Prime Minister of Armenia

– who is also the Chairman of the Anti-Corruption Council – during the first sitting of the Council ordered the creation of a special platform for cooperation with the business sector. Business associations have joined the anti-corruption coalition of non-governmental organisations providing for a more active public-private dialogue.

In **Azerbaijan**, the National Action Plan for Promotion of Open Government for 2012-2015 and the National Action Plan for Combating Corruption for 2012-2015 foresee the establishment of Social Cooperation Council at the Ministry of Economic Development, which will conduct awareness-raising activities and promote self-regulation in the private sector. The Council on Cooperation with Civil Society was established under the Civil Service Commission, but it appears that it does not deal with business integrity issues. Transparency Azerbaijan and several bilateral and multilateral donors in the country actively raise awareness about private sector corruption.

Article 64 of the Company Law of Kazakhstan permits the establishment of consultative councils under various state bodies that can provide expert opinions and proposals to the respective bodies on various drafts of legal acts related to business regulations. **Kazakhstan**'s authorities reported that in 2013, expert councils advising 23 ministries and state agencies reviewed a total of 532 draft acts and provided their comments and suggestions. At the same time, only an insignificant number of suggestions coming from the business sector are taken into account during such consultations. In 2013 Kazakhstan adopted a law on the National Chamber of Entrepreneurs, participation in which is mandatory for all businesses. The National Chamber has a broad mandate and powers and consultation with it is mandatory when developing legal regulations affecting business. Consultations of the Prime Minister with foreign investors, which is supported by AmCham Kazakhstan, allows leaders of foreign companies that are operating in the country to raise their concerns, including on sensitive issues such as corruption, directly with the government in a confidential environment. But there is no formal follow-up to these consultations and the outcome relies upon the government's good will.

A large number of permanent forums for discussing different issues with the business community exist in **Kyrgyzstan**, including – since 2012-2013 – the Anti-corruption Forum in the Ministry of Economy, as well as the Anti-Corruption Business Council. Another such forum is the Council for Development of Business and Investments, which is part of the Kyrgyz Government (its chairman is the Prime-Minister). In 2013, Kyrgyzstan created the “SIA Council”, a forum chaired by the speaker of the parliament that seeks to protect investors' interests in the sphere of small and medium enterprises. At the initiative of the Ministry of Economy in Kyrgyzstan, the Charter “Business of Kyrgyzstan against Corruption” was developed; at the time of the third round of monitoring, 21 business associations had signed the Charter. Also at the time of the monitoring, the legal basis for creating a business ombudsman in Kyrgyzstan was developed. The EBRD has offered its technical assistance to develop the capacity of the President of the Chamber of Commerce of Kyrgyzstan to perform the duties of the business ombudsman; the launch of that project was foreseen for June 2016.

The Government of **Tajikistan** has implemented several reforms to improve its investment climate and to promote private sector development. It has reviewed several laws and established several bodies, including the State Committee on Investments and Management of State Property, Consultative Councils for improvement of investment climate under the President and heads of regions, cities and districts, Council for public-private partnership, State Enterprises “Centre for private-public partnership projects” and “Foundation for support of entrepreneurship under the President”. However, it is not clear if any of these bodies address corruption risks.

The business sector respondents to the ACN survey opined that the fight against corruption was ineffective in the region due to the lack of cooperation, motivation and trust between the public and private sectors. For example, business associations in **Kyrgyzstan** noted that, in general, public councils were an “echo from the past”. They reported that public councils were not very effective because the composition of these councils did not adequately represent the private sector and because state bodies

were not obliged to take the public council's views into account in the decision-making process. According to Kyrgyz NGOs, large companies continued to lobby for their interests through business associations or MPs. Small and medium business in reality had no avenues to promote their interests. An example of the lack of proper consultations with business entities could be seen in the way in which a Tax Code was drafted in 2010 – the first draft resulted in public protests from companies and business associations.

#### Box 45. Business integrity project in Estonia

To tackle private sector corruption, in 2014 the Estonian Ministry of Justice launched the project **Reducing corruption: Focusing on Private Sector Corruption** (PrivaCor), with the financial support of the European Commission under the Prevention of and Fight against Crime programme (ISEC). The project targeted anti-corruption practitioners, law enforcement officials, judges, businessmen, students and social scientists.

The first objective of the project was to obtain information about the extent and forms of private corruption through sociological study based on reliable methodology. The study was carried out among Estonian and Danish entrepreneurs and managers, and the sample consisted of 1000 managers, 500 from Estonia and 500 from Denmark. The results of the study were discussed with the entrepreneurs in regional seminars where also policy recommendations were developed. The study is available at <http://goo.gl/6NDBRx>.

Some of the key findings of the study:

- 57% of Estonians and 51% of Danes have encountered at least one type of corruption within their business sector.
- In both countries, the most common forms of corruption are kickbacks and conflicts of interest.
- The problem with corruption is more serious among small companies, younger managers and men.
- The main cause (or excuse) for bribery is pressure from management.
- Consequences of the corruption are mainly seen in terms of damage to the company's reputation as well as financial losses.
- More than 90% of respondents in both countries find that the personal example of the manager is an effective anti-corruption measure.

The project also involved visits to OLAF and to law enforcement agencies in Denmark and Spain. Finally, there was an international conference to raise awareness and tackle private corruption. The conference included different workshops on understanding and investigating private corruption. The conference and study trips helped to improve the investigation and analysis capacity of the participants and also helped develop international anti-corruption networks. The conference was also used to disseminate information about the study. The purpose of the anti-corruption networks is to increase the international investigation capacity and prevent cross-border corruption offences.

Source: Information of the Ministry of Justice of Estonia.

At the same time, business delegates themselves are not always active in public-private dialogues. A representative of the State Agency "National Centre for Legislative Regulation" of **Armenia** described the difficult experience of public-private consultations in the framework of the "Legislative Guillotine" project. The aim of the project was to repeal or simplify sectorial regulations in order to reduce compliance costs for companies. To identify outdated or unnecessary regulations, the Agency invited business associations active in the respective sectors to fill out a checklist, but no responses were received. The Agency therefore decided to skip the checklists and invited the associations to the meetings for consultations in person, but their input to the project remained limited.

To improve public-private dialogue it is important that both the government and the private sector genuinely aim to reduce business corruption and develop meaningful forms of cooperation with practical results useful for both sides. The business integrity committee that was established under the Anti-Corruption Council in **Georgia** is probably a more effective form of dialogue, as it provides a strong focus on anti-corruption as well as a continuous and visible institutional and policy framework. The business integrity project in **Estonia** is a rare example of a focused effort of the government to engage with the private sector in the area of business integrity. In **Romania**, the Ministry of Justice has a dedicated co-operation platform with business under the National Anti-Corruption Strategy.

### Preventing corruption risks in business regulations

The 2013 Summary Report noted that “Corruption is widespread in all forms of interaction between the private and public sectors and with businesses as well. Public funds are often diverted to companies that are well connected to public officials. Small, medium and large enterprises, both domestic and foreign, face major problems related to irregular court and administrative practices concerning property rights. Complex administrative procedures in tax, customs, licensing, permits and public procurement represent areas prone to arbitrary decisions. Various types of inspections are used to solicit bribes.”

The third round of monitoring observed that several IAP countries took measures to improve their regulatory frameworks and, in this way, reduced opportunities for corrupt behaviour. In many ACN countries, e.g. in **Kazakhstan**, state bodies are obliged to conduct a regulatory impact assessment, if they plan to either introduce a new regulation or make an existing regulation more stringent towards the business sector. However, this procedure does not focus on corruption risks. **Georgia** took important measures to deregulate its economy and to reduce administrative barriers, which produced good results in improving its business environment. In 2013, Georgia ranked 9th among 185 countries according to the World Bank’s Doing Business, and it ranked 24th among 189 countries in 2015. The introduction of e-governance systems, one-stop-shops for company registration and other administrative matters, limiting inspections (e.g. in **Armenia, Azerbaijan, Georgia, Kazakhstan, Ukraine**), as well as simplifying business regulations (e.g. regulatory “guillotine” in **Armenia**) were among the most successful anti-corruption measures in the region. See also IAP countries’ ranking in various indexes in the beginning of this report.

**Tajikistan** took a number of measures to improve its business climate and to reduce opportunities for corruption. For examples, the new Tax Code decreased the number of taxes from 21 to 10, reduced the number of tax reports by 40% and introduced an electronic declaration system. The system of permits was reformed in 2015, reducing the number of documents necessary for various permits by roughly 10%. The Ministry of Health and Ministry of transport have launched pilot projects for on-line permits. The 2015 Law on Inspections introduced the principle of risk-based inspections. A one-stop shop was opened for business registration, so now businesses can be registered in 3-5 days (compared to 45 days in the past). Reflecting these efforts, Tajikistan was named “the top reformer” by the Doing Business 2015 report.<sup>518</sup>

In order to reduce the potential for corruption in regulatory procedures, **Ukraine** adopted the Law on the reduction of permission procedures, and the Law on streamlining procedures concerning permits and certificates. A new law on licencing, which was adopted in March 2015, significantly reduced the number of licenced activities. Another package of amendments of deregulation and streamlining of administrative procedures was adopted in February 2015.

The measures described above usually aim at improving the business environment generally. Although they do not explicitly aim to prevent corruption, they effectively reduce the corruption risks faced by companies. Some countries also took measures that aimed to remove corruption risks for businesses from their legislation and regulatory acts. For instance, in **Kyrgyzstan**, the Anti-Corruption Business Council examined legal acts related to pharmacological sector; the results were discussed at the 2014 Anti-Corruption Forum “Statutory Corruption Risks in the Sphere of Circulation and Provision of Pharmaceuticals”. Anti-corruption screening of legal acts is also used in **Moldova, Ukraine and Russia**.<sup>519</sup>

<sup>518</sup> Source: <http://goo.gl/fw8Coj>.

<sup>519</sup> OECD/ACN (2015), Thematic study, Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia, available at <http://goo.gl/mgyTJ9>.

However, many challenges still remain in relation to business regulations. For example, businesses in **Mongolia** need to obtain 956 special “multi-layer” permissions for their operations. The government and the parliament set up working groups to reduce the number by at least 50 per cent, yet the final draft law was rejected by the Parliament in mid-2015. No concrete actions to address the problem have been envisaged in the new anti-corruption programme of Mongolia either.

Apart from simplifying business regulations and removing systematic corruption risks in legislation, it is also possible to identify and remove specific corruption schemes in the business regulations. This approach was promoted by the business associations in **Ukraine**, and more recently also by the governor of Odessa region in relation to the corruption in the customs services.

#### Box 46. Example of alleged corrupt business regulation schemes in Ukraine

The EU-Ukraine Association Agreement includes environmental provisions such as Directives on waste management that will need to be implemented within the next 3-6 years. According to civil society and business representatives, the current waste management system in Ukraine not only fails to meet the EU requirements, but also contains corruption schemes. The state enterprise “Ukrainian Environmental Resources” (UER) is one such scheme, according to them. While according to the Ukrainian legislation, domestic and foreign producers of packaging can either ensure the collection and recycling of their used packaging themselves, or conclude agreements with third parties, the decision of the Cabinet of Ministers has limited the choice of third parties to the UER. More specifically, foreign packaging producers can import their products in Ukraine only when they present a copy of their agreement with the UER. For many years now, the packaging companies have been forced to conclude agreements with the UER and pay for their services, while in reality the UER did not provide any services and did not collect or recycle the used packaging. This monopoly situation without proper state control over the activities of the UER allowed the UER to extract undue advantages from companies for their own benefit. In 2009, packaging companies appealed to court against the Cabinet of Ministers’ decision that created this alleged corruption scheme. After lengthy court proceedings, the State Service on Regulatory Policy and Development of Entrepreneurship suspended the above Cabinet’s decision in April 2014; but Kiev regional administrative court has reinstalled it in May 2014, thus maintaining this alleged corruption scheme. Only in March 2015 the Government cancelled its decree on establishment of the UER.

Source: OECD/ACN (2015), Third Monitoring Round report on Ukraine, page 182; additional research.

#### Ensuring the integrity of state-owned enterprises

State-owned enterprises (SOEs) and state-controlled firms are often associated with high risks of corruption, due to the close involvement of public officials and oligarchs in their operations. In addition, SOEs often operate in sectors of strategic importance, and thus have monopolies or lack transparency, which further exacerbating such risks. In 2012, a study on the governance of SOEs in **Estonia, Latvia and Lithuania** found that the public tended to view the boards of SOEs “as politicized, having conflicts of interest, lacking talent, and as conduits for personal or political influence”.<sup>520</sup> The same study identified other weaknesses such as, for example, SOE boards serving as fiefdoms of ministries and political parties; insufficient independent board members and insufficient independent oversight; as well as the absence of formal policies on conflicts of interest or related-party transactions.

Governments usually cannot directly prescribe anti-corruption measures for a private company, but they can take measures to prevent corruption in SOEs. This is particularly important in the ACN countries where SOEs account for a large share of the market and benefit from preferential or subsidised use of state resources.

Many kinds of measures can be used to prevent corruption and strengthen integrity in SOEs in addition to the measures that are usually applied to private companies. Some of the measures are simply those that would typically be applied in the public sector. As a result, the heads of some SOEs have to publish property declarations, and entities in which the state owns more than 50% of the shares have to procure

<sup>520</sup> Source: The Baltic Institute of Corporate Governance, Governance of State-Owned Enterprises in the Baltic States, 2012.



goods and services according to public procurement rules (with a possibility to apply special rules considering the specifics of the entity in question).<sup>521</sup>

Some countries in the ACN region recognise the important role that SOEs play in their economy, and they therefore strive to improve their corporate governance and economic performance. For example, the **Kazakh** government has taken some measures to improve the economic performance and governance of its SOEs, which represent a very large share of the national economy, with a particular focus on the National Welfare Fund Samruk-Kazyna.<sup>522</sup>

However, examples of successful and targeted anti-corruption measures in SOEs are rare in the ACN countries. To date only one such project was identified: **Croatia** has implemented an anti-corruption programme for its SOEs during 2011-2013, which helped increase the transparency of such companies and raised the importance of transparency and merit-based nomination of members of boards of SOEs.<sup>523</sup>

According to the new Law of **Ukraine** on Corruption Prevention adopted in 2014, large enterprises established by state or municipal bodies, as well as commercial entities with majority of shares owned by the state or municipality must develop anti-corruption programmes and appoint officers responsible for their implementation. However, the implementation of this Law is suffering major delays, while at the same time media reports about corruption in SOEs have been further increasing. This prompted the Government of Ukraine to develop proposals for improving governance and transparency of SOEs. The parliament adopted relevant legislative amendments in June 2016 that included: the introduction of supervisory boards in all SOEs; a requirement that such boards must include independent members; the mandatory external audit of financial reports; and the publication of annual financial and activity reports on-line, including audit reports.

The revised OECD Guidelines on Corporate Governance of State-Owned Enterprises provide an important standard that will help ACN countries with their reforms. Among other things, the Guidelines establish standards regarding the transparency and accountability of SOEs, including those on the responsibility of board members as well as audit committees for ensuring compliance as well as overall performance. The Guidelines also require that conflict of interest rules are established for SOEs and their management, as well as other anti-corruption standards and compliance programmes.<sup>524</sup>

### Public procurement and state-financed projects

Public procurement, state subsidies and other state benefits present a high risk of corruption. Corrupt governments can abuse public procurement rules for their personal benefit. For example, in 2010, the parliament of Ukraine excluded from the general public procurement rules purchases for the preparation of the European football championship, which was co-hosted by Ukraine and Poland. The new rules allowed this procurement without competitive procedures and allegedly led to the inflation of costs and the awarding of contracts to companies affiliated with senior government officials who were in charge of the championship organisation, including the Vice Prime Minister.<sup>525</sup> The illegal privatisation of the Mezhyhirya estate outside Kyiv by the former President of Ukraine and the use of state funds for its lavish decoration became a symbol of the captive regime, which was recognised by TI in 2015 as the most corrupt regime in the world.

At the same time, public procurement is the area where governments who genuinely want to fight corruption can establish anti-corruption conditions that not only can prevent corruption crimes on a case-

<sup>521</sup> Source: <http://goo.gl/KluQzL>.

<sup>522</sup> For more information on reforms of Samruk-Kazyna, please refer to the ACN "Business Integrity Study", upcoming (2016).

<sup>523</sup> The Croatian Anti-Corruption Programme for SOEs has already been referred to in the 2013 summary report, it was further described by the Georgian Young Lawyers Association at <http://goo.gl/tBvRvh>.

<sup>524</sup> Available at <http://goo.gl/45splc>.

<sup>525</sup> OECD/ACN, Business Integrity Study, upcoming (2016).



by-case basis, but also create conditions for business integrity across the private sector at large. This may involve measures that reduce the discretion of public officials in the procurement process, as well as building anti-corruption conditions into the procurement contracts.

The development of e-procurement in almost all the ACN countries is very important trend that will contribute to the reduction of discretion of public officials. **Georgia** was the pioneer of e-procurement among the IAP countries. More recently, in 2014-2015, Ukraine introduced a new system ProZorro (<http://prozorro.org/>), which was developed in partnership between public bodies and a group of civil society actors. The system aims to introduce full transparency regarding procurement and contract implementation by ensuring unlimited access, the equality of all procuring entities and market operators, links to state registers to reduce administrative costs related to tenders, an open data approach to facilitate external monitoring, as well as a straightforward and rapid review of complaints.<sup>526</sup> See detailed description of the system in the chapter on public procurement integrity of this report. While this represents remarkable progress, many public and private sector experts recognise that e-procurement is not an ultimate and final solution to corruption in public procurement. Additional measures are therefore needed.

The IAP monitoring reports made recommendations to many countries that they should introduce anti-corruption clauses in the tender process, strengthen complaints and review mechanisms and ensure provisions that would allow for suspending and annulling contract that were concluded in corrupt manner. The IAP monitoring welcomed progress in some countries. For example, according to the new Law of **Ukraine** on Corruption Prevention adopted in 2014, legal persons participating in public procurement above a certain threshold must develop anti-corruption programmes and appoint officers responsible for their implementation.

Blacklisting – or debarment of companies that have been convicted of corruption from public procurement and other public advantages – is one of the strongest disincentives. Many ACN countries provide for such a possibility. For example, in **Ukraine**, the new Law on Corruption Prevention provides that legal persons that were subject to criminal measures in relation to corruption crimes will be listed in a unified state register of persons who have committed corruption crimes and will be banned from public procurement. In many other countries there are such black lists, but only for unreliable suppliers. Blacklisting does not yet provide a strong disincentive in the region, largely due to very weak or lack of enforcement of corporate liability for corruption. Some countries also have “white” lists: e.g. the **Georgian** public procurement system uses a blacklist of dishonest participants,<sup>527</sup> and a white list that includes qualified suppliers who meet certain criteria. Suppliers on the white list enjoy simplified procedures for public procurement.<sup>528</sup> However, white lists are not very common, and they are not directly linked to integrity and anti-corruption.

During the past years, many ACN countries have implemented large infrastructure projects, such as the construction of roads, cultural and sport facilities (e.g. **Azerbaijan, Russia** and **Ukraine**), public buildings (e.g., new Parliament building and city halls in **Georgia**). Large infrastructure projects in any country represent high corruption risks. New good practices are emerging around the world in order to prevent and manage such risks. In addition to proper controls of procurement and contracting rules, some countries now implement integrity pacts, where all potential participants of such projects from both the government and the private sector sign a contract committing not to engage in corrupt activities; the enforcement of such contracts is usually entrusted to a third party such as an NGO. To date, ACN countries have not explored the possibility of such integrity acts.

### Mechanisms to report and complain about corruption

<sup>526</sup> Source: <http://goo.gl/CtWC53>.

<sup>527</sup> Available at <http://goo.gl/3deRxs>.

<sup>528</sup> Available at <http://goo.gl/MbrCYQ>.

Many countries in the ACN region have established hot lines and other channels for companies and individuals to report corruption and other violations. For example, the Cabinet Ministers of **Ukraine** established a telephone and e-mail “hot line” for business complaints, and similar “hot lines” function in the Ministry of Internal Affairs and State Tax Service as well as on the regional level. According to the government, an “interactive service” called “Pulse of the tax administration” has been set up to receive complaints and proposals from businesses on tax and customs matters, including reports of illegal actions by employees of the Ministry of Revenues and Fees. However, the NGOs noted that these reporting channels were not effective: reports cannot be anonymous and reporting persons are either afraid of repression or do not trust that there will be an effective investigation. There is also no procedure for an independent evaluation of any reports received.

#### Box 47. Business ombudsman in Ukraine

In 2013, responding to the growing complaints from the companies about bribe solicitation by the government, the EBRD negotiated a Memorandum of Understanding with business-sector representatives. The Memorandum was eventually signed on 12 May 2014 by the Cabinet of Ministers, EBRD, OECD, the American Chamber of Commerce in Ukraine, the European Business Association, the Federation of employers of Ukraine, the Chamber of industry and commerce of Ukraine, as well as the Ukrainian Union of industrialists and entrepreneurs. The Memorandum includes provisions to establish a Business Ombudsman, who will be a mediator between the public authorities and the business sector in dealing with disputes and allegations of maladministration, including corruption.

The Business Ombudsman started its operations in May 2015. By July 2016, it had received 937 complaints. In 2015, the Ombudsman received 585 complaints from Ukrainian entrepreneurs and successfully closed 151 of those cases. The office provided 123 recommendations to various government agencies, of which 63% have been implemented as of the beginning of 2016. According to the second quarter report for 2016, the Ombudsman had received 213 complaints, with the most common subjects of complaints concerning:

- Tax issues (96 complaints): problems with electronic VAT administration, dilatory VAT refund, tax inspections, criminal proceedings initiated by the State Fiscal Service, other tax issues;
- Legislation drafts/amendments (28);
- Actions of state regulators (14);
- Actions of local councils/ municipalities (11): land plot allocation, other actions;
- Prosecutor’s office actions (10): procedural abuse, inactivity, other actions;
- Customs issues (9): customs clearance delay/refusal, customs valuation, other actions;
- Actions of state companies (8);
- Ministry of Justice actions (8): enforcement service, registration service;
- Actions of National Regulatory Agencies (7); and
- Ministry of Internal Affairs actions (5).

The Business Ombudsman issues public reports about the results of the review into notable complaints, for example, the cancellation by the State Fiscal Service of a decision by the State Tax Inspection, which saved the complainant more than UAH 6 million, the refund of an overdue VAT amount to a business, the issuance of a building permit by the State Architecture and Construction Inspection, the due registration of a share capital contribution by a Danish shareholder as a foreign investment, etc. The Ombudsman has also published a number of systemic reports about particular areas, for example, the administration of business taxes and problems with cross-border trading, abuses of office committed by the law enforcement authorities in their relations with business, natural monopolies versus competitive business, access to electricity, etc. (available at <https://boi.org.ua/en/publications/reports>).

Source: OECD/ACN secretariat research; reports of Business Ombudsman.

Several countries in the ACN region have opted to create a Business Ombudsman as a mechanism for companies to complain and to seek assistance in resolving problems, usually with state institutions. For instance, **Georgia** established a business ombudsman office in 2009; the main role of the ombudsman is to mediate between companies and the government in tax disputes. A business ombudsman was also created in **Russia** in 2013 with a broad mandate to protect the rights of business people in broad terms. The recently established Business Ombudsman office in **Ukraine** is a promising form of public-private cooperation that allows addressing specific integrity cases and concern raised by the private sector.

### Corporate governance

Corporate governance codes exist in many ACN countries and can improve internal regulations in companies. Companies trading on stock exchanges are usually required to conduct annual audits by independent auditors and to publish reports about their operations. However, significant weaknesses remain, including the ineffectiveness of supervisory boards, the lack of internal controls, limited disclosure of information and non-observance of shareholder rights. Corporate governance regulations do not provide detailed provisions regarding the responsibility of corporate management for corruption. They also do not require the disclosure of information regarding companies' anti-corruption policies or their implementation.

For instance, the Ministry of Economic Development of **Azerbaijan** developed Standards for Corporate Management and Corporate Ethics Code, but it was not clear if they provided for any anti-corruption measures and how their implementation was ensured.

The **Kazakh** Joint-Stock Company Law specified that every public company must run a web-site, and stipulated what information must be published there. Companies must have corporate governance codes, and their boards must monitor the efficiency of corporate governance practice in the company. Kazakh draft Anti-Corruption Strategy until 2025 mentions the use of offshore vehicles by domestic companies and a lack of transparency in the ownership structure of Kazakhstan's strategic companies as potential integrity risks. Lack of transparency in the selection and promotion of officers at national companies has also been highlighted by civil society.

### Accounting and audit

The 2013 Summary Report stated that “Regarding accounting rules, IAP countries are generally compliant with international standards.... Concerning auditing and disclosure, many IAP countries have made significant progress in developing modern legislation.... Information about beneficiary owners of companies is a hot topic in the region. Lack of transparency in this area makes corporations a potential tool for hiding illegal wealth, including proceeds of corruption.... Many countries have developed rules to protect the independence and integrity of auditors.... However, more often than not, information provided by the company to the auditor is confidential and cannot be disclosed without the agreement of the company...”<sup>529</sup>

It appears that these problems persist in the region. For example, according to the third monitoring report on **Ukraine**, the auditors are obliged to inform their own managers about a potential conflict of interest that can arise in the course of an audit, but they do not have any obligation to report suspicions of corruption that can be uncovered during the audit. There is an option that allows the auditors to inform the managers of the audited companies about such suspicions. According to the private sector representatives, auditors do inform the managers of companies about corruption risks, but the managers typically do not react to this information. Disclosing information about possible violations outside the company would be considered a violation of confidentiality by the auditor. Reporting obligations were, however, expected to be introduced in Ukraine in 2015 as a part of the implementation of the Association Agreement with the EU. The introduction of this reporting obligation will require the amendment of the Audit Charter. There is also a plan to develop a law to regulate auditing activities. As a result, the auditors will be required to report suspicions of corruption to the head of the public supervisory body. The Ministry of Finance is the public supervisory body in relation to publicly significant enterprises. There are about 15,000 such enterprises in Ukraine, such as listed companies, banks, insurance and large state-owned enterprises. During the monitoring, a concern was raised about the role of the Ministry of Finance as the public supervisory body; it was suggested that a new and independent public supervisory body should be created instead.

<sup>529</sup> See OECD/ACN (2013), *Anti-Corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges, 2009-2013*, pages 172-173, available at <http://goo.gl/2Cz7dx>.

### **Enforcement of corporate liability for corruption**

The majority of business-sector respondents to the ACN survey<sup>530</sup> agreed that the risk of being sanctioned for corruption was low and that the enforcement of anti-bribery laws was weak. Only 11% of the responding companies were the subject of investigation by regulatory bodies, and none were investigated or prosecuted with regard to bribery of public officials or of other company. The ACN Study on Responsibility of Legal Persons for Corruption confirms that 17 of 25 ACN countries (including three IAP countries **Azerbaijan, Georgia** and **Ukraine**) have established company liability for corruption.

For example, in **Ukraine** corporate liability was established only in 2014. The Law on Amendment of Some Legal Acts of Ukraine in Connection with Fulfilment of the Action Plan for Liberalising the Visa Regime for Ukraine by the European Union concerning Liability of Legal Persons, which was adopted on 23 May 2013, introduced amendments envisaging criminal measures to be applied to legal persons for crimes committed for their benefit by their representatives. Another Law adopted in May 2014 further provided that criminal measures could be imposed on a legal entity if an authorised person of that entity improperly performed corruption prevention functions. According to the new Law on Corruption Prevention and Criminal Code provisions on criminal measures applied to legal persons, one of the grounds for corporate liability is the lack of supervision of the company's management and, in particular, the lack of enforcement of measures to prevent corruption (Article 96-3 of the Criminal Code). While the Criminal Code does not provide explicitly for a defence of preventive measures taken by the company, the court can take such preventative measures into account when sanctioning the legal entity. The above-mentioned legislation, if properly enforced, will provide a powerful incentive for private and state-owned enterprises to develop internal anti-corruption regulations, such as codes of ethics and compliance programmes.

However, the enforcement of corporate liability for corruption remains negligible across the region. To date only nine ACN countries have experience in enforcing it. **Georgia** is so far the only country in the IAP to have enforcement experience in at least four cases (even though these cases were not related to corruption).

This is in contrast with certain OECD countries, where active enforcement of corporate liability sends the signal to the private sector about growing risk of prosecution for corruption and creates an incentive for stronger internal controls to prevent such risks. For instance, the enforcement of foreign bribery provisions by the members of the OECD Working Group on Bribery, illustrated below, led to an important increase of awareness and corruption prevention measures in the large multi-national companies based in the OECD countries and active in global markets.

---

<sup>530</sup> OECD/ACN Business Integrity Study, upcoming (2016).

**Box 48. Highlights from the OECD Foreign Bribery Enforcement Database**

- 361 individuals and 126 entities have been sanctioned under criminal proceedings for foreign bribery in 17 Parties between the time the OECD Anti-Bribery Convention entered into force in 1999 and the end of 2014.
- At least 110 individuals and 200 entities have been sanctioned in criminal, administrative and civil cases for other offences related to foreign bribery, such as money laundering or accounting, in 8 Parties.
- Approximately 392 investigations are on-going in 24 Parties to the Anti-Bribery Convention. Prosecutions are on-going against 142 individuals and 14 entities in 12 Parties for offences under the Convention.

Source: OECD/WGB Annual Report, 2014, <https://goo.gl/38jqkn>.

**Company compliance programmes**

Responding to enforcement signals, companies in the OECD countries have increased their internal efforts to prevent corruption risks. The joint OECD/WB/UNODC “Anti-Corruption Ethics and Compliance Handbook for Business”<sup>531</sup> provides a review of measures that the private sector can implement, including: 1) establishing clear policy against corruption, including policies for specific risk areas; 2) commitment from senior management (“tone from the top”); 3) developing anti-corruption programme with adequate oversight; 4) communication and training of standards and programme to ensure compliance; 5) applying standards to business partners; 6) encouraging detection, reporting and sanctioning of violations.

According to the ACN survey, the majority of the responding companies (mostly MNEs and their subsidiaries in the region) had ethical rules, compliance programmes and reporting mechanisms in place, which were likely required by head offices. At the same time, respondents acknowledged that these anti-corruption tools were either never or only very rarely used in practice.

For example, according to the monitoring report, a growing number of companies operating in **Georgia** are introducing compliance programmes as a response to external signals from foreign investors, international financial institutions (IFIs) and IPO requirements. In addition, seven Georgian entities participate in the UN Global Compact, although only four are active members.

The authorities of **Kyrgyzstan** reported that only big foreign companies had compliance programs. Businesses in Kyrgyzstan would have liked to introduce such programmes but this is quite an expensive exercise. A 2011 survey conducted in **Ukraine** with support of the UNITER project showed that private companies were not prepared to take an active position in fighting corruption. While more than half of the surveyed companies believed that compliance with anti-corruption rules improves a company’s reputation among investors and shareholders and helps to attract investment on better terms, 49% of them had no clear position on corporate anti-corruption policy and only 19% of companies were ready to dedicate 3-5% of their income to anti-corruption measures. The survey also indicated that companies tried to adapt to the existing conditions of doing business, instead of counteracting them. According to the same survey, less than 10% of the companies had a compliance unit, and these were mostly foreign companies. According to the Global Competitiveness Index (GCI) by the World Economic Forum, Ukraine fell behind most of its peer countries in terms of the ethical behaviour of firms (130<sup>th</sup> out of 148 nations). The low performance of the country is also confirmed by the fact that not a single Ukrainian company has ever entered the World’s Most Ethical Companies (an annual list compiled by the Ethisphere Institute). A number of Ukrainian companies are members of the UN Global Compact, but only half of them submit reports on anti-corruption measures. These are mostly large companies.

An assessment of business integrity in the IAP countries shows that, on the one hand, business executives understand the importance of corporate ethics and some of them even seek to do business on the basis of ethical standards. On the other hand, in reality, ethical behaviour is rather an exception than a

<sup>531</sup> Available at <http://goo.gl/xC1AZk>.

rule. The probable reason can be the fact that risk of being punished for bypassing the rules is quite low as well as the difficulty of solving problems without irregular payments. In addition to the lack of enforcement pressure from their own governments, only a few companies from the IAP countries are operating in international markets. Experience shows that when companies go global or work with multi-national clients they also aim to improve their integrity and image in response to pressure from the market. The example of a customs integrity project in Turkey demonstrates how the combination of stronger enforcement and market pressures can create incentives for a company to develop a strong integrity policy.

#### Box 49. Customs integrity project in Turkey

Guler Dinamik Customs Consultancy Inc. (GD) was established in the beginning of 2010. Customs consultants in Turkey are liable for any violations in their transactions with the client companies and with the state authorities. Customs consultancy companies need to be very careful in order to avoid penalties. Advised by the Turkish Ethics and Reputation Society (TEID), the GD hired a consultant to evaluate the situation, develop a revised code of ethics and other relevant policies together with the chief auditor of the company. GD assigned a compliance officer whose only job was to run the program with the support from the very top of the management. A whistle-blowing system was set up and all employees were trained about anti-corruption, compliance and ethics. The program is currently being integrated into the company's quality management system.

In implementing its integrity policy, the GD faced several challenges. One of the key challenges was to make sure that every employee has a common understanding of the company's approach. Avoiding corrupt practices caused certain delays when dealing with customs authorities. While major international customers accepted the integrity policy introduced by the GD, some local clients complained that the GD could not handle some of their matters. With time, other large companies have started following GD's integrity policy, which helped to speed up the cultural change in the customs brokerage business in Turkey. The initiative involved a substantial cost related to investment in the program, increased penalties because the GD refused to use illegal means to avoid them, and lost business from clients who do not value compliance.

The most valuable outcome has been a marked improvement in the company's reputation, as it is now very well known for its anti-corruption initiative. Another gain was the increase in the knowledge, self-confidence and motivation of the employees. The company developed a model school for customs consultants. The quality management system became more effective. The company's reputation with customs offices also resulted in faster transactions.

Inspired by GD's example, and supported by TEID, in January 2015, 250 customs brokers in Turkey signed the Customs Brokers Ethical Values Statement.

Source: OECD/ ACN Business Integrity Study, upcoming (2016).

While individual companies in the ACN region still shy away from introducing compliance and anti-corruption programmes, many of them are seeking to improve their corporate governance. For instance several companies in **Georgia** made use of the American Chamber of Commerce (AmCham) Handbook on corporate social responsibility (CSR); a number of Georgian banks signed the voluntary Corporate Governance Code, which was developed by the IFC, the Georgian Banking Association and the Georgian Stock Market. However, it is not clear that such CSR programmes contain anti-corruption provisions; more explicit introduction of anti-corruption clauses in the CRS programmes may be an effective approach.

#### Role of business associations in promoting business integrity

Business associations can also play an important role in promoting business integrity.<sup>532</sup> They can assist companies in the development of effective internal control, ethics, and compliance programmes for the prevention of integrity risks. Such support may include, *inter alia*: disseminating information on corruption risks, providing training and promoting due diligence and other compliance tools, as well as providing advice and support on resisting extortion and solicitation. Business associations can study

<sup>532</sup> See OECD (2010), Good Practice Guidance on Internal Controls, Ethics, and Compliance, available at <http://goo.gl/39Iwnc>.

business integrity risks, represent companies in the public-private dialogue, and support collective actions against corruption.

A business integrity expert seminar, which was organised in November 2014 in Istanbul as a part of the ACN Business Integrity Project, discussed the role of business associations in promoting business integrity. The seminar participants noted that many business associations have developed projects dedicated to business integrity, and some have even established their own committees that address these issues on permanent basis. The seminar also helped identify examples of other business integrity initiative in the ACN countries:

- *Several business associations have started a dialogue with the government about integrity.* AmCham and BAG in **Georgia** participate in the Anti-Corruption Council and in the legislative process concerning the introduction of new business regulations under the EU association agreement. The Employers' association in the **FYR of Macedonia** concluded a cooperation agreement with the State Anti-Corruption Committee. The **Serbian** chamber as well as EBA **Russia** are working with their respective governments on legislative drafting. AmCham in **Ukraine** is working with the government to address corruption in risk areas such as customs and tax in order to establish "high level reporting mechanisms" and to eliminate notorious corruption schemes such as those in the waste management sector.
- *Associations provide trainings and advice.* For example, AmCham organised regulatory impact assessment seminars in **Georgia**; the Employers' Association in the **FYROM** has a training centre for compliance officers in companies; and the Novorossiysk chamber in **Russia** is organising conferences "What to do when an inspector comes". In addition, business associations can also provide commercial services on compliance, e.g. local chambers are selling services related to compliance programmes, while the Armenian Chamber of Commerce has issued an anti-corruption handbook for businesses, based on the experience of the OECD and the International Chamber of Commerce.
- *Few business associations focus on ethics and anti-corruption.* AmCham **Ukraine** has established an anti-corruption working group on legislation and runs a Compliance Club. In the **FYR of Macedonia**, the Employers' Association has an anti-corruption committee. In AmCham **Georgia**, the CSR committee deals with anti-corruption to some extent. An **Azerbaijani** microfinance association has established a group to prepare their code on responsible lending.
- *Voluntary and industry standards.* Model business ethics code and charter on anti-corruption were developed by the Employers' Association in the **FYR of Macedonia**. EAB **Russia** supported the development of integrity guidelines for the pharma and automobile sectors. A pharma sector initiative in **Ukraine** promotes voluntary disclosure of doctors' incomes. TI **Romania** has organised collective action for companies with compliance programmes in the health sector.
- *Risk assessment.* The Employers' Association in the **FYR of Macedonia** conducts regular surveys on corruption in business. It has also published a report on enabling environment for business development, including a chapter on anti-corruption. Four large business associations in **Georgia** have identified permits, tax and investigations as major risk areas, and they have prepared a MOU with the parliament on addressing these risks.
- *Channels for complaints.* Some business associations provide a channel for companies to report/complain about corruption, e.g. the AmCham in **Ukraine** and the Chamber of commerce of **Serbia** are providing such a channel to some extent and make public statements related to complaints on a sector level or concerning a specific municipality.
- *International initiatives.* National business associations also join international initiatives. For example, the **Mongolian** National Chamber of Commerce and Industry has joined PACI in



2011, and currently 170 companies are taking part in this initiative. Also a **Croatian** business association is the national coordinator for the UN Global Compact.

Other examples were also identified in the IAP monitoring process. For example, a sectorial association, the Union of Employers in the Transport sector in **Ukraine**, is working on corruption-related challenges in the area of air transport, ports and railway regulations. It is chairing a working group at the Ministry of Infrastructure.

It is rare for business associations to focus exclusively on business integrity. But some examples exist and they have shown a remarkable performance, as demonstrated by the case of the Ethics and Reputation Society (TEID) in **Turkey**. It aims to increase awareness of business ethics and ensure that ethics culture becomes the keystone of the Turkish business. TEID has over 115 corporate members. Each member of TEID signs the Cross-Sectoral Declaration of Ethics in order to declare its commitment to the principles of TEID and the Global Compact. TEID collects and analyses data, prepares and disseminates publications, and also provides training and advocacy. It also supports collective actions, such as the Customs Brokers Ethical Values Statement, discussed above in Box 49.<sup>533</sup>

### Collective actions against corruption

Companies, business association and governments can promote collective actions against corruption. When acting jointly, they can more effectively tackle corruption, even in countries where corruption is systemic. Anti-corruption collective action can include industry standards, multi-stakeholder initiatives, and public-private partnerships. In practice, there are several categories of collective actions: anti-corruption declarations; initiatives based on key principles or to develop common standards, which can also include a certification model to monitor and audit adherence to an agreement not to bribe; and integrity pacts. Engaging with competitors, local authorities, government agencies and civil society stakeholders to confront bribery risks that are common to market participants can also be an efficient way to reduce corruption and improve business environment.<sup>534</sup>

Only few collective actions in the ACN region were identified by the ACN Study or by the International Centre for Collective Action at the Basel Institute on Governance, including the Clear Wave initiative in **Lithuania** and collective actions in the health, academic, and SME sectors in **Romania**.

#### Box 50. "Clear Wave" campaign in Lithuania

Clear Wave in Lithuania is a business-labelling initiative. The initiative aims to encourage transparent and ethical business practice. Company participating in the project commit themselves to operate in a responsible and transparent manner and to encourage their business partners to:

- Also participate in a transparent and fair manner in public procurement tenders without resorting to the corruption of their organisers or jury members and without resorting to illegal financial and non-financial measures to gain an advantage over other participants;
- Comply with the laws of the Republic of Lithuania and to pay all required fees and taxes; and
- maintain transparency, including with regard to payments to their employees.

The initiative started in 2007 and, as of 2014, involved over 50 members who can use the Clear Wave label for their products, services, and marketing material.

Source: <http://www.baltojibanga.lt/en.html>.

While there are no collective actions yet in the IAP countries, the IAP monitoring reports and ACN business integrity project activities identified several initiatives that can eventually develop into collective actions. For instance, integrity guidelines for the pharma industry have been developed in **Russia**. There is also a pharma sector initiative in **Ukraine**, while in **Armenia** the Ministry of Health

<sup>533</sup> For more information about TEID, please refer to the OECD/ACN Business Integrity Study, upcoming (2016).

<sup>534</sup> For additional information see <http://www.collective-action.com>.

and the Union of the Drug Producers and Drug Importers have adopted an ethics code for the pharma industry. Together, these efforts demonstrate the interest and willingness of the public and private sectors to develop effective collective actions. In **Ukraine**, the OGP Action Plan for 2014-2105 included a commitment by the Government to develop regulations on monitoring committees in infrastructure projects with involvement of the civil society, which would basically be a type of integrity pact. The Ministry of Infrastructure has prepared relevant regulations, but the NGOs have criticised them for not providing a robust oversight mechanism and the regulations have not been adopted so far.

### Conclusions and recommendations

Business integrity remains a relatively new and unexplored area of anti-corruption work in the region. So far, countries in Central Europe, including new EU and OECD members, are taking the lead, while countries participating in the Istanbul Action Plan are somewhat lagging behind. Interest in this area is growing across the region, and key actors (including governments, companies and business associations) have a greater awareness about their roles and responsibilities. Nonetheless, business integrity remains a low priority for anti-corruption policy. The progress that has been achieved in promoting business integrity is mainly the product of simplifying business regulations and introducing e-governance tools (i.e. measures primarily intended to improve the efficiency of business regulations and the general business environment).

Governments need to take more focused measures to prevent corruption in the business sector. The key challenges in this area are related to corruption risks in the SOEs and in public procurement. Governments also need to strengthen incentives for companies to improve their compliance that are still weak. To do this, the ACN countries must build trust in both public institutions and law-enforcement bodies and also boost the enforcement of anti-corruption legislation. Companies and business associations often take a passive role in responding to governments' signals regarding anti-corruption. They need to take a proactive stance and engage themselves in raising awareness, collaborating with the government, and exploring the potential for collective action.

In order to further promote business integrity in the ACN countries, the following **recommendations** are proposed:

- Develop risk-based business integrity policy, e.g. as a part of anti-corruption strategy or another national, sectoral or local policy:
  - Give higher priority to business integrity in national anti-corruption and law-enforcement policy.
  - Implement meaningful measures to ensure predictable legal environment, including stable legislation and uniform court case law.
  - Establish a system to control implementation and monitor the impact of the business integrity policy, in dialogue with business.
- Introduce and enforce corporate liability for corruption, where effective compliance programmes can be used as defence for prosecution of legal entities.
- Introduce anti-corruption conditions and incentives in the public procurement and other programmes that involve state subsidies and benefits.
- Develop, implement and monitor anti-corruption measures in state and municipally owned (or controlled) enterprises.
- Provide support to small and medium enterprises to prevent corruption.
- Continue work to simplify and increase transparency of business regulations and public service provisions, on-line tools for tax, inspections, etc.
- Introduce business integrity measures in corporate governance policies (e.g. corporate disclosure

on, *inter alia*, beneficial owners, the role of corporate boards and financial audits in preventing and detecting corruption in companies.

- Provide and use reliable channels to report corruption as well as independent review bodies (e.g. business ombudsmen).
- Promote the role of business associations regarding business integrity, such as studying corruption risks, disseminating good integrity practices, supporting awareness raising and training, as well as effective reporting mechanisms.
- Promote company compliance programmes, whistle-blower protection, and business integrity throughout the supply chain.
- Promote collective actions.
- Measure the impact of business integrity measures.

*Chapter 5.***OECD ANTI-CORRUPTION NETWORK FOR EASTERN EUROPE AND CENTRAL ASIA**

This Chapter describes the role that the OECD Anti-Corruption Network for Eastern Europe and Central Asia played in supporting anti-corruption reforms in the region. It describes the governance structure and funding mechanism as well as the main ACN activities implemented during 2013–2015. The Chapter reiterates the findings of the external evaluation that was conducted in 2015, which identified the key features that ensured the success of the ACN work as well as recommendations for further increasing its impact.

**How does the ACN work**

The Anti-Corruption Network for Eastern Europe and Central Asia is a global relations programme of the OECD Working Group on Bribery.<sup>535</sup> It was established in 1998 with the goal of providing a regional forum for the promotion of anti-corruption reforms, the exchange of information, the elaboration of good practices and donor coordination in the region. The ACN Secretariat is located at the OECD Anti-Corruption Division. The Secretariat is guided by a Steering Group composed of National Coordinators from ACN countries, as well as representatives from OECD countries, international and non-governmental organisations.<sup>536</sup> The ACN activities are funded mostly by voluntary contributions from donor-countries with co-funding by partner organisations and ACN countries. Detailed information about the ACN is available on its website [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn).

The ACN Work Programme for 2013–2015 supported countries' anti-corruption efforts through the following activities: high-level policy dialogue to reinforce the political will to fight corruption, continuous peer pressure through the Istanbul Anti-Corruption Action Plan, thematic studies on prevention and criminalisation of corruption and on business integrity, and the ACN Law-Enforcement Network (LEN) to build the capacity of practitioners.

**High-Level Policy Dialogue**

<sup>535</sup> The OECD Working Group on Bribery in International Business Transactions is made up of representatives from the Parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; for information about the Working Group, please refer to [www.oecd.org/daf/nocorruption](http://www.oecd.org/daf/nocorruption).

<sup>536</sup> The ACN is open to all countries in Eastern Europe and Central Asia, including Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Former Yugoslav Republic of Macedonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Mongolia, Montenegro, Romania, Russia, Serbia, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. OECD countries participate in the ACN as partners or donors. The ACN is open for participation by international organisations, such as the Council of Europe and its Group of States against Corruption (GRECO), the Organisation for Security and Cooperation in Europe (OSCE), the UN Office on Drugs and Crime (UNODC), and the UN Development Programme (UNDP), as well as multi-lateral development banks, such as the Asian Development Bank, Council of Europe Investment Bank, EBRD, and the World Bank. The ACN is also open for participation by non-governmental partners, including Transparency International and other non-governmental and business associations.

The ACN High Level Meeting “Reinforcing Political Will to Fight Corruption in Eastern Europe and Central Asia” took place in December 2012 at the OECD. It gathered anti-corruption decision makers from Eastern Europe and Central Asia, including Ministers, deputy Ministers, Heads of Anti-Corruption Institutions, deputy Prosecutor Generals and other high level officials, as well representatives from OECD countries, international organisations supporting the fight against corruption in the region, civil society and business organisations. The meeting provided the opportunity to take stock of achievements and challenges in recent years and to develop a strategic vision how to reinforce the fight against corruption in the region in the years to come. The meeting discussed various issues such as the effectiveness of anti-corruption policies and preventive measures, how to boost the enforcement of anti-corruption laws, and how to launch a productive dialogue with companies and business associations about business integrity. The High Level Meeting adopted the Statement on Strategic Directions for Fighting Corruption in Eastern Europe and Central Asia, which established strategic directions for the ACN Work Programme for 2013-2015.<sup>537</sup>

### **Istanbul Anti-Corruption Action Plan**

The Istanbul Anti-Corruption Action Plan is a voluntarily monitoring programme that targets nine ACN countries – Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Mongolia,<sup>538</sup> Tajikistan, Ukraine and Uzbekistan. The participating countries are monitored against the standards found in the anti-corruption conventions, recommendations and best practices developed by the UN, the OECD and the Council of Europe. Since the launch of the IAP, all countries have undergone a base-line review during 2003-2005. Subsequently, the countries underwent the first round of monitoring during 2005-2007, the second round during 2009-2012, and the third round during 2013-2015. The main feature of the third round was the focus on the implementation of anti-corruption reforms, the enforcement of anti-corruption laws, and their impact on the levels of corruption.

Each IAP monitoring round examines all major anti-corruption activities including anti-corruption policies, the criminalisation of corruption and law enforcement efforts, as well as the prevention of corruption in public administration and the private sector. Other anti-corruption monitoring programmes active in the region examine several issues at one time, e.g. GRECO has assessed corruption in respect to MPs, judges and prosecutors in its 4th round; the first cycle under the UNCAC review mechanism examines Chapters III and IV on criminalization and law-enforcement as well as international co-operation. The IAP process contributes to other monitoring processes and gives governments a comprehensive and regular assessment of their anti-corruption reforms.

During the third round, the monitoring of one country – Uzbekistan – was organised jointly by the ACN together with the UNODC, which was a useful approach that allowed the country to use its resources in the most effective manner.

The IAP monitoring is based on a peer review methodology, where governments review each other, collectively agree on recommendations and continuously monitor their implementation. The OECD Working Group on Bribery uses this method in its own monitoring. In the IAP monitoring, practitioners from all the IAP countries – joined by practitioners from certain ACN and OECD countries – conduct mutual reviews. As a result, the IAP’s recommendations are practical and politically neutral. This not only builds trust but also helps to ensure that the IAP countries remain committed to implement the recommendations.

The IAP monitoring process involves the following main steps. First, governmental and non-governmental partners from each country are invited to fill out a monitoring questionnaire; then, a group of experts from other ACN countries will visit the country under review to meet with governmental and

<sup>537</sup> Further information on the ACN High-Level Meeting is available at <http://goo.gl/IExMNR>.

<sup>538</sup> Mongolia joined the ACN and the Istanbul Anti-Corruption Action Plan at the High Level Meeting in December 2012.

non-governmental partners; finally, these experts will prepare a draft report, which is presented for the discussion and adoption at the IAP plenary. Monitoring reports include an assessment of the implementation of recommendations that were adopted in previous rounds, a compliance rating, and either updated or new recommendations. Reports are adopted by consensus. All IAP reports are published on the ACN website after their adoption in the plenary meetings without any further authorisation of the countries concerned. After a report is adopted and published, a return mission is organised to present the report in the monitored country.

On two occasions, the return missions were organised in the context of larger events, in order to increase the dissemination of the recommendations and to promote their implementation. The return mission to Ukraine was organised in the framework of the first national anti-corruption conference in Ukraine, which was attended by the President and Prime Minister as well as many ministers, ambassadors, leading NGOs and the media. The return mission to Mongolia was organised as a part of the annual conference of the OECD-ADB Asia-Pacific Anti-Corruption Initiative, which was hosted by Mongolia. The conference was attended by the Prime Minister, public officials, NGOs, and the media organisations from Mongolia, as well as participants in the Asia-Pacific initiative.

After the full-scale monitoring, the country is invited to present progress updates about the implementation of the outstanding recommendations at each follow-up IAP plenary. The methodology for progress updates was improved in 2014: in the past progress updates were self-reports by countries, the IAP plenary now adopts its own assessment of the country's progress together with ratings, which ensures continued peer pressure.

The IAP monitoring process is open to the participation of non-governmental partners, including civil society organisations, business associations, academics, representatives of international organisations, diplomatic missions and bilateral donor-funded programmes. The participation of these non-governmental partners strengthens the objectivity of the monitoring results. Non-governmental partners are consulted during on-site visits and are invited to attend plenary meetings. They can also submit shadow reports.

To further strengthen the participation of CSOs, in 2013-2014 the ACN in cooperation with TI Georgia and TI Ukraine prepared "Practical Guide: How to Conduct Monitoring by Civil Society"<sup>539</sup>, provided training for CSOs in **Kyrgyzstan** and **Tajikistan**, and organised a special session on the role of civil society back-to-back with an IAP plenary meeting. These efforts led to a significant increase in the contribution made by civil society organisations to the IAP monitoring process, in a structured and meaningful manner. Several NGOs have stated that the IAP process was the only formal anti-corruption monitoring process in which they could fully participate as equal partners.

---

<sup>539</sup> Available at <http://goo.gl/VOsNff>.

### Box 51. Third round of the IAP monitoring in figures

During the third round of monitoring under the Istanbul Anti-Corruption Action Plan, which was carried out in 2013–2015, the following activities were implemented:

- **9 on-site visits:** Armenia (July 2014), Azerbaijan (June 2013), Georgia (May 2013), Kazakhstan (May 2014), Kyrgyzstan (January 2015), Tajikistan (February 2014), Ukraine (November 2014) and Uzbekistan (June-July 2015). In addition, the IAP conducted an on-site visit within the joint first and second round of monitoring for Mongolia (June 2015).
- During the on-site visits, the monitoring teams held **91 panels** with approximately **320** state institutions. In addition, **26 special sessions** were organised with the representatives of from civil society, business groups, international organisations, and donors.
- **64 monitoring experts** from **18 ACN** or **OECD countries** (including Armenia, Azerbaijan, Croatia, Estonia, Georgia, Kazakhstan, Italy, Latvia, Lithuania, Macedonia, Moldova, the Netherlands, Romania, Slovenia, US, Ukraine, Uzbekistan, and Tajikistan) participated in the examination of the IAP countries, along with **5 international organisations** (including OECD, SIGMA, UNODC, World Bank and EBRD).
- **5 plenary meetings** were organized (September 2013, April and October 2014, March and October 2015) to discuss and adopt country reports. The plenary meetings brought together **389 delegates** from ACN countries, international organisations and NGO partners.
- **9 monitoring country reports** (one for each IAP country) were adopted and published, and **9 return missions** were organised to present the reports back in the countries. The IAP also published **15 follow-up progress updates** after discussing them in IAP plenaries.
- In total, **168 recommendations** were adopted for the eight countries that were examined during the third round of monitoring. Of these, 11 recommendations were fully implemented, 35 largely implemented, 103 partially implemented and 19 not implemented. As a result of the third round of monitoring, **125 new recommendations** were made and 60 previous recommendations remained valid.

Source: OECD/ACN Secretariat.

As noted above, the focus of the third round of monitoring was on implementation and enforcement. To achieve this objective, the assessment of progress focused on the implementation of practical measures and the enforcement of legislation, including statistical data about law-enforcement actions and studies of the impact of anti-corruption measures on the level of corruption.

The analysis showed that many IAP countries do not pay sufficient attention to tracking the impact of their anti-corruption reforms, and only indirect links can be established between the measures taken and their impact on the ground. While this task is methodologically challenging, this deficiency can also indicate the unwillingness of policy-makers to reveal the results of their efforts and to face public criticism for shortcomings. In some cases, sectoral reforms designed for other purposes produced more impact on the level of corruption than the actual anti-corruption strategies and laws.

To understand these processes better, it would be useful to focus the next round of monitoring under the IAP on selected sectors in order to assess how anti-corruption tools – as well as other sectoral reforms – can effectively reduce corruption.

#### Thematic study on the prevention of corruption in the public sector

Building on the peer learning activities launched during 2009-2012, the ACN Work Programme for 2013-2015 included several activities that aimed to strengthen the capacity of anti-corruption practitioners. These capacity-building activities included expert seminars to exchange experiences among practitioners and cross-country thematic studies designed to collect and disseminate good practices in selected anti-corruption areas.

The thematic study “Prevention of corruption in the public sector in Eastern Europe and Central Asia” was one of these activities. The ACN Secretariat together with the OSCE, UNDP, as well as other co-organisers and host countries organised three expert seminars in Latvia, Albania and Croatia. The purpose was to identify corruption prevention tools that proved to be effective by exchanging



experiences among corruption prevention practitioners from all the ACN countries. Based on the information gathered during the seminars and through additional research, the ACN Secretariat and an external consultant drafted the Study, which provides an overview of international standards and approaches to the prevention of corruption, presents examples of successful preventive measures taken by ACN countries, and concludes with policy recommendations for further corruption-prevention reforms in the region. The Study was reviewed and validated by an Advisory Group established for this project and by the ACN Steering Group.

#### Box 52. The prevention of corruption in the public sector in Eastern Europe and Central Asia

The Study covers the following successful prevention measures:

- Using research on corruption to guide anti-corruption policy making
- Anti-corruption assessments of laws, regulations and other legal acts
- Corruption risk assessment in public institutions
- Internal anti-corruption or integrity plans in public institutions
- Measuring, assessing and monitoring implementation of anti-corruption measures
- Effective and innovative engagement of civil society organisations
- Anti-corruption and ethics training and education
- Awareness-raising campaigns
- Innovative approaches and measures to prevent conflicts of interest
- Responsibility for, and expertise in, preventing corruption within public institutions
- Approaches to anti-corruption coordination
- Preventing corruption in the management of public finances
- Fostering the role of state audit institutions in preventing corruption
- Electronic services, simplification and unification of public services
- Access to information as a tool for preventing corruption
- Tools for reporting corruption, including whistle-blower protection and rewards.

Source: OECD/ACN (2015), Thematic study, Prevention of corruption in the public sector in Eastern Europe and Central Asia, <http://goo.gl/8xedkU>.

The project allowed the ACN Secretariat to create an informal network of corruption prevention practitioners from all the countries in the region. This network is an effective framework for disseminating good practices and identifying the trends and further areas where the ACN could provide analytical support. Upon the conclusion of the project, corruption prevention practitioners suggested that the future seminars and studies should focus on good practices of corruption prevention at the sectoral and local levels and that the future seminars should also assess the impact of corruption prevention measures.

In addition to this regional project, the Secretariat also provided support to one sub-regional and one country project on corruption prevention. The sub-regional project involved a seminar, which was organised in 2013 together with ReSPA – Regional School for Public Administration for the Western Balkan countries to present the findings of the study “Ethics Training for Public Officials”, which was prepared by the ACN together with SIGMA and the OECD Public Integrity Network. The country project involved a seminar on public sector integrity, which was organised in Uzbekistan in 2015 to help the country implement one of the IAP recommendations related to codes of ethics and other civil service reform measures. The expert seminar was timely, as it helped Uzbekistan with its on-going process of developing civil service regulations, including the concept for a new law on civil service, uniform rules for civil service recruitment, and a framework code of ethics for civil servants. The expert seminar adopted a roadmap of practical measures to move Uzbekistan’s civil service reform forward. One of the measures proposed in the roadmap has already been implemented, with the adoption of a code of conduct for civil servants in March 2016.

### **Thematic studies on criminalisation and Law-Enforcement Network**

ACN established a Law Enforcement Network (LEN) for investigators and prosecutors of corruption cases in 2010. During 2013-2015, LEN held two meetings: first, in 2014, back-to-back with the meeting of the Steering Group and with the meeting of the OECD Working Group on Bribery, and then in 2015, back-to-back with the meeting of the joint meeting with OECD Working Group on Bribery law-enforcement officials and the Global Law Enforcement Network (GLEN). These back-to-back arrangements allowed the law-enforcement practitioners from the ACN countries to establish professional contacts with their counterparts from OECD countries as well as from other countries around the world. Such professional contacts are crucial for the effective investigation and prosecution of complex cross-border corruption crimes. LEN participants highly appreciated the opportunity to meet jointly with their colleagues, and they suggested that this practice should be continued in the future, when possible.

As in the past, the LEN meetings focused on the discussion of practical real-life cases as a form of mutual learning among practitioners. LEN meetings also include working group sessions that are based on hypothetical cases that allow participants to practice newly acquired knowledge. The themes for the meetings were linked to the thematic cross-border studies prepared by the ACN Secretariat under the guidance of the Advisory Group and with the assistance of external consultants. The 2014 meeting focused on the study the “Liability of Legal Persons for Corruption in Eastern Europe and Central Asia”<sup>540</sup>, and the 2015 meeting focused on the study “Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia”<sup>541</sup>. The joint meeting of the LEN, GLEN, and OECD Working Group on Bribery law-enforcement officials focused on the theme of international cooperation and mutual legal assistance (MLA) in the investigation and prosecution of corruption cases. To address this issue, the LEN has launched a new thematic study on MLA, which will be completed in 2016. The last LEN meeting also suggested that future studies may address such issues as procedures for investigation and prosecution of corruption offences, such as confiscation, as well as on new complex offences, such as illicit enrichment.

### **Thematic study on business integrity**

The ACN first launched its business consultations in 2008, and further continued them throughout the 2009-2013 Work Programme. These activities were upgraded into a full-scale project in the 2013-2015 Work Programme. To help develop the project, the ACN Secretariat has established a Business Integrity Board that brought together key experts in this area from the public and the private sectors from ACN and OECD countries. Its first meeting took place in Turkey in 2013.

Under the guidance of the Board and in cooperation with EY Baltics, the Secretariat conducted an on-line survey that aimed to identify trends and good practices regarding the efforts of governments, companies and business associations to prevent corruption in business. To validate the findings of the survey, the ACN Secretariat, together with country partners, organised a series of consultations and case studies, including a high-level round table and consultations with the private sector in Lithuania, consultations with the public and private sector in Romania, and case studies in Central Asia.

The results of the survey, consultations and case studies were discussed at the second meeting of the Business Integrity Board that took place in 2014 in Turkey. The first expert seminar on business integrity was organised back-to-back with the Board meeting; it brought together representatives of ACN governments, as well as companies and business associations, who presented their experiences in promoting business integrity.

<sup>540</sup> Available at <http://goo.gl/zcjkea>.

<sup>541</sup> Available at <http://goo.gl/JVGJgJ>.

On this basis, during 2015, the ACN Secretariat together with the external consultants prepared the draft study “Business Integrity in Eastern Europe and Central Asia” and organised a review of this draft by the Steering Group and the informal network of business integrity experts. The draft includes an overview of trends in the region, presents examples of good practices and contains policy recommendations. It is expected that the report will be finalised by April 2016.

#### Box 53. Business Integrity in Eastern Europe and Central Asia – good practices

The forthcoming study provides a review of trends based on the survey of business integrity efforts taken by governments, companies and business associations in the ACN countries. It further provides examples of good practices, including the following:

*Actions by governments to promote business integrity:* enforcing anti-corruption legislation, including corporate liability for corruption, preventing undue relations between business and politics, adopting state policy on business integrity, taking measures to prevent corruption in state-owned enterprises, creating incentives for companies to improve compliance, promoting business transparency through corporate governance rules, and supporting the implementation of whistle-blower protection laws.

*Actions by business associations and NGOs to promote business integrity:* studying corruption risks, awareness raising and training, establishing anti-corruption committees and groups in business associations, supporting individual companies as well as channels for reporting corruption risks, and developing and promoting integrity standards as well as collective actions.

*Actions by companies to promote business integrity:* adopting integrity policies, conducting risk assessments, establishing rules on conflicts of interest, standards on gifts, benefits, and political contributions, establishing requirements for business partners and procurement rules, ensuring disclosure and transparency, establishing a compliance office or function, strengthening the role of internal audit in preventing corruption, strengthening monitoring and internal controls, internal reporting and whistle-blower protection, as well as participating in business integrity activities with business organisations, international organisations, and governments.

Source: OECD/ACN, Thematic study "Business Integrity in Eastern Europe and Central Asia", forthcoming (2016).

These ACN efforts have produced an important impact on business integrity activities in the region. The ACN helped to raise awareness about measures that governments and their private-sector partners can take to prevent corruption in business. It triggered several country projects on business integrity and created a unique group of experts on business integrity in the region. At the same time, it is important to recognise that business integrity is still a relatively new and unexplored area of anti-corruption work in the region. Further efforts are needed to boost business integrity reforms across the ACN region, building on good national and international practices.

**Box 54. ACN peer-learning activities in figures**

During 2013-2015, the ACN held the following thematic activities:

- 10 peer-learning seminars:

1. March 2013, Montenegro (ethics training for public officials, co-organised with the Regional School for Public Administration (ReSPA)): 26 participants from 8 countries and 2 international and civil society organisations
2. June 2013, Latvia (corruption prevention): 65 participants from 24 countries and 3 international and civil society organisations
3. October 2013, Turkey (business integrity): 27 participants from 10 countries and 4 international and civil society organisations.
4. June 2014, Albania (corruption prevention): 62 participants from 24 countries and 9 international and civil society organisations
5. October 2014, France (NGO consultations on civil society monitoring): 89 participants from 24 countries and 16 civil society and international organisations
6. November 2014, Tajikistan (capacity building of civil society): 36 participants from 6 countries and 3 international partners working with civil society
7. November 2014, Turkey (business integrity): 55 participants from 15 countries and 9 international and civil society organisations
8. December 2014, Georgia (corruption prevention, co-organised with the OSCE and the UNODC): 52 participants from 9 countries and 7 international and civil society organisations
9. May 2015, Croatia (corruption prevention): 89 participants from 26 countries and 15 international and civil society organisations
10. September 2015, Uzbekistan (integrity in the public sector): 50 participants from Uzbekistan and 4 international organisations

- Three meetings of the ACN Law Enforcement Network:

1. April 2014, France: 71 participants from 25 countries and 10 international and civil society organisations
2. December 2014, France (back to back with the OECD Working Group on Bribery): 75 participants from 27 countries
3. December 2015, France (back to back with the OECD Working Group on Bribery and the Global Law Enforcement Network): 33 participants from 16 countries.

The following thematic studies were prepared:

1. Specialised Anti-Corruption Institutions. Review of Models: Second Edition (OECD, 2013)
2. Ethics Training for Public Officials (joint study by the ACN, the EU-OECD initiative SIGMA, and the OECD Public Sector Integrity Network, 2013)
3. Mutual Legal Assistance and other forms of co-operation between Law Enforcement Agencies (OECD, 2013)
4. Corruption Prevention in Public Sector in Eastern Europe and Central Asia (OECD, 2015)
5. Liability of Legal Persons for Corruption in Eastern Europe and Central Asia (OECD, 2015)
6. Foreign Bribery Offence and its Enforcement in Eastern Europe and Central Asia (OECD, 2015)
7. Business Integrity in Eastern Europe and Central Asia (OECD, 2016, forthcoming)
8. Mutual Legal Assistance in Corruption Cases (OECD, 2016, forthcoming)

Source: OECD/ACN Secretariat.

**Box 55. ACN project on Ukraine**

Corruption was one of the key reasons why the people of Ukraine went out to the “Maidan” and demanded a change. It is also one of the reasons behind the difficult economic situation in Ukraine today. Building a democratic state and restoring economic growth in Ukraine is impossible without strengthening the rule of law and effectively combating corruption. The government of Ukraine has committed to fight corruption and has reached out to the OECD for assistance in this difficult task. The Memorandum of Understanding, which was signed by the OECD and Ukraine in October 2014, identifies the fight against corruption as one of its main goals. To implement the Memorandum, the OECD Anti-Corruption Network for Eastern Europe and Central Asia has launched the Ukraine Anti-Corruption Project.

The project was launched in December 2014. It aimed to provide immediate and practical support for the implementation of anti-corruption reforms in Ukraine. The main directions were providing support to the National Anti-Corruption Bureau of Ukraine (NABU) and building capacity to investigate and prosecute high-profile, complex corruption crimes. In the initial stage, the project provided assistance with the development of admission tests to hire detectives for the NABU, followed by the development of tests for the selection of anti-corruption prosecutors and anti-corruption experts engaged by the Parliament’s Anti-Corruption Committee. The project provided input into the initial training course for newly appointed NABU detectives. The project also assisted in development of the draft law on Asset Recovery Office. And finally, the project fostered donor coordination on anti-corruption issues.

In April 2015, the OECD and Ukraine signed an Action Plan for strengthening co-operation to help tackle corruption, improve public governance and the rule of law, boost investment, and foster a dynamic business environment. A more comprehensive country-specific project was designed to implement components of the first policy area of the Action Plan, which deals with anti-corruption and will be implemented in 2016-2017.

The main goal of the new project is to complement the initiatives launched by the Ukrainian government, civil society and the international community by providing assistance in strengthening Ukraine’s capacity to effectively detect, investigate and prosecute corruption. The project is tailor-made. It provides assistance to the NABU and to the specialised anti-corruption office within the General Prosecutor’s Office. The project team is developing training programmes on selected aspects of detection, investigation, prosecution and adjudication of complex corruption cases; these trainings will cover financial investigations by law enforcement and judicial bodies to help guide Ukraine towards compliance with OECD standards on foreign bribery, focusing on the liability of legal persons for corruption offences, confiscation, international co-operation and asset recovery. The project also provides assistance to the Office of the Business Ombudsman: it will help developing that institution’s capacity to handle business complaints through training, creating a case-management system, and advising on legislation. Taking a demand-driven approach the project will also focus on business integrity issues.

Source: OECD/ACN Secretariat.

**ACN Evaluation**

For the first time since its creation, the ACN has included in its Work Programme for 2013-2015 both internal and external evaluations in order to help improve its performance.

The internal evaluations were conducted through regular questionnaires that were sent by the Secretariat to the Steering Group members as well as to participants in the thematic seminars and monitoring experts. The responses were collected by the Secretariat and presented to the Steering Group for discussion. The responses were generally positive and confirmed that the ACN provides a useful regional framework for the ACN countries to exchange experiences and promote good practices. Some of the suggestions that were provided in the response were taken on board by the Secretariat, including improvements of the ACN website and simplification of the registration procedures for various events.

In addition to the internal evaluation, the Work Programme provided for an external evaluation. For this purpose, an external consultant was retained through a competitive procedure. The methodology for the evaluation included not only a desk review of various ACN documents, but also attending ACN events, country visits and interviews. The results of the external evaluation were presented at the Steering Group in March 2015 and published on the ACN web-site.<sup>542</sup> The main findings included the following:

<sup>542</sup> Available at <http://goo.gl/2A09jd>.

- All the activities considered under the current Work Programme are assessed to be highly relevant for ACN countries;
- Efficiency in the use of the network resources and the resulting synergies across activities in one of the most striking achievements of the ACN;
- Overall, the ACN is believed to have helped to build a critical mass of national officials who have internalised international standards and good practices on anti-corruption policies and law-enforcement methods;
- Establishing impact is difficult for all development or reform interventions due to attribution challenges, but in the case of anti-corruption efforts the problem is compounded by the fact that corruption is multi-faceted and encompasses many institutions and substantive issues, as well as the lack of regularly produced comparable data.
- The sustainability of the results across the ACN 2013-2015 Work Programme is quite promising. The initiative's overall financial sustainability is not, however, as the ACN only has limited institutional budget through the OECD and no cost-recovery mechanism, although members do provide in-kind support for IAP monitoring and network seminars.

The external evaluation also provided several recommendations for further strengthening the ACN, including three main ones: (1) track the results of the ACN activities in a more systematic manner; (2) develop a long-term financial strategy to ensure that the ACN activities are maintained; and (3) disseminate ACN products, such as the IAP reports more actively to increase international public attention and pressure for reforms.

## Way forward

Building on the achievements to date, the ACN should focus on supporting countries in the implementation of anti-corruption reforms and in enforcing anti-corruption legislation. The focus can be achieved through:

- Reinforcing the peer pressure of the IAP monitoring process by focusing the fourth round on the results of the implementation of recommendations, including enforcement statistics, and in-depth analysis of anti-corruption measures in selected sectors;
- Boosting the level of peer learning by building highly specialised professional expertise through informal networks and studies for corruption prevention, business integrity and law-enforcement practitioners.

The results of the ACN's activities over the past three years suggest that further closer cooperation NGOs and the business community would be very important, both for strengthening the IAP monitoring process and for the thematic studies on corruption prevention and business integrity. This cooperation should be better institutionalised: special contact and mailing lists will need to be established, and other forms of regular communication can be explored to promote stronger and more regular links with non-governmental partners.

The past results also show that bringing ACN law-practitioners to the Global Law Enforcement Network (GLEN) is a useful means of promoting mutual learning, sharing expertise and building professional contacts. The practice of joint meetings between the ACN's LEN and GLEN should therefore be promoted when possible.

Strengthening alliances with international partners, including donor programmes and multi-national development banks, and also with their offices in the ACN countries is another useful way to strengthen the impact of the ACN on the anti-corruption reforms in the region. These alliances not only allow ACN to save costs by organising events jointly with international partners, but to disseminate ACN findings

more broadly, reinforce policy messages and eventually help donors focus on the most significant anti-corruption priorities for each country.

Country projects are another means for strengthening ACN's impact on the ground. The Ukrainian anti-corruption project, business consultations in selected countries, the corruption prevention seminar in Uzbekistan and the other *ad hoc* projects implemented to date suggest that the ACN can provide timely and highly specialised assistance on specific requests from countries. The potential to engage in such country projects should be further explored, but precautions should be taken that they do not steer the ACN into a “commercial consultancy”; such projects, therefore, should be within the general frame of the ACN mandate, and their products should benefit the whole region as much as possible.

Responding to one of the key recommendations of the external evaluation, it will be important to track the results of ACN's work and its impact on the level of corruption in the region. Tracking the results of anti-corruption reforms in all ACN countries – as well as tracking the ACN's own impact on the region's anti-corruption performance – can be achieved through systematic data collection, analysis and reporting along a select number of realistic indicators that can be developed using international anti-corruption indices, data generated by the ACN Secretariat and provided by ACN countries.

Responding to another recommendation, the ACN will need to strengthen its financial sustainability. This is a challenging task as the ACN is an OECD global relations programme, and such programmes are always funded by voluntary contributions, which are, by definition, not guaranteed. Expanding the amount of funding contributed by the participating countries should be the main new approach for the ACN, in addition to seeking further funding from OECD member states and making co-funding arrangements with other international organisations.

The new ACN Work Programme for 2016-2019 was adopted by the ACN Steering Group in October 2015. The Work Programme reflects the main directions for further work as outlined above. In order to reinforce the political mandate and commitment for the implementation of the Work Programme, including financial support, the ACN organised a High-Level Meeting in April 2016, which took place during the OECD Integrity Week, thus allowing ACN countries to contribute to the global debate on how to fight corruption and to learn from other countries around the world.



## ACN Funding

Table 45. ACN funding in 2013-2015

	<b>Amount (EURO)</b>
<b>Voluntary contributions</b>	<b>Received</b>
<b>ACN regional programme</b>	
Liechtenstein	65,584
Switzerland	750,000
United States	656,285
<b>Sub-total</b>	<b>1,471,869</b>
<b>ACN country specific programmes</b>	
Latvia (Project on Ukraine)	25,000
Lithuania (Project on Ukraine)	30,000
Slovak Republic (Project on Ukraine)	25,000
Sweden (Project on Ukraine)	201,667
UK DFID (Project on Kyrgyzstan/Tajikistan)	308,053
United States (Project on Ukraine)	156,093
<b>Sub-total</b>	<b>745,814</b>
<b>In kind contributions by ACN countries</b>	<b>Estimate only</b>
In-kind expenses during monitoring country visits	80,000
Self-financing of country delegates to ACN events	35,000
<b>Sub-total</b>	<b>115,000</b>
<b>Co-funding by other international organisations</b>	<b>Estimate only</b>
Co-funding of seminars by OSCE, UNODC, RACVIAC, RESPA and others	140,000
<b>Sub-total</b>	<b>140,000</b>
<b>OECD Part 1 contributions</b>	
Staff costs & Operational costs	619,970
<b>Sub-total</b>	<b>619,970</b>
<b>TOTAL ESTIMATED CONTRIBUTIONS TO ACN PROGRAMME IN 2013-2015</b>	<b>3,092,653</b>

Source: OECD/ACN Secretariat research.



## **CONTENTS**

Executive summary

Chapter 1. Anti-corruption trends in Eastern Europe and Central Asia

Chapter 2. Anti-corruption policy and institutions

Chapter 3. Criminalising corruption and enforcement

Chapter 4. Prevention of corruption

Chapter 5. OECD Anti-corruption Network for Eastern Europe and Central Asia

[www.oecd.org/daf/anti-bribery](http://www.oecd.org/daf/anti-bribery)

