CORRUPTION IN UKRAINE

An analysis of its nature and causes

Contents

INTRODUCTION

Ukraine's achievements in the years since its independence are significant. The country has established government institutes, adopted the Constitution and become an active and influential member of the international community. Ukrainians have a strong sense of national identity. The national economy has been liberalized to a certain extent, major changes have been made to existing legislation and sweeping legal reforms have begun. Progress has been made in democratic development. After struggling through the deep economic crisis of the 1990s, Ukraine has for several years now achieved the highest economic growth rate in Europe.Nevertheless, public institutions remain weak and inefficient, and the political process lacks structure. Significant problems have arisen in the process of democratic development. The reliability and integrity of public bodies are subjects of serious public concern. Living standards are amongst the lowest in Europe. The many challenges that Ukraine faces in the areas of social, economic and legal development are compounded by a widespread belief that public interests often yield to the interests of individuals and business groups. Corruption is one of the most pressing problems of Ukrainian society. At the international level, Ukraine has the reputation of being an extremely corrupt country. This standing has been confirmed in the past few years by several authoritative international studies of integrity, in which Ukraine's rating is invariably low. For example, Ukraine's score on Transparency International's "corruption perception index" was 2.3 in 2003 and 2.4 in 2002. This index measures corruption as it is perceived by business people and analysts on a scale from 0 (corruption is prevalent) to 10 (effectively no corruption), with a score below 3.0 signifying dangerous levels of corruption.

Various public opinion polls conducted in the mid 1990s showed that between 65% and 88% of respondents regarded corruption as "very common". The same polls also showed that a majority believed the situation to be worsening.

More recently, research conducted in January-April 2003 by the Institute of Applied Humanitarian Studies shows that the problem of government integrity remains unsettled. Current practices give few signs that holders of public offices, for the most part, feel any obligation to the state or the public they are supposed to serve. The vicious circle of private deal making for personal gain has not been broken. The belief that the amount of stolen goods depends on the amount of goods that are available to steal still prevails among the public.

The negative impact of the abuse of public office cannot be overestimated. Corruption threatens the supremacy of law, undermines social justice and hinders economic development and international competitiveness. It weakens the moral foundations of society and endangers the stability of democratic institutions. In a democratic system, which depends on public trust, pervasive dishonesty can fatally destroy faith in the government. For these reasons, improper conduct in the performance of pu-

blic duties must be prevented.

Acknowledging the fact that good governance requires the promotion of accountability in the management of collective resources, the Decree of the President of Ukraine recognized the campaign against corruption as a national priority. Accordingly, the Department of Justice of Canada and the Ministry of Justice of Ukraine, with the financial support of the Canadian International Development Agency, have set up a joint project aimed at promoting integrity in the public sector.

The project started on 9 February 1999 and finished on 31 March 2004. It dealt primarily with the more technical aspects of integrity by providing Ukrainian authorities with the extensive knowledge and experience available in Canada. The project took several lines of approach, including :

- the development of extensive background material on the control of public-sector corruption in Canada;
- research by Ukrainian experts on a number of issues related to the integrity of public officials and government processes in their country;
- a series of consultations and round-table discussions in Ukraine.

Of these three fields of activity, the extensive research work carried out by the Ukrainian scientists can be regarded as the major achievement of the project. These investigations uncovered a number of problems that had not been examined. These findings, together with the research as a whole, lead to a better understanding of the nature and the scale of the phenomenon.

Members of the Institute of Applied Humanitarian Studies performed the research in Ukraine : M.V. Buromenskyi, Research Supervisor, Doctor of Legal Science, O.V. Serdyuk, Candidate of Philosophy, V.V. Fesenko, Candidate of Philosophy, M.P. Kolisnyk, Candidate of Legal Science, F.V. Venislavsyy, Candidate of Legal Science, O.M. Yaroshenko, Candidate of Legal Science, S.P. Pogribnyak, Candidate of Legal Science, V.M. Steshenko, Candidate of Legal Science, V.M. Suschenko, Candidate of Legal Science, O.M. Tolochko, Candidate of Legal Science, V.M. Kuts, Candidate of Legal Science, I.Ye. Shekhovtsov, lawyer, S.V. Leontieva, O.V. Us, V.I. Tochenyy, S.V. Konovalov. Other participants – lecturers at academic institutions, employees of local sociological centres, NGOs, and journalists – were involved in opinion polls conducted in various regions of Ukraine.

The studies were based on the following materials :

Analysis of legislation. In total, 2,529 Acts and regulations connected with the functioning of governmental bodies have been examined.

Analysis of administrative and judiciary practices. The research focused on decisions (resolutions, orders, guidelines, conclusions) of the central and local executive authorities and decisions (judgments, opinions, verdicts) of judicial bodies. In all, 725 documents have been analyzed.

Analysis of mass media materials, including selective content analysis. Materials of 15 national and regional editions and 4 Internet news editions were studied between December 2002 and September 2003. Selective analysis covered materials from 1995 onward.

Expert assessments. Heads, assistants of heads of the central executive bodies, judges, employees of law enforcement bodies, lawyers, legal scholars, active members of nongovernmental organizations, and journalists were interviewed as experts. In total, 211 respondents have been interviewed. Some special case studies required the use of focus groups, of which 19 were organized.

Public opinion polls. Direct questioning was the main method used. The interviews were conducted in the main regions of Ukraine (the central, eastern and western regions and the Crimea) and involved 1,100 respondents. The data collected can be regarded as representative of the Ukrainian population, with an error rate of less than 3%.

Business people opinion polls. These were carried out in the form of interviews in the major regions of Ukraine (Kyiv, Kharkiv, Donetsk, Lviv, Ternopil Regions and the Crimea). Respondents included directors (owners, shareholders) and leading experts on private enterprises of different types (large, average and small-scale enterprises) representing typical industries (trade, services, manufacturing). In total, 410 respondents have been interviewed.

Public servants polls. Public servants surveys were carried out in the form of interviews. Respondents included representatives of the central and local executive bodies (except for the judicial and law enforcement bodies) in Kiev, Kharkiv, Lviv regions and the Crimea. In total, 540 respondents have been interviewed.

The main purpose of the report is to transform the knowledge obtained in the course of the project into specific proposals on the conduct of the reform. There are two main objectives : to encourage discussion of the problem of government integrity and, when possible, to identify measures for improving living standards for the public. The report places a clear emphasis on the prevention of unethical behaviour. The punishment of corruption is undoubtedly an important element. But in our opinion, real progress and the certainty that officials will not cross the boundaries of acceptable behaviour can be ensured only by making unethical actions impossible or uninviting in a democratic system of public life.

1 THE EXTENT OF THE PROBLEM

Measures to counteract and prevent corruption in the government require a clear assessment of the problem's extent. An analysis of anti-corruption publications shows there to be two extreme opinions, either of which could be equally counter-productive to ensuring an effective approach to the problem of corruption at the executive level. As a result, according to the well-known researcher D. Kaufman, the extent of corruption in this sector generally remains "in the mist of ambiguity"[1].

On the one hand, representatives of public bodies, primarily law enforcement bodies, rely on official statistics on crime rates and may conclude on this basis that there are no grounds for serious concern. The view of M. Garnyk, a recent head of the Prosecutor General's Office of Ukraine, is representative in this respect : "Speaking about the corruption level in the government would be difficult when annually not more than 1% of public servants are brought to different types of account for corrupt actions".[2]

On the other hand, representatives of NGOs and journalists tend to make conclusions on the level of government corruption on the basis of public opinion polls. Such surveys are often procedurally correct, but their results can be open to a wide range of interpretation. Important factors are often left out of account, such as the presence of popularly held stereotypes, uncertainty in regarding corruption as a political and a legal phenomenon, an inability to distinguish between the public and private sectors, and viewing corruption only or mainly in terms of bribery. As a result, allegations in the mass media claiming that "80% of Ukrainian civil servants take bribes" or that "the executive is totally corrupt" appear from time to time. Arguments based only on popular stereotypes are obviously an insufficient basis on which to draw conclusions. An unbiased and proper assessment of the extent of corruption in the government would be possible only by combining all available data and applying theoretically sound methods of interpretation to the results.

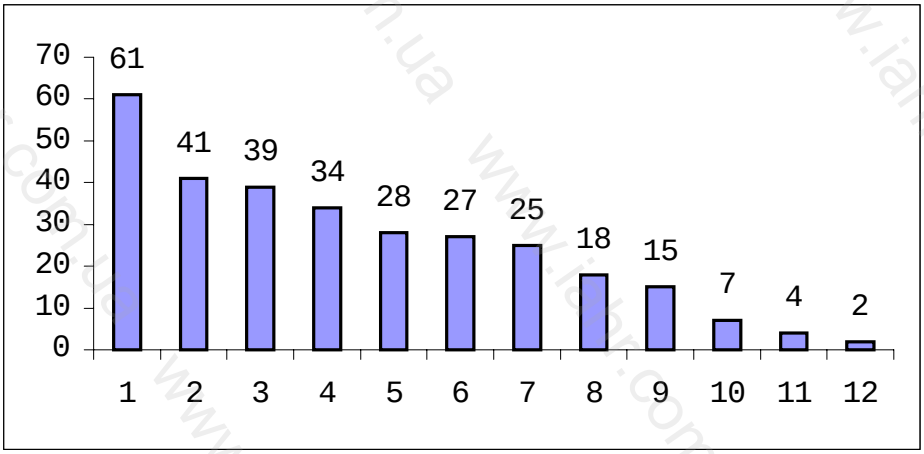
This study regards corruption as a complex social and legal phenomenon encompassing the types of conduct for which Ukrainian legislation provides criminal or administrative liability and which are recognized as corruption in international political and legal treaties.

[1] Кауфман Д. Корупція в тумані двозначності// Політика і час .-1998.-№ 5, с. 23.
[2] Цит за Жук І. Корупція в Україні: спроба аналізу.// Вісник.-2001.-№ 2, с. 46.

General assessment of corruption risks in public bodies (based on opinion polls of business people and the general public)

Ukrainians today face countless problems that hinder the normal functioning and development of society. The results of the polls give a general idea as to the types of problems and their relative positions in the public's concern (see Diagram 1).

Diagram 1. Problems of the greatest public concern (%)



1. Low wages
2. Corruption of authorities
3. High prices
4. Crime
5. Poor quality of health care
6. Unemployment
7. Environmental problems
8. High taxes
9. Accommodation problems
10. Other problems
11. Political conflicts
12. Refugees and migrants from other countries

Evidently, the problem of corruption **is one of the most pressing for Ukrainians, second only to low living standards resulting from low wages**. The respondents confirmed that the problem of government corruption is even more critical than high prices, unemployment and crime, traditionally painful concerns for Ukrainian society. This result may be due to the public's prevailing belief that the problems of greatest concern will not be settled so long as public bodies remain corrupt. That being said, one could assert that the resolution of the corruption problem is the main priority for Ukraine at its current stage of development. Otherwise, all efforts aimed at resolving the other pressing social problems will be in vain.

The public is subjugated by the idea that it is impossible to change the situation and to reduce the level of corruption within the next few years : **46.2% of respondents agreed that "the level of corruption will continue growing"**, while only 7.8% felt that "the level of corruption shall significantly decrease". The respondents emphasized several key factors :

- "inadequate control over public bodies and public officials" (36.7% of the respondents consider this to be the "key factor")

- "absence of the will to control corruption in the national political leadership" (34.5%)
- "the common practice of resolving problems not according to the law but through good connections" (29.8%)
- "widespread corruption in the law enforcement bodies" (28.5%)
- "imperfect legislation (flaws, conflicts, excessive complexity)" (26.2%)
- "public ignorance or unfamiliarity with their rights of communication with public bodies" (25.8%)
- "imperfect legislation on sanctions against corruption (light penalties, possibility of avoiding real liability)" (24.3%)

It is worth noting that several factors repeatedly mentioned in professional discussions on these issues are not regarded by the public as key factors. In particular, only 12.7% chose "low wages in the public bodies" as one of the key factors of corruption. Apparently, the public believes that "wages in this sector are sufficient" and that such social security indicators as "stability", "benefits" and "guarantees" are non-existent for a majority of employees. The polls enabled a more concrete assessment to be made of the global scale of corruption from the public's point of view (see Table 1).

Table 1. Public opinion on some features of the situation in Ukraine (%)

Agree		Disagree
85.1	Corruption is a common practice in our country.	3.7
85.0	Corruption is a common practice in the leadership of our country.	4.7
75.2	When settling a majority of issues with public bodies, bribes should be given.	11.3
39.0	Young public servants are more corrupt.	32.7
69.5	The more severe the penalties are for corruption, the better officials work.	14.3

The close connection of corruption with the government is highlighted by the fact that people perceive corruption to be prevalent in all units of public agencies. The respondents spoke with a remarkable unanimity when asked to assess the current situation. **A majority of respondents (85%) indicated that corruption in the country in general was a common practice.** No more than 5% of the respondents disagreed with the statement that corruption is widespread in everyday life. The assumption that the level of corruption depends on the generation to which a public official belongs has both supporters and opponents. Thus, 39% of respondents believe that young officials are more corrupt, 33% are of the opposite view and 28% could not answer the question.

This widespread certainty of corruption within the government is confirmed not only by individual opinions but also by personal experience. According to the poll, **75% of respondents are positive that a bribe is a mandatory prerequisite to obtaining a positive decision from public bodies, while only 11% disagree with this statement.** As for what

measures should be taken in order to control this practice, it should be noted that more than 70% of respondents advocated severe and strict measures to counteract corruption.

On the question of whether assessments of high levels of corruption in society are related to a respondent's affiliation with a particular social group, it can be noted that **business people with substantial experience in dealing with public bodies are even more critical than the public in general.** Of this group, 93% believe corruption to be a common practice ; however, in comparison with the general population, the proportion of those who advocate severe measures to combat corruption in the public sector is lower in this group (see Table 2).

Table 2. Assessments of the situation in Ukraine by business people (%)

Agree		Disagree
92.8	Corruption is a common practice in our country.	2.6
88.2	Corruption is a common practice in the leadership of our country.	2.0
75.0	When settling a majority of issues with public bodies, bribes should be given.	5.9
40.2	Young public servants are more corrupt.	36.2
62.5	The more severe the penalties are for corruption, the better officials work.	13.8

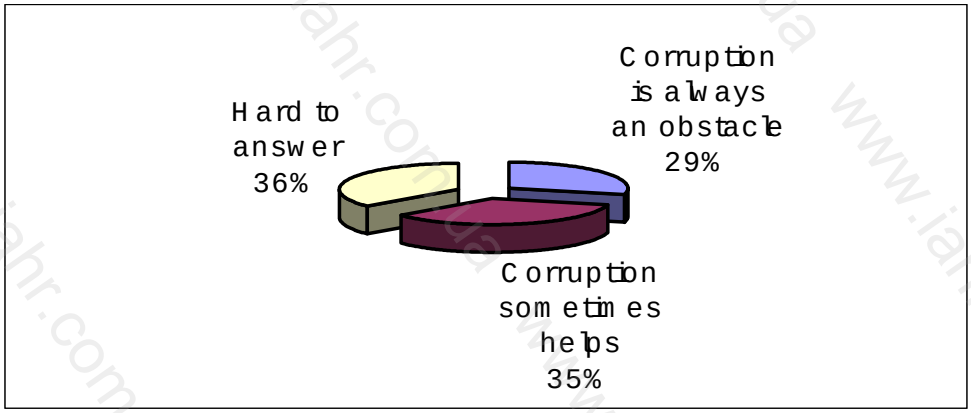
An analysis of the attitude of business people to corruption reveals some contradictions in their opinions and assessments. On the one hand, in assessing the social factors that may hinder business development, business people identify corruption as the second-most serious problem after high taxes. Corruption in public bodies was underlined by every second respondent (see Diagram 2). Only 4.7% of those running private enterprises believe that corruption in the judiciary and the private sector hinders business development.

Diagram 2. Factors hindering business development
(ranked according to importance)

1. High taxes
2. Corruption in public bodies
3. Low population solvency
4. Legislation flaws
5. Dependence on public bodies
6. Lack of inexpensive loans
7. Excessive public control
8. Absence of foreign investments
9. Corruption in the judicial
10. Crime
11. Low personnel qualifications
12. Neglect of duties
13. Corruption in the private sector

At the same time, the tolerance among business people for corrupt public officials is also noteworthy (see Diagram 3). Less than one-third of the respondents believe that the corruption of public officials always has a negative impact on their business. The number of those who appreciate corruption is somewhat higher (see Diagram 3). The share of those who were unsure or could not assess corruption with certainty is even higher.

Diagram 3. Is the corruption of public officials always a constraint on business? (in % to the number of businessmen interviewed)



It can therefore be said that while business people believe that corruption hinders their work, at the same time they emphasize the positive aspects of this practice for their businesses. Other findings of the research describe this finding in more detail. The attitude of the general public to different types of corruption — particularly, to bribery — is another important criterion. Respondents were asked to describe their probable conduct in a situation when they are being extorted for a bribe.

There results are the following (%) :

"I shall not give a bribe" – population 50.0, business people 27.9
"I shall report this to the management"– population 4.0, business people 7.2
"I shall report this to law enforcement bodies (anonymously)" – population 3.6, business people 2.1
"I shall report this to law enforcement bodies and identify myself" – population 5.4, business people 3.6
"I shall pay if I have money" – population 40.7, businesspeople 57.1

These findings demonstrate a high rate of tolerance for bribery. Answers to the question "What do you feel when giving a bribe?" are indicative in this respect :
- "Gratitude"– population 5.9, business people 2.0
- "Envy" – population 4.6, business people 0.7
- "Disdain for bribe taker" – population 13. 6, business people 22.4
- "Rage, irritation" – population 18.0, business people 13.2
- "Nothing, it is a common practice" – population 35.0, business people 55.3

These assessments reveal a dangerous trend, one that is getting stronger in Ukraine : corruption has become such a common practice that it is perceived as a way of overcoming administrative constraints in certain kinds of activity.

Assessing integrity in the executive

The situation at the executive level has the biggest impact on the development of the general perception of integrity. Since executive bodies perform the largest part of public functions, business people, other special interest groups and the public in general communicate mainly with them when settling various issues.

Corruption-related offences rate : official statistics and comments.

In line with the approach adopted in Ukraine, official statistics take corruption-related offences into account based on the law "On the Struggle Against Corruption", with the result that only the administrative offences provided for by this law are considered to be corruption-related. An analysis of the statistical data provided by law enforcement agencies for 2002, which is similar to a large extent to the findings of the previous years, is given below. In 2002, law enforcement agencies prepared and brought to court 5,318 reports on corruption offences, but the files were closed in 1,239 cases : in 318 cases due to the expiry of the limitation period, and in 51 cases due to the institution of criminal cases. The courts imposed the following penalties : 99 individuals were dismissed from office, and 2,863 individuals were fined. The guilt of more than 1,000 individuals was not proved, and they were acquitted.

The majority of corruption cases are associated with civil servants. In 2002, 3,459 reports were drawn up ; they fall within the following groups of grades of civil servants:
Grade 1–2 : 5
Grade 3–4 : 119
Grade 5–7 : 3,335

The courts closed 904 cases (including 237 cases due to the expiry of the limitation period and 41 cases due to the institution of a criminal case), and they applied the following sanctions : 57 individuals were dismissed from office, and 1,711 were fined.

It should be noted, as has been repeatedly emphasized in the mass media and in political debates (in particular, on the plenary session dedicated to this topic in the Parliament at the end of 2001), that the statistics obtained from law enforcement bodies give an unrepresentative view of the qualitative aspect of corruption, namely that corruption is a problem of "village councils secretaries or messengers" rather than a problem of "the representatives of the power and senior officials".

One of the experts interviewed in the course of the research indicated that, in focusing on minor cases, investigating agencies are "enhancing their operations to a certain extent" since they improve reporting data and avoid incriminating "the elite" or senior officials.

Thus, a senior member of the Prosecutor General's Office states : "as before, persistent efforts to disclose corruption offences are often answered by the concurrent preparation of numerous reports on middle-level public

officials, public servants of the 6–7 categories, who have committed minor offences that constitute corruption only formally and are of no social danger."[3]

The problem of the prevalence of corruption offences in public bodies is difficult to analyze, since the statistics do not sufficiently distinguish these offences. Further, Ukrainian legislation does not formally establish the notion of "corrupt actions", although their existence has been recognized at the political level (for example, bribery of public officials, abuse of public office). Moreover, not all forms of corruption are regarded as "crimes" by the public.

But, in line with the general concept of our study, even in the absence of a formal conception of "corruption offence" the Criminal Code of Ukraine provides adequate legal definition for the majority of corruption offences. Crimes that could be regarded, at least provisionally, as corruption can be divided into two groups :

- Corruption offences proper. These are crimes of abuse of authority or office (section 364) ; taking a bribe (section 368) ; the appropriation, defalcation or taking possession of property in abuse of office (subsections 2–5 of section 191) ; and some other offences.
- Other offences that in some circumstances can be referred to corruption. For instance, when the actions of an individual (meeting the liability criterion under the section 2 of the Law of Ukraine "On the Struggle Against Corruption") constitute an element of a corrupt action (such as crimes provided for in 36 sections of the Criminal Code) together with elements of a specific crime provided for by the respective provisions of the Special Part of the Code.

Taking these considerations into account, a group of judges, experienced criminal investigation officers of law enforcement bodies, scientists and other experts was invited to identify the proportion of crimes committed by public bodies that can be attributed to corruption-related crimes in the respective statistical categories on cleared cases (the categories are those of law enforcement bodies that meet the above-mentioned criteria). Out of almost 28,000 crimes the experts selected 20-30% of crimes committed by public servants in the executive bodies. These include 6,000-9,000 of cleared cases that can be regarded as corruption. However, experts emphasize that only 10-15% of the individuals involved are actually criminally liable.

It is possible to conclude that the total number of corruption offences detected by law-enforcement bodies (including both corruption crimes and corrupt administrative wrongdoings) in the executive bodies makes up 9,000-11,000 cases.

[3] Медведько О. Боротьба з організованою злочинністю та корупцією. Проблеми та законодавче забезпечення.// Вісник прокуратури.-2002.-№ 5 – с. 37.

Prevalence of some types of corrupt behaviour (according to the survey results)

Corruption as a wrongdoing and as a social phenomenon may have different forms. The subdivision of corrupt practices provided for in the law of Ukraine "On the Struggle Against Corruption" cannot be applied here because of the somewhat eclectic nature of the law where certain corruption practices are regarded as elements of criminal offences with no recognition given to their social dimension. Therefore, it is advisable to apply the typological classifications, such as "corrupt lobbying" and "influence peddling", used in international corruption-related legal and political documents.[4]

The research examined the prevalence of some basic forms of corruption.

Bribery

Bribery is the most typical and widespread type of corruption. In the public's opinion, the perception of widespread corruption as a whole arises largely from the practice of bribery. In the course of the research, the views of the general population and of business people were analyzed separately bearing in mind that the latter group communicates with executive bodies more often.

In order to determine the perception of the prevalence of bribery in general, respondents were asked to give their opinion on the following statement : *"It is necessary to give bribes to settle the majority of issues with the executive bodies".*

The results were as follows :

Population	*Business people*
"Completely agree" 52.0% "Agree more than disagree" 23.2% "Disagree more that agree" 5.0% "Completely disagree" 6.3% Other answers 13.6%	"Completely agree" 52.6% "Agree more than disagree" 22.4% "Disagree more that agree" 4.6% "Completely disagree" 1.3% Other answers 13.6%

It is noteworthy that the responses do not vary depending on the region.

Polls among the employees of executive bodies showed that **bribery (and other corrupt actions) is becoming a distinctive feature of internal relations within the public service system**. Almost 30% of respondents indicated that they daily face demands of bribes or other kinds of gifts when solving **professional** problems in other governmental bodies.

[4] United Nations Manual on Anti-Corruption Policy, Vienna, 2001, p. 23.

"Corrupt lobbying"

"Corrupt lobbying" is a part of so-called "large-scale" (that is, not household) corruption and is a social phenomenon that is difficult to detect and to assess. It is most common in relations between public bodies and business people. Opportunities to create desirable conditions for business operations have always been attractive for business people. Lobbying is one of the natural elements of the democratic process. There are numerous lobbying technologies. Recently, a number of successful lobbying campaigns have been conducted in Ukraine to eliminate economically and socially unjustified restrictions in business activity.

However, it is obvious that "corrupt lobbying" – or, to be exact, lobbying technologies that employ the bribing of officials and other corruption tools – has become the most widely used of these business approaches. International anti-corruption treaties emphasize the need "to distinguish between lobbying as a political technology used in a democratic society and "corrupt lobbying" based on deformations of democratic institutions."[5] World Bank analysts use the notion of "state capture" to define this phenomenon and consider it to be even more socially dangerous in some respects than the attempts of bureaucrats to control certain spheres of activity with the help of corruption.[6]

In the course of the survey 25.9% of respondents indicated that "the adoption of regulations in the interests of specific circles is a common practice in Ukraine", and 28.4% noted that these are not isolated cases.

Respondents were asked, "Do you agree with the statement that "corruption is the main underlying factor in all this?"". Answers were distributed in the following way :

- "Fully agree" 43.8%
- "Agree more than disagree" 40.6%
- "Disagree more that agree" 7.8%
- "Fully disagree" 1.6%
- "Hard to answer" 6.3%

Influence peddling

Unlike the case in many other countries, influence peddling – that is, the illegal, essentially corrupt "mediation" of public officials related to third-party affairs with public bodies – is not a separate type of corruption offence under Ukrainian legislation. Nevertheless, Ukrainian law provides for administrative and criminal liability for certain actions constituting elements of this type of conduct. Our research aimed at assessing the prevalence of influence peddling as an integral phenomenon. In the opinion of public servants, the practice is common in executive bodies. Almost one third of respondents (29.0%) state that they are "frequently" or

[5] United Nations Manual on Anti-Corruption Policy.-Vienna.-2001- p. 21.
[6] J. Hellman, G. Jones, and D. Kaufman, *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition Economies* (World Bank Policy Research Working Paper 2444) September 2000.

"constantly" requested to assist in the settlement of the problems of third parties by their colleagues or employees of other public bodies.

The views of business people are rather informative on this point. Only 12.8% of those interviewed do not enjoy the support of "intermediaries" when dealing with problems with supervising bodies. These intermediaries include : "lawyers, attorneys at law" – 17.8% of respondents ; "employees of the public body with which the respondent had problems" – 26.3% ; "acquaintances from law enforcement bodies" – 25.7% ; "employees of other public bodies" – 13.2%. The settlement of disputes with the "assistance" of employees of these bodies or law enforcement bodies is becoming more and more widespread. This method of mediation is built on corrupt relations.

Influence peddling has other forms and becomes not situational but sustainable (so-called "roofing"). **It involves payment of "rent" to a particular official on a regular basis for assistance in the settlement of daily problems with public bodies.** According to the results of the poll, only 11% of the large- and middle-scale business representatives and 37% of small-scale businesspeople do not deal with such persons on a regular basis. Employees of law enforcement bodies and public bodies with broad controlling and regulatory powers, such as taxation bodies and fire inspections, are most commonly involved. Moreover, the participation of members of legislatures of different levels is becoming more and more evident.

Other corrupt practices within executive bodies

In the course of research, we examined the prevalence of other corrupt practices of a more hidden nature, such as favouritism and nepotism. "External assessments" could not be used in these cases. Thus, the basic sources of information were the views of civil servants who were asked to assess the prevalence of some practices among employees of executive bodies. These assessments are of special importance not as an absolute measurement of the frequency of these practices but as a relative indicator of the presence of the problem.

The basic poll results for various practices are given below (% of those who believe these practices are widespread) :

- *employment of relatives or friends in subordinate or related agencies - 44.5%*
- *kickbacks from participants in tenders, competitions and other public procurement procedures - 24.5%*
- *money and gifts to speed up the settlement of problems - 34.9%*
- *informal contacts with representatives of organizations under inspection or that have contractual relations with an official body - 26.2%*
- *kickbacks to direct superiors paid out of informal rewards - 19.2%*
- *entrepreneurial activity through dummies or close relatives - 27%*
- *benefits and privileges not stipulated by the law - 15.6%*
- *gifts from clients for national holidays - 40.8%*
- *informal representation of interests of "third parties" (assistance in the*

settlement of problems, access to service information) - 29.2%

Assessing integrity in the judiciary

The main corrupt practices in the judiciary include :

1) Misuse related to mercenary interests of a judge :

Bribery

Receipt by a judge of money or other economic benefits in exchange for the misuse of his or her powers, such as an illegal judgment, to meet the request of the person giving a bribe ; the creation of procedural constraints in protection of the rights and interests of other persons ; and other actions of the judge beyond his or her authority to protect the interests of the briber with the help of the court.

In fact, bribery encompasses the receipt of some non-economic benefits as the result of abuse of office ("household corruption" – for example, accepting free medical services in a private clinic ; finding a bed in a hospital for free surgery or treating a serious disease for the judge and his or her relatives and friends ; the education of children in desirable schools and successful graduation ; free admission to institutes of higher education and free academic training ; the employment and promotion of relatives ; the acquisition of property titles in elite areas ; accommodation, renovations and repair, etc.)

"Traditional corruption", when, in line with established "traditions" (presumption of mandatory gratitude), a judge receives a bribe for appropriate (under the law) performance of duties (legitimate court decision or verdict for a bribe).

2) Misuse directly unrelated to mercenary interests of judge :

a) Misuse "under the pressure of circumstances"

Breach of the law (such as an illegal decision or verdict, or inadvertent procedural infringements) committed by judge at the request of a person whom the judge depends upon or "feels" to be dependent on (such as MPs, officials of executive bodies, members of court qualification commissions, chief judges, the chief judge of the court of appeal) without reward or in exchange for benefits stipulated for judges by the law (appointment, accommodation, sanatorium treatment).

b) Misuse for private benefit

Misuse of office by a judge to obtain personal, non-property benefits, such as formally confidential information and free-of-charge assistance to relatives and friends.

3) Indirect "compound" forms of corrupt conduct of judges include the following real-life situations :

a) "a judge-dependent" – judge who regularly receives certain funds or other benefits from somebody in case of the need for assistance in the settlement of problems requiring judicial "intervention"

b) "a proxy-judge" – by using flaws in the procedures for judicial appointments, MPs, business people and other persons assist in the appointment to judicial positions of individuals who are dependent on them and who exert their influence to pass "desired" judgments. The professional advancement of these judges is often quite rapid, and they are actively involved in protecting the interests of the persons who ensured their promotion.

c) close connections between judges of different judicial bodies – these are used in order to exert influence to pass "desired" decisions and to relax control over the execution of judgments.

d) agreements between judges and other interested persons on transfers of funds to bank accounts of various non-governmental foundations and NGOs as a means of payment for the judgments passed. The simplest scheme in this case would be the following. An interested person inquires about lawyers or law firms with whom the judge "keeps in touch". The interested party then signs a contract with this entity and formally pays for representation. This payment, however, includes a covert bribe that will be then received by the judge in "black-market" cash. Statistics show that in these cases it is practically impossible to find any evidence of judicial corruption since the evidence is in the hands of the side that wins the case, and this side clearly has no interest in disclosing its "methods".

e) obtaining corporate rights in enterprises. Corporations are used as a channel to pay rewards to judges. Participation in the foundation of offshore companies as a rule lies outside the information available to law enforcement bodies, and these bodies usually do not have any corresponding information and often do not know where to find it.

The Resolution of the Plenary Session of the Supreme Court of Ukraine of 09.06.2000 on a particular case states that part 1 section 5 of the Law of Ukraine "On the Struggle Against Corruption" provides for the liability of persons authorized to perform public functions only for involvement in corporate activities directly, through representatives or figureheads. According to section 1 of the Law "On Entrepreneurial Activity" of 7 February 1991, participation in entrepreneurial activity embraces direct, independent, regular activities undertaken at one's own risk to produce works and to render services to receive profit that are carried out by physical persons and legal entities registered as subjects of entrepreneurial activity in the order stipulated by the law. It is a rather doubtful standpoint since under the corporate law an individual may have corpo-

rate rights although not be directly involved in management. Such is the case with some heads of state agencies, ministers and MPs. Registering a subject of a legal entrepreneurial entity and ownership of corporate rights are not entrepreneurial activities, except for cases stipulated by the law. Therefore, in the opinion of the Supreme Court of Ukraine, participation in the establishment of a company is not corruption.

f) arrangements between a judge and another party on the lawful settlement of the case in favour of the party in exchange for services such as financial assistance in the repair of an office, courtroom, change of office equipment, computers, the purchase of mobile communication equipment and repair of vehicles.

The following are overt displays of corruption :

- a registrar's office refuses to accept applications, complaints and other requests, advising that they must be sent by mail
- the missequencing of correspondence received by mail : the registrar's office first scans the mail and then decides what should be registered and what should not
- the applicant is deprived of the right to deal through a representative by preventing the representative from taking steps stipulated by the law
- the court illegally refuses to accept claims for processing on far-fetched formal grounds (such as "excessive formalities")
- a pre-trial inquiry is conducted in an inadequate manner, and the respondent is summoned without advance notice in order to make the presentation of proofs and any objections impossible
- unjustified breaks in court proceedings and the resulting postponement of the session to another day, or a failure to re-plead that deprives the other side of the opportunity to file a petition or to present proofs, thus making access to justice in general impossible
- the loss by the courts of case evidence or files
- the judge fails to appear in the case assigned
- the demurring of lawful petitions and complaints without court judgments
- unreasonable personal prejudice of the judge
- the issuing of decrees and opinions by illegitimate boards of judges
- the failure to ensure the secrecy of the decision room
- the falsification of judicial reports, decisions, orders, opinions and verdicts by changing their contents outside of the court session
- the absence of signatures of members of the board and the unexecuted judicial reports, decisions, orders, opinions and verdicts that consequently make appeal to higher court impossible
- the refusal to issue properly certified copies of orders and decisions on the ground that they are not in force till approved by the higher court or for other reasons
- the illegal decline of appeal or cassation on formal grounds
- the failure to meet the terms of consideration, unjustified tardiness arising from groundless orders to keep the case unconsidered, transferring the hearing of the case to other dates

The secrecy of corruption in judicial bodies is one of its main characteris-

tics. The clannish nature of judicial corruption is another feature that may explain the lack of criminal corruption cases heard in courts. A situation when a judge hints at a bribe and receives it directly from the interested person almost never happens. According to some experts interviewed for the research, no more than 2-5% of judges take bribes themselves.

In the current climate of declining authority of the rule of law, the main tools of successful lawyers are not professional qualifications but connections with law enforcement bodies and courts. Such is especially the case with lawyers who used to work in the Ministry of Internal Affairs, the National Security Service, the Office of the Prosecutor General and the court system. The ranks of practicing lawyers have grown considerably in the past five years as the result of the admission of former employees of these agencies. Many of these new lawyers have retained close connections with their former colleagues and make use of them. This situation necessarily affects the nature of legal practice in general. Numerous opportunities arise to defend a client chiefly or exclusively through the use of bribes. The increased rate of corruption in the courts and the law enforcement bodies, including tax bodies, has generated a criminal symbiosis between police officer or tax inspector, prosecutor and judge. This symbiosis often appears in the investigation of economic crimes. Such investigations are usually made in the case of business people with above-average incomes. Everyone in this system plays a specific role. The police officer, or the tax inspector with corresponding official powers, institutes a criminal case that is usually groundless. The prosecutor then avoids addressing the resulting appeals with the standard answer that the case will be heard in court or that it does not fall within the authority of the Prosecutor General. The law enforcement officer then, although well aware that the case is groundless, suggests that the accused transfer funds – often a significant amount – to the bank account of a foundation, a firm or a law enforcement body. If the accused does not comply, retaliatory measures such as arrest are taken with the help of the judge, and the amount of money extorted is increased. When the person agrees to pay, the criminal case is closed. Reviews of any formal complaint by the "victim" never as a rule take place. This procedure as a whole improves the official success-rate claimed by the law enforcement bodies, which record the groundless case as a "crime solved".

Frequency of corruption offences in courts

In four years of work, the High Council of Justice, the President of Ukraine and the Parliament have approved the dismissal of more than 500 judges, of which 40 judges were dismissed for breach of oath and 3 for bribery (court verdict).[7] The low rate of corruption cases against judges can be explained by the fact that these crimes are by their nature secret and thus usually undetectable. It is therefore of great importance to obtain additional sources of information. The prevalence of judicial corruption was one of the subjects raised in the interviews with the general

[7] Як посварилися дві правові інституції // Юридичний вісник України. – 2002. - № 15, с. 2.

public and with business people in the course of the survey.

Assessment of the general public

The findings show that 31.7% of interviewees have had contacts with judicial bodies. This rate is much higher than in the previous years : in the similar interviews carried out in 1997, it was only 19.8%. However, ***among those who have had experience in dealing with the courts, only 44% say that there was no direct or indirect extortion of bribes as a condition for the favourable resolution of a case***. This result means that, according to the subjective perception of the situation, the level of corruption among judicial bodies does not differ from the assessment of the similar situation in, for example, the Customs agency, which is generally perceived as "corrupt", where 42% of interviewees had no personal experience, compared to 88% in connection with the Social Security agencies.

Assessment of business people

In our interviews held in spring 2003, the assessment of the court system by business people constituted a separate question because of its very specific nature. According to the results, 38.9% of the interviewees had dealt with judicial bodies. That number slightly exceeds the level for the general public. However, among those who have court experience, ***only 39% stated that there was no direct or indirect extortion of bribes as a condition for the favourable resolution of a case***. Table 3 presents the results and permits judicial corruption to be rated in comparison with other problems in the organization of legal proceedings, which are of special concern for business people.

Table 3. Assessment by business people of some aspects of courts operations (interviews held in 2003)

	Typical	More likely typical than not	More likely untypical than typical	Untypical
Decisions are made according to the law	44.5	25.0	16.7	13.9
Terms of consideration are observed	30.5	25.0	30.6	13.8
Judges are independent	22.8	28.6	22.9	25.7
Judges are unbiased	20.6	34.3	14.3	28.6
Judgments are implemented without problems and delays	16.7	31.4	20.0	31.4
Corruption is absent	14.4	22.8	18.6	45.7

The results show that corrupt conduct prevails, is the optimal way of "settling problems" in the courts, and does not evoke criticism from society.

Corruption in Ukraine resembles an iceberg. Everyone knows or at least suspects its actual extent, but only the tip of the iceberg is visible on the official surface. This view also applies to governmental measures aimed at counteracting corruption. To be more precise, the campaign for integrity is more show than substance.

The public's attitude to corruption is often ambivalent and even contradictory. At least in theory, citizens are genuinely interested in government integrity. However, in practice this interest is mostly prospective and is expressed primarily in expectations rather than in actions.
It is a matter of great concern that society gradually becomes accustomed to corruption, which has now become a regular feature of relations between citizens and public officials or agencies. Year by year, the practical social value of government integrity diminishes both for citizens and for holders of public office.

Both government and society must be cured of corruption. But in these conditions only the government itself – or, more precisely, its healthy, unaffected part – can achieve this result. The root causes of corruption rather than simply its manifestations shall be addressed by identifying the risks of corruption in the executive and neutralizing them.

2 INTEGRITY OF ELECTED OFFICIALS

2.1. Corruption risks in the electoral process

The scope and extent of corruption in a country, together with effective countermeasures, depend on the level of integrity among elected officials and the truly democratic functioning of the political system in general and the electoral process in particular. Elections allow voters to change and renew the government when it loses their confidence and support. But this outcome is possible only when free and fair elections based on democratic principles are conducted properly.

However, the actual practice of conducting elections for almost all legislative bodies clearly shows that democratic standards are often not maintained in the Ukrainian electoral process. The main obstacle to the conduct of free and fair elections is the manipulation of the electoral process by the powers in place. The massive abuse of so-called "administrative resources" during elections benefits the candidates and political forces supported by the ruling party. As a result, elected offices are often held by individuals who have grossly violated election laws during campaigns and won elections only because of massive governmental pressure on the voters and, in some cases, massive falsifications. In other words, there is typically little integrity among those who hold elected offices. Therefore, to ensure free and fair elections, the observation of democratic principles in the electoral process is one of the most important means to prevent corruption.

Corruption risks in the organization and conduct of elections

During elections many opportunities for corruption arise and much corrupt activity takes place. To what extent do flaws in the legislation regulating elections admit the potential for corruption in the Ukrainian electoral process? The conduct of elections is regulated by the Constitution of Ukraine and various Laws of Ukraine : "On the Election of MPs of Ukraine", "On the Presidential Elections of Ukraine", "On the Election of Members of Local Councils and Rural, Town and City Mayors", "On the Elections of MPs of the Autonomous Republic of the Crimea", "On the Central Election Commission" and "On National and Local Referendums".

An assessment of the election legislation and the application of and compliance with democratic standards can be carried out based on the results of the opinion polls conducted by the Fund of Democratic Initiatives[8].

[8] The poll was taken between August 27 and September 11, 2003. In total, 106 persons were interviewed, including 18 Members of Parliament from different factions, 39 leading political analysts and 49 public servants (employees of the Central Election Commission, the Ministry of Justice and the Constitutional

The survey results show that the Law of Ukraine "On the Election of Members of Parliament" is in general viewed positively. Of the experts interviewed, 6% consider that it is in full compliance with European standards, 54% believe that it is mainly in compliance and 25% held that the law conforms with democratic standards only in part. Only 2% of the respondents felt that the law fully contradicts the international standards, while 6% held that it generally contradicts them.

By assessing electoral legislation on a 5-point scale where 1 indicates "totally contradicts international standards", 3 means "complies in 50% of cases" and 5 signifies "is completely in compliance", the following results were obtained :

Law on the Elections of Members of Parliament – 3.61
Law on the Elections of the President of Ukraine – 3.3
Law on Elections to Local Self-Governance Bodies – 3.22[9]

So, in general, all three pieces of legislation received satisfactory assessment. At the same time, a majority of experts emphasized the need to amend election laws. Only 3% of the experts said there is no need for major changes in election legislation, while 22% believe that fundamental changes, that is, reform, are required, and 38% spoke of the need for considerable changes in the legislation. In the experts' opinion, better legislative regulation is required for election-related dispute resolution, and also for appealing election commission decisions (69% of the interviewees), the funding of political campaigns (52%), the formation of election commissions (41%), mass media activities (41%) and defining the powers and responsibilities of governmental and self-governing public bodies[10].

Accordingly, the areas of the highest corruption risks during election campaigns are the following :
- Actions of the official responsible for organizing and conducting elections
- Actions of the courts in election-related dispute resolution and considerations of appeals against decisions of election commissions
- Actions of election commission members
- Relations between candidates and the mass media

The covert or even overt buying of votes is becoming increasingly pervasive, and the problem is compounded by the lack of adequate response from election commissions and law enforcement bodies. This situation

Court, Parliamentary Offices and Commissions, Assistants of Members of Parliament).

[9] See Вибори в Україні: законодавство і практика та їх відповідність європейським стандартам: опитування експертів. – Київ: ПЦ “Фоліант”, 2003. – с. 11–13.

[10] See Вибори в Україні: законодавство і практика та їх відповідність європейським стандартам: опитування експертів. – Київ: ПЦ “Фоліант”, 2003. – с. 13.

has been widely covered and discussed ; however, there have been no cases of punishment for corruption during election campaigns.

Let us identify the most typical corruption-prone situations that emerge during election campaigns.

A substantial corruption risk factor is the provisions for refusing the registration of a candidate.

Under the section 47 of the Law of Ukraine "On the Election of Members of Parliament", the grounds for a refusal to register a candidate are "the absence of or inadequately prepared registration papers" required for registration and "essential inadequacies in the information about the candidate, submitted under this Law identified by the corresponding election commission". In particular, candidates are required to submit the following information in order to register : curriculum vitae, electoral program and declaration of property and income. The absence of precise criteria for "inadequately prepared registration papers" and "essential inadequacies in the information about candidate" allows a broad latitude in the interpretation of these provisions. In practice, this resulted in the refusal of a candidate's registration for reasons such as providing the initials of candidate instead of the first name and surname name and failing to declare income totaling several hryvnas.

As one of the Ukrainian Supreme Court judges said, a trial court could "be ordered" to give a particular decision which, under the legislation in force, is final and is not subject to appeal. The judge believes that in this case one may as well completely discard the institute of elections since courts are given discretionary powers to recognize or not recognize an individual as a member of parliament[11].

Compared with the 1998 election campaign, the number of legal cases on election disputes has skyrocketed. At that time, Ukrainian courts heard 162 cases initiated by participants in the electoral process, including 46 appeals against decisions of the Central Election Commission. In 2002, Ukrainian courts considered more than 1,500 cases, including 160 lawsuits against decisions, actions and omission of actions of the Central Election Commission heard in the Supreme Court[12].

In many cases court decrees as well as election commission decisions had a direct impact on election results in single-member constituencies. In the opinion of some experts, sanctions such as the annulment of registration should be abolished, or at least its application should be considerably li-

[11] Україна за рік до президентських виборів 2004 р.: Аналітична доповідь Українського центру економічних і політичних досліджень ім. О.Разумкова. – Київ, грудень 2003.

[12] Алсуфьев В.В. До питання співвідношення адміністративної та судової юрисдикції щодо виборчих спорів// Вибори і референдуми в Україні: законодавче забезпечення, проблеми реалізації та шляхи вдосконалення. Збірник матеріалів науково-практичної конференції, Київ, 13–15 листопада 2002 року. – Київ: Нора-друк. 2003.

mited and applied only in cases of gross violations and actions with proven effects on election results.

Provisions on election campaign financing create potential corruption risks.

Under section 32 of the Law of Ukraine "On the Elections of Members of Parliament of Ukraine", "expenses on the preparation and conduct of elections of MPs are covered exclusively by the state budget of Ukraine and by the election funds of parties (blocks), candidates of which are registered in the multi-mandate constituencies and candidates registered in the single-member constituencies".

The election funds of parties (election blocks) and candidates are created exclusively by the party (election block), the candidate and voluntary individual contributions. The maximum amount of election funds spent by a party (block) cannot exceed 150,000 untaxed minimal incomes and 10,000 untaxed minimal incomes for a candidate registered in a single-member constituency, which results in 2,550,000 hryvnas for a political party (election block) and 170,000 hryvnas for candidates.

Taking into account that the law prohibits the use of other sources to fund an election campaign, and also the consideration that the specified limits on election funds do not reflect any of the costs of organizing and conducting a campaign in Ukraine, the participants in the electoral process, namely political parties (election blocks) and candidates, are placed in an unrealistic situation in which they have to use funds from other sources to participate in a campaign.

As estimated by the Committee of Voters of Ukraine, and according to informal statements of participants of the elections, a victory in the parliamentary elections in a single-member constituency will require at least 300,000-500,000 USD (1.6-2.7 million hryvnas) and in many cases will even exceed 1 million USD (5.4 million hryvnas). According to the assessment of the Committee of Voters of Ukraine, the minimum election funds needed for a political party or election block to ensure lowest acceptable result, assuming efficient administration of the funds and a successful election campaign, totals at least 8-12 million dollars[13]. This means that the real expenses of an election winner exceeded the funding limits in single-member constituencies by 10-30 times and, for the limits of political parties and blocks, by 17-25 times.

According to the results of public monitoring of campaign funding (organized by the Freedom of Choice Coalition), expenditures on direct political advertising only for two candidates in one multi-mandate national constituency significantly exceeded the limit on all election expenses stipulated by the law. Taking into account the real expenditures on both

[13] Парламентські перегони: низький старт. (Аналітична служба Комітету виборців України, м. Київ, 13 серпня 2001 року) // Політичні фінанси: регулювання і практика. Матеріали міжнародної конференції. – Київ, 29 квітня 2002 року. – с. 138.

direct and indirect advertising, one participant exceeded the official limit by 4.5 times (as estimated, overall advertising costs made up 11.4 million hryvnas) and the other by 2.6 times.[14] It is noteworthy that these amounts include only advertising costs and are exclusive of organizational and administrative expenses.

It is evident that election limits were exceeded by those parties and election blocks that enjoyed the support of the government in power, and that the practice had no consequences for them.

The monitoring revealed other gross violations of election legislation, such as :

- The covering by third parties of the costs of political advertising in support of parties and blocks.
- The placement of direct political advertising of political parties and blocks before and after the news and analysis programs on Ukrainian TV channels, contrary to subsection 6 section 54 of the Law of Ukraine "On the Election of Members of Parliament of Ukraine".[15]

What ways and means are there to improve the situation in the field of election funding? Many experts believe that this could be done through a campaign for proper legislative regulation, in particular by ensuring the efficiency and transparency of control mechanisms. Sources of funding, size of election funds, accountability, control and disclosure of information on the funding of election campaigns, liability for violation of funding rules – these are the priorities of legislative regulation.

A serious problem is presented by the buying of votes by candidates or persons working on their behalf. Vote buying is becoming more and more widespread. During general and supplemental parliamentary elections, voters agree to vote for a specified candidate for a price. Such transactions take place practically at all stages of the electoral process, either overtly by the direct payment of money or covertly through the free distribution of goods and services to voters. Because of flaws in the legislation regulating the grounds and procedures for the annulment of constituency election commission decisions on registration, candidates who buy votes are not prevented from becoming members of parliament.

In particular, according to subsection 9 part 3 of section 49 of the Law "On the Election of Members of Parliament of Ukraine", constituency

[14] Предко І., Каськів В. Звіт за результатами здійснення проекту “Громадський моніторинг фінансування виборчої кампанії - 2002”: підсумки, висновки, коментарі // Політичні фінанси: регулювання і практика. Матеріали міжнародної конференції. – Київ, 29 квітня 2002 року. – с. 145, 146.

[15] Предко І., Каськів В. Звіт за результатами здійснення проекту “Громадський моніторинг фінансування виборчої кампанії - 2002”: підсумки, висновки, коментарі // Політичні фінанси: регулювання і практика. Матеріали міжнародної конференції. – Київ, 29 квітня 2002 року. – с. 149..

election commissions are required to annul decisions on the registration of a candidate in the case of "proven bribery of voters or of members of election commissions by the candidate or at his request or on his behalf by other persons".

However, the law does not define the procedures that courts should follow to establish a finding of bribery. Consequently, during the last parliamentary elections some courts accepted reports of vote buying on behalf of candidates while others refused to recognize similar allegations, since the bribery of voters is a criminal offence and these actions therefore can be proved only by conviction.

Another essential factor for corruption in election funding is the low salaries of members of the constituency and polling station election commissions. Consequently, it is a common practice for commission members and, in particular, heads of local polling station commissions to receive funds from representatives of specific candidates that considerably exceed their salaries. In exchange, the commission member agrees to "assist in every possible way" in the victory of this candidate in the polling district. Such "assistance", as a rule, involves illegal campaigning in support of a particular candidate, declaring ballots cast in favour of other candidates invalid, etc. Therefore, the insufficient public funding of election commissions frequently introduces a serious risk of corruption in an election campaign.

The studies conducted by the Fund of Democratic Initiatives show that, in the opinion of 60% of the experts interviewed, the most efficient means of punishment for abuse of office is imposing criminal liability for disturbing suffrage, switching election papers, miscounting votes and ignoring the privacy of balloting[16].

That being said, to improve election legislation and increase its efficiency it is advisable to limit the scope and impact of corruption risks during elections. On the other hand, democracy and fair elections in Ukraine depend more and more on the strengthening of the multi-party system, the development of civil society and the strengthening of the influence of its institutions on the government.

Funding of political parties

In a democratic system political parties are major participants in elections and the political process in general. Their role and importance in the political system of Ukrainian society will increase. But an obstacle to their development is directly related to the problem of political corruption, namely in the funding of political parties.

Today, the financial operations of political parties are regulated by the

[16] Див. Вибори в Україні: законодавство і практика та їх відповідність європейським стандартам: опитування експертів. – Київ: ПЦ “Фоліант”, 2003. – с. 28.

following laws : "On Political Parties", "On Presidential Elections", "On the Elections of MPs", "On the Elections of MPs of Autonomous Republic Crimea", "On the Elections of Members of Local Councils, Rural, Town and City Mayors" and the Decree of the Central Election Commission No. 37 of January 10, 2001, the "Order of Accounting of Collection and Use of Election Funds of Political Parties, Election Blocks of Political Parties, Candidates to MPs of Ukraine and Reporting". Under the law in force, the following are legal sources of party funds : membership dues, donations of physical persons and legal entities (with restrictions for foreign citizens, enterprises and states, as well as state-owned, municipal enterprises ; anonymous individuals ; etc.) and profits received from the sale of party editions and symbols.

As of 2005, parties and election blocks that gained at least 4% of the votes in the parliamentary elections will receive public subsidies to cover day-to-day operations.

The poverty of the majority of the Ukrainian people makes it practically impossible to accumulate party budgets from party membership dues, causing other sources of income to be found. On the other hand, business groups make attempts to exert influence on legislative and executive bodies and local self-governance bodies. To this end, they look for and create corresponding political tools, in particular, political parties. Since the mid 90s, there has arisen a range of parties that are being developed as business-projects. There are examples of parties being literally purchased from their former leaders and becoming the property of business entities. Virtually all of the more- or less-influential Ukrainian parties that take part in political life and participate in parliamentary and local elections receive various amounts of funds from business structures through different channels. This situation, as a result, generates a direct or indirect dependence of Ukrainian political parties on big business and creates a fertile economic environment for political corruption.

This conclusion is supported by the results of special public opinion polls. In March-April 2003 a group of researchers interviewed leaders of political parties at the central level in the Lviv and Donetsk Regions. In total, 22 leaders of regional party organizations and 12 central level leaders were interviewed. The poll covered political parties (blocks) that participated in the parliamentary elections in 2002 and had either won or lost parliamentary elections. The survey questions concerned the system of funding political parties both during and between elections, focusing in particular on the correlation between official (overt) and shadow (covert) funding.

Four parties refused to provide any information related to party funding. This refusal is open to a wide range of interpretation, including the view that the funding of these structures is largely an informal matter and that parties do not want to open up this subject for discussion. The refusal to discuss these issues in itself provides indirect confirmation of this view.

Almost all parties provided such information, but noted that it was incomplete and that estimates were conditional; these qualifications actu-

ally emphasized the parties' reluctance to discuss the problem openly. Public opinion polls showed membership dues to be insignificant in the funding of parties. While 92% of party leaders of the central level regarded membership dues to be an important factor, only 15% of their counterparts at the regional level agreed. Representatives of only one party clearly declared the regular collection of membership dues to be an important source of party income. Today, the system of collecting membership dues is either non-existent or very specific to the parties under the survey. The rest of the political parties interviewed formally provided for the collection of membership dues in their charters, but in reality did not collect them. In the case of two other selected parties, it is possible to speak more accurately about special donations than about membership dues. These findings permit the conclusion that, with exception of several parties, membership dues are not the main source of funding for political parties in Ukraine.

In a wider context, the polls showed political party funding to be mostly covert and to include :

- payment for political party lobbing (96% at the central level)
- the sale of seats in party lists (84% at the central level)
- profits of corporations or indirectly managed enterprises and share holdings founded by parties (68% at the central level)

The obscurity of the political party funding system subsidized by sponsors' out-of-pocket donations (often using shadow funding) is of special concern. Under section 17 of the Law of Ukraine "On Political Parties", parties are required to publish their annual returns in the mass media. This provision, however, has so far been observed only in appearance.

International practice proves that ensuring the independence of parties from large business corporations is the best way to enhance the transparency of political parties and electoral process funding, and thus to encourage the stability of the party system. In late November 2003, the Parliament of Ukraine passed a law that provides for public funding of political parties. Under this law the annual amount of public funds for authorized party activities is set at the rate of 0.01 minimal salaries (now equivalent to 185 hryvnas) multiplied by the number of citizens who voted for the party in the last general election of MPs. A party can be eligible for public funding for its operations only if it obtained at least 3% of the vote in the last election.

However, parties cannot rely exclusively on public funding. An internal system of funding, comprising membership dues and special fundraising campaigns, will guarantee stable operations. The development and improvement of the funding system is one of the priorities in the organizational development of parties.

At the same time, control over the sources of political party funding, with strict observation of financial disclosure rules, should be reinforced.

The gradual and systematic implementation of the above-mentioned measures will significantly reduce corruption risks in the operations of Ukrainian political parties.

2.2 Corruption risks in elected bodies

Corruption risks and remuneration of elected officials

The remuneration of elected officials is regulated by the Laws of Ukraine "On the Status of Members of Parliament of Ukraine" and "On Public Service", together with the corresponding regulations of the Parliament of Ukraine. The levels of remuneration and social security for members of parliament exceeds the living standards of average Ukrainians. The salary of a member of parliament exceeds the average salary by almost four times.

Members of parliament are entitled to reimbursement for expenses related to their parliamentary activities, costs of leaving for work in the Parliament of Ukraine and returning to their previous workplace, and also financial assistance of several kinds paid from the State Budget of Ukraine. The pensions of members of parliament are also quite high. Under subsection 12, section 20 of the Law of Ukraine "On the Status of Members of Parliament of Ukraine", pensions amount to 80 to 90% of the salary of an acting member of parliament of Ukraine. Members of parliament also enjoy a number of additional social benefits, such as accommodation, free health care and transportation. The high level of remuneration aims at preventing officials from committing corrupt actions.

However, the "worth" and "price" of decisions made by members of parliament is very high. Business structures interested in ensuring the advancement of their interests at the legislative level do influence and will keep influencing the activities of parliamentarians. This relationship objectively results in corruption risks in the operations of parliament. Taking into account that election campaigns are extremely expensive, many members of parliament face the problem of recouping their expenses. The temptation of bribery is strong, and some parliamentarians are not able to resist it. The absence of corruption cases against members of parliament could well be due to the absence of an efficient means to detect corruption within parliament.

The social security of elected officials of local legislatures is much lower than that for members of parliament. However, objectively there are similar corruption risks and "temptations". The point is made by the frequent corruption scandals that arise in a number of regions.

Since the corruption risks in the work of elected officials are of an objective nature, they cannot be neutralized only by increasing salaries and improving the social security of members of legislatures and heads of local self-governance bodies. The immunity of members of parliament impedes the application of legal methods of corruption control. At the same time, waiving this principle in the present-day situation is unjustified, because it is an important guarantor of the independence of mem-

bers of parliament. The problem of political corruption can be solved only step by step, by means of intensifying control over the activities of elected officials and the functions of representative bodies by corresponding public agencies, civil society institutes and, in particular, the mass media, as well as by increasing the accountability of elected officials and the political responsibility of citizens for the choices they make.

Conflict of interest of elected officials

Conflicts of interest mainly arise due to objective conflicts between various interests – those of the branches of power, functionally different public settings, public and local self-governance bodies, the business or private interests of an official – and the public interests that officials swear to serve within their official duties.

In international practice this problem is addressed through the application of the principle of incompatibility of some positions with the parliamentary mandate. Under this principle, a member of parliament cannot hold positions provided for by the law during the term in office. This restriction should enhance the member's independence and impartiality in office.

The Constitution of Ukraine and some other legal acts provide for a definition of the principle of incompatibility. Section 3 of the Law of Ukraine "On the Status of Members of Parliament of Ukraine" prohibits combining parliamentary duties with a number of activities, including :

- Holding the position of a member of the Cabinet of Ministers of Ukraine, or of head of the central executive body.
- Other representative mandates or public service.
- Holding the position of mayor of a village, settlement or city.
- Holding executive positions or membership in the board of directors or executive committee of commercial enterprises, agencies or organizations.

Direct links between members of parliament and business groups present an extremely dangerous potential for corruption. However, in practice these links are widely maintained.

According to the data presented at the meeting of the Coordination Committee of the President of Ukraine on the Control of Organized Crime and Corruption, 364 members of parliament receive funds from business structures, and only 84 members are not involved in business activities. Members of parliament hold executive positions in 202 corporations, some of them in several companies; they are also founders of 473 companies, and they receive revenues from 600 companies[17]. Formally, conflicts of interests are avoided, but members of parliament who are linked with business groups maintain their ties as "distinguished" executives and continue their entrepreneurial activity.

[17] Войтков В. Кто-кто в этой власти живет? // Власть и политика, 27 декабря 2002 г. – с. 4.

Conflicts of interests related to combination of member's office with senior positions in the central executive bodies. These conflicts are often resolved in courts on the recommendation of the Head of the Parliament of Ukraine.

Conflicts of political interest may objectively arise in parliamentary operations. Obviously, parliament consists of different political forces guided by different ideological doctrines and representing different social interests.

At first sight, political conflicts do not create corruption risks. The instability of the political system, low political standards, the absence of political accountability and the merging of political and business interests result in a situation where purely political conflicts are solved through direct payoffs to members of parliament or through other actions that can be described as political corruption (such as benefits and advantages for businesses of members of parliament or vice versa, applying business pressure to join the opposition party or to vote in favour of a particular decision, and meeting the member's personnel requests). According to some assessments (January-February 2000), the going rate for a member's transfer to another parliamentary faction in the course of forming the first parliamentary majority was 30,000-50,000 USD[18]. In the course of forming the second parliamentary majority (June-September 2002) membership in the parliamentary majority was ensured through a variety of means, ranging from pressure on the part of law enforcement and controlling bodies on the business structures of members of parliament to direct payoffs[19].

The actual resolution of the conflicts of interests of elected officials (both legal and political) is the priority in the anti-corruption campaign. Strategically, it is a result of the delimitation of the party in power and business, and thus it requires the political will of the government (namely, no longer tolerating a combination of a member's mandate with business activities) together with changes in the patterns of conduct of business people in political matters (namely, agreeing not to combine business and political activities).

Corruption risks in the consideration and decision-making process of elected officials

Corruption risks in elected bodies may arise at all stages of the decision-making process. They apply mainly to the legislative process. Lobbying in support of personal interests, and business interests in particular, starts at the drafting stage. Some two-thirds of bills are introduced by private

[18] See: Жаловага Л., Скрябін Д. Олександр Єльяшкевич: "Якщо в парламенті збережеться демократія.,то це буде прикладом для всього суспільства" // День, 10 лютого 2000 р. – с. 4.

[19] Шовкун Л. Почім продаються депутати? // Україна молода, 9 жовтня 2002 р. – с.1,3.

members[20], of whom the majority – as noted above – have private business interests. Bills dealing with economic and industrial development predominate in the field of regulation. In the opinion of experts, a whole range of bills introduced and passed by the parliament are overtly the result of lobbying.

The prevalence of laws to amend previously adopted laws over the number of laws passed for the first time clearly reveals lobbying trends in the legislative activities of the Ukrainian parliament. According to V. Pogorilko, Deputy Director of the V. Koretsky Institute of the State and the Law, two-thirds of the laws passed in Ukraine amend previously adopted acts[21].

Members of parliament with no legal background usually do not draft bills personally. As a rule, experts are invited to draft bills. Their services are quite expensive, and as estimated, the cost of a draft bill ranges from 500 to 10,000 USD depending on its complexity [22]. These expenditures can be covered only by private business funds or with the help of interested business structures.

All drafts are subject to preliminary examination. However, the examination is not always done properly. To obtain support for a bill, public officials sometimes exert political or administrative pressure on the relevant offices of Parliament. Other corruption risks may arise as well. An efficient, professional review of draft bills requires the involvement of non-governmental experts and experts from non-governmental organizations to ensure independent expertise.

Corruption risks may arise in the process of the examination of the draft by specialized committees. The terms and especially the conclusions of the committee depend to a large extent on the head of the committee.

However, there are examples where the opinions of specialized committees are neglected. For example, contrary to the Rules of the Parliament, the Presidium of the Parliament can introduce a draft bill into parliament and put it to a vote without prior consideration by the committees or receiving the report of the committee chair.

The vote during parliamentary plenary session plays an important role in the fate of the bill. The major risks arise exactly at this stage. Between February 2000 and November 2003, parliamentarians voted only one day a week during parliamentary sessions. This arrangement fostered "promotion" in the Parliament of overtly lobbyist bills by interested members or factions and groups. During this "voting marathon" it is often difficult for members to recall the essence of bills that were debated several days ago. In this case, there is a substantial increase in the role of

[20] Така ситуація, до речі, суперечить практиці країн, в яких існує усталений зв'язок між Парламентом і Урядом, де переважна більшість законопроектів вноситься саме Урядом.
[21] See: Создавать законы нужно умеючи // Юридическая практика, 24 декабря 2002 г. – с. 4.
[22] Національна безпека і оборона, 2003, № 2, – с.20.

ago. In this case, there is a substantial increase in the role of the faction or the parliamentary group leaders who guide the voting process.

The above-mentioned corruption risks could be substantially reduced by the introduction of procedural rules in the Law of Ukraine "On the Rules of the Parliament of Ukraine". A number of draft bills on this issue have been introduced in the parliament, but their passage was impeded by the tension between the parliamentary majority and the opposition and by the ongoing political crisis in the work of the parliament.

Lobbying in elected bodies

As stated above, corruption risks in the operations of elected bodies are related, directly or indirectly, to the lobbying of elected officials or other individuals. In a wide sense, lobbying means exerting influence on legislative or executive bodies in order to adopt a decision in the interests of particular groups.

Lobbying is often negatively assessed and is equated to corruption. However, the main function of elected officials in general is to represent voters' interests (including social, political and regional groups) in compliance with the public interest. Therefore, the promotion of a particular group's interests is not a negative practice. On the contrary, it conforms with the essence of the democratic political system, subject to transparency and conformity with the law.

Certain traditions in lobbying on behalf of social-economic and political interests have already developed in contemporary Ukraine. However, normatively this activity is unregulated, which results in corruption. Legitimate mechanisms of mediation between the public and the public bodies are unavailable. The subject of lobbying in the legal sense is not defined. However, in reality this practice exists and requires the development of corresponding legal mechanisms. Drafting and approval of the Law of Ukraine "On Lobbying in Ukraine" could present a specific effort in this direction.

2.3 Corruption risks in the legislation

Institutional (objective) corruption affects the condition and the quality of legislation. Even the public views legislation as a potential cause of corrupt conduct. According to the poll results, 35.5% of the business people interviewed and 25.8% of citizens pointed to this factor as an important prerequisite of corruption.

In contemporary corruption theory models, including those used in the recent studies conducted by the World Bank and EBRD in countries with transitional economies, the condition of legislation is regarded as an important factor for corruption.[23] We would agree, however, with the con-

[23] J. Hellman, G. Jones, and D. Kaufman, *Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition Economies* (World Bank Pol-

clusions of a comparative study conducted in 2003 of the anti-corruption policies of countries applying for European Union Membership, which found that "corruption risks aspects of legislative process have not been properly addressed both in analytical studies and in political legal documents."[24] This problem is mostly viewed in the context of a general practice called state capture, which encompasses various means of the influence of political and economic circles on the development of regulations. The practice sometimes includes "administrative corruption", in which the condition of the legislation and, in particular, its flaws and gaps are regarded as conditions that can be used for corrupt actions.

In Ukraine the problem of corruption risks in the legislation has never been addressed either in theory or in political legal documents outlining the principles of state anti-corruption strategy. The Concept of The Struggle Against Corruption for 1998-2005 (approved by the Decree of the President of Ukraine No. 367/93 of 24 April 1998) recognizes that "efforts are focused mainly on responding to corruption cases instead of the elimination of underlying reasons and causes." At the same time, the Concept does not clearly define the connection between legislative regulation and corruption, confining itself to general conclusions as to the presence of "flaws in the legislation" and "flaws and obscurity of laws". These flaws are regarded only narrowly with respect to anti-corruption legislation and the regulation of the operations of bodies involved in the anti-corruption campaign.

In view of these considerations, three main areas (patterns) of legislatively generated corruption risks in the functioning of public bodies can be identified.

There are three basic models of influence of legislation on the generation of corruption risks in the activities of public bodies :

1. Creation of excessive burdens for state-services clients.
2. Granting to persons authorized to perform public functions unjustified discretionary powers in applying rules of law.
3. Unjustified granting to public bodies of powers related to the creation of new rules of law or the interpretation of existing rules that establish standards of their application.

It is noteworthy that none of the preceding phenomena are corrupt practices in essence or generate corruption themselves. Corruption as a social

icy Research Working Paper 2444) September 2000 ; J. Hellman, G. Jones, D. Kaufman, and M. Schankerman *Measuring Governance, Corruption, and State Capture: How Firms and Bureaucrats Shape the Business Environment in Transition Economies* (World Bank Policy Research Working Paper 2312) April 2000 ;
R.Klitgaard, R.Maclean-Abaroa, H.Lindsey Parris "Corrupt Cities. A Practical Guide to Cure and Prevention", Institute for Contemporary Studies Oakland, California 2000.

[24] Monitoring of the EU Accession Process. Corruption and Anti-Corruption Policy.-OSI, 2002- P 46.

phenomenon and as a type of offence emerges in a certain context as the result of the functioning of a system of objective and subjective factors, including the quality of the legislation. But the attributes of the quality of legislative regulation stated above may affect corruption in two ways :

1. They provoke corrupt actions by persons authorized to perform public functions, or they facilitate implementation of mercenary interests contrary to the public interest through the abuse of authority or office.
2. They force clients of state services to choose corrupt conduct as the most rational and effective means to meet situational interests.

The main causes of corruption risks presented by Ukrainian legislation can be conditionally subdivided into four groups :

1. Flaws in the development of general governmental policy in defining the scope and means of legal regulation.
2. Flaws in available rule-making procedures.
3. Insufficient legal qualifications of individuals involved in the legislative process.
4. Absence of efficient public scrutiny of the rule-making activities of public bodies.

Great emphasis has been recently placed in Ukraine on the problem of improving the quality of regulations. The Ministry of Justice of Ukraine plays an important role in the enhancement of the quality of legislation. Under the Regulations on the Ministry of Justice of Ukraine approved by the Decree of the President of Ukraine of December 30 1997, the Ministry *drafts, under consultation with responsible ministries, other central executive bodies, and academic institutions* draft-concepts of legislative development and scientific statements, taking into account international practice *; provides legal expertise (opinions) on compliance with the Constitution of Ukraine, Ukrainian laws, major regulations of the European Union, legislative drafting technique requirements, and other legislative acts, introduced in the Parliament of Ukraine, tabled for consideration by the President of Ukraine and the Cabinet of Ministers of Ukraine.* Under the Presidential Decree "On the Improvement of the Drafting of Bills and the Implementation of Legal Reform," of April 29, 1994, the Centre for Legal Reform and Legislative Drafting has been set up at the Ministry of Justice. The main objectives of the Centre include "*coordination of the activities of the central governmental bodies, academic institutions and higher educational settings in legislative drafting"* and "*the development of concepts and drafts in major areas of social and public development and their scientific substantiation".* However, implementation of these objectives has not produced any major changes in the legislative field.

An analysis of current legislation and other regulations demonstrates that low legal qualifications of participants in the legislative process result in the poor quality of laws and regulations, the use of awkward and inaccurate language patterns and uncoordinated conceptual category schemes.

These results consequently lead to the generation of numerous corruption risks in the current legislation.

No studies on rule making have ever been conducted to consolidate cumulative experience ; identify typical mistakes ; develop general principles, requirements, rules and procedures ; or to establish the most acceptable rules of legislative activity in Ukraine. As a result, a system of vocational training in the field of legislative drafting is absent in Ukraine. Accordingly, laws very often (and, in some agencies, almost always) are drafted amateurishly, by guesswork and without adequate substantiation.

A low level of public scrutiny of the legislative process is one of the main reasons for the presence of high corruption risks in the system of legislative acts and regulations. This occurs not because of counteractivity on the part of respective public bodies but as a result of the absence of a real public interest in influencing the process. This is a result of the immaturity of civil society in Ukraine and a lack of political involvement by the majority of citizens and civil organizations. Some organizations of business people are the only exception, since the business interests of specific financial industrial groups depend on the content and trends in the regulation of economic processes in the country. These organizations set up various groups to lobby on behalf of their interests and to ensure public scrutiny of the drafts of respective regulations.

As a result, the rule-making activities of governmental bodies today still remain insufficiently transparent. The general public is rarely involved in the discussion of bills, drafts or other regulations.

Types of corruption risks in the legislation

Instable legislation. One of the main problems of Ukrainian legislation is the fact that a majority of the laws passed in parliament are laws to amend the laws in force. This is true of 40% of the total number of laws passed after Ukraine gained independence.

Some laws have been amended over 70 times. The Law of Ukraine "On Business Profit Tax" has been changed 73 times, the VAT law 87 times and the Code of Administrative Offences of Ukraine dozens of times.

Instability of the legislation often results in numerous corruption risks in its application. For example, "backdated" amendments to tax laws permit some officials – contrary to the requirements of the Constitution of Ukraine – to "miss" late submissions of various reports and recalculations to tax bodies while, at the same time, permitting these officials to be excessively exacting if necessary.

This flaw in Ukrainian legislation is so widespread that the attitude of business people to it agrees with that of public servants. The poll results show that 42.8% of business people and 43.5% of public servants consider such flaws to be typical of our legislation.

Flaws in the legal regulation. The presence of flaws in the legislation is

one of the major risks in general, because it permits decision makers to be driven not by legal rules but by other, often illegal motives in the process of using the laws to apply their own subsidiary laws. Thus, there is actually a "replacement" of the law by the individual decisions of particular officials for personal mercenary ends.

60.75% of public servants and 55.3% of business people consider that current legislation suffers from serious flaws.

Inconsistent legal regulations (that is, internal conflicts between rules of the same statute and contradictions between the rules of different statutes). Internal disagreements and discrepancies are characteristic in virtually all areas of modern Ukrainian laws. They are the product of non-observance of procedures in approving regulations, interference in the jurisdiction of other legislators and neglect of legislative drafting techniques. As a direct result, corruption risks in the laws are increasing, as agents of the state subject to concrete circumstances (and often driven by personal mercenary interests) can apply different rules of the same legal act to identical situations.

The same situation takes place in cases when laws of different effect, for example, a law and a decree of the President of Ukraine, conflict with each other. Such conflicts create preconditions for "manipulations" of the laws on the part of officials in each case. Thus, a dishonest official is always able to defend a decision by referring to a particular law that supports the case.

Legislation on enterprise activity provides many similar examples (when the presence of a significant number of acts does not mean absence of flaws in them).

It should be noted that the law does not clearly stipulate the rules of conflict resolution for legal matters. That having been said, and taking into account the complexity of legal conflicts, public officials can make discretionary decisions that best suit their own interests in particular situations.

Inconsistency between legal regulations and actual conditions. Ukrainian practice provides many examples where the law "lags behind" the development of society and where some areas that have long required legal regulation lie outside the authority of the law. Such is particularly the case in the regulation of business activity.

The contradiction between objectives of the state that are regulated by law ("conflict of objectives") is even more striking. For example, taxation law is often driven by the pragmatic task of collecting public revenues rather than by the idea of encouraging business activity. As a result, the tax laws harm not only business people but also the economy in general, the public and the state. Sometimes legal regulation is unconnected with economic needs. For example, current corporate profit taxation procedures require that funds obtained from stakeholders for joint investments be considered as gross revenues of investment funds and corporations.

The definition of "direct investment" does not correspond to economic reality.

General, abstract (declarative) nature of laws. Excessive generalization and pretentiousness in the rules of law, especially laws, is a significant cause of corruption risks. It is especially deleterious to laws. The main characteristic of many domestic laws is that they have no regulating power : they do not establish any rights and duties but define only the general principles of legal regulation, and thus have no direct effect. It results in the ramifications of subordinate rule making.

Regulation of this kind and the excessive use in regulatory texts of such phrases as "in case of need", "to take all possible measures", "comprehensively assist" and "to make efforts" are potential risk factors for corruption. An indication in the law that compulsory measures are applied "in case of need" enables civil servants to act at their own discretion to justify their actions on the grounds of necessity.

Adoption of laws in corporate interests. Adoption of laws not in the public interest but in the interests of specific business groups or often specific individuals is widespread. This practice is used excessively in the areas of taxation, customs fees, export-import preferences or restrictions, the privatization of public property and the granting of powers of administration for public property.

An analysis of poll results shows that a considerable number of business people (44.1%) agree with the statement that a great deal of Ukrainian laws and regulations were passed in the interests of specific business people and business groups. It is worth noting in this respect that 84.4% of this group regard the adoption of laws in the interests of private corporations as corruption.

Issuing regulations in cases requiring exclusive legislative regulation. One of the main sources of corruption risks in Ukrainian legislation is the artificially diminished role of laws caused by various traditional and emerging factors.

In turn, flaws in the legislative regulation set the background for subordinate rule making and justify it. As a rule, subordinate rule making is characterized by low legal standards. Excessive departmental rule making frequently specifies and replaces legislative regulation, and is accompanied by the application of unforeseen types of legal regulation in the form of "explanations" and "letters".

Typical corruption risks in the field of departmental rule making

Frequent changes in regulations (some instructions issued by the State Tax Administration have been changed about 100 times). Subordinate rule making within departments has exponentially expanded since Ukraine gained independence. As a result, for example, the Cabinet of Ministers, ministries and other executive bodies have adopted 1,300 regulations (including 1,000 instructions) to introduce instructions or

amend them. The accumulation and complication of reporting forms and unjustified changes of procedural rules (filing of documents, change of bank accounts) together with departmental regulations to introduce changes to various reporting forms have amounted to about 500 since 1992 (including the reporting forms introduced by more than 260 statutory acts).

Discretionary interpretation of the same rules. Flaws in legislative drafting techniques and the sometimes intentionally ambiguous wording of legal rules result in the potential for diverse interpretations of the same rules. This, in turn, creates serious corruption risks.

Excessive complexity of legal acts ("over-regulation", "formalities"). The excessive complexity of procedures is one means to increase the dependence of individuals on decision-making bodies.

Excessive complexity of laws and regulations results in the complication of decision-making procedures in governmental bodies. The point has been clearly illustrated by the results of the polls. The majority of the business people interviewed, namely 52%, gave a negative answer and only 15.8% disagreed with them. The point is also proved by the statements as to the ways to improve the efficiency of governmental bodies. The suggestion to "simplify decision-making procedures" is one of the most important. It was supported by 62.2% of public servants and opposed by only 6.9% of the respondents, almost ten times less.

Flaws in legislative drafting techniques. The absence of uniform approaches, standard requirements, fundamental criteria and basic principles of the drafting of laws and regulations results in widely varying readings, interpretations and, correspondingly, application. Despite notable efforts to solve these problems, the main flaws in legislative drafting remain as follows :

- absence of uniform legal language (first of all, the definition of the same ideas with different concepts)
- absence of firm rules and methods of the wording of laws and regulations
- excessive complexity and obscurantism of legal phrases (some provisions are unclear to experts even after thorough analysis)
- excessive use of reference rules in many laws and regulations
- unjustified complexity of contents of some laws due to excessive number of special terms and definitions
- absence in many laws and regulations of any precise wording of the rule of conduct that a law or regulation aims at

Discretionary powers of governmental bodies and official authorities stipulated by the law to impose administrative sanctions and penalties in a discretionary manner (presence of alternative sanctions). The discretionary powers given to governmental bodies and local self-governance bodies quite often create substantial corruption risks. The scope of the discretionary powers of executive bodies is gradually expanding, and their everyday use raises the problem of creating an efficient system of control over official bodies. Governmental bodies have discretionary

powers in the area of issuing permits and licenses, service promotions, examination of administrative and disciplinary offences, and many other cases in which public officials have discretionary power in administrative decisions.

A legislatively defined option to impose different penalties for the same offence and the power of officials or public bodies authorized to impose administrative penalties to use both legislative and other, non-legal considerations are other serious corruption risks of legislation that provides for penalties for offences by individuals.

Of course, if an official who considers an administrative case has private interests, he or she can easily substantiate a whole range of circumstances mitigating the liability of a particular individual in a particular situation.

Another serious corruption risk is the use in nearly all the sections of the CPC of alternative sanctions and sanctions that provide for penalties within certain legislatively established terms. Therefore, the option to select the type of sanction and the degree of a penalty provided for in the law opens up the possibility of creating corruption-generating situations. Current Ukrainian legislation on administrative offences provides ample examples of such options. Moreover, the budgetary legislation of Ukraine fosters the expansion of excessive "administrative endeavours" of many officials who are authorized to make reports and consider administrative cases.

3 INTEGRITY IN THE EXECUTIVE

3.1 Corruption risks in the public service

Improvement of public service operations is critical to resolve the problem of integrity in the government. Since the mid 1990s, controversial tendencies have appeared in the development of the public service and in the attitude of the public towards the issue. These trends give reason to believe that the corruption risks in the public service have been increasing.

1. There was a dramatic and extensive rise in the number of public employees, despite political declarations to reduce and optimize government operations.

The Concept of The Struggle Against Corruption for 1998-2005 approved by the Decree of the President of Ukraine of April 24, 1998, No. 367/98, recommended a reduction in the number of public employees. Two years later, the Cabinet of Ministers of Ukraine (Resolution No. 403 of February 26, 2000) approved the maximum number of employees (169,151) in the ministries and in other central bodies of the executive power and the subordinate territorial units. However, as of December 1, 2003, the Cabinet of Ministers of Ukraine had introduced over 70 changes to the maximum number of employees in the central executive bodies and to the budgetary allocations for their maintenance. As a result, the number of employees in the ministries and departments has increased by almost 37%.

2. Society showed an increasing disappointment in the integrity and honesty of public servants, and the public service began to be associated more and more with corruption and abuses of office.

3. The attractiveness of employment within the public service has been growing steadily, and this phenomenon cannot be explained either by the remuneration offered or by a positive regard among the public for the public service. Many successful entrepreneurs and politicians have joined the public service (in various positions, not just senior positions).

Some of the aspects of the public service organization have been analyzed in this context.

Employment and service promotions

Pursuant to part 2, section 38 of the Constitution of Ukraine, the public service is an important institute that ensures direct access of the citizens to the government. Despite a ramified system of laws and regulations on the organization of the public service (about 700 laws and regulations, including 38 laws, over 200 decrees and orders of the President and over

450 regulations of the Cabinet and the State Public Service), the implementation of many provisions of the laws in force is rather difficult due to several reasons : the absence of an effective system of economic and legal guarantees for the professional activities of public servants ; the imperfection and incompleteness of mechanisms of liability for the negligent performance of professional duties ; the abuse or over-extension of power ; and the breach of restrictions related to public service. These and other factors affect the performance of public servants within the scope of their duties and therefore complicate the process of recruitment of public servants based on their personal and professional qualities. The fact that these issues remain unsettled often results in the corruption of public servants.

Employment in executive bodies *(based on the poll results)*

The results of polls conducted among public servants on sources of information about vacancies in official positions are as follows : only 12.6% of the respondents learned about a vacancy from advertisements in the mass media ; 33.8% received job offers from the senior management of the public body ; 32.4% were informed by relatives, friends or acquaintances ; and 13.4% learned about them by accident. These findings show that the efficiency of the mass media advertising is very low. Therefore, and taking into account the significant number of those who learned about a position by accident, it could be said that the level of professional human resources services in governmental agencies is low. Further, bearing in mind the relatively high number of those who were assisted by senior management, friends and relatives, one could conclude that many governmental agencies are building their own "in-house teams" and are reluctant to hire "strangers". These factors, accordingly, result in the strengthening of interpersonal ties at the expense of creating corruption-prone situations.

These conclusions are also supported by the fact that almost one third of respondents (31.7%) mentioned that senior management had played a key role in their employment in the respective governmental agency, while 15.2% used recommendations of "influential people". Actually, at the moment of employment in the public service, a public employee becomes a "debtor". The "creditor" in turn now has an opportunity to request a favour. This relationship creates a real basis for potentially corrupt ties between the employee and the person who hired or promoted him or her. So-called "intermediaries" very often render services in the field of government employment only with one purpose : to have individuals who will overtly or secretly lobby on behalf of their interests and those of their financial, political or other partners in the public bodies.

About 48% of interviewees agreed that appointments to prestigious and advantageous position in the public executive bodies require recommendations and influential relatives and friends. 30.1% of respondents noted that beneficial and promising appointments are accompanied by gifts and rendering of services. Pressure "from the top" was recognized by 41.3% of those interviewed as a determining factor in such appointments.

A situation is gradually developing in contemporary society in which appointments and promotions in the public service depend not on the quality of the performance of official duties but on the place of an individual within the official system and the presence of stable personal connections. An individual understands that service promotions are possible only if he or she becomes one of the system elements and agrees to comply with the "rules of the game". The newly hired civil servant slowly starts to realize that recommendations, influential relatives and friends, and pressure "from the top" are inherent, integral features of the public service system.

The Decree of the President of Ukraine "On Additional Measures to Implement Administrative Reform in Ukraine" No. 345/2001 (May 29, 2001) states that the positions of the Prime Minister of Ukraine, the First Deputy Prime Minister, Deputy Prime Ministers and Ministers are political by the nature of their powers, as well as by the procedures for appointment and dismissal, and are not regarded as categories of civil service positions stipulated by the Law "On Public Service". This pronouncement, however, is a clear breach of the requirements of current Ukrainian legislation. In particular, pursuant to subsection 12 part 1 section 92 and part 2 of section 120 of the Constitution of Ukraine, the organization, powers and operations of the government, other central and local executive bodies are determined by the Constitution and the laws of Ukraine. The specified provision is reflected as well in the section 9 of the Law "On Public Service", pursuant to which the legal status of the above-mentioned categories of employees is defined by the Constitution and special laws of Ukraine. The classification of positions of members of government as political positions creates a basis on which to exclude these employees from the subjects (offenders) of corruption and other corruption-related offences.

To ensure the functioning and organizational support of operations, and pursuant to section 15 of the Law of Ukraine "On Public Service", members of the Cabinet of Ministers of Ukraine and heads of local state administrations have the right to select individuals to fill positions of patronage (support) service independently. The patronage service may include positions of assistants, advisers, press directors or other positions, which are stipulated in the list of staff members. Employees of patronage service report directly to the members of the government and heads of local state administrations where the patronage service was formed.

Appointments in the patronage service are made without competitions, i.e. a government official can appoint anyone as an employee of the patronage service. This arrangement creates real grounds for corrupt actions by the persons mentioned above. It is advisable that more precise qualifications and other requirements for candidates for corresponding positions be established in the current legislation of Ukraine and that the procedures of selection of persons who have authority to influence the formation of state or regional policy be regulated more clearly.

An administrative position is a primary structural unit of a public body in which a civil servant is to perform organizational and administrative

functions stipulated by the laws and regulations.

Ukrainian citizens are entitled to employment in the public servant provided they have the appropriate education and professional training and were selected properly through a competition or some other procedure set forth by the Cabinet of Ministers of Ukraine (section 4, Law of Ukraine "On Public Service"). The Concept of The Struggle Against Corruption for 1998–2005 recognizes the special role of competitions in the control of corruption. It states that non-compliance with the terms or a formalistic approach to competitions creates conditions for corruption. Under the section 15 of the Law "On Public Service" appointments to positions of the 3–7 categories of public servants are made through competitions unless otherwise stipulated by the law of Ukraine. A competition to fill vacant positions in the public service is conducted according to the "Regulation on the Order of Conduct of Competition to Fill Vacant Positions of Civil Servants" introduced by Resolution No. 169 of the Cabinet of Ministers of February 15, 2002.

The stipulated competition procedure and the creation of a competition commission face obstacles arising from the process of disbanding and forming new agencies. This process is legislatively unregulated. So, in practice there are situations where, in the process of recruiting new employees on a competitive basis, there is no one to form the competition commission. For example, an appointed minister shall staff a ministry by selecting specialists on a competitive basis. But where will he find commission members if there are none in the ministry? Under the law a commission should be chaired by the deputy minister, but this official has not been appointed yet. To ensure independent decisions of the commission and to eliminate non-professional considerations in the selection of personnel, independent competition commissions shall be created.

Procedures of the competition have no precise mechanism of implementation. Recruitment to the public service must be absolutely transparent to the general public. As a rule, information presented in different periodicals and through the mass media does not reach a significant number of interested persons. This matter requires more precise legal regulation in order to provide information on vacant positions and the terms of competition among all interested parties in a systematized and accessible manner. Decisions on civil servant appointments and promotions are made by the head of the public body on the basis of proposals of the competition commission within one month from the date of the commission's decision. Therefore a rule that would make the decisions of competition commissions binding for the official body and its head shall be introduced. It would provide a legal ground on which to sign a contract or refuse employment in the public service. The issues related to employment competitions are to be governed by the Law of Ukraine "On Public Service" rather than by Resolutions of the Cabinet of Ministers.

About 75% of public servants are employed through a competitive process, approximately 5% through internal rotations and promotions, and over 20% are employed for a trial period. However, in senior positions there is a decrease in employment through competitions. Thus, currently

45% of appointments in the administration of the Cabinet of Ministers are made without competitions or qualifying examinations. Attempts to establish a competitive system for employment and promotion on the basis of the present version of the Law of Ukraine "On Public Service" have not produced the desired results. Pursuant to the existing version of the law, the organization of competitions and the work of competition commissions lie within the powers of the Cabinet, whereas the main parameters of competitive procedures that would form the basis for creating a separate legislative institute of competitive selection in the public service should, in our opinion, be incorporated in the law to ensure transparency and impartiality.

Heads of governmental agencies have enough powers to transform the competition process into a screen for democracy under the cover of which candidates to vacant positions are selected in advance and others are rejected for different reasons. The procedure of the competitive selection of candidates for the public service should exclude unprofessional motives for hiring and prevent corruption related to employment. These goals could be attained, to a certain extent, as international practice proves, by special rules for the formation of competition commissions when, because of their membership, they become more or less free of influence from senior management, personal connections and external patronage.

Remuneration

Pursuant to part 1 of section 33 of the Law of Ukraine "On Public Service", "remuneration of public servants shall ensure sufficient compensation for the independent performance of official duties, recruitment of competent and skilled staff by public bodies and motivation for diligent and eager work."

Salaries of these employees are the main and, for the majority of them, the single source of income. In the years of transformations in the economy, the level of the actual earnings of employees has decreased three times. The share of accrued salary in the consolidated fiscal income of the general population has decreased twice. The ratio of the average salary of the 10% most poorly paid and the 10% best-paid employees in 2002 (according to several sources) ranged from 1:10 to 1:25. Very often, applicants realize even prior to employment that it would be impossible to make a living with their public service salaries only, and they assume that possible corrupt actions will improve their financial standing. Bearing in mind the extremely low wages of civil servants, corruption has become, in fact, the single means of survival for themselves and their family members.

However, as the majority of experts say, raises in the salaries of civil servants – even significant ones – would hardly lead to an automatic decrease in corruption. In fact, many officials cannot conceive of performing their functions without corruption. Thus, there is an inevitable problem of the massive dismissal of those civil servants who are not able to resist corruption.

Staff Rotations

The introduction of periodic rotations of officials as one means to prevent corruption among civil servants, in particular those holding positions with a high risk of corruption, was stipulated in the "Concept of the Struggle Against Corruption" for 1998–2005, approved by the Decree of the President of Ukraine of April 24, 1998, No. 367.

Periodic staff rotations will assist in the prevention of corruption among civil servants. The long-term employment of civil servants in the same position in the same body within a particular area stimulates close connections with other public bodies and commercial structures that create grounds for corruption. Information about corruptible officials travels fast, and corruption and bribes soon become a common practice in their work.

Procedures for periodic staff rotations for certain positions of civil servants with high corruption risks and an exact list of positions to which rotation should be applied are to be provided for by the corresponding document related to public service issues. The possibility of rotation for certain positions should also be provided for in special legislation (e.g. the Law of Ukraine "On the Office of the Prosecutor General" or "On the Customs Code of Ukraine").

The polls conducted among civil servants as to the subjects of rotations give the following results : rotations shall apply to all positions – 30.0% of respondents ; they shall apply only to senior positions in enterprises, settings and organizations and their structural subunits – 34.3% ; they shall apply to the categories clearly determined by the legislation – 9.3% ; there is no need at all for rotations – 26.4%.

Certification

The absence of appropriate regulation of an organizational element for public service employment such as certification as a consequence of the ambiguous assessment of the role of certification by different categories of public bodies after the so-called "certification campaign" is a serious shortcoming of the current Law of Ukraine "On Public Service".

Polls of civil servants showed their attitude to the practice of certification. The following are the answers to the question : "Do you agree with the following assessments of certification?" :

"Certification is an unnecessary formality" – 35.2%
"Certification allows management to get rid of unwanted employees regardless of their professional skills" – 22.1%
"Certification spoils team relationships" – 2.8%
"Possibility of negative assessments prevents employees from infringements" – 37.9%
"Certification is biased" – 5.5%

Because of the absence of legislative regulation, the problems of conducting certifications are solved at the level of regulations.

Certification successfully meets its objectives only when it is unbiased. The subjectivity of an evaluation could be especially significant when it is used as a convenient way to get rid of unwanted personnel. The classification of the criteria for performance assessment is of great importance for defining the modern type of civil servant. An objective assessment of public servants in the course of certification also allows placing barriers against corrupt actions with regard to the persons already employed in the public bodies.

Bearing in mind that the certification commission is selected by the head of the body that carries out the certification, it is quite natural that he or she can manipulate the certification of internal or external employees. A negative aspect of certifications is the recommendations of certification commissions, who are not authorized to promote civil servants or to dismiss them if they are underqualified. Only the head of the public body or another person responsible for the appointment of civil servants has the authority to do so. Decisions on employee incompetence are made only with the preliminary authorization and instruction of the senior official according to the desired results. In a situation where the fortune of an employee depends on his or her superior, both individuals are tempted by bribery or the performance of some service to ensure continued employment.

Problem of income declaration (accountability) of civil servants

Pursuant to section 13 of the Law of Ukraine "On Public Service", a person who applies for employment in the civil service for positions of the 3–7 grade shall file an income declaration with the prospective employer and list financial assets and liabilities, including those abroad, for him/herself and for family members. Further, a person who applies for the position of civil servant of the 1–2 grade shall file data on his/her own and his/her family members' real estates and valuable movables, bank deposits and securities.

However, the practice of declaring income and financial assets and liabilities has effectively failed because in reality there is a substantial divergence between the incomes and actual expenses of civil servants. This fact shapes the public's attitude to the government and proves corruption within the latter.

The Decree of the President of Ukraine "On Measures to Intensify Control Over Income Declarations of Individuals Authorized to Perform Public Functions" of February 4, 2003 No. 73/2003 for the first time recognized the need to create a special system of state financial control over the declarations and expenditures of persons who apply for civil service positions and of those who are authorized to perform public functions that would assist in the further implementation of measures against tax evasion and corruption. The Cabinet of Ministers of Ukraine, in its Plan of Measures Against Organized Crime and Corruption for the Year

2003, approved by the Resolution of May 15, 2003, No. 270-p, recognized that it was necessary to develop an additional, special declaration form to be used to establish the origin of funds spent by civil servants and persons applying for civil service positions, to purchase property, pay for works or services provided, and to prepare suggestions regarding liability for failure to submit a declaration or for providing inadequate information. However, these provisions have never been implemented.

Codes of conduct

The introduction of ethical conduct regulations is an important prerequisite to ensure transparency and integrity in the government and to prevent corruption. Addressing this problem in Ukraine has been difficult, and real steps in this direction were taken only ten years after the foundation of the new state. Ethical standards of public service in the system of executive bodies were established for the first time by the Law of Ukraine "On Public Service" No. 3723-X II of December 16, 1993[25]. Section 5 of the Law required that "the civil servant should: perform official duties honestly and thoroughly; be respectful to the concerns of citizens, superiors and employees; adhere to high communication standards; avoid actions and deeds that may have a negative effect on the interests of the public service or may affect the reputation of the civil servant". In addition, section 14 stipulated the disciplinary responsibility of the civil servant for "actions discrediting him as a civil servant or discrediting the public body where he/she works."

These standards, however, were too general to be of any practical value in the development of ethical anti-corruption regulations.

Administrative reform starting in the late 90s aimed to achieve one of the basic tasks – to eliminate the objective (institutional) and subjective conditions that generated corruption – since this issue had become one of the main constraints hindering the development of the Ukrainian public service system.

The Concept of Administrative Reform in Ukraine (approved by the Decree of the President of Ukraine No. 810/98 of July, 22, 1998) for the first time emphasized the "expediency of the definition of ethical requirements in activities of civil servants and their consolidation in the Code of Conduct (Ethics) of the Civil Servant". The problem of creating a code of ethical standards of public service was defined more clearly and precisely by the Decree of the President of Ukraine of July 26, 2000 No. 925/2000. The Directive of the Central Administrative Board of Public Service of Ukraine of October 23, 2000, No. 58, the first document setting the background for the processes of institutionalizing ethics in the public service, introduced the "General Rules of Civil Servants' Conduct" (registered with the Ministry of Justice of Ukraine on November 7, 2000 under No. 783/5004). The key provisions of the General Rules often repeat the provisions of some laws (for example, the Laws of Ukraine "On

[25] Відомості Верховної Ради України, 1993, № 52, ст. 490

Public Service" and "On the Struggle Against Corruption") or contain general theoretical abstract provisions. At the same time, the General Rules do contain provisions for which this type of document is created, namely, recommendations as to the appropriate conduct of an employee in "risky" situations (offers of gifts, conflict of interests, invitations to receptions, job offers from relatives, etc.).

Adoption of the General Rules of Civil Servants' Conduct has not proved to be an optimal solution of the problem of consolidating the ethical requirements for civil servants. We would point out the following most pressing problems :

Problems associated with the legal status of the General Rules of Conduct

Taking into account the specifics of the system of legal and enforcement practices in Ukraine, the introduction of ethical standards of conduct of civil servants by the Order of the Central Public Service shall be deemed as legally incorrect. The place of orders of the central executive bodies with special status within the hierarchy of statutory acts does not ensure the appropriate validity and social importance of the ethical standards introduced by them.

International practice in resolving the problems related to establishing ethical standards offers different solutions, ranging from a constitutional definition of corresponding principles and standards of conduct to the approval of "soft" acts (such as "recommendations"). However, it has been recently admitted that setting ethical codes on the basis of acts of parliament is more efficient for countries with a continental system of public service organization. In this respect, the practice of the Russian Federation could be exemplary, where after long discussions it was recognized as expedient to pass the federal Law "Code of Conduct of Civil Servants of the Russian Federation". In 2003, the bill "On the Adoption of the Code of Conduct of the Civil Servant of Ukraine" was tabled in the Parliament of Ukraine. However, the Code is too general in its contents, repeats provisions of the General Rules and does not solve the problem of developing a "realistically useful document".

Absence of an effective "ethical infrastructure" in executive bodies (mechanisms of implementation and control of ethical standards)

Recently, the concept of "ethical infrastructure" has been widely used in international political-legal documents to define a system that ensures the effective application of corresponding ethical standards.[26] This system has the following important elements :

Political initiatives of the leadership. There are formal indicators of positive processes (the law introduced the minimal requirements necessary for ethical regulation of the public service, the concept of "ethical aspect"

[26] Ethics in the Public Service. Current Issues and Practice.- P.1996.

was taken into account in anti-corruption documents, etc.). However, the actual implementation of political initiatives is being hindered, and they have largely stayed on paper. This situation is directly confirmed by provisions of the Decree of the President of Ukraine No. 84/2003 of 06.02.2003 "On Additional Urgent Measures to Intensify the Struggle Against Organized Crime and Corruption", which attest to the "chronic" default of the decisions made earlier.

Presence of the bodies responsible for monitoring the implementation of ethical standards. In fact, there is no specialized agency in Ukraine to perform such functions. Practice shows that ethical standards cannot be implemented spontaneously ; rather, their introduction is a controlled process that should be carried out in particular by administrative means. Unfortunately, the Central Administrative Board of Public Service is not able to perform these functions in full. The resolution on the Central Administrative Board of Public Service (approved by the Decree of the President of Ukraine No. 1272/1999 of October, 2, 1999) provides that this body "conducts service investigations as to the observance by civil servants of the legislation on public service, on the struggle against corruption and also as to the infringement of ethics of conduct of civil servants in compliance with the established procedures".

However, a staff of only 10–15 employees in the corresponding subunit and the complete lack of local units prevent the Central Administrative Board from performing its monitoring function. Besides, there are procedural restrictions. Often this body receives information on infringement from law-enforcement bodies after significant delays. Its actions therefore make no sense and turn into only a formal "response". We have reasons to state that the actual monitoring is being performed by law-enforcement bodies, but only to the extent that ethical misconduct is a part of a corresponding administrative and criminal-legal delinquency.

Abstract nature ("inoperability") of ethical standards

Pursuant to section 59 of the Recommendations 10 (2000) of the Committee of Ministers of the Council of Europe, the Code of Conduct "shall fill the gap between abstract legislative instructions presenting general principles of conduct, and specific recommendations and rules of conduct in daily situations. It shall reduce the degree of uncertainty and instruct employees when such challenging situations arise". It also meets another important purpose : the conduct of officials becomes predictable for the public. With this objective in mind, the Model Code of the Council of Europe provides for an "operational" description of the most complex situations (those that involve gifts, "indecent offers", conflicts of interest, etc.).

"General rules of Conduct of Civil Servants" provides for a similar interpretation of the purpose of ethical standards. But these are limited to a textual reproduction of some provisions of the legislation on public service and the struggle against corruption, thereby actually devaluing their practical importance.

Actual implementation of the "General Rules of Conduct of Public Servants" (by results of the civil servants polls)

When choosing the appropriate mode of conduct in performing their official duties, the civil servants interviewed were ambiguous in their perception of the need to take ethical standards into account . Only 43.7% of respondents agreed that in these situations ethical considerations should be the guiding principles.

Obviously, this view is explained largely by the fact that ethical rules and standards in their field of professional work are not always clearly defined. 35% of the interviewees agree with the statement, while 39% take the available ethical standards into account. Such a ratio confirms the presence of certain challenges in developing a system of ethical standards for the public service.

The research assessed the attitude of civil servants to the General Rules of Conduct of Civil Servants as the basic instrument of ethical regulation. The law requires that appointments to the civil service are possible only after an examination of this document. A formal procedure ensures that every employee reads this document. However, the results of the study give no reasons to consider the current system to be an efficient one. Almost one-third of interviewees (31.9%) believe that the review of the General Rules is a formality and that employees do not know how to apply them in practice.

In general, the results of the sociological study confirm that in Ukraine there is a problem of inefficiency of ethical rules of conduct for employees of executive bodies.

Conflicts of interest

The problem of the social and legal means for the regulation of conflicts of interest stands apart in the system of anti-corruption measures.

Polls of experts (the heads of central executive bodies) show that the conflict of interests is a topical problem for all categories of civil servants, especially for heads and employees directly responsible for rendering public services to legal entities and individuals. 60% of the interviewees consider that in recent years the preconditions for conflicts of interest have not decreased. There is an active process of personnel rotations between public bodies and private entities, which creates informal ties that establish a potential for such conflicts. Since the late 90s, experts have emphasized that almost 80% of senior officials held positions for less than one year. The practice of staffing through the transfer of employees from other sectors is common in Ukraine. Of special importance is the influx of manpower from business entities and political parties. According to the data of civil servant polls, 6.9% of interviewees had been engaged in enterprise activity before their employment in the public service, and 13.8% have family members employed in the business sector. The number of respondents holding the position of head of corresponding bodies or their structural subunits has almost doubled.

Therefore, there is a strong potential for conflict of interest.

The poll of civil servants determined a general level for the prevalence of conflicts of interest. According to respondents, 39% of employees and 76% of heads and leading experts face conflicts of interest. The ability of employees to adequately assess different situations in their professional activities, to identify real or potential conflicts and to take steps to avoid these conflicts are important parameters of the public service's performance (refusal to participate in the settlement of certain issues or in the work of collegial bodies). In order to define these subjective characteristics, respondents were invited to assess a situation where the actions of a public official were characterized by intentional conflicts of interest. The results prove that a significant number of civil servants (32%) are unable to build adequate patterns of behaviour in situations of real and potential conflicts.

Legal means of regulating conflicts of interests

Attempts at a legal definition of conflicts of interest and of the means to settle them have been made only recently and have had a negative impact on establishing the real practice of developing ethical standards for the public service.

Often this problem is not recognized as a separate subject of normative regulation. For instance, both the definition of conflict of interest and the majority of norms that could be applied for its prevention and elimination are absent in the bill of Ukraine "On the Adoption of the Code of Conduct of the Civil Servant" (introduced in the Parliament of Ukraine in January 2003).

This problem was worded in detail for the first time in the General Rules of Conduct of Civil Servants (approved by the Order of Central Administrative Board of Public Service of Ukraine of October, 23 2000 p, No. 58, registered with the Ministry of Justice of Ukraine on November 7, 2000, No. 783/5004).

There were two important, although general, procedural provisions :

- The employee is required to declare the presence or absence of conflicts of interest upon request.
- All conflicts shall be resolved before employment in the public service or appointment to a new position.

As admitted, the criterion for the presence of conflicts of interest was the violations of restrictions and bans established by Laws of Ukraine "On Public Service" and "On the Struggle Against Corruption". However, this approach has not been specified, that is, the legislation did not determine what violations of the specified restrictions and bans create conflicts of interest. At the same time, similar provisions appear in the special legislation.

The legal patterns on which these rules are based focus mainly on nega-

tive obligations (bans), although positive obligations are important in settling conflicts, that is, obligations as to the ways of declaring interests and the ways of conduct in the case of disclosure of such conflicts. That is to say, the mechanism for the regulation of conflicts of interest is absent in the general statutory acts. Further, an analysis of regulatory legislation (relating to 18 fields) demonstrates an absence of rules governing conflicts of interest in the majority of statutory acts that cover potentially risky situations.

In some fields of regulatory activity the state fills this gap with regulations.

Pursuant to the Order of the State Property Fund of Ukraine No. 2284/334/49 of November 3, 2000 to amend the "Regulations On the Conduct of Tenders on the Sale of Shares of Energy-Generating Companies" approved by the Order of the State Property Fund No. 1855 /263/414 of September 7, 2000 : "individuals who have not signed the statement of absence of conflict of interests (personal interest) in tender results to prove an absence of personal interests in the results of the tender and an absence of personal or business connections that, if made public, could question the impartiality of the commission member in the process of decision making on tender outcomes and the selection of the bidder who offered the highest price, cannot be members of tender commissions."

Analysis of the regulatory legislation shows that from a legal point of view the above-mentioned rule is the most ideal example of the regulation of conflicts of interest in the legislation. However, it does not ensure the required and sufficient comprehensiveness of legal regulation. First, this concerns the legal definition of the implications for non-observance of the specified terms because the annulment of corresponding decisions in many cases is economically and organizationally inappropriate and sometimes impossible.

The analysis shows incompleteness of the processes in the formation of legal grounds for the regulation of conflicts of interest.

Conflicts of interest exist in the operations of some categories of employees of executive bodies.

In many countries the inclusion of special terms of regulating conflicts for some categories of employees in executive bodies is a usual practice. Taking into account the specific socio-political situation in Ukraine, two categories could be identified :

Employees leaving public service. In some European countries, detailed regulations govern cases of conflicts of interest with regard to public servants who are retiring or transferring to other sectors. This issue was raised as a separate objective of anti-corruption efforts in the Program of Actions against Corruption adopted by the Committee of Ministers of the European Council.

The topicality of this problem for Ukraine is shown by the polls of civil servants on their career plans in the case of resignation from the public service. The following results were received :
After resignation, public servants plan :
- to work in the private sector in positions where there could apply the knowledge, experience and connections they had gained in the public service – 52.5%
- to work in the private sector, irrespective of their present position – 10.7%
- to run their own business – 10.0%
- to pursue other plans – 26.8%

Obviously, the professional work of ex-public servants (in particular, senior officials) in the field within controlling, licensing and regulatory powers of the department where he or she used to work implies increased corruption risk. There is a significant "demand" for this category of employees.

In Ukraine, there are no rules (legal or quasi-legal) that would set up restrictions as to the employment or occupation of civil servants after leaving the public service. The only exception is a partial consideration of this problem in the provisions of section 7 of the Law of Ukraine "On Public Procurement of Goods, Works and Services" for situations where bidders offer or give compensation in any form – offers of employment, services and valuables – to an official or a former employee of the customer are recognized as "unethical behaviour". However, according to the information available, this norm has not been applied.

Ministers and other officials of the central executive bodies. Consideration of the specifics of this category (and of local officials) is of special social importance. The research materials show that the general public is dominated by stereotypes of perception when a minister or other official of the same level continues, after appointment, to be the owner of corporate rights of enterprises in the field under his/her official control. The majority of those interviewed (72%) believe that this situation involves "corruption".

We have analyzed some appointments – those of heads and deputy heads of the central executive bodies – to the Ukrainian government for the last three years. Almost 30% of those appointed were former business people. However, such appointments are not accompanied by a formal or informal declaration as to their corporate rights or any other aspects of their business background. A similar practice could be also observed in the local executive bodies involving senior positions in the corresponding bodies (first of all, state administrations) and their structural subunits.

The Concept of the Struggle against Corruption for 1998–2005 (the Decree of the President of Ukraine of April 24, 1998, No. 367/98) provided for the development of a mechanism under which individuals appointed to positions of heads of ministries and departments shall transfer their corresponding corporate rights in asset management under the guarantees of the state. It is worth noting that a similar practice is used worldwide.

However, the appropriateness of applying these state guarantees to cover all kinds of risks (including those caused by mismanagement) is questionable. Such guarantees should cover only the risks related to the activity of the state and its agencies. However, this provision of the Concept has never been implemented, as was reflected by the Decree of the President "On Urgent Additional Measures to Intensify the Struggle Against Organized Crime and Corruption" of February 6, 2003, No. 84/2003, in which the importance of such measures for the prevention of corruption was emphasized once again.

3.2 Corruption risks in decision-making procedures

Decision making is the most essential element in the relations of public bodies with legal entities and individual persons that largely define the level of public trust. Therefore, the corresponding administrative procedures for rendering public and administrative services should be assessed in terms of their inherent corruption risks.

The research found the most "corrupt procedures", that is, procedures where corruption risks are most common.

The results allowed the identification of three categories of procedures that differ in the extent of corruption.

Group I : Procedures with high corruption-risk levels
("corruption is a common practice in this field")

- Customs procedures relating to the import of goods by business entities
- Procedures for public procurement
- Registration and licensing procedures within the traffic police authority
- Construction licensing procedures
- Sanitary inspection licensing procedures
- Passport and registration procedures
- Audits of businesses by taxation bodies
- Licensing for trade and consumer services
- Fire licensing procedures

Group II : Procedures with an average level of corruption

- Licensing procedures (in general, regardless of the specifics of the licensing body which, according to respondents, may differ substantially)
- Certification of goods
- Registration of real estate
- Privatization procedures (industrial projects)
- Procedures for public registration (re-registration) of legal business entities and individual persons

Group III : Procedures with a low level of corruption
("there may be cases of corruption, but it is untypical")

- Privatization of accommodations

- Social security and subsidies
- Civil registration and others

Respondents did not name a single corruption-free procedure.

Basic features of decision-making procedures (by results of polls for the general population and for business people)

The characteristic parameter of the analysis of decision-making procedures is the assessment by employees of the formal rules on which decision making is based.

Table 4. Assessment of the formal rules of decision making regulating the activities of public servants (percentage of those interviewed)

Comprehensive, regulate majority of actions	17	Absolutely insufficient	41.7
Require superfluous administrative procedures	17.7	Simple	42.1
Stable	43.7	Frequently change	25
Clear	38.5	Require additional interpretation	35
Known to those concerned	31.9	Unknown to clients	26.8
Set out liability for incorrect decisions	18.9	Do not establish any liability	45.5
Give ample opportunities for discretionary decisions	44.1	Discretionary decisions are almost absent	21
Require much time for decision making	25.2	Do not require a lot of time	35.7

Basing on these results, the most challenging aspects of the formal rules of decision making are the following :
- incompleteness and fragmentariness (25% of interviewees)
- complexity, that is, application impossible without additional interpretation
- burdensome nature, taking into account superfluous administrative actions and excessive time consumption
- absence of standards setting forth responsibility for wrong decisions

A significant number of those interviewed (20–25%) pointed to the problems of instability of rules and inaccessibility of information on corresponding procedures for clients of public services. One should not underestimate that the interviewees underlined the presence of ample discretionary powers. In the absence of responsibility and unsatisfactory regulation (emphasized by respondents), discretionary powers easily turn into willfulness and foster corrupt conduct.

The assessments of business people's experience in communicating with

public bodies in connection with registration, obtaining licenses and permits are rather informative for characterizing procedures. In the course of analyzing the assessments of decision-making procedures by business people, the following results were obtained (see Table 5). In general, the structure of these assessments essentially differs from that of the assessments of civil servants.

Table 5. Business people's assessment of basic characteristics of decision-making procedures (percentage of those interviewed)

1. Completeness and clarity of regulation	28.4
2. Simplicity and concreteness	16.8
3. Absence of superfluous actions	19.8
4. Rules known to those concerned	30.8
5. Accountability of officials for wrong decisions	19.7
6. Time-consuming procedures	74.3
7. Considerable discretionary powers of officials	60.2
8. Real possibility of appeal against unfair decisions	21.2
9. Stable normative legal framework	13.0
10. Flaws in the legislation	63.2
11. Numerous rules in the legislation requiring special interpretation	58.4
12. Internal conflicts within the legislation	49.6

Institutional preconditions of corruption risks in decision-making procedures :

Unregulated elements of administrative procedures

Comprehensiveness in the regulation of procedural aspects is an important condition of the procedure's application, since it excludes or limits opportunities for corrupt conduct. However, analysis shows that this requirement is frequently ignored by developers of corresponding statutory acts.

"Flaws" in the legislation on governmental (administrative) procedures can be divided into several types :

Absence or incompleteness of the definition of procedural terms

The most typical flaw is limiting the definition of deadlines to general terms of case consideration. At the same time, the formal definition is often insufficient for the practical application of a procedure. Often, timeframes are neither technically nor economically substantiated.

For instance, the settlement of an issue unrelated to the "limited" services that do not require significant expenses on the part of employees of a corresponding body takes weeks or even several months. This situation makes the "corrupt" way of reducing terms appealing for both clients and civil servants. Clearly, the official introduction of the so-called "expedited" consideration of issues subject to additional payment does not solve the problem.

Another typical situation is the absence of regulations that would establish the responsibility of administrative bodies and officials for the non-observance of the terms of case consideration or their replacement with reference rules ("pursuant to legislation in force"). In our opinion, the approach used in section 5.2 of the Law of Ukraine of December 21, 2000 No. 2181-III "On the Procedure for Tax Refunds" could be applied universally : if a reasonable decision on a complaint is not made within the established deadlines, such claim shall be deemed satisfied.

Unclearness in the contents of some regulatory actions

Such actions as "coordination" and "approval" create a majority of the problems. Not a single procedure analyzed in the course of research included a precise definition of the contents of coordination procedures. Under the Concept of the Administrative Reform (Decree of the President of Ukraine No. 810/98, of July 22, 1998), "coordination procedures shall be of a consultative nature, except for the cases stipulated by the law". However, as the poll data shows, the coordination of documents with certain bodies in some procedures is the most complex part. Coordination becomes more open to corruption than the procedure itself. To a large extent, this situation is explained by the fact that coordination procedures are not regulated at all (deadlines, requirements on the format of the decision, influencing the final decision). Employees authorized to conduct particular actions perform them at their own discretion. Actually, coordination is an additional approval procedure.

Possibility of the creation (use) of alternative ("shadow") procedures

The experience of the past few years shows an increase in the number of cases where procedures are used in order to "sidestep" certain restrictions that are established by legislation. This means, basically, that legal procedures are used to achieve illegal goals. In the majority of cases, this is possible only because of the presence of corrupt connections and the bribing of employees of corresponding bodies.

The so-called "shadow privatization" that in 2000–2002 substituted for lawful, transparent privatization is the most illustrative and the most harmful in its social consequences. The most popular patterns were "tax pledging", "the confiscation for debts" and some others. According to the World Bank experts, the fact that shadow privatization increases corruption both among the executive authorities and in the private business sector is "a dangerous factor in this process".[27]

Absence of regulation on the use of discretionary powers

A significant number of cases are solved by officials at their own discretion. This finding was also established by the results of the polls.

[27] Дослідження прозорості приватизації (Г.Бонненберг, О.Пасхавер, К.Штаудт)- Київ.-2001-с.1

The following are the answers to the question on the presence of rules and regulations or other documents that regulate the actions of civil servants :

regulation is absent – 12.8%
regulation is present only in some situations – 19.5%
regulation is present in not more than half of situations – 18.0%
regulations available for all situations – 49.6%

It is indicative that 51.8% of those interviewed believe that the legislation governing the field of their professional interests instead of the detailed regulation of the actions of officials gives officials almost unlimited discretionary powers, and 65.5% believe that the legislation governing the field of their professional interests does not contain precise procedures for the application of these or those provisions (several answers were given).

In the absence and with the imperfection of legal regulation for discretionary powers, an official is to define by himself/herself the guiding principles in the process of making a decision on particular issues. Thus, eventually he/she begins to resort to an increasing simplification of decision-making procedures, knowing that decisions can be made at his/her discretion. This situation allows officials to abuse their office when making decisions.

Controversies in the status of public bodies : conflict of functions

The Concept of the Administrative Reform in Ukraine (Decree of the President of Ukraine No. 810/98 of July 22, 1998) provided that the following conditions shall be created in the process of the administrative reform : "executive authorities will not exercise functions that create potential conflicts of interests. Only procedures of conflict settlement that are transparent to the public can provide successful compromise. This relates to all potential conflicts between such functions as the development of policies and rules in certain sectors and the regulation of business activity".

Over the past several years, major changes have not taken place. Instead, such controversies are increasing. Departmental rulemaking (both regulation and the drafting of bills) creates numerous administrative constraints on the exercise of the rights of individuals that, under certain conditions, become corruption factors, namely, the introduction of new approval procedures, the complication of working procedures, the introduction of conflicting rules, etc. No significant changes have taken place in this sphere.

The conflict between controlling the licensing (regulatory) and economic activities of some public bodies is becoming especially important. A majority of enforcement authorities render commercial services to legal entities and private individuals. This activity objectively creates grounds for competition between business entities that operate in this field. In these

circumstances, granting the right to issue licenses and to supervise the corresponding public bodies can create conditions for abusing these powers to limit competition. In such a situation, the probability of corrupt practices always increases. For the first time this problem was identified in connection with the Department of Public Security Service of the Ministry of Interior of Ukraine, which renders security services on a contract basis and at the same time issues licenses to corporations operating in the field of security services.

Priority of "departmental" interpretation

A common problem typical for all procedures is the presence of so-called "departmental rule interpretation" – based on the nihilist principles (in terms of the law), these include "presumption of guilt", "absolutising the objective side of offence", "impossibility to observe the law without departmental instructions", "absolutising the legal power of departmental regulation", "absolutising the public and departmental interest", "ignoring human rights in the business sector". The application of laws based on departmental "interpretation" remains the major problem.

Respondents were presented with the following situation : "a law was adopted that sets up new, additional powers to make decisions related to issues normally within your competence and in which you are usually engaged. What would you do when making a decision on these issues if, for this purpose, you will have to decide whether or not you should take into account the changes introduced by the new law?" The answers were distributed in the following way :

- I shall refrain from decision making till the departmental instructions and directives are approved – 37.4%
- I shall consult my superior – 23.3%
- I shall apply the provisions of the law – 36.5%
- Other – 2.8%

One of the manifestations of departmental rule interpretation is a vague interpretation of terms. The presence of essential variations in definitions of basic terms in statutory acts is a typical corruption risk, since these terms are used in corruption-related situations as a basis for discretionary or selective application of the statute. According to our estimates, discrepancies in the definitions of various statutory acts occur in about 15% of the legal terms defined in the database of laws and regulations of the Parliament of Ukraine.

The situation with the concept of "economic activities" is indicative. Definitions of this term are given in eight acts, but they all could be divided into two groups that differ not only in wording but also conceptually, because they are in essence based on two different approaches.

1. The first approach can be found in economic legislation. In 1991 (section 1 of the Law of Ukraine "On International Economic Activities" of

16.09.1991 No. 959-12[28]) "economic activities" were defined as "any activity, including commercial activity, activity of legal entities and individuals related to manufacturing, production, trade, services, and works". This definition has been used in some laws and regulations. It is important that this definition was used (with virtually unchanged wording) in the Law of Ukraine "On the Licensing of Certain Types of Economic Activities" of 01.06.2000, No. 1774-14[29].

2. The second approach was set forth in the tax legislation. The Law of Ukraine "On the Taxation of Profits of Enterprises" of 28.12.1994 No. 334/94 provides for the following definition : "economic activities are any activities of an individual aimed at receiving profit in monetary, material or intangible form in the case of regular, constant and substantial direct participation of such individual in the administration of such activities." This definition has been repeatedly used in statutory acts (orders and directives, instructions) of the tax administration.

The following example obtained in the course of the polls of business people shows how divergences in these approaches to the definition of terms can contribute to corruption. An organization registered as an association of citizens (non-governmental organization) filed an application to be included into the register of non-profit organizations. After reviewing the papers an employee of the tax inspection offered "assistance" in settling the issue because, as he said, it would be impossible to do so otherwise since the charter of the organization provided for "economic activities". In this case, he referred to the definition of economic activities contained in the taxation laws, saying that according to this definition any economic activity provides for the receipt of profits.

Administrative appeals against approved decisions

Administrative appeals against the decisions and actions of public bodies occupy an important place within the system of decision-making procedures. According to the results of the polls, the general population employs these procedures much less than business people : almost 60% of business people have used procedures of administrative appeal, compared to 15% of the general population. The main field of application for administrative procedures is the resolution of disputes between corporations and governmental bodies. According to the interview data, only 18.3% of business people have never been involved in such disputes.

At the same time, the research materials do not provide grounds for considering the existing procedures as an efficient means of dispute resolution. The general attitude of business people to the actual appeal practice is given in the following table.

[28] Вісник Верховної Ради України. 1991, № 29, с 377
[29] Вісник Верховної Ради України. 2000, № 36, с 299

Table 6. Assessment of procedures for administrative appeal against decisions and actions of public bodies

Procedure Descriptions	Answers (by percent of responses)		
	Typical	Partially typical	Untypical
Clearness of regulation procedures	36.5	29.2	33.1
Decision making in compliance with the law	41.1	17.1	31.7
Impartiality and objective consideration	31.4	12.2	55.1
Reasonable terms of review	51.4	21.9	26.8
Possibility of obtaining information on the course of case consideration	31.4	24.3	44.1
Possibility of presenting own proofs and arguments	60.5	22.0	17.4
Equality of the dispute parties	33.6	20.3	45.0
Extortion of bribes, gifts, payments to charity funds, etc.	56.0	2.4	41.4

The current legal situation in Ukraine could be characterized by the absence of uniform procedures for administrative appeal against the actions and decisions of central and local self-governance bodies. The consideration of these disputes is stipulated by more than 80 laws and several hundred regulations.

Appeal procedures do not exclude the possibility of passing a negative decision that would aggravate the situation of the applicant more than the appealed decision itself. Such a principle does not correspond to the nature of appeal procedures. In this case, the "Resolution on the Order of Filing and Consideration of Complaints of Tax Bearers" in the version approved by the Order of the State Tax Administration of Ukraine of March, 2, 2001 No. 82 could be used as an example.

Example : According to one businessman, after auditing his enterprise the tax body compiled a report in which the amount of arrears was determined to be 2,000 hryvnas. As soon as an appeal was filed, the head of the tax administration made a decision to increase this amount to 8,000 hryvnas. The businessman was warned that in case of further appeals, the amount will increase several times more.

Limited availability of information on the activities of government bodies

The accessibility of information is an important precondition for the integrity of the government and the transparency of its procedures.

The most promising way to increase the transparency of procedures is to

use modern information technologies. In Ukraine, these objectives were defined in the Decree of the President of Ukraine "On Additional Measures to Ensure Transparency in the Activities of Governmental Bodies" No. 683/2002 of August 1, 2002. However, their performance is essentially hindered, as is shown by communication processes in public procurement. For example, the last issue of the electronic version of the "Bulletin of Public Procurement" at the Web site of the Ministry of Economics is dated July 2002. Besides, in Ukraine there are no organizational, technical and legal conditions for introducing the "electronic bidding" procedures[30]. In 2001, only 5,205 tender calls out of 63,500 thousand of tenders were published, including 5,079 open-tender announcements or 50.8% of the total number of open tenders.

Absence of uniform administrative procedures in different bodies of executive bodies

In the course of research we analyzed legislation related to administrative procedures in 18 different fields of regulatory activities of the state : taxation ; customs ; sanitary-and-epidemiologic control ; securities regulations, licensing, and business activity ; certification ; standardization ; regulations in the finance and banking sector ; land ; investments ; competition ; and industrial regulatory modes (oil and gas, insurance, electric power, transportation, trade, construction, telecommunication services).

Results of the analysis confirm the presence of essential divergences in the degree of regulation and the clearness of definitions for procedures in these fields. Regulations often do not contain descriptions and do not specify regulations where such procedures are determined. Instead, general wording is used, such as "to be considered in accordance with established legislation" or "actions can be appealed to a higher body or court, in compliance with the procedure established by the law". In other cases, the regulations define only the most general elements of such procedures.

Problem of responsibility for illegitimate decisions

According to the results of expert opinion polls, the absence of "fear" of sanctions for illegitimate decisions is an especially important motivator of corrupt conduct. Pursuant to section 56 of the Constitution of Ukraine, economic and moral damage caused to citizens by illegal decisions, actions or negligence of governmental bodies, their officials and service employees in the exercise of their powers shall be reimbursed at the expense of the state. Specified constitutional provisions are primarily aimed at the prevention of illegal decisions by governmental bodies. Nevertheless, the above-mentioned constitutional provision has never been enforced or observed.

[30] Про результати перевірки й аналізу ефективності здійснення Міністерством економіки та з питань європейської інтеграції України координації та контролю за дотриманням Закону України «Про закупівлю товарів, робіт та послуг за державні кошти./Затверджено постановою колегії Рахункової палати України від 17.09.2002 № 20-2- Київ: Рахункова палата України, 2002, Випуск 14, с 10.

Introducing terms of the rendering of public services unstipulated by the legislation

According to the results of the polls, the creation of additional (unforeseen by the legislation) conditions for the rendering of public services is very common in operations of the bodies rendering such services. In a majority of cases, they generate corruption risks.

The following situations are the most common :

- requests of documents unforeseen by the legislation

Such actions in most cases are initiated by the management of corresponding bodies and are related to documents that, as a matter of fact, have no principal importance for the resolution of the issue. They are corruption-prone since clients will try "to facilitate" the procedure and, in order to avoid additional efforts, will resort to bribes and gifts.

- the introduction in procedures of additional obligations and additional stages (conditions) that have not been stipulated by the law

These additional conditions could be different in nature. The basic type of such a requirement is a request to buy stationary.

Example. Many local tax bodies when registering tax bearers demand – apart from the documents stipulated by the legislation – that stationery be provided for the registration of a private business or a tax bearer. However, for a small tip (gift), the tax inspection employee will not insist on this matter.

- compulsory contacts with particular ("in-house") consulting and legal firms, notaries and so on.

This practice is most common in the work of bodies that render approval services, such as registration, licensing, certification and "permits".

The business people polled repeatedly underlined that, when obtaining these approvals, they received informal but rather categorical "recommendations" to apply to a particular legal entity or individual who could "prepare the necessary papers as needed or otherwise would refuse their applications". Sometimes such "recommendations" are accompanied with the opportunity to purchase blank forms, several sheets of which could cost dozens of hryvnas.

Example : In October 2002 the Expert Appeal Council of the State Committee of Ukraine on regulatory policies and affairs reviewed an application of a joint stock company to annul the decision of the licensing body within the State Construction and Architecture Committee of Ukraine (SCACU) to refuse to issue a construction license. In the course of the application review it was established that the company had refused to follow the recommendation of the Public Constructions to address the

"UkrInvestLicensing" Company, which rendered commercial services. The Expert Appeal Council concluded that the procedure of considering papers submitted by the company to SCACU to obtain a license does not meet the requirements of the legislation in force ; in particular, it involves elements of violation of the requirements of the Laws of Ukraine "On Public Service" and "On the Struggle Against Corruption" (excerpt from Resolution No. 42 of October 4, 2002).

Many law and consulting firms specialize in certain types of licensing procedures. The price of such "licenses" ranges from 200 up to 5,000-6,000 hryvnas, sometimes more. According to the statement of an employee of a firm that "cooperates" with some ministries and departments, the share of bribes to officials comprises from 20 to 40% of the cost of the service.

- compulsory donations to funds created in the corresponding public bodies

Over the past years, practically all executive authorities have established charity funds. Some of these authorities are national (with affiliated offices and branches in the field), and others are local (regional, city). The purpose of the funds' creation is usually declared to be "the collection of funds from private individuals for socially important purposes related to the field of activity of the corresponding body". However, in reality the funds are largely a form of corruption.

Some departments have precise, officially published "charity rates" fixed for corresponding public services. For example, issuing a driving license requires a "charity payment" of 10 hryvnas, and some services in passport registration office require 300 hryvnas. Using information published by the Accounting Chamber, one can estimate the scale of operations for these funds. In 2001 "law enforcement departments", using the funds received as charity payments from private individuals, made the following expenditures :

- the Ministry of the Interior – 310,000,000 hryvnas
- the National Security Service – 122,000,000
- the National Border Service – 94,000,000
- the Ministry of Defence – 94,000,000
- the Public Tax Administration – 72,000,000

In 2002, these amounts increased substantially.[31]

The studies provided numerous cases where some officials of public bodies received bribes indirectly through the charity funds created within these bodies.

Example : Businessman N. was accused of breaching customs rules for

[31] Мельничук В. Экономический рост и макроэкономические диспропорции: анализ украинской действительности// Зеркало недели № 35, 14–21 сентября 2002.

which the law provides criminal liability. Through a friend in a law-enforcement body, he managed to meet with the head of the investigating department. During this meeting, he offered a "substantial reward" to drop the case. Receiving a positive answer, the businessman then asked about the technique of transferring the bribe. He was instructed to transfer the funds to the bank account of a particular charity fund.

The Decree of the President of Ukraine No. 84/2003 of 06.02.2003 "On Additional Urgent Measures to Intensify the Struggle Against Organized Crime and Corruption" is an indirect recognition of corruption risks in the operations of such funds :

"In order to duly detect cases of office abuse, bribery, corruption practices of officials of law enforcement bodies, to prevent such practices in the internal security services of the central offices of ministries and other central enforcement authorities, a check-up of observance of lawfulness of funds spending in the establishment and operations of charity foundations in support of law enforcement body operations shall be performed by June 1, 2003. It is recommended to focus on cases of the collection of charity funds by cheques, the purchase of expensive furniture, communication devices, payments for services of commercial structures, and education using charity payments."

Unfortunately, no information has been published on the implementation of the measures stipulated by this document and their results.

Introducing licensing procedures unforeseen by the legislation

Research shows that the introduction of licensing procedures unforeseen by the legislation in the form of "certification" or "coordination" is quite common. It can be encountered both in the central executive authorities and at the local level. The corresponding resolutions offered in support of the new procedures ostensibly provide socially justified grounds for their introduction (e.g., "to improve the protection of consumers rights", "to ensure regional interests"), but such procedures in fact become an additional obstacle to attaining the interests of private individuals and create grounds for corruption.

The practice is particularly widespread in the regulation of business activities. It is noteworthy that, according to the experts interviewed, the central executive bodies have recently intensified actual opposition to the strategy of deregulating enterprise activity that was announced at the end of the 1990s. Attempts to introduce administrative barriers into entrepreneurial activities are some of the manifestations of this countermovement.

4 INTEGRITY OF JUDGES AND COURT PROCEEDINGS

The integrity of judges and court proceedings is a necessary precondition for an independent judicial system in the state. Meeting this precondition has been the main objective of every effort taken at all stages of judicial reform. This goal gains special importance in view of the fact that courts hold a key position in the control of corruption in democratic countries. However, the research findings give grounds to conclude that the efforts made so far for judicial reform have failed to produce any appreciable changes in the integrity of the judicial system.

4.1 Corruption risks in the selection and appointment of judges

It can be said that factors conducive to judicial corruption exist from the very start. In the selection and appointment of judges, corruption risks arise that are related to both the public legal regulation of this process and the social practices of its implementation. The following aspects are worthy of attention.

Requirements of applicants for judicial positions

An analysis of Ukrainian laws relating to the requirements of applicants for judicial positions shows some flaws and conflicts that could generate corruption risks. These circumstances have an adverse effect on the quality of the judicial corps and, as a result, undermine the integrity of the judiciary.

The specifics of court proceedings require special training of applicants. An underqualified judge is a potential target for both direct corrupt practices and for manipulation by the parties involved. The need for training is well illustrated by the common practice of having defence lawyers rather than judges draft court decisions and by the suspension of court hearings so that the judge could review the text of laws and regulations.

Applicants to judicial positions demonstrate the prevalence of low qualifications, which in the majority of cases reflect the low quality of training in judicial proceedings in the higher educational institutions throughout the country. In Ukraine, the development of the training system for candidates to judicial positions is stipulated by the Law "On the Court System of Ukraine" and by the Decree of the President of Ukraine of October 11, 2002 "On the Academy of Judges of Ukraine". Ukraine needs a uniform public system of training, advanced training and ongoing education for judges. In 1999, under the Decree issued by the President of Ukraine, the Yaroslav the Wise National Legal Academy of Ukraine opened the department for the training of professional judges and, in 2002, the Institute of Professional Judicial Training at the Odessa National Legal Academy began to train qualified employees to staff courts. However, due to the absence of a uniform, purposeful and scientifically

based concept of judicial training, these efforts were obviously unable to resolve the problem of supplying the courts with highly professional staff. Indeed, these specialized programs have been of no decisive importance for the development of court staff.

About 200 higher educational institutions in Ukraine train lawyers ; prior to 1990, there were only 6. Many of these institutions lack qualified faculty and, similar to the case in the higher education system in general, the system of relationships within these settings is becoming increasingly corrupt, even to the extent that it inculcates corrupt practices in future professionals. Another important factor is that many Ukrainian lawyers are trained in educational institutions within the system of the Ministry of Interior, where the curriculum itself suffers from a pro-police bias that is incompatible with the values of the judicial profession.

Specific experience in the field of law is an obligatory requirement for all applicants to judicial positions. However, the absence of criteria for designating particular occupations as within the "work in the field of law" leads to confusion on the part of the High Council of Justice and the qualification commissions of judges in recognizing some occupations as forms of legal practice, such as, being a member of local councils or an official in the local self-government bodies. Quite frequently, the required legal record is perceived formally (account of partially paid or extra maternity leaves, other leaves under the effective labour legislation in the required standing in the law field). Such "legal field standing" does not ensure the necessary level of professional experience for prospective judges.

Under the Law of Ukraine "On the Status of Judges", "persons under investigation, pre-trial investigation or judicial proceedings of criminal cases, or those who have a non-cancelled previous conviction" are not entitled to hold judicial office. In this case, the definition "having non-cancelled previous conviction" is not appropriate, since the fact of the perpetration of any crime is incompatible with the ethical requirements for judges. The following wording of this legislative rule would be more correct : "convicted for the perpetration of crime except for the rehabilitated".

Recently, a call for the legislative formalization of intellectual and physical requirements for judicial applicants (in particular, developing psychological requirements for applicants) has been made in both Ukrainian and foreign scientific and popular journals. However, the implementation of these suggestions would result in dubious consequences, especially in generating additional corruption risks in the process of selecting judges.

Ukrainian law does not provide for mandatory probationary training of applicants to judicial positions as assistant judges in local courts, making it impossible to assess their professional abilities and moral qualities.

Flaws in the procedures for the selection of applicants, appointments and service promotion of judges

The procedures for selecting applicants to judicial positions are an important means of ensuring integrity in legal proceedings. According to the research, these mandatory procedures are imperfect, having flaws and inconsistencies that may generate corruption risks.

The qualification certification of applicants to judicial offices is carried out in the format of a qualification test (section 91 of the Law "On the Judicial System of Ukraine"). However, the procedures for its actual conduct are not legislatively specified. There is no uniform technique for assessing the levels of professional knowledge and skills of applicants, which results in divergent assessments by different qualification commissions of the professional knowledge of applicants.

The law does not provide for interviews or examinations of prospective judges on issues of professional judicial ethics, the detection and settlement of conflicts of interest and other matters of essential importance for the prevention of corruption.

In addition, the law does not define the format and range of questions for interviews with applicants for judicial positions, recording and analysis methods. The law provides for only one qualification test in the respective judges' qualification commissions. First-time appointees to judicial positions, following their initial examination by the qualification commission, are to take an additional exam in the High Council of Justice.

This practice has positive sides. Thus, in the first three years of the functioning of the High Council of Justice, 119 candidates (17.5%) were refused recommendations for various reasons, including underqualification (105), insufficient experience in the legal field (13) and non-compliance with the 10-year Ukrainian residence requirement (1) (Ларін М. Вища рада юстиції стане більш "прозорою" // Юридичний вісник України. – 2001. – 16-22 червня.-с.3.). These figures expressly demonstrate that qualification commissions sometimes carry out qualification tests and give their opinions on the suitability of applicants only formally.

The problem of the appointment of judges for life. Professional judges in courts of general jurisdiction hold their offices for life (until 65) except for judges appointed for the first time, who have a five-year term in office (part 4, section 126, Constitution of Ukraine, section 16 of the Law "On the Judicial System of Ukraine"). The draft Law of Ukraine "On Amendments to the Constitution of Ukraine" (and all alternative drafts thereof) provides that the re-election of professional judges in courts of general jurisdiction be made for a term of 10 years. The introduction of this provision will decrease the independence of judges and may cause corruption risks in the procedures for the re-election of judges in the Parliament of Ukraine. Therefore, it is expedient to preserve the present terms of appointments, but to specify in the law the grounds that would prohibit the appointment of judges for life.

Flaws in procedures for the appointment and dismissal of judges from administrative offices

Procedures for the appointment and dismissal of judges from administrative offices stipulated by part 5, section 20 of the Law "On the Court System of Ukraine" do not comply with the spirit of the Constitution of Ukraine, which in part 2, section 128 provides for the principle of the election of the Chief Judge of the Supreme Court of Ukraine by the judges of the said court at their plenary session, thereby suggesting that chief judges of the lower courts be elected and dismissed by boards of judges of these courts. In addition, under this law, judges can be dismissed from administrative offices (except for administrative offices within the Supreme Court of Ukraine) at the request of the High Council of Justice, contradicting section 131 of the Constitution of Ukraine which provides that the High Council of Justice is not entitled to make relevant submissions for the dismissal of judges from administrative offices.

Flaws in the normative regulation of requirements for applicants and procedures for the selection and appointment of judges become an institutional background for situations defined in our research as "complex forms of corruption" :

a) "a judge-dependant" – a judge who each month receives certain funds or other benefits from somebody in cases of a need for assistance in settling problems requiring judicial "intervention"
b) "a proxy-judge" – using flaws in the procedures for judges' appointments, members of parliament, business people and other persons assist in the judicial appointments of persons depending on them who exert influence to pass "necessary" judgments. The career of such judges can be quite fast, and their actions to protect the interests of persons who ensured their career are rather intensive.

The possibilities of neutralizing such negative trends are very limited. Internal mechanisms based on professional institutions have appeared to be inefficient. Great expectations were placed on the development of appropriate parliamentary procedures. However, experience shows that these expectations appeared to be groundless.

The election of judges in the Parliament of Ukraine unreasonably depends on the subjective aspects, moods and tastes of the members of parliament, who sometimes even use the process to take political revenge on judicial applicants by, for instance, neglecting their official duties in the election of judges and refusing to vote.

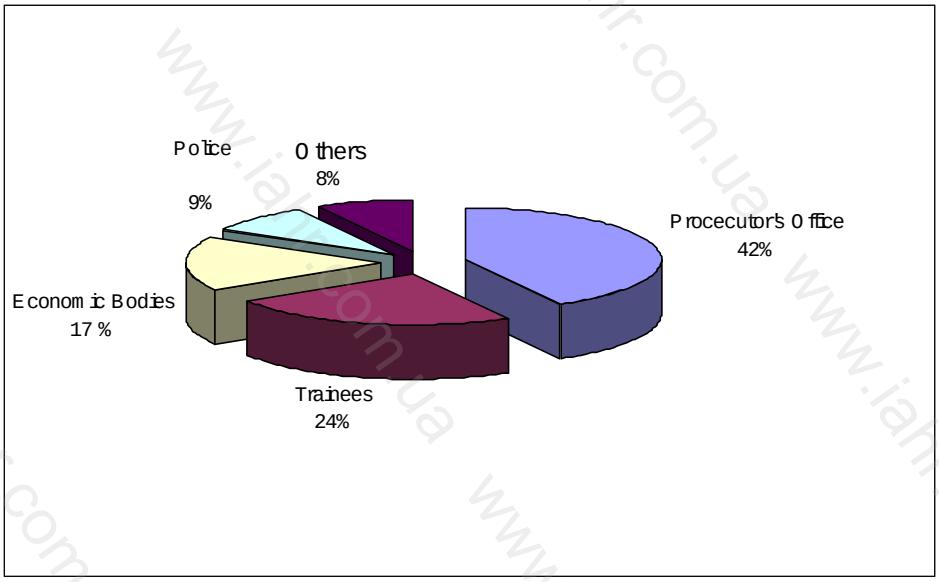
Example : The appointment for life of Pavlo Gvozdyk as a chief judge of the Ivano-Frankivsk City Court. A number of attempts were made to bring criminal charges against him, but the Office of the Prosecutor General of Ukraine refused to institute legal proceedings. The Parliamentary Committee on Legal Policy did not find any reasons to refuse the appointment for life. But members of parliament refused to support this recommendation during the vote. The remark of the Chairman of the Parliament to the members of parliament was rather characteristic in this

respect : "I am talking to you : please don't fray our nerves, or just say that you simply do not want to work, or vote if there are no claims against him" ("Law & Business", May 9, 2003).

Dubious consequences may arise from the recruitment to the courts of former employees of the police, the Office of the Prosecutor General and the National Security Service who resigned from these bodies for various reasons including professional impropriety.

The activities of law enforcement bodies aim at discovering crimes and apprehending criminals : such duties result in the development of an accusatory bias. This consideration is particularly dangerous in the context of the long tradition of inquisitorial justice that prevailed in the USSR. The judge, on the contrary, must be objective and fair in the courtroom. The following table shows the typical proportions of applicants for judicial positions.

Table 7. Applicants for judicial positions in one region



Comments on Table 7 : Judicial personnel is comprised mostly of former Prosecutor General's employees. The numbers of judges who used to work in the police (9%) and Prosecutor General's Office (42%) may foster corrupt connections between judges and other parties to legal proceedings, where the intermediaries are employees of law enforcement authorities and the forms of corruption are borrowed from the practices employed in those bodies. "Others" include attorneys, representatives of tax administration, and so on. "Economic bodies" include applicants from public bodies and agencies, specifically, legal departments and officials with law degrees. "Trainees" include employees of the courts, the State Court Administration and justice authorities.

The fact that in one of the last interviews (January 2004) the Chairman of

the State Judicial Administration of Ukraine V. Karaban said "the search to attract judicial staff still remains very pressing for Ukraine" is indicative in this respect.

Therefore, the integrity of judges shall be ensured as early as the stage of their selection and appointment (election). This requires both increasing the requirements of judicial applicants and improving the procedures for the selection and appointment of judges in order to encourage transparency and democracy in action.

4.2 Corruption risks related to the personal conduct of judges

The opinion of the general public on integrity in the judicial system is mostly shaped by the personal conduct of judges, who are perceived not only as "procedural figures" ("a device for professing the law", according to Montesquieu), but also as real people and members of specific communities. The conduct of judges is regulated in two ways : based on the requirements of the procedural law and on ethical standards.

Professional ethical standards play an important part in the regulation of conduct of judges in two ways. They :

1. allow judges to assess their actions in administering justice and to compare them with the requirements of their high-profile profession
2. serve as a uniform criteria system in the assessment by the authorized bodies of different aspects of a judge's conduct

Ukraine still faces the problems of establishing an accurate definition of ethical standards for legal proceedings and ensuring their implementation in judicial practice.

The Constitution of Ukraine does not contain any moral requirements on the conduct of judges.

The Law of Ukraine "On the Status of Judges" contains fragmentary provisions related to judicial ethics (section 5-6). In particular, to avoid conflicts of interest judges are forbidden : to be members of political parties and trade unions, to take part in any political activities, or to have representative mandates ; and to embrace any other paid position or perform other paid jobs, except for scientific, teaching and creative activities. Pursuant to section 6 of the Law of Ukraine "On the Status of Judges", judges shall : ensure complete, comprehensive and objective consideration of cases within the terms established by the law ; observe requirements of the service discipline ; and not allow any actions that may discredit their position or call into question their objectivity, impartiality and independence.

An important place in the regulation of judicial conduct will belong to the Code of Judicial Professional Ethics approved on October, 24, 2002 at the 5th Congress of Judges. Although this act was adopted in order to introduce modern ethical standards of the judicial profession in the conduct of judges, it has not become an effective instrument in the regulation of judges' conduct.

Basic problems in the regulation of the ethical conduct of judges

Slowness in the development of ethical rules of conduct for judges has resulted in a situation where adopted rules remain a formality, since other corporate standards – not necessarily positive ones – have emerged, such as the practice of "coordination" with judges of the appeals courts for the decisions made by the judges of trial courts.

Corresponding amendments have not been introduced in the Code of Professional Ethics of Judges since its first provisional adoption (February, 24, 2000). The last version approved at the 5th Congress of Judges (October, 24, 2002) completely reproduces the previous one.

The general nature and vagueness in the wording of existing provisions, specified in the Code of Professional Conduct of Judges, is a result of unjustified borrowing of the practices of other countries, especially those that use the Anglo-Saxon system of law.

For instance, section 12 of the Code of Legal Ethics of Judges stipulates that "the judge shall do all the best so that his/her conduct be beyond reproach of a sound, law-abiding and informed individual".

There is an absence of definitions for concepts that are essential for the real application of ethical standards and necessary for the interpretation of such concepts both in the Code and the Law on Public Judges (subsection 4 of section 6).

Example. The concept of "misconduct that discredits justiceship and calls into question the objectivity, impartiality and independence of judges".

The actual application of the Code of Legal Ethics of Judges in the work of judges and in the operations of bodies of judicial self-governance is insufficient.

The chairman of one of the qualification commissions for judges indicated that the presence of the Code helps in the commission's disciplinary proceedings. At the same time, the Code's enforcement is limited since, according to its preamble, these provisions cannot be applied as the basis of disciplinary responsibility of judges.

Conflicts of interest in the activities of judges

An analysis of procedural legislation demonstrates incompleteness in the normative definition of procedures for the regulation of conflicts of interest in the activities of judges, which is limited to a single, precisely formulated requirement.

The law requires that judges should reject participation in legal proceedings where their objectivity can be questioned. Judges should also verify if they or their family members, relatives, friends or persons and organizations with which they had or have common business or other relations

have any interests in the cases under consideration. The rule of the Constitution of Ukraine that bans judges against making statements as to the guilt of the accused before the verdict reading (section 62) could to a certain extent be attributed to the regulation of the conflict of interests.

These general provisions shall be specified, taking the specifics of the Ukrainian situation into account. In particular, in order to prevent conflicts of interests it is recommended that the law provide for the following :
- *A ban against holding the positions of chief judge of a court,* if a spouse or close relative of the individual (a parent, child, sister, brother) work as judges in the same court, if one of them works as a chief justice of the court of appeal to prohibit working in the regional courts and to hold judicial positions throughout Ukraine if one of them works in superior courts.
- *A ban against considering appeal cases or cassation cases* if the judge has taken part in the trial or cassation proceedings as well as in cassation court hearings after reversal of court decree ruled with his/her participation.

Ethical standards, in addition to provisions of procedural law, should be an efficient means of resolving conflicts of interest. In practice, drafters of codes of ethics in Ukraine ignore this problem. At the same time, according to the findings of expert polls, 40-70% of judges regularly face conflicts of interest.

Specifics of the liability of judges for corruption

The problem of recognizing judges as subjects of corruption. Under the section 2 of the Law of Ukraine "On the Struggle Against Corruption" of October 5, 1995, judges are subjects (offenders) of corruption. Positively, the usefulness of recognizing judges as subjects of corruption today is obvious.

In its Order "On the Procedures of Consideration of Corruption Cases and Other Offences Associated with Corruption by Courts", the Plenary Session of the Supreme Court of Ukraine tried to settle the issue, and resolved that "*subjects of corruption offences include judges, Prosecutor Generals, investigators…*» (Section 5). However, this explanation is disputable because these persons are not civil servants in the meaning of the Law of Ukraine "On the Public Service" (section 9). Besides, orders made by the Plenary Session of the Supreme Court of Ukraine are only of recommendatory force in the application of Ukrainian laws by the courts. In the past years, subjects of legislative initiative have tried to solve the problem of recognizing judges as subjects of corruption (draft laws of Ukraine "On Amendments to the Law of Ukraine", "On the Struggle Against Corruption" of February 14, 2000 ; January 30, 2003) and have introduced corresponding bills for consideration in the parliament. But these actions failed to produce concrete results.

Specifics of the administrative and disciplinary responsibility of judges for the perpetration of corrupt and corruption-related actions. The spe-

cial legal status of judges predetermines the need for the detailed development of mechanisms of their responsibility for the perpetration of corrupt actions in order to prevent encroachments on the independence and immunity of judges. In this connection, it is advisable that legislative guarantees of a sound and justified bringing-to-account of judges for corrupt actions be regulated, including :

- An accurate definition of the grounds for responsibility (outlining the scope of corrupt activity for which judges would be liable). The Law of Ukraine "On the Struggle Against Corruption" shall provide for individual types of corrupt action that are specifically inherent to the judiciary.

- Establishment of *uniform* procedures for bringing judges to administrative and disciplinary account for the perpetration of corrupt actions ; these would include two types of proceedings, administrative and disciplinary.

The idea that unprecedented corporatism within the judiciary is increasing after the introduction of the Law "On the Court System of Ukraine" seems confirmed, firstly, by the fact that there is an absolute majority of judges on qualification commissions, and secondly, by the fact, that the new Law of Ukraine "On the Court System of Ukraine" part 2 section 97 aims at limiting possibilities to respond to offences of judges and making them disciplinary accountable on the initiative of the Prosecutor General. Such views demonstrate problems in the operations of qualification commissions. Indeed, the majority of commission members (6 out of 11) are judges. The participation of representatives of the legal community is an instrument of control of the public over the judiciary. If bringing judges to disciplinary responsibility on the initiative of Prosecutor General is approved, the independence of judges in disciplinary procedures will be derogated. Enhancing the efficiency of the disciplinary responsibility of judges shall be accompanied with an increase of transparency in their work, although a significant part of procedures shall remain closed to the general public. However, eventually the main problem is the need to protect this institute from suspicions of corporatism.

The problem of the criminal liability of judges for the perpetration of corruption crimes remains unresolved. It is caused by two basic issues : 1) the scope of the corruption crimes committed by judges ; 2) the specifics of making judges criminally liable.

While the Criminal Code of Ukraine does not cover corruption, it contains rules that provide for liability for actions that are corrupt in essence, such as *: the misuse of power or office abuse* (section 364 of the Criminal Code) ; *receiving a bribe* (section 368 of the Criminal Code) ; and *the misappropriation, peculation or capture of other's property by the abuse of office by an official* (part 2-5 section 191 of the Criminal Code). It is impossible to make a comprehensive list of corruption crimes because the Criminal Code does not contain any provisions on this issue ; besides, the Law of Ukraine "On the Struggle Against Corruption" only gives a definition of corrupt actions (part 2 section 1) without their accurate specifi-

cation. Therefore, if a willfully illegal sentence, decision, opinion or order made by the judge (section 375 of Criminal Code) was associated with the gain of economic benefits, services, privileges and other advantages, this action shall be deemed corrupt (if the judge is recognized a subject of corruption).

The investigation and consideration of cases involving judges should be subject to procedural safeguards aimed at protecting the independence of the judiciary. However, the Criminal Procedure Code of Ukraine (CPC) does not contain any special rules in relation to the regulation of procedures for the bringing of judges to criminal liability. It would be expedient for the CPC to provide a separate section on procedures related to the bringing of criminal charges against judges and employees of law enforcement bodies.

4.3. Corruption risks in the functioning of the courts

Finding an explanation exclusively in "personal" factors would unreasonably simplify the issue. This approach is frequently reflected in the public's opinion and in mass media publications. The question "Who is to judge?", while being an important one, would hardly be the core of the explanation for corruption in the courts. The research demonstrates the presence of institutional preconditions for this social phenomenon. These preconditions differ in content and nature. A comprehensive list of these causes is difficult to compile. However, in our opinion, the following considerations are worth attention as primary causes.

Options to use flaws in procedures for corrupt actions

All types of judicial proceedings (criminal, administrative, civil and economic) have the following specific procedural features (sometimes defined as flaws, but that would be an exaggeration) that, under specific conditions, may be used for the perpetration of corrupt actions and which quite often provoke such actions. For example, flaws in the procedures for considering criminal cases established by the Criminal Procedure Code introduce corruption-prone functional contradictions or discretionary powers of judges :

- the duty of the court to use all the means stipulated by the law for a comprehensive, detailed and objective inquiry into the circumstances of a case (section 22 of CPC) and to close a case if the Prosecutor General refuses to proceed to a public prosecution, or a victim does not demand further consideration of a case and does not seek prosecution (part 2 section 282 of CPC)
- the duty of the court to close a case if the Prosecutor General refused to proceed to a public prosecution, or a victim does not demand further consideration of a case and does not seek prosecution (part 2 section 282 of CPC) ; and the duty of a court to acquit in cases when the facts of crime are not established, when the actions of the defendant are not criminal and when the participation of the defendant in the perpetration of a crime has not been proved (4 section 327 of CPC)
- the independence of judges (section 18 of CPC) and the duty of higher courts to ensure the supervision of judicial activities (section 24 of

CPC) in the absence of precise definitions of the contents of such supervision in the legislation

- the duty of the court, while maintaining objectivity and impartiality, to ensure the conditions necessary for the performance by the sides of their procedural functions and the exercise of their rights (part 6 section 16-1 of CPC) ; and the duty of the court to impose on the body that investigated the case to perform certain investigatory actions (section 315-1 of CPC)
- the legal status of the court as a body of state responsible for the crime rate in society (often alluded to in political statements) and the duty of the court to consider a case fairly (section 6), while maintaining objectivity and impartiality (part 6 section 16-1 of CPC). This generates so-called "accusatory bias" in court proceedings and in essence creates illegal ties between courts and prosecuting agencies.
- the duty of the court to institute criminal cases (section 4, 27 of CPC) and to consider cases objectively and impartially (part 6 section 16-1 of CPC). Since, in bringing criminal charges the court cannot be unbiased, the possibility for the court to establish the truth and to issue a lawful and sound judgment is limited. Initiation of criminal cases by the court may have the following consequences : first, it develops conviction in the guilt of persons in perpetration of crime ; secondly, the court that instituted a criminal case is entitled to consider it further in substance. In these cases, it is practically impossible to convince the court of the innocence of the accused.
- the duty of the court to interpret all doubts as to the validity of the guilt of the person in its favour (section 62 of the Constitution of Ukraine) and the duty of the court to return a case for additional investigation in case of incompleteness or flaws in pre-trial investigation when such incompleteness or flaws cannot be eliminated during the court session (section 281 of CPC)
- the duty of the court to examine cases only in relation to the accused and only within charges against the accused (part 1 section 275 of CPC) and the duty of the court to expand or to change charges in case of need (section 276, section 277 of CPC) or to institute a case on the basis of new charges (section 276 of CPC) or against new individuals (section 278, 279 of CPC)
- the discretionary powers, stipulated in the legislation, of judges to set the order of the examination of evidence during court session that might be favourable to one of the parties (section 299 of CPC)

Options available in existing procedures for the selection of an assessor and jury members in consideration of cases, which make it possible to form a "submissive" board of people's representatives (section 67, 70 Law of Ukraine "On the Court System in Ukraine").

The institution of assessors and jury as one of the forms of "public scrutiny" for fair legal proceedings is a deterrent to the growth of corruption. No matter how passive assessors and jurors are, their presence in the courtroom is positively important. They help to prevent judicial infractions and misuses. With this in mind, it is impossible to agree with *suggestions to waive the presence of jurors and assessors.*

Insufficient openness and transparency of legal proceedings

The transparency of litigation and the comprehensive recording of proceedings by technical devices is one of the basic principles of legal proceedings pursuant to section 129 of the Constitution of Ukraine. Corresponding rules were incorporated in the procedural legislation of Ukraine. For instance, according to section 370 of the CPC, the verdict or the order of a court in any case shall be annulled if the course of litigation stipulated by section 87 of the CPC is not recorded by technical devices, since breach of these requirements of procedural law is deemed to have prevented or to prevent a court from giving a full and comprehensive consideration of the case and from giving a ruling that is a lawful, justified and fair verdict or sentence. The general number of technical sets required for the recording of litigations in local and appeal courts amounts to 2,630 sets and costs 31.6 million hryvnas. According to information provided by courts of appeal, a significant number of cases are postponed for an indefinite term due to the requests of the litigation sides to record proceedings with technical devices. The majority of suspended cases in which individuals were charged with serious crimes and had been under arrest for a long time was registered in Donetsk (49), followed by Dnipropetrovsk (21), Odessa region (27), and the Autonomous Republic of Crimea (14). The accessibility of court decisions is a separate problem, as the corrupt background of some court opinions is often obvious and the impossibility to study the decision facilitates the perpetration of corrupt actions.

The presence of the non-procedural (actual) dependence of judges of different units of the court system may generate corruption risks. Such relations between judges of different court units are essentially of a subordinate administrative nature. In such cases, when considering a case a judge will be guided, first of all, by the sense of justice of the "the superior or the supervisor" from the higher court. The judges of local courts consult judges of courts of appeal in respect to decisions on cases in substance (qualification, sentences, the credibility or non-credibility of proofs). Sometimes an "area judge" gives consultations and informally instructs on criminal cases and edits drafts of verdicts and other procedural decisions. The procedure and assessment of the quality of the proceedings in the courts in this "area" depend on this judge. In this case, a judge of a higher court is not interested in the amendment or cancellation of decisions.

The power of the higher court to give instructions to subordinate courts provided for in the Ukrainian legislation can be used for corrupt ends. According to part 7, section 374 and section 399 CPC, an order of an appeal or cassation court is binding in the repeated consideration of a case in a trial court. By virtue of the said instructions, the trial court is obliged to follow and to reflect them in the verdict. In the case of a repeated hearing of a case, judges in their opinions are not bound by the decision of the higher court, which has no right to advise them on what sentence or cassation decision to make. Practice shows, however, that courts do not always comply with these requirements.

Example : A court verdict of the Criminal Chamber of Appeal Court whereby L's conviction for murder was annulled and the case was sent for new consideration. It was concluded that the statement that the conduct of the victim and her confession of adultery evoked strong emotions in L was not consistent with the case materials. Thus, the court of the higher instance actually proved the guilt of L and qualified his acts, and thereby violated requirements of part 3 section 395 of CPC. After receiving specific instructions as to what decision to make in considering the case again, the trial court followed instructions and left the verdict without changes.

Flaws in the normative and legal regulation of the immunity of judges limit the guarantees of immunity, thereby generating corruption risks:

a) flaws in procedures for instituting criminal charges against judges
Criminal cases against judges of general jurisdiction can be instituted on grounds stipulated by the law and by any official or body, as specified in section 98 of the CPC of Ukraine. In these circumstances the procedure of interrogating judges and bringing charges for the perpetration of crime, including the approval of a willfully wrong and illegal decision, can be used (and is used) to influence their service operations.

b) flaws in procedures of operative-search and investigatory activities and bringing judges to criminal liability
Operational, search and investigatory activities with regard to judges (search, inspection and seizure in office, place of residence, vehicle ; monitoring of telephone conversations ; personal search of a judge ; seizure of correspondence, belongings and papers and bringing of charges against a judge) can be performed only after the institution of a criminal case and only subject to a justified decision passed in relation to judges of the Supreme Court of Ukraine, judges of higher specialized courts, and judges of the Court of Appeal of Ukraine by the court panel of three judges of the Supreme Court Ukraine ; and in relation to judges of other courts by the court panel of three judges of the corresponding regional court of appeal or a court equated to it. These provisions on the immunity of judges should be stipulated in the Criminal Procedural Code, the Law "On the Status of Judges" and the Law "On Investigation Activities".

c) ignoring procedures in cases of administrative offences committed by judges
Under part 3 section 13 of the Law "On Public Judges" a judge cannot be brought against his or her will to any state body in proceedings in cases on administrative offences. "A judge detained on suspicion of the perpetration of an administrative offence for which the law provides sanctions shall be released immediately after identification." Practice shows, however, that law enforcement authorities ignore the requirements of the law in force.

Example : Employees of the Office of Prosecutor General broke into the study of a judge who considered a case on elections-related violations and conducted a search and seizure of documents.

d) low efficiency in ensuring the security of employees of courts, members of their families and close relatives

The security of employees of courts, members of their families and close relatives is ensured under the Laws of Ukraine "On the State Protection of Employees of Courts and Law Enforcement Bodies" and "On the Security of Persons Who Take Part in Criminal Legal Proceedings" by special police subunits or departments for the control of terrorism and the protection of participants of criminal legal proceedings of regional bodies of the Security Service of Ukraine depending on the investigative jurisdiction of the criminal case. The security of employees of the courts and law enforcement authorities in criminal proceedings is ensured under their orders by a law-enforcement body. This protection reduces the risk of the corruption of a judge because of a threat to his life or the life of his family members. In reality, physical and psychological pressures on judges are still exercised.

One of the most essential corruption risk factors is flaws in the normative regulation of the funding of courts.

According to section 130 of the Constitution of Ukraine, the financial support and administration of courts is funded from the State Budget of Ukraine. At the moment, the government fails to cover all needs of the judiciary. Despite the fact that budget revenues have grown by 110%, the real funding of courts does not exceed 70%. Thus, in 1996 funding of judicial system comprised 36.7% of the required amount, 39.4% in 1997, 55.8% in 1998, 58% in 1999, 65.4% in 2000, and 60.5% in 2001. Budgetary allocations for 2004, as stipulated, will make up 564 million hryvnas, which will exceed the allocations for the previous year by 60% ; however, this sum will cover not more than 50% of the required amount. Corruption risks arise in the funding of the court system from local budgets or from other sources. In this case, the dependence of judges on local authorities increases. In this connection, the constitutionality of the Decree of the President of Ukraine "On Additional Measures to Ensure Appropriate Conditions for the Work of Judges and the Administration of Courts" No. 1564/99 of December 15, 1999 could be questioned. The Decree provides for the funding of courts from the budget of the Autonomous Republic of the Crimea and other local budgets. Nevertheless, unfortunately because of insufficient funding the heads of many courts are still forced to address local administrations for funds.

The results of interviews with judges show that the funding and covering of some categories of court costs (repair of rooms, equipment, etc.) from charity funds remains the major corruption risk factor. As a rule, these are specific funds created within law-enforcement bodies. The origin of the funds in these charities is often doubtful, and their spending procedures are unclear. Research material show that such funds are often part of corrupt relations.

Sections 120, 121 of the Law of Ukraine "On the Court System in Ukraine" provide for the participation of judiciary bodies responsible for the funding of courts from the state budget in the budgetary process. In a nutshell, these sections stipulate that the funding of courts should be car-

ried out in full, according to corresponding expense items in budgetary classification, and that the government has no right to reduce these costs subject to the collection of budgetary funds. However, the specified law does not provide for mechanisms for the enforcement of these provisions.

Execution of court decrees

The execution of the court decrees in many respects determines the social efficiency of legal proceedings. Therefore, it is important to take into account the presence of corruption risks in the execution of court decrees. These risks are the following :

- *the presence of unjustified discretionary powers and referral to requirements unforeseen by the legislation*

The fact that under part 1 section 55 of the Law "On the Execution of Court Decrees" (arrest and seizure of property), the types, volumes and terms of restrictions to use property are established by the public executor in each particular case, taking into account specifics of the property, its value to the proprietor or owner and its need in use and other circumstances is highly indicative. The Law of Ukraine "On the Enforcement of Court Decrees" does not contain descriptions of some procedures and does not refer to regulations that would define them. Thus, section 66 of the Law "On the Execution of Court Decrees" contains a reference to a non-existent Law "On Public Tenders".

- *the absence of the regulation of legal proceedings related to control over execution of court decrees*

If a public executor breaches the terms of execution, his actions can be appealed in the court and deemed illegal. The issue of the contents of the resolution part in the court's decrees – in particular, if execution proceedings have been started and actual actions have taken place – is still unclear.

The issue of addressing the courts not only for explanations on decisions, which are subject to execution, but also for explanations as to the execution of judgments remains unsolved.

- *the absence of legislative regulation of the liability for damage caused by the state executor to physical or legal persons in execution of court decision*

- *the absence of effective and real encouragement of flawless operations of state executors*

A public executor who has ensured the actual, proper and lawful performance of execution receives a reward of 2% of the amount collected or the cost of property, but no more than ten untaxed minimal incomes of citizens (section 47 of the Law "On the Execution of Court Decrees"). However, according to section 4.17.2 of the Instruction on Execution, the chief of the department of state execution service controls the admissibi-

lity of the grounds for payment of the reward, summarizes them with respect to each state executor and files a recommendation to pay out compensation with the higher department of justice. As a result, this additional approval process creates corruption risks.

- *the absence of requirements as to the substantiation of the decisions made by the civil servant*

Example : Part 3 section 26 of the Law "On the Enforcement of Court Decrees" states that "the state shall make a resolution as to refusal in opening of execution proceedings that shall be sent to the applicant the next day". Nevertheless, the requirement of substantiation of the decision is not stipulated, and this flaw is being actively misused.

Research shows that corruption risks arise at all stages of court proceedings, from the selection and appointment of judges to the execution of court decrees. As a result, there is a need for a systematic approach to counteract corruption in legal proceedings. The court system should be a cornerstone of integrity in society. The efficiency of the anti-corruption campaign largely depends on this.

5 POSSIBLE SOLUTIONS : CONCLUSIONS AND SUGGESTIONS

Government integrity has been the focus of public discussions for Ukraine's entire political history as an independent state. Important political and organizational legal measures were taken in 1992-1995 to prove the country's ability to ensure that government operations are corruption-free, open, transparent and honest. However, these steps have not produced the desired results and have turned into the "state's fight against its own shadow".

Campaigning against corruption becomes an extremely complex issue, but it is feasible if we stop considering it in a simplistic way as "mismanagement" or "the improper fulfillment of perfect rules by imperfect people". An inclination to rely on repression and to consider law enforcement bodies as a major anti-corruption agent may develop. Approval of the Concept of the Struggle Against Corruption, which for the first time set prevention of corruption instead of "combating" corruption as a priority, demonstrates a recognition of the illusiveness of such an approach. The Concept gave hope for change because it provided a realistic vision of the situation in Ukraine, took into account international practice and relevant standards, and identified all major steps to be taken to eliminate the basis for corruption. Nevertheless, real changes have not taken place, the Concept has remained a political document and the situation in general has deteriorated.

There are some crucially important and new aspects of the situation in 2003-2004 to be taken into account in the process of developing an implementable anti-corruption strategy :

- The level and forms of corruption clearly and unequivocally depend on the general maturity of democratic institutes and the presence of efficient and real efforts in reforming major spheres of public life (such as administrative procedures, the taxation system, the regulatory activity of the state, and the resolution of social problems).

- Corruption has become systematic, and – more than the simple fact that it has permeated all vital spheres of society – it has turned into a functionally important means of their existence ("normal functioning").

- All political initiatives in the area of corruption control appear to be inefficient, as can be seen in the "chronic neglect" of decisions previously passed in this field.

- The public's tolerance of corruption is growing stronger. In the perception of the main social groups, the recognition of the damage caused by corruption and the readiness to use corrupt means to settle various daily problems are merging (very often an honest official does not satisfy both the public in general and business people in particular as the most

active part of society). The most negative result of this situation is the inability of major social groups to become active players in anti-corruption efforts.

- Corruption has permeated the main law enforcement bodies authorized to take anti-corruption measures

- Civil society organizations are weaker than ever. The mass media, the "watchdogs of democracy", are constrained by dependence on their owners and by political censorship, and they avoid objective coverage of the problem. Civil initiatives are constrained by disillusionment and social apathy on the large part of the population. Non-governmental organizations are mostly slow and dependent on foreign "donors". They are often founded under the patronage of public institutions as part of public relations campaigns.

In these circumstances, the question is not "What to do?" but rather "How to do it?", "Who shall do it?" and "Who shall be responsible for neglecting these efforts?".

International practice shows that the presence of social forces interested in controlling corruption is an important condition for an effective anti-corruption campaign[32]. An analysis of public opinion may contribute to the general understanding of the level of maturity that drives anti-corruption forces in Ukraine. Our survey shows that almost half of those interviewed (48.5%) feel that social forces interested in reducing corruption are non-existent in Ukraine, 45.5% believe that "these forces do exist in Ukraine but have no impact" and that only 5.9% consider that "these forces do exist and are actually able to overcome corruption". An analysis of the specific social forces mainly associated in the public's opinion with the anti-corruption movement is very revealing. In the opinion of not more than a quarter of those interviewed (24%), these forces involve public institutions (including law enforcement bodies), while slightly fewer (22%) named civil society institutions (mass media, legal aid organizations), and most (51%) named political forces (parties and politicians, mainly the opposition). These assessments show the excessive political bias of the problem and the public's disillusionment in the ability of existing public institutes to overcome corruption.

Polls of the general population and of business people have identified the attitude of respondents to the main public institutions that could be referred to as the bodies able to detect and control corruption. The results of the survey are given below with the percentage of those who have confidence in the ability of these bodies to counteract corruption) :

[32] See, for example, « Шеф. Моріс Дюплессі та провінція Квебек », що було виконане в рамках Українсько-канадського проекту сприяння доброчесності.

	Population	Business People
President of Ukraine	10.7	6.0
Parliament	9.2	6.7
Cabinet of Ministers	12.2	9.4
Police	12.4	11.7
General Prosecutor's Office	15.0	16.1
Security Service of Ukraine	23.4	24.8
Courts	17.7	16.3
Tax Administration	14.1	9.4
Ombudsman in the Parliament of Ukraine	28.8	16.4
Local self-governance bodies	12.4	8.1
Legal advocacy non-governmental organizations	31.4	26.9
Political parties	16.0	8.7
Mass Media	39.5	31.2
Social and Political Associations	24.7	16.5

Our findings show there to be a rather vocal distrust among the public in the ability of the majority of public bodies to counteract corruption. At the same time Ukrainian citizens consider the mass media to be the most important social institute in the detection of corruption. In our view, such assessments reveal not so much the significance and social importance of the mass media as the public's unawareness of the potential force of the law and its general distrust of the capacities of public institutes (legislative, executive and judicial bodies).

The subject of corruption is quite conspicuous in Ukrainian mass media. In the findings of our survey only 24.8% of interviewees did not encounter any articles dealing with corruption in the past year, while 7.6% read such materials only once and 67.4% read such materials regularly. However, the coverage of corruption is limited by the typical flaws of the Ukrainian mass media. As proved by extensive studies conducted in Ukraine in the past few years, the main problem remains the dependence of the mass media. Our findings show that 58.0% of respondents believe that censorship hampers an objective assessment of the level of corruption in Ukraine.

At the same time, the latest studies show the general level of confidence in the mass media to be increasing. The number of Ukrainians who trust news and analysis programs substantially exceeds the number of who do not. In general, the mass media and television in particular enjoy wide public confidence. 64% of respondents say that they have confidence in

television, 30% that they do not trust it. 61% of respondents indicate that they have confidence in newspapers (33% do not), and 61% have confidence in radio broadcasts (32% do not).

Disillusionment in the ability of civil society institutions to efficiently counteract corruption is dangerously high. Only 19.8% of respondents believe that journalists are incorruptible and that the mass media serve the truth rather than those who employ them. The institutions of civil society, primarily the independent mass media, play an extremely important role in the detection and coverage of corruption cases and the presentation of information on subsequent punishment. This relationship fosters an atmosphere of integrity and confidence in the public service and also helps to consolidate the principle of the inevitability of punishment for corruption, because the effectiveness in controlling corruption depends on the values of the public's representatives and political leaders. Media coverage is of general importance as a preventive measure, and it directly affects the likelihood that responsible agencies will apply anti-corruption legislation. Under the Criminal Procedural Code of Ukraine, information published in the press is a ground for instituting a criminal case.

Ukraine has yet to develop an efficient system for influencing the prevention of corruption and its control by other institutions of civil society, particularly non governmental organizations. NGOs that declare their intentions to make efforts against corruption unfortunately focus on settling the private problems of their members and their families. This practice often generates long-term and unsuccessful correspondence on countermeasures against corruption, with governmental bodies using tendentious expressions and methods of influence. This procedure does not improve the public profile of such organizations ; rather, it can clearly reveal that their struggle against corruption in reality consists only of the settlement of private problems and a concern with image-building among local political circles.

The interviews show few results of the anti-corruption efforts of non governmental organizations. Only 11.4% of respondents (among the general population) said that they know about anti-corruption efforts in Ukraine. However, 92% of these efforts were initiated by political organizations (parties, blocks) and included the dissemination of "discreditable evidence" against political opponents, and were often of a situational ("market") nature. As the modern political history of Ukraine shows, political forces normally forget their anti-corruption positions when they come to power.

According to the mass media, 200 non governmental organizations in Ukraine are engaged in anti-corruption efforts. There were two attempts to unify these efforts into a joint "anti-corruption front". One was made "on an initiative from the top" with the implementation of the Concept of the Struggle Against Corruption and united nongovernmental organizations that were created with the support of the authorities or were loyal to them. This anti-corruption association was led by the head of the State Tax Administration. However, according to experts, the actual results were minimal. The second attempt to consolidate anti-corruption forces

was made within the network of the Freedom of Choice Coalition, an association of non governmental organizations. However, the activities of its member-organizations have not been an essential factor against corruption and have had no impact either in the regions or in the country in general, since they are carried out chaotically, unsystematically, and often unprofessionally and are subject to "donors". The interviews with the general public and with business people did not mention any actions taken by these organizations. Experts mention these organizations from time to time, but they only indicate information on the existence of these organizations without characterizing their activities. The situation demonstrates the presence of a serious problem in Ukraine – non governmental organizations (except for political parties) still have no real impact on the struggle against corruption.

It is advisable to institutionalize the role of non governmental organizations and other segments of civilian society in the field of countermeasures against corruption in the new version of the Law "On the Struggle Against Corruption". In many respects, however, such activities depend on public opinion but, as shown by the respondents, the general attitude to corruption is much more tolerant in Ukraine than in other societies.

The survey results point to several suggestions for developing possible ways to control corruption. These suggestions are subdivided into several sections.

Legislative process

Concerning the law of Ukraine on the legal acts system and the scope of legal regulation, which provide a comprehensive and exhaustive list of all legal acts that governmental and non-governmental bodies are entitled to issue, it is recommended that these be adopted, their hierarchy be established and the scope of the legislative powers of all governmental and non-governmental (that is, the issues and types of statutes they are entitled to issue) be developed.

It is recommended that a legal framework of lobbying (following the adoption of the corresponding law) be set as the main prerequisite for a transparent and honest system of representing social and collective interests in the legislative bodies.

It is recommended that a new law on the President of Ukraine outlining procedures and the scope of rule making by the head of the state be passed and that the form of the President's participation in the legislative process (signing a law, interposing a veto, overriding a veto, publishing of the law) be clearly defined.

It is recommended that a legislative ban to issue laws and regulations not provided for by the Constitution and the laws of Ukraine be introduced for all public executive bodies, and that all central executive bodies be forbidden to make comments and interpret the law by issuing instructions, letters, comments and methodological recommendations.

It is recommended that a legislative rule be introduced that provides, in case of the need for the regulation of an unregulated issue, that the responsible executive body will have to submit a draft to the Cabinet of Ministers instead of interpreting the matter themselves (by issuing instructions, rules, recommendations). The Cabinet of Ministers shall be entitled to decide whether to draft a corresponding bill based on the submitted proposal or to send it to the Administration of the President in order to draft and approve a document by the head of the state, or to develop and to approve the resolution of the Cabinet of Ministers on this issue. The Cabinet of Minister shall follow the law in this process.

It is recommended that laws to determine the legal status of all central executive bodies (such as the Laws of Ukraine "On the System of Executive Bodies", "On Executive Bodies", a separate law on individual executive bodies, similar to the Law "On State Tax Service" or the Law "On the National Bank of Ukraine") be developed and introduced in the Parliament of Ukraine.

It is recommended that the Law of Ukraine "On the Rules of Parliament" be passed, outlining the procedures for adopting laws (all stages of the legislative process, starting with an assessment of needs in regulation of particular field, bill drafting, bill drafting procedures, the exercise of the right of legislative initiative, to official publication procedures, focusing on the identification of the general principles of professional legal review and the assessment of the economic efficiency of a bill and ensuring public scrutiny).

It is recommended that the Law of Ukraine "On the Official Publication of Laws and Regulations" be adopted (or that this procedure be stipulated by the law of Ukraine on the legal acts system and the scope of legislative activity).

It is recommended that the system of the state registration of rules and regulations be regulated by means of the development and approval of the Law of Ukraine "On State Registration of Legal Acts".

It is recommended that a procedure be introduced for the presidential veto of a law by issuing a regulation (the title of the regulation must differ from decrees and resolutions) and be subject to mandatory publication and registration in the legal database. It will be then impossible to return laws repeatedly to the parliament and to neglect cases when the parliament overrides the presidential veto.

In order to prevent any possible corruption risks in the new laws it is important to improve the system of a comprehensive legal review for all bills. The review should include :
- a forecast of possible negative results of a bill's adoption
- an analysis of possible corruption risks in the practical application of the law

It is recommended that a system of real public scrutiny of the legislative process be introduced and that the practice of applying the Law "On Na-

tional Discussion of Important Issues of the Public Life of Ukraine" of June 4, 1988 be renewed, provided it is in compliance with the Constitution of Ukraine.

Executive bodies

It is recommended that the operations of administrative personnel be improved and optimized, based on the principles of rational democratization, and that the number of public offices be reduced. The implementation of these measures, however, shall be reasonable and justified.

It is recommended that flaws in the regulations in the area of public service be consolidated to improve the quality of legal regulation and to eliminate conflicts.

Ukraine's intentions to gain membership in the European Union, thereby developing the Ukrainian public service system to the standards of European Union member-states, is totally justified.

Taking into account that work in the public service cannot be combined with representative powers, the Constitution of Ukraine shall provide for the mandatory resignation of a public servant in the event of his/her decision to represent public bodies.

It is recommended that the Code of Administrative Procedures of Ukraine (or the Law of Ukraine "On Administrative Procedures") be developed and approved to ensure a uniform approach to the organization of the operations of public offices. This Code (or Law) shall regulate relations arising in the proceedings on the following :

a) cases initiated by individuals or legal entities
b) cases initiated by executive bodies, local self-governance bodies, or other public officials, including exercise of powers infringing upon the rights and freedoms of persons and the legal rights of legal entities
c) appeals of individuals and legal entities against decisions, actions or a failure to act by executive bodies, local self-governance bodies and their officials.

The code should outline basic principles of efficiency, simplicity, uniformity and transparency of administrative procedures.

It is recommended that the Code of Conduct for the Public Service (based on Model Code of the Council of Europe) be adopted to consolidate standards of conduct and integrity for public servants and to ensure their binding effect, taking into account other international legal standards in this field. The Code should provide an overview of specific situations typical for all spheres of public administration, such as accepting gifts and dealing with conflicts of interest.

Taking into account the duties and other important functions of the Cabi-

net of Ministers, directors of state enterprises and senior officials of public agencies and organizations, and also acknowledging the need to set out adequate organizational principles of corruption prevention, detection and control and the elimination of corruption's consequences, it is recommended that the list of subjects (offenders) of corruption and other corruption-related offences contained in the section 2 of the Law of Ukraine "On the Struggle Against Corruption" be completed with the members of the Cabinet of Ministers of Ukraine and the heads of state enterprises, agencies and organizations.

To ensure the efficient management of personnel, the re-establishment of employees' potential and the prevention of corruption, it is recommended that section 24 of the Law of Ukraine "On Public Service" be amended to introduce provisions on staff rotations for public servants holding specified positions and individuals authorized to perform public functions, and to provide that the list of such positions and rotation procedures be determined by the Cabinet of Ministers of Ukraine. The Cabinet of Ministers should develop and approve the Resolution on Procedures of Public Service Rotations.

Taking into account the importance of improving public service efficiency and of ensuring openness and transparency in the performance of public duties, the Law of Ukraine "On the State Financial Audit of Income Declarations and Expenditures of Individuals Authorized to Perform Public Functions" should be developed and adopted. Declaring expenditures should become the main component of the financial reporting system. It is recommended that the law identify bodies of state financial audits and their authorities and controlling powers. In order to ensure the comprehensive legal protection of the legitimate interests of persons authorized to perform public functions, it is expedient that their rights and duties in the process of financial control be clearly defined.

Taking into account the need to ensure the lawfulness of the public service system and to detect potential options available to public servants, the Law of Ukraine "On the Public Service" shall be amended to introduce provisions defining the major requirements, conditions and procedures for the conduct of certifications. The law should define the main criteria of certifications : periodical and planned certifications, with transparency and impartiality ; the participation of representatives of the body involved in the work of certification commissions ; the right of employees to familiarize themselves with materials of certification ; the compulsory force of the decisions of certification commissions ; and the right to appeal decisions of certification commissions in the Central Public Service and the courts.

It is recommended that the public service system of remuneration be reformed as well. The main reform objectives will be the following :

a) to identify measures aimed at increasing remuneration standards and generating resources for their increase at both the national and the regional levels
b) to improve parameters of a uniform tariff scale of salaries of public

employees and to combine it with the active use of bonuses and additional payments and the promotion of highly qualified employees, including provisions to introduce bonuses to official salaries for continuous service and highly productive work

c) to ensure a stable increase of actual salaries, taking into account not only the increase in the cost of living but also the remuneration dynamics in the private sector
d) to renew the function of salaries as a factor of labour power intake and to advance salaries gradually in accordance with the real manpower costs in the labour market

It is recommended that Ukrainian legislation more clearly define qualification requirements and other terms of holding patronage (support) positions and that it regulate the selection procedures for these positions.

It is recommended that the law provide for a list of data to be available within the public bodies and that it be defined in order to develop civil society and foster civilized business media.

It is recommended that all governmental bodies be required to develop departmental regulations in order to ensure better management of governmental offices, to increase the accountability of employees for assigned work and to control the abuse of public office and the bribery and corruption of public officials. It is also recommended that standard rules of operation for central and local public bodies be adopted and that their disclosure and communication to legal entities and private citizens be ensured.

It is recommended that a database of persons convicted for corruption offences or punished with administrative penalties be developed and used for special check-ups of applicants to public service offices and of employees already holding these positions.

It is recommended that the practice of compiling reserve rolls of candidates for senior public positions by acting heads of corresponding public bodies be stopped and that a system for developing an efficient personnel pool be developed in all governmental agencies.

It is recommended that the Register of Public Service Positions be developed and approved to enhance the efficient operations of governmental offices. This register should include the consolidated job titles of public servants subdivided into categories in compliance with the Constitution and the laws of Ukraine. It is also recommended that a standard public servant passport and standard regulations on the procedure for appointment to public offices be developed and approved.

It is recommended that a diversified network of public scrutiny of the operations of governmental bodies be developed and implemented to make the political and administrative activities of governmental bodies and public officials transparent to the public. To this end it is also recommended that the framework Law of Ukraine "On the Public Scrutiny of Governmental Activities" be adopted.

It is recommended that the functional conflict in the authorities of executive bodies, primarily the combination of control and revision functions with actual economic activity in the field, be eliminated and that the necessary amendments to the legislation be made.

It is recommended that regulatory legislation be amended to restrict licensing procedures, or when this is impossible, to ensure the simplification and transparency of corresponding procedures, in particular, to provide for the principle of "positive administrative silence" (namely, if a public agency does not respond within the time set, then the corresponding request or application shall be deemed to have been satisfied). It is also recommended that public bodies be authorized to partially process elements of administrative procedures (for example, the coordination of the specific decisions of other public bodies).

It is recommended that the overall independent scrutiny of the legitimacy and validity of the establishment of non-governmental organizations (firms, agencies) to provide commercial services, operations and procedures rendered free of charge or at a rate lower than that of public institutions be ensured, and that the mechanisms and reasons for a prompt and simplified rendering of these services by private organizations, together with the possibility of hidden corruption, be examined.

It is recommended that the liability of officials of public and local self-governance bodies who omit responding (pursuant to the law) to criticism in the mass media or to allegations of corruption or the infringement of human and civil rights and freedoms be instituted.

It is recommended that a database of allegedly corrupt business entities be created to exclude the possibility of their participation in public contracts.

It is recommended that standard legal patterns as to the procedures for the resolution of conflicts of interest of public servants (in particular, for such specific categories as ministers, heads of central and local public bodies, and persons who have left public service) be developed and introduced into the special legislation.

It is recommended that special legislation be amended to abolish alternative sanctions that can be imposed by public officials on individuals and legal entities for offences.

It is recommended that a legal ban on the funding and financial support of public bodies from non-budgetary sources (such as charity funds or other legal and physical persons) be introduced.

Court system

It is recommended that the powers of public bodies in human resources management for the judiciary system be regulated, and that the Law of Ukraine "On the Status of Candidates to Professional Judicial Positions",

outlining the principles of personnel recruitment, the procedures for the selection of judges and the requirements for applicants to these positions ; the social, educational, and professional backgrounds ; the personal and professional qualities and abilities, their examination and assessment procedures ; the powers of public bodies responsible for the selection of applicants to judicial positions ; and the rights and duties of individuals applying to the position of professional judge of Ukraine, be adopted.

It is recommended that amendments to the Constitution of Ukraine and the Law of Ukraine "On the High Council of Justice" be made and that this body be authorized to table in the Parliament of Ukraine recommendations on the appointment of all judges in the courts of general jurisdiction. Further, this body should be given a duty to select judges, thereby excluding the jurisdiction of court qualification commissions in this issue. This will ensure a uniform approach to the selection and assignment of judges throughout the country and preclude possible interventions by chief judges into the process. The qualification commissions will retain the duty to conduct qualification certifications of judges and to give them qualification grades and to undertake disciplinary proceedings against judges and other powers, as provided for by legislation in force. All this is essential to ensure the impartiality of judges.

It is recommended that the appointment to the position of chief judge be banned if a spouse or a close relative of the individual (parents, children, sister, brother) works as a judge in the same court, or to be prohibited from working in the regional courts if a spouse or a close relative works as a chief judge of the court of appeal, or from holding a judicial position throughout Ukraine if one of them works in the superior courts.

It is recommended that judges be prohibited from participating in appeal proceedings if a judge has taken part in trial or cassation proceedings as well as in cassation court hearings after the reversal of court decree that has been ruled with his/her participation (subsection 2 section 55 CPC of Ukraine).

As a general rule, the decision of the court that hears an appeal or cassation case is binding for the second trial in the trial court. Therefore, appeal (cassation) courts should be banned from a) making decisions as to validity of charges ; b) making decisions as to the credibility of evidence or as to the prevalence of evidence ; c) making decisions as to what criminal law shall be applied in the trial court ; and d) determining sentences.

It is recommended that the principles of competitiveness and transparency be introduced into the judicial selection process to attract qualified candidates to the judicial system. This provision should be implemented through a legislative provision on the publication of notices on vacant judicial positions and employment competition procedures. Further, citizens should be given the opportunity to affect the formation of courts, from the selection of applicants to the dismissal of judges.

It is recommended that formal requirements for applicants to judicial po-

sitions be legally consolidated. In particular, specified and obligatory training in the specialized academic sessions should be introduced with regard to the following matters : age limits for applicants to judicial positions ; the notion of "experience in the legal field" ; disqualification on the grounds of mental disorders and disabilities incompatible with a judicial position ; and non-admission to the administration of justice of individuals with criminal records, except for rehabilitated individuals. The following should be approved :

- Instruction on the assessment of professional standing in the legal field
- Principles of certifying the qualification of judges

It is recommended that procedures for confirming the applicant's information as to compliance with legal criteria, proficiency tests and a mandatory psychological assessment be legally regulated.

It is recommended that the Concept of Human Resources Policy applicable to professional judges in Ukraine outlining the main objectives and directions for improvement of work with court personnel be adopted.

It is recommended that there be developed a Comprehensive State Training Program for Professional Judges that will address such issues as the acquisition, advancement and continuous improvement of knowledge, proficiency and skills ; fostering professional self-actualization of judges ; the intellectual and emotional development of judges ; the certification of judges and their specialization based on training and practical experience.

To ensure the real funding of courts by the state budget :

It is recommended that provision be made for an unconditional write-off of funding when such funds are not transferred within the set time and that the bodies listed in part 2 section 120 of the Law of Ukraine "On the Court System" be authorized to do so.

It is recommended that a legal rule that will allow a reduction in funding for the next year for less than 5% of the amount allocated for the current year be introduced only with the consent of the Council of Judges of Ukraine.

It is recommended that representatives of the judiciary, the State Court Administration and judicial self-governance bodies be involved in the review of budgetary expenses for the current fiscal year.

It is recommended that corresponding laws and regulations be amended to eliminate flaws in the field of execution of court decrees, and :

- that some provisions of the Law of Ukraine "On the Execution of Court Decrees" be specified and the requirements for the presentation and content of passed decisions be determined
- that the instruction on execution of court decrees be specified as to the methods of execution for court decrees

- that pursuant to the law : a) authorized bodies be allowed to give official explanations and recommendations on issues related to the regulation of the conduct of judges, and b) a collection of decisions on disciplinary cases be published
- that the Law of Ukraine "On the Status of Judges" be amended to introduce the following : "In case of corrupt actions or other offences related to corruption, a judge is to be dismissed by the body that elected or appointed him"
- that section 31 "Grounds for the Disciplinary Liability of Judges" of the Law of Ukraine "On the Struggle Against Corruption" be amended to introduce provisions according to which a judge could be brought to disciplinary account for disciplinary offences, in particular for corrupt actions or other offences related to corruption
- that guarantees of valid and fair bringing to account of judges for corrupt actions or other corruption-related offences be legally regulated, more specifically, on the points of : a clear definition of grounds of liability (identification of corruption offences that can be perpetrated by judges) ; the appropriate procedures for considering cases, with the possibility of appeal against judgements ; a ban to appoint these offenders to judicial positions ; and a ban against remaining a judge, including the regulation of various benefits

In order to eliminate flaws in the execution of court decrees, corresponding rules and regulations shall be amended.

It is recommended that uniform procedures for taking administrative and disciplinary measures against judges for corrupt actions or for other corruption-related offences be developed that will provide for two types of proceedings : 1) administrative, and 2) disciplinary. Court judgments on corruption or other corruption-related cases shall be considered as a ground for taking disciplinary measures. It is also suggested that there be introduced simplified disciplinary proceedings accompanied with a warning that plenary disciplinary proceedings shall be started when necessary.

It is recommended that the declaration of assets by court system representatives and their family members be introduced. It would be misleading to assess the standards of living of judges without considering the standards of family members. It is advisable that regulations aimed at preventing judicial corruption be set, specifically, provisions that would regulate the financial dealings of judges including the ownership and control of assets and property, business partnerships, receipt of gifts, awards, inheritances or loans, and a maximum value of gifts to judges.

Availability of judicial statistics. It is inadmissible to maintain that court statistics are private and intended only for administrative use, because these statistics – on matters such as the number of appeals against the actions of courts, the number of cases heard after deadlines and the number of cases considered by one justice – are not the private matter of the courts. Ensuring the transparent operations of courts and the availability of court information is an important anti-corruption tool. To eliminate bribery and corruption, it is advisable to introduce clear and transparent

procedures for the publication of the decisions of courts of all levels and to develop an electronic database of court decisions that is available both to judges and to the general public.

Legal liability for the corruption and detection of corruption.

To intensify the operations of bodies responsible for the detection of corruption, including specialized bodies :

It is recommended that their operations be focused on the detection of the most dangerous corrupt practices in public bodies, the most important spheres of public life and the areas largely permeated by corruption.

It is recommended that the procedures and mechanism for the proper implementation of operational information on corruption cases be introduced, and that heads of the respective law enforcement bodies and their subunits be given exclusive authority and be personally accountable for the decisions and actions in responding to such allegations provided for by the law. At the same time, the level of the decision maker shall be consistent with the level of public official who committed the corruption offence.

It is recommended that techniques for the identification, validation and use of corruption-related data in various spheres of economic and social life be introduced.

It is recommended that procedures for the full and timely registration of reports on corruption and corruption-related offences and the legal liability for neglecting these procedures by law enforcement employees be introduced.

It is recommended that procedures to disclose to law enforcement bodies information on the assets and property of legal entities and private persons be legally regulated.

It is recommended that the terms and conditions of the disclosure of information to law enforcement and other bodies be consolidated and specified in a single legal act, taking into account legally stipulated privacy considerations.

It is recommended that mechanisms be identified for cooperation between specialized bodies involved in the detection of corruption and other bodies responsible for the operational, technical and informational services to administer the anti-corruption campaign.

It is recommended that the uniform registration system of individuals who were allegedly corrupt or connected with corruption be introduced subject to their professional affiliation, field and region of activities.

It is recommended that national anti-corruption legislation be brought into conformity with international legal standards. When considering the issue of the ratification of Conventions by Ukraine – Convention of the

Council of Europe on Criminal Liability for Corruption (ETS 173, of January, 27, 1999), Convention on the Civil Responsibility for Corruption (ETS 174, signed in November, 4, 1999, came into effect on November, 1, 2003), Convention of the United Nations Organization Against Transnational Organized Crime (UN Resolution 55/25 of November, 15, 2000) – and the Convention of the United Nations Organization Against Corruption (UN Resolution of October, 31, 2003) and bringing them into compliance with their provisions, it is recommended that the following measures be taken : scientific development of implementation tools for international treaties ; correlation between the types and elements of corruption crimes provided for by these conventions ; definition and comparison of limitations provided for by the conventions ; and definition of the correlation between types and elements of corruption crimes provided for by the conventions and crimes provided for by the Criminal Code of Ukraine and the Law of Ukraine "On the Struggle Against Corruption".

It is recommended that a study be undertaken to determine whether it is expedient to provide a legal definition of the notion of corruption.

It is recommended that the index of corruption crimes be expanded to consolidate their subdivision, taking into account their practical significance. It is also recommended that the circle of corruption offences be expanded, taking into account the presence of actions that are corrupt in essence but are not formally proscribed.

It is recommended that all types of corruption-related administrative offences be stipulated in one statute (the Law of Ukraine "On the Struggle Against Corruption") by means of a detailed enumeration of the offences and sanctions for the perpetration of these offences provided for exclusively pursuant to the above-mentioned law.

It is recommended that corruption offences be clearly divided into the following categories according to the level of threat for society : criminal, administrative (disciplinary) and civil offences. Such a division will rebut the belief prevailing in both theory and practice that corruption offences are limited either to crimes or to the administrative and disciplinary offences provided for by the Law of Ukraine "On the Struggle Against Corruption". Besides, determining uniform criteria for the division of corruption offences into these categories (criminal, administrative, civil) will permit the establishment of priorities in further improvements of anti-corruption laws, more specifically, in considering the problem of the criminalization and decriminalization of corrupt actions, the problem of the subject of liability (offender) and the coordination between sanction clauses that stipulate the types and severity of penalties for the perpetration of corruption crimes.

It is recommended that the expediency of a legal division of corrupt practices into corruption offences and other offences related to corruption be considered.

It is recommended that the index of corruption offenders be expanded

and the criteria of their legal description be developed in order to avoid vagueness in the definition of unclear or undefined terms (for example the legislation in force – section 2 of the Law of Ukraine "On the Public Defence of Employees of Court and Law Enforcement Bodies" – does not clearly define law enforcement bodies but simply provides a rough enumeration). Therefore, it is recommended :

- that the areas where corruption is prevalent and its presence in the private sector, healthcare system and education be determined
- that the issue recognizing the active payoff of public officials as corruption be considered
- that the issue of the validity and expediency of the liability of legal entities for corruption be considered
- that foreign officials and officials of international organizations be subject to liability for corruption offences
- that the following persons be liable for corruption :
    - individuals who under the Law of Ukraine "On the Struggle Against Corruption" are not liable for corruption (regardless of the sanctions provided for by the law) such as heads of state enterprises, public institutions and organizations, heads of their structural subunits (section 10), persons authorized to combat against corruption (section 11).
    - individuals who are not civil servants pursuant to the Law of Ukraine "On the Struggle Against Corruption" but are actually in public service, such as (pursuant to the section 9 of the Law of Ukraine "On Public Service") the President of Ukraine, Head and Deputy Heads of the Parliament of Ukraine, Heads and Deputy Heads of Permanent Commissions of the Parliament of Ukraine, Prime Minister of Ukraine, members of the Cabinet of Ministers of Ukraine, Chief Justice and judges of the Constitutional Court of Ukraine, Chief Justice and judges of the Supreme Court of Ukraine, Chief Justice and judges of the Superior Arbitration Court of Ukraine, Prosecutor General and Deputy Prosecutors of Ukraine, public servants who work in the administrations of the prosecutor's offices, courts, diplomatic service, customs, security service, and ministry of interior.
    - individuals who do not enjoy the status of a public servant but perform public functions delegated to them by the state, such as auditors and, private notaries ; experts authorized to provide expertise in the mentioned categories of cases as participants of civil, criminal or other proceedings ; defence lawyers ; chief arbitrators and employees of international organizations ; and other individuals performing public functions.

It is recommended that efficient prevention and investigation measures and procedures for making people liable for corruption be developed.

It is recommended that consideration be given to the development of a bill that will oblige all bodies involved in the campaign against corruption to check all citizens' reports of corruption cases. It is recommended that a concrete public body be charged with responsibility to ensure appropriate control over the execution of court decisions on cases of the

above-mentioned category.

It is recommended that a separate section of the Law of Ukraine be dedicated to the procedure of bringing to account for the perpetration of corruption offences by individuals who enjoy special legal status (such as judges and officers of law enforcement bodies), with a special focus on procedural stages, participants of the proceedings, terms and securing legal guarantees for persons participating in the proceedings.