

FIGHTING CORRUPTION IN EASTERN EUROPE AND CENTRAL ASIA

# Anti-corruption reforms in Kyrgyzstan

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

ANTI-CORRUPTION NETWORK FOR EASTERN EUROPE AND CENTRAL ASIA

# **Anti-Corruption Reforms in KYRGYZSTAN**

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

*Unverified translation from Russian*



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## **About the Istanbul Anti-Corruption Action Plan**

The Istanbul Anti-Corruption Action Plan (IAP) is a sub-regional peer-review programme launched in 2003 in the framework of the ACN. It supports anti-corruption reforms in Armenia, Azerbaijan, Georgia, the Kyrgyz Republic, Kazakhstan, Mongolia, Tajikistan, Ukraine and Uzbekistan through country reviews and continuous monitoring of participating countries' implementation of recommendations to assist in the implementation of the UN Convention against Corruption (UNCAC) and other international standards and best practice.

Find out more at [www.oecd.org/corruption/acn/istanbulactionplan](http://www.oecd.org/corruption/acn/istanbulactionplan).

**This report was adopted at the ACN meeting on 4 July 2018 at the OECD in Paris.**

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## Acronyms

ACN	OECD Anti-Corruption Network for Eastern Europe and Central Asia
ACS	Anti-Corruption Service of the State National Security Committee
AML / CFT	Anti-Money Laundering and Counter Terrorism Financing
CC	Criminal Code
CPC	Criminal Procedure Code
EBRD	European Bank for Reconstruction and Development
EEU	Eurasian Economic Union
EITI	Extractive Industries Transparency Initiative
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
GDP	Gross domestic product
GPA	Agreement on Government Procurement
GRECO	Group of States against Corruption
IAP	Istanbul Anti-Corruption Action Plan
IDLO	International Development Law Organisation
IMF	International Monetary Fund
KR	Kyrgyz Republic
MLA	Mutual legal assistance
NGOs	Non-governmental organisations
ODIHR	Office for Democratic Institutions and Human Rights of the Organisation for Security and Co-operation in Europe
OECD	Organisation for Economic Co-operation and Development
OSCE	Organisation for Security and Co-operation in Europe
PEPs	Politically Exposed Persons
PPL	Public Procurement Law
RIA	Regulatory impact assessment
SCITC	State Committee for Information Technologies and Communications of the Kyrgyz Republic
SCS	State Customs Service at the Government of the Kyrgyz Republic
SFIS	State Financial Intelligence Service at the Government of the Kyrgyz Republic
SNSC	State National Security Committee
SOE	State-owned enterprise
SPS	State Personnel Service of the Kyrgyz Republic
SRS	State Registration Service at the Government of the Kyrgyz Republic
SSCEC	State Service for Combating Economic Crimes (Financial Police) at the Government of the Kyrgyz Republic
STS	State Tax Service at the Government of the Kyrgyz Republic
STR	Suspicious transaction report
UAIS	SCS Uniform Automated Information System
UN	United Nations
UNCAC	UN Convention against Corruption
USAID	US Agency for International Development
VAT	Value added tax
WCO	World Customs Organisation
WTO	World Trade Organisation
WGB	OECD Working Group on Bribery in International Business Transactions

## Executive Summary

### Anti-corruption policy

The general instability of the system of political power in Kyrgyzstan leads to frequent changes in the legislation and anti-corruption policies. Due to the frequent shifts of the centre of power, many control functions overlap, duplicate or are fragmented. This, in turn, leads to ambiguity in the distribution of powers with respect to the different issues of anti-corruption policy among different authorities.

Activities to develop and implement the anti-corruption policies in the Kyrgyz Republic have been very intense during the recent years, especially the work on preparing the national and departmental anti-corruption plans. However, the quality of the measures and indicators for assessing their effectiveness need to be improved and should be aimed at changing the level of corruption in the real life of citizens.

The report welcomes the Government efforts to engage the public, as well as the activity of the civil society itself, but it notes the formality of the public councils. The Government should encourage a more active and open participation of the civil society in combatting corruption.

The report also positively notes the Government efforts to create a system of anti-corruption education for the population, in particular, the adoption of the Concept for Enhancing the Legal Culture of the Population. However, in general, the work on public education was not conducted systematically, priorities were not set, no assessment of the results and impact of anti-corruption education and training activities was made. No dedicated funding was allocated for public education work. In terms of research, the efforts taken so far did not yield the results that could be used regularly to develop and monitor the anti-corruption policies.

The anti-corruption functions are fragmented among too many bodies, when everyone does everything without proper coordination. As a result, it is impossible to provide the necessary level of independence and to allocate resources and specialization of these bodies in accordance with the international standards. The organizational system for fighting corruption remains ineffective. Therefore, the report recommends that Kyrgyzstan establishes (or defines) a single body tasked with developing, coordinating and monitoring the implementation of the anti-corruption policy, and coordinating the public education program, and grant it the necessary level of independence, resources and powers.

### Prevention of corruption

With regard to the reform of the **civil service**, Kyrgyzstan has differentiated political and professional positions. However, the competitive recruitment procedure does not apply to all positions of administrative officials.

An important step in ensuring integrity in the civil service was the adoption of the Law on Conflict of Interests. Unfortunately, the Law does not provide for an effective mechanism for its implementation. The definition of conflict of interests does not fully comply with the international standards. Kyrgyzstan should ensure the proper implementation of the new Law in practice.

There was initiated an important reform of assets declarations of public officials. However, the establishment of two systems of declarations – declarations of interests and of assets – and the assigning of responsibility for them to different agencies will not contribute to their effectiveness. There are also doubts about the effective control over assets declarations by the tax service, for which such anti-corruption function is not the main one. Also, the scope of information that is subject to publication in the form of the summarised data appears insufficient. In Kyrgyzstan, the civil society and mass media are active, so the

maximum disclosure of data from the declarations will facilitate their analysis and identification of false statements and will also help to increase trust in the public service. The report recommends to significantly expand public access to information from declarations and publishing such information on the Internet in open data format.

The report recommends completing the work on drafting legislation on the protection of whistle-blowers in accordance with the international standards and to ensure its implementation in practice.

The monitoring report analyses in detail the state of **integrity of the judiciary and public prosecution authorities**. Despite the established legal guarantees, in practice, the independence of judges is not ensured, and this is one of the main problems of the judicial integrity in Kyrgyzstan. The appointment of judges for a probationary period is still maintained. The Council for the Selection of Judges and the Disciplinary Commission are not independent bodies, and they still depend on political bodies. Political bodies perform not only a formal role, but, in fact, have unlimited or significant discretion in the appointment of judges, which does not comply with the standards and previous recommendations of the IAP monitoring. The report also criticizes the concentration of powers in the hands of the Supreme Court's chairperson and his influence on the bodies that ensure the work of the entire judicial system.

In the report, Kyrgyzstan is recommended to clearly envisage in the legislation common criteria for assessing candidates for the position of a judge on the basis of personal merits and qualities, and to ensure their application in practice. It is necessary to cancel the need to give consent to wiretapping of conversations by candidates for the position of a judge. The report recommends reviewing and narrowing down the list of grounds for terminating judicial office for not imperfect behaviour, and clearly specify all grounds for disciplinary liability in the law.

As far as the public prosecution authorities are concerned, with the adoption of the current Constitution of the Kyrgyz Republic, the prosecution authorities no longer supervise commercial organizations and individual entrepreneurs, which narrows down their scope of supervision. However, the remaining supervisory functions of the prosecution office are excessive and problematic not only from the standpoint of the organization of public authorities in a democratic state but can also contribute to corruption. The report welcomes the refusal of performance of investigation by the prosecutor's office; however, the power to initiate criminal cases against officials of certain state bodies is problematic. It is also necessary to eliminate the ability of prosecutors to join the case at any stage of the proceedings if this is required for the purposes of protection of certain rights and interests and other powers that undermine legal certainty.

One of the main problems related to the independence of the prosecutor's office in Kyrgyzstan is the procedure for appointing and dismissing the Prosecutor General and his/her deputies, in which political bodies – the President and the Parliament – play a key role. The report recommends transferring the main powers related to the organization of the prosecutor's office, the management of the prosecutors' career and their accountability, to the special council of prosecutors by analogy with the judicial council.

With respect to the **administrative procedures**, the report recommends continuing the implementation of modern e-government tools in order to reduce direct contacts between consumers of the government services and the state bureaucracy, as well as to reduce corruption risks. With regard to **transparency and access to information**, Kyrgyzstan needs to revise legislation on access to information in accordance with the previous recommendations and to create (or determine) an independent state body for overseeing compliance with the law on access to information. The report also gives a number of recommendations related to increasing the transparency of the public administration and free access to publicly significant information. This includes implementation of the standards of the Extractive Industries Transparency Initiative, the Construction Sector Transparency Initiative, development and implementation of the standards and rules for the publication of open (machine-readable) data on the Internet, publication of

registers of asset ownership and legal entities, including information on their beneficial owners, and others registries of public interest. Kyrgyzstan is also recommended to approve and implement, in partnership with civil society organisations, a national action plan within the framework of the Open Government Partnership initiative.

Kyrgyzstan has carried out significant reforms in the field of **public procurement**. Fundamental changes in the legislation, introduction of broad use of purchases through the electronic portal represent a significant progress in minimizing corruption risks in the sphere of public procurement. Nevertheless, the controlling and law enforcement bodies continue to detect corruption and other crimes related to public procurement. Journalists publish materials that speak of the inefficiency of the public procurement system and possible corruption schemes. The level of companies' participation in tenders, especially at the regional level, is low. In order to further strengthen impartial oversight over public expenditure and procurement, the state should increase the participation of the civil society in this process, expand the volume of information disclosed at all stages of the procurement cycle by further developing the e-procurement and through the wider use of e-government initiatives. Kyrgyzstan should continue to increase the share of competitive procedures when concluding contracts in the total volume of public procurement.

**Business integrity.** The Government and the private sector of Kyrgyzstan are engaged in a quite active dialogue on corruption risks and how to address the corruption problem. However, numerous platforms for dialogue are scattered, and their success often depends on the openness of individual leaders of the state. There are a number of improvements in the business environment as regards inspections and e-governance, but many systemic problems remain unresolved due to frequent changes in the country's leadership and instability of legislation. Compliance programs are not yet in demand, and the institution of the business ombudsman has not received the necessary political and financial support from the government. The first steps have been taken to improve anti-corruption work at the state-owned enterprises. The disclosure requirements for business are still very weak and require considerable strengthening.

### **Criminalization of corruption**

Kyrgyzstan adopted new criminal and criminal procedure legislation, a new code on administrative offences. This is an important reform, which corresponds to a number of previous recommendations. However, the new legislation, unfortunately, does not fully bring the legislation on criminal liability for corruption in line with the international standards. This concerns the mandatory elements of corruption crimes, the range of persons who are liable for corruption, the definition of the undue advantage, establishing liability for trading in influence, the abolition of the crime of "corruption", effective liability for money laundering and illicit enrichment, review of sanctions and so on. The report welcomes the introduction for the first time of the liability of legal entities for corruption crimes and provides a number of recommendations to eliminate deficiencies in the liability regime.

In order to increase the effectiveness of detecting and investigating corruption crimes, Kyrgyzstan is recommended to extend the definition of politically exposed persons in the legislation on combating money laundering to national persons who perform important public functions; to establish a centralised register of bank accounts that will contain, among other things, information about beneficial owners and will be accessible by investigative agencies without a court order; to ensure direct access of investigative agencies involved in financial investigations to databases.

Kyrgyzstan should also ensure effective specialization in the investigation and prosecution of corruption crimes in accordance with the international standards. It is recommended to consider the possibility of excluding the function of pre-trial investigation of corruption crimes from the scope of powers of the

national security authorities. It is necessary to establish (or determine) an agency or a unit responsible for the identification, tracing, seizure and management of assets subject to confiscation, including abroad.

### **Prevention and prosecution of corruption in a separate sector – Customs Service**

The Government of Kyrgyzstan has recognised that the customs sector has high corruption risks which is reflected in numerous national and agency-level anti-corruption plans. This also explained the choice of the sector for the in-depth study under the IAP monitoring. These risks are based on the significant share of taxes, duties and excises collected through customs (more than 25% of the state budget revenues) in combination with the low salary level of customs officers. The high risks are also explained by the lack of reliable preliminary customs information and the insufficient spread of modern information exchange technologies and customs control means. This leads to the substantial impact of human factor on the customs formalities.

The report points out the “manual” estimation of customs value and inaccurate declaring of imported goods as two key areas of corruption risks in the customs. Such conclusion is based on the abnormally high discrepancies in the customs statistics data between Kyrgyzstan and some countries, the unreasonably high share of particular goods with the low level of taxation in the import structure, the extensive use of the so-called indicative prices in the customs valuation. The report suggests long-term sustainable solutions for mitigating such risks, in particular through automation of customs procedures.

The report also provides a number of recommendations on the prevention and resolution of conflict of interests, selection procedures for senior positions in the customs administration and operation of the internal investigation units within the customs service. It is also recommended to finalise implementation of the full-scale e-declaring and Kyrgyzstan’s accession to the World Customs Organisation’s Revised Kyoto Convention.

**Table 1. Summary table of compliance ratings for implementation of the recommendations of the Third Round of Monitoring of Kyrgyzstan**

Recommendation of the Third Round of Monitoring of Kyrgyzstan	Compliance rating for implementation of the previous recommendations			
	Fully compliant	Largely compliant	Partially compliant	Not compliant
1. Anti-corruption policy documents				
2. Corruption research				
3. Public participation				
4. Raising awareness and public education				
5. Anti-corruption policy and corruption prevention institutions				
6. Criminal offences and their elements, subjects of corruption crimes				
7. Sanctions				
8. Confiscation				
9. Immunities and statute of limitation				
10. Access to financial information, interaction with FIU				
11. Investigation of corruption crimes				
12. Specialized anti-corruption law-enforcement bodies				
13. Statistics				
14. Integrity in the civil service (delineation of positions, recruitment and promotion)				
15. Integrity in the civil service (remuneration)				
16. Integrity in the civil service (conflict of interests, asset declarations)				
17. Integrity in the civil service (publication of incomes and assets declarations)				
18. Whistle-blower protection				
19. Transparency and discretion in public administration				
20. Public financial control and audit *	-	-	-	-
21. Public procurement				
22. Access to information				
23. Political corruption*	-	-	-	-
24. Integrity in the judiciary **				
25. Integrity in the judiciary **				
26. Integrity in the business sector **				

\* The topics “Public Financial Control and Audit” and “Financing of parties / political corruption” are not covered by the IAP Fourth Round of Monitoring.

\*\* In the Third Round Monitoring Report, recommendations 24-26 were mistakenly referred to as Recommendations 23-25.

## Introduction

The Istanbul Anti-Corruption Action Plan (IAP), adopted in 2003, is the main sub-regional initiative of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN). It targets such countries as Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Ukraine and Uzbekistan; other ACN countries participate in its implementation as well. The implementation of the Istanbul Action Plan involves systematic and regular peer review of legal and institutional framework for fighting corruption in the targeted countries

The initial review of the legal and institutional anti-corruption framework in the Kyrgyz Republic and the recommendations thereto were approved in 2004. The First Round Monitoring Report with assessment of implementation of the initial recommendations and with Kyrgyzstan's compliance rating for such recommendations was adopted in September 2007. The Second Round Monitoring Report was adopted in February 2012 and the Third Round Monitoring Report – in March 2015. The monitoring reports contained the updated Kyrgyzstan's compliance ratings for the earlier recommendations, as well as the new recommendations.

In between the monitoring rounds Kyrgyzstan presented at all ACN monitoring meetings its progress updates on implementation of those recommendations. Kyrgyzstan has also actively supported and participated in other ACN events. All previous reports on Kyrgyzstan are available on the ACN web-site at [www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm](http://www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm).

The Fourth Round of Monitoring of the Istanbul Anti-Corruption Action Plan was launched in 2016 based on the methodology approved by the ACN participating countries. The authorities of Kyrgyzstan submitted their responses to the country-specific fourth round monitoring questionnaire in February 2018 and answers to the additional questions – in March 2018.

The country visit to Bishkek took place on 2-6 April 2018 and included 12 thematic sessions with representatives of the state bodies, including: the Parliament, the Office of the Government, the Office of the President, the Office of the Prosecutor General, the Supreme Court, the Council for the Selection of Judges, the Council of Judges, the Disciplinary Commission at the Council of Judges, the Judicial Department, the State Personnel Service, the Ministry of Internal Affairs, the Ministry of Justice, the Ministry of Economics, the Ministry of Finance, the State Tax Service, the State Financial Intelligence Service, the Anti-Corruption Service of the State National Security Committee, the State Service for Combating Economic Crimes under the Government, the National Bank, the Central Election Commission, the Audit Chamber, the Public Administration Academy and other agencies and establishments.

The OECD Secretariat organised separate meetings with representatives of the civil society, business community and international organisations. The meetings with representatives of the civil society and international organisations were organised jointly with the OSCE Programme Office in Bishkek, and the meeting with the business community – together with the European Bank for Reconstruction and Development.

The Office of the Prosecutor General of the Kyrgyz Republic was the coordinating body on the side of Kyrgyzstan; coordination and monitoring by Kyrgyzstan was ensured by the staff of the Office of the Prosecutor General (Khurshudov A.Ya., the head of Unit of the Department for Combating Corruption and Supervising Compliance with Laws, Mamyrov T.Sh., the Senior Public Prosecutor of the Department of International Legal Cooperation and other personnel), as well as the Secretariat of the Security Council of the Kyrgyz Republic (Akhmetov B.K., the head of the Sector for Analysing and Forecasting Threats in the Security Sphere) and the Office of the Government of the Kyrgyz Republic (Suyunbayeva D.A., an expert

of the Anti-Corruption Policy Sector of the Department for Defence, Law Enforcement and Emergency Situations).

The monitoring team for the Fourth Round of Monitoring of Kyrgyzstan included:

- **Jargalan Dashnyam** (Independent Anti-Corruption Authority, Mongolia, section 1, section 2.1.);
- **Aziza Umarova** (expert on good governance, Uzbekistan; sections 2.1., 2.2., 2.4.);
- **Evgeny Smirnov** (European Bank for Reconstruction and Development; section 2.5.);
- **Natalia Petrova** (USAID New Justice Program, Ukraine; section 2.3.);
- **Māris Urbāns** (Department of Investigation of Particularly Serious Cases, Public Prosecution Service, Latvia; section 3);
- **Andriy Laktionov** (Ukrainian Social Investment Fund, former head of the Department of the State Fiscal Service, Ukraine; section 4).
- **Dmytro Kotlyar** (OECD ACN Secretariat, monitoring team leader; sections 2.3. - 2.5., section 3);
- **Olga Savran** (OECD ACN Secretariat; section 1, sections 2.1., 2.2., 2.6., section 4).

The monitoring team would like to express its gratitude to the state bodies of Kyrgyzstan for their excellent cooperation during the Fourth Round of Monitoring – in particular, to the staff of the Office of the Prosecutor General of the Kyrgyz Republic. The monitoring team is also grateful to the representatives of the Kyrgyz authorities and non-governmental organizations for the open and constructive discussion that has taken place during the country visit.

The monitoring team thanks the OSCE Office in Bishkek and the European Bank for Reconstruction and Development for their assistance in organising and conducting the monitoring visit, as well as the World Customs Organisation for comments provided to the draft report.

This report was prepared on the basis of the responses to the questionnaire and the findings of the country visit, additional information provided by the Government of Kyrgyzstan and NGOs (in particular, NGO “Resultat”, CSR Central Asia), the desk research conducted by the monitoring team as well as the relevant information obtained in the course of the plenary meeting.

This report was adopted at the plenary meeting of the Istanbul Anti-Corruption Action Plan on 4 July 2018 in Paris in the OECD Headquarters. It contains the following compliance ratings for implementation of the recommendations of the Third Round of Monitoring: **out of 26 previous recommendations Kyrgyzstan did not implement four recommendations, was found to be partially compliant with 16 recommendations, largely compliant with four recommendations and fully compliant with none of the recommendations.** Two recommendations of the previous round were not assessed, since the Fourth Round of Monitoring did not cover the relevant topics (state financial control and audit, political corruption). **As the result of the Fourth Round of Monitoring 45 new recommendations were given to Kyrgyzstan and one previous recommendation was found to be still valid.**

The report will be made public after the meeting, including at: [www.oecd.org/corruption/acn](http://www.oecd.org/corruption/acn). The Kyrgyz authorities are requested to ensure the widest possible dissemination of this report. With a view to presenting and facilitating the implementation of the results of the Fourth Round of Monitoring, the ACN Secretariat will organise a repeat visit to Kyrgyzstan, which will include meetings with representatives of the state bodies, civil society, business community and the international community.

The Government of Kyrgyzstan will be invited to regularly inform the plenary sessions of the Istanbul Action Plan about measures taken to implement the recommendations.

The Fourth Round of Monitoring within the framework of the OECD Istanbul Action Plan is implemented under the OECD ACN Work Programme for 2016-2019, which is financially supported by Latvia, Lithuania, Liechtenstein, Slovakia, United States of America, Switzerland, Sweden.

## **Part 1. Anti-Corruption Policy**

### **1.1.-1.2. Anti-corruption reforms, policy and its implementation, public participation**

#### **Recommendation 1 of the Kyrgyzstan Third Round Monitoring Report:**

- 1. Estimate the financial needs for the implementation of the specific measures/activities, when developing action plans, to enable appropriate budgetary allocations to the implementing institutions, as well as grounded requests for technical support from the international community**
- 2. Ensure active participation of the civil society in the forthcoming development of the action plans for implementation of the State Strategy on Anti-Corruption Policy.**
- 3. Conduct regular monitoring and assessment of the implementation of the State Strategy on Anti-Corruption Policy with appropriate inclusion of NGOs, international community and experts in these processes.**
- 4. Ensure wide publication of the reports on implementation of the State Strategy in general and action plans in particular.**

#### **Recommendation 3 of the Kyrgyzstan Third Round Monitoring Report:**

- 1. Ensure more efficient co-operation between civil society and public institutions in fighting corruption and conduct joint practical anti-corruption activities, for example, in the area of research or training.**
- 2. Further involve the public at large in developing policies, laws and in assessing anti-corruption measures, including through public consultations and hearings, publication of draft policy documents, using and on-line comments and similar tools easily accessible for the public.**

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

Since the Third Round in 2015, Kyrgyzstan has adopted a number of legal documents regulating the implementation of the anti-corruption policies. Government Resolution No. 170 of March 30, 2015 approved the Action Plan of the State bodies for the Implementation of the State Strategy of the Anti-Corruption Policy for 2015-2017. The Secretariat of the Security Council, Office of the Government, the Supreme Court, the Office of the Prosecutor General, the Anti-Corruption Service of the State National Security Committee, the National Bank and other executive authorities, as well as representatives of the civil society institutions and business associations took part in developing the Action Plan. The Action Plan also passed public hearings.

The plan envisages 37 tasks, including 106 events. The tasks set by the Plan include such areas of anti-corruption policy as reducing the level of political corruption, increasing the effectiveness of the law enforcement bodies and the judiciary, reducing corruption through the risk assessment and anti-corruption expertise of legislative and regulatory legal acts, preventing conflicts of interest, improving cooperation with the civil society, reducing corruption in entrepreneurial activities and public services, anti-corruption education, reducing corruption in the state and municipal authorities, in the field of public procurement, preventing corruption by using public audit, as well as monitoring of the implementation of the Plan.

Although technically the Plan includes almost all elements of the Istanbul Action Plan, which is welcomed, the Plan itself is not well elaborated, the included measures are of a general nature, the responsibility for implementation is very blurred, as almost all authorities are responsible for all measures, and the implementation criteria just repeat the task, that is, they are aimed at the process, but not at the result. For example, paragraph 6 demonstrates these shortcomings. The tasks, results and indicators are the same. The

effectiveness of the proposed measure is questionable – can adoption of the law on testing integrity be an effective method for ensuring the integrity of the public servants. The timing is clearly unrealistic for drafting of a quality bill. There are three responsible authorities, including the Anti-Corruption Service of the State National Security Committee and the Office of the Prosecutor General, which have no legislative initiative or competence in the field of the public service, but not including the authorities that are responsible for this area of government or public representatives. Moreover, this measure has remained unfulfilled.

Cl.	Tasks	Measures / Actions	Term of implementation	Responsible body, joint bodies	Expected results / indicators
6	To ensure professional integrity of the civil servants on the basis of identifying and addressing vulnerabilities and risks that induce or facilitate the commission of corruption offenses	Development of the Draft Law of the Kyrgyz Republic “On Testing the Professional Integrity of the Public Servants” identifying the principles, means, methods, procedures and legal consequences of testing professional integrity in the state bodies exposed to corruption risks	To work out and to submit to the parliament of the Kyrgyz Republic, October 2015	Anti-Corruption Service, Ministry of Justice, Office of the Prosecutor General (as agreed)	Ensuring professional integrity, preventing and combating corruption in the state bodies; identifying, assessing and eliminating vulnerabilities and risks that induce or facilitate the perpetration of acts of corruption, corruption-related acts or the facts of corruption behaviour / drafting and adopting a bill, the number of activities carried out and measures taken

Under clause 15 of this Plan all state bodies are instructed to approve on an annual basis intra-departmental anti-corruption plans. Although there are concerns about the quality of the wording of this clause, it turned out to be important in the real work on the preparation and implementation of anti-corruption policy. The earlier adopted Decree of the President “On the Measures for Eliminating the Causes of Political and Systemic Corruption in the State bodies” of November 12, 2013 No. 215, which is aimed at the development of anti-corruption plans for the state bodies, also facilitated implementation of that clause. Since both documents required the departments to develop plans (each public agency developed itself an internal anti-corruption plan, while the working group of the Security Council developed step-by-step detailed plans on dismantling of corruption), at first it led to some confusion, for example, the Tax Service developed two plans in 2015 but in 2016 they were combined into one plan.

Annually, in accordance with the Methodology for the development and implementation of the departmental anti-corruption program and the plan of measures, approved by the Government Resolution of February 12, 2014 No. 44-p, there are developed and implemented the departmental anti-corruption plans, which are published on the websites of the ministries and departments. Under the Decree of the President in total 61 state bodies are given the task to develop plans, as of May 30, 2018 detailed plans on dismantling of systemic corruption were approved for 51 state authorities. For example, the orders of the Ministry of Finance approved the anti-corruption plans for 2015, 2016, 2017 and 2018. The plans for 2017 and 2018 include the developed measures for the elimination, minimization and prevention of corruption risks approved by the order of the Ministry of Finance of October 13, 2016 No. 170-p “On Approval of the Lists of Corruption Risks and Corruption-Related Positions”. In addition, two largest cities of the country, Bishkek and Osh, and seven regions have developed their plans.

The working group of the Security Council played a role in the development of the plans on dismantling of corruption, while the departmental action plans were developed jointly with the Office of the Government. In the period from 2015 to 2017 the Council Working Group together with the independent experts and members of the public councils conducted sectoral studies of corruption risks in the state bodies. Based on the results of these studies, the Working Group compiled the plans that were mandatory for implementation by the relevant state bodies. Anti-corruption plans are available on the official website [www.anticorruption.kg](http://www.anticorruption.kg) and the official websites of the state bodies.

The development of the departmental plans has led to a significant increase in the anti-corruption activities, but there is no assessment of the impact of these plans on the level of corruption. During the meetings with the state bodies' representatives the monitoring group learned several examples of how the plans on dismantling of corruption had been prepared by the Security Council with participation of the state bodies and handed over to heads of the departments for approval. For example, the Ministry of Sports and the Civil Service Agency had unclear plans, and the state bodies did not know how they would be assessed in future for implementing these plans.

Another example of the plan in the customs service, which is discussed in Chapter 4 of this report, shows that the quality of such plans has been insufficient, the external experts have often been unable to know all the specifics of corruption risks in the industries, many measures have been of general nature, and if there should have been no real participation of managers and employees from the industries, the plans would not be effective.

An important drawback of the national and intra-departmental anti-corruption plans was the lack of assessment of the costs of their implementation and absence of financing allocated for their implementation.

Regular monitoring of the plans' implementation is carried out by several authorities. Every quarter or six months the Security Council monitors them under the Decree on dismantling of corruption. The Office of the Government does the same within the framework of the Strategy and departmental plans. Twice a year at its meetings the Government reviews the progress of the plans' implementation within the framework of the National Plan. If the plans had not been implemented, disciplinary liability was applied: various disciplinary sanctions were imposed on managers of the middle and senior level, including a deputy head of the State Committee on Construction who was dismissed for failure to implement the plan.

In the period from November 2017 to January 2018 the Office of the Government analysed implementation of the Government Action Plan for the Implementation of the State Anti-Corruption Strategy. Under the Executive Order of the Government of February 12, 2014 No. 44, there were approved the methodology of anti-corruption monitoring and assessment as well as the guidelines for conducting a comprehensive assessment of the effectiveness of anti-corruption measures by the state bodies approved by the Government Resolution of September 15, 2015 No. 450-r. In 2017 there was worked out a methodological manual on the development, implementation and monitoring of anti-corruption measures. This manual and its publication became possible thanks to the financial support of the OSCE Centre in Bishkek.

The Anti-Corruption Policy Sector of the Department for Defence, Law Enforcement and Emergency Situations of the Office of the Government conducted analysis together with on-site visits. The indicators of the action plan served as the main criteria for monitoring and assessment, which, as indicated above, are oriented at the process but not at the level of corruption in the country. In general, out of 37 measures, 14 measures have been implemented in full, 19 measures have been implemented partially and 4 measures have not been implemented at all, but due to the absence of indicators of impact on the level of corruption or without using the results of other corruption studies, it is impossible to assess the impact of the

implemented measures on the real life of society.<sup>1</sup> The Monitoring Group welcomes the widespread publication of the reports on implementation of the anti-corruption policy in general and action plans for its implementation in particular, compared with the previous round of monitoring.

Under the decision of the Security Council of February 8, 2018 the Secretariat of the Security Council was instructed to develop by July 1, 2018 proposals on updating the strategic documents in the sphere of anti-corruption policy in order to improve the existing anti-corruption system. Within the framework of implementation of the said item of the decision, a new State Strategy of Anti-Corruption Policy will be developed taking into account the modern realities and aimed at achievement of a maximum effect. This period is too short to prepare quality plans.

It should be noted that the new anti-corruption policy will need to pay special attention to anti-corruption activities at the local level. This will be especially important in connection with the ongoing process of decentralization, which leads to the significant changes in financing, increased corruption risks at the local level, and competition between the power centres at the national level.

### **Public participation in the anti-corruption policy**

In order to ensure an effective dialogue between the state bodies and the civil society on anti-corruption issues, the Government established the Anti-Corruption Council at the Government (Government Executive Order No. 454-r of September 15, 2015).<sup>2</sup> In order to ensure public control over the activities of the state bodies in the anti-corruption sphere within the framework of implementation of measure No. 21 of the Action Plan for Implementation of the State Anti-Corruption Strategy, there is an opportunity for all public councils of the state bodies established under the Law on Public Councils of 2014 to participate in the process of developing and monitoring implementation of the anti-corruption plans by the ministries / departments. The public councils include representatives of non-governmental organizations, scientific organizations, business community, professional and sectoral organizations, experts. There is an opportunity to participate in the process of developing and monitoring implementation of the anti-corruption plans by the ministries / departments. Currently, the Draft Law on Changes and Amendments to the Law of the Kyrgyz Republic “On Public Councils” is being considered.<sup>3</sup> The draft law provides for inclusion in the purpose of creating and functioning of the public councils “ensuring of public control over activities of the state bodies in the anti-corruption sphere.”

Each public council at the state bodies consists of 7-15 persons. They are selected by an independent commission among NGO representatives on the competitive basis, the Office of the Government checks NGO proposals, for example, to prevent the participation of convicted people or to prevent a conflict of interest. The public councils can invite the state bodies to their meetings to discuss various issues and to take part in departmental commissions on recruitment, on tenders and on prevention of corruption. So far, they have not participated in the initial monitoring of the anti-corruption plans and could only submit their alternative reports.

According to the Government representatives, another form of public participation was the involvement of independent experts by the Secretariat of the Security Council in the development of departmental plans with the support of the OSCE. They assisted in holding a comprehensive analysis of corruption risks in the regulatory legal framework and activities of the state bodies and there were developed anti-corruption plans for ministries / departments. Over the past three years independent experts were involved in the

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<sup>1</sup> More detailed information on the monitoring results is available at <https://bit.ly/2xBS81F>.

<sup>2</sup> Available at <https://bit.ly/2LT20qR> ;

<sup>3</sup> Available at <https://bit.ly/2LTH6I7> ;

development of more than 20 anti-corruption departmental plans, which took into account about 400 recommendations for the eradication of corruption.

Government representatives informed the monitoring group that during the analysis of the plans' implementation, the representatives of NGOs, public councils of the state bodies, academia, business community and independent experts were extensively involved. Reports on the results of the first half of the year and on the annual results were submitted for discussion with the public councils. The final reports were published on the governmental website [www.anticor.e-gov.kg](http://www.anticor.e-gov.kg) and on the website of the Ministry of Economy - <http://mineconom.gov.kg/>.

According to NGOs, the public councils are not a sufficiently effective form of working with the public. During the visit of the expert group, NGO representatives expressed doubts about the fairness and transparency of the selection of candidates for members of the public councils. In addition, other forms of public participation in assessing the plans' implementation, such as taking into account the views of different NGOs, and not only those who are on the boards, have not been used enough.

## **Conclusions**

Frequent changes in the political power system lead to repeated changes in the legislation and review of legal framework. The President, Parliament, Prime Minister, in different periods of time, take over leadership over different directions of the public policy and distribute various control functions to bodies subordinated to them. Due to frequent shifts in the power centre many control functions overlap, duplicate or get scattered. This, in turn, leads to unclear distribution of responsibilities for various anti-corruption policy issues among different authorities.

The activities to develop and implement the anti-corruption policies in the Kyrgyz Republic have been very active during the recent years, especially the work on preparing the national and departmental anti-corruption plans. The quality of plans, including the measures proposed in the plans, and indicators of their effectiveness, need to be improved, they should aim at changing the level of corruption in the real life of citizens.

The departmental plans were developed from top to bottom. This approach may be justified to a certain extent, as it has prompted the departments to accelerate their anti-corruption work. However, this approach could not take into account the departments' peculiarities that could only be understood from inside, and the support of the management of the departments necessary for their implementation.

One of the conditions for implementing the public policy is the financing of a variety of measures. However, there is no targeted financing for the implementation of the anti-corruption plans. Relevant recommendation 1.1. is not implemented, it remains in force.

The monitoring group welcomes the Government's efforts to involve the public, as well as the activity of the civil society itself, but notes the formalistic nature of the public councils and calls on the Government to encourage more active and open participation of the civil society in the anti-corruption struggle. The recommendations 1.2., 3.1. and 3.2. are partially implemented.

The Government analysed the implementation of the previous strategy and plan and published the relevant reports, which is a positive practice. However, when the monitoring was conducted, the public opinion was not sufficiently taken into account, thus, the recommendation 1.3 was partially implemented and the recommendation 1.4. was fully implemented. The government began preparing a new anti-corruption policy, but the deadlines for this work are too short to ensure a higher quality of the plans than the last time.

In general, Kyrgyzstan is partially compliant with the previous Recommendations 1 and 3.

#### **New recommendation No. 1**

- 1. Develop and adopt a new anti-corruption strategy and action plans at the national, departmental and local levels, ensuring the high quality of these documents, including the effective implementation measures and indicators for assessing their impact on the level of corruption in the country, assessment of the necessary funding and a unified monitoring system.**
- 2. Ensure broad and open participation of the civil society in the development of new anti-corruption policy documents and their direct participation in monitoring the implementation of this policy, both through the public councils and with all interested non-governmental organisations, including by using open internet discussions.**

#### **1.3. Raising awareness and public education, anti-corruption research**

##### **Recommendation 4 of the Kyrgyzstan Third Round Monitoring Report**

- 1. Assign an institution to develop targeted and practical awareness-raising and public education activities (about practical solutions, rights and duties of citizens when facing corruption) and to coordinate their implementation.**
- 2. Evaluate the outcomes and impact of the public anti-corruption awareness-raising and education activities and use in subsequent activities.**

##### **Recommendation 2 of the Kyrgyzstan Third Round Monitoring Report:**

- 1. Conduct regularly and based on comparative methodology researches and opinion polls on corruption issues, as well as on public trust of government institutions and disseminate such reports.**
- 2. Ensure that part of anti-corruption researches are commissioned on a competitive basis to non-governmental institutions.**
- 3. Ensure use of corruption researches and surveys in the course of development and monitoring of anti-corruption strategies and programmes.**

#### **Education**

In accordance with the State Anti-Corruption Strategy, its main areas are the creation of a system of legal education of the population, including schools, public awareness of corruption risks in certain spheres, as well as implementation of the special training programs for the public about corruption risks, ways of countering corruption and anti-corruption behaviour with involvement of the civil society institutions.

According to Article 6 of the Law of the Kyrgyz Republic on countering corruption, the Ministry of Justice the Kyrgyz Republic through the mass media or Internet resources carry out legal propaganda, dissemination of knowledge on the issues of corruption prevention among the population. Therefore, the law specifies the agency in charge of the development of targeted and practical awareness-raising and public education activities, coordination of their implementation.

At the same time, in order to determine the state body or its structural unit responsible for the development of the comprehensive approaches and measures for anti-corruption education, the Prime Minister's Order of January 27, 2017 introduced the appropriate amendments to the Regulations on the Department for Defence, Law Enforcement and Emergency Situations of the Office of the Government.

The concept of increasing the legal culture of the population of the Kyrgyz Republic for 2016-2020, approved by the Government Resolution of March 14, 2016 No. 122, aims to increase the level of knowledge and training of the public in the field of combating corruption through the implementation by the state bodies of explanatory lectures in general educational organizations (schools) and higher education institutions (universities) on legal topics, including in the field of combating corruption, and creation of social videos aimed at formation of anti-corruption legal consciousness of citizens.

The Ministry of Education established a training and methodological base for prevention of corruption, while educational institutions develop educational and methodological tools for conducting extra-curricular activities for teachers of secondary schools. Disciplines on anti-corruption policies have been introduced in higher educational institutions. There has been developed a module for heads of educational institutions, principals of schools and kindergartens and teachers. Scientific and practical conferences, roundtables, competitions of posters on anti-corruption themes are regularly held in universities. In 2016-2017 the Ministry of Justice carried out explanatory lectures in general educational organizations (schools) and higher educational institutions (universities) on legal topics, including in the field of combating corruption, and created two social videos aimed at formation of anti-corruption legal consciousness of citizens. Besides, the tax service conducted an anti-corruption event in the form of an interactive game and filmed a public ad video.

The Ministry of Justice, the Ministry of Internal Affairs, and the National Bank publish anti-corruption information on their websites, conduct training seminars and roundtables, create social videos, their officers speak in mass media, etc. The Tax Service, the Central Election Commission, and the Ministry of Economics also conduct educational activities. Various agencies publish e-mails, web-sites and hotline phones for citizens' communications about corruption.

However, there is no financing of anti-corruption public educational activities, as well as other anti-corruption measures. Some of these activities were financed by donors. Although the authority that could have coordinated and guided a variety of educational activities is defined, in fact it has not fulfilled that function. The public did not participate in the development and implementation of awareness-raising activities. Also no one conducts evaluations of the results of these events.

## **Surveys**

In accordance with the Government Resolution of June 17, 2016 No. 329, the National Statistics Committee of the Kyrgyz Republic conducts a semi-annual survey of the population asking questions about the personal trust of citizens to the state bodies and local governments (by name), as well as personal corruption perception in these authorities. 3,600 households participate in these surveys. The standard questionnaire for conducting survey has been developed by the Ministry of Economy, National Institute of Strategic Research and expert community. Some authorities, for example, the Ministry of Health, applied to the Statistics Committee to find out how the questions are formed in order to improve their level of trust.

According to one of the surveys, the Penal Enforcement Service was named the most corrupt, its chief was dismissed. Based on the results of another survey, it was determined that the practice of withdrawal of drivers' licenses by the Ministry of Internal Affairs was very corrupt, therefore, the Ministry of Internal Affairs decided to install video cameras and use tablets to compile protocols.

The survey results are posted on the official website <http://stat.kg/ru/indeks-doveriya-naseleniya/>. This is the only anti-corruption study that is carried out on the government's request and at its expense.

A few more state bodies conduct their own industry studies, for example, the Ministry of Education and Health as well as local authorities.

However, the anti-corruption authorities did not use the data of the Statistics Committee or other industry surveys to assess the implementation of the strategy and plans. The public also doubted the quality and usefulness of these data. At the meeting with NGOs, there was a mistrust of the population towards these data of the Statistics Committee, in particular, in connection with a narrow sampling, imperfect content of the questions and unclear methodology of processing the results.

As a result of discussions with the civil society, the government decided to develop its own national methodology for measuring corruption. To this end, the Secretariat of the Security Council of the Kyrgyz Republic engaged international and national experts (with the assistance of the Council of Europe) who helped to develop the methodology. The Secretariat of the Security Council of the Kyrgyz Republic together with the Council of Europe plans to organize a pilot study of corruption using the national methodology for measuring corruption in 2018. It is yet unknown whether this study will be conducted in addition to the work of the Statistics Committee, or will replace it, including financing.

In addition to the surveys of the Statistics Committee, certain international and non-governmental organizations conduct research on corruption. In February 2015 at the initiative of the OSCE Bishkek Centre, there was conducted a sociological survey of corruption in the Kyrgyz Republic in coordination with the Office of the President.

Analysis of the results shows that a significant part of citizens consider bribes as a normal way of solving their problems, and corruption and their actions in corrupt situations – as normal social practice. A quarter of respondents described their attitude to participation in corruption as “Relief that the situation was resolved”, about 20 percent noted “I did not feel anything, I'm already used to it” when describing their reaction to giving bribes. However, 41.7% felt “Hatred against an official”, and about 30% felt “Dissatisfaction with our state system, putting people in such circumstances.”

The Public Association “Result” conducted in 2016 and 2017 an assessment of the implementation of the Third Round of the implementation of the Istanbul Anti-Corruption Plan in Kyrgyzstan and presented twice at the plenary session of the ACN in Paris. NGO Result conducted an alternative monitoring in accordance with the “Practical Guide: How to Monitor the Civil Society” (hereinafter the “Practical Guide”) developed by the ACN Secretariat. NGO Result conducted nine focus-group discussions, in-depth interviews with the independent experts, as well as round tables to discuss the results of alternative monitoring.

A number of other organizations also conducted studies, including Transparency International (the National Integrity System Assessment), BalticSurveys / The Gallup Organization together with SIAR Research & Consulting conducted research in 2017<sup>4</sup>, the Youth Parliament conducted a sociological study on Corruption in the Field Education Among the Leading Universities of Kyrgyzstan. Unfortunately, the results of these studies are not systematically taken into account in the process of developing and monitoring the implementation of the anti-corruption policies.

## **Conclusions**

The Monitoring Group notes the Government’s efforts on creation of an anti-corruption education system for the population, in particular, the adoption of the Concept for Raising the Legal Culture of the Population, which identifies students and pupils as the target audience. In addition, as a positive step, one should note the appointment of the Department for Defence, Law Enforcement and Emergency Situations of the Office of the Government of the Kyrgyz Republic as the body responsible for developing comprehensive approaches and activities for the anti-corruption education and training, although it is not

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<sup>4</sup> See <https://bit.ly/2sx2tav>.

clear how this department coordinates in practice its work with the Ministry of Justice that is responsible for the Concept of Raising Legal Culture. Comprehensive measures on anti-corruption education have not yet been developed. Different authorities independently conduct different educational activities. The work on education was not systematic, priorities were not defined, no assessments of the results and impact of the anti-corruption education and training activities were made, so that they could not be used in subsequent activities. No dedicated funding was allocated for the education work.

**Kyrgyzstan is partially compliant with the previous Recommendation 4.**

The expert group notes the Government's efforts on the performance of corruption research, in particular, surveys of the Statistics Committee and individual bodies, as well as the development of a new national methodology. However, these efforts did not allow to get the results of studies that can be used regularly to develop and monitor anti-corruption policies. In addition, the government did not sufficiently use the results of studies conducted by non-governmental partners.

**Kyrgyzstan is partially compliant with the previous Recommendation 2.**

**New recommendation No. 2**

- 1. Ensure effective work of the body responsible for developing the integrated approach and measures for the anti-corruption awareness raising and education, as well as for coordinating the implementation of such measures.**
- 2. Assess the results and impact of the anti-corruption awareness raising and education activities, use the results of such assessment in the preparation and implementation of follow-up actions.**
- 3. Ensure the conduct and the use of studies and surveys on corruption during the development and monitoring of the anti-corruption strategies and programs.**

**1.4. National anti-corruption policy coordination and corruption prevention bodies**

**Recommendation 5 of the Kyrgyzstan Third Round Monitoring Report:**

- 1. Assess the adequacy and effectiveness of anti-corruption functions performed by different existing state institutions and consider if these institutions have the necessary independence resources and specialisation as required by the international standards.**
- 2. Enhance the capacity of the body (bodies) responsible for development and control of implementation of national anti-corruption policy and programme and action plan on countering corruption by the government; provide sufficient budgetary resources, increase specialised staff and trainings, as well as ensure necessary independence to effectively and free from any undue influence carry out such functions.**

The Monitoring Group notes the efforts of the Government and the state bodies on setting anti-corruption measures but believes that the current system of distribution and coordination of anti-corruption functions is ineffective. At the national level, at least three bodies are responsible for coordination and their functions overlap in many respects.

The Security Council Working Group on Monitoring the Implementation of the State Anti-Corruption Strategy is developing and implementing policies to counter systemic corruption. The Secretariat of the

Security Council of the Kyrgyz Republic provides organizational assistance to it. The functions of the Security Council include the development of concepts, strategies, doctrines and other strategic documents in the field of combating corruption, as well as assessment of their effectiveness.

The Office of the Government carries out: coordination of the state bodies' work to develop and implement state anti-corruption plans, control over their implementation, analysis of the situation in the anti-corruption area and development of proposals to improve anti-corruption measures.

The Prosecutor General coordinates the activities of law enforcement, fiscal and other state bodies, state administration and local self-government bodies on fighting corruption, collects and analyses information on the state of corruption in the system of state administration and local self-government, assesses the effectiveness of the measures taken.

The coordination meetings are held at the national level under the chairmanship of the Prosecutor General with the participation of the Secretary of the Security Council, the Prime Minister or the Vice Prime Minister in charge of the activities of the law enforcement bodies, deputies of the Supreme Council, representatives of the Office of the President, the heads of the Supreme Court, the Audit Chamber, ministries and departments. Similar meetings are held by the prosecutors of oblasts, Bishkek and Osh cities with the participation of heads of local authorities. One of the Coordination Meetings (June 28, 2016) was devoted in detail to the implementation of the anti-corruption legislation and analysed the effectiveness of the state bodies and the Office of the Government.

There was established an institution of the Commissioner for Preventing Corruption in the State Bodies. In connection with the introduction of this office there were introduced full-time offices of the Commissioner for Preventing Corruption for 43 state bodies in the Register of the State and Municipal Offices of the Kyrgyz Republic (Decree of the President of the Kyrgyz Republic as of January 31, 2017 No. 17). In some ministries and departments there operate anti-corruption departments (units) with a staffing of 3-4 full-time offices. The annual budgeted expenses on these employees comprise about 33.2 million som per year in the republic. This new institution can become an important element of the overall anti-corruption institutional system if it facilitates the necessary coordination, methodological and political support.

In addition to the general vagueness of the system of the anti-corruption authorities, frequent changes in the structure of the central government, where certain persons play a significant role, also lead to an uncertain and unstable situation.

## **Conclusions**

The assessment of the anti-corruption functions of various state bodies was not carried out systematically. However, it is obvious that these functions are dispersed among too many authorities, when everyone does everything without proper coordination. As a result, it is impossible to ensure the necessary level of independence, allocation of resources and specialization of these authorities in accordance with the international standards. The organizational anti-corruption system remains ineffective.

**Kyrgyzstan is not compliant with the previous Recommendation 5.**

## **New recommendation No. 3**

**Set up (or determine) a single body with the functions of developing, coordinating and monitoring the implementation of the anti-corruption policies, and coordinating the public awareness raising and education programme, and providing such body with the necessary level of independence, resources and powers.**



## **Part 2. Prevention of corruption**

### **2.1. Integrity in the civil service**

#### **Recommendation 14 of the Kyrgyzstan Third Round Monitoring Report:**

- 1. Clarify the definitions of political and administrative officials, as well as the regulations which are applicable to the political servants. Prevent further politization of civil service by limiting the number of political offices and ensuring the stability of professional civil service and the continuity of the institution of State Secretaries.**
- 2. Strengthen recruitment process for high-level positions by applying different recruitment procedures and evaluating not only knowledge of the applicants but also abilities and competencies.**
- 3. Increase transparency and impartiality of competitions by limiting the number of the commission members and including external experts to examine special knowledge, skills and competencies of the applicants.**
- 4. Increase attraction of civil service by developing a promotion system which will motivate civil servants, create merit-related criteria for civil servants promotion to higher positions.**
- 5. Reconsider the necessity of internal and national reserves, and either develop its proper implementation, or reject it as not useful element in the recruitment system**

#### **Delimitation of political and professional offices**

The Law “On the Public Service and Municipal Service” of May 30, 2016 No. 75 provides for a new system of delimitation of offices into political, special, administrative and patronage offices.

Political public office is an office whose holder exercises power and makes politically determinative decisions aimed at implementing political programs and projects and is responsible for implementing the stated political goals and tasks within the framework of the powers envisaged by the Constitution and other regulatory legal acts.

Special public office is an office whose holder exercises powers to make decisions and to conduct actions of controlling, supervisory, judicial or other special nature that are not connected with the adoption of politically-determining decisions.

Administrative public office is an office established as a full-time office of a state body with an established scope of powers and responsibilities created for the implementation of tasks and functions of a state body.

The new Register of the Public and Municipal Offices of the Kyrgyz Republic (hereinafter referred to as the Register) adopted by the Decree of the President of the Kyrgyz Republic as of January 31, 2017 No. 17, distinguishes between political and administrative offices not based on the principle of election or appointment, but on the basis of whether employees have the authority to accept or execute politically-determinative decisions.

The Register lists the following political positions: the President, head of the President’s Office and heads of institutions under the President; chairperson, deputy chairperson, members and head of the Office of Zhogorku Kenesh (Parliament); Prime Minister, his/her deputies, Government members, heads of agencies and bodies under the Government, Government’s plenipotentiary representatives in regions, heads of local state administrations; chairpersons, deputy chairpersons and members of local keneshs (councils), city mayors, heads of ayil okmotu.

The Register retains all offices set in the Constitution, but the number of the public political offices is reduced almost fourfold: from 868 to 219 offices.

The offices of deputy heads of the state bodies and other separate political offices (employees of the Office of the President, the Supreme Council, the Government, etc.) are classified as administrative ones with a special (non-competitive) order of appointment. The qualification requirements for these offices are established for the first time, which significantly reduces the risks of political lobbying for personnel appointments.

**Table 2. Number of civil servants**

Number of civil servants of the Kyrgyz Republic	As of Jan 2015	As of Jan 2016	As of Jan 2017
Number of staff positions	16,788	17,250	17,561
Actual number of personnel, including	15,893	16,326	16,259
- political public offices	868	868	219
- special political public offices	372	355	356
- administrative public offices	14,653	15,103	15,684

### **Stability of the civil service**

In the state executive power bodies, where the civil service functions, there is established an office of a secretary of state. The Secretary of State is the civil servant who holds the highest administrative position in the state body. The office of the Secretary of State is permanent and is similar to the position of the first deputy head of the state body. Secretaries of State are appointed, based on the open competition results, by the Prime Minister on the proposal of the Civil Service and Municipal Service Council (hereinafter – the Civil Service Council) with the consent of the head of the state body.

In 2018 the working group of the Security Council responsible for the control over implementation of the State Anti-Corruption Policy Strategy approved the Detailed Plan of Actions to Reduce Corruption Risks in the Civil Service System. According to the document, the provision of the Civil Service and Municipal Service Law concerning the consent of the head of the state body for appointment of the Secretary of State should be removed.

The State Personnel Service (SPS) may submit a proposal on rotation of the secretary of state before the rotation period, if the circumstances require the application of such measure, to prevent serious damage to the civil service. This right has already been used and the secretaries of state have been repeatedly rotated, which indicates the availability of departmental discretion in creating conditions for full-fledged activities of the secretary of state.

According to Article 8 of the Civil Service and Municipal Service Law, the Secretary of State should develop anti-corruption measures and organise their implementation. However, following discussions during the on-site visit, the monitoring team got an opinion that the office of the secretaries of state does not play an important role in the anti-corruption policy.

According to the representatives of the Government, the personnel turnover is not a big problem in the country. Reliability and constancy of work are important attractive aspects of work in the state bodies. On the other hand, the statistics show that about 10% of all personnel is renewed annually: 1641 civil servants have been dismissed from their jobs in 2015 1591 civil servants – in 2016 and 2124 civil servants – in 2017. According to NGOs, many people use the civil service as a springboard allowing them to shift to the private sector. In addition, the constant changes at the level of the political leadership of the country worsen the general unstable situation for the civil servants.

In general, the monitoring team had the impression that the State Personnel Service and the newly created Civil Service Council do not yet play an important role in the development and implementation of policy, standards and methodology in the area of corruption prevention. The international best practice shows that it is impossible to improve the ethical behaviour of officials from the outside without the leading role of the civil service agency.

### **Recruitment to the civil service**

The new Law “On the Public Service and Municipal Service” of 2016 excludes an opportunity of holding of an administrative public office without the competitive procedure. However, during the country visit, the monitoring group found out that in practice there are cases when the candidates had been admitted to these offices without a competition, for example, when moving from a political post to an administrative post, which is not a good practice.

The admission to the public and municipal service is carried out on a competitive basis. As in the past, there are two types of competition: a closed competition – for persons who are registered in the internal and national personnel reserves, and (if the vacancy was not filled through a closed competition) a competition which is open to all persons wishing to enter the civil service. The national personnel reserve is formed by the authorized state body through holding competition among the employees who apply for the official promotion, employees proposed by the head of the state body on the results of their assessment, and other persons who meet the qualification requirements. The internal reserve is formed by the head of the state body from the employees of the latter recommended on the basis of the results of their performance assessment, persons removed from office due to reorganization, redundancy, long-term disability for health reasons, and employees as well as other persons who participated in the competition to fill a vacant post and showed high results but were not recommended for the appointment.

The Law “On the Public Service and Municipal Service” establishes a new procedure for the formation of the national and internal personnel reserves. The national personnel reserve will consist of the candidates for the main and higher administrative posts, and the internal personnel reserve consists of the candidates for junior, senior and chief posts.

When a specific vacancy appears, the competition is announced by posting information about the competition in the newspaper and on the website of the authorized state body or other official media, as well as on the website of the state body or local government. For the purposes of holding the competition, a competition commission is established, which consists of the chairman of the competition committee and the secretary of state, as well as the chairman of the commission on ethics of the state body; the commissioner for corruption prevention; representative of the public council; heads of the HR and legal departments; and managers (specialists) of other structural divisions. The secretary of the competition commission is appointed by the head of the state body from among the members of the competition commission.

For those persons who are registered in the internal and national personnel reserves, the competition starts with the testing phase on topics. This testing is carried out by the state bodies themselves, and sample questions are posted on the websites of the hiring state bodies in order to facilitate preparation for the tests. There are also introduced psychological tests (for example, in the Ministry of Public Health) and a polygraph test to identify a tendency to power abuse. For the purposes of selection of candidates in the National Reserve for the top and highest posts, there is a second round of testing for the ability to analyse and formulate a vision for strategic issues. After tests the candidates are interviewed.

**Table 3. The results of the competitions for filling in the civil service administrative positions in 2017**

Based on open competition	1,560
Based on internal reserve	487
Total:	2,047

In total in 2017, there were announced 1,560 vacancies, and 2,973 persons were accepted for public office. That is, the share of civil servants hired on a competitive basis in 2017 was 68.9%, while 926 persons (31.1%) were appointed without competition, including:

**Table 4. Appointment to civil service positions without competition**

Civil servants within one category of this state body (intra-departmental rotation)	241
Based on the results of performance assessment	1196
Interdepartmental rotations	1124
Private office posts	551
Due to reorganization	779
Through the special procedure (deputy heads of the state bodies, employees of the Office of the President, the Zhogorku Kenesh, the Government, the Administration of the President and Government, the Administration of the Zhogorku Kenesh)	2235

There is a special out-of-competition recruitment procedure for a number of administrative posts (Article 24 of the Law “On the State Civil Service and Municipal Service”). Such a special procedure for out-of-competition recruitment to the civil service does not correspond to the principle of meritocracy and undermines the professionalism of the civil service.

### **Promotion and performance assessment**

The state bodies and local self-government bodies independently develop a set of measures aimed at career growth of the employees. The career planning process is aimed at the perspective promotion based on the performance assessment system. The procedure for promotion is governed by the Regulations on the Procedure for Holding Competition and Official Promotion in the Public Service and Municipal Service, approved by the Resolution of the Government of December 29, 2016 No. 706. The Regulations on the Procedure for Assessing the Activities of the Public Servants and Municipal Servants, approved by the Resolution of the Government of March 1, 2017 No. 131, specify the procedure for the performance assessment of the officials holding administrative posts.

Every quarter an official makes a quarter work plan, which is approved by the secretary of state (the head of the administration / responsible secretary), the deputy head of the body in accordance with the division of responsibilities between the management of the body. On the basis of the approved plan, there is performed a quarter performance assessment of the employee by the immediate supervisor. The report on the fulfilment of the official’s quarter plan is also approved by the secretary of state (the head of the administration / responsible secretary), the deputy head of the body.

The annual assessment is carried out by the assessment commission with the support of the HR department. The annual assessment grade can be “Excellent”; “Good”; “Satisfactory”; and “Unsatisfactory.” An employee with a positive assessment grade receives a new level (coefficient) in the wage scale. The scale includes 10 levels. An employee admitted to the civil service for the first time is given the first level. The next level in the wage scale is assigned based on the results of the annual performance assessment when a positive assessment grade is received. When receiving the “Satisfactory” grade, the employee is sent for further training. When receiving an “Unsatisfactory” grade, there is made a

proposal to rotate the official or to demote him/her; or a proposal to lower the class rank, and when an employee receives “Unsatisfactory” grade two years in a row, there is made a proposal to dismiss the employee from his/her post.

Despite the relative stability and the possibility of growth, the civil service is still not very attractive for highly qualified personnel, primarily because of low wages and instability.

## **Conclusions**

A clear delineation of political and professional posts in the civil service is an important and positive step. The institute of the Secretaries of State did not become an important element in ensuring the stability and professionalism of the civil service and does not play an important role in preventing corruption.

The legislative ban on holding administrative public posts without competition is a good practice, but common examples of violation of this requirement devalue this measure. In addition, the admission to the Presidential Administration without competition is a serious violation of the principle of meritocracy and gives a bad example for the entire civil service. The system of reserves for admission to the service was not revised. It does not contradict the international standards, but it seems unnecessary to take additional steps in a small country without a centralized admission to the civil service, where this service is not sufficiently attractive. It complicates the admission system and limits the flow of the candidates from outside the civil service, especially to senior positions.

**Kyrgyzstan is partially compliant with the previous Recommendation 14.**

### **New recommendation No. 4**

**1. Establish in the Civil Service Law the competitive selection procedure for all administrative positions in the President’s Office and the Government’s Office and in other bodies that are subject to the provision of a special non-competitive recruitment.**

**2. Ensure effective monitoring of compliance with the legislative requirements of competitive selection to all administrative posts.**

### **Transparent and objective remuneration of the civil servants**

#### **Recommendation 15 of the Kyrgyzstan Third Round Monitoring Report:**

**1. Perform comparative study of the salaries in civil service in different state bodies and as compared to those in the private sector; as well as the study of the relative shares of fixed and variable parts of the salaries.**

**2. Based on the findings of these studies, review the system of remuneration of the civil servants to ensure decent salaries for the latter as well as transparency and equality of remuneration for all servants performing similar functions in all sectors of the civil service.**

The Ministry of Finance together with the State Personnel Service and the Ministry of Labour and Social Development conducted a study of the private sector wage market and the existing system of employees’ remuneration (July 2017). There was performed an analysis of the ratio of the share of official wage with other payments and allowances, and an analysis of all existing posts of the public and municipal service with similar functions and responsibilities.

The study showed that the salaries of civil servants are still low and uncompetitive in comparison with the private sector. However, there are restrictions related to allocation of funds to raise the average nominal salary of the civil servants. The representative of the Ministry of Finance noted the role of the IMF in connection with the allocated loans to support the economy, and the IMF's demands not to increase the labour compensation fund of the state budget. It should be noted that according to the data of the Ministry of Finance, the civil servants make up 5% of the number of employees in the public sector. Despite the difficulties, during the period under review it became possible to reduce the gap between the high- and low-paid posts, raising salaries for the lower levels, and to double the salaries of the officials in the regions.

Based on the results of the study, the State Personnel Service together with the Ministry of Finance and the Ministry of Labour and Social Development submitted to the Government a draft set of regulatory legal acts proposing to review the policy of remuneration of the officials. Currently, the policy and revision of the remuneration of all officials is carried out within the framework of the Program for Improving the System of Remuneration of the Public and Municipal Servants for 2013-2020 and, accordingly, the Action Plan.

In 2017, the Government adopted various regulatory aimed at changing the gaps in the multiplicity factors in the salaries of the public and municipal servants, the Scale of Remuneration of Officials was revised, new multiplication factors were introduced for remuneration of the officials together with the possibility of annual increase by 5 and 10 percent on the basis of performance assessment.

The Resolution of the Government of August 7, 2017 No. 466 "On Amending the Resolution of the Government of the Kyrgyz Republic "On the Performance Assessment and the Terms of Remuneration for the Public Servants and Municipal Servants of the Kyrgyz Republic" dated March 1, 2017 No. 131, provides that starting September 1, 2017 there will be introduced new multiplicity factors to the official salaries used in determining the amount of salaries for the Public servants and Municipal Servants. These changes allowed to reduce pay disparities between the posts from 20 percent to 10 percent. Due to this approach, the salaries of the lower-level officials were increased in the first place. For example, the official wage of the ministry's specialist was increased from 6,750 som to 10,462 som (by 55 percent), the salary of the leading specialist was increased by 43 percent, the salary of the chief specialist – by 31 percent. The salary of the top management had the least growth: the salary of the sector head was increased by 19 percent, the salary of the unit head was increased by 10 percent, the salary of the department head – by 1 percent. In general, the increase of wages by increasing the multiplicity factors to the official wage allowed to reduce pay disparities between posts. In general, in 2017 about 340 million som were allocated from the republican budget from September 1, 2017 and in 2018 1.3 million som are planned to be allocated for the above purposes.

At present, the official wage is calculated by multiplying the minimum base rate by the multiplicity factor by the post and the correction factor of the body. The minimum base rate is a fixed wage for the officials, which is the basis for calculating the official wage – 5,000 som (about EUR 60). An allowance for the length of service, rank, etc. is added to the official wage to calculate the salary of an official.

The bonuses are paid on the basis of the performance assessment of the officials approved by the Resolution of the Government of the Kyrgyz Republic "On the Performance Assessment and the Terms of Remuneration for the Public Servants and Municipal Servants of the Kyrgyz Republic" dated March 1, 2017 No. 131.

The criteria for payment of additional incentives are set in the Regulation on the Procedure for the Performance Assessment of the Public Servants and Municipal Servants of the Kyrgyz Republic" approved by the Resolution of the Government Decree dated March 1, 2017 No. 131.

The Law “On the Public Service and Municipal Service” introduced measures for increasing the attractiveness of the civil service: career growth (career planning); professional development (at least every three years); annual vacation of 30 calendar days (or more); social guarantees (obligatory insurance, medical care, receipt of a pension, compensation in case of disability); rotation in the civil service and municipal service. In addition, according to the above-mentioned law, an employee has the right to engage in educational, expert, scientific and other creative activities in the relevant professional sphere being additionally paid from the funds not prohibited by law, as agreed with the head. The performance of this activity should not affect the quantity and quality of the work performed at the official’s place of work.

## **Conclusions**

There was performed a comparative study of wage levels, and on that basis there were adopted certain measures to review the system of remuneration of the civil servants, to ensure equal pay for the officials in different departments, both in the centre and in the regions. It is necessary to continue this work and to carry out regular monitoring of the tasks’ implementation.

**Kyrgyzstan is largely compliant with the previous Recommendation 15.**

## **Conflict of interests and other limitations**

### **Recommendation 16 of the Kyrgyzstan Third Round Monitoring Report:**

**1. Further improve the definition of the conflict of interest established in the Law on Public Service. Create an effective mechanism for the management and control of implementation of the conflict of interests’ regulations by introducing a requirement to declare public and personal interests and by strengthening the role of managers and heads of the institutions in their control...**

The new Law on Conflict of Interests of December 12, 2017 (which came into force on June 29, 2018) aimed at unifying the legislation on conflict of interests and introducing mechanisms for the timely identification, prevention and resolution of conflicts of interests, as well as providing practical assistance to the state bodies and their officials in maintaining the integrity of the official political and administrative decisions in the public administration system in general.

The law defines the conflict of interests as follows: “Conflict of interest is a conflict between the public legal duties and personal (private) interests of persons specified in Article 6 of this Law, when their personal (private) interests affect or may affect the performance of their official duties, which leads or can lead to violation of the rights and interests of the individuals, organisations or the state. Conflict of interests can be potential, real and the one that has occurred.”

The law sets a number of prohibitions, including restrictions on the exercise of the function of supervision, control and conclusion of contracts, acceptance of gifts and donations, and the exercise of the representative functions, including in private commercial enterprises. It is important to note that the original draft Law prepared by the Ministry of Economy included provisions prohibiting persons who hold political and other positions in the state and municipal bodies during the performance of their official duties to develop, participate in the discussion or adoption of acts, to exercise supervision and control, when these persons and their close relatives have a personal interest. As a result, a compromise version was adopted, but it has less legal force to prevent conflicts of interest in lobbying, nepotism or public procurement. In other words, they removed the restrictive norms for decision-making where relatives are potentially involved and what can generate a conflict of interest.

The law applies to persons occupying state and municipal posts, heads of institutions, organisations or enterprises whose activities are financed from the state or local budget, or if the state has a share in their charter capital, as well as trustees of the state property; persons who do not have the status of a civil or municipal servant, but who carry out labour activities in the state bodies. The law introduces declarations of interests.

Unfortunately, the law does not provide for an effective mechanism of its implementation. The initial version included enforcement measures, but it was rejected due to the objection of the President and members of the Parliament. The adopted Law instructs heads of the state bodies, local self-government bodies, enterprises and their HR departments to collect declarations of interests. The duties of ethics commissions include:

- 1) consideration and issuing recommendations on the received petitions and complaints, as well as based on publications and reports in the mass media regarding violations of the conflict of interests legislation;
- 2) informing the heads of the body, organisation or enterprise about the existence of a potential, real conflict of interest or conflict of interest that has occurred;
- 3) carrying out explanatory work among personnel concerning situations of potential or actual conflict of interests and options of their settlement;
- 4) carrying out explanatory work concerning the legislation on the conflict of interests and its practical application;
- 5) carrying out checks of official activity of the persons who are subject to the Law;
- 6) verifying declarations of personal (private) interests and reporting on its results to the head of the relevant state body, local self-government body, institution, organisation or enterprise;
- 7) immediate, within three days after detection, informing of the authorised state bodies specified by the Government of the Kyrgyz Republic about of violations of the requirements of the Law, as well as measures taken on these facts.

The definition of a conflict of interest also does not fully meet the international standards since it does not cover an apparent conflict of interest.

There has been yet no training on the application of the law on the conflict of interest in any form, although the law already becomes effective at the end of June 2018.

In late 2017 the Office of the Prosecutor General developed memos for its personnel on the following topics: “Conflict of interest”, “Control of conformity of expenses of the civil and municipal servants with their income”, “Restrictions and prohibitions related to the civil and municipal service, and liability for their non-compliance” and “Criminal liability of officials for committing corruption crimes”. Brochures (memos) on the above topics were also distributed among ministries and agencies.

The question may arise: why the State Personnel Service has not developed such documents for the whole civil service. The experts believe that this example demonstrates the lack of a systemic institutional approach to preventing corruption in Kyrgyzstan, as well as the existence of active anti-corruption specialists in the country who are trying to promote reforms despite all difficulties.

**Kyrgyzstan is partially compliant with paragraph 1 of the previous Recommendation 16.**

## **New recommendation No. 5**

- 1. Develop, adopt and publish by-laws necessary for the implementation of the Law on Conflict of Interests.**
- 2. Conduct regular and practical training of the civil servants on the prevention of conflicts of interests and declarations of interests, and ensure control over enforcement of the requirements of the Law on Conflict of Interests.**
- 3. Conduct regular monitoring of the implementation of the Law on Conflict of Interests and its impact on the prevalence of conflict of interests.**

### **Asset disclosure**

#### **Recommendation 16 of the Kyrgyzstan Third Round Monitoring Report:**

**... 2. Reform the civil servants' assets and income declaration system by, namely:**

- introducing effective sanctions for failure to submit assets and income declarations or for providing false or incomplete information;**
- considering establishment of a mechanism for the verification of the information provided in the declarations;**
- streamlining the rules related to disclosure of the assets and income declarations, introducing the uniform requirements with respect to the information which is subject and which is not subject to disclosure ensuring mandatory publication of data from the assets and income declarations of political servants and persons holding special offices, as well as higher administrative officials on the web-site of the State Personnel Service.**
- creating clear mechanisms for sharing of information contained in the assets and income declarations with the law enforcement bodies.**

#### **Recommendation 17 of the Kyrgyzstan Third Round Monitoring Report:**

**Publish assets and income declarations of the high ranking officials (Internet or mass media).**

Until 2018 there were four types of declarations of natural persons which was an ineffective anti-corruption mechanism. The Law of August 2, 2017 "On the Declaration of Incomes, Expenses, Obligations and Assets of Persons Who Hold or Occupy State and Municipal Offices" combined these declarations into one. The law applies to persons holding political, special civil service posts; persons holding administrative civil service posts; military servicemen, law enforcement officers and diplomatic officials; persons holding or occupying political and administrative municipal offices; Chairman of the National Bank and his deputies.

The Government Resolution of January 22, 2018 No. 45 "On the Measures for Implementation of Requirements of the Law of the Kyrgyz Republic "On Declaring Incomes, Expenditures, Obligations and Assets of the Persons Who Hold or Occupy State and Municipal Offices" approved:

- a form of the Uniform Tax Declaration of a person holding or occupying a state or municipal office (FORM STI – 155);**

- the Procedure for Filling Out the Uniform Tax Declaration of a person holding or occupying a state or municipal office (FORM STI – 155);
- Classifier of incomes, expenses, assets and liabilities of a person holding or occupying a state or municipal office;
- Parameters of the summarised information on incomes, expenses and assets of a person holding or occupying a state or municipal office, and his close relatives / dependents;
- Regulations on the procedure for reviewing and analysing the information indicated in the Uniform Tax Declaration of a person holding or occupying a state or municipal office.

In accordance with the Procedure for Filling Out the Uniform Tax Declaration, the declaration is submitted to the tax body in electronic form.

In accordance with the adopted Law on the Declaration of Incomes, Expenses, Liabilities and Assets, the tax service is responsible for verifying the completeness and accuracy of the information in the declarations. Currently, there are 1-2 tax officials in each district who are responsible for verifying declarations. It is planned that there will be 120 of them overall. It is also planned that first they will process the declarations of political officials, then those holding the highest posts and the rest. However, at the moment of the country visit, just a few months before the Law was supposed to come into force, these were only plans.

In addition, the decision of the Security Council “On the Actual Measures to Combat Corruption in the Judiciary, Supervisory and Law Enforcement Agencies” of February 13, 2018 recommended that the Government should implement mechanisms for verifying declarations on incomes and expenses of the judicial, supervisory and law enforcement officers and their families through their acceptance of the obligation to disclose information that constitutes banking, tax, customs secrets; ensure that the law stipulates that the use by officials of the judicial, supervisory and law enforcement bodies and members of their families of someone else’s assets for personal purposes is the basis for verifying the disclosure of such assets in the declarations of the persons who have provided such assets in order to determine the legality of its acquisition. According to the information from the Kyrgyz authorities, on June 29, 2018, the Government of the Kyrgyz Republic adopted the corresponding resolution No. 305. Experts did not have an opportunity to analyse this decision, and it is not yet clear for them how this decision will be implemented in practice.

#### Publication of information from the declarations

In accordance with the Law in the Declaration of Incomes, Expenses, Liabilities and Assets of Persons, the tax bodies shall: publish in the official bulletin summary information on the declarations, except for the persons who hold administrative civil service posts whose activities are related to ensuring national security; publish on the agency’s website summary information on the above-mentioned persons.

The above-mentioned Resolution of the Government of January 22, 2018 No. 45 approved the Parameters of the summarised information, according to which the summary information includes information about incomes, expenses and assets of the Declarant and his close relatives (immediate family members), including in the following form:

- 1) monetary means– the total amount of the received income and expenses;
- 2) real estate – the name of the property, its area/space, property in the charter capital of the commercial entities subject to the right of claim;

3) movable property – the name of the property, information on the movable property (brand, volume of the engine, manufacturing year), property in the charter capital of commercial entities subject to the right of claim.

The declaration form requires the public officials to disclose information on their incomes or assets abroad.

It should be noted that before the entry into force of this Law, the declarations have been submitted in paper form, and summary information for previous years had been published on the website of the State Personnel Service. SPS is supposed to transfer all declarations and corresponding materials to the State Tax Service.

#### Exchange of information with the law enforcement bodies

In accordance with the Law on the Declaration of Incomes, Expenses, Liabilities and Assets, information about the declarant is provided to the law enforcement bodies based on their written request exclusively with respect to the declarant and/or his close relative against whom there has been initiated a criminal case on tax evasion through failure to submit the relevant declaration or inclusion of deliberately distorted data in it.

The tax service body interacts with the body where the declarant carries out professional activities by obtaining information in terms and order approved by the Government. In this connection, work is under way to conclude an Interdepartmental Agreement with the state bodies for the exchange of information between the State Tax Service and the authorized state bodies to conduct an analysis on the accuracy and completeness of the information indicated in the declaration on incomes, expenses, liabilities and assets of the public and municipal officials.

If the declaration is submitted after the deadline specified in the Law or if the submitted declaration contains incomplete and/or false information, the tax body publishes information about these persons in the mass media and sends relevant materials to the prosecutor's office.

**Table 5. Statistics on the submission and verification of declarations**

Name of measure		2015		2016	
Number of received declarations	Political administrative	28,861	2,424	28,742	2,595
Number of published summary entries for publication on the site		1,760		1,201	
Work within the framework of the interdepartmental commission: the number of reviewed declarations		2,087		2,008	
Number of identified deviations		865		Work not performed	

Source: data of the State Personnel Service of the Kyrgyz Republic.

#### Sanctions

Sanctions for violating the rules on declarations, which were applied under the previous legislation, were aimed, mainly, to ensure timely submission. According to the acts of the prosecutor's response made on the basis of the detected violations of the legislation on income declarations, the prosecution office of the Kyrgyz Republic imposed liability as follows:

**Table 6. Liability for violation of the legislation on asset declarations**

Sanctions imposed	2015	2016	2017
disciplinary	111	73	37
administrative	36	53	50

Source: information provided by the Kyrgyz authorities.

The Law on the Declaration of Incomes, Expenses, Liabilities and Assets (Article 9) provides that in case of failure to submit the declaration before the established deadline, submission of the declaration with incomplete and/or false information, the declarant shall be liable in accordance with the legislation of the Kyrgyz Republic. The Law “On the Civil Service and Municipal Service” (Article 47) and the Law “On Combating Corruption” (Article 7) provide for the possibility of dismissing an employee from office in this case. The Code of Administrative Liability (Article 400-3) provides for the imposition of an administrative fine. The Criminal Code (Article 308-1) provides for deprivation of liberty from three to eight years with confiscation of assets for illicit enrichment.

STS and SRS signed an agreement on February 13, 2018, on interdepartmental exchange, under which, to date, the tax service receives a database on movable and immovable property on a quarterly basis from SRS. However, in general, it remains unclear how the Tax Service, the State National Security Committee and other bodies will interact in identifying the violations described above, especially those related to illicit enrichment.

To date, there is a draft document under discussion that would amend the Regulations on the Procedure for Reviewing and Analysing the Information Provided in the Uniform Tax Declaration of Individuals Holding or Occupying State and Municipal Office. In particular, Chapter 3 “Interdepartmental Commission” is introduced. The members of the interdepartmental commission will be granted access to automated information systems of the state bodies, such as SRS, STS, SCS, etc. At the same time, the powers of the interdepartmental commissions set up under the territorial tax authorities include the adoption of decisions on the transfer of materials: 1) to the archive for storage – if information on incomes, expenses, assets and liabilities specified in the Declaration is accurate and complete; 2) to the prosecutor’s office – in case of incomplete and/or false information and failure of the declarant to provide a notarised consent.

## **Conclusions**

Transfer of income declarations to the Tax Service may simplify the existing system. It should be noted though that the Tax Service, in the nature of its activities, pursues the task of replenishing the budget while the task of identifying a conflict of interest or illicit enrichment is not inherent in it. In addition, the separation of two systems of declarations – declarations of interests and declarations of incomes – to different agencies will also not contribute to efficiency.

It is doubtful that the Tax Service will be able to enforce the law by July 2018 when it comes into force: will it be able to efficiently establish centralized collection and processing of data and then ensure quality checks of the officials’ declarations in the absence of electronic registers and databases of immovable property, vehicles, beneficiaries, etc. that would be accessible to the inspecting authority within interagency interaction, and not based on the ‘request-response’ principle. The risk is that the sample of verified declarations will be minimal, and reconciliation of data may be inaccurate. Thus, there is a need to ensure a connection to the State Registration Service’s databases (movable and immovable property), FIU’s databases for in-depth monitoring of bank accounts of the civil servants. As of today, according to the information received during the country visit, only 1-2 tax officials in every district are responsible for checking declarations. At the same time, it is expected that the declarations will be submitted by about 30,000 public officials.

Also, the volume of information that is subject to publication is insufficient. In Kyrgyzstan, there are active civil society organisations and the mass media, so the maximum disclosure of data from the declarations will facilitate their analysis and identification of false statements, as well as help increasing trust in the public service. The publication of only summarised data, without a detailed breakdown of the declared

items, significantly narrows the possibilities of civic oversight and is unreasonable in light of the significant public interest in access to information on incomes, assets, financial obligations and expenses of the officials. Therefore, it is recommended to change the approach to publishing information from the declarations by disclosing all information, except for narrowly defined statements (for example, information about the exact place of residence, the date of birth of persons, passport data).

It is important that the information from the declarations is published on the Internet in the open data (i.e., machine-readable) format, which will create an opportunity for their reuse and ensure broad participation of the society in monitoring of the financial status of persons performing public functions.

**Kyrgyzstan is partially compliant with the previous Recommendations 16 and 17.**

### **New recommendation No. 6**

**1. Conduct regular practical training of the public servants on declaring income and assets, and provide all necessary assistance to the Tax Service to ensure the collection, verification and publication of declarations.**

**2. Analyse the effectiveness of the control system for declarations of income and declarations of private interests to prevent conflicts of interests and detect illicit enrichment, and, if necessary, revise the institutional framework in this area in accordance with the international standards and best practices.**

**3. Ensure publication on the Internet of all information from declarations of income and assets, as well as declarations of interests, except for certain clearly defined data that are not published in order to protect the declarants' personal safety. The publication of such information should also take place in a format of machine-readable (open) data.**

### **Codes of conduct and ethics education**

As part of the implementation of the Concept of Modernization of the Public and Municipal Service, there was developed, in cooperation with representatives of the expert community, the Code of Ethics for the Public and Municipal Servants, which, in accordance with the Law of the Kyrgyz Republic "On the Public Service and Municipal Service", was approved by the Decision of the Public Service and Municipal Service Council of August 19, 2016 No. 43, which regulates the norms of the officials' conduct. The code consists of six chapters: general provisions; professional duties; prevention of corruption; culture of conduct; the procedure for considering violations of ethical standards; liability for violation of the ethical standards. The Code of Ethics is posted on the website of the Office of the President and the Office of the Government of the Kyrgyz Republic<sup>5</sup>.

In addition, the codes of ethics are being developed by the sectoral bodies:

- the Code of Deputies' Ethics approved by the Resolution of the Supreme Council of the Kyrgyz Republic of June 20, 2008 No. 548-IV;
- the Code of Ethics of the Diplomatic Officials of the Kyrgyz Republic approved by the Order of the Ministry of Foreign Affairs of the Kyrgyz Republic of April 27, 2006, No. 35-p;

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<sup>5</sup> Available at <https://bit.ly/2JqLMqw>.

- the Code of Ethics of the Personnel of the Audit Chamber of the Kyrgyz Republic approved by the Resolution of the Council of the Audit Chamber of the Kyrgyz Republic of November 25, 2005 No. 01-08/60;
- the Code of Professional Ethics of the Personnel of the Prosecutor's Office of the Kyrgyz Republic of October 21, 2014;
- the Code of Ethics of the Customs Officials of the Kyrgyz Republic and the Code of Honour of the Customs Officials of the Kyrgyz Republic approved by the Order of the State Customs Service at the Government of the Kyrgyz Republic of October 25, 2012 No. 5-10/427 and of March 18, 2015 No. 5-07/127 accordingly;
- the Code of Professional Ethics of the Personnel of the Bodies of Internal Affairs of the Kyrgyz Republic approved by the Order of the Ministry of Internal Affairs of the Kyrgyz Republic of February 27, 2009;
- for the military personnel the code of ethics is represented by the Armed Forces By-laws of the Kyrgyz Republic (adopted by the Law of the Kyrgyz Republic of June 18, 1998, No. 117);
- there is the Code of Official Ethics in the National Bank;
- the Code of Ethics for Civil Servants of the Office of the State Agency for Local Government and Ethnic Relations under the Government of the Kyrgyz Republic was approved by the order of the Director of December 30, 2016 No. 01-24/215;
- The Code of Professional Ethics for officials of the Tax Service of the Kyrgyz Republic was approved by the Order of the State Tax Service at the Government of the Kyrgyz Republic of October 3, 2017 No. 196 (the previous Code of Ethics for Civil Servants of the State Tax Service at the Government of the Kyrgyz Republic, approved on December 26, 2012, was abolished).

In accordance with paragraph 17 of the Code of Ethics for the Public and Municipal Official, an ethics commission is formed in each government and local government body to review applications and complaints about the ethical conduct of the officials. The Ethics Commission is formed at a general meeting of the team of officials who are respected and honoured in the team, taking into account gender representation. This monitoring mechanism for the implementation of the ethical standards seems to be weak.

In addition, there has recently been introduced the post of the Commissioner for Preventing Corruption in certain ministries and agencies. The main tasks of the Commissioner include coordination of the activities of the state body and the local self-government body in the implementation of the state policy in the field of preventing corruption; development of proposals for the introduction of anti-corruption measures; implementation of primary monitoring of the anti-corruption measures; methodological and advisory support of the anti-corruption measures within the state body. The commissioners will also be members of ethics commissions, however, it is not yet clear how these two institutions will cooperate on different issues and how their functions will be delineated.

The Human Resources Department introduced the Code of Ethics for the Public and Municipal Servants of the Kyrgyz Republic to the new hires. In addition, the new hires go through the ethics training. The Executive Order of the Government of July 27, 2015 No. 354-r approved the subject of training courses for the civil servants, including the professional ethics and anti-corruption. Training and professional development of personnel on the preventing and combating corruption with emphasis on the practical application of legislation were carried out in accordance with the Decree of the President "On the Issues of Improving the Training System for the Public and Municipal Servants of the Kyrgyz Republic" of July 12, 2013 No. 162 and the Provisional Regulations "On the Procedure for Training of the Public and Municipal

Servants of the Kyrgyz Republic” (Resolution of the Government of the Kyrgyz Republic of August 11, 2014 No. 462).

Every year the Government adopts executive orders on implementation of the state order for training of the public and municipal servants. The educational institutions having the right to conduct training and professional development of the officials are selected through the tender.

Certain agencies work out their own training programs for the personnel. In order to increase the professional knowledge of the personnel of the internal affairs bodies, the schedules of the advanced training programs are approved annually, according to which trainings are conducted at the Academy of the Ministry of Internal Affairs, the issues of prevention and combating corruption are included in the curriculum of these courses.

All programs of training and professional development of the State Service for Combating Economic Crimes under the Government (SSCEC) provide for the full range of regulatory legal acts related to the anti-corruption restrictions. Trainings are conducted monthly. Every year at least 100 SSCEC officers go through the training.

The Public Administration Academy at the President of the Kyrgyz Republic was holding advanced trainings for the public (municipal) officials; 31 courses were conducted and 644 public and municipal servants were trained on the topic “Anticorruption policy.”

According to the Regulations on the State Personnel Service, the service function of this state body includes provision of advice to the public and municipal servants and persons on matters of the public and municipal service, including ethics issues. Also, there is an ongoing work on explanation of the ethics’ issues for the civil servants, as well as on compliance with the basic principles of the civil service.

According to the annually approved curricula of the advanced trainings the Academy of the Ministry of Internal Affairs of the Kyrgyz Republic conducts training of the personnel of the internal affairs bodies of the republic, and the subjects of these courses include issues on preventing and combating corruption. So, in 2015 the Academy of the Ministry of Internal Affairs trained 344 officials, and in 2016-2017 the Academy of the Ministry of Internal Affairs trained 691 officials and 457 officials respectively.

The Ministry of Finance held several roundtables and seminars for their personnel and for university professors. Training in ethics is conducted by the Audit Chamber.

## **Conclusions**

Adoption of the new general code of ethics is a positive step, but many industry codes, for example for members of the Parliament, are clearly outdated. One should welcome the efforts of all bodies to train their personnel on the issues of ethics. However, it should be noted that there is no uniform methodological and information and analytical support. Training is conducted by the agencies themselves and is not systemic. So, each body develops its methodological tools, while the State Personnel Service could have undertaken a coordinating role. For example, despite the adoption of the Law on Conflicts of Interest, training courses have not yet been introduced to establish a purposeful, systematic and orderly process on this important issue. Also, some important bodies, for example, the Parliament, do not conduct any training for their personnel.

## **New recommendation No. 7**

### **1. Update sectoral codes of ethics, especially for the bodies with a high risk of corruption.**

**2. Organise a system of training on ethics and ensure control over compliance with the ethical standards, in particular, to clarify the interaction of the ethics commissions and the anti-corruption authorised persons in this regard.**

## **Reporting on the facts of corruption, protection of whistleblowers**

### **Recommendation 18 of the Kyrgyzstan Third Round Monitoring Report:**

**Introduce an effective system for protecting whistleblowers (personnel reporting on the facts of corruption) from arbitrary dismissal from service and harassment.**

According to the public organizations, “at the moment there is no effective protection of whistleblowers. The current legislation contains only a general framework for the protection of witnesses, victims and other participants of the criminal proceedings. And also there is a separate provision that information about the whistleblower is secret.”

This view is confirmed by the recent case, which was mentioned by the representatives of Kyrgyzstan during the meetings with the monitoring team, when an employee of one of the state bodies sought a decision on a particular issue related to the risk of corruption at her job place. The Parliament supported this employee, but as a result she was dismissed from her office. Representatives of the Government claim that there has been no such case.

The draft Law “On the Protection of Persons Reporting Corruption Offenses” was passed by the Supreme Council in the third reading and was sent to the President for signature. On December 29, 2016 the draft law was returned with the President’s objections for developing an agreed version and for making a revision to eliminate some contradictions. The Resolution of the Supreme Council of February 8, 2017 No. 1327-VI formed a conciliation group to elaborate an agreed version of the Law. The Conciliation Group finalized the draft Law and submitted it to the Committee on the Rule of Law, Combating Crime and Anti-corruption of the Zhogorku Kenesh.

At present, each state body should maintain a log to record cases of tempting to corruption. In the Ministry of Justice, two cases were recorded in 2017. There are no separate statistics on the reports on corruption offenses, the statistics are reflected in the reports on consideration of the persons’ applications.

## **Conclusions**

An important work was done to draft legislation on the protection of whistleblowers, but its adoption was postponed, apparently for the political reasons. It is necessary to continue this work, adopt effective legislation, and ensure its implementation in practice.

**Kyrgyzstan is partially compliant with the previous Recommendation 18.**

## **New recommendation No. 8**

**Adopt the law on the protection of whistleblowers and take measures to implement it, including the assignment of the responsible body, training of the civil servants on measures for implementation of the law and regular monitoring of the effectiveness of its implementation.**



## 2.2. Integrity of political officials

### **Recommendation 23 of the Kyrgyzstan Third Round Monitoring Report:**

**... Consider a possibility of adoption of the Codes of Ethics for the Deputies of the Supreme Council and for members of the Government of the Kyrgyz Republic.**

In accordance with the Law of the Kyrgyz Republic “On the Public and Municipal Service” and the Register of the Public and Municipal Posts approved by the Decree of the President of January 31, 2017 № 17, the public posts are divided into the following categories: political, special and administrative.

In accordance with the Register of the Public and Municipal Posts of the Kyrgyz Republic approved by the Decree of the President of January 31, 2017 No. 17, the political public posts include:

- the President of the Kyrgyz Republic
- Toraga of the Supreme Council, Prime Minister, Head of the Office of the President;
- Deputy Toraga, deputy of the Supreme Council, first Vice Prime Minister, Vice Prime Minister, member of the Government, head of the state body subordinated to the President, head of the Office of the Supreme Council;
- head of the administrative agency at the Government, head of other body subordinated to the Government;
- plenipotentiary representative of the Government in the region, head of the local state administration – akim of the district.

The above-mentioned register also specifies the political municipal posts, which include: Chairman, deputy chairman, deputy of the local *kenesh*; mayor of the city, head of *ayil okmotu*.

Surveys of the Statistics Committee do not contain questions on members of the Parliament, and therefore do not contain any indications of corruption risks in this area. There are no other studies on political corruption. At the same time, during meetings with representatives of the state bodies and non-governmental organizations, many of them openly spoke about the risks which were most often associated with political employees in the country (for example, bribery of voters on the election day, bribery for getting into the party lists, lobbying for a fee).

#### Rules of conduct or rules of ethics for the political servants

Resolution of the Supreme Council of June 20, 2008 No. 548-IV approved the Code of Deputies’ Ethics. The code is clearly obsolete and does not reflect the new requirements of the law and society. There is no training system for members of the Parliament related to the ethical requirements and no effective system for monitoring of implementation of the code. Ethics training is organized at the beginning of each convocation for those deputies who want to take part in it. According to the code of ethics, training is conducted only for the office of the deputies. There is no permanent commission on ethics in the Parliament. If a complaint on a deputy is received, it is considered by the head of the faction, which includes the deputy (in 2017 there were three such cases). The last high-profile case was the application of

the code to the deputy, who called for measures against users of the social networks that distribute negative publications about the President<sup>6</sup>.

The Code of Ethics of the Public and Municipal Official is approved by the decision of the Public Service and Municipal Service Council of August 19, 2016 No. 43. The Decree of the Acting President “On the Political Public Service” of May 25, 2005, No. 200 provides that the President, the Supreme Council, the Prime Minister or the Government respectively may impose disciplinary sanctions on the persons, whom they have appointed or elected to the office, for improper performance of the duties assigned to them, abuse of the official powers, violation of the labour discipline, violation of the ethics of the civil service, violation of the oath (swear), as well as failure to comply with the restrictions established by laws relating to the civil service.

In addition to the grounds for the dismissal of a person from a political public post in the executive power bodies established by the Constitution and laws, a political civil servant can be dismissed from their post if their activities do not comply with the decisions and policies pursued by the political leadership.

These provisions are generally positive, but they are declarative in nature. There are some cases of imposing sanctions for unethical behaviour and violation of the rules of conduct; for example, the Minister of Transport was fired for using official vehicles for personal needs. In practice, there are no systemic mechanisms for training political servants on the issues of ethics or monitoring of implementation of the ethical standards.

#### Conflict of interests

Conflict of interests and, in particular, affiliation of members of the Parliament with the business is an acute problem in Kyrgyzstan.<sup>7</sup> Parliament adopted the Law on Conflict of Interests on December 7, 2017. This Law applies to the political servants. As noted earlier, members of the Parliament took a conservative stance when adopting the Law in order to limit its influence on themselves. In addition, until now no work has been done to implement this Law in the Parliament. For example, according to the Law, members of the Parliament should avoid making decisions in which they may have a conflict of interests, but there was no single instance of such self-elimination. Information on how different deputies vote, which can show illegal lobbying, is not published.

#### Declarations

The Law “On the Declaration of Incomes, Expenses, Liabilities and Assets of Persons Who Hold or Occupy Public and Municipal Posts” also applies to the persons holding or occupying political and administrative posts.

In accordance with the Law “On the Declaration of Incomes, Expenses, Liabilities and Assets of Persons Who Hold or Occupy Public and Municipal Posts” persons holding political posts are obliged to declare information about their assets and liabilities subject to disclosure in the declarations.

During the country visit of the monitoring team, members of the Parliament did not yet know how the system of declarations would work for them, despite the fact that it took several months to come into force. Earlier, the State Service collected their declarations, and violations were considered by the interdepartmental commission.

#### Remuneration

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<sup>6</sup> See <https://bit.ly/2soa4If>.

<sup>7</sup> See, for example, <https://bit.ly/2tnYE7H>.

According to the information received by the experts during the country visit, the salaries of the political servants remain low, as the change in the salary scale has affected mainly the employees at the lower levels and in the regions. The increase of remuneration has been postponed by the Ministry of Finance for political reasons until 2020. However, the public insisted that members of the Parliament had set salaries for themselves without following any criteria.

In accordance with Article 4 of the Law of the Kyrgyz Republic “On the Maximum Number of Staff and on the Terms of Remuneration for the Public and Municipal Servants of the Kyrgyz Republic”, the terms of payment for the President, Toraga of the Supreme Council and the Prime Minister, civil servants of the Office of the President, the Office of the Supreme Council and the Office of the Government of the Kyrgyz Republic and their sizes are set in equal terms. The net salaries for the political servants have not yet been approved.

The terms of remuneration of the civil servants and other categories of employees of the Office of the President and the Office of the Supreme Council, as well as their sizes are set in equal terms.

**Kyrgyzstan is not compliant with this part of the previous Recommendation 23.**

#### **New recommendation No. 9**

- 1. Update the code of ethics for members of the Parliament and ensure effective control over its observance.**
- 2. Establish transparent terms of remuneration for the political officials.**
- 3. Ensure transparency in the formation and execution of the budget of the Parliament and its committees and their spending of funds, including funds allocated for supporting the deputies' work.**
- 4. Ensure regular training of the political officials on ethics, anti-corruption restrictions and requirements.**

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

### **Judiciary**

#### **Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report<sup>8</sup>:**

- 1. Continue reforming the legislation on the judiciary in order to strengthen the guarantees of judicial independence, their irremovability from office, and elimination of corruption possibilities, in particular:**
  - to exclude or significantly limit the role of the Parliament in appointment of judges; revise the composition and the procedure for forming the Council for the Selection of Judges; establish uniform criteria for selection of judges on the basis of personal qualifications;**
  - to provide clear grounds for, and modify the procedure of, bringing judges to disciplinary liability in order to comply with the fair trial guarantees and prevent arbitrary dismissal of judges from office while ensuring effective accountability of judges;**
  - to set the amount of judicial remuneration in law.**
- 2. Ensure implementation in practice of an automated case assignment system and that information on case assignment is open; ensure publication of court decisions on the Internet.**
- 3. Consider abrogating the procedure for revision of court decisions through supervisory review.**
- 4. Ensure that the constitutional jurisdiction body is formed and functions. ...**

#### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report:**

- 1. Take all necessary measures aimed at prohibition of *ex parte* communication with the judges and implement the respective provisions in practice.**
- 2. Consider possibility of abolishing the probation period for judges, alternatively if the probation period is maintained, ensure objective and transparent procedure for evaluation and appointment of judges after the termination of the probation period.**
- 3. Revoke the Presidential powers related to the career of judges, including their dismissal and other powers, that may have negative impact on the judicial independence.**
- 4. Revise the Code of Ethics of judges to covers incompatibilities, conflicts of interests, gifts, and other related provisions and ensure its practical implementation.**
- 5. Ensure that the training of judges includes the issues of ethics, fight against corruption and integrity, for both initial and continuous trainings for judges.**

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<sup>8</sup> Recommendations 24 and 25 in the Kyrgyzstan Third Round Monitoring Report are mistakenly referred to as Recommendations 23-24.

**6. Ensure financial autonomy of judiciary in law and in practice. Salary, any remuneration of judges and their social guarantees should be explicitly set by law.**

**7. As a matter of urgency ensure practical implementation of the automated case assignment.**

### **Corruption in the judiciary**

The judicial system of Kyrgyzstan is still subject to a high level of corruption as well as an improper interference in the activities of the courts. This is confirmed by the surveys of participants in trials and citizens of Kyrgyzstan, as well as by the official government policy documents and international ratings.

The State Strategy of Anti-Corruption Policy of the Kyrgyz Republic, approved by the Decree of the President of the Kyrgyz Republic of February 2, 2012 No. 26, noted that “the weakness of the judicial system in the sphere of combating this phenomenon, their internal corruption also contribute to the growth of corruption.”

In the National Sustainable Development Strategy of the Kyrgyz Republic for 2013-2017 adopted in 2013 one of the main directions of the country’s development for this period was “the completion of the judicial reform, the enhancement of the independence and authority of the judiciary in defending with its help of the rights and freedoms and legitimate interests of persons and legal entities, as well as the legitimate interests of the state and society.” The Strategy also noted “continued radical reform of the judicial system, strengthening of the rule of law, adherence to the principles of justice, equality of all before the law and the court, ensuring transparency of justice. There should be performed an extensive targeted work to ensure the irreproachable conduct of judges, to increase the level of trust in the judicial system, to create conditions for this and to amend the legislation accordingly. Changes in the legislation will not undermine the independence of the judicial system, and the judicial self-government bodies will play an important role in ensuring judicial ethics.”

It is noted in the Decree of the President of the Kyrgyz Republic of 2013 “On the Measures for Eliminating the Causes of Political and Systemic Corruption in the Government”<sup>9</sup> that the most problematic corruption schemes have been developed in the judicial, law enforcement, financial, registration, energy and educational systems.

In December 2013 the Supreme Court of the Kyrgyz Republic adopted the Anti-Corruption Plan, as well as the comprehensive Program to implement this plan. In 2014 the Supreme Council approved the State Special Purpose Program “Development of the Judiciary of the Kyrgyz Republic for 2014-2017”<sup>10</sup> worked out with the technical support of the USAID-IDLO Judicial Strengthening Program in Kyrgyzstan. In this Program the following tasks are identified as the tasks for achieving the goal of building trust in the courts by the society: development of an internal system for assessing the activities of the courts and judges and an effective mechanism for holding the judges liable, development and adoption of the set of measures to counter corruption among the judges and office employees of the courts.<sup>11</sup>

In 2015 the Government of the Kyrgyz Republic adopted the Action Plan of the State Bodies of the Kyrgyz Republic to implement the State Strategy of Anti-Corruption Policy of the Kyrgyz Republic for 2015-2017 which identified the following measures for reducing the level of corruption in the judicial system:

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<sup>9</sup> Decree of the President of the Kyrgyz Republic of November 12, 2013 No. 215.

<sup>10</sup> Resolution of the Supreme Council of the Kyrgyz Republic of June 25, 2014 No. 4267-V.

<sup>11</sup> Report on the Project: Study of Judiciary’s Activities within the Anti-Corruption Framework Rfp-190-2016 SIAR Research & Consulting, 2016.

- 1) introducing liability of officials of the judiciary for failure to report on the facts of interference in the activities of the judges;
- 2) ensuring the implementation of the automated case assignment system, the openness of information on such assignment and publication of court decisions on the Internet;
- 3) increasing transparency of consideration of disciplinary materials related to the judges;
- 4) installing continuous video surveillance systems in the offices of judges and in the courtrooms and systems for continuous recording of calls over the official telephones of judges.

There was also adopted the Plan of Countering Corruption in the Judiciary of the Kyrgyz Republic for 2018-2020.

According to the statements of the country's top leadership, the judicial reform remains one of the top priorities<sup>12</sup>.

A high level of corruption and improper interference in the administration of justice in Kyrgyzstan is confirmed by the results of the sociological study. According to the survey of the population of Kyrgyzstan from March 2016 (conducted by SIAR Research & Consulting commissioned by the International Republican Institute), the courts were the second most corrupt institution (after the State Traffic Inspectorate)<sup>13</sup>.

According to the mentioned study of 2016 the respondents named the following main factors that motivate the participants of the judicial process to give bribes, namely, the lack of opportunities to solve the case by legal means; lengthy proceedings; mistrust of courts.

Please see other results of the sociological surveys conducted in 2012 and 2016<sup>14</sup> in the Annex to the Report.

National surveys also reflect the position of Kyrgyzstan in the international ratings. For example, according to the indicator "Independence of the courts" in the Global Competitiveness Report 2017-2018 of the World Economic Forum, Kyrgyzstan was ranked 102<sup>nd</sup> among 137 countries<sup>15</sup>.

### **The system of courts and legislative reform**

The judiciary in Kyrgyzstan is regulated with the following main provisions:

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<sup>12</sup> According to the President of the Kyrgyz Republic Sooronbai Jeenbekov, the reform of the judiciary is the main problem in the state. "When I meet with the people, I am told about the glaring facts of violation of the rights of citizens by corrupt and unjust judges. About 70% of appeals concern this problem. Reforming the judiciary is one of the main tasks for today. In recent years, much has been done, but the pace of reform has been significantly lower than public expectations, and the reform of the judiciary is lagging behind. Therefore, the implementation of the judicial and legislative reforms and the fight against corruption is a priority for Kyrgyzstan", he said. Source: <https://bit.ly/2GMawUU>, May 17, 2018.

<sup>13</sup> Source: <https://bit.ly/2LhMUv3>.

<sup>14</sup> See: Report on the comparative analysis of the results of studies on the assessment of corruption in the judicial system of the Kyrgyz Republic for 2012 and 2016 conducted within the framework of the USAID-IDLO Judicial Strengthening Program in the Kyrgyz Republic, 2017; Report on the Project: Study of Judiciary's Activities within the Anti-Corruption Framework Rfp-190-2016 SIAR Research & Consulting, 2016. The Study of 2012 was performed by the national office of Transparency International in Kyrgyzstan.

<sup>15</sup> Source: <https://bit.ly/2jZK8Rg>.

- Constitution of the Kyrgyz Republic (as amended by the Law of the Kyrgyz Republic of December 28, 2016 No. 218);
- Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic” of July 9, 2008 No. 141;
- Law of the Kyrgyz Republic “On the Supreme Court of the Kyrgyz Republic and Local Courts”;
- Law of the Kyrgyz Republic “On the Council for the Selection of Judges of the Kyrgyz Republic” of June 13, 2011 No. 40;
- Law “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic” of July 28, 2017 No. 147;
- Law of the Kyrgyz Republic “On Approval of the Structure of the Local Courts and Number of Judges of the Local Courts of the Kyrgyz Republic” of October 28, 2011 No. 188.

In accordance with the Law of the Kyrgyz Republic “On the Supreme Court of the Kyrgyz Republic and Local Courts”, the Supreme Court and local courts constitute a unified system of courts administering justice in the civil, criminal, administrative, economic and other cases provided for by law. The Supreme Court is the highest judicial body in the civil, criminal, economic, administrative and other cases, which consists of the chairman, three deputy chairmen and 31 judges of the Supreme Court. Deputy chairmen are chairmen of the judicial boards. The change in the number of judges of the Supreme Court is allowed only on the proposal of the Council of Judges of the Kyrgyz Republic.

The system of local courts consists of: 1) first instance courts (district courts, district courts in the city, city courts, inter-district courts); 2) second instance courts (regional courts, Bishkek City Court).

Establishment, reorganization and abolition of the local courts, changing the number of judges of the local courts are carried out only by law. In case of abolition of the local courts, the issues of the administration of justice referred to their jurisdiction are transferred to the jurisdiction of other courts. The established posts of judges of the abolished courts are transferred to other courts, and judges are transferred thereto in the course of rotation.

The change in the number of judges of the local courts is allowed only on the proposal of the Council of Judges.

In 2015-2017 there were adopted a number of legislative measures aimed, in particular, at strengthening the independence and integrity of the judicial system of Kyrgyzstan and its reform in general. They included the following:

- the Law of the Kyrgyz Republic “On Amending Certain Legislative Acts in the Field of Access to Information” of 27 July 2016 No. 151 strengthened guarantees of publicity and access to information on the activities of the courts and provided for the creation of the State Register of Judicial Acts;
- the Higher School of Justice should be established<sup>16</sup>;
- the Law on Bailiffs of 5 August 2016 No. 164 was adopted;

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<sup>16</sup> The Law of the Kyrgyz Republic “On Amending Certain Legislative Acts of the Kyrgyz Republic (the laws of the Kyrgyz Republic “On the Supreme Court of the Kyrgyz Republic and Local Courts”, “On the Judicial Self-Government Bodies”) of August 5, 2016 No. 165

- in December 2016, there was held a referendum to change some of the provisions of the Constitution of the Kyrgyz Republic, including those related to the judiciary (some changes will be analysed below), and the relevant legislation was revised (the Constitutional Law of the Kyrgyz Republic “On Amending the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic” of 28 July 2012 No. 148);
- the Law “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic” of 28 July 2017 No. 147 was adopted;
- in 2017, the new Civil Procedure Code of the Kyrgyz Republic, the Administrative Procedure Code of the Kyrgyz Republic, the Law of the Kyrgyz Republic “On the Status of Bailiffs and on Enforcement Proceedings” and other laws entered into force;
- the new Criminal Code of the Kyrgyz Republic, the Code of Offences, the Criminal Procedure Code of the Kyrgyz Republic, and the Criminal Executive Code of the Kyrgyz Republic were adopted and will enter into force on 1 January 2019;
- on 1 January 2019 the Code of the Kyrgyz Republic on Violations will come into force.

### **Guarantees of independence**

According to parts 1-4 Article 94 of the Constitution of the Kyrgyz Republic, judges shall be independent and subordinate only to the Constitution and laws. Any interference in the administration of justice shall be prohibited. Persons found guilty of influencing upon a judge shall be liable in accordance with the law. A judge shall be provided with social, material and other guarantees of his independence in

The Constitutional Law “On the Status of Judges the Kyrgyz Republic” envisages the following guarantees of independence of judges:

1) The independence of judges shall be guaranteed by the administration of justice according to the procedures provided for only by law; the prohibition, under threat of liability, of interference in the activity of a judge by any party whatsoever; the irremovability of judges; the immunity of judges; the obligation to provide material and social support of judges corresponding to their high status at the expense of the State; the functioning of judicial self-governing bodies; the right to resign.

The guarantees of the independence of judges provided for in the Constitution of the Kyrgyz Republic and the present Constitutional Law may not be abolished or reduced in any circumstances.

#### 2) Inadmissibility of interference in the activity of a judge

- Any interference with the administration of justice shall be prohibited. Persons guilty of interfering in the activities of the judge in the administration of justice are liable according to the law;

- No one shall be entitled to solicit a report from a judge on a specific judicial case, except where, in accordance with the present Constitutional law, a matter concerning the liability of a judge is under examination;

- A judge shall be under no obligation to give any kind of explanation as to the merits of cases examined by or assigned to them or to pass the case material to whomsoever to gain knowledge thereof, other than in the circumstances and under the procedure provided for in the procedural law.

#### 3) Irremovability of a judge

- Judges of all courts of the Kyrgyz Republic shall be irremovable. They shall exercise their duties and conserve their powers within the limits of the term laid down in the Constitution;

- A judge may not be subject to early discharge or dismissal from office and their powers may not be suspended or terminated other than under the procedure and on the grounds established in the Constitution of the Kyrgyz Republic and the present Constitutional Law;

- A judge exercising their powers in a local court in a given region of the Republic may be sent to an equivalent or higher post at another court under a transfer/rotation procedure to exercise the powers of judge in that local court only in the circumstances and on the grounds provided for in the present Constitutional Law.

#### 4) Immunity of a judge:

- A judge has the right to immunity and cannot be detained and arrested, subjected to a search or body search, except when caught at the scene of a crime. A judge detained on suspicion of committing a crime or on other grounds or forcibly delivered to any law enforcement agency when it was not known who the judge was at the time of detaining them, shall be immediately released upon their identity being established;

- A judge, including after termination of their powers and dismissal from their position, cannot be brought to criminal and administrative liability imposed in a judicial procedure for unlawful acts committed by them during the exercise of the authority of a judge, other than as established by this Constitutional Law.

- A body search of a judge shall not be permitted except in circumstances provided for by law for the purposes of ensuring the security of other people.

### **Analysis**

The UN Human Rights Council in its resolution of 2015 notes that “independent and impartial judiciary, an independent legal profession, an objective and impartial prosecution able to perform its functions accordingly and the integrity of the judicial system are prerequisites for the protection of human rights and the application of the rule of law and for ensuring fair trials and the administration of justice without any discrimination.”<sup>17</sup>

As it was summarised in the report of the International Commission of Jurists,<sup>18</sup> judicial independence requires both individual independence of judges and institutional independence of the judiciary as a whole. Institutional independence refers to independence from other branches of power, and individual independence refers to the independence of a particular judge. These two aspects of judicial independence are interlinked since independence of individual judges can only be ensured where there is sufficient institutional protection of the independence of the judiciary. It is equally vital that the independence of individual judges is protected from undue influence from within the judiciary itself. Therefore, judicial independence requires not only guarantees against external pressure on judges but equally importantly

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<sup>17</sup> Resolution No. 29/6 (2015) of the UN Human Rights Council on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, UN Doc. No. A/HRC/29/6.

<sup>18</sup> International Standards on the Independence, Efficiency and Quality of Justice, International Commission of Jurists, Geneva, January 2017 available at <https://bit.ly/2InUyWL>.

internal procedural safeguard. Regulation of almost every aspect of the judicial career can affect judicial independence<sup>19</sup>.

Despite the guarantees provided by the Constitution and laws of the Kyrgyz Republic, in practice the independence of judges is not ensured and it is one of the main problems of the judiciary's integrity in Kyrgyzstan.

According to the study of 2012<sup>20</sup>, judges and court staff were subjected to pressure, and the judicial system was highly dependent on both the civil society and officials. The main forms of pressure, according to the judges, included telephone calls with the demands to make a certain decision on the particular case, to leave the case without consideration, to expedite consideration of the case or, to delay it, direct instructions from the chairman of the court and the judges of higher instances; personal requests; threats and intimidation; rallies of citizens, etc. The highest degree of influence on the judiciary was exercised by the Parliament and the Office of the President. The main forms of corruption were bribery and abuse of office; judges noted that they often had faced corruption in the form of pressure exerted on them.

The same study was undertaken in 2016<sup>21</sup>, where it was also noted that the strongest pressure on judges was made by representatives of the executive and legislative branches of power, higher judicial authorities and citizens offering bribes. According to the survey, five out of ten court decisions are put under pressure. The majority of litigants and individuals noted that there is still a notion of "telephone law" in the courts. Interference in the course of trials by the executive and legislative branches of power remained at the level of 2012; besides, in 2016 a new type of corruption (abuse of office) was added.

The Kyrgyz authorities noted in their comments to the draft of this report that the statement on the impact on the judiciary by the Zhogorku Kenesh of the Kyrgyz Republic is not true, as there is no evidence of this (documentary, etc.).

Below are the other results of the 2016 study.

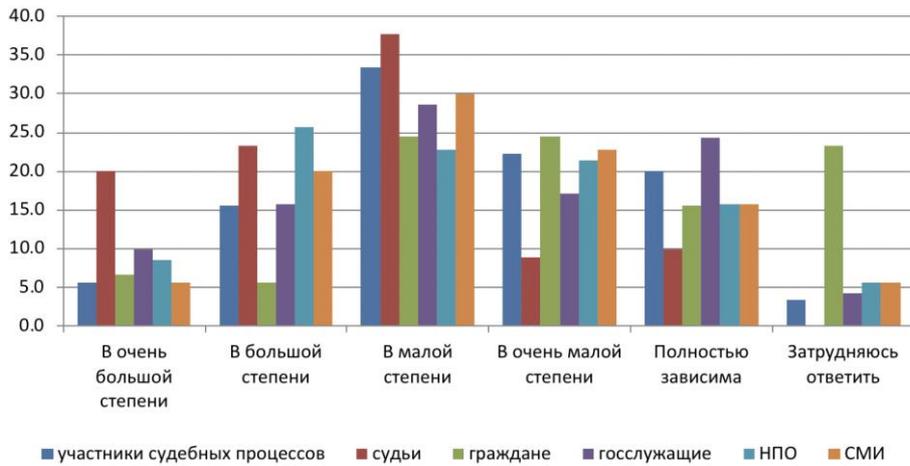
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<sup>19</sup> The standards on the independence of judges can be found, *inter alia*, in the following sources: ECHR resolution on cases *Beaumartin v France* (1994), s. 38, *Sramek v Austria* (1984), s. 42, *Langborger v Sweden* (1989), ECHR, s. 32, *Kleyn et al. v Netherlands* (2003), ECHR, s. 190; the Council of Europe Committee of Ministers, Recommendation No. CM/Rec(2010)12; Consultative Council of European Judges, Opinion No. 1 (2001), as well as Magna Carta of Judges (Fundamental Principles), Strasbourg, November 17, 2010 CCEJ (2010)3; European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004; International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, ICJ Practitioners' Guide No. 1 (2007); Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, OSCE/ODIHR, 2010.

<sup>20</sup> Study on Assessment of Corruption in the Judiciary of the Kyrgyz Republic, 2012, USAID, IDLO, Transparency International Kyrgyzstan.

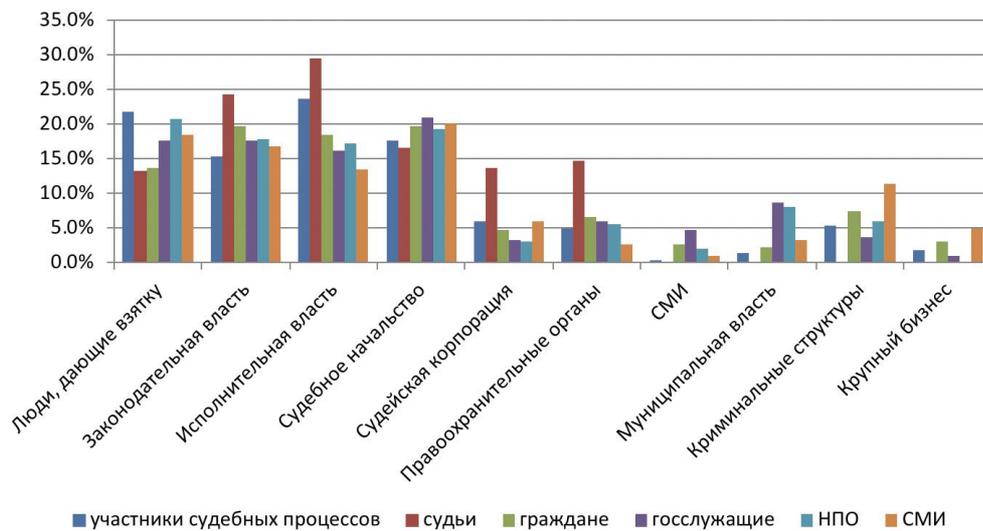
<sup>21</sup> Report on the Project: Study of Judiciary's Activities within the Anti-Corruption Framework, IDLO, SIAR Research & Consulting, 2016

Figure 1. Level of judicial independence



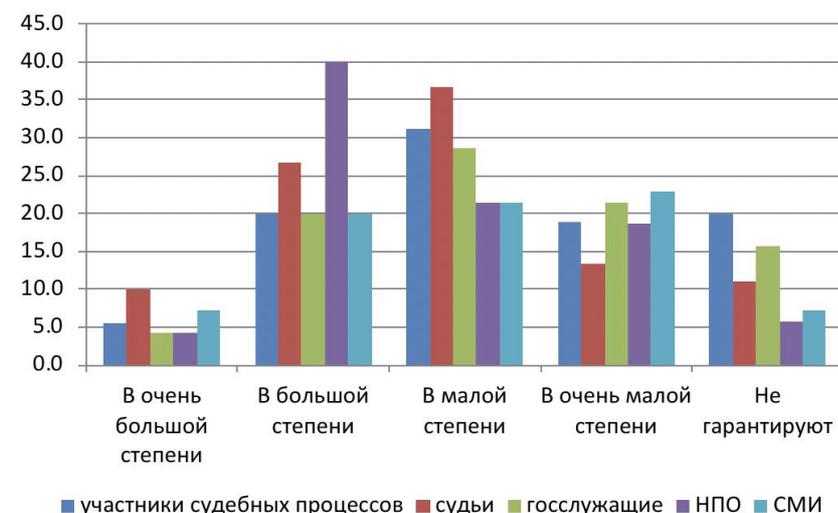
Source: SIAR Research & Consulting, 2016.

Figure 2. Who places pressure on the judicial system



Source: SIAR Research & Consulting, 2016.

Figure 3. Level of guarantees of the independence of judges by legislation



Source: SIAR Research & Consulting, 2016.

## Financial autonomy

### Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report

**“1. Continue reforming the legislation on the judiciary in order to strengthen the guarantees of judicial independence, their irremovability from office, and elimination of corruption possibilities, in particular: ... establish the amount of judicial remuneration in law.”**

### Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report

**“6. Ensure financial autonomy of the judiciary in law and in practice. Remuneration of judges, any wage premiums and social guarantees of judges should be set directly in law.”**

In accordance with Article 98 of the Constitution of the Kyrgyz Republic, the state provides financing and appropriate conditions for the functioning of courts and the activities of judges. Financing of the courts is carried out at the expense of the republican budget and shall ensure the possibility of full and independent administration of justice. The budget of the judiciary shall be drawn up by the judiciary independently and shall be included in the republican budget upon agreement with the executive and legislative branches of power.

According to Article 5 of the Budget Code of the Kyrgyz Republic of May 16, 2016, draft regulatory legal acts on matters relating to the judiciary’s budget are subject to mandatory agreement with the Council of Judges. According to Article 92 of the Budget Code, the budget of the judiciary shall be drawn up by the judiciary independently and shall be included in the republican budget upon agreement with the executive and legislative branches of power. The draft budget of the judiciary is sent by the Council of Judges to the Government for approval no later than eight months before the start of the next fiscal year. If there are disagreements, the authorized state body shall forward the draft budget of the judiciary to the Council of the Government. Representatives of the Council of Judges and the Council of Government are obliged to conduct and complete the approval procedure no later than seven months before the start of the next fiscal year. If the agreement is reached, the Council of Judges finalizes the draft budget of the judiciary, taking into account the agreed proposals, and submits it to the Government. In case the agreement is not reached, the proposals of the Council of Judges and the Government on the draft budget of the judiciary are

simultaneously sent to the Supreme Council for consideration. When drawing up the republican budget for the corresponding year, the amount of the expenditures in the budget of the judiciary may be lower than the approved indicators of the previous year subject only to the consent of the Council of Judges.

Sequestration of the budget funds provided for by law to finance the judiciary in the current fiscal year is allowed only with the consent of the Council of Judges.

In 2014, there was adopted the State Special Purpose Program “Development of the judiciary of the Kyrgyz Republic for 2014-2017” (SSPP) providing for a planned increase in the budget of the judiciary and reaching its size to 2% of the share of the budget of the Kyrgyz Republic<sup>22</sup>.

## Analysis

Legislation of Kyrgyzstan establishes the progressive provisions on the guarantees of financial autonomy of the judiciary. The approval of the State Special Purpose Program “Development of the judiciary of the Kyrgyz Republic for 2014-2017” and the analysis that was presented in the program were both commendable.

However, in practice, not all of these guarantees are observed. The State Special Purpose Program aimed to achieve the level of financing at 2% of the total state budget expenditures; this indicator is not reached (see the table below). At the same time, it is positive that in the last few years the budget of the judiciary according to the republican budget was consistent with the request that was formed by the judiciary itself and submitted by the Council of Judges (and sometimes even exceeded it - see the table).

**Table 7. Budget of the Judiciary**

Year	The amount of financing according to the budget of the judiciary, formed by the Council of Judges ( <i>thousands of som</i> )	The size of the budget of the judiciary envisaged in the law on the republican budget ( <i>thousands of som</i> )	The share of the budget of the judiciary in the expenditure part of the republican budget (%)
2015	1,036,989.7	1,034,355	0.87%
2016	1,136,898.2	1,213,535.4	0.83%
2017	1,352,208.9	1,360,538.7	0.91%
2018	1,622,572.3	1,622,572.3	1.01%

Source: information of the Judicial Department at the Supreme Court of the Kyrgyz Republic.

## Remuneration, support, qualification classes

According to Article 32 of the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, judges are provided with labour remuneration from the republican budget allocated for the financing of the judiciary. Terms of remuneration for judges are set by the President on the proposal of the Council of Judges. The amount of remuneration for judges cannot be reduced while they hold their offices. According to the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, judges with qualification classes get wage premiums in accordance with the procedure established by the legislation of the Kyrgyz Republic.

A judge who needs housing or its improvement shall be provided with the official housing or compensation for expenses in connection with the rental of housing or get sufficient funds from the budget of the judiciary to improve housing conditions. The procedure for providing housing or assisting in individual housing construction is regulated by the Government with the consent of the Council of Judges.

<sup>22</sup> Available at <https://bit.ly/2rOLxLq>.

Judges are subject to the obligatory medical insurance at the expense of the state. Expenses related to the medical treatment during illness are compensated by the state. Judges continue receiving the average monthly salary during the period of their illness, as confirmed by a medical certificate. The life of a judge is subject to the obligatory state insurance at the expense of the republican budget. In case of death of a judge, as well as in case of termination of the judge’s authority on the grounds provided for in clause 9 part 1-1 of Article 27 of this Constitutional Law, his/her family is paid a one-off allowance based on his/her average monthly salary for the last full year of work of the judge, but not less than his/her annual salary.

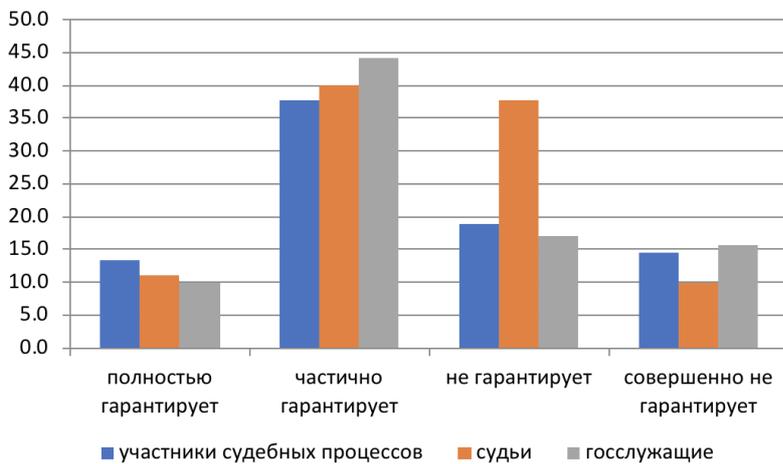
Legislation also provides for other social guarantees and pensions for judges.

## Analysis

Remuneration of judges is an important condition of the judiciary’s independence.

Based on the results of 2016 study<sup>23</sup>, in the opinion of the majority of respondents, the current level of remuneration of judges guarantees the independence of judges only in part or does not guarantee it at all.

**Figure 4. The level of wages as a guarantee of the independence of judges**



Source: SIAR Research & Consulting, 2016.

Although no official information on the amount of remuneration of judges was provided, it is known that the salary of a judge of a first instance local court ranges from 18 to 23 thousand som (about EUR 200-280), the salary of a judge of the Supreme Court is around 25-30 thousand som (about EUR 300-370)<sup>24</sup>.

According to the mentioned 2016 study, more than 70% of the respondents from among the participants in the trials consider the salary of 40 thousand som as sufficient to guarantee the independence of the judges. One third of the respondents among the judges consider the salary level of 80 thousand som as sufficient to guarantee the independence of judges.

Judges of the local courts do not get bonuses. Bonuses are paid to the judges of the Supreme Court quarterly in equal parts.

The salaries of the staff of the courts’ offices remain low (their salary being about 6,000 som<sup>25</sup>).

<sup>23</sup> Report on the Project: Study of Judiciary’s Activities within the Anti-Corruption Framework, IDLO, SIAR Research & Consulting, 2016

<sup>24</sup> Source: <https://bit.ly/2GvQKwV>.

The financial autonomy of the judiciary, stipulated in the laws of the Kyrgyz Republic, requires practical implementation. As it was established during the evaluation mission, information on the remuneration and wage premiums of judges comprises restricted information. Judges of different instances are unaware of how much their colleagues are paid for their work. The Law of the Kyrgyz Republic on the Status of Judges, as before, provides that the terms of remuneration of judges are set by the President on the proposal of the Council of Judges. At the same time, Article 64 of the Constitution of the Kyrgyz Republic neither provides such powers to the President, nor it authorizes the President to issue certificates to chairmen, deputy chairmen of local courts and judges. At the same time, the salaries of judges are set by the Government Resolution on the Remuneration of Judges of the Local Courts.

Thus, the recommendation from the previous round of monitoring regarding the direct stipulation in law of the amounts of remuneration, all wage premiums and social guarantees of judges was not implemented.

The experts also pay attention to the provision of Article 9 of the Law of the Kyrgyz Republic on the Status of Judges, which in fact contains a discriminatory idea that during the first six months newly appointed judges work for a minimum remuneration, since no qualification class is assigned to them. In this regard, it is recommended to revise this provision by awarding of newly appointed judges with the fifth qualification class from the first day when they are appointed. It is also necessary to supplement Article 9 of the Law on the Status of Judges with a provision on who assigns the qualification classes, and Article 10 – with the basic rates of wage premiums for each class.

At the same time, experts believe that, in general, it is necessary to abolish the institution of qualification classes in the judiciary of the Kyrgyz Republic and replace it with a legally guaranteed and balanced approach to determining the remuneration of judges. The assigning of qualification classes can be used to influence judges and should not replace an objective assessment of judges. This is especially important, since qualification classes are assigned to judges by the President on the recommendation of the Council of Judges, that is, with the participation of a political body, and the criteria for assigning qualification classes are not clearly defined in the law.

#### **New recommendation No. 10**

- 1. Establish directly in the law the criteria for determining and periodically indexing the basic rates of remuneration of judges (for example, based on a certain number of minimum wages), the list and the amounts of any established wage increments and allowances. The amount of the remuneration of judges and court staff should be sufficient to reduce the risk of corruption.**
- 2. Ensure the disclosure and free access to the information on the established and actual remuneration of judges and staff of the judiciary as well as the structure of such remuneration.**
- 3. Eliminate the discrimination of newly appointed judges in terms of the amount of their remuneration due to their lack of a qualification class during the first six months and, eventually, abolish the institute of qualification classes in the judiciary of the Kyrgyz Republic.**

#### **The principle of irremovability of judges**

#### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report**

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<sup>25</sup> The official amount of the subsistence level in 2018 was 4,900 soms. Source: <http://www.stat.kg/ru/living-wage/>.

**“2. Consider the possibility of cancelling the initial temporary appointment for the position of a judge, alternatively, if this institution continues to exist, ensure an objective and transparent procedure for assessing and appointing a judge after the expiration of the trial period.”**

In accordance with Article 3 of the Constitutional Law “On the Status of Judges of the Kyrgyz Republic,” judges of all courts of the Kyrgyz Republic are irremovable. They hold their posts and retain their powers within the constitutional term. The judges cannot be released early or dismissed from their offices and their powers cannot be suspended or terminated other than in the manner and on the grounds established by the Constitution and this Constitutional Law.

A judge exercising his/her powers in a local court located in the same region of the republic may, in the order of transfer (rotation), be sent to another local court for an equivalent or higher position to exercise the powers of the judge of that local court only in cases and on the grounds provided for by this Constitutional Law.

According to the Constitution of the Kyrgyz Republic, the judges of the Supreme Court are elected for a term until the age limit is reached. Judges of the local courts are appointed by the President on the recommendation of the Council for the Selection of Judges for the first time for a period of five years, and subsequently – until reaching the age limit. The procedure for the presentation and appointment of judges of the local courts is specified in the constitutional law.

At the same time, the procedure for the assessment of judges in the course of their selection is established by the Regulations on the Procedure for Holding a Competitive Selection for the Position of a Judge of the Kyrgyz Republic, approved by the Decision of the Council of Judges of September 21, 2017. The criteria for the competitive selection for the position of a judge are also applied.

## **Conclusion**

**Kyrgyzstan was partially compliant with that part of the Recommendation** since there were determined the criteria and the selection procedure for an indefinite appointment of a judge after the first appointment.

The constitutional changes in 2016 did not address the issue of the first appointment of judges to the local courts. Kyrgyzstan did not provide information on the consideration of the possibility of cancelling the initial temporary appointment for the position of a judge, as recommended.

## **New recommendation No. 11**

**Consider the possibility of revoking the initial 5-year appointment for the position of a judge, ensuring the permanent tenure of all judges of the local courts (until the age limit is reached).**

## **Judicial bodies**

### **Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report:**

**1. Continue reforming the legislation on the judiciary in order to strengthen the guarantees of the independence of judges, their irremovability from office, and elimination of corruption possibilities, in particular:**

**... review the composition and procedure for the formation of the Council for the Selection of Judges.**

According to Article 102 of the Constitution of the Kyrgyz Republic, the judicial self-regulation shall be used to resolve internal issues concerning the activities of judges. The bodies of the judicial self-regulation in the Kyrgyz Republic shall be the Congress of Judges, the Council of Judges and the assembly of judges. The Congress of Judges shall be the superior body of the judicial self-regulation. The Council of Judges shall be the elected body of the judicial self-regulation which shall perform its functions between the Congresses of Judges, shall protect rights and legal interests of judges, shall supervise the drawing up and execution of the budgets of courts, organization of training and retraining of judges. The assembly of judges shall be the primary body of the judicial self-regulation. The organization and procedures of the judicial self-regulation bodies shall be specified in the law.

According to the Law of the Kyrgyz Republic “On the Judicial Self-Government Bodies” of March 20, 2008 No. 35, **the Council of Judges** is an elected body of the judicial self-regulation functioning in the period between the congresses of judges and implementing the policy of the supreme body of the judicial self-regulation. The Council of Judges shall be subordinate to the Congress of Judges. The Council of Judges shall be elected by the majority of votes of the number of judges attending the Congress.

The Council of Judges shall comprise fifteen members elected from among the members of the judicial community for a three-year term taking into account gender representation, no more than seventy percent of people of the same sex. The proposals for candidacies for members of the Council of Judges are submitted to the Congress of Judges by the congress of judges. In addition to the judges of local courts, no more than three judges of the Supreme Court and one judge of the Constitutional Chamber of the Supreme Court may be included in the list of the candidates. When forming a new composition of the Council of Judges, the Congress of Judges takes into account the need to ensure continuity in the work of the Council of Judges.

The organisational, technical, material, financial and methodological resources for the activity of the Council of Judges shall be provided by the authorized state body supporting the activity of the local courts (Judicial Department).

The Council of Judges cannot include the chairmen and deputy chairmen of the Supreme Court, the Constitutional Chamber of the Supreme Court and the local courts, as well as judges who are members of the Council for the Selection of Judges.

The Council of Judges shall be convened when necessary, but no fewer than four times a year. Depending on the amount of work performed by the Council of Judges, at the written proposal of the Chairman of the Council of Judges, the workload at the main place of work in the relevant court is reduced for a member of the Council of Judges.

The Council of Judges shall:

- implement measures aimed at protecting the rights and lawful interests of judges of the Kyrgyz Republic;
- exercise supervision over the drawing up and execution of the budget of the courts;
- examine questions of instituting disciplinary proceedings against judges;
- convene the Congress of judges of the Kyrgyz Republic;
- coordinate work on the practical implementation of judicial reform;

- study, generalise and disseminate the experience of bodies of judicial self-regulation and devise recommendations on improving their activity;
- carry out judicial community expert appraisals of draft laws and other regulatory and non-regulatory legal acts concerning the activity of courts and judges;
- represent the interests of judges in dealings with other state bodies and public associations;
- engage in cooperation with bodies of the judicial communities of other States, international organisations and also mass media.

The Council of Judges shall also:

- exercise control over drawing up and execution of the budget of the courts;
- convene the judges' meeting;
- coordinate the work on the practical implementation of the judicial reform;
- study, summarize and disseminate the experience of the judicial self-government bodies, develop recommendations for improving their activities;
- examine draft laws, other regulatory and non-regulatory legal acts concerning the activities of courts and judges;
- represent the interests of judges in relations with other state bodies and public associations;
- interact with the bodies of the judicial community of other states, international organizations, as well as with the media;
- request from the state bodies, local self-government bodies and their officials information and documents necessary for its activities;
- carry out the organization of advanced training of judges, office staff of the courts and the authorized body, training of the applicants for the positions of judges of the local courts;
- consider other issues aimed at developing the judicial community;
- hear the report of the authorized body on the execution of the budget of the judiciary in the relevant part;
- hear annual reports of the heads of the authorized body and the Higher School of Justice on the activities of the authorized body and the Higher School of Justice;
- approve the standards of remuneration of the teaching staff of the Higher School of Justice;
- carry out quality control of the teaching process at the Higher School of Justice;
- approve the composition of the commissions of the Council of Judges, develop and approve regulations on them;
- submit a presentation to the President on assigning qualification classes to judges of the Kyrgyz Republic;

- elect one third of the membership of the Council for the Selection of Judges;
- form one third of the membership of the Disciplinary Commission at the Council of Judges;
- conduct obligatory verification of the information about the judge's faulty behaviour published in the mass media.

The Council of Judges has other powers provided by the laws of the Kyrgyz Republic.

The Council of Judges is authorized to take decisions jointly by at least two thirds of the members of the Council of Judges by a majority of the total number of members of the Council of Judges.

According to the Law of the Kyrgyz Republic "On the Council for the Selection of Judges of the Kyrgyz Republic", the **Council for the Selection of Judges** of the Kyrgyz Republic is an independent collegiate body established in accordance with the Constitution of the Kyrgyz Republic. The status of the Council is determined by the Constitution and this Law.

The main tasks of the Council are the selection of the candidates for vacant positions of judges of the Supreme Court of the Kyrgyz Republic, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, local courts, their presentation for the appointment. The Council carries out its activities on the principles of independence, transparency, collegiality, integrity and legality.

The Council consists of nine judges elected by the Council of Judges of the Kyrgyz Republic, representatives of the civil society elected by the parliamentary majority and the parliamentary opposition of the Supreme Council. The Council of Judges, the parliamentary majority and the parliamentary opposition elect one third of the Council respectively.

Judges are elected to the Council by the Council of Judges in accordance with the procedure established by the Congress of Judges, taking into account the representation of no more than seventy percent of persons of the same gender. At the same time, judges elected to the Council must be represented by all instances of the courts.

Representatives of the civil society in the Council are elected by the parliamentary majority and the parliamentary opposition at meetings, taking into account the representation of no more than seventy percent of persons of the same gender. Candidates from the civil society for the positions of members of the Council are nominated from the educational, scientific institutions, public associations and other organizations.

The civil society (educational, scientific institutions, public associations and other organizations) submits its proposals in writing to the parliamentary majority or to the parliamentary opposition of the Supreme Council. The parliamentary majority and the parliamentary opposition select three candidates from among the proposals, taking into account the requirements for members of the Council.

The meetings of the parliamentary majority and the parliamentary opposition are held separately and are considered eligible in the presence of at least half of their members. The meetings, nomination of the candidates to the Council and voting are conducted openly. Candidates from the parliamentary majority and candidates from the parliamentary opposition who have received the largest number of votes from the number of members of the parliamentary majority and the parliamentary opposition, respectively, are elected to the Council.

The main tasks of the Council are selection of candidates for the vacant positions of judges of the Supreme Court of the Kyrgyz Republic (hereinafter referred to as the Supreme Court), the Constitutional Chamber

of the Supreme Court of the Kyrgyz Republic (hereinafter - the Constitutional Chamber), the local courts, presentation for their appointment.

The Council:

1) conducts competitive selection for the vacant positions of judges of the Supreme Court, the Constitutional Chamber, the local courts, taking into account the representation of no more than seventy percent of persons of the same gender;

2) on the basis of the results of competitive selection, proposes to the President of the Kyrgyz Republic candidates:

- for presentation to the Supreme Council of the Kyrgyz Republic for the vacant post of a judge of the Supreme Court, the Constitutional Chamber;

- for appointment on the vacant post of a judge of the local court;

3) approves the Regulations of the Council and the Regulations for Conducting Competitive Selection;

4) approves legal topics and questions for the competitive selection; and

5) takes decisions on the suspension, termination of the powers of a member of the Council.

According to the requirements of the Law of the Kyrgyz Republic “On the Council for the Selection of Judges of the Kyrgyz Republic”, the members of the Council, the persons in respect of whom the issue is being considered, the mass media shall be notified by the secretary of the time of the meeting of the Council no later than five calendar days before it is held. The list of not less than five mass media is approved by the decision of the Council.

Meetings of the Council are subject to mandatory audio recordings and videotaping.

The final list of the candidates is posted in the state media and on the Council’s official website, as well as in the list of mass media.

The decision of the Council on the results of the competitive selection, as well as the results of the competitive selection of the candidates are subject to mandatory publication in the media and on the Council’s official website ([www.otborsudei.kg](http://www.otborsudei.kg)) no later than three days after the decision has been made. This site also contains information about the announcement of competitive selection for the vacancy of a judge, the list of the candidates, etc.

After the constitutional reform in December 2016, the new Law “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic” was adopted in July 2017. According to the Law, **the Disciplinary Commission:**

1) considers issues of disciplinary liability of judges;

2) imposes disciplinary penalties on judges for committing disciplinary offenses;

3) gives approval for bringing a judge to criminal and administrative liability imposed by court;

4) gives approval for the temporary removal of a judge from office in case of giving consent for bringing him/her to criminal liability (bringing in as a defendant);

5) submits a proposal to the President of the Kyrgyz Republic on early dismissal of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court for subsequent submission to the Supreme Council and a judge of the local court in case of violation of the irreproachability requirements; and

6) exercises other powers provided for by this Law.

The Disciplinary Commission consists of nine members and is formed by the President, the Supreme Council and the Council of Judges by one-third of the composition of the commission, respectively. The President, the Supreme Council and the Council of Judges are represented by three members of the Disciplinary Commission, taking into account the requirements for gender representation. The Disciplinary Commission is considered legally eligible after formation of not less than two-thirds of its membership. The decision of the Disciplinary Commission is made by a majority of the votes of the members present (in case of a tie, the vote of the chairman of the commission is decisive).

The Disciplinary Commission may not include chairmen, deputy chairmen of the Supreme Court, the Constitutional Chamber of the Supreme Court and local courts, deputies of the Supreme Council, prosecutors, law enforcement officers, lawyers, members of the Council of Judges and the Council for the Selection of Judges of the Kyrgyz Republic.

As of the time of the country visit of the monitoring group, the Disciplinary Commission consisted of seven out of nine members (with a quorum of six members). The commission started its work in October 2017. The work of the Disciplinary Commission, as well as of other judicial bodies, is supported by the Judicial Department.

As of October 2016, the Disciplinary Commission at the Council of Judges reviewed in total 86 complaints and applications against judges, of which nine judges were prosecuted, one judge received oral warning, some complaints and statements were submitted to the Council of Judges for consideration and final decision, there is no publicly available information on the decision made.<sup>26</sup>

## **Analysis**

1. The existence of the judicial self-government bodies, provided for in the Constitution and laws, is a very good experience of the Kyrgyz Republic. It is also positive that judges cannot be members of the Council of Judges. Based on the scope and content of the powers of the Council of Judges, it is advisable to envisage its monthly meetings, as well as to practice the annual rotation of one-third of its members.

2. The establishment of a separate body responsible for the selection of the candidates for judicial positions is a positive step. The quota procedure for election of members of the Council for the Selection of Judges envisaged in the specialized law looks attractive, but the fact that two-thirds of its members is formed by the Parliament retains the political context.

Also, the report of the Second Monitoring Round noted the importance of limiting the role of the Parliament in the process of appointing judges, reviewing the composition of the Council for the Selection of Judges and introducing clear selection criteria. The report of the Third Round of Monitoring stated that the Council for the Selection of Judges is not an independent body and very much depends on the Parliament of the Kyrgyz Republic. This is due to the fact that representatives of the civil society in the Council for the Selection of Judges elected by the Parliament represent the dominant political forces controlling the appointment of judges.

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<sup>26</sup> Alternative progress update on Kyrgyzstan's compliance with the OECD ACN Third Round of Monitoring recommendations, presented by Transparency International Kyrgyzstan, September 2017, <https://bit.ly/2IDW6Mw>.

It was also recommended to consider the possibility of electing the members of the Council for the Selection of Judges not by the Council of Judges consisting of 15 members, but by the Congress of Judges as the highest judicial self-government body.

An additional weakening factor is the work of the members of the Council on a voluntary basis. This circumstance reduces motivation and prevents full-fledged work on proper assessment of all specifics of the candidates' personal files.

3. As for the Disciplinary Commission, it is not a good idea to duplicate the format of forming a commission by analogy with the formation of the Council for the Selection of Judges of the Kyrgyz Republic. The international standard for the organization of disciplinary practice in relation to judges in a democratic state provides for the formation of a special body consisting of at least 50% of judges elected by the judges themselves (at a congress of judges). This approach is designed to guarantee the professional approach to the maximum possible extent in analysing the disciplinary offenses of judges by their fellow judges and thus to create a procedural guarantee for the independence of the body.

Similar remarks are also given in the opinion of the Venice Commission of 2016 (paragraphs 74-75). The commission criticized the fact that the composition of the disciplinary commission (namely, that the President, the Supreme Council and the Council of Judges each appoint one third of the members of the commission). "This can lead to a situation in which members of the commission appointed by the President and the Supreme Council together will constitute the majority necessary to resolve disciplinary issues concerning judges, which raises concerns about the independence of the judiciary and the principle of separation of powers."

The Venice Commission noted that any control by the executive branch or other persons outside the Council of Judges or disciplinary bodies should be avoided. The independence and impartiality of the disciplinary body is largely determined by its composition. In this sense, the OSCE / ODIHR and the Venice Commission noted the inclusion of the civil society representatives and thus ensuring public participation in the disciplinary procedures as a measure meriting special approval. It is necessary to amend the rules regarding the formation of the disciplinary commission to ensure that the legislative and/or executive branches of government will not exert a decisive influence on the work of this body, while ensuring adequate representation in the commission of the civil society / the public and its generally gender-balanced composition.

As noted by Transparency International Kyrgyzstan, according to the experts, the new law "On the Disciplinary Commission at the Council of Judges" will create conditions for the dependence of judges and restrict their freedom and they will become dependent on other branches of power, since the Disciplinary Commission will be formed by representatives of three parties and the commission will have the authority to submit proposals on the rotation of judges to the President.<sup>27</sup> The previous practice of bringing judges to disciplinary liability confirms the reality of the risk of political bias and use of disciplinary sanctions to get rid of unwanted judges<sup>28</sup>.

4. The experts also draw attention to the fact that the Judicial Department is under the Supreme Court. At the same time, the Judicial Department ensures the work of the judicial system, including the judicial self-government bodies and special bodies, such as the Council for the Selection of Judges and the Disciplinary Commission. The Chief of the Judicial Department is appointed by the Chairman of the Supreme Court with the consent of the Council of Judges. At the same time, the Office of the Supreme Court is not part of

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<sup>27</sup> Alternative interim progress update on Kyrgyzstan's compliance with the OECD ACN Third Round of Monitoring recommendations, presented by Transparency International Kyrgyzstan, September 2017 <https://bit.ly/2IDW6Mw>.

<sup>28</sup> See, for example: Is Judicial Independence Finally Coming to Kyrgyzstan?, Shamil Ibragimov, Joshua Russell, November 16, 2017 available at: <https://osf.to/2LqXIqt>.

the Judicial Department. It is inappropriate to have such a concentration of powers as well as influence on the bodies ensuring the work of the entire judiciary (Judicial Department and the Office of the Supreme Court) in the hands of the chairman of the Supreme Court.

5. In the context of the design and implementation of anti-corruption policy in the Kyrgyz Republic, it is important not to forget about 1800 civil servants who work in the judicial system and who are not judges with special status, namely employees of the Supreme Court, the Judicial Department of the Supreme Council of the Kyrgyz Republic, the Higher School of Justice and employees of the local courts.

It is very important that all these employees are covered by the training programs that are organized in the executive power institutions, they are subject to declaration requirements, and that they are assessed for the presence of a conflict of interests, etc.

### **New recommendation No. 12**

- 1. Establish in the law that members of the Council for the Selection of Judges and the Disciplinary Commission at the Council of Judges carry out their work on a permanent basis and receive a decent level of remuneration equivalent to the amount of remuneration, for example, of a judge of the Supreme Court.**
- 2. Revise the procedure for the formation of the Council for the Selection of Judges and the Disciplinary Commission taking into account the international standards for guaranteeing the independence of judges, in particular by limiting the participation of the Parliament in the appointment of members of these bodies.**
- 3. Consider the possibility of subordinating the Judicial Department to the Council of Judges as a judicial self-government body.**
- 4. Ensure in practice that the measures to prevent corruption in the judicial system cover staff members of the courts and employees of the Judicial Department.**

### **Role of the political bodies**

#### **Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report:**

**“1. Continue reforming the legislation on the judiciary in order to strengthen the guarantees of independence of judges, their irremovability from office, and elimination of corruption possibilities, in particular:**

**- exclude or significantly limit the role of the Parliament in appointment of judges; revise the composition and the procedure for forming the Council for Selection of Judges; ...”**

#### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report:**

**“3. Revoke the Presidential powers related to the career of judges, including their dismissal and other powers, that may have negative impact on the judicial independence.”**

In general, despite the recent reforms, the role of the political bodies in the judiciary of Kyrgyzstan remains quite high. The role of the Parliament in the formation of the Council for the Selection of Judges was noted above. In addition, the Supreme Council:

- 1) elects judges of the Supreme Court and the Constitutional Chamber of the Supreme Court at the proposal of the President;
- 2) in cases provided for by the Constitution and constitutional law, releases them from office at the proposal of the President;
- 3) Toraga (chairman) of the Supreme Council issues certificates of the judge, chairman, deputy chairman of the Supreme Court, the Constitutional Chamber of the Supreme Court;
- 4) at the meetings of the Supreme Council, an oath of judges of the Supreme Court, the Constitutional Chamber of the Supreme Court is brought on the day of their election; and
- 5) if the Disciplinary Commission at the Council of Judges agrees to bring a judge to criminal liability (bringing in as an accused), decides on the temporary dismissal of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court at the proposal of the President for the subsequent submission of a proposal to the Supreme Council, or of a judge of the local court - to the President.

The President of the Kyrgyz Republic:

- 1) presents to the Supreme Council candidates for election as judges of the Supreme Court and the Constitutional Chamber of the Supreme Court at the proposal of the Council for the Selection of Judges;
- 2) proposes to the Supreme Council for dismissing the judges of the Supreme Court and the Constitutional Chamber of the Supreme Court upon the proposal of the Disciplinary Commission at the Council of Judges or the Council of Judges in cases provided for by the Constitution and the constitutional law;
- 3) appoints judges of the local courts at the proposal of the Council for the Selection of Judges;
- 4) dismisses judges of the local courts at the proposal of the Disciplinary Commission at the Council of Judges or the Council of Judges in cases provided for by the Constitution and the constitutional law;
- 5) carries out the transfer (rotation) of judges of the local courts at the recommendation of the Council of Judges in the manner and in cases determined by the constitutional law;
- 6) assigns qualification classes to judges at the recommendation of the Council of Judges;
- 7) issues certificates of the judge, chairman, deputy chairman of the local court;
- 8) if the Disciplinary Commission at the Council of Judges agrees to bring a judge to criminal liability (bringing in as an accused), decides on the temporary dismissal of the judge of the local court; submits a proposal to the Supreme Council on the temporary dismissal of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court; and
- 9) specifies the terms of remuneration for judges at the proposal of the Council of Judges.

In addition, the President and the Supreme Council, together with the Council of Judges, form the Disciplinary Commission at the Council of Judges.

The role of the political bodies in appointing judges is especially problematic.

According to Article 15 of the Constitutional Law “On the Status of Judges of the Kyrgyz Republic”, judges of the Supreme Court, judges of the Constitutional Chamber of the Supreme Court are elected by

the Supreme Council at the proposal of the President based on the proposal of the Council for the Selection of Judges, taking into account the gender representation of no more than seventy percent of the persons of the same gender. Judges of the Supreme Court are elected up to the age limit established by the Constitution; judges of the Constitutional Chamber of the Supreme Court are elected for the first time for a period of seven years, and subsequently – until the age limit established by the Constitution.

The selection of the candidates for the vacant position of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court is carried out by the Council for the Selection of Judges on a competitive basis.

Upon completion of acceptance of applications and the results of competitive selection, the Council for the Selection of Judges shall within ten working days submit to the President a candidate for election to the position of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court. In the event that there are no circumstances preventing the election of such candidate for the position of a judge of the Supreme Court and the Constitutional Chamber of the Supreme Court, the President presents the applicant to the Supreme Council within ten working days. The President has the right to return to the Council for the Selection of Judges the materials on the submitted candidate for the position of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court substantiating his decision.

If the Council for the Selection of Judges does not establish, within ten working days, the circumstances preventing the election of a candidate for the position of a judge of the Supreme Court and the Constitutional Chamber of the Supreme Court, the Council for the Selection of Judges shall re-submit to the President a proposal for the same candidate. The decision to re-submit to the President the previously proposed candidate for the position of a judge of the Supreme Court and the Constitutional Chamber of the Supreme Court shall be adopted by a majority of not less than two-thirds of the total number of members of the Council for the Selection of Judges.

The President shall submit to the Supreme Council the candidate re-nominated by the Council for the Selection of Judges together with the previously proposed candidates, for which there are no circumstances preventing them from being appointed to the position of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court, within ten working days from the receipt of the repeated proposal from the Council for the Selection of Judges.

In the event that the Council for the Selection of Judges agrees with the circumstances set forth by the President, the Council for the Selection of Judges shall, within ten working days, propose, in order of priority, a new candidate from the appropriate list of the candidates, depending on the number of points received. Repeated proposals of the Council for the Selection of Judges are made until the complete use of the formed list of the candidates for the specified post. In case of complete use of the formed list of the candidates, the Council for the Selection of Judges announces a new competitive selection for the remaining vacant posts.

The Supreme Council takes a decision on the proposed candidate not later than two weeks from the date of receipt of the submission. If the Supreme Council does not elect a candidate for the position of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court, the President shall, on the proposal of the Council for the Selection of Judges, nominate another candidate from the list of the candidates for the said post.

The Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic” envisages a slightly different procedure for the appointment of **judges of the local courts**. Such judges are appointed by the President from among those who have passed the competitive selection and who are proposed by the Council for the Selection of Judges.

A candidate for the appointment of a judge of the local court is presented to the President upon the results of the competitive selection. The President, by his reasoned decision, has the right to return to the Council for the Selection of Judges the materials on the proposed candidate within ten working days from the date of their receipt. In this case, the Council for the Selection of Judges within ten working days proposes in the order of priority a new candidate from the list of the candidates, depending on the number of points received. The repeated proposals of the Council for the Selection of Judges are made until the complete use of the formed list of the candidates for the specified post. In case of the complete use of the formed list of the candidates, the Council for the Selection of Judges holds a new competition.

## **Analysis**

As it follows from the procedure for appointing judges, in case of the appointment of judges of the local courts, the Council for the Selection of Judges cannot insist on the candidate that it has proposed to the President for appointment. At the same time, the President can return any candidacy “by his/her grounded decision” for any reason. This, in fact, provides for unrestricted discretion of the President and does not meet the international standards. This is confirmed by practice: about 30% of the candidates proposed by the Council for the Selection of Judges have been previously rejected by the President without explanation.<sup>29</sup>

The procedure for the appointment of judges of the Supreme Court and the Constitutional Chamber of the Supreme Court is more acceptable, since the President is obliged to submit to the Parliament the proposed candidacies in case of “absence of circumstances preventing the election of a candidate for the position of a judge”, and also must present the candidates repeatedly submitted by the Council for the Selection of Judges. However, such “circumstances preventing the election of a candidate for the position of judge” are not clearly defined in the law, which also allows the President to reject candidates at his own discretion. Part 9 of Article 15 defines persons who cannot be judges, but it is not clearly specified that these particular grounds constitute the exhaustive list of “the circumstances preventing the election of a candidate for the position of a judge”.

There exist no restrictions for the decision of the Supreme Council to appoint judges of the Supreme Court and the Constitutional Chamber of the Supreme Court.

This confirms that the political bodies perform not only a formal role, but also have unlimited or significant discretion in the issue of appointing judges, which does not comply with the standards and previous recommendations of the IAP monitoring.

In its opinion on the draft amendments to the Constitution of the Kyrgyz Republic,<sup>30</sup> the Venice Commission criticized the fact that according to the draft changes (which were adopted in December 2016) the role of the President and the Parliament in the appointment and dismissal of judges was retained. The Commission noted:

“... all decisions concerning the appointment and the professional career of judges, which should include the appointment to the highest offices within the judiciary, should be based on merit, following pre-determined objective criteria set out in law, and open and transparent procedures. The involvement and decisive influence in appointment procedures and promotion of ordinary judges, including constitutional judges in the Kyrgyz Republic, of independent judicial councils or similar independent self-regulation bodies is generally considered to be an appropriate method to guarantee judicial independence. As recommended in OSCE/ODIHR’s Kyiv Recommendations (2010), in

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<sup>29</sup> Source: Is Judicial Independence Finally Coming to Kyrgyzstan?, Shamil Ibragimov, Joshua Russell, 16 November 2017 available at : <https://osf.to/2LqXIqt>.

<sup>30</sup> Venice Commission Opinion No. 863/2016 October 19, 2016 available at <https://bit.ly/2swYDx4>.

cases where the final appointment of a judge lies with the president, his/her discretion to appoint should be limited to those candidates nominated by an independent selection body; any refusal to appoint such a candidate should be based on procedural grounds only and would need to be reasoned. Another possible option is to give the selection body the power to overrule a presidential veto by a qualified majority vote. The proposed system of appointment of judges of the Constitutional Chamber which gives a wide discretion to the President is highly problematic from the viewpoint of the separation of powers and for ensuring effective checks and balances. Similar comments apply with regard to the appointment of Supreme Court judges ... It is strongly recommended to amend the procedures for appointing Supreme Court and Constitutional Chamber judges to ensure greater openness and transparency, which may include a greater role for the Council of Judges.”

The Venice Commission noted in another earlier opinion that the right to dismiss judges from office by a two-thirds majority vote of the deputies may be due to politically motivated decisions. “This system in the long term may undermine the powers of the judiciary.”<sup>31</sup> As noted in 2014 Joint Opinion of the OSCE/ODIHR and the Venice Commission on the draft amendments to the legal framework on the disciplinary liability of judges in the Kyrgyz Republic, the Constitution should not stipulate for the powers of the President and the Supreme Council regarding the dismissal of judges, since this raises concerns in terms of guaranteeing the independence of judges.<sup>32</sup>

The Venice Commission also noted in the 2016 Opinion that according to part 6 of Article 95 of the Constitution the transfer (rotation) of judges of the local courts is carried out by the President on the recommendation of the Council of Judges in the manner and in cases envisaged in the constitutional law. In the opinion of the Commission, it is unclear whether the decision of the Council of Judges is binding on the President, and it is impossible to exclude the possibility that the President may not take into account the representation of the Council of Judges, thereby undermining the authority and independence of this body of self-regulation. Therefore, the Venice Commission recommended that it would be desirable to resolve such internal affairs of the judiciary without the participation of the President.

The experts support the recommendations concerning the maximum limitation of the role of the political bodies (the Parliament and the President) in deciding on the career of judges and other issues that affect the independence of judges. Even such seemingly ceremonial powers as the delivery of certificates or the taking of an oath can have a negative effect on the independence, as they form an incorrect understanding of the loyalty of judges to the authorities.

In this regard, it is recommended to remove the Parliament from the process of appointing and dismissing judges, suspension from office, delivery of certificates and taking oath of judges. As mentioned earlier, the role of the Parliament in the formation of the judicial authorities (Council for the Selection of Judges and the Disciplinary Commission) should also be narrowed to the maximum possible extent.

Also the experts recommend limiting the role of the President as much as possible. The international standards allow a certain role of the President in the process of appointing judges, but at the same time his discretion should be limited with giving priority to decisions of the judicial authority (see above). All other powers (issue of certificates, determination of the working conditions for judges, assignment of qualification classes to judges, removal from office) should be abolished and handed over to the judicial authorities.

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<sup>31</sup> Venice Commission Opinion No. 582/2010 June 8, 2010 available at <https://bit.ly/2LVRYz2>.

<sup>32</sup> Joint Opinion of the OSCE/ODIHR and the Venice Commission, June 16, 2014 par. 104, available at <https://bit.ly/2ssJU7h>.

**Overall, Kyrgyzstan is not compliant with the previous Recommendations 24 and 25 as regards the role of the President and the Parliament.**

### **New recommendation No. 13**

**Prepare draft changes, consult on such draft and abolish the powers of the Parliament and the President regarding the career of judges, including their appointment, suspension and dismissal from office, as well as other powers that may adversely affect the judicial independence.**

#### **Selection of the candidates for the position of judge**

##### **Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report:**

**“1. Continue reforming the legislation on the judiciary in order to strengthen the guarantees of independence of judges, their irremovability from office, and elimination of corruption possibilities, in particular:**

**... set uniform criteria of the selection of judges based on their personal characteristics;”**

The procedure for selection of the candidates for the position of judge and their appointment is competitive and is based on the criteria specified in the Laws of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic” and “On the Council for the Selection of Judges of the Kyrgyz Republic.”

The persons who apply for the position of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court for the first time and who do not have the judicial experience, as well as the persons who have a judicial experience, but who have over ten years of gap between the submission of an application for participation in the competition and the dismissal of the person from the position of a judge or the termination of the powers of a judge, are subject to the following additional requirement: they should have a certificate issued on the basis of the results of the training of the applicants.

The persons who apply for the position of a judge of the local court for the first time and who do not have the judicial experience, as well as the persons who have a judicial experience, but who have over ten years of gap between the submission of an application for participation in the competition and the dismissal of the person from the position of a judge or the termination of the powers of a judge, are subject to the following additional requirement: they should have a certificate issued upon passing the qualification exam (hereinafter, the exam). The exam is based on the results of training of the applicants. The certificate is valid for three years. The training programme, the composition of the exam commission, as well as the procedure for sitting for the exam are approved by the Council of Judges.

Competitive selection is a process that is carried out by an independent collegiate body, the Council for the Selection of Judges, in order to identify the persons with a high level of legal knowledge that meet the requirements for the personality of the applicant, qualifications and behaviour for applying to the positions of judge of the Supreme Court, the Constitutional Chamber of the Supreme Court and the local courts.

According to Article 21-1 of the Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, competitive selection is a process that is carried out by an independent collegiate body, the Council for the Selection of Judges, in order to identify the persons with a high level of legal knowledge, that meet the requirements for the personality of the applicant, qualifications and behaviour for applying to the positions of judge of the Supreme Court, the Constitutional Chamber of the Supreme Court and the local courts.

The persons, whose documents to participate in the competition for the vacancy of judge of the local court judge are accepted, are included in the list of the candidates. The list of the candidates is published in the state media of the Kyrgyz Republic and on the website of the Council for the Selection of Judges no later than forty days after the publication of the announcement of the competition for receiving responses on the professional and moral qualities of the applicants. The deadline for receiving responses is set by the Council for the Selection of Judges.

Competitive selection is carried out by conducting an interview to determine important professional and volitional qualities. The following persons are allowed to have an interview: 1) acting judges whose term of office expires; 2) persons having judicial experience of work, who, in this case, have less than ten years of gap between the submission of an application for participation in the competition and the dismissal of the person from the position of a judge or the termination of the powers of a judge; and 3) persons who received a certificate on the results of passing the exam.

When admitting to an interview, the Council for the Selection of Judges examines: 1) the documents of the candidates and their compliance with the statutory requirements; 2) a declaration on incomes and expenses of a candidate submitting information in accordance with the legislation on declaration, his/her spouse and close relatives; and 3) other information (comments on the candidate, recommendations), confirming the irreproachability of the candidate's behaviour.

Based on the results of the examination of documents, the Council for the Selection of Judges makes a decision on admission of the candidate for the competitive selection. The decision to admit the candidate is made by the Council for the Selection of Judges by open vote by a majority of the total number of members of the Council.

An interview is conducted in the manner determined by the Council of Judges. Questions for the interview are approved by the Council of Judges annually and published on the official website of the Council for the Selection of Judges and in the media.

The candidate gives his/her written consent to wiretapping in case s/he is appointed a judge.

The candidate has the right to additionally provide the results of his/her lie detector examinations. The procedure for assessing these results is set by the Council of Judges.

The Kyrgyz authorities provided the criteria for the competitive selection for the position of a judge. The criteria contain detailed indicators of the evaluation of “the professional and volitional qualities”, including such criteria (groups of criteria) as: irreproachability, efficiency of activities; intellectual abilities, cognitive abilities (general outlook, professional horizons); moral and ethical qualities (honesty, sincerity, impartiality, objectivity); self-criticism; constructive behaviour in a conflict situation; motivation to hold the position of a judge; aspiration for professional development; organization; operability.

The list of the candidates proposed by the Council for the Selection of Judges to the President for the presentation or appointment is formed in descending order according to the points received during the competitive selection. Candidates who received the highest score according to the results of the competition are presented by the Council for the Selection of Judges to the President for the presentation or appointment in the number equal to the vacant posts. The candidates who have passed the competitive selection, but have not been proposed to the President, remain on the list of the candidates. The presentation of the candidates from the relevant list is made in the order of priority, depending on the number of points received by the candidate, in accordance with the procedure established by this constitutional law. Candidates are excluded from the list of the candidates as they are submitted by the Council for the Selection of Judges to the President. The list of the candidates is dissolved by the Council

for the Selection of Judges in cases of the appointment or election of all previously proposed candidates, filling of all vacant positions of judges or complete use of the formed list of the candidates for the specified position.

Consideration of the materials at a meeting of the Council is conducted openly with the participation of persons claiming to hold relevant posts, the media and any other stakeholders. Meetings of the Council are subject to mandatory audio recordings and videotaping. The authorized body is responsible for ensuring the safety of audio recordings and videotaping as well as open access to them.

The Council makes decisions through open voting by the majority of votes of the total number of members of the Council. Members of the Council have no right to abstain from voting. In case of disagreement with the adopted decision, a member of the Council has the right to write a separate written opinion, which is attached to the minutes of the meeting of the Council. Following the voting, the Council takes a decision, which is signed by the chairman and members of the Council who participated in the meeting.

The decision of the Council shall be announced immediately after its adoption in the presence of the persons in respect of whom the matter has been examined. Absence of a person shall not prevent from announcing the decision. The Council has the right to announce only the resolute part of the decision taken. In case of the announcement of the resolute part of the decision, the full text is prepared no later than in four days. The stakeholders are entitled to receive a copy of the decision within five days after its adoption.

The decision of the Council on the results of the competitive selection, as well as the results of the competitive selection of the candidates are subject to mandatory publication in the media and on the Council's official website no later than three days after the decision is made.

Decisions of the Council can be appealed by the candidate in the first instance court only if the Council has violated the procedure of competitive selection. The decision of the first instance court may be appealed to the Supreme Court. The decision of the Supreme Court is final and cannot be appealed.

## **Analysis**

The experts welcome the open and competitive nature of the selection for the position of judges, including the judges of the Supreme Court and the Constitutional Chamber of the Supreme Court. This is a positive practice that meets the international standards.

1. The experts welcome the establishment and use of the criteria for assessing the candidates for judges during the competitive selection. This corresponds to the previous recommendation. However, it is not clear who has approved these criteria and what is the basis for their use, whether they are mandatory for use in the assessment of the candidates or are only recommended. For example, the provided Regulations on the procedure for holding a competitive selection for the post of judge of the Kyrgyz Republic (of September 21, 2017) do not mention these criteria. The laws are also silent about them.

Since the recommendation of the previous round was “to establish the uniform criteria for the selection of judges on the basis of personal qualifications”, then it can only be considered as **partially implemented**. It is necessary to approve the indicated criteria by the decision of the Council of Judges and to make them a part of the Regulations on the procedure for holding a competitive selection for the position of judge.

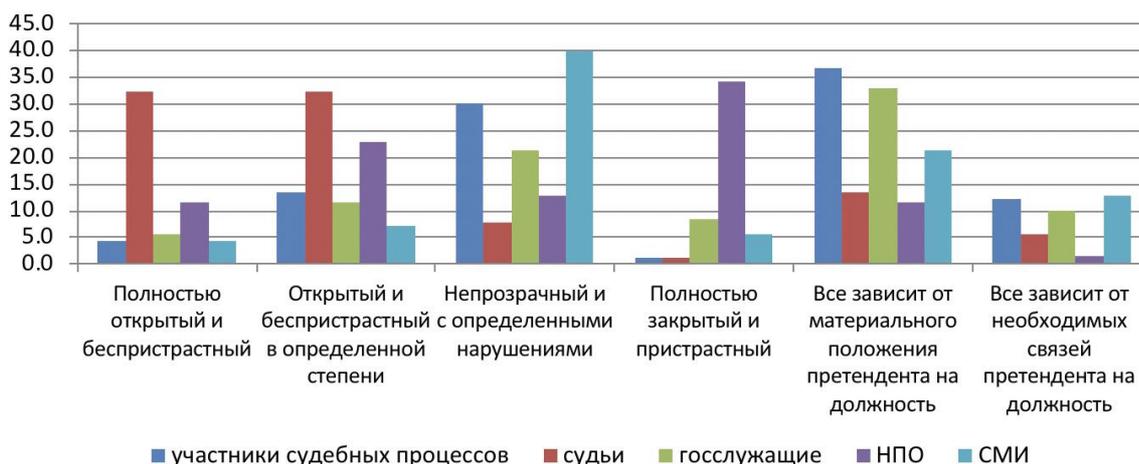
2. The experts' attention was attracted by the statutory provision that at the stage of passing the procedure for selection for a judicial position the candidate must give a written consent to the wiretapping in case of his/her appointment as a judge. At the time of preparing the report, the procedure for giving consent to the wiretapping and the content of such consent have not been determined. However, in general, such

interference in the personal life of a judge, even on the basis of his/her consent, seems to be excessive and unreasonable. Such a requirement puts the candidate in unfavourable conditions when s/he must either refuse to participate in the contest or voluntarily give up his fundamental right to personal privacy in the part of the secrecy of communications. Such requirement can also be considered discriminatory. The condition of voluntary consent does not eliminate the problem, since it is obligatory for participation in the competition, which, in fact, can be regarded as coercion. The experts are very negative about this situation.

Similarly, it is questionable whether the candidate can provide the results of his/her lie detector examinations. Firstly, the results of lie detector examinations are not reliable and can be distorted due to the psychological and emotional characteristics of a person. Secondly, although this study is voluntary, failure to pass it can be considered by potential candidates as a circumstance that reduces their chances of passing the competition or that will have a negative impact on the result. This can, in fact, force a person to take a lie detector examination and discriminate against those who refuse to take one.

3. The legislative provisions on the openness of competitive selection are quite progressive. However, it should be noted that the opinion polls of different categories of respondents show that in practice all respondents except judges consider the process of selection of judges to be insufficiently open and impartial (see the chart).

Figure 5. Process for selecting judges



Source: SIAR Research & Consulting, 2016.

#### New recommendation No. 14

1. Clearly envisage in the legislation the uniform criteria for assessing the candidates for the judicial positions on the basis of personal merits and qualities, as well as ensure their application in practice.
2. Abolish the requirement to give consent to wiretapping by the candidates for the judicial positions and the possibility of providing the results of a lie detector examination.

#### The system of training of the candidates for the position of a judge

In accordance with Article 5-4 of the Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, the training of the applicants for the positions of judges is carried out by the Higher School of Justice. Persons applying for the position of a judge must undergo training for up to one year, during which

they are granted unpaid leave at their place of work. Upon completion of the training, a qualification exam is conducted. The procedure for and terms of the training of the applicants for the positions of judges are specified by the chairman of the Supreme Court and the Council of Judges.

According to Article 24-2 of the Law of the Kyrgyz Republic “On the Supreme Court of the Kyrgyz Republic and the Local Courts”, the High School of Justice operates under the Supreme Court and carries out its activities in accordance with the Constitution, the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, this Law, as well as the legislation regulating the activity of the judiciary, the charter approved by the chairman of the Supreme Court with the consent of the Council of Judges.

The training is conducted according to the Curriculum of the Higher School of Justice at the Supreme Court of the Kyrgyz Republic. The Council of Judges carries out quality control of the teaching process in the Higher School of Justice.

The Higher School of Justice is not subject to the legislation on higher vocational education. The Higher School of Justice is a state institution carrying out advanced training of judges, staff of courts and authorized bodies, as well as training of the applicants for the positions of judges of the local courts.

According to Article 5-3 of the Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic,” every judge must improve his/her qualifications. The professional development of judges is carried out in accordance with the curricula at least every three years, with the continuing pay of salaries in this period.

The procedure for and terms of the judges’ professional development are specified by the chairman of the Supreme Court and the Council of Judges.

The professional development of judges is carried out at the expense of the republican budget, as well as other sources not prohibited by law.

To date, there has been developed the Curriculum of the Higher School of Justice at the Supreme Court of the Kyrgyz Republic for 2018, which is being approved by the Council of Judges of the Kyrgyz Republic. The said Curriculum also envisages various training modules on the ethical-deontological topics.

## **Analysis**

For the candidates who do not have judicial experience or who have been dismissed from their offices more than ten years prior to submitting their applications for the competition, it is necessary to pass the training at the School of Judges and pass the qualification exam. The requirement for passing the specialized training before the appointment to the position of a judge is a positive one. However, the sufficiency of such training (which in practice is six months) raises concerns. A person must be trained before s/he even applies or becomes a candidate for the position of judge. This can reduce the motivation to go through such training. Also, the training period of six months is insufficient, given that the newly appointed judges do not take any additional initial training.

The experts recommend that Kyrgyzstan considers other options for organizing an initial training system for judges. For example, the persons, who have passed the main stages of the competitive selection and have been appointed to the position of a judge, are sent to the training. Such judges should get remuneration during the training and confirm their qualifications by passing the exam.

## **New recommendation No. 15**

**Consider changing the duration and order of the initial training necessary for the judicial work.**

## **Disciplinary liability, dismissal of judges**

### **Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report**

**“1. Continue reforming the legislation on the judiciary in order to strengthen the guarantees of judicial independence, their irremovability from office, and elimination of corruption possibilities, in particular: ...**

**- provide clear grounds for, and modify the procedure of, bringing judges to disciplinary liability in order to comply with the fair trial guarantees and prevent arbitrary dismissal of judges from office while ensuring effective accountability of judges;”**

According to Article 95 of the Constitution of the Kyrgyz Republic, judges of all courts of the Kyrgyz Republic shall hold their posts and keep their powers as long as their conduct is irreproachable. The violation of the requirements of irreproachability of the conduct of judges shall serve as the basis for bringing such judge to liability in accordance with the procedure envisaged in the constitutional law.

In case of violation of the irreproachability requirements, the judge shall be dismissed from his/her office at the proposal of the Disciplinary Commission at the Council of Judges in accordance with the constitutional law.

Judges of the Supreme Court may be dismissed from office by the majority of at least two-thirds of the total number of deputies of the Supreme Council at the President’s proposal, except for the cases specified in part 3 of this Article. The dismissal of judges of the local courts is exercised by the President.

A person dismissed from the office of a judge due to violation of the irreproachability requirements, has no further right to hold public and municipal posts established by law, and is deprived of the right to use the benefits granted to judges and former judges.

In the event of the death of a judge, reaching the age limit, retiring or moving to another job, declaring him/her deceased or missing, recognizing incompetent, losing citizenship, withdrawing from citizenship or acquiring the citizenship of another state and in other cases not related to breach of the irreproachability requirements, the powers of the judge are terminated ahead of time at the proposal of the Council of Judges by the body that has elected or appointed him/her, from the day when such grounds have arisen in accordance with the constitutional law. At the same time, judges of the Supreme Court are dismissed by the decision of the Supreme Council, adopted by the majority of the number of present deputies, but not less than 50 votes.

According to the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic» a judge shall be discharged from office early on the following grounds:

- 1) submission of a written letter on retirement;
- 2) submission of a written voluntary resignation letter; inability, owing to their state of health, to exercise the powers of a judge, attested to by the conclusion of a medical commission;
- 3) inability to exercise the powers of a judge for health reasons as confirmed by the report of a medical commission;

- 4) appointment of a judge of the Constitutional Court or the Supreme Court as a local court judge; election of a local court judge as a judge of the Constitutional Court or the Supreme Court;
- 5) transfer to another work not related to the administration of justice;
- 6) loss of citizenship or withdrawal from the citizenship of the Kyrgyz Republic, or obtaining of citizenship of another state;
- 7) limitation of the judge's legal capacity or his/her recognition as incompetent by a court ruling that entered into legal force;
- 8) his/her death;
- 9) declaring him/her dead by a court ruling, which entered into legal force;
- 10) recognition him/her as missing by a court ruling, which entered into legal force;
- 11) refusal of a judge of the local court to transfer to another local court on the grounds provided for in clause 2 part 1 of Article 23 of this Constitutional Law;
- 12) entry into legal force of a court ruling on application to the judge of the compulsory measures of medical nature;
- 13) entry into legal force of a court conviction or a decree on termination of criminal prosecution on non-rehabilitating grounds;
- 14) application of disciplinary punishment in the form of early dismissal of a judge from office;
- 15) engaging in an activity incompatible with the office of judge;
- 16) membership in political parties, his/her speeches in support of a political party;
- 17) his/her registration as a candidate for the President, a deputy of the local kenesh; and
- 18) his/her inclusion in the registered list of a political party participating in the elections to the Supreme Council.

According to the Constitutional Law on the Status of Judges, a judge holds his/her position and retains his/her powers until his/her conduct is irreproachable. A breach of the irreproachability requirements means gross or regular commission by a judge of an offence (offences) envisaged in part 2 of Article 28 of this Constitutional Law incompatible with the sonorous title of judge.

A judge is brought to disciplinary liability for committing a disciplinary offense.

According to part 2 of Article 25 of the Constitutional Law on the Status of Judges, a disciplinary offense is the guilty action or inaction of a judge in the performance of his/her official duties or off-duty activities, expressed in:

- 1) obvious and gross violation of the law in the administration of justice;
- 2) a gross violation of the Judicial Code of Honour;

- 3) disclosure of the secrecy of the deliberations room or secret, which has become known to the judge during the closed hearing of the case;
- 4) failure to notify the Council of Judges in the manner prescribed by law on any form of interference in its activities in the administration of justice or in the exercise of other powers provided for by law, as well as any other interference not provided for by law;
- 5) non-submission or untimely submission of declaration of their assets, incomes and expenditures with provision of deliberately false information;
- 6) gross violation of the labour regulations, which has led to negative consequences in the work of the court; and
- 7) gross infringement of other requirements provided for in parts 2 and 3 Article 5-1 of this Constitutional Law applicable to judges.

According to parts 2 and 3 Article 5-1 the Law “On the Status of Judges of the Kyrgyz Republic”, a judge has no right:

- 1) to be a representative (except for cases of legal representation) on cases of individuals or legal entities in courts and other state bodies;
- 2) to make public statements on the issue that is subject to review in a court of law before the judicial act on this issue comes into force;
- 3) to disclose or to use, for purposes not related to the exercise of the judicial powers, information classified in accordance with the law as restricted information, or official information that has become known to the judge in connection with the exercise of his/her powers;
- 4) to use gifts received in connection with the hospitality and other official events. Such gifts are recognized as the state property and should be transferred by the judge under the act to the court in which s/he holds the position of judge, with the exception of cases provided for by law. A judge who has handed in a gift received by him/her in connection with a hospitality and other official event may redeem it in accordance with the procedure established by the regulatory legal acts of the Kyrgyz Republic;
- 5) to accept honorary and special (except for scientific and sports) titles, awards and other insignia of the foreign states and political parties without the permission of the Council of Judges;
- 6) to take business trips outside of the Kyrgyz Republic at the expense of individuals and legal entities, with the exception of business trips carried out in accordance with the legislation of the Kyrgyz Republic, international treaties of the Kyrgyz Republic or reciprocal agreements of the Supreme Court, the Constitutional Chamber of the Supreme Court, the Council of Judges with the relevant courts of the foreign states, international and foreign organizations;
- 7) to be a part of the management bodies, guardianship or supervisory boards, other bodies of foreign non-profit non-governmental organizations operating in the territory of the Kyrgyz Republic and their structural subdivisions, unless otherwise provided by the legislation of the Kyrgyz Republic, international treaties of the Kyrgyz Republic or reciprocal agreements of the Supreme Court, the Constitutional Chamber of the Supreme Court with the relevant courts of the foreign states, international and foreign organizations;
- 8) to participate in strikes and rallies;

9) to carry out entrepreneurial activities, as well as to combine the position of a judge with deputy activity or activity in the state bodies and local self-government bodies, other paid work, with the exception of:

- pedagogical, scientific, expert and creative activities, which is additionally paid from the funds not prohibited by law, in agreement with the chairman of the relevant court. Undertaking of this activity should not affect the quantity and quality of the work performed at the place of work of the judge;

- participation in the activities of the judicial self-government bodies, the Council for the Selection of Judges, the Disciplinary Commission at the Council of Judges; and

10) judges cannot be members of parties, act in support or against of any political party.

The procedure for filing and considering applications with respect to judges is regulated by Chapter 3 of the Law of the Kyrgyz Republic “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic” of July 28, 2012 No. 147. The following persons may file to the Disciplinary Commission their appeals against the action and inaction of a judge: 1) individuals and legal entities; 2) state bodies, local self-government bodies, their officials; 3) chairmen of the courts of the Kyrgyz Republic.

The appeals are filed to the Disciplinary Commission in writing or by e-mail. Appeals of individuals and legal entities can be submitted to the Disciplinary Commission in the form of complaints. Appeals of the state bodies, local self-government bodies and their officials are made in the form of application. An appeal submitted by e-mail must contain, among other things, an electronic digital signature.

Appeals are submitted to the Secretariat of the Disciplinary Commission, which are registered no later than on the next business day and are forwarded to the Chairman of the Disciplinary Commission.

In the absence of grounds for the return of the appeal, a member of the Disciplinary Commission on the instructions of the chairman shall conduct an official investigation not later than 30 calendar days from the date of receipt of the materials. This period does not include the period during which the judge in respect of whom the appeal has been filed, has been absent for a valid reason. Based on the results of the official investigation, a member of the Disciplinary Commission submits to the Disciplinary Commission a report on the presence or absence of a disciplinary offense.

A judge may be brought to disciplinary liability not later than six months from the date of registration of the appeal, not counting the time of the official investigation, consideration of the appeal by the Disciplinary Commission or the absence of a judge from work for a valid reason, but no later than three years from the date of committing a disciplinary offense.

Based on the results of consideration of the appeal by the Disciplinary Commission, a decision is made. Information on bringing a judge to disciplinary liability is published on the website of the Disciplinary Commission.

The decision of the Disciplinary Commission is made by the majority of the present members. When the votes are equal, the vote of the chairman of the commission is decisive.

In case of consent to bringing a judge to criminal liability (bringing in as an accused), the Disciplinary Commission submits a proposal for a temporary suspension of a judge of the Supreme Court, the Constitutional Chamber of the Supreme Court from their positions to the President for the subsequent submission of a proposal to the Supreme Council, and with respect to a judge of the local court – to the President.

The Kyrgyz authorities provided the following statistics on the dismissal of judges.

**Table 8. Statistics on the dismissal of judges**

Year	At will	Resignation For health reasons	Upon reaching the age limit	Dismissal in connection with early termination
2015	10	4	6	5
2016	8	0	2	5
2017	10	1	0	0

**Table 9. Number of disciplinary sanctions imposed on judges**

Year	Early termination	Reprimand	Admonition	Total
2015	5	9	3	17
2016	5	2	6	13
2017	0	0	0	0

**Table 10. Statistics on the grounds for bringing judges to disciplinary liability**

	2015	2016	2017
<b>Early termination</b>			0
- on the basis of interlocutory rulings of the higher courts	3	5	
- on the basis of presentation by the prosecutor's office	1	0	
- on the basis of application (complaint)	1	0	
<b>Reprimand</b>			0
- on the basis of interlocutory rulings of the higher courts	4	1	
- on the basis of the appeal (presentation) of the Chairman of the Supreme Court	2	0	
- on the basis of application (complaint)	2	0	
- on the basis of decision of the Supreme Council Committee	1	0	
- on the basis of the presentation by the Office of Prosecutor General on the consent to the application of criminal liability (consent is denied, materials were transferred to the Disciplinary Commission at the Council of Judges, as a result of the examination, a reprimand was issued)	0	1	
<b>Admonition</b>			0
- on the basis of interlocutory rulings of the higher courts	2	1	
- on the basis of presentation by the prosecutor's office	1	0	
- on the basis of application (complaint)	0	5	

In 2017, the Council of Judges did not consider the issue of disciplinary liability of the judges.

## Analysis

1. The new wording of part 3 of Article 95 of the Constitution envisages early dismissal of judges for a number of reasons, including the death of a judge, reaching of the maximum age or loss of citizenship, transfer of the judge to “another job”, as well as “other cases not related to breach of the irreproachability requirements”. As noted by the Venice Commission (2016 Opinion), such open-ended and vague wording could potentially be abused to remove individual judges. The Commission recommended finding a way to ensure that the early dismissal of judges is only permissible in cases specifically set out in law, it is recommended to list all possible grounds for such early dismissal in the Constitution, and to remove the reference to ‘other cases’ currently set out in part 3 of Article 95.

2. According to the Constitutional Law “On the Status of Judges of the Kyrgyz Republic”, a judge is dismissed if his/her conduct is not irreproachable. A breach of the irreproachability requirements means “gross or regular commission by a judge” of an offence (offences) envisaged in part 2 of Article 28 of this Constitutional Law “incompatible with the sonorous title of judge” (see above).

It can be noted that the wording “gross or regular commission by a judge... incompatible with the sonorous title of judge” is not sufficiently clear and allows too much freedom of interpretation. This

provision also allows the judge to be dismissed for a one-time “gross” violation of one of the paragraphs of part 2 of article 28 of the Law, for example, for publicly speaking on an issue that is subject to review in a court of law before a judicial act on this issue enters into legal force, failure to notify the Council of Judges on any form of interference in its activities in the course of administration of justice.

In general, the list of grounds triggering disciplinary liability of judges appears to be excessively large. In this case, there is a room for broad discretion when choosing a disciplinary sanction. This can lead to the fact that for gross violations that should lead to dismissal (for example, combining judicial work with the prohibited activities) the judge will apply relatively soft penalties, and for minor violations – on the contrary, unnecessarily harsh. Therefore, it is necessary to scale sanctions for various violations, which will be clearly defined in the law without references to other provisions.

3. It is also problematic to provide such ground for disciplinary liability as a “gross violation” of the Judicial Code of Honour. The Code contains rather broad wordings, the violation of which can be interpreted arbitrarily. Therefore, a simple reference to the Code as the basis for a disciplinary offense (even with the specification of “gross violation”) is not enough.

The Venice Commission in its opinion on the draft amendments to the legal framework on the disciplinary liability of judges in the Kyrgyz Republic of June 2014 (CDL-AD(2014)018) recommended to remove the non-compliance with the Judicial Code of Honour as the ground for instituting disciplinary proceedings and to specify the grounds for bringing judges to disciplinary liability in separate clearly worded provisions. The experts support this recommendation.

4. According to Article 28 of the Constitutional Law “On the Status of Judges of the Kyrgyz Republic”, a judge is brought to disciplinary liability for committing such a disciplinary offense as a gross violation of the labour regulations resulting in negative consequences in the work of the court. Article 51 of the Constitutional Law of the Kyrgyz Republic on the Status of Judges contains the duty of the judge to observe the labour regulations.

These statutory provisions level the special status of the judge, since the requirements of the labour legislation should not apply to judges. If the behaviour of the judge is inappropriate and it affects the process of administration of justice, then it should not be about the labour schedule but about the violation of the oath of the judge.

5. According to the experts, the Law of the Kyrgyz Republic “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic” does not contain sufficient procedural guarantees of the due procedure for a judge in the disciplinary proceedings, namely: the judge should have the right, in particular, to express his/her version with respect to the facts brought against him/her, to prepare defence, to represent oneself independently or through a lawyer, to appeal against the decision on the legality and proportionality of the imposed disciplinary sanctions; the law should also specify the requirements for sufficiency and admissibility of evidence, a list of grounds for holding closed disciplinary proceedings.<sup>33</sup>

6. According to the Law “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic”, the Disciplinary Commission considers complaints against judges and also decides on the disciplinary liability of judges. At the same time, the Disciplinary Commission itself makes decisions on the admissibility of the application or on its leaving without consideration.

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<sup>33</sup> See also the opinion of the Venice Commission on the draft amendments to the legal framework on the disciplinary liability of judges in the Kyrgyz Republic, June 2014, document CDL-AD(2014)018, available at <https://bit.ly/2s2iJz7>.

In the absence of grounds for the return of the application, a member of the Disciplinary Commission on the instructions of the chairman shall conduct an official investigation. Based on the results of the official investigation, a member of the Disciplinary Commission submits to the Disciplinary Commission a report on the presence or absence of a disciplinary offense.

The consideration of the application starts with the submission of a report by the member of the Disciplinary Commission who has conducted the official investigation. The decision of the Disciplinary Commission is made by the majority of the present members. A member of the Disciplinary Commission, who has conducted an official investigation, is not entitled to participate in the decision-making.

This procedure does not meet the international standards. For example, as noted in the Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia (paras. 5 and 26), in order to prevent allegations of corporatism and guarantee a fair disciplinary procedure, Judicial Councils shall not be competent both to a) receive complaints and conduct disciplinary investigations and at the same time b) hear a case and decide on disciplinary measures.

Such unacceptable overlapping can be resolved, for example, by creating an autonomous service of disciplinary inspectors at the Council of Judges, who will examine complaints against judges, conduct investigations on them and present their results at a meeting of the Disciplinary Commission that will decide whether to hold judges liable.

**The above-mentioned part of the previous Recommendation 24 was partially implemented.**

#### **New recommendation No. 16**

**1. Review and narrow down the list of grounds for dismissing the judge from office for imperfect behaviour, and also determine what violations are “substantial”, “gross”, “systematic”. Revoke such ground for disciplinary liability as a “gross violation of the Judicial Code of Honour” replacing it with the specific grounds envisaged directly in the text of the law.**

**2. Eliminate the exercise by one body of the functions of receiving complaints against judges and investigating them, as well as examining and deciding on disciplinary cases, for example, by creating a service of disciplinary inspectors.**

**3. Exclude from the list of grounds for bringing a judge to disciplinary liability a gross violation of the labour regulations.**

**4. Supplement legislation with the due procedure guarantees for a judge in the disciplinary proceedings.**

#### **Transfer (rotation) of judges**

According to Article 23 of the Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, a local court judge may be transferred from one local court to another local court on the following grounds: 1) at their own wish; 2) in the event of reorganisation of the court or changes to the structure or staffing level of the court; 3) for the purpose of the state protection of judges in circumstances beyond the control of the judge and the state; 4) in case of participation of a judge of the local court in the competitive selection for the vacant position of a judge of another local court.

The transfer (rotation) of judges at the judge's own will is carried out by the Council of Judges upon receipt of the judge's application. Applications of judges are submitted to the authorized state body in the name of the Council for the Selection of Judges. The Council of Judges, having considered the applications of judges for the transfer (rotation), approves them and makes an offer to the President on the transfer (rotation) of the judges only subject to the mutual agreement of the judges on the transfer (rotation).

A judge transferred from one local court to another has the right to repeatedly apply for transfer (rotation) not earlier than five years from the date of the last transfer (rotation).

In the event of reorganization of the local court, changes in its structure with the transfer of staff to other local courts, the Council of Judges shall hear the judges' opinions regarding their transfer (rotation) to the courts, where the staff units of the judges of the reorganized court or the court whose structure is changed are transferred. The decision of the Council of Judges on the transfer (rotation) of judges is made with due regard of all the circumstances and the possibility of judges working in a new place.

The transfer (rotation) of the judge of the local court is carried out for the remaining term of his/her authority.

The decision to transfer (rotate) the judge is made by the Council of Judges and submitted to the President for issuance of the relevant decree. The decree is subject to signing within ten days from the date of receipt of the decision by the President.

#### **Appointment of judges to the administrative positions in courts, powers of court chairpersons**

The judges of the Supreme Court elect from themselves the chairman and vice-chairmen for a period of three years. The same judge cannot be elected as the chairman, deputy chairman of the Supreme Court for two consecutive terms. The chairmen and deputy chairmen of the local courts are elected by the assembly of judges of the relevant local court for a period of three years. The same judge cannot be elected as the chairman, deputy chairman of the local court for two consecutive terms in the same court.

If the chairman of the first instance court is not elected under the rules provided by law, the position of the chairman of the court shall be held by the judge having the greatest judicial experience.

According to the Law of the Kyrgyz Republic "On the Status of Judges of the Kyrgyz Republic", the chairman of the court is a judge and, along with the discharge of the judge's duties s/he:

- 1) considers court cases;
- 2) ensures the functioning of the automated system for the assignment of cases and court materials among judges, and in the event of a technical malfunction of the automated system, s/he assigns cases and court materials himself/herself;
- 3) organizes the work of the court for consultation of individuals and consideration of their proposals, applications and complaints, except for the applications and complaints in respect of cases and materials being in the judicial proceedings;
- 4) carries out general management of the work of the court office, makes submissions to the head of the authorized body:
  - on the appointment and release of the civil servants of the court office;
  - on assigning qualification classes to the civil servants of the court;

- on application of the incentive measures and disciplinary punishment of the civil servants of the court office;

- on application of the incentive measures to the court bailiffs and their disciplinary punishment for improper execution of the judicial acts;

5) manages the conduct of the judicial statistics;

6) organizes the work to improve the skills of court personnel;

7) makes applications to the Disciplinary Commission at the Council of Judges for action (inaction) of the judge; and

8) exercises other powers in accordance with the legislation of the Kyrgyz Republic.

According to Article 20 of the Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, the Chairman of the Supreme Court is a judge and along with the performance of the duties of a judge s/he:

1) organizes the activities of the Supreme Court, distributes duties among deputy chairmen;

2) has the right to preside at the judicial sessions of the judicial collegiums and the plenum of the Supreme Court;

3) ensures the functioning of the automated system for the formation of court structures and the assignment of cases and court materials among the judges, and in the event of a technical malfunction of the automated system, s/he forms the judicial structures and assigns cases and court materials himself/herself;

4) has the right to demand court cases for summarizing the judicial practice;

5) if necessary, involves judges of one judicial collegium for the consideration of cases in the composition of another judicial collegium of the Supreme Court;

6) approves the plan of work on organizational issues of the Supreme Court;

7) exercises overall leadership of the Supreme Court office;

8) with the consent of the meeting of judges of the Supreme Court appoints to the post of the head of the Supreme Court office;

9) dismisses the head of the Supreme Court office in accordance with the legislation of the Kyrgyz Republic;

10) approves the instructions on record keeping in the Supreme Court and the local courts, the Regulations on the Supreme Court office;

11) carries out international relations in accordance with the established procedure, represents the Supreme Court and the local courts in relations with the state, public, international and other organizations;

12) coordinates the work of the judicial collegiums of the Supreme Court;

13) submits materials to the plenum of the Supreme Court;

14) submits to the plenum of the Supreme Court for approval the composition of the Scientific Advisory Board at the Supreme Court;

15) with the consent of the Council of Judges, appoints and dismisses the head of the authorized state body at the Supreme Court, which provides for the operation of local courts (hereinafter - the authorized body). The head of the authorized body may be dismissed from the post at the recommendation of the Council of Judges upon the results of consideration of his/her annual report;

16) appoints and dismisses the head of the Higher School of Justice with the consent of the Council of Judges. The head of the Higher School of Justice may be dismissed from the post at the recommendation of the Council of Judges upon the results of consideration of his/her annual report;

17) in case of impossibility of consideration of the case in the court of second instance, transfers the case to another court of the same level;

18) makes applications to the Disciplinary Commission of the Council of Judges for actions (inaction) of a judge of the Supreme Court and the local courts;

19) issues orders on the organization of work of judges and the local courts of the Kyrgyz Republic;

20) consults individuals and considers their proposals, applications and complaints, except for the applications and complaints in respect of cases and materials being in the judicial proceedings; and

21) exercises other powers in accordance with the legislation and the Regulations of the Supreme Court.

### **Analysis**

In the legislative regulation of the powers of the Chairman of the Supreme Court of the Kyrgyz Republic, it is noteworthy that s/he is empowered to perform a number of functions that are not typical for such post:

- with the consent of the Council of Judges, appoints and dismisses the head of the authorized state body at the Supreme Court, which supports the activity of the local courts;

- with the consent of the Council of Judges, appoints and dismisses the head of the Higher School of Justice.

### **New recommendation No. 17**

**Considering the procedural role of the Supreme Court of the Kyrgyz Republic as the highest court of the state, it is advisable to transfer the judicial administration functions from the Supreme Court's chairperson to the Council of Judges.**

### **The procedure for case assignment among judges**

#### **Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report**

**“2. Ensure implementation in practice of an automated case assignment system and that information on case assignment is open; ensure publication of court decisions on the Internet.”**

#### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report**

**“7. As a matter of urgency ensure practical implementation of the automated case assignment.”**

According to Articles 20, 31 and 36 of the Law of the Kyrgyz Republic “On the Supreme Court of the Kyrgyz Republic and the Local Courts”, the chairmen of the first instance courts, the chairmen of the second instance courts, as well as the Chairman of the Supreme Court ensure the functioning of an automated system for assignment of cases and court materials among the judges, and in the event of a technical malfunction of the automated system, they form the judicial structures and assign cases and court materials themselves.

The judicial collegium for civil cases and the judicial collegium for economic and administrative affairs of the Supreme Court of the Kyrgyz Republic introduced an automated case assignment system. Until the end of 2017, it was planned to introduce automated case assignment in the judicial collegium for criminal cases and cases of administrative violations of the Supreme Court of the Kyrgyz Republic. However, due to the revealed technical mistakes, the module of automated case assignment is currently being put into operation in the judicial collegium for criminal cases and cases of administrative violations of the Supreme Court of the Kyrgyz Republic.

At the moment, there is being developed the module of automated case assignment in the local courts of the Kyrgyz Republic.

**Analysis**

As it follows from the above information, the automated case assignment system was implemented in practice only in one chamber of the Supreme Court. In other courts, assignment of cases is still carried out in a “manual” mode by the chairmen of the courts. Given that Kyrgyzstan has had enough time to implement the automated case assignment system, Kyrgyzstan shall be considered as **not compliant with these parts of the Recommendations 24 and 25**.

Concerning the openness of information on the assignment of cases, after full implementation of the automated case assignment system, it should be possible to publish such information on the Internet, while even more detailed information on the assignment of cases (for example, the electronic protocol of case assignment) should be available to the parties to the case. Also, the experience of other countries proves that even after putting these systems into operation, they are often prone to unauthorized intervention or manipulation using the system parameters or other means. Therefore, it is important to ensure, inter alia, the appropriate mechanisms to protect against such interference, to maintain electronic logs of accessing and making changes to the system.

**New recommendation No. 18**

- 1. Implement in practice an automated case assignment system, as well as ensure the openness of the criteria, the parameters of such case assignment, the publication and the availability of the information on the results of case assignment to the parties.**
- 2. The case assignment system should provide for mechanisms preventing unauthorized interference and manipulation of the system and establish an effective liability for the commission of such actions.**

**Publication of the court decisions, transparency**

**Recommendation 24 of the Kyrgyzstan Third Round Monitoring Report**

**“2. Ensure implementation in practice of an automated case assignment system ... ensure publication of court decisions on the Internet.”**

On the basis of the approved Instruction, all judges of the Kyrgyz Republic on an ongoing basis publish on the website [www.act.sot.kg](http://www.act.sot.kg) the judicial acts on the considered criminal, civil, administrative and economic cases. In accordance with the Instruction on the Procedure for the Publication of the Judicial Acts and Sessions of the Supreme Court of the Kyrgyz Republic and the Local Courts, the judicial acts on criminal, civil, administrative and economic cases are published on the Internet portal [www.sot.kg](http://www.sot.kg), except for the certain categories of cases.

Also, the consultants (IT specialists) of the courts, together with the judges, regularly post information on court hearings and judicial acts on the internet portal [sot.kg](http://sot.kg) and constantly interact with the press service of the Supreme Court of the Kyrgyz Republic.

Currently, the Supreme Court of the Kyrgyz Republic maintains official correspondence with the state bodies on the implementation of digital transformation components “Taza Koom” in the judiciary of the Kyrgyz Republic. There is carried out support work to put the Data Processing Centre (DPC) into commercial operation for the needs of the judiciary of the Kyrgyz Republic.

Individuals and all judges can access the database of legal and judicial acts, clarifications of the Plenum of the Supreme Court of the Kyrgyz Republic through the Internet site [www.sot.kg](http://www.sot.kg).

There has been introduced a system of external and internal video surveillance in the courts of the Kyrgyz Republic.

According to Article 18-2 of the Law of the Kyrgyz Republic “On Access to the Information Administered by the State Bodies and Local Self-Government Bodies of the Kyrgyz Republic” of December 28, 2006 No. 213, the texts of judicial acts issued on the merits of the case in the prescribed form and published publicly are open to public access and made public subject to the requirements envisaged in paragraphs 2, 3, 5 and 6 of this Article of the Law.

Texts of the decisions and opinions of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic are published in full.

Paragraph 2 of this Article states that in the publicly available texts of the judicial acts, information that allows to identify a person (individual and legal entity) cannot be disclosed. Such information is replaced with the initials, letters or digital symbols.

According to paragraph 3 of Article 18-2 of this Law, the information referred to in paragraph 2 of this Article includes:

- 1) first name, patronymic, last name of individuals;
- 2) addresses of the place of residence or stay of citizens (individuals), telephone numbers or other means of communication, e-mail addresses;
- 3) passport data, personal numbers (codes) and information pertaining to the civil status records of individuals;
- 4) data of the technical passport of vehicles;

5) name and identification number of the legal entity, the court claims against which are recognized by the court as unlawful and unjustified; and

6) other information allowing to identify persons.

The information referred to in paragraphs 2 and 3 of this Article does not include:

1) last name and initials of the judge or the composition of the judicial panel, which adopted the judicial act;

2) last name and initials of the prosecutor and the lawyer, if they have participated in the trial;

3) last names and initials of officials of the state bodies and local self-government bodies who, in the exercise of their powers, took part in the judicial proceedings;

4) first names, patronymics (if any), last names of citizens (individuals) found guilty of committing crimes; and

5) name and identification number of the legal entity, the court claims against which are recognized by the court as lawful and justified.

The texts of the judicial acts adopted on the cases that have been held in closed court hearings, with the exception of the details, the introductory and the resolute parts of the judicial acts, shall not be made public.

In the texts of the judicial acts adopted on cases that have been held in partially closed court hearings, the information that has served as the basis for a closed court hearing shall not be made public.

In accordance with Article 6 of the Law of the Kyrgyz Republic “On the Supreme Court of the Kyrgyz Republic and the Local Courts”, the judicial proceedings in all courts are open. The hearing of cases in closed court hearing is allowed only in the events envisaged in law.

The state ensures the publicity of the judicial proceedings and the exercise of the right of access to information on the activities of the courts. The presence of the mass media representatives in an open court session for the purpose of obtaining information on the case is a legitimate way to find and obtain information.

Recording of the court hearing by means of sound recording, filming and photography, video recording, direct radio and television broadcasting of the court hearing are allowed in the manner prescribed by the procedural law.

According to Article 13 of the Law of the Kyrgyz Republic “On the Council for the Selection of Judges of the Kyrgyz Republic”, consideration of materials at a meeting of the Council is conducted openly with the participation of persons claiming to hold relevant posts, the media and any other stakeholders. Absence of a person claiming to hold the relevant position, properly notified of the time and place of the meeting, shall not prevent from consideration of the matter on the merits, with respect to other candidates. Meetings of the Council are subject to mandatory audio recordings and videotaping.

In accordance with the Law of the Kyrgyz Republic “On the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic”, meetings of the Disciplinary Commission at the Council of Judges of the Kyrgyz Republic are open, except for the cases when the judge in respect of whom the appeal is filed, requests consideration of the case in a closed hearing.

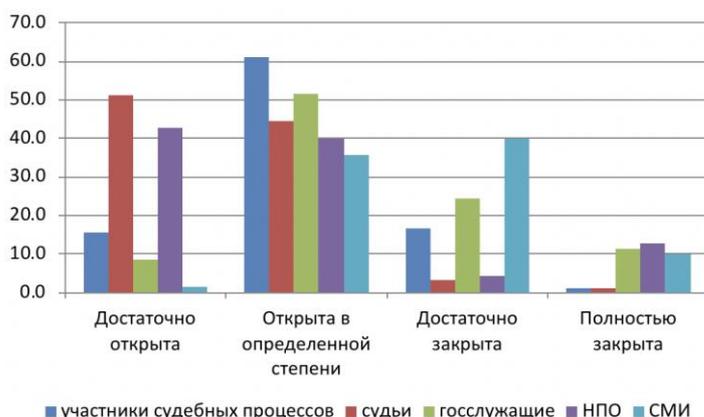
According to the official information, the transparent functioning of the Council of Judges is ensured by the participation of representatives of the civil society at its meetings, the publication on the Internet of the agenda of meetings, taken decisions, statistics of the activities of the Council of Judges.

In the Supreme Court of the Kyrgyz Republic, as well as in all courts of the republic, there are installed and functioning information and reference stands, and in some courts there are installed monitors (installation of monitors in other local courts is planned and implemented as funds are received) with information on the cases being considered indicating the time and place of their consideration, information on the procedure for filing applications by citizens in relation to actions or inaction of judges, civil servants, the procedure for applying to the court and the service of bailiffs, as well as the sample procedural documents. The information and reference stands were also installed in the Judicial Department of the Supreme Court of the Kyrgyz Republic and regional offices. This information is updated on an ongoing basis.

### Analysis

Despite the steps taken towards the judiciary’s openness in Kyrgyzstan, according to the public opinion polls, less than half of the respondents from among the trial participants consider that it is easy to find information on the courts’ work. The overwhelming majority of individuals (84.4%), representatives of NGOs and the media noted that it is very difficult to find such information, there is no access to its source<sup>34</sup>.

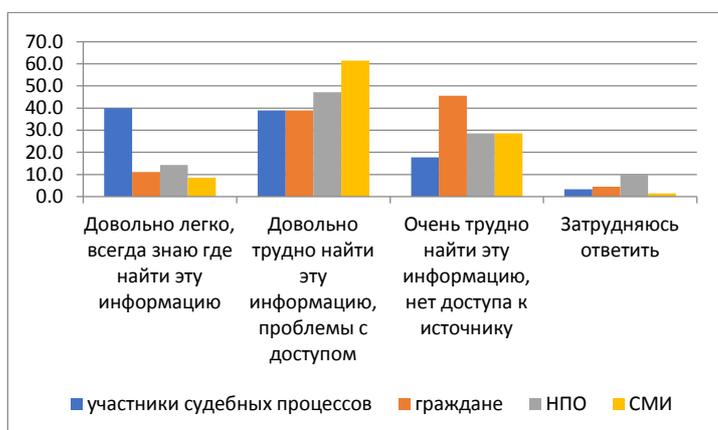
Figure 6. Level of transparency of the courts



Source: SIAR Research & Consulting, 2016.

<sup>34</sup> Report on the Project: Study of Judiciary’s Activities within the Anti-Corruption Framework Rfp-190-2016 SIAR Research & Consulting, 2016.

**Figure 7. Access to information on the work of the courts**



Source: SIAR Research & Consulting, 2016.

According to the same study, a large part of judges (61.1%) publish their judicial acts on the website [www.sot.kg](http://www.sot.kg), and most often this site is used by litigants (44.4%), while individuals use this site very rarely.

NGO representatives during their monitoring country visit noted judges' incomplete implementation of the requirement to place their judicial acts on the Internet<sup>35</sup>.

Due to the low level of the judges' compliance with the requirement to publish judicial acts, there should be considered another way of organizing this process. Performance of the technical function of placing the judicial acts on the Internet also goes beyond the basic functions of judges, this responsibility can be entrusted to the Judicial Department and/or the staff of the court offices whose duties will include such placement.

**Kyrgyzstan was partially compliant with that part of the previous Recommendation 24.**

### **New recommendation No. 19**

**Ensure in practice the publication of all court decisions that are subject to publication. Consider assigning the responsibility for publication of the decisions to the court staff and the Judicial Department.**

### **Requirements for judges, code of ethics**

#### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report**

**4. Revise the Code of Ethics of judges to covers incompatibilities, conflicts of interests, gifts, and other related provisions and ensure its practical implementation.**

In accordance with Article 5 of the Constitutional Law "On the Status of Judges of the Kyrgyz Republic", the exercise of powers by elected or appointed judges in the Kyrgyz Republic shall commence on the day

<sup>35</sup> See also: "...Decisions and sentences of judges, which are then posted on the judicial sites, are digitized selectively. Until now, the issue of digitization of all decisions and sentences has not been resolved," said Sooronbai Jeenbekov, the President of the Kyrgyz Republic, on May 17, 2018; available at : <https://bit.ly/2kptwQB>.

on which they take the judge's oath. The oath taken by the judges of the Constitutional Court and the Supreme Court shall be made at a meeting of the Supreme Council on the day of their election. The oath taken by judges of the local courts shall be made at a meeting of judges of the Supreme Court no later than five days following their appointment.

There are certain requirements which apply to the judges in accordance with their status. The judge shall be under obligation to:

- 1) scrupulously comply with the Constitution and laws of the Kyrgyz Republic, keep the judge's oath inviolate;
- 2) comply with the rules laid down by the Judicial Code of Honour and refrain from anything that might besmirch the authority and dignity of a judge;
- 3) resist any attempts of illegal interference in the administration of justice;
- 4) maintain the secrecy of the deliberations room;
- 5) declare their assets and incomes in accordance with the legislation of the Kyrgyz Republic; and
- 6) comply with the labour regulations.

A judge has no right:

- 1) to be a representative (except for cases of legal representation) on cases of individuals or legal entities in courts and other state bodies;
- 2) to make public statements on the issue that is subject to review in a court of law before the judicial act on this issue comes into force;
- 3) to disclose or to use, for purposes not related to the exercise of the judicial powers, information classified in accordance with the law as restricted information, or official information that has become known to the judge in connection with the exercise of his/her powers;
- 4) to use gifts received in connection with the hospitality and other official events. Such gifts are recognized as the state property and should be transferred by the judge under the act to the court in which s/he holds the position of judge, with the exception of cases provided for by law. A judge who has handed in a gift received by him/her in connection with a hospitality and other official event may redeem it in accordance with the procedure established by the regulatory legal acts of the Kyrgyz Republic;
- 5) to accept honorary and special (except for scientific and sports) titles, awards and other insignia of the foreign states and political parties without the permission of the Council of Judges;
- 6) to take business trips outside of the Kyrgyz Republic at the expense of individuals and legal entities, with the exception of business trips carried out in accordance with the legislation of the Kyrgyz Republic, international treaties of the Kyrgyz Republic or reciprocal agreements of the Supreme Court, the Constitutional Chamber of the Supreme Court, the Council of Judges with the relevant courts of the foreign states, international and foreign organizations;
- 7) to be a part of the management bodies, guardianship or supervisory boards, other bodies of foreign non-profit non-governmental organizations operating in the territory of the Kyrgyz Republic and their structural subdivisions, unless otherwise provided by the legislation of the Kyrgyz Republic, international treaties of

the Kyrgyz Republic or reciprocal agreements of the Supreme Court, the Constitutional Chamber of the Supreme Court with the relevant courts of the foreign states, international and foreign organizations;

8) to participate in strikes and rallies;

9) to carry out entrepreneurial activities, as well as to combine the position of a judge with deputy activity or activity in the state bodies and local self-government bodies, other paid work, with the exception of:

- pedagogical, scientific, expert and creative activities, which is additionally paid from the funds not prohibited by law, in agreement with the chairman of the relevant court. Undertaking of this activity should not affect the quantity and quality of the work performed at the place of work of the judge;

- participation in the activities of the judicial self-government bodies, the Council for the Selection of Judges, the Disciplinary Commission at the Council of Judges; and

10) judges cannot be members of parties, act in support or against of any political party.

The latest edition of the Judicial Code of Honour of the Kyrgyz Republic was adopted at the X Congress of Judges of the Kyrgyz Republic on February 19, 2016, replacing the 2006 code. According to Article 16 of the Judicial Code of Honour, a violation of the requirements of the Code is a disciplinary offense. A judge shall be brought to disciplinary liability for committing a disciplinary offense in accordance with the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic.”

The Kyrgyz authorities provided the following statistics of bringing judges to disciplinary liability for gross violation of the Judicial Code of Honour.

**Table 11. Statistics on bringing judges to disciplinary liability for violation of the Judicial Code of Honour**

Year	Early dismissal	Reprimand	Admonition	Total
2015	5	9	3	17
2016	5	2	6	13
2017	-	-	-	-

## Analysis

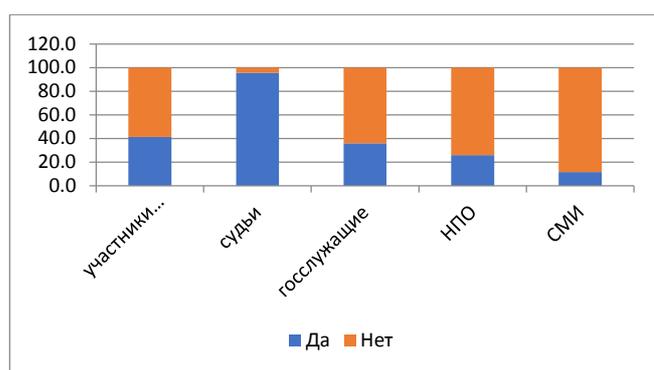
1. Overall, the new Judicial Code of Honour of Kyrgyzstan corresponds to the international standards. However, part of its provisions overlaps with the provisions and restrictions set forth in the Constitutional Law of the Kyrgyz Republic on the Status of Judges.

For example, according to the Constitutional Law on the Status of Judges (paragraph 5 of Part 2 of Article 5-1), a judge is prohibited from carrying out entrepreneurial activities, as well as combining the position of a judge with other paid work except for “pedagogical, scientific, expert and creative activities” not prohibited by law in agreement with the chairman of the relevant court. At the same time, according to the Judicial Code of Honour, a judge cannot receive any other remuneration other than wages and fees for pedagogical, creative or scientific activities. These two provisions not only partially duplicate each other, but also regulate the same restriction differently. In this case, according to the Law, both a violation of Article 5-1 and an independent gross violation of the Judicial Code of Honour are the grounds for bringing a judge to disciplinary liability.

2. Article 5 of the Constitutional Law of the Kyrgyz Republic on the Status of Judges provides that the oath taken by judges of the local courts shall be made at a meeting of judges of the Supreme Court no later than five days following their appointment. It would be more logical and correct from the standpoint of the judges’ independence if such a ceremony of taking an oath by the newly appointed judges of the local courts is within the competence of meetings of the local courts, where the judges are appointed.

3. According to the results of the survey in 2016, the majority of the survey participants believed that the Judicial Code of Honour was not applied in practice, but practically all respondents (95.6%) from among the judges indicated that they were applying that code in their practice<sup>36</sup>.

**Figure 8. Is the judicial code of honour actually applied?**



Source: SIAR Research & Consulting, 2016.

**In general, Kyrgyzstan was largely compliant with that part of the previous Recommendation 25.**

New recommendations in this respect are provided below.

<sup>36</sup> Report on the Project: Study of Judiciary’s Activities within the Anti-Corruption Framework Rfp-190-2016 SIAR Research & Consulting, 2016.

## **Prohibition of *ex parte* communications**

### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report**

#### **1. Take all necessary measures aimed at prohibition of *ex parte* communication with the judges and implement the respective provisions in practice.**

According to Article 5 of the Judicial Code of Honour of the Kyrgyz Republic, the judge in the administration of justice must proceed from the premise that the protection of the human and civil rights and freedoms is the main task of the court. The judge is obliged to resist anyone's illegal influence, pressure, interference in his/her professional activities.

The judge adheres to an independent position with respect to the society as a whole and the parties to the case before him/her. Public opinion, possible criticism of the judge's activity, including those in the mass media, should not influence the legality, validity and fairness of the taken decisions.

The chairman of the court and the deputy chairman of the court, the judges of higher courts are prohibited from allowing actions that restrict the independence of judges in the administration of justice and put pressure on judges to influence their activities in the administration of justice.

The judge is obliged to inform the Council of Judges of the Kyrgyz Republic, law enforcement agencies of any attempts to influence the judge, to exert direct or indirect pressure on the judge or to influence the decision to be made.

The extrajudicial activity of a judge should not raise doubts about his/her integrity and honesty. The conduct of a judge outside the service should not undermine the integrity of the judge's reputation. The judge must support the ethical standards of conduct established by this Code, both in private and in public life. The judge must avoid any personal ties that may damage the reputation, affect his/her honour and dignity.

According to Article 28, the Law of the Kyrgyz Republic on the Status of Judges, failure to notify the Council of Judges in the manner prescribed by law on any form of interference in the activities of a judge in the administration of justice or exercise of other powers envisaged in law, as well as any other interference not provided for by law, is a disciplinary offense.

In December 2017, the Council of Judges approved the Procedure for Posting Information on the Extra-procedural Applications on the Official Websites of the Supreme Court of the Kyrgyz Republic and the Local Courts. An extra-procedural application means a written or oral application to the chairman of the court, his/her deputy or judge on a particular case or material being considered by the court (judge), an application of a state body, local government, other body, organization, an official or a citizen, or application in the form of participants in a court proceeding, which is not envisaged in the procedural legislation.

All written extra-procedural applications submitted to the court on a specific case or material being considered by the court (judge) are subject to the obligatory publication on the court's official website, and in case of its absence – on the official website of the Supreme Court of the Kyrgyz Republic. Oral extra-procedural application is subject to written registration by the judge to whom it is addressed and is subject to the obligatory publication on the court's official website, and in case of its absence – on the official website of the Supreme Court of the Kyrgyz Republic.

## **Analysis**

One can welcome establishing the requirements for reporting on the facts of extra-procedural contacts and publishing information about them on the court websites. However, these measures are additional and they cannot be considered as the fulfilment of the previous recommendation on the prohibition of extra-procedural (*ex parte*) contacts with the judges.

The requirement prohibiting extra-procedural contacts of the judge is based on the necessity to provide each party to the trial with an independent and impartial (objective) resolution of the conflict. This means that the judge cannot and should not communicate with one party or its representative in the absence of the other party, cannot discuss the circumstances of the case outside the trial room with anyone other than as within the framework of the judicial procedure.

According to the experts, it is not so much the fact of reporting on such contacts which is important as the upbringing of the judge's internal attitude towards abstention from them, in order to preserve objectivity and to ensure the right to a fair trial for all involved parties. Also, if such contact has taken place, the judge should first inform the parties to the process and their representatives about it.

During the monitoring mission, the experts discussed this issue with the judiciary representatives and received information that in the Kyrgyz Republic the extra-procedural contacts of the judge mean work with the extra-procedural applications (complaints, letters from citizens, etc.).

Thus, this part of the recommendation was not implemented. This part of the recommendation is shown below in the new recommendation.

#### **Conflict of interests, gifts, other restrictions**

#### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report**

#### **4. Revise the Code of Ethics of judges to covers incompatibilities, conflicts of interests, gifts, and other related provisions and ensure its practical implementation.**

##### Conflict of interests

In accordance with the Judicial Code of Honour of the Kyrgyz Republic, the main task of a judge is the administration of justice. Throughout the term of office, a judge should not engage in any other activity that could prejudice their independence and impartiality and lead to a conflict of interest.

A judge is obliged to observe the ethical standards, does not have the right to commit discrediting acts, and is also obliged not to allow manifestations of improper behaviour when carrying out any actions related to their position.

A judge has no right to speak out publicly outside the judicial process regarding the assessment of the behaviour of the participants in the trial and to comment on their testimony. A judge has no right to publicly express his/her opinion before adopting the judicial act, publicly question the judicial acts that have entered into legal force.

A judge is obliged to keep and not use for their personal purposes information obtained in the performance of their duties, not to disclose the secrecy of the deliberations room.

A judge should not participate in the consideration of the case in situations that cause a conflict of interests.

According to the Judicial Code of Honour of the Kyrgyz Republic, the conduct of a judge must be irreproachable. A judge is not entitled to demand or accept any gifts, assistance in any form, if it is related to the performance of their official duties.

A judge shall not allow family, kinship, group and other relationships to influence the behaviour of the judge and the adoption of judicial decisions. A judge shall not receive any other remuneration other than wages and fees for pedagogical, creative or scientific activities.

A judge is obliged to take all exhaustive measures dependent on him to prevent corruption offenses in their professional activities.

The Law of the Kyrgyz Republic “On Conflict of Interests” (will come into force in June 2018), adopted in December 2017, applies to the judges of the Supreme Court and the local courts and the persons holding public posts envisaged in the Register of the Public and Municipal Posts of the Kyrgyz Republic. One of the bodies responsible for implementation of this law is the Council of Judges.

### Gifts

The Judicial Code of Honour provides that a judge does not have the right to demand or accept any gifts, assistance in any form, if it is related to the performance of their official duties. At the same time, the new Law on Conflict of Interests prohibits accepting gifts in connection with the performance of the official duties, with the exception of ordinary gifts, the value of which does not exceed ten calculation index units.

Violation of these restrictions is a disciplinary offense for which a disciplinary sanction may be imposed. Kyrgyzstan provided the following statistics on the use of disciplinary sanctions for such violations.

**Table 12. Statistics of bringing judges to disciplinary liability for violation of the anti-corruption restrictions**

<b>Year</b>	<b>Early dismissal</b>	<b>Reprimand</b>	<b>Admonition</b>	<b>Total</b>
2015	5	9	3	17
2016	5	2	6	13
2017	-	-	-	-

### Analysis

1. The general provisions on the necessity to prevent a conflict of interests in the work of a judge are envisaged in the Judicial Code of Honour. Also, the new Law “On Conflict of Interests” applies to judges. However, the latter does not contain special provisions that would regulate the procedure for preventing and eliminating conflicts of interests among judges. Most of the provisions of the Law on Conflict of Interests cannot be implemented by judges, because they do not have “direct leadership” or ethics commission in court. The relevant rules should be adapted to the organization of the work of judges and take into account the guarantees of their independence. This can be done by amending the Law on Conflict of Interests and its harmonization with the Law of the Kyrgyz Republic on the Status of Judges. Another option may be to determine the specifics of resolution of the judges’ conflicts interests by an act of the Council of Judges (which may also require a prior amendment of the Law on Conflict of Interests).

In addition to adapting the general rules regulating conflicts of interests to the specifics of the judicial work, the Council of Judges should also prepare detailed clarifications and practical advice on preventing and eliminating conflicts of interests in the judicial work.

In this regard, one should appreciate that, according to the information provided by the Kyrgyz authorities, there has been developed a plan of measures to implement the Law on Conflict of Interests in the judicial

system; there is a possibility of forming a commission for the management of conflicts of interests within the Council of Judges and there are elaborated the Regulations on the management of conflicts of interests, including questions of analysis of potential conflicts of interest in the performance of official activities, consideration of the applications of these persons for the presence of a conflict of interests, control, checks to prevent or identify conflicts of interests, resolution of a potential, actual and occurred conflict of interests or informing the relevant authorities.

2. Another inconsistency is the requirement to file and verify declarations of personal (private) interests under the Law on Conflict of Interests. The law provides that the verification of declarations of personal (private) interests is carried out by the ethics commissions of the state bodies, local self-government bodies, institutions, organizations or enterprises. The law does not provide for establishment of such commissions in courts.

3. According to the Law on Conflict of Interests, a conflict of interests is defined as a conflict between public and legal duties and personal (private) interests of the persons specified in Article 6 of this Law, where their personal (private) interests affect or may affect their performance of the official duties, which leads or can lead to violation of the rights and interests of the individuals, organizations or the state. Conflict of interests can be potential, real and occurred. Such definition does not fully correspond to the international standards, since it does not cover apparent (visible) conflicts of interests, that is the situation when a conflict of interests arises in the eyes of an outside objective observer, even if it is absent in reality.

Even if such conflicts of interests are not covered by the rules for the public and other employees, a higher standard of integrity should apply to judges due to the positions they occupy. Such requirement can be implemented through a change in the Judicial Code of Honour.<sup>37</sup>

4. The restrictions on gifts related to judges are regulated by the Law on the Status of Judges, the general Law on Conflict of Interests and the Judicial Code of Honour. The corresponding provisions overlap and do not always conform with each other (see above).

### **New recommendation No. 20**

**1. Amend legislative acts with a view to defining provisions on the conflict of interests of judges, taking into account the specifics of the organisation of judicial work and judicial authorities, as well as the need to respect the judicial independence guarantees; harmonise the Law on the Status of Judges with the Law on Conflict of Interests with regard to the submission and verification of declarations of personal (private) interests.**

**2. Harmonise the provisions of the laws of the Kyrgyz Republic on conflict of interests and on the status of judges, as well as the Judicial Code of Honour, regarding the restrictions on gifts, other paid activities and other anti-corruption restrictions.**

**3. Amend the Judicial Code of Honour with provisions on the prohibition of extraprocedural (*ex parte*) contacts of the judge with one party to the case in the absence of the other party or its representative with a view to maximally objective consideration of court cases; ensure practical application of this provision.**

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<sup>37</sup> See, for example, Bangalore Principles on Judicial Conduct, principles 1.3., 2.5., 4.1., 4.3.

## **Asset disclosure**

According to the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, judges are obliged to declare their assets, incomes and expenditures in accordance with the Kyrgyz Republic. The Law of the Kyrgyz Republic “On Declaring Incomes, Expenditures, Obligations and Assets of the Persons Holding or Occupying the State and Municipal Office” regulates the relations connected with declaration of incomes, Expenditures, Obligations and Assets of the persons holding the public and municipal offices, which also applies to the persons who hold special public posts (chairman, deputy chairman, judge of the Supreme Court, chairman, deputy chairman, judge of the Constitutional Chamber of the Supreme Court, chairman, deputy chairman, judge of the local court).

In accordance with Clause 5 Part 2 of Article 28 of the Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, failure to submit or untimely declaration of the assets, incomes and expenditures, provision of deliberately false information is a disciplinary offense for the commission of which one of the following sanctions may be applied – warning, admonition, reprimand or early dismissal.

The system of declaration envisaged in this specialized law is considered in Chapter 2.1. of this report.

## **Training on anti-corruption**

### **Recommendation 25 of the Kyrgyzstan Third Round Monitoring Report**

**“5. Ensure that the training of judges includes the issues of ethics, fight against corruption and integrity, for both initial and continuous trainings for judges.”**

According to Article 5-3 of the Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic”, a judge is obliged to improve his/her skills. The professional development of judges is performed in accordance with the curricula at least every three years, with the continuing pay of salaries in this period.

The procedure for and terms of the judges’ professional development are specified by the chairman of the Supreme Court and the Council of Judges. The professional development of judges is carried out at the expense of the republican budget, as well as other sources not prohibited by law.

According to the Kyrgyz authorities, there has been developed the Curriculum of the Higher School of Justice at the Supreme Court of the Kyrgyz Republic for 2018, which is being approved by the Council of Judges of the Kyrgyz Republic. The said Curriculum also envisages various training modules on the ethical-deontological topics and the anti-corruption legislation of the Kyrgyz Republic.

## **Analysis**

From the information provided it can be concluded that **the mentioned part of the previous recommendation was partially implemented.**

There is no mechanism for providing judges with (confidential) consultations and recommendations on conflict of interests, service restrictions, declaration of assets, rules of conduct etc. Also there are no written manuals, methodological and training aids on these issues which are developed specifically for judges.

## **New recommendation No. 21**

**1. Implement in practice a mechanism for providing judges with consultations, including confidential ones, and recommendations on conflict of interests, declarations of assets and interests, rules of conduct and other anti-corruption restrictions. Prepare and disseminate practical guidelines, methodological and training manuals on these issues, which are developed specifically for judges.**

**2. Ensure that training on ethics, anti-corruption and integrity be a part of the initial training and regular in-service training of judges.**

**Administrative and criminal investigation with respect to judges**

In accordance with the Constitutional Law of the Kyrgyz Republic “On the Individual Powers of the Prosecutor’s Office Set by the Constitution of the Kyrgyz Republic” and the Law of the Kyrgyz Republic “On the Prosecutor’s Office of the Kyrgyz Republic”, the decision to initiate criminal proceedings against a judge is taken by the Prosecutor General of the Kyrgyz Republic.

The Constitutional Law of the Kyrgyz Republic “On the Status of Judges of the Kyrgyz Republic” provides that bringing a judge to criminal liability is allowed with the consent of the Disciplinary Commission at the Council of Judges on the proposal of the Prosecutor General.

In order to obtain consent to bringing a judge to criminal liability, the Prosecutor General submits an application to the Disciplinary Commission at the Council of Judges, which indicates the circumstances of the criminal case, the article of the criminal law under which the judge is accused, the request for consent to bringing a judge to criminal liability as the accused.

In order to obtain a consent to bringing a judge to administrative liability imposed in a judicial procedure, the relevant state body shall submit an application to the Disciplinary Commission at the Council of Judges.

The decision of the Disciplinary Commission at the Council of Judges to give consent to bringing a judge to administrative liability imposed in a judicial procedure is not subject to appeal.

A judge has the right to immunity and cannot be detained and arrested, subjected to a search or body search, except when caught at the scene of a crime. A judge detained on suspicion of committing a crime or on other grounds or forcibly delivered to any law enforcement agency when it was not known who the judge was at the time of detaining them, shall be immediately released upon their identity being established. A body search of a judge shall not be permitted, except in cases provided for by law in order to ensure the safety of other people.

A judge, including after termination of his/her powers and dismissal, cannot be brought to criminal and administrative liability imposed in a judicial procedure for unlawful acts committed by him/her during the exercise of the judicial powers other than in the procedure established by this constitutional law.

During the monitoring visit the judiciary representatives provided the following statistics on giving consent to bringing judges to criminal liability:

**Table 13. Statistics of consideration of requests for approval of bringing judges to criminal liability**

Year	Number of filings	Approved	Rejected	Returned (outside of competence)

2015	8	6	2	0
2016	5	4	1	0
2017	1	0	0	1*

\* In 2017, the Council of Judges received one application from the Prosecutor General about giving consent to the criminal prosecution of a judge. However, due to the introduction of the Constitutional amendments the disciplinary liability of judges is referred to the competence of the Disciplinary Commission at the Council of Judges.

## Analysis

The immunity of a judge from liability for the taken decisions is an important guarantee of the judicial independence. At the same time, the states in the post-Soviet territory are characterized by setting at the constitutional level of a very broad range of judges' immunity from prosecution, but there is no clear regulation of the guarantees of functional immunity, namely the inadmissibility of prosecution for the activities of a judge. There is no such clear guarantee in the legislation of the Kyrgyz Republic.

Moreover, unjustified immunity is guaranteed here to judges even after termination of their powers and dismissal, since a judge cannot be brought to criminal and administrative liability imposed in a judicial procedure for the unlawful acts committed during the exercise of the judicial powers.

Also the immunity from detention and arrest, search or body search, except when the judge is caught at the scene of the crime, seems to be excessive. It would be advisable to require, instead of such a broad prohibition, obtaining consent to such actions from the Disciplinary Commission (after bringing the procedure for its formation in conformity with the international standards) or the Council of Judges. At the same time, in case of detention of a judge on the scene of crime at the time of its commission or immediately thereafter, such body would have to be immediately notified, while extending the judge's detention in custody would only be possible if such body does not abolish it.

Consideration should also be given to the possibility of repealing the requirement of obtaining the Disciplinary Commission's consent to bringing judge to criminal liability for corruption crimes. As noted in the 2014 Opinion of the Venice Commission, according to Article 11 of the UN Convention against Corruption, which was ratified by the Kyrgyz Republic, the participating States undertake to take "measures to strengthen integrity of the judges and judiciary personnel and to prevent opportunities for corruption among them." The Commission recommended to discuss and decide, taking into account the circumstances of the Kyrgyz Republic, whether the Constitutional Law should specifically exclude from the scope of functional immunity certain types of intentional crimes (such as bribery, corruption or use of official position for personal purposes), as it has been recently done in other countries (e.g., in Moldova). "While this may have some kind of deterrent effect on judges and the rule of law, possibly, it might be appropriate to separate these offenses individually, since corruption in the public sector, including the judiciary, is a particular problem in the Kyrgyz Republic".<sup>38</sup>

## New recommendation No. 22

**1. Revise the provisions of the Law on the Status of Judges concerning the scope of the judicial immunity, providing for immunity from prosecution for the judicial activity for the decisions the judge issued, provided that there have been no signs of an intentional crime.**

**2. Prepare a draft, hold consultations on it and adopt changes that allow detention and arrest, search and body search of judges subject to the consent of the Council of Judges or other judiciary body that meets the international standards with respect to its composition.**

<sup>38</sup> Joint opinion - Venice Commission and OSCE/ODIHR - on the draft amendments to the legal framework on the disciplinary liability of judges in the Kyrgyz Republic, June 2014, document CDL-AD(2014)018, clause 42, available at <https://bit.ly/2s2iJz7>.

### **3. Consider revoking the requirement of obtaining a consent of the Disciplinary Commission at the Council of Judges to bring the judge to criminal liability for corruption crimes.**

#### **Conclusions**

Since the previous round of monitoring, Kyrgyzstan has carried out an important reform of the judiciary, including by amending the Constitution of the Kyrgyz Republic. Many of the adopted changes are welcome. However, the reform cannot be considered complete and some of the changes do not fully comply with the international standards. First of all, this concerns the preservation of the significant influence of the political bodies on the judiciary. The President and the Parliament continue playing a significant role in the formation of the judiciary – directly through the appointment and dismissal of judges, or indirectly through participation in the formation of the judicial authorities (the Council for the Selection of Judges and the Disciplinary Commission).

The work of the judicial self-government bodies is a positive achievement, but the key functions related to the career of judges are performed by the bodies that are not formed in accordance with the international standards. This leads to the fact that in practice the level of confidence in the judiciary remains low, the judiciary is considered politically dependent.

The independence of judges is also affected by too broad and indistinct list of grounds for bringing judges to disciplinary liability, unreasonable requirements for giving consent to wiretapping.

Also the level of corruption perception in the judiciary remains high. This indicates that there are needed the additional measures to prevent, detect and suppress corruption in the judiciary. These measures should concern effective implementation of the anti-corruption restrictions (conflict of interests, gifts, incompatibility, declarations of interests and assets, etc.), establishing a clear prohibition on ex parte communications (and not only publication of information on such contacts), regular training and raising awareness, creating mechanisms for advising judges, providing them with practical tools.

**Taking into account the assessment of the implementation of different elements of the previous Recommendations 24-25, it can be concluded that Kyrgyzstan was partially compliant with Recommendations 24 and 25 of the previous monitoring round.**

## **Public prosecution service**

### **Recommendation No 24 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**“...Reform the public prosecution bodies to ensure their independence and accountability; in particular, establish an exhaustive list of clear grounds for dismissal of the Prosecutor General and other prosecutors.”**

### **General information and functions**

Pursuant to Kyrgyz Presidential Decree of 18 July 2016 No 161-UP, “On measures to reform the system of law enforcement bodies in the Kyrgyz Republic”, law enforcement agencies were put through the reform which affected, among others, the prosecution authorities. In order to consolidate the prosecutors’ efforts in the area of supervision, investigative functions were taken away from the Office of the Prosecutor General except criminal prosecution of persons with the status of servicemen; these functions were transferred to the State Committee for National Security and the State Service for Combatting Economic Crimes. In parallel, in order to ensure proper checks and balances, the prosecution authorities have been given the right to initiate criminal prosecution for crime in public office (corruption crime), including against prominent public officials, with the cases to be referred for further investigation to the relevant authorities.

Under Article 10 of the Kyrgyz Law “On the Office of Prosecution of the Kyrgyz Republic” the prosecution service in the Kyrgyz Republic comprises:

- 1) the Office of the Prosecutor General of the Kyrgyz Republic;
- 2) Military Prosecution Office of the Kyrgyz Republic;
- 3) prosecution offices in the regions and the cities of Bishkek and Osh;
- 4) district (municipal) prosecution offices and the equivalent offices of specialized prosecution and garrison military prosecution;
- 5) academic and educational establishments and editorial boards of print media.

The prosecution service comprises 845 people in various categories, of which, as of 30 December 2017, 87% were men and 13% were women.

Under the Constitution of the Kyrgyz Republic and the Kyrgyz Law “On the Office of Prosecution of the Kyrgyz Republic”, the prosecution service is authorized to:

- 1) supervise the accurate and uniform compliance with the laws by the executive authorities and other state bodies the list of which shall be defined by the constitutional law, as well as bodies of local self-government, and the public officials of all such authorities;
- 2) supervise compliance with the laws by any authorities that are engaged in operative and investigative activities and investigation;
- 3) supervise compliance with the laws in the execution of court verdicts in criminal cases and in the application of enforcement measures associated with the restriction of personal freedom;

- 4) represent interests of a citizen or the state in cases stipulated by law;
- 5) lead prosecution in courts on behalf of the state;
- 6) initiate criminal prosecution against public officials of state authorities the list of which shall be defined by the constitutional law, with the cases referred for investigation to the relevant authorities, and to prosecute under criminal law any person with the status of serviceman.

While previously the prosecution service performed exclusively supervision over compliance with the law by executive authorities and bodies of local self-government, under the revised wording of Article 104, paragraph 1, of the Constitution, the remit of the supervision was broadened to include compliance with the law “by other state authorities the list of which shall be defined by the constitutional law.” This list is to be found in the Constitutional Law “On certain powers of the prosecution service as stipulated by the Constitution of the Kyrgyz Republic” and comprises:

- 1) execution authorities and bodies of local self-government;
- 2) the Office of the Prosecutor General of the Kyrgyz Republic and its structural (territorial) divisions;
- 3) the National Bank of the Kyrgyz Republic and its structural (territorial) divisions;
- 4) the Central Commission for Elections and Referenda of the Kyrgyz Republic and its structural (territorial) divisions, except for the work of election commissions in preparing and conducting elections and referenda;
- 5) the Audit Chamber of the Kyrgyz Republic and its structural (territorial) divisions;
- 6) the Staff of Akaykatchy (Ombudsman) of the Kyrgyz Republic and its structural (territorial) divisions, except for the work of Akaykatchy (Ombudsman) in his oversight of the exercise of constitutional civil rights and liberties;
- 7) the Social Fund of the Kyrgyz Republic and its structural (territorial) divisions;
- 8) the Public Service of the Kyrgyz Republic and its structural (territorial) divisions;
- 9) the National Statistic Committee of the Kyrgyz Republic and its structural (territorial) divisions;
- 10) the National Commission for the State Language advising the President of the Kyrgyz Republic and its structural (territorial) divisions;
- 11) the State Commission for the Religious Affairs of the Kyrgyz Republic and its structural (territorial) divisions;
- 12) the National Centre of the Kyrgyz Republic for the Prevention of torture and other cruel, inhuman or degrading treatment or punishment, and its structural (territorial) divisions;
- 13) the Judicial Department of the Supreme Court of the Kyrgyz Republic and its structural (territorial) divisions;
- 14) the Armed Forces, other military forces or state agencies of the Kyrgyz Republic where the law prescribes military service;

15) public officials of the state authorities and local self-government listed above.

The regulatory legal acts that form the legal basis for the activity of the offices of prosecution are as follows:

- the Constitution of the Kyrgyz Republic;

- the Constitutional Law “On certain powers of the prosecution service as stipulated by the Constitution of the Kyrgyz Republic” dated 13.07.2017, No 124;

- the Law of the Kyrgyz Republic “On the Office of Prosecution of the Kyrgyz Republic” dated 17.07.2009, No 224;

- Statutes “On the conditions of service at bodies and offices of the prosecution in the Kyrgyz Republic”, approved by the decree of the President of the Kyrgyz Republic, dated 06.02.2001, No 48.

The activity of the prosecution authorities is also subject to other regulations and legal acts of the Kyrgyz Republic, including procedural legislation.

## **Analysis**

1. In its 2016 opinion on the draft amendments to the KR Constitution, the Venice Commission was critical of the list of functions entrusted to the prosecution authorities, namely, the retained broad supervisory powers. The Commission pointed out that such “supervisory” model of the prosecution service in actual fact harked back to the old, Soviet, model of prosecution. At the same time, in the past decades many post-communist countries, now democracies, have opted for ridding prosecution of broad supervisory powers, transferring this prerogative to other agencies, including national human rights institutions (such as that of ombudsman). The purpose of such reforms was to eliminate a prosecution service vested with excessive powers and largely unaccountable. Keeping the prosecution service intact in the Constitution might mean preserving a system in which one specific agency enjoys broad powers, which may seriously undermine the principle of separation of powers as well as individual rights and liberties.

The Venice Commission noted that such broad supervisory powers granted to the prosecution service had been criticized repeatedly by such international and regional organizations as OSCE/ODIHR and the Venice Commission. In various opinions on that matter, including specific ones on the legislative framework that regulates the prosecution service in the Kyrgyz Republic, OSCE/ODIHR and the Venice Commission, for the above reasons, had recommended ridding prosecutors of their supervisory functions, limiting their remit to criminal matters. In their 2013 opinion OSCE experts recommended considering reforming the prosecution service by eliminating its general supervisory powers and limiting its powers to matters of criminal prosecution. The rationale for such a restriction of prosecutorial supervisory powers was “to prevent an over-powerful and largely unaccountable prosecution service which could potentially be used for political goals and for pressuring other state bodies, including the judiciary, as had happened in the Soviet system.”<sup>39</sup>

The experts agree with this assessment. Although with the adoption of the current Constitution of the Kyrgyz Republic, the prosecutor’s office no longer supervises commercial organisations and individual entrepreneurs, which narrows the scope of the supervision, the remaining supervisory functions of the prosecutor's office are excessive and problematic not only from the point of view of the way government should be set up in a democracy; they also could lead to corruption. Kyrgyzstan has an ombudsman; it has

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<sup>39</sup> See Opinion on key legal acts regulating the prosecution service of the Kyrgyz Republic, OSCE/ODIHR, October 2013, paragraph 13, available at <https://bit.ly/2IKjoML>.

also implemented free legal aid. These are sufficient to allow giving up the broad supervisory role of the prosecution authorities and focusing their functions on leading criminal prosecution in court.

Note also that one of the supervised bodies listed was the Judicial Department of the Supreme Court of the Kyrgyz Republic and its structural (territorial) divisions. This could be interpreted as limiting independence of the judiciary, since the Judicial Department is there to support the work of courts and judicial bodies (Council of Judges, Judges Selection Board, the Council of Judges' Disciplinary Commission).

At the same time, the experts welcome the fact that, as the Office of the Prosecutor General of the Kyrgyz Republic informs, in the recent years there have been taken measures eliminating duplication of supervisory functions with other bodies (the Audit Chamber, Ombudsman, State Ecological Inspectorate, etc.) and since 2018 the number of inspections has been excluded from the statistical reporting on supervision over execution of laws.

2. Experts welcome the fact that the prosecution authorities will not be conducting investigations; this function is alien to prosecutors and leads to the conflict of interest. Problematic, however, is the power to open criminal prosecution against public officials of certain state authorities (the list thereof coincides with that of the authorities to be supervised by the prosecution service – see above). Prosecutors enjoy sufficient powers to lead investigations and endorse key decisions in the course of the investigation, including the charges brought. There is no need to grant an additional corruption-prone power to initiate criminal prosecution. This step, opening up prosecution, in principle, is conducive to corruption, and it ought to be eliminated, replaced with an automatic registration of the detected criminal offences. This is exactly what was done in the new 2017 KR Criminal Procedure Code which becomes effective in January 2019 and provides for no such action as “initiating a criminal case”. In this context, it is unclear how provisions of Article 104 of the KR Constitution will be complied with.

Another inconsistency is the prosecution service's investigators being granted jurisdiction, by the new CPC, in certain categories of offences, including corruption-related (Art. 153, paragraph 3). Such powers are not deemed to be in line with the constitutional remit of the prosecution service. The Kyrgyz authorities noted that there was no discrepancy, because in accordance with Article 104 of the Constitution of the Kyrgyz Republic, military prosecutors prosecute persons who have the status of military personnel who are also officials. It is difficult to agree with this interpretation, since, according to Article 153 of the Criminal Procedure Code, in general, the jurisdiction of the “prosecutor's office” covers a long list of crimes, including crimes against health, crimes against civil and other human rights, crimes against public health and many other crimes that do not concern military personnel.

3. A very important aspect of the work of the KR prosecution service, which may create a real threat to judicial independence and the right of the citizens to legal certainty, is a possibility, given by law to the prosecutor, to join the process at any stage should that be required in order to protect civil rights or the interests of the public or the state safeguarded by law (Art. 40, paragraph 3, of the Law on Prosecution Service), and also the provision in Article 41 therein bearing on the prosecutor's appeal against judicial acts.

Pursuant to Article 41 of the KR Law on Prosecution Service, the prosecutor or his deputy, within their competence, shall make a submission to the superior court within the appeal, cassation or supervision procedure or a procedural appeal against judicial acts.<sup>40</sup> Irrespective of their involvement in the trial, the

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<sup>40</sup> According to the information made available by the prosecution service, in 2015 prosecution offices made 529 *supervisory appeals*, of which courts granted 208; in 2016, 507 such appeals were made and 223 granted; in 2017, 564 supervisory appeals were made and 226 granted. In 2015 prosecution offices submitted 725 *cassation appeals*, of

prosecutor or his deputy may, within their competence, demand and obtain from the court any case or a category of cases for which the verdict, sentence, ruling or decision has become final. Having found that such verdict, sentence, ruling or decision by the court are unlawful or unsafe, the prosecutor may make a submission to the superior court in the form of a cassation or supervisory appeal or else make a submission to the superior prosecutor.

Of no less concern is Article 43 which stipulates that the Prosecutor General has the right to make submissions to the Plenary Council of the Supreme Court of the Kyrgyz Republic demanding that courts be instructed on issues of judiciary precedents in civil law, commercial, criminal, administrative or other cases, and to take part in their discussion.

### **New recommendation No. 23**

**1. Ensure that the functions of the prosecutor's office be gradually brought in line with the international standards and recommendations.**

**2. Revise Articles 40-43 of the Law of the Kyrgyz Republic on Prosecution Service and provisions of the procedural laws in order to eliminate threats to judicial independence and uphold the principle of legal certainty for the parties to the proceedings.**

### **Safeguards to independence/autonomy of prosecution authorities and prosecutors**

Under the Constitution of the Kyrgyz Republic (Chapter 7), the prosecution service belongs in the class of "other state authorities" and thus is part of neither the judicial, nor executive arm.

The Kyrgyz law "On the Prosecution Service in the Kyrgyz Republic" provides certain safeguards to prosecution independence. In particular, interfering with the work of the prosecution authorities is forbidden. Any kind of pressure on a prosecutor aiming to obstruct him in his exercise of duty or to lead him to an unlawful decision, or else failure to comply with the prosecutorial submissions, instructions or cautions shall create liability under law.

A prosecutor or a prosecutorial investigator is not under any duty to offer comments on the merits of cases or materials under his responsibility, or else disclose them to anyone except under circumstances and on conditions stipulated by law. No one has the right to disclose the findings of inspections or prosecution cases without a permission of the lead prosecutor until completion.

Article 400-2 the Code of Administrative Offences of the Kyrgyz Republic provides for liability for the failure to comply with the lawful requirements of a prosecutor, investigator or other officer carrying out administrative offence proceedings. A wilful failure to comply with the requirements of a prosecutor or an investigator implied by their authority stipulated by the Kyrgyz legislation, as well as an officer carrying out administrative offence proceedings, shall be punished by an administrative fine of up to 20 calculation index units for individuals, and from fifty to one hundred calculation index units for legal entities.

### **A body of prosecutorial self-government**

In their replies pertaining to self-government, Kyrgyz authorities provided some information about collegial boards in prosecution authorities. They are consultative bodies established to advise the

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which courts granted 374; in 2016, 572 such appeals were made and 300 of them granted; in 2017, 639 appeals were made and 322 granted.

Prosecutor General, Military Prosecutor as well as prosecutors of regions, the cities of Bishkek and Osh; they comprise the leadership of the said prosecution offices (chairmen), their deputies (ex officio), and other executive officers of prosecution authorities. However, those boards are not bodies of prosecutorial self-government (the Prosecutor General establishes them, and they play only an advisory role).

### **The Prosecutor General of the Kyrgyz Republic**

The Office of the Prosecutor General is the supreme body of the prosecution service of the Kyrgyz Republic, headed by the Prosecutor General. The KR President appoints the Prosecutor General with the consent of Supreme Council; in cases stipulated by law he may relieve the Prosecutor General of his office provided at least half of all Supreme Council members consent to this, or at the initiative of one third of all Supreme Council members supported by two thirds of Supreme Council members; at the suggestion of the Prosecutor General, he shall also appoint or dismiss the Prosecutor General's deputies.

In the event that the President's nomination to the office of the Prosecutor General should fail to win the required number of votes, the President, within 14 days, shall propose to Supreme Council another nomination.

The term of office of the Prosecutor General is 7 years.

Pursuant to Article 11 of the Kyrgyz law on the prosecution service, the Prosecutor General shall be dismissed by the KR President under circumstances stipulated by this law, given the consent of at least one third of all Supreme Council members, or at the initiative of one third of all Supreme Council members supported by two thirds of Supreme Council members.

### **Analysis**

1. One of the key issues bearing on prosecutorial independence in Kyrgyzstan is deemed to be the procedure for appointing and dismissing the Prosecutor General and his/her deputies. As long as the Kyrgyz prosecution service is highly hierarchical, the significance of the Prosecutor General for ensuring genuine autonomy of prosecution authorities shall remain central. The process of appointment and dismissal is dominated by political bodies – the President and parliament.

Either the Constitution or the KR Prosecution Service Law fail to list grounds for early dismissal of the Prosecutor General from his office. Under Article 11 of the KR Law "On the prosecution Service of the Kyrgyz Republic", the Prosecutor General shall be relieved of his duties by the KR President under the circumstances stipulated therein. However, the law defines no such circumstances. There is only a general list of grounds for dismissal of any prosecutor in Article 19: prosecutors may resign from their office prior to the end of their term of their own will, due to a transfer to another office or inability to perform their duties for reasons of bad health, as a result of their performance assessment, in the case where the conviction for the committed offence becomes final, or under other circumstances stipulated by the legislation of the Kyrgyz Republic. Obviously, it is an open list.

It appears, the President and parliament have unlimited discretion as to early termination of the Prosecutor General's term of office, which only politicizes this office even more and makes it dependent on political interests. Such state of affairs fails to comply with democratic standards in the organisation of public prosecution authorities. As was noted by one of the opinions of the Venice Commission, "The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of democratic legitimacy of such appointments, on the one hand, and the requirement of depoliticisation, on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary

safeguards are necessary in order to diminish the risk of politicisation of the prosecution office. The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. [...] the nomination of the candidate should be based on his/her objective legal qualifications and experience, following clear criteria laid down in the Draft Law. It is not sufficient for a candidate for such a high office to be subjected to the general qualification requirements that exist for any other prosecutorial position; the powers of the Chief Prosecutor require special competencies and experience [...].”<sup>41</sup>

It is therefore important that the role of the President and parliament in the appointment and dismissal of the Prosecutor General should be removed or restricted to the maximum extent, with the establishment of a body of prosecutorial self-government (a prosecutorial council) which will be authorized to select candidates for this office and appoint the Prosecutor General or nominate the selected candidate for appointment, as well as decide whether there are grounds for early dismissal of the Prosecutor General from office.

Grounds for early dismissal of the Prosecutor General from office must be clearly defined in the Constitution or in the law, and no dismissal for political motives should be allowed.

2. Experts also note that the Prosecution Service Law offers no limitations to the number of times the Prosecutor General may occupy this office. It is recommended that it should be stipulated that the Prosecutor General shall be appointed for one term of 7 years and may not be appointed to this office for another term.

As was noted by the Venice Commission, “A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament’s term in office.”<sup>42</sup>

It is recommended that the Kyrgyz Law on prosecution service be amended accordingly.

3. Experts are drawing attention to Article 67 of the Constitution of the Kyrgyz Republic which stipulates that the KR President may be removed from his office only subject to accusations made by the Supreme Council of a committed offence affirmed by a statement made by the Prosecutor General as to the elements of the offence present in the actions of the KR President. Since it is exactly the KR President that appoints and dismisses the Prosecutor General, this results in a conflict of interest and a situation where the KR President will only appoint loyal candidates to the office of the Prosecutor General, someone who will pose no threat to him in case of impeachment.

4. Overall, importantly, in line with the recent trends, the level of autonomy of prosecution authorities seems to get closer to the safeguards of judicial independence. As a result, good practice is to transfer the key powers relating to the organization of the prosecution service, prosecution career management and prosecutors’ accountability under special prosecutorial councils similar to judicial councils.

In their Report for the Fourth Round of Monitoring of the Istanbul Anti-Corruption Action Plan for the OECD ACN<sup>43</sup>, the monitoring group was positive about the establishment of the Prosecutorial Council

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<sup>41</sup> CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, paragraphs 19, 20 and 27; available at <https://bit.ly/1PPjtiz>.

<sup>42</sup> CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, paragraphs 35-38, 40.

<sup>43</sup> Report on the 4th Round of Monitoring of Georgia, the Istanbul Anti-Corruption Action Plan, September 2016, pp. 69-70, available at <https://bit.ly/2x3c7Gu>.

which was given powers to appoint and dismiss the Prosecutor General. However, the monitoring group was concerned about the limited role given to this independent prosecutorial body. The majority of the Prosecutorial Council's members are elected by a conference of prosecutors, however the Council enjoys limited powers with respect to various stages of appointment and dismissal from the office of the Prosecutor General, disciplinary proceedings against the Prosecutor General, hearing reports by the Prosecutor General and his deputies on the public prosecution service's performance, criminal law practices, protection of human rights in the criminal proceeding or other issues. Meanwhile, the Prosecutor General determines the person responsible in the Commission for the selection and recruitment of prosecutors. It is also the Prosecutor General who with his decisions establishes the Advisory Board which plays an important role in career promotions, sanctioning and dismissal of prosecutors. The Prosecutor General decides on the composition of the Advisory Board, which may be changed at any time. The Advisory Board is not an independent authority, but just a body advising the Prosecutor General. Such a system may negatively impact independence of individual prosecutors and lead to excessive power concentration in the hands of the Prosecutor General. Additionally, while the Prosecutor General may have a guaranteed term of office, he is still appointed with the decisive contribution from too many political authorities (minister of justice, government and parliament). In order to consolidate the lack of bias and independence of prosecutors, a better way would be to trust the key function in the recruitment, promotion and dismissal procedures to the Prosecutorial Council or some other independent prosecutorial body making sure that prosecutorial workers contribute to the key decision-making, and the independence of prosecutors is enhanced. It will also comply with the standards of the Council of Europe.<sup>44</sup>

Article 10, paragraph 5, of the KR Law on prosecution service provides that decisions on establishing or liquidating the Military Prosecution Service, regional prosecution offices or prosecution offices in the cities of Bishkek and Osh shall be made by the President of the Kyrgyz Republic at the submission of the Prosecutor General. As was noted in the 2013 OSCE opinion, "This denotes a highly centralized system, with a strong "vertical" hierarchy, in which the President of the Republic and the Prosecutor General may establish or liquidate, and respectively reorganize, the specialized prosecutor's offices, basically at will. To safeguard against possible excesses of such unchecked executive power, it is advised that the establishment, re-organization and liquidation of prosecution offices, including the specialized ones, be carried out only by law; it would be acceptable for the Prosecutor General to then decide on the particular competencies and organizational structure of those offices, within the limits set by the law." 45

6. The core Kyrgyz law on prosecution service offers no provisions on the underlining principles guiding the work of the prosecution service, viz., rule of law, respect for human rights and civil liberties, political neutrality, presumption of innocence, non-interference in the work of the legislative and judicial branches, transparency, independence, integrity, etc.

## **New recommendation No. 24**

**1. Limit the role of political bodies in the appointment and dismissal of the Prosecutor General in accordance with the international standards; determine an exhaustive list of grounds for the early termination of office of the Prosecutor General; consider: a) excluding such grounds for the dismissal of the Prosecutor General as political considerations, b) limiting the term of office of the**

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<sup>44</sup> See, e.g., Opinion No 9 (2014) by adopted by the Consultative Council of European Prosecutors, December, 2014 Explanatory Note, paragraph 54: "Striving for impartiality, which in one form or another must govern the recruitment and career prospects of public prosecutors, may result in arrangements for a competitive system of entry to the profession and the establishment of High Councils either for the whole judiciary, or just for prosecutors." Available at: <https://goo.gl/e7XF7p>.

<sup>45</sup> Opinion on key legal act regulating the prosecution service of the Kyrgyz Republic, OSCE/ODIHR, October 2013, paragraph 20, available at <https://bit.ly/2IKjoML>.

**Prosecutor General by one term, and c) that the Prosecutor General shall appoint his deputies.**

**2. Provide for the establishment of a body (bodies) of prosecutorial self-governance where the majority of members will be elected by a regularly convened conference of prosecutors. Such a body (bodies) must be independent of the Prosecutor General and play a key role in the competitive selection of candidates to the office of the Prosecutor General, his deputies and other prosecutors, and have remit over their sanctioning and performance assessment.**

**3. Stipulate that prosecution bodies, including specialised one, may be set up, reorganised or abolished only based on the law and without involvement of the President of the Kyrgyz Republic.**

**4. Supplement the Law on the Prosecution Service with the key principles of prosecutorial activity including such as the rule of law, legality, respect for human rights, presumption of innocence, impartiality and objectivity, independence, political neutrality, transparency, integrity.**

### **Selection for the office of prosecutor**

Pursuant to the Rules for the selection of candidates for the human resources pool for the offices of the prosecution service of the Kyrgyz Republic, dated 01.08.2016, No 33-p, selection of candidates shall be a vital objective for the leadership of the prosecutorial and HR services, with the efficiency of the entire prosecution service dependent on the high-quality accomplishment of this objective.

The selection of candidates for inclusion in the pool is organized by the HR Department of the Office of the Prosecutor General of the Kyrgyz Republic with contribution from the structural divisions of relevant prosecution authorities.

There are the following stages in the candidate selection process:

- computer-aided tests aimed at determining the level of academic knowledge, intellectual capabilities, logical reasoning, and testing the candidate's knowledge of the norms of the Constitution of the Kyrgyz Republic, laws and other regulations and legal acts of the Kyrgyz Republic;
- an essay – where the candidate puts to paper his or her thoughts on the relevant formulated topic to have his or her writing skills, patterns of mentality, creative talents assessed. The topic for the essay shall be set by the Commission;
- a medical and comprehensive psychodiagnostic test aimed at establishing whether the potential candidate is fit to serve in the prosecution;
- a polygraph test aimed at determining, in the manner prescribed by the legislation, the candidate's resilience to corruption and his or her compliance with the requirements and restrictions laid down by the civil service legislation;

Pursuant to the requirements of the Polygraph Testing Provisions approved with the decree by the President of the Kyrgyz Republic on 27.08.2010, No 146, it is the Prosecutor General of the Kyrgyz Republic who initiates the polygraph testing of the candidates for the pool.

- an interview of the candidate aimed at collecting additional information about the candidates and taking away an impression of him or her as a personality, an opinion of his/her intellect, erudition, interests, skills in formulating thoughts properly and logically, his/her willpower, inclinations and motivation;

- decision by the Commission whether the Prosecutor General may be recommended to have this or other candidate included in the pool, or refused inclusion;

- the Prosecutor General considers the candidate recommended by the Commission for the inclusion in the pool, and takes a relevant decision whether to dismiss the candidate or include him/her in the pool.

The procedure for the appointment for the office of a prosecutor is laid down in the Provisions “On the Procedures governing the service in the bodies and agencies of the prosecution service of the Kyrgyz Republic” approved with the decree of the President of the Kyrgyz Republic of 06.02.2001, No 48, that stipulate the powers to appoint to an office enjoyed by the Prosecutor General and prosecutors of the Kyrgyz Republic.

Candidates for the pool must meet the following requirements:

- be nationals of the Kyrgyz Republic and have no other nationality;

- have a 5-year law school university degree, or a master’s degree obtained from a nationally certified university;

- be fit to serve on duty in the event the candidate subsequently is recruited by the prosecution service;

- be prepared to work at any territorial division of the prosecution service, including remote regions of the Kyrgyz Republic;

- possess the requisite professional and moral qualities.

Such professional qualities shall include: be good and ready to act as a professional lawyer compliant with the state educational standard for a higher professional education with a specialization in law; have general and special knowledge needed to succeed in performing his/her office duties, skills to apply this knowledge in practice; leadership qualities, good organisational skills, work capacity, ability in formulating the problem and accomplishing its ultimate solution.

The candidate who has successfully passed all stages of the competitive selection, recommended by the Commission and endorsed by the Prosecutor General, shall be included in the pool of candidates by the order of the Prosecutor General, and shall be considered a contender for an office in the prosecution service in strict compliance with the ranking established in according with the points received.

The selection of candidates by the prosecution authorities shall be conducted transparently and openly, with the results at the end of each of the stages published on the website of the Office of the Prosecutor General of the Kyrgyz Republic at [www.prokuror.kg](http://www.prokuror.kg).

Pursuant to paragraph 7.5 of the Rules for the selection of candidates for the pool of the prosecution service of the Kyrgyz Republic, candidates for the pool should possess the requisite professional and moral qualities.

Moral qualities required include impartiality, insistence of high standards for oneself and others, integrity, honesty, civic virtue, sense of responsibility, emotional balance, resilience to stress, tact, sensitivity to others, and modesty.

### **Training of candidates**

According to the Kyrgyz Law “On the Prosecution Service in the Kyrgyz Republic”, human resources for the prosecution service shall be trained through the instruction of the newly recruited officers following vocational training programmes to ensure they acquire essential professional knowledge, skills and habits and competences that they need to perform their official duties.

The Prosecutor General, by his order, has approved a curriculum, “Introduction to the profession” (composed of 9 sections), for candidates included in the pool for the prosecution service of the Kyrgyz Republic, based on which the HR Department of the Office of the Prosecutor General, at the Centre for Professional Advancement of prosecution officers, offers training to the candidates.

### **Prosecutorial careers**

Prosecutors of regions, cities or districts can only stay in office for two consecutive terms in one and the same administrative territorial region.

Before their term expires, prosecutors may be relieved of their duties at their own will, in view of the transfer to another office or being unfit to continue in the office, or else as a result of internal investigation, in the case where a court conviction for the committed crime has become final, or for other reasons stipulated by law.

The procedure for the promotion of an prosecutor is regulated by the Law of the Kyrgyz Republic “On Prosecution Service of the Kyrgyz Republic” and by the Provisions on the service in the offices of the Kyrgyz prosecution service approved by the Decree of the President of the Kyrgyz Republic of 06.02.2001, No 48.

Pursuant to the Law of the Kyrgyz Republic “On Prosecution Service of the Kyrgyz Republic”, service in the prosecutorial offices and institutions shall be terminated with the dismissal of the prosecution officer. Apart from the grounds stipulated by the Law of the Kyrgyz Republic “On civil service and municipal service”, a prosecution officer may be dismissed as a consequence of his/her resignation or at the initiative of the head of the prosecution authority in the following cases:

- 1) loss of nationality of the Kyrgyz Republic;
- 2) violation of the oath of the prosecutor (investigator) or commission of acts discrediting a prosecution officer;
- 3) failure to comply with the restrictions relating to the service as stipulated in Article 46 of the Law.

### **Analysis**

1. Experts commend provisions on the competitive selection of candidates for the prosecutorial pool in the Kyrgyz Republic. However, the follow-up appointment to the very first position in the prosecution service and career advancement do not seem to be guided by transparent or competitive procedures as they are subject to the Prosecutor General’s discretion unlimited by any impartial criteria.

The Office of the Prosecutor General noted in its comments that after going through all stages of the competitive selection process, the Personnel Selection Commission discusses the issue of making recommendations to the Prosecutor General on the placement of a candidate in the personnel reserve or on the rejection of a candidate. During the screening conducted by the personnel department together with the Internal Investigation Department of the Office of the Prosecutor General, they review the candidate’s behaviour in the society, his/her propensity to drink alcohol, narcotic and toxic drugs, adherence to the reactionary trends in religion, conviction for acquisitive and violent crimes committed by the candidate’s

close relatives, as well as the grounds for the candidate's dismissal from a previous job. Further consideration by the Prosecutor General of the candidacy recommended by the Commission for inclusion in the staff reserve is based on the results of the screening activities conducted by the personnel department together with the Internal Investigation Department.

According to the experts, the presence of a candidate's screening check is not equivalent to transparent and competitive selection based on clear criteria of personal merits and qualities.

Similar to the case of the Prosecutor General and his deputies, the best option for the appointment of prosecutors or heads of prosecution offices must be their selection and appointment by a prosecutorial council or a similar body, e.g., a qualifications commission where the majority of members are to be elected by the conference of prosecutors (see the recommendation above).<sup>46</sup> It will ensure that prosecutors are appointed for their competences and experience, rather than connections or personal loyalty. As a transitional option, prosecutors may be appointed by the Prosecutor General at the recommendation of the prosecutorial council or any other body of prosecutorial self-government.

2. Experts note that the Rules for the selection of candidates for the prosecutorial pool (approved by the order of the office of the Prosecutor General on 1 August 2016) stipulate several stages in the selection for the pool (including computer-aided tests, an essay, a polygraph test, an interview.) A minimum number of points has been set that would allow the candidate to move on to the next stage. However, the Selection Rules fail to stipulate that only candidates that collected the biggest number of points and best match the criteria will be recommended for the pool.

Nor do the Rules offer detailed provisions on openness and transparency of the selection, including publication of announcement of the selection for the pool, publication of the scores achieved at every stage of the selection, including detailed final results complete with the number of points achieved by each candidate.

3. The Procedure for the service in the prosecutorial offices and institutions of the Kyrgyz Republic is regulated by the 2010 Decree of the President (as amended in 2003). The key issues of recruitment for and service at the prosecution authorities (issues of hire and career advancement of prosecution) must be regulated by the law, rather than regulations, let alone acts by political authorities.

### **New recommendation No. 25**

**Provide for a competitive selection for all positions in the public prosecution bodies based on merits, integrity and previous experience; announcements of vacancies and the outcome of all key stages in the selection for a prosecutorial office, including the first-time selection for the reserve, should be open to public scrutiny and published on the internet.**

### **Assessing performance of prosecutors**

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<sup>46</sup> As noted by the Venice Commission in their Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, "In order to prepare the appointment of qualified prosecutors expert input will be useful. This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment." (CDL-AD(2010)040, paragraph 48). In their Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, the Venice Commission welcomed "that state prosecutors and heads of state prosecution offices will be appointed (for five years, as stipulated by the Constitution) by the Prosecutorial Council." (CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, paragraph 74).

Pursuant to the Law of the Kyrgyz Republic “On the Prosecution service of the Kyrgyz Republic”, there are the following key areas for the development of human resources at the prosecution authorities:

- 1) regular, planned training of officers to take up vacancies across the prosecution service;
- 2) providing conditions for professional and career advancement of officers;
- 3) evaluating the performance of duties by the officers through assessment;
- 4) setting up a pool and making an efficient use of it; and
- 5) relying on modern HR technologies in recruitment for and service at the prosecution authorities.

Pursuant to the order of the Prosecutor General of the Kyrgyz Republic “On the procedure for evaluating the performance of prosecution and investigation officers at the prosecution service of the Kyrgyz Republic of 30.12.2013, No 101-p, central to the efficient performance of the prosecutorial agencies are quality and effectiveness of the prosecutorial supervision and investigation by the prosecution authorities, improved work organisation and planning, optimal use of the prosecutorial powers, labour resources and work time. One of the mandatory organisational requirements for the functioning of the prosecution authorities that impact considerably the efficiency of the work done is the analysis into the performance of the prosecutorial authorities. As a consequence, proper development of this kind of analyses impacts the quality of prosecutorial supervision.

To assess performance of an individual prosecutor or investigator or the prosecution service as a whole, there are a number of criteria that may help to define whether the work done by the prosecution service is in line with the requirements and objectives formulated for them in the Kyrgyz legislation. The main outcome of the implementation of the prosecution performance assessment should be an improved level of prosecutorial supervision and effectiveness of prosecution.

### **Analysis**

1. Experts welcome development of a detailed methodology and criteria for the assessment of prosecution authorities and individual prosecutors.

The central criteria in the prosecution performance assessment, as defined, are efficiency and quality, viz.:

- timely and comprehensive detection of wrongdoing, circumstances leading to it and identification of persons in violation;
- timely, comprehensive, adequate and meaningful response to the wrongdoing detected;
- uncompromising and persistent work to eradicate wrongdoing and prosecute the guilty parties;
- meaningful, actual elimination of the wrongdoing and restitution of rights, liberties and legitimate interests to citizens, public and state;
- state of rule of law and protection of human rights and civil liberties, legitimate interests of the public and state over the supervised territory, and meaningful consolidation of rule of law.

At the same time, some criteria give rise to questions. As was noted in one of the Istanbul Action Plan monitoring reports,<sup>47</sup> it is advisable to refrain from any assessment system that takes into account largely the number of completed investigations, since such a system may disincentivize prosecutors, investigators and their superiors from investigating complex cases, which in the final count may seriously hurt the society and undermine public trust in the ability of the prosecution service to ensure compliance with the laws. Besides, while the fact that the case resulted in an acquittal may be reflecting inadequate training or qualifications of respective prosecutors, the acquittal as such should not be used for assessing the prosecutor's performance, since only in rare cases decisions to charge can be taken without consultations with the superiors, and while some complex cases may result in acquittal, under certain specific circumstances the decision to prosecute is justified.

Using the percentage of acquittals as an indicator of performance may become particularly problematic given the legacy of the Soviet Union, with its powerful prosecution service flourishing at the expense of judicial independence. Should such indicators be used in the assessment system, prosecutors may be encouraged to abuse their powers, put pressure on judges, close their eyes to procedural violations of the rights of the accused, etc.

It is recommended that the significance of such indicators be dropped or reduced to a minimum and be replaced with assessments of adequate training for the tasks entrusted and professionalism.

2. Note also that this assessment methodology is supposed to be applied to prosecution authorities, rather than individual prosecutors. This means that the assessment is not part of the prosecution service's human resources management or personal assessment of the performance of individual prosecutors.

For a new recommendation for this item see the end of the section.

### **Rules of conduct for prosecutors**

Pursuant to the Code of professional ethics of a prosecution officer of the Kyrgyz Republic of 21.10.2014 (Rule for the conduct of a prosecution officer), the prosecution officer performing his duties should:

- under all circumstances, maintain his personal dignity and follow ethical norms, refrain from any actions which may hurt his reputation or cast doubts on his impartiality or independence in performing the duties entrusted to him, present an example of integrity and moral purity, comply with and enhance best traditions of the Kyrgyz prosecution authorities;
- be impartial, prevent anyone from influencing his professional work, including his family, friends or acquaintances;
- show patience, politeness, tact and respect for those he communicates with while on duty; reach well-grounded decisions;
- in his communications with the leadership, colleagues, subordinates and the public, follow the generally accepted rules of conduct, behave with dignity, never ignore facts of unethical behaviour by other officers;
- never compel his subordinates to take unlawful decisions or resort to illegal actions, disallow any unsubstantiated accusations against his subordinates, or insults, rudeness, violation of human dignity or indelicacy;

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<sup>47</sup> Report of the Fourth Round of Monitoring for Georgia, Istanbul Action Plan, OECD/ACN, September 2016, p. 70, available at <https://bit.ly/2x3c7Gu>.

- have no right to make public statements or declarations in press on cases he has got before him, without the consent of the leadership of the prosecution office, or disclose classified information;
- have no right to receive from individuals or legal entities any remuneration in the form of gifts, money or services for actions or inaction in relation to his office;
- shall not allow his political or religious beliefs to impact decisions made in connection with his office;
- the prosecution officer must promote a sound moral and psychological climate at the workplace;
- disallow any manifestations of red tape, officialdom, arrogance or disrespect with regards to lawful requests and requirements of the public;
- observe bans, restrictions and duties introduced by the effective legislation with respect to civil servants;
- in cases of unruly behaviour of a visitor, the prosecution officer should take steps to first de-escalate the individual's emotional tension and then calmly explain the procedure for resolving this or other issue.

Pursuant to the Code of professional ethics of a prosecution officer of the Kyrgyz Republic, a commission for ethics shall be established at the central division of the Office of the Prosecutor General of the Kyrgyz Republic, Military Prosecution Office, at prosecution officers of regions, and the cities of Bishkek and Osh, to exercise control over the compliance with the ethical rules by the officers of respective prosecution authorities. The work of the commission lies mainly in the following areas: developing ethical values and preventing wrongdoing, monitoring compliance with the ethical rules.

The ethics commission consists of the secretary and members who are elected among executive prosecution officers who are respected by the workforce and have moral and business capacities to cope with the tasks given. The commission may have among its members retired former prosecution officers. Heads of the prosecution officers and their deputies (or one of the deputies) sit on the commission but may not be elected to chair the ethics commission. The chairpersons shall be elected by the members and may also sit on the assessment and interview panel.

Findings by internal checks and investigations shall be presented to the ethics commission for consideration. Based on this consideration, the commission shall make a recommendation to the head of the agency for his decision-making.

The prosecution offices' ethics commissions report back every six months to the Office of the Prosecutor General of the Kyrgyz Republic. The ethics commission of the Office of the Prosecutor General of the Kyrgyz Republic report annually on the work done to the Kyrgyz President's Public Service Ethics Commission.

### **Procedures for the prevention and resolution of conflict of interest, other restrictions**

Pursuant to the Code of professional ethics of a prosecution officer of the Kyrgyz Republic, a conflict of interest arises where decisions by officials may be open to influence by their own personal bias, and/or by exploiting advantages of their office to promote personal interests. As a result of the conflict of interest, officials make decisions which may not always match the broader interests of the state.

In order to prevent conflicts of interest, ethical norms require that the prosecution officer should:

- report the conflict of interest or the risk of a potential conflict of interest to his immediate superior;

- stop any dubious and compromising interpersonal relations;
- reject any potential improper gain that has led to the conflict of interest;
- counter corruption and unmask a corrupt official of any rank; and
- take steps to mitigate the conflict of interest.

One of the substantive conditions for the conflict of interest is the failure of the prosecution officer to comply with his duty to disclose information on income, property and real obligations or else his dishonesty in so doing.

The Law of the Kyrgyz Republic on the prosecution service provides for certain limitations associated with the service at the prosecutorial offices and institutions.

Prosecutors and investigators may not be members of the Supreme Council of the Kyrgyz Republic or local keneshes, or else members of commissions or other elected bodies established by public authorities or bodies of local-self-government.

Prosecutors and prosecution investigators may not be members of any political parties or other public associations that pursue political aims, support them or take part in their activity.

While in office, prosecution officers shall not be bound by any decisions by political parties or other public or non-for-profit associations.

Prosecutors and investigators of the prosecution may not compliment their official duties with another remunerated or unremunerated job, except when it is teaching, academic or artistic.

The prosecution officers are subject to restrictions stipulated by the law of the Kyrgyz Republic “On state public and municipal service” (see Chapter 2.1. above).

The personnel of the prosecutor’s office, as they are civil servants, are subject to the Law “On the Declaration of Incomes, Expenses, Obligations and Assets of Persons Who Hold or Occupy Public and Municipal Posts”. According to the information of the Office of the Prosecutor General, before March 1, 2018, all personnel of the republican prosecutor’s offices submitted electronic declarations to the State Tax Service at the Government of the Kyrgyz Republic.

### **Training on prosecutorial ethics and integrity**

The HR Department offers on a permanent basis professional ethics training for prosecution officers at the Professional Advancement Centre of the office of the Prosecutor General, following the curriculum plans, occasionally inviting international experts to discuss ethics and deontology.

In March 2017, under the Memorandum of understanding between the Kyrgyz office of the Prosecutor General and the International Development Law Organisation (IDLO) and aiming to implement the project called “Supporting the prosecution service of the Kyrgyz Republic in institutional capacity building” to upgrade the qualifications of prosecution officers in anti-corruption, a trainer training was held attended by 20 experienced prosecution officers. In April 2017, a similar training session was held for another 17 attendees from among prosecution officers.

In May 2017, supported by the European Union project promoting the rule of law in the Kyrgyz Republic, a training session was organized to discuss “Anti-corruption as one of the priority activities for prosecution

authorities”; there, prosecutors from the Department for countering corruption and supervision of compliance with the laws of the Kyrgyz Office of the Prosecutor General discussed improving legal frameworks in land tenure and urban development and mitigating corruption risks. The seminar was attended by 21 prosecution officers. A similar training session was held in September 2017 during the study class at the Centre attended by 20 prosecution officers from Bishkek and the Chui Province. Officials from the Office of the Prosecutor General and SSCEC acted as lecturers and trainers discussing detection and investigation corruption-related offences.

In October 2017, a study class at the Professional Advancement Centre of the Office of the Prosecutor General conducted a one-day seminar for 20 prosecution officers from the Military Prosecution Office of the Kyrgyz Republic, specialized prosecution offices and prosecution authorities from the Chui Province and the city of Bishkek, on the following topics: History of the prosecution service; Ethics of a civil servant; Proper behaviour in public places; and requirements of the Code of professional ethics of the prosecution officer of the Kyrgyz Republic.

### **Analysis**

1. Although the KR Law on Conflict of Interests of December 2017 extends to prosecutors as civil servants, its general provisions are insufficient for the effective prevention and regulation of the prosecutors’ conflicts of interests.

It is necessary to work out detailed rules regulating conflict of interests, with the duties and specific operations of the prosecution authorities in mind.

2. The KR Law “On declaring income, expenses, obligations and property by persons taking up or occupying state and municipal positions” attaches only to the Prosecutor General and his deputies. Prosecutors and other prosecution officers should not be excluded from these requirements for incomes and property declaration. Therefore, the Law on declarations should be extended to cover all prosecutors.

3. The information provided shows that prosecutors had been offered individual seminars and training events covering issues of ethics, integrity and prevention of corruption. However, these events all appear mostly one-off, non-systemic, and dependent on the initiative coming from some donor. There is a need for a regular curriculum and professional advancement training for prosecutors in these subjects, and relevant teaching materials with a practical focus.

### **New recommendation No. 26**

**1. Establish detailed rules for preventing and resolving the conflict of interests of prosecutors taking into account the powers and specificity of the prosecutorial work.**

**2. Implement in practice a mechanism whereby prosecutors and other prosecution service employees can obtain consultations, including on a confidential basis, and advice on issues relating to conflict of interest, asset and interest declarations, rules of conduct and other anti-corruption restrictions. Develop and disseminate practical guidelines, methodological and teaching manuals on these issues drafted specifically for prosecutors and other prosecution service employees.**

**3. Ensure regular practical training and professional advancement of prosecutors in issues of ethics, integrity and prevention of corruption, and develop relevant training materials with a practical focus.**

### **Disciplinary liability**

Pursuant to the Code of professional ethics of the prosecution officer of the Kyrgyz Republic, in case of any violation of the requirements of the said code, the head of the prosecution authority personally or, if needed, in the presence of the workforce, may apply the following sanctions to the prosecution officer: verbal reprimand; caution against unethical behaviour; and requirement of a public apology.

Any violation by the prosecutor officer of the norms of this code that led to a transgression undermining the honour and discrediting the good name of the prosecution officer shall be good grounds for a disciplinary action. The transgression undermining the honour and discrediting the good name of the prosecution officer shall be deemed to be any such action or inaction that, while not criminal, is incompatible in its nature with the good name of the prosecution officer.

Pursuant to para.1.9 of the Instruction for the workflow management in the Kyrgyz prosecution offices, approved with the order of the Prosecutor General of the Kyrgyz Republic of 04.04.2005, No 16/7, data or information in this category is not subject to disclosure.

Pursuant to the Law of the Kyrgyz Republic “On the prosecution service of the Kyrgyz Republic” and the Provisions for the service in the prosecutorial offices and institutions of the Kyrgyz Republic (approved with the Decree of the KR President of 06.02.2001, No 48), failure to perform or undue performance by prosecution officers of their official duties or commission of transgressions that disgrace the prosecution officer, non-compliance with the professional ethics or equally non-compliance with the restrictions stipulated by the law with regards to the officer’s service in the prosecution authorities, may result in the following disciplinary sanctions by the head of the prosecution offices: caution; reprimand; severe reprimand; warning for improper conduct; demotion in the special or military rank or employee class by one step; reduction in position; and dismissal from the prosecution service.

While selecting the disciplinary sanction, the gravity of the transgression, its circumstances and prior service and conduct of the employee are taken into account.

**Table 14. Disciplinary sanctions applied to prosecutors**

	Total number of those subjected to disciplinary sanctions
In 2015	261 officers
In 2016	282 officers
In 2017	241 officers

## Analysis

1. The KR legislation fails to list clearly grounds for disciplinary liability. The Prosecution Service Law (Art. 49) stipulates that disciplinary sanctions procedures against prosecution officers shall be defined by the legislation of the Kyrgyz Republic. Under Article 52-1 of the law, apart from grounds provided for by the KR Law On Public Service, the prosecution officer may be dismissed, among other things, at the initiative of the head of the prosecution authority in the following cases: violation of the oath of the prosecutor (investigator) or commission of a transgression that disgraces the prosecution officer; or failure to comply with the service-related restrictions as stipulated by Article 46 therein.

The Code of professional ethics of the prosecution officer says that any violation of the Code’s norms by the prosecution officer through commission of a transgression that undermines the honour and discredits the good name of the prosecution officer shall be good grounds for disciplinary action. Such transgression may be “action or inaction, which although not criminal, is incompatible by its nature with the good name of the prosecution officer.”

But pursuant to the Provisions for the service in the prosecutorial officers and institutions of the Kyrgyz Republic, failure to perform or undue performance by the officer of his official duties or transgressions that disgrace the prosecution officer, may result in disciplinary sanctions imposed by the head of the prosecution authorities.

The legislation uses different terms to describe acts that may lead to the disciplinary liability of prosecution officers. There is no clear list of misdeeds that disgrace the prosecution officer. The definition, “action or inaction, which although not criminal, is incompatible by its nature with the good name of the prosecution officer” cannot be deemed unambiguous as it allows for a broad interpretation.

As a result, prosecution executives have a large discretion in selecting the sanction.

2. Also problematic is the fact that the decision to apply a disciplinary sanction is taken solely by the head of the prosecution authority. Internal investigation is not deemed mandatory. This goes against due process, offers opportunities for abuse and improper influence on prosecutors and limits their independence. It is deemed advisable to have a special body with the authority to look into the matters of prosecutorial disciplinary liability, e.g., the prosecutorial council or somebody within its jurisdiction set up by the conference of prosecutors and with proper safeguards of its independence of the leadership of the prosecution service (e.g., a disciplinary commission).<sup>48</sup>

3. Nor does the legislation offer guarantees of fair hearing of disciplinary cases; appeal does not go beyond the superior prosecutor. Equally problematic is the fact that issues of disciplinary liability are regulated by implementing regulations, rather than by the law.

4. The prosecution service law makes it possible to dismiss a prosecution officer for violating the oath of the prosecutor (investigator) or for transgressions that disgrace the prosecution officer, or for non-compliance with the restrictions associated with his service. Dismissal from service appears to be the extreme measure and may only be used in case of grave misdeeds which should be named in the law.

5. The Kyrgyz Republic has not provided any information on disciplinary sanctions applied to the prosecutors referring to the fact that this sort of information is confidential. The information about liability actions against prosecution officers or officers of any government authority is essential for ensuring integrity and accountability of prosecution authorities. This information enjoys significant public interest and the access thereto may not be restricted.

See the new recommendation below.

### **Administrative and criminal investigation against prosecutors**

Pursuant to Art. 104, paragraph 6, of the Constitution of the Kyrgyz Republic, prosecution is part of an integral system which is responsible for: bringing criminal actions against public officials the list of which shall be stipulated in the constitutional law, with their cases referred to relevant bodies for investigation, and for the prosecution under criminal law of persons with the status of servicemen.

Under Art. 3, paragraph 2, of the KR Constitutional Law “On certain powers of the prosecution service as granted by the Constitution of the Kyrgyz Republic”, the authority of the prosecution service granted under

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<sup>48</sup> See, e.g., the Opinion of the Venice Commission CDL-AD(2012)008 (Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, para 77): “... disciplinary measures should not be decided by the superior who is thus both accuser and judge, like in an inquisitorial system. Some form of prosecutorial council would be more appropriate for deciding disciplinary case.”

paragraphs 1 and 6 of Article 104 of the Constitution of the Kyrgyz Republic extend to the Office of the Prosecutor General of the Kyrgyz Republic and its structural (territorial) divisions.

Pursuant to Art.163 of the KR CPC, criminal charges against public officials shall be investigated by national security bodies.

Information about administrative measures or criminal sanctions against prosecutors shall be published.

Pursuant to the KR Constitutional Law “On certain powers of the prosecution service as granted by the Constitution of the Kyrgyz Republic” of 13.07.2017, No 124, the decision to bring a criminal action against the Prosecutor General of the Kyrgyz Republic shall rest with one of the deputies of the Prosecutor General with the consent of the KR Supreme Council at the submission of the President of the Kyrgyz Republic.

Prosecution officers are representatives of the government authority and enjoy special protection by the state. A prosecutor or investigator may not be subjected to detention, compelled appearance, personal examination, search of their belongings or vehicle while on duty, except when they have been caught en flagrante.

## **Analysis**

Granting such immunities to the Prosecutor General and prosecutors falls short of international standards<sup>49</sup>, as it may lead to abuses, limit prosecutorial accountability and create risks of politicization as in the case of Prosecutor General where bringing criminal charges requires involvement of political bodies.

After the prosecutorial council is set up, it could be asked to grant consent to having a prosecutor put under arrest or detained. In case of detention straight at the scene of the crime at the time of its commission or immediately thereafter, this body should be informed without delay; any continued custodial detention may be allowed only unless this body decides not to repeal it.

## **New recommendation No. 27**

- 1. Provide in the Law on the Prosecution Service: a clear list of grounds for disciplinary action against prosecutors without any reference to the Ethics Code and other bylaws; sanctions proportionate to the act; detailed procedures for applying disciplinary sanctions with safeguards to the prosecutor’s procedural rights.**
- 2. Revise the procedure for considering and adopting decisions on disciplinary actions against prosecutors, ensuring impartiality and fairness, separation of the functions of investigation from that of the decision making (e.g., by setting up a disciplinary commission).**
- 3. Ensure publication of information about disciplinary sanctions applied to prosecutors.**
- 4. Limit immunities of prosecutors against detention and arrest.**

## **Remuneration**

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<sup>49</sup> See, e.g., the opinion of the Venice Commission on Turkey: CDL-AD(2011)004, Opinion on the Draft Law on Judges and Prosecutors of Turkey, paragraph 88, available at <https://bit.ly/2sazYxY>. See also the opinion by OSCE experts: Opinion on key legal act regulating the prosecution service of the Kyrgyz Republic, OSCE/ODIHR, October 2013, paragraph 32, available at <https://bit.ly/2IKjoML>.

Pursuant to Article 50 of the Law of the Kyrgyz Republic “On the Prosecution Service of the Kyrgyz Republic”, terms and conditions for prosecution officers’ remuneration - the salary (monetary allowance) - are set forth based in compliance with the legislation of the Kyrgyz Republic depending on the level of responsibility and complexity of office duties, and the category of the position.

The salary (monetary allowance) of prosecution officers consists of the position salary, additional payment for the grade rank and seniority. The salary (monetary allowance) may be complimented with other payments in line with the laws and other regulations and legal acts of the Kyrgyz Republic.

Pursuant to the Law of the Kyrgyz Republic “On the Prosecution Service of the Kyrgyz Republic”, prosecutors and investigators with special grade ranks and service grades are eligible to free service dress issued in the manner and amount approved by the Government of the Kyrgyz Republic.

In line with the resolution of the Government of the Kyrgyz Republic “On terms and conditions for the pay of civil servants in the prosecution offices of the Kyrgyz Republic” of 18.10.2013, No 568, civil servants working in the prosecution service of the Kyrgyz Republic, are eligible for quarterly bonuses.

Prosecutors and investigators of the prosecution service having no accommodation of their own shall be provided with service flats owned by the prosecution authorities, or other housing provided by bodies of local self-government and state administrations in temporary use. In 2017, 81 officers received service housing.

Pursuant to the Provisions for the service in the prosecutorial offices and institutions of the Kyrgyz Republic approved with the Decree of the President of the Kyrgyz Republic on 06.02.2001, No 48, exemplary discharge of professional duties, lengthy and unblemished service in the prosecution, accomplishment of tasks of particular importance and complexity may be rewarded as follows: citation; awarding a certificate of honour; payment of a bonus; awarding a valuable gift; accelerated promotion in grade ranks or conferment of a grade rank one step above the next one or above the one specified for the position occupied; awarding badges instituted by the Office of the Prosecutor General of the Kyrgyz Republic.

Pursuant to the above Provisions, the rewards procedure shall be as follows:

- citation, bonus, or valuable gifts are given by the Prosecutor General of the Kyrgyz Republic, prosecutors of regions, the city of Bishkek and the military prosecutor of the Kyrgyz Republic;
- accelerated promotion in grades or conferment of the grade rank one step above the next one or above the one specified for the position occupied, awards of badges and Certificates of Honour is done by the Prosecutor General of the Kyrgyz Republic.

## **Analysis**

1. Payment of bonuses to prosecutors remains problematic. It may be conducive to interference with their work, undermining their independence and encouraging loyalty to the superiors. The KR Law on the prosecution service and the Provisions for the service in the prosecutorial offices and institutions of the Kyrgyz Republic do not limit the amount of monetary allowances, nor do they provide for any grounds for giving or withdrawing bonuses.

It is recommended that the payment of any discretionary bonuses to prosecutors be abolished and, if necessary, their position salaries be increased. Should the bonus system be retained, it ought to be based on clear and transparent criteria, while bonuses must be awarded as part of an open and well-grounded decision-making procedure based on the prosecutor’s performance assessment.

2. Kyrgyzstan has not provided any data about the amount of monetary allowances paid to prosecutors quoting classified information. Limiting access to information about payments made from the government budget to employees of public authorities, including judges and prosecutors, goes contrary to democratic standards of accountability, public oversight and access to information. Such information may not be restricted in access; public interest in having such information outweighs any other interests.

3. Problematic is also the fact that remuneration rates applicable to prosecutors are set by the government, undermining prosecutorial independence. Rates of remuneration and the pay's basic terms and conditions must be stipulated directly in law.

4. According to the information available publicly, prosecutorial remuneration averages 15,000 som.<sup>50</sup> It is not clear whether this is the position salary only, but in any case this amount does not appear sufficient and must be increased to ensure remuneration commensurate with the work performed and to remove corruption incentives.

### **New recommendation No. 28**

**1. Implement a modern system for the performance assessment of individual prosecutors based on performance indicators, limit the use of the number of acquittals or similar indicators.**

**2. Define terms and conditions and amount of prosecutors' remuneration in the law; the amount of the remuneration of prosecutors should be sufficient and ensure reduction of the corruption incentives and should not envisage discretionary payments.**

**3. Ensure publication of detailed information about the structure and amount of remuneration of prosecutors, including information on bonuses paid.**

### **Conclusions**

With respect to compliance with the relevant part of recommendation 24 from the previous round of monitoring (“...Reform the public prosecution bodies to ensure their independence and accountability; in particular, establish an exhaustive list of clear grounds for the dismissal of the Prosecutor General and other prosecutors”), experts note that **Kyrgyzstan is not compliant with this part of the recommendation.**

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<sup>50</sup> Source: <https://bit.ly/2KOipuX>.

## **2.4. Administrative procedures, accountability and transparency in the public sector**

### **Recommendation No 19 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

- 1. Finalize the reform of the anti-corruption screening of legal acts and ensure its practical implementation.**
- 2. Ensure proper regulatory impact assessment before adopting the new legislation (at least the major laws - specify categories in the regulations).**
- 3. Ensure regular publication of the results of the anti-corruption screening and regulatory impact assessment.**
- 4. Ensure maximum possible stability of legislation to the benefit of the business environment. ....**

#### **Anti-corruption screening**

In accordance with Article 20 of the Law of the Kyrgyz Republic “On Normative Legal Acts of the Kyrgyz Republic”, draft normative legal acts relating to issues of constitutional rights, civil liberties and duties; legal status of public associations and mass media; government budget and tax system; environmental safety; countering wrongdoing; introduction of new types of state regulation of business – should be subject to legal, human rights, gender, environmental, anti-corruption and other academic screening (depending on the legal relations that draft act is supposed to regulate).

Similar requirements are reflected in the Provisions on the Ministry of Justice of the Kyrgyz Republic approved with the resolution of the Kyrgyz Government of 15.12.2009, No 764. The ministry is to conduct legal, human rights, anti-corruption and gender screening of draft normative legal acts. The draft acts screening shall be relying on standards applicable to certain types of specialized assessments of draft laws at the Supreme Council of the Kyrgyz Republic, approved by the decision of the Supreme Council of the Kyrgyz Republic of 18.01.2008, No 75-IV.

Additional guidance is provided by the Legislative Screening Standards that serve as a practical manual.

The screening of draft implementing acts shall follow the Instruction for the legal, human rights, gender, environmental, and anti-corruption screening of implementing acts of the Kyrgyz Republic, approved with the resolution of the KR Government of 08.12.2010, No 319.

The anti-corruption screening is conducted in parallel with other types of screening, except when it is only the anti-corruption screening that was asked for.

The screening findings are not published but handed over to the person who submitted the draft normative legal act.

Pursuant to the Provisions “On normative legal acts of the National Bank of the Kyrgyz Republic” approved with the resolution of the Board of the National Bank of 18 November 2009, No 46/11, draft normative legal acts containing provisions bearing on constitutional rights, civil liberties and duties, countering wrongdoing, implementation of new types of business regulation, as well as provisions regulating the National Bank’s powers, its governing bodies, structural divisions, servants or employees (including its law-making, oversight, licensing or registration authorities) should be subjected to anti-corruption screening.

The Ministry of Justice drafted a new version of the law “On normative legal acts of the Kyrgyz Republic” to address some outstanding issues in the enforcement practices. In particular, this draft law envisages that draft normative legal acts shall be subject to some mandatory types of specialized screening, including anti-corruption screening. Also, it was proposed that the draft law should stipulate that effective normative legal acts may be screened for any corruption-leading provisions following the methodology, which is attached to the draft law. The draft law was submitted, following a usual procedure, to the Government Office in a letter dated 03.10.2017.

Meanwhile, as part of the promotion of this draft law, the Government Office introduced some improvements in the provisions bearing on the methodology for specialized types of screening. In particular, it was proposed that this draft law should stipulate that the relevant methodology is to be approved by the Government.

After the above law of the Kyrgyz Republic is adopted, the Ministry will work to implement the methodology underlying the legal, human rights, gender and anti-corruption screening of draft normative legal acts of the Kyrgyz Republic, and also, at the normative legal level, identify bodies responsible for the anti-corruption screening.

In the meantime, the effective document is the Methodological guidelines for corruption risk detection, assessment and management approved with the order of the Prime Minister of the Kyrgyz Republic of 18.05.2016, No 281.<sup>51</sup>

Departments that conduct screening include the Ministry of Justice, a department at the Supreme Council and independent experts accredited with the Ministry of Justice.

The Ministry of Justice conducts specialised screenings, including anti-corruption screening, of normative legal acts pending consultations and adoption; no draft normative legal acts lacking an opinion of the Ministry of Justice of the Kyrgyz Republic may be adopted by the Government of the Kyrgyz Republic.

The specialised screening department of the Supreme Council of the Kyrgyz Republic conducts screenings of draft laws under consideration at the Supreme Council of the Kyrgyz Republic, and here too, without the opinion of the above department, no further law-adopting procedures may take place (the above department screens only draft laws, and the Ministry of Justice does it for all normative legal acts).

Independent experts are there to conduct independent screenings of draft normative acts following the same methodologies as experts of the Ministry of Justice, but their opinions are advisory in nature.

All structural units of the National Bank involved in normative drafting are expected to be guided by the Provisions “On normative legal acts of the National Bank of the Kyrgyz Republic” approved with the resolution of the Board on 18.11.2009, No 46/11. The final anti-corruption screening is done by the Legal Department.

There are no additional allocations from the state budget towards anti-corruption screening. It means that all types of screening are conducted within the limits of the available salaries of experts that are engaged in specialized types of screening.

The screening outcomes submitted by a state authority subordinate to the Government must be studied and, whenever there are comments or suggestions, those should be taken into account by the drafter. In the event of a disagreement, a matrix of differences is drawn up consistent with the rules prescribed by the

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<sup>51</sup> Available at <https://bit.ly/2JmpJ4z>.

Government Procedures approved with the resolution of the Government of the Kyrgyz Republic on 10.06.2013, No 341.

**Public debate.** Pursuant to Article 22 of the Kyrgyz Law “On normative legal acts of the Kyrgyz Republic”, where draft normative legal acts affect immediately citizens or legal entities or else where draft normative legal acts offer business regulation, except for those draft normative legal acts that arise from the rulings of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic, such draft normative legal acts are subject to public debate through publication on the official website of the drafting body. As part of the above procedure, suggestions and comments on possible corruption norms in the draft normative acts can be collected.

The public debates of draft normative legal acts (NLAs) are handled in accordance with the rules of the Law of the Kyrgyz Republic “On normative legal acts of the Kyrgyz Republic” and published on the Government’s website in the Public Discussion of the draft NLAs. Published alongside the draft NLA and addenda thereto is the information about the drafter (full name, position, the name of the state authority), contact information, e-mail address; also published are contact data and email address of the state authority itself. At the same time the draft NLA is uploaded to the website of the drafting state authority.

Comments and suggestions may be directed to either the drafter’s email address or the general email address of the state authority. Also, individuals and legal entities may send official letters to the state authority with comments and suggestions on the draft NLA.

The comments received are analysed, and the draft NLA is revised, if needed. The information about comments and suggestions collected is reflected in a memo attached to the draft NLA, with an indication whether those were accepted or not, complete with the grounds for rejecting these or other comments or suggestions.

No separate report on the outcomes of the debate is drawn up.

Pursuant to Article 22 of the Kyrgyz Law “On normative legal acts of the Kyrgyz Republic”, following the public debate, suggestions received are summed up and presented, complete with the explanation for non-inclusion of those in the draft normative legal act. This summary is reflected in the memo attached to the draft normative legal act.

**Regulatory impact assessment.** Pursuant to Article 22 of the Kyrgyz Law “On normative legal acts of the Kyrgyz Republic”, any draft NLA designed to regulate entrepreneurial activities is subject to the regulatory impact assessment (RIA). The regulatory impact assessment of normative legal acts is a tool for drafting and assessing socioeconomic implications of the state regulations being implemented or implemented earlier. In most general terms, RIA is a check for advisability and efficiency of this or other law-drafting initiative.

The regulatory impact assessment addresses the following key issues: ensures the choice of the most efficient solution for a problem; helps calculate benefits and costs for the business, state and other stakeholders; assesses the impact that regulation will have on the country’s business climate and investment appeal; mitigates risks associated with the implementation of new regulation, and increases trust on part of citizens and business in the decisions made by the state.

The RIA procedure for the normative legal acts that regulate business activities and development is stipulated in the Methodology approved with the resolution of the KR Government of 30.09.2014, No 559. The RIA is conducted by act-drafting agencies, and the Ministry of Economy conducts screening of the performed RIA.

According to the Methodology, the RIA has 9 stages: identifying issues; defining the purpose of the regulation; establishing criteria for different regulatory options; developing the regulation; assessing expected effects; analysing implementing risks; economic, legal, anti-corruption assessments and completion impact assessment; choosing the regulatory options for implementations, implementing NLA; and monitoring and assessing the outcomes.

## Analysis

1. Anti-corruption screening of draft NLAs is done in practice but since no opinions have been available, its quality remains unclear. The screening conducted by the Ministry of Justice is limited to draft NLAs on a select number of issues (constitutional rights and civil liberties; legal status of public associations and the mass media; government budget and tax system; environmental safety; countering wrongdoing; and implementation of new types of state regulation of businesses).<sup>52</sup> This unreasonably restricts the scope of anti-corruption screening. Since under the KR Law on NLAs the number of law-drafting bodies is limited, it will be advisable to have all draft NLAs, irrespective of their topic, to be made subject to the anti-corruption screening.

In addition, in order to identify and remedy conflicts of law, and given the mass of implementing acts in legal drafting, it would be advisable to give special focus to the anti-corruption screening of the effective normative acts and also monitor NLAs performance.

Note also that the anti-corruption screening procedure is regulated by acts that stipulate the rules for other types of screening. These procedures only offer general provisions on the methodology of anti-corruption screening. In this context, it is recommended that a detailed methodology for the anti-corruption screening be developed, given the previous experience in screening by the Ministry of Justice and in parliament. Such methodology should come with practical examples, and, when drafted, it should be published for a general debate.

2. With regards to public debate, since comments and suggestions may be received directly to the drafter's email address or to the general email address of the state authority, and there is no final report on the outcome of the debate, the risk is high that important comments may be missed.

The memo attached to the draft NLA is on 1 to 2 pages, in other words, it is so laconic in its form that it is hardly possible to allow for an analysis of objections. A positive development is the fact that following the debate the memo is submitted to parliament and is available on the website.

On the negative side, detailed results of the public discussion are not prepared or published. The KR Ministry of Justice admits that as of today the procedure for the public debate of draft documents is fairly formal in character.<sup>53</sup>

The Ministry of Economy is responsible for examining the regulatory impact assessment of normative acts as done by the drafting authorities. As part of the assessment, the issue is formulated, three options for the solution are proposed and the economic reasoning is presented together with calculations. According to data collected during the country visit, in 2017 the Ministry of Economy conducted over 120 screenings and over 80 per cent of NLAs were returned to the drafters. This may suggest that RIA may develop into a working tool to filter the huge body of regulatory documents. The methodology is made available on

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<sup>52</sup> Screening standards at Supreme Council, apart from the above topics, also provide for screening of draft laws that contain "provisions aimed at regulating powers of public authorities and officials, including their law-drafting, supervisory, licensing, registration and jurisdictional powers."

<sup>53</sup> Source: <https://bit.ly/2x49VhG>.

parliament's website. Meanwhile, there is still no specialization in RIA, in other words, lack of specialists capable of doing such assessment systemically.

Also, experts want to draw attention to the fact that RIA is conducted at the stage when the draft NLA has already been finalized, that is, when the regulatory concept has been chosen and it is hard to change it. As noted in the OSCE expert opinion with regards to Kyrgyzstan's legislative process, "At present, regulatory impact assessment is carried out after a law has been drafted, at which point it tends to serve as a means of justifying decisions that have already been taken rather than as an aid to evidence-based policy making. ... At this earlier stage, a fuller and more open-ended consideration of the issue could be conducted, which would include an assessment of the various ways in which such issue might be addressed. ... Carrying out impact assessments at an earlier stage in the law drafting process might also increase the likelihood of stakeholder participation in the process, as it enhances the possible impact of their contributions. Sufficient time must also be allowed for the process to be carried out properly and in a meaningful way: depending on the issue, the timeline can vary from, for instance, three weeks to several months."<sup>54</sup>

4. In May 2018, the KR Government decided to call back from Supreme Council the draft law "On normative legal acts". Submitted earlier for public debate, the draft law was severely criticized by the business community, as it was said to allow ministries, departments and other government authorities to produce their own normative legal acts in business regulation.

Experts note that promulgation of normative legal acts by authorities that formulate state policies (parliament, government, ministries) is standard practice in many countries. One needs to differentiate legal drafting powers depending on the authority's status and functions. Local bodies of executive government and central administrative agencies (agencies, committees, services, inspections, etc.) that do not shape the state policies but ensure they are implemented should not, in fact, have the right to issue normative legal acts. Since such agencies will be implementing these acts subsequently, that would lead to institutional conflict of interest. As to ministerial acts, the risks of having corruption-prone acts or acts that restrict unreasonably business activities or competition, could be mitigated with meaningful public discussion of the draft acts in the process of drafting and also with anti-corruption screening and regulatory impact assessment.

Experts welcome the fact that the government of Kyrgyzstan is in discussion with the business community about these changes.<sup>55</sup> Nevertheless, the fact that this issue has emerged points also to the lack of efficiency in the existing mechanism of public discussion of important legislative changes, as it appears that the disagreements had not been properly addressed before the draft document was submitted to parliament.

### **New recommendation No. 29**

**1. Ensure practical implementation of anti-corruption screening of all draft normative legal acts and also conduct selective anti-corruption screening and impact monitoring of the effective acts. Based on the analysis of the previous screening experience and following consultations with the public, develop a detailed methodology for anti-corruption screening including practical examples of corruption factors and risks.**

**2. Ensure that all findings of the anti-corruption screening and regulatory impact assessment are published online.**

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<sup>54</sup> See Assessment of the legislative process in the Kyrgyz Republic, OSCE/ODIHR, October 2015, paragraphs 52-53, available at <https://bit.ly/2s4q3Lg>.

<sup>55</sup> See, e.g.: <https://bit.ly/2x8b4VL>.

**3. Improve the procedure for public discussion of draft normative legal acts, in particular by drawing up and publishing a detailed report on the outcomes of the discussions and grounds for rejecting suggestions.**

**4. Conduct additional consultations and public discussion of amendments to the Law on Normative Legal Acts to reach agreement on a balanced approach to assigning law drafting powers to the authorities that form public policy.**

#### **Instruments of e-government**

#### **Recommendation No 19 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**... 5. Promote and introduce modern e-government tools aimed at decreasing direct contacts between government services users and government bureaucracy and reducing the risks of corruption.**

Government services portal. The State Committee of information technologies and telecommunications of the Kyrgyz Republic has developed and piloted in testing regime the portal at tazakoom.kg. There were also developed 30 e-forms (for 21 government services) to apply for government services in line with the effective legislation. The State Committee of IT and telecom set up a list of 189 electronic services.

Tunduk System for electronic interdepartmental interaction (Tunduk henceforth). In April 2018, the Government of the Kyrgyz Republic adopted resolutions on the requirements for the interaction of information systems in the system of electronic interdepartmental interaction “Tunduk”, as well as on the establishment of the State Enterprise “Electronic Interaction Centre” under the State Committee for Information Technologies and Communications. Also, the Resolution of the Government approved the requirements for the protection of information contained in databases of the state information systems, which specifies the measures to protect information, as well as the requirements for the use of information technology in the state information systems and ensuring the security of information contained in their databases (<https://www.tunduk.gov.kg/безопасность>).

In 2015-2016 SEII Tunduk operated on the fifth version of the platform. According to the recommendations of the Estonian specialists, starting December 2017 SEII Tunduk has been technologically transferred to the sixth version, which is conceptually advanced in the use of technological solutions compared to the fifth version. On April 23, 2018 SEII Tunduk received international recognition, and the State Enterprise “Electronic Interaction Centre” is listed as the world’s third operator of X-Road electronic platform after Estonia and Finland.

Twelve state bodies of the Kyrgyz Republic (the Social Fund, the Ministry of Internal Affairs, the Ministry of Education and Science, the Ministry of Labour and Social Development, the State Tax Service, the State Customs Service, the State Registration Service, the Public Procurement Department of the Ministry of Finance, the National Statistical Committee, the Obligatory Medical Insurance Fund, the State Commission for Religious Affairs, the State Committee of Information Technologies and Communications) are connected to SEII Tunduk.

Interdepartmental exchange takes place between five government bodies through SEII Tunduk: the Obligatory Medical Insurance Fund, the State Registration Service at the Government, the State Tax Service at the Government, the Social Fund, the Public Procurement Department of the Ministry of Finance.

Implementation of projects under the Digital Transformation Programme Taza Koom

Smart City project: the Zhany doorgo kyrk kadam Programme of the Kyrgyz Republic provides for the implementation of a Smart City project in 2-3 years in Bishkek and Osh. For that, the Kyrgyz Government signed an agreement with Chinese Huawei Technologies Co. Ltd.

Information Kiosk project. Information kiosk is a mini-centre of retail services to be set up in all aimaks at the post-offices to help to offer government services electronically. This kiosk is a module assembly including: a waiting and service place; a photo booth with a digital camera; the operator's workplace with furniture and the electronic system of the State registration service of the KR Government. Presently, information kiosks offer 10 types of e-services (collection of passport application forms; birth certificates; marriage certificates; death certificates; PIN; residential registration; establishment of paternity; submission of data on real property; and directory service).

State system of e-payments. The State IT and Telecom Committee developed a state system of e-payments (e-payments system henceforth); its purpose being to provide comfort and convenience to individuals applying to government services by offering the possibility to pay for the service electronically (with a plastic card, through internet-banking, e-wallet, etc.). Technically, the e-payments system is up and running in the test mode. Agreements have been signed with 10 commercial banks which will supply payment services. Testing has been done for internet payments with MPTs (Elcard), Elsom with KIKB, with banks Demir and Kyrgyzstan. In addition, the Provisions "On the procedures for the functioning of the state system of electronic payments" were developed and approved with the resolution of the Government of the Kyrgyz Republic of 28.10.2017, No 709.

Mass scanning of archived documents. Electronic archiving is one of the central stages in the creation of a modern ICT infrastructure and provision, on its basis, of good-quality government services by the Ministry of the Interior, State Registration Service and the State IT and Telecom Committee. As part of the implementation of this project in December 2017, there was approved the creation of the SRS Data Digitization Centre. In turn, SCITC granted funds in the amount of 30 million soms.

Project "Implementation of the e-Queue system at pre-school institutions in Bishkek. The Kyrgyz Ministry of education and Science (MES) has developed terms of reference for the tender to develop, implement and support software for the e-Queue system at pre-school educational institutions in Bishkek. The contract was signed with the TLN company. The implementation is expected in 2018 1<sup>st</sup> Quarter, after it is integrated with the education management IT database at the Ministry of Education and Science.

Improving modules of the public purchasing portal. These improvements in public purchasing are to implement additional functionalities pursuant to the KR Law "On Public Purchasing", including options for framework agreements and implementation of two-stage tenders methods. SOE Info-sistema belonging to the State IT and Telecom Committee is in the process of upgrading the analytical capabilities of the Public Purchasing Portal. Within the framework of the implementation of the projects of the Taza Koom Program, in May 2018, the module for conducting prequalification procedures under Article 25 of the Public Procurement Law was launched on the Official Public Procurement Portal.

Electronic auctions platform. The State Property Fund of the KR Government drafted the resolution of the KR Government "On approving the Provisions regulating privatisation and lease of state property through electronic auctions", which was adopted on 18.08.2017, No 507. The State Property Fund set up a working group to implement electronic auctions, composed of employees from the fund itself, State IT and Telecom Committee and SOE Info-sistema. At the working meeting a test version of the platform was presented by Info-Sistema which developed it. They also discussed such issues as security against hacking and security breaches, platform implementation deadlines, funding of technical maintenance, whether registration will be required (with or without platform),

The official portal run by the Ministry of Economy to manage inspections of businesses at [www.proverka.gov.kg](http://www.proverka.gov.kg) is a system of administrative inspections by state monitoring authorities of businesses and their operations.

In addition, [www.proverka.gov.kg](http://www.proverka.gov.kg) is the outcome of the 10-year efforts by experts working on the transition to the electronic administering of the inspections system by the state and fighting corruption among inspectors. Moreover, this is the very first working interdepartmental document flow in the republic: among active users of the interactive portal at [www.proverka.gov.kg](http://www.proverka.gov.kg) are 1,118 users from 10 (there were 13) state inspectorates, including also their territorial branches across the country. The total number of entities covered is 58,948.

The key purpose of automation is to remove unreasonable administrative barriers and eradicate corruption in the work of inspections by streamlining the regulations and business inspection procedures.

Results of the implementation of the portal at [www.proverka.gov.kg](http://www.proverka.gov.kg):

1. Migration to online interdepartmental document flow for inspections;
2. Creation of a single interdepartmental database on businesses and their facilities: by type of business, ownership, geographic location; and inspections' frequency based on the risk assessment.
3. Mitigation of corruption among inspectors. For instance, the inspection number is assigned automatically, showing the inspectorate code and that of its branch, and there is an open access to the planned list of inspections. With the open online service, a businessman enters his tax number and gets information as to which state authorities will be conducting their inspection and in what month, with the purpose of the inspection made clear. By getting information about the requirements to and responsibility of business operations, the inspected entity implements the transparency principle. In this way, the inspection is not so much to punish the business but to alert it to its responsibility. Also, the inspector is under pressure to comply with the inspection rules.
4. Provision of electronic information services available for outside users at [www.proverka.gov.kg](http://www.proverka.gov.kg):
  - Open background information about inspectors, including their personal number, the applicable regulations, dates of planned regular inspections and other useful open data;
  - Businesses can search the site, using their tax number, to find out which inspections and when they may be planned, and to which level of risk their operations have been assigned;
  - External users may themselves try to assess the risk level of their operations (a calculator). The risk assessment allows businesses to be inspected to be aware of the applicable rules of safety compliance in their operations;
  - There is an automated feedback system whereby business community can evaluate anonymously the inspectorates or individual inspectors after the inspection (the systems has been implemented at all state inspectorates).
5. There is open access to statistical and analytical reports on the supervisory and monitoring activity of state inspectorates (in the process of being implemented). Note that certain government agencies may want to have statistics on businesses by regions, industries of ownership, as well as quality of safety regulations impacting the well-being of the population or environment.

6. Improving and developing the capacity of the system's internal users, i.e. inspectors, and the work of inspectorates, e.g., taking stock of the internal regulatory standards for product safety and business operations.
7. In order to improve [proverka.kg](http://www.proverka.kg), it was integrated with the State Tax Service's IT system allowing identification of businesses' tax numbers.
8. The website at [www.proverka.gov.kg](http://www.proverka.gov.kg) now has a feedback application which collects and processes feedbacks from the businesses (all state inspectorates are linked).
9. At [www.proverka.gov.kg](http://www.proverka.gov.kg), any businessman can get information about the impending inspection, its time, the name of the inspector, the level of risk of its business, how often it will be inspected; there are answers to the most frequently asked questions about inspections, and the database of applicable legislation.

## **Analysis**

1. The *Taza Koom* digitalisation programme and the ambitious 7 goals action plan (see above) is evidence of the presence of some general vision and meaningful approach to e-government reforms, changes in the legal and regulatory framework and establishment of universal national platforms and services.

Experts believe it crucial to ensure succession and full implementation of the *Taza Koom* programme as announced, thus reaffirming the government's commitment to the introduction of e-government anti-corruption tools.

2. Experts welcome the launch of the *Tunduk* system for electronic interdepartmental exchanges. Essentially, this is a platform for the entire government, and it borrows from the Estonian X-road (which took 10 years to be developed), ensuring collection, processing and transmission of data as part of interdepartmental exchanges.

One cannot but note a positive step in the planned creation of the position of deputy minister for digital development (Chief Information Officer) at 23 government authorities. This step is directly in line with the UNDESA best practices whereby e-government is created with public interests at heart. For this objective, a Centre for electronic interaction was created.

3. According to information available, the Smart City project has never got off the ground. Some alternative examples included pilot initiatives to address bribes on highways proposed by the Kyrgyz Association of Developers, or a High-tech Park. Take, e.g., the traffic safety concept and terms of references. Projects Smart Utilities and Smart Traffic Lights never got past the pilot phase, as they have never been scaled up.

4. To provide government services efficiently, functions need to be delegated to the State Registration Service, which may create problems for the expansion of the list of services provided. However, already at this stage, the government has set clear deadlines for the provisions of the services offered. After the documents have been collected, they are reviewed within 5 days. Also, a differentiated state duty scale has been introduced, enabling an accelerated service from 3 hours to 2 days. The official offer of express services may help to mitigate the risk of corruption significantly.

Not all government services come complete with the standards for their provisions. Moreover, there is an effective resolution by the Government requiring re-engineering of business processes, but since every authority has to do it on their own, it proves challenging in practice.

5. There are also general issues common for all e-government programmes, including the Taza koom digital transformation programme. There are no administrative regulations, paper and electronic document flows have not been made equal. As a result, there is still a proper stamp requirement, and the reason is in the complexity of checks to verify the authenticity of documents. The majority of civil servants in services provisions do not have an electronic digital signature.

**Overall, Kyrgyzstan is partially compliant with the previous Recommendation 19.**

### **New recommendation No. 30**

**Continue implementing modern tools of e-government aimed at reducing direct contacts between government services users and state bureaucracy and mitigating the corruption risks.**

#### **Administrative procedure law and administrative justice**

Administrative acts of government authorities, actions (inaction) by their public officials may be appealed in the manner defined by the Law “On the fundamentals of administrative activities and administrative procedures” and by the Administrative Procedure Code of the Kyrgyz Republic.

The Kyrgyz Law “On the fundamentals of administrative activities and administrative procedures” of 31.07.2015, No 210, lays down uniform and key principles, rules and procedures for the actions of government authorities and bodies of local self-government in their relationship with individuals and legal entities.

The Administrative Procedure Code of the Kyrgyz Republic of 25.01.2017, No 13, (effective as of 1 July 2017) stipulates the due process for disputes arising from administrative law (public law) relationships, procedural principles and rules for consideration and resolution of this kind of disputes in court.

Pursuant to the Administrative Procedure Code of the Kyrgyz Republic, administrative cases shall be taken up in the first instance by inter-regional courts at the defendant’s location.

According to Kyrgyz authorities, the drafting of the Law “On the fundamentals of administrative activities and administrative procedures” drew on the experience of other countries (Germany, Switzerland, Armenia, Georgia, Azerbaijan, etc.). The law was praised by international experts. The draft law went through the procedure of two public debates (roundtable discussions) which introduced a number of substantive amendments into the draft, in particular, refining the scope and subjects of regulation, principles of administrative activity, time allowed for the appeal against administrative acts, and liability of administrative bodies).

#### **Access to information**

##### **Recommendation No 22 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**1. Reform the legislation on access to information in line with international standards by consolidating relevant provisions in one law and aligning other legislative acts (first of all the law on state secrets) with the access to information law.**

**2. Ensure efficient oversight of enforcement of the right to access to information by the state bodies, including proactive publication of information of high public interest.**

**3. Increase public awareness of the right of access to information.**

**4. Explore the possibility of establishing a unified portal for proactive publication of public information for all public agencies.**

**5. Ensure designation of persons responsible for access to information in government agencies as required by legislation and their regular training.**

**6. Abolish the duty of the Prosecutor General to protect honour and dignity of the President.**

According to Kyrgyz authorities, in order to ensure mandatory awareness and advocacy work for socially significant decisions adopted by government agencies, the KR Law of 29.12.2016, No 224, introduced the following amendments to the KR laws “On guarantees and freedom of access to information” and “On access to information held by government authorities and bodies of local self-government of the Kyrgyz Republic”. Now, such decisions must without fail be explained to the general public for avoidance of any lack of understanding or misunderstanding of the decision made, let alone civil protests. The amendments made helped to strengthen trust in decision making by government authorities and bodies of local self-government, they expanded and facilitated the dialogue between the authorities and the public and promoted legal culture among the population.

The Resolution of the KR Government of 21.11.2017, No 761, “On amending the resolution of the Government of the Kyrgyz Republic “On approving the List of the most essential information that constitutes state secrets and the Provisions for establishing the degree of secrecy of the classes of information and establishing the degree of secrecy of information containing in the works, documents and manufactured products”, dated 07.07.1995, No 267/9, is intended to reduce the list of information deemed to be state secrets.

To raise awareness of civil society about the work conducted and highlight the more significant achievements by the KR Government in eradicating/mitigating systemic corruption within the government authorities of the Kyrgyz Republic, a website on the anti-corruption policies of the Government of the Kyrgyz Republic was launched on 21 August 2017 at [www.anticor.gov.kg](http://www.anticor.gov.kg). This website regularly publishes reports and other information about the implementation of anti-corruption plans of the Government of the Kyrgyz Republic, reports on the monitoring of state authorities and the extent to which they have implemented anti-corruption tools in the system of public governance; it has the necessary information about international anti-corruption instruments and details of the authorized officers responsible for the prevention of corruption in government agencies.

To ensure the protection of interests of individuals and prompt review of their complaints at the legislative level, the time allowed for the review was reduced from 30 to 14 working days, and a list of executive officials, to be prosecuted for the violation of this law, was stipulated.

As part of anti-corruption efforts, all government agencies are instructed to upload to their websites the maximum possible information on government services they provide, their price and contact details. To promote transparency and contacts with the local communities, government authorities are expected to respond, promptly and timely, to all complaints published in the electronic mass media. There has been a positive trend in the promptness of reaction and response by government authorities to reports and complaints by individuals published in the mass media. The website AkiPress, in the Reporter application, allows the public to leave their complaints and suggestions for better services by the government

(<http://reporter.akipress.org/dept>). The website makes it possible to monitor the statistics of government responses to individual petitions.

Pursuant to Article 30 of the KR Law “On access to information held by government authorities and bodies of local self-government of the Kyrgyz Republic”, there is a specialized service set up at agencies or bodies of local self-government to facilitate access to information, empowered to have relevant functions and authorities in the manner stipulated, or else such functions or powers are given to some other service or unit within the structure of the government authority or body of local self-government, or a specific official.

Rights, duties and responsibility of specialized services, units or officials whose function is to provide information to requesting persons, shall be stipulated in the rules and regulations of the said services or units and in job descriptions approved in the manner prescribed.

There is no statistical data about appeals against actions (inaction) or decisions on access to information for 2015-2017. No statistics are produced separately for information requests; they are recorded as petitions by citizens.

## **Analysis**

1. For the overview and analysis of the legislation on access to information see the OECD/ACN Report on the Third Round of Monitoring. See also the overview of legislation of Kyrgyzstan in the Global Right to Information rating of Kyrgyzstan.<sup>56</sup>

The information made available appears to suggest that no amendments have been made in the access to information legislation to comply with the previous recommendation. Still in force are two special laws regulating issues of access to information held by government authorities. The Law on state secrecy was not harmonised with the Law on Access. Still relevant are the comments to the laws made in the monitoring reports. The only amendments that have been made concern mostly the openness of the judiciary: those amendments are positive but fail to address the challenges identified earlier.

Therefore, the earlier part of the recommendation concerning the reform of the legislation has not been complied with.

Nor is there any information concerning compliance with the following recommendations:

- Ensure efficient oversight of enforcement of the right of access to information by the state bodies, including proactive publication of information of high public interest;
- Increase public awareness of the right of access to information.
- Explore the possibility of establishing a unified portal for proactive publication of public information for all public agencies.

Kyrgyzstan provided information about the anti-corruption portal, however the recommendation was about a single portal where state authorities could publish socially important information.

Kyrgyzstan did not provide any information about the real state of things with the establishment of services within government authorities or bodies of local self-government that are to ensure access to information in these authorities. The responses by Kyrgyzstan indicate that data on the number of officers/units

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<sup>56</sup> See: <https://bit.ly/2sClveB>.

responsible for access to information or the holders of information, or where they were established (appointed), may not be provided as this information is classified. Experts are of the opinion that limiting access to such information is an extremely dubious and problematic practice.

2. Overall, Kyrgyzstan does not seem to have a common state policy enabling the right of access to information. There is no one body, or bodies, responsible for the implementation of such policy, its coordination, monitoring and summing up the implementation results for the relevant legislation, advising on issues of access, addressing complaints against actions or inaction of information on the holders, etc.

As was noted in the OECD/ACN Final Report on the Third Round of Monitoring, judiciary or general administrative appeal is rarely efficient: administrative authorities do not seem to be too willing to admit violation within their own subordinate agencies or officers, whereas appealing in court takes a lot of time and could be costly. Therefore, international standards require the presence of an independent complaints mechanism in the shape of an information ombudsman (commission or agency) or any other similar authority. Its duties should cover monitoring and supervision over compliance with the relevant access to information provisions. Such institutions also have an important role to play in raising awareness and educating public officials. Such bodies, responding to a complaint, should have powers to issue binding rulings and impose fines or other sanctions for a violation.<sup>57</sup>

This institution has several models. In some countries the mandate goes to a special commission (or special ombudsman), as in Belgium, France or Italy (Commission on access to administrative documents), Ireland (Office of Information Ombudsman), Macedonia (Commission for the protection of the right to free access to public information). Other countries merged this institution with an agency that is supposed to protect personal data (e.g., Estonia, Germany, Hungary, Latvia, Malta, Serbia, Slovenia, Switzerland and the UK). There are countries where the right of access to information is ensured by a single institution of ombudsman (all IAP countries, Bosnia and Herzegovina, Croatia, Denmark, Norway, Poland, Spain, Sweden and Ukraine), but it rarely proves successful, as in most cases the Ombudsman does not have the power to issue binding rulings.

Usually the best solution to safeguard efficient and independent control over access to public information is a special Office of the Information Commissioner (Ombudsman) (even if merged with the personal data protection function). The general institution of the human rights ombudsman may have no resources or focus needed, as it has to look into a broad spectrum of matters relating to violations of human rights. That is why the monitoring of IAP countries has been recommending invariably that countries set up an independent oversight mechanism.<sup>58</sup>

**Kyrgyzstan is not compliant with the previous Recommendation 22.**

### **New recommendation No. 31**

**1. Reform the legislation on access to information in line with the international standards and best practices by consolidating relevant provisions in one law and aligning other legislative acts (first of all the law on state secrets) with the law on access to information.**

**2. Establish (determine) an independent state body for the oversight in the area of compliance with the legislation on access to information (as a separate body or as a service merged with an office for the personal data protection) that will be authorised to review complaints, conduct administrative inquiries and take binding decisions based on their outcomes; conduct monitoring over compliance with the access to information legislation and produce relevant statistics and**

<sup>57</sup> See the 2016 ACN Final Report on the Third Round of Monitoring, p. 271-272, available at <https://bit.ly/2H1LBNr>.

<sup>58</sup> Idem, p. 272.

reports; such a body, to function effectively, should be provided with necessary powers and resources.

**3. Conduct regular practical training on the exercise of the right of access to information for information holders and carry out campaigns in order to raise awareness of the public about the existing mechanisms for enforcing this right.**

**4. Conduct regular reviews of documents, access to which is restricted, including documents classified as for official use only, ensuring that the classified status is removed from documents where there is no need to restrict access or where public interest in having an open access is overriding.**

**5. Set up a separate registration and record keeping of information requests, collect and publish department-level statistics on requests processed and their outcomes.**

### **Extractive Industries Transparency Initiative**

In 2017, based on the validation outcome, the Kyrgyz Republic lost its status of compliance with the Standard of the Extractive Industries Transparency Initiative (EITI). The remarks of the EITI Board criticized insufficient transparency of state-owned extractive enterprises, level of involvement in the multilateral group, insufficient disclosure of data in the 2013-2014 EITI Report and lack of compliance with the recommendations of the previous EITI reports.

Judging by the 2015-2017 EITI Progress Reports, because of financial difficulties arising from excessive dependence on donor assistance in the implementation of the EITI, the Kyrgyz Republic was not in a position to prepare its 2015-2017 EITI reports. At the same time, significant progress was achieved in the implementation of the beneficiary law, recognized by a special award by the Global Conference on beneficiary law in Jakarta in 2017. In addition, the State Committee on industries, energy and subsoil use of the Kyrgyz Republic supports efforts to harmonize the legislation with the EITI, so that EITI reporting will be made mandatory, membership in the Advisory Board will be expanded, and EITI reporting forms will be revised.

A Road Map was approved according to which requirements for the disclosure of beneficiary owners and politically exposed persons in the Kyrgyz Republic will be implemented in 2017-2020.<sup>59</sup>

In the meantime, in view of all the implementation challenges, on 9 February 2018 the EITI International Secretariat put forward a number of recommendations which could help the Kyrgyz Republic, if it complies with them, to reduce in part the costs of EITI reporting by disclosing data through government portals thanks to the initiatives of the Government's Taza koom and Open Government.

The annual 2017 EITI Report was planned for publication in June 2018, within the EITI Standard's deadline.

See new recommendation below.

### **Construction Sector Transparency Initiative**

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<sup>59</sup> See <https://bit.ly/2GMW6nJ>.

Although Kyrgyzstan has not joined the Construction Sector Transparency Initiative (CoST),<sup>60</sup> it has provided the following information with regards to improved transparency and mitigation of corruption risks in urban planning and construction.

Pursuant to the Decree by the President of the Kyrgyz Republic “On measures to eradicate causes for political and systemic corruption in government”, dated 12.11.2013, No 215, The Security Council Secretariat, in coordination with the Anti-Corruption Service of the State National Security Committee and the State Agency for Architecture, Construction and Utilities of the Kyrgyz Government (KR Gosstroi henceforth), approved on 29 September 2016 the Updated Plan for the dismantling of corruption schemes and taking steps to remove corruption risks in government regulation and management of urban development and architecture and general construction.

Pursuant to the Updated Plan, the KR Gosstroi completed the following work.

The 2018-2025 Programme of the Government of the Kyrgyz Republic for the development of master plans of towns and cities across the Kyrgyz Republic was approved with the resolution of the KR Government of 17.08.2017, No 490. The Programme is to be implemented in two stages: the first (short-term, 2018-2020) and the second (long-term: 2021-2025). The implementation of the programme will help to put an end to unlawful distribution of lands in cities and towns of the republic.

To eliminate legal gaps, and in order to define procedures and sequence in the development of urban planning documentation, as well as procedures for amending it, the order of KR Gosstroi of 27.05.2016, No 5-npa, approved the Compendium of rules on the composition, procedures, coordination and approval of urban planning documentation in the Kyrgyz Republic.

To set up a mechanism ensuring openness of decision making in line with the existing requirements, public demand, and the needs of the population and the state, the Provisions were developed setting up procedures for public hearings of urban planning documentation in the Kyrgyz Republic, approved with the KR Gosstroi order of 24.01.2018, No 12-npa. These provisions proceed from the principles that citizens and public associations may exercise their constitutional right to be provided, in a timely manner, with accurate and complete information about the state of the environment, and the community participating in urban planning decision-making.

Declassification and online publication of the Master Plan of the city of Bishkek is deemed a positive step.

See the new recommendation below.

### **Open data**

Pursuant to the Law of the Kyrgyz Republic “On Electronic Government” of 19.07.2017, any information, including information disseminated through the internet, in the format that allows for automated processing without prior changes by a human being for its repeated use, shall be deemed open data. Under the same law, the e-government infrastructure includes, among other things, the open data infrastructure built in compliance with the Law of the Kyrgyz Republic “On access to information held by government authorities and bodies of local self-government of the Kyrgyz Republic”. Article 31 of the KR Law on access to information stipulates that in order to safeguard the right of access to information from the government’s IT systems, government authorities and bodies of local self-government shall arrange for the publication of information from their IT systems on the respective websites in the open data format.

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<sup>60</sup> See [www.constructiontransparency.org](http://www.constructiontransparency.org).

The e-Government law makes an authorized body responsible for assisting government authorities and bodies of local self-government in the migration to electronic administration, in particular in the creation of tools for open and accountable governance, mechanisms that allow open data to be used with the help of advanced information technologies, as well as in the development of methodologies for the assessment of the efficiency of implementation of initiatives towards openness and accountability, and in the creation of open data portals.

According to information provided, Kyrgyzstan received a World Bank grant of US 450,000 for the implementation of the open data action plan (the grant agreement was ratified by the Kyrgyz parliament in December 2017). The project's objective is to establish a national open data platform and mechanisms allowing public to access it. The Open Data Action Plan (Open Data) has four components: a) the basic ecosystem of open data; b) opening of government data; c) creating demand for open data; d) project management and capacity building.

As a part of the project implementation work, the following was accomplished, among other things: under the Government's instruction an interdepartmental working group was set up to implement open data policy, composed of representatives from 12 pilot agencies; lists of data sets were developed for pilot agencies, which started working on defining priority data sets; jointly a draft plan of open data activities was drawn up for 2018 — 2019; terms of reference were prepared for the prospective developer company which will be working on the open data portal.

This open data portal will publish open format government data that are most required by the general public and business such as: data on republic budget expenditures, state of the environment, education and healthcare, transport data, detailed data on transport's routes and timetables, national registers, public census; geolocation data, weather forecasts, government contracts, data on real property, etc.

## **Analysis**

The legislative framework for the implementation of the publication of machine-readable data in Kyrgyzstan is deemed insufficient. What needs to be done is to have detailed rules and requirements drafted extending to publication and updating of open data by their owners; rules should be set up about free of charge and unrestricted reuse, with the possibility to publish data sets with personal data whenever such publication is stipulated by law (e.g., registers of property), and to regulate other issues with respect to open data infrastructure, creating, among other things, a central depository of open data sets, a national portal of open machine readable data. At the level of the government or an authorized agency, a minimum list of data sets should be established for the data to be published by information holders. Before such lists can be set up, they should be discussed in consultations with business and the general public, to identify the socially significant data sets.

The civil society and mass media in Kyrgyzstan are quite active (for example, the *Kloop* media agency undertakes data journalism and collection and analysis of open data). That is, there is a demand for government data in a machine-readable format that can be widely used for civil control and corruption detection.

See the new recommendation below.

## **Open Government Partnership Initiative**

In 2017 Kyrgyzstan was the first in Central Asia to join the Open Government Partnership, a multilateral platform for the implementation of the governments' duty to promote transparency, empower their

citizens, and fight corruption, with the help of new technologies. A National plan is being developed together with civil society, to be ready for implementation starting 31 August 2018.<sup>61</sup>

### **Information about public budget**

In order to improve transparency and availability of budget information, the Budgetary Code of the Kyrgyz Republic, effective from 1 January 2017, incorporates a separate chapter: “Openness and transparency of the budget and budgetary process”. It provides for the publication of key budgetary documents on the official websites of government authorities and bodies of local self-government; public budgetary hearings to be held and feedback collected as a result of such hearings; and the civilian version of budgetary documents drafted.

Pursuant to the rules of the Budgetary Code, the resolution of the Government of the Kyrgyz Republic of 05.10.2017, No 653, approved the Methodology for the formation of the Civilian Budget of the Kyrgyz Republic. This methodology provides for the publication of the civilian version of the following budgetary documents: draft budget of the Central Government; approved law on the budget of the Central Government; and a draft law on the approval of the report on the execution of the budget of the Central Government.

Also, to achieve a complete budgetary proposal by the executive branch, the resolution of the Government of the Kyrgyz Republic of 01.11.2017, No 723, approved the Procedures for developing the draft republican budget or for amending the republican budget, providing for the drafting of an explanatory note in line with the international best practices promoting budget openness.

Presently, pursuant to the rules of the budgetary legislation, aiming to engage public in the budgetary process, public budgetary hearings on draft republican budget are held by the Parliament of the Kyrgyz Republic and its Government. Since 2017, it has been a practice at the KR Ministry of Finance to hold public hearings on the execution of the republican budget after the first half year and at the end of the year.

In addition, both the Budgetary Code of the Kyrgyz Republic and the resolution of the Government of the Kyrgyz Republic of 30.12.2017, No 854, “On programme budgeting”, provide for rules aimed at enabling public engagement in the budgetary process. These rules stipulate the mandatory public hearings on the draft mid-term strategies for budgetary expenditures and on the draft programme budget at sectoral ministries and agencies prior to their submission to the Ministry of Finance of the Kyrgyz Republic.

The Ministry of Finance of the Kyrgyz Republic issued an order, dated 21.09.2017, No 127-P, “On steps to improve the budget transparency index for the republican budget of the Kyrgyz Republic”, reflecting international standards in budget transparency.

The Open Budget portal is still operational (<https://budget.okmot.kg>), supported by the Ministry of Finance. It is an automated system of online presentation of data on revenues and expenditures of the republican and local budgets. Data is presented by government authorities, territorial division or by individual recipients based on their tax number. This online portal is updated automatically as it extracts data from the Treasury’s IT system.

The Open Budget portal also publishes participatory (incentive) grants (website [Stimgrant.okmok.kg](http://Stimgrant.okmok.kg)) allocated to bodies of local self-government for them to maintain and repair socially important facilities. This project shows the joint budget as a result of the tender (local budget of up to 3 million som after the tender) and the amount of additional support from the Ministry of Finance.

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<sup>61</sup> See announcement by the KR Government: <https://bit.ly/2ETyf4T>.

## Analysis

Kyrgyzstan has been implementing, for quite a number of years, the open public budgets policy; the Open Budget portal continues to function. However, since 2015 budget openness indicators have changed but little.

Figure 9. Transparency of the budget and public participation in Kyrgyzstan compared to other countries



Source: Open Budget Index, 2017, <https://bit.ly/2IKI6h6>.

The international Open Budget Survey, 2017, offers the following recommendations to Kyrgyzstan:<sup>62</sup>

- Produce and publish a Mid-Year Review that provides detailed information on forward-looking macro-fiscal estimates;
- Increase the information provided in the Executive's Budget Proposal by including information on updated revenue and expenditure estimates for the year prior to the budget year;
- Pilot mechanisms for members of the public and executive branch officials to exchange views on national budget matters during both the formulation of the national budget and the monitoring of its implementation;
- Hold legislative hearings on the Audit Report, during which members of the public or civil society organizations can testify;
- Establish formal mechanisms for the public to assist the supreme audit institution in formulating its audit program and to participate in relevant audit investigations;
- Ensure a legislative committee examines reports on in-year budget implementation and publishes recommendations online;
- Ensure the supreme audit institution has adequate funding to perform its duties, as determined by an independent body (e.g., the legislature or judiciary);
- Consider setting up an independent fiscal institution to further strengthen budget oversight.

## Open registers

<sup>62</sup> See <https://bit.ly/2IKI6h6>.

The website of the State Registration Service of the Government of the Kyrgyz Republic publishes accessible information on real and moveable property: <https://grs.gov.kg/ru>. The register of legal entities is available on the website of the Ministry of Justice of the Kyrgyz Republic: <http://minjust.gov.kg/>. The register of state and private notaries and the state register of lawyers can be found on the website of the Ministry of Justice. There are also such registers as the register of normative legal acts, an address directory, and a register of transport vehicles.

### **New recommendation No. 32**

- 1. Ensure implementation of the recommendations of the Extractive Industries Transparency Initiative and full compliance with the EITI Standard and implement the Road Map on the disclosure of beneficiary owners and politically exposed persons in the sphere of subsoil use.**
- 2. Accede to the Construction Sector Transparency Initiative and ensure online publication and free access to master plans of towns and cities and other urban planning documentation.**
- 3. Develop standards and rules for the online publication of open data (machine readable data) with the rules for free reuse of such data, a minimum list of mandatory data sets; ensure functioning of the national open data portal.**
- 4. Ensure publication of registers of ownership of real estate and movable property, legal entities, including data on beneficiary owners, and other publicly significant registers, including in open data format.**
- 5. Approve and implement, in partnership with civil society organisations, a national action plan within the framework of the Open Government Partnership Initiative.**

### **Defamation**

Pursuant to the Law of the Kyrgyz Republic “On amending certain legislative acts of the Kyrgyz Republic” of 10.03.2015, No 53, Article 128 (insult) of the Criminal code of the Kyrgyz Republic was revoked as contravening Article 20, paragraph 4, subpara 20, and Article 33, paragraph 5, of the Constitution of the Kyrgyz Republic stipulating that there can be no restriction to the constitutionally provided safeguards to the ban on criminal prosecution for the dissemination of information, discrediting the honour and dignity of an individual.

The duty of the Prosecutor General to protect the honour and dignity of the President has not been repealed. Under the effective Law of the Kyrgyz Republic “On guarantees to the activity of the president of the Kyrgyz Republic” of 18.07.2003, No 152, the President of the Kyrgyz Republic enjoys protection of the state. The honour and dignity of the President of the Kyrgyz Republic are protected under law.

Should there be any evidence defamatory to the honour and dignity of the President of the Kyrgyz Republic, the Prosecutor General of the Kyrgyz Republic is under duty, provided other measures of prosecutorial response failed to produce necessary results, to go to court on behalf of the President of the Kyrgyz Republic seeking protection to his honour and dignity. In doing that, the Prosecutor General of the Kyrgyz Republic is deemed a legitimate representative of the President of the Kyrgyz Republic, and he enjoys all the rights of the claimant, defendant or victim under the laws of the procedure, including the right to transfer his powers to other persons, while his powers to participate in the trial do not require any special certificate (power of attorney).

Pursuant to Art. 18 of the Civil Code of the Kyrgyz Republic, any individual may petition the court for the retraction of information that damages his or her honour, dignity or business reputation, or just business reputation in case of a legal entity. Article 96 of the Constitution of the Kyrgyz Republic specifies that the Plenary Council of the Supreme Court shall provide interpretation to judiciary practice which shall be mandatory for all courts and judges in the Kyrgyz Republic.

In line with paragraph 2 of the resolution of the Plenary Council of the Supreme Court of the Kyrgyz Republic, No 4 of 13.02.2015, “On judiciary practice in resolution in disputes over protection of honour, dignity and business reputation”, communication of defamatory information to the person whom such information may concern, may not be deemed as dissemination provided the person communicating such information, has taken reasonable steps to make sure it would not become known to third parties. It is important to remember that such communication may be enabled by telecommunication means, including the internet (e.g., by sending emails, publishing information on the personal page accessible only to the person to whom the information is being communicated, by sending messages through online instant messaging services, etc.), and the fact of the transmission of the information using telecommunication means, in itself, may not be sufficient grounds to deem this information disseminated.

“False and untrue” shall be such allegations of facts or events that have never taken place in reality at the time to which the disputed information refers.

No information may be deemed to be false and untrue if it is contained in court rulings or verdicts that come into legal force, in the rulings of investigative authorities or other procedural or official documents which are subject to a different procedure of protest or appeal established by law.

Similarly, any information containing hypothetical statements about actions allegedly committed by the person in question, may not be deemed to be false and untrue.

Under paragraph 9 of this ruling by the Plenary Council of the Supreme Court, by virtue of Article 221 of the KR Civil Code, the statute of limitations shall not apply to claims seeking protection of honour, dignity and business reputation as arising from the violation of personal non-property rights.

According to its curriculum, the Higher School of Justice at the Supreme Court of the Kyrgyz Republic also offers judges learning modules on the adjudication of damages in court.

## **Analysis**

The previous recommendation that the duty of the Prosecutor General to protect the honour and dignity of the President be abolished was not complied with.

In August 2017 the international organisation Article 19 conducted a legal review of the Law “On guarantees to the activity of the President of the Kyrgyz Republic” and confirmed that this law failed to comply with the international standards of the right of freedom of opinion and expression, as under such international standards public officials, by virtue of their office, should accept a larger scope of criticism levelled at them. “Unlimited right granted to the Prosecutor General of Kyrgyzstan to protect the President’s reputation is in direct contradiction with this principle.”<sup>63</sup>

An extremely negative trend is the application of the law, in particular in the following cases.

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<sup>63</sup> Source: <https://bit.ly/2INyTnd>.

Invoking the law, the Prosecutor General initiated actions against reporters and human rights activists, e.g.:<sup>64</sup>

- The Prosecutor General initiated five claims against a local media organisation, ProMedia, which maintains a popular online Zanoza news agency. They were accused of insulting the President in their articles. In June 2017, the Bishkek municipal court ruled on the four defendants, ordering Zanoza to pay the President moral damages of 15 million som (about Euro 188,000) and its editor-in-chief, 3 million som (approximately Euro 37,000). In July 2017, the Bishkek municipal court also pronounced Zanoza and its founder Idinov guilty in another case and made each of them pay the President 3 million som of moral damages. Another two cases are pending trial.

- In April 2017, the Prosecutor General lodged a claim against Cholpon Dzakupova, head of the law clinic Adilet and a former member of KR parliament, for her speech at the round table devoted to the right to peaceful assembly, hosted by the Human Rights Ombudsman in Kyrgyzstan.<sup>65</sup>

In March 2018, 29 international media organisations made a statement criticizing Kyrgyzstan's practice vis-à-vis upholding the freedom of speech.<sup>66</sup> In their statement, members of the international IFEX network that promotes and defends freedom of speech, expressed their concern over the defamation court actions resulting in disproportionate fines, restriction of movement and other severe punishment of the defendants accused of insulting the President under the law on the President's safeguards.

As was also noted in the statement, persecutions of journalists continued in 2018. On 22 February the Supreme Court upheld the judgment that compelled journalist Kabai Karabekov to pay 5 million som for "insulting" the newly elected president Sooronbai Dzeenbekov. Freelance journalist Elnura Alkanova was presented with charges of "disclosure of commercial, banking or other secrets" for her investigative journalism story alleging a corrupt sale of government property. She, too, was forbidden to leave the country.

Analysis of the resolution of the Plenary Council of the Supreme Court of the Kyrgyz Republic, No 4 of 13.02.2015, "On judiciary practice in resolution in disputes over protection of honour, dignity and business reputation" suggests that it fails to offer safeguards against abusive use of actions claiming protection of the honour and dignity or striking a balance with the public interest in disclosing important information, including possible acts of corruption. In particular, the resolution fails to state that information that is true to reality may not be deemed defamatory; nor does it segregate value judgments from facts, and so on.

Kyrgyz legislation appears to be devoid also of other preventive instruments, e.g., a shorter statute of limitations for such actions against the mass media (under one year); the concept of "reasonable publication" as an exemption from liability (when the mass media and journalist have taken reasonable steps to check the information which proved to be untrue); special standards for the protection of the

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<sup>64</sup> Source: Article 19, legal analysis of the Law "On guarantees to the activity of the President of the Kyrgyz Republic", August 2017, available at <https://bit.ly/2INyTnd>. See also Review of actions by Prosecutor General of the Kyrgyz Republic claiming protection of the honour and dignity of the President of the Kyrgyz Republic, Institute Media Policy Public Fund, 2017, available at <https://bit.ly/2s7xEZx>.

<sup>65</sup> It is claimed that Dzakupova made "ungrounded attacks on the President, accusing him of ignorance and violation of laws and abuse of power for personal benefit, as well as putting pressure on the freedom of expression by selective application of laws". See Human Rights Watch, Kyrgyzstan: President persecutes his critics: stop trials against human rights activists and mass media workers, 12 May 2017.

<sup>66</sup> Source: <https://bit.ly/2LqtZhr>.

honour and dignity of public figures; the shift of the burden of proof of falsity to the claimant in cases where the publication in question deals with public officials and public interest, and others.<sup>67</sup>

### **New recommendation No. 33**

**1. Abolish Articles 4 and 18 of the Kyrgyz Republic Law “On Guarantees of the Activity of the President of the Kyrgyz Republic”**

**2. Introduce in the legislation effective mechanisms to prevent unreasonable and excessive lawsuits against the mass media and journalists claiming compensation for moral damages as a part of the protection of the honour and dignity, for example: introduce a shorter period of limitations for such claims, provide for the exemption from liability for value judgments and reasonable publications, allow for a larger degree of criticism of public officials, place the burden of proof of unauthenticity on the plaintiff in the case where the publication concerns public officials and public interests. Conduct relevant training of judges.**

### **2.5. Integrity in public procurement**

**Recommendation No 21 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**1. Finalize and adopt a full set of required implementing legislation in the area of public procurement and without further delay start its implementation.**

**2. Improve the institutional framework and the capacity of the Public Procurement Department.**

**3. Establish a functional independent complaints review commission and publish results of the review of complaints.**

**4. Implement electronic public procurement to ensure 90% of all tenders for purchasing goods, works and services are conducted electronically by December 2017.**

**5. Improve statistical data collection systems including performed procurement, complaints and results of their review and its analysis; publish annual public procurement performance reports.**

#### **Background**

Between 2015 and 2017 the GDP of Kyrgyzstan increased from 430,489 billion som to 520,959 billion som. There was a respective change in the government budget expenditures in the period (in 2015 and 2016 expenditures stood at 134,572 and 151,559 billion som, respectively).<sup>68</sup> The volume of public procurement in the period is shown in the table below.

**Table 15. Volume of public procurement in the Kyrgyz Republic**

Year	Number of procurement announced	Total amount (in bln som)
2015	20 221	126 460

<sup>67</sup> See international standards in the publication by international organisation Article 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, 2016, available at: <https://bit.ly/2vmazWX>.

<sup>68</sup> 1 billion som = approx. 12.5 million euros.

2016	80 338	81 038
2017	105 770	72 794

As it follows from the above figures, public procurement tends to impact significantly the economy of the Kyrgyz Republic. In 2015, the aggregate value of public procurement came close to 29% of the country's GDP; in 2017, this ratio dropped to 14%, closer to that of the OECD countries.

#### Evolution of the regulatory framework in public procurement

In many respects, a major impetus to the development of public procurement in Kyrgyzstan came in the wake of adoption by the Supreme Council of the Kyrgyz Republic of a new version of the Public Procurement Law (hereinafter – PPL), which came into effect in May 2015.

This law, drafted with the support of experts from international financial institutions and UNCITRAL, reflects much more completely the key provisions of the leading legislative standards in public procurement. The law has introduced the following key changes:

- it sets common legal and economic principles underling public procurement;
- it regulates the public procurement procedure;
- full transparency of tenders from the announcement to contracting;
- it has revised the functions of purchasing organisations and tender commissions;
- it completes migration to electronic public procurement via [zakupki.gov.kg](http://zakupki.gov.kg) – state e-procurement portal;
- it streamlines public procurement procedures;
- its strives for avoidance of conflict of interest in public procurement;
- it eliminates completely the function of conciliation with the authorized public procurement agency;
- it establishes an independent complaints and protests body and a database of blacklisted suppliers.

Pursuant to the new law and the resolution of the KR Government “On delegating certain law drafting powers of the Government of the Kyrgyz Republic to a number of government executive authorities” of 15.09.2014, the Ministry of Finance issued an order, dated 14.10.2015, No 175-P, to adopt certain implementing normative legal acts as follows:

- Provisions on the rules of electronic public procurement;
- Methodological guidelines on benefits and concessions to domestic suppliers (contractors);
- Provisions on the application of a framework agreement;
- Methodological guidelines on the evaluation of tender bids;
- Standard tender documentation for the procurement of goods in a single-stage, two-stage, simplified methods and in a reversed auction method;

- Standard tender documentation for the procurement of works in a single-stage, two-stage, and simplified methods;
- Standard tender documentation for the procurement of services in a single-stage, two-stage, simplified methods and in a reversed auction method.

Also, the order of the Ministry of Finance of 22.08.2017 approved the Provisions for reverse auctions. The Ministry's order of 11.10.2017 approved the Provisions for the independent interdepartmental complaints and protests commission, and for the database of unreliable and bad faith suppliers (contractors).

Note that the Kyrgyz Public Procurement Law does not regulate public procurement directly associated with national security; defence; protection of state secrecy or natural disasters.

The procedures for the above public procurement are laid down by the Government of the Kyrgyz Republic. Provisions of this law do not apply to procurements of goods from the associations of the disabled, or works and services from sole entrepreneurs with impaired health (based on the decision of the Government).

In line with the PPL, within the month after the approval of the republican budget, based on the budget or estimate of expenditure, the purchasing entity shall develop its plan of public procurement for at least one year and publish it on the public procurement web portal. In case of a tender, the announcement and the entire package of bidding documentation developed under Article 14 of the PPL is also published online on the public procurement portal.

In addition, the public procurement portal publishes the protocol of the opening of bids for tenders, protocol of procurement procedures, and the outcome of the bidding, except e-procurement where protocols are generated and published on the web portal automatically by the system. The purchasing entity must publish information about the resulting contract on the public procurement portal.

Information about procurement excluded from the regulation by the PPL is not published on the public procurement portal.

The Order of the Ministry of Finance of February 1, 2018 approved the Program for Improving and Increasing Efficiency of the Public Procurement of the Kyrgyz Republic for the period 2018-2022.

The purpose of the Program is to increase the efficiency of the national public procurement system and to implement the Concept "On the Digital Reform Program of the Kyrgyz Republic" Taza Koom "aimed at improving the national public procurement system by implementing an effective system of control, monitoring and assessment of results within the framework of the full automation of the process, and the Plan of Measures of the Government of the Kyrgyz Republic for 2018 for the Implementation of the Governmental Program "Unity Trust Creation".

The State Committee for Information Technologies and Communications worked out a draft Action Plan for Open Data for 2018-2019; the decision of the Government of the Kyrgyz Republic established an Interdepartmental Working Group to implement the policy of open data from representatives of 12 ministries and departments including the Ministry of Finance.

International cooperation

At the moment, in order to improve the legal framework in the field of public procurement and harmonization of the Law with the regulatory legal framework of the Eurasian Economic Union, there were drafted the amendments to the PPL, which were adopted in the first reading by the Parliament.

The Ministry of Finance, together with the Ministry of Economy of the Kyrgyz Republic, continues negotiations on the accession of the Kyrgyz Republic to the World Trade Organization (WTO) Agreement on Government Procurement (GPA).

Kyrgyzstan accession to the GPA will help to promote transparency and fair competition, higher level of competition, and more efficient government expenditure. Economically, it opens a reciprocal access to public procurement markets of the GPA members in the World Trade Organisation.

#### Procurement planning

In accordance with the Budget Code of the Kyrgyz Republic, the Law of the Kyrgyz Republic “On the Republican Budget of the Kyrgyz Republic” is adopted for the next budget year and the next two years (the forecast period).

Therefore, in line with Article 12 of the PPL, within the month after the approval of the republican budget, based on the budget or estimate of expenditure, the purchasing entity shall develop its plan of public procurement for at least one year and publish it on the public procurement web portal. The procurement plan must have information about the items for public procurement, their amount and tentative prices as well as the timing of the procurement. The purchasing entity may make amendments and/or amplifications in the annual public procurement plan, provided it publishes such amendments in the public procurement portal. Goods, works or services that are not covered in the annual public procurement plan (as amended) may not be subject for procurement.

#### Electronic procurement

Since May 2015 all public procurement in the Kyrgyz Republic is electronic, except for the cases stipulated in the PPL, and also except for the procurement of goods from the associations of the disabled under the Law “On the public procurement of goods from associations of the disabled in the Kyrgyz Republic”. It means, a full transition was made to electronic bidding; there is an official portal for (electronic) public procurement, and a single system of e-procurement.

Officers of the Public Procurement Department of the Ministry of Finance of the Kyrgyz Republic upload to the portal annual reports on the tenders conducted and contracts resulting from each tender conducted by purchasing entities. All information, from the published procurement plans to announcement to contracting (bid opening protocols, procurement procedures protocol and the contract), is published on the portal, and any interested party may have access to this information.

To ensure quality of public procurement, the Ministry of Finance has its Training Centre conduct trainings for purchasing entity officers and participants of the public procurement system (suppliers and contractors).

It ensures transparency, openness and public access to such information as bid opening, procurement procedures and winning bid selection in public procurement. There is also a level playing field for suppliers (contractors) any person registered on the portal has the right to bid for the tenders announced on the portal on equal terms and conditions. There are no restrictions as to the number of bidding suppliers (contractors).

The *Taza Koom* programme of digital transformation of the Kyrgyz Republic and the Programme “Unity Trust Creation” of the Government of the Kyrgyz Republic are aimed at improving the national public procurement system with the incorporation of efficient control, monitoring and assessment systems in the fully automated process, which is also supported by the 2018 Action Plan of the Government of the Kyrgyz Republic for the implementation of the Governmental Programme “Unity Trust Creation”. The draft resolution of the Government of the Kyrgyz Republic has been drawn up entitled “On approving the 2017-2021 Programme of the Government of the Kyrgyz Republic for improving and enhancing public procurement efficiency”, pending approval now.

#### Procurement by state and municipal entities

Pursuant to Article 3 of the PPL, the purchasing entity (buyer) may include state or municipal organisations with a legal entity status, joint-stock companies in which the state and/or bodies of local self-government own over 50 per cent or more, separately or together, and other businesses established with government money. The government money is deemed to be assets defined by the budgetary law as “extra-budgetary assets” and held by joint-stock companies where the state or municipality owns over 50 per cent, or foundations and other businesses established with the government money.

In line with this definition, procurement by state-owned companies is covered fully and completely by the PPL.

#### Procurement monitoring

Registration of and control over execution of procurement contracts is the responsibility of the central Treasury at the Ministry of Finance. However, there are plans to improve the contract execution module on the public procurement web portal so that the execution of contract shall be monitored by the authorized public procurement agency.

#### Procurement statistics

Kyrgyzstan has made available the following statistics on procurement in 2015-2017.

**Figure 10. Number of contracts by procurement mode**

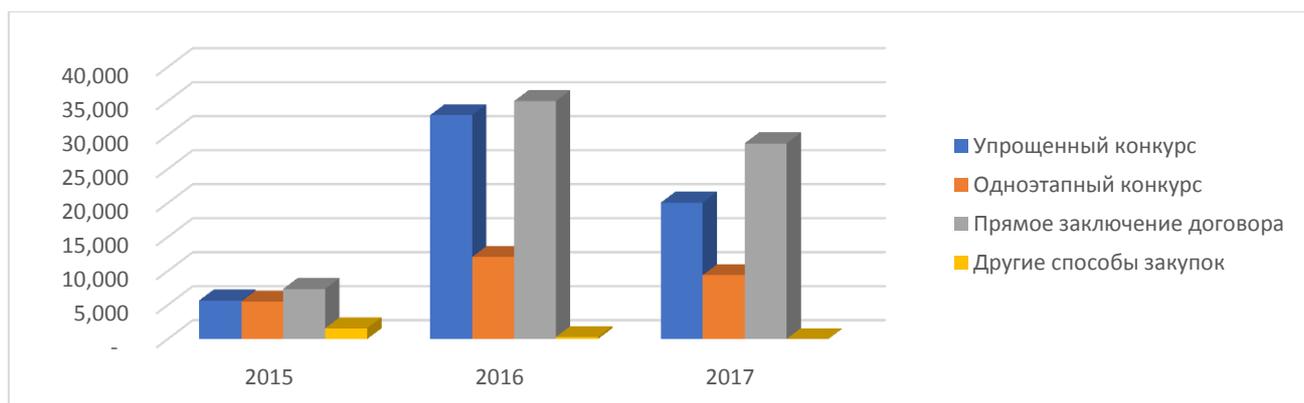
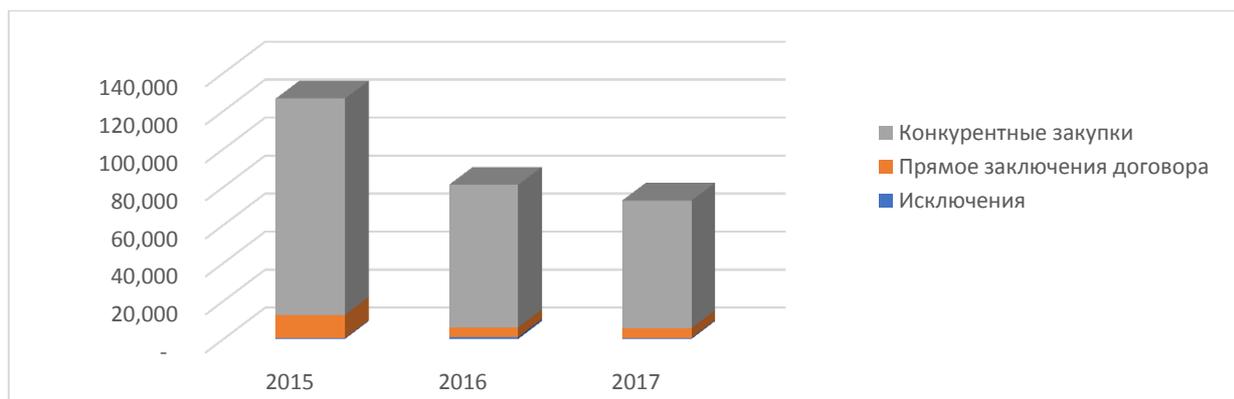


Figure 11. Amount of procurement by procurement mode (in million som)



As it follows from the data published on the public procurement portal, despite the openness and accessibility of the e-auctioning, the level of participation in tenders is not that high. E.g., there has not been a single bid for 187,389 tenders, only one bid for 100,474, and over two bids in only 263,952 tenders (around 48 per cent of all tenders).

#### Public monitoring

According to official information, representatives of NGOs and public associations are active participants in public discussions of public procurement. The relevant Department at the Ministry of Finance held public hearings on the new Provisions for complaints and protests, on amendments to the PPL, etc.

As part of the World Bank's capacity building in public procurement project, the Anti-Corruption Business Council of the Kyrgyz Republic prepared a 6-month review of the advanced public procurement course and an overview of the efficiency of the independent interdepartmental complaints commission. The reviews were made available to the Department and the Training Centre to assist improvements.

#### Complaints system in public procurement

In accordance with Part 1 of Article 49 of the PPL, an order of the Ministry of Finance of May 28, 2016 established an independent interdepartmental commission for handling complaints and appeals consisting of 15 persons representing the public, ministries and departments, certified specialists in public procurement and jurisprudence.

For the purposes of reviewing each complaint, appeal or petition, the Portal automatically sets up a separate sub-group from the general members of the Commission, consisting of three members who represent the interests of different groups.

The public procurement portal has an online module allowing a complaint to be lodged, and a separate module for the publication of resolutions of the independent interdepartmental complaints commission has been developed, tested and implemented. Pursuant to Articles 9 and 49 of the PPL, resolutions of the independent interdepartmental complaints commission shall be published in the portal in the manner prescribed. This independent interdepartmental complaint commission makes its decision known to the applicant and the purchasing entity through the Public Procurement Department at the Ministry of Finance.

Under the PPL, a bidder may lodge a complaint through the public procurement portal at any stage of the bidding. Complaints are also received at the Department's email address or in writing.

The Complaints Commission has a Secretariat whose function is performed by the authorized public procurement agency (PP Department). The PP Department entrusted this function to its complaints and sanctions unit. The unit does all the work in drafting the relevant documentation on each complaint to be submitted to the Complaints Commission for consideration, it also sends out invitations to the parties to the dispute (petitioner and purchasing entity) to the Complaints Commission meeting, notifying them that the Complaints Commission shall suspend the bidding process for 10 days. Then, within 7 days after the Complaint Commission has made its decision, it will prepare a substantiated resolution.

Under the Public Procurement Law, there can be no complaints against:

- Privileges offered to domestic suppliers (contractors) under Article 4 of the PPL, or
- Any decision taken by a purchasing entity in line with Article 31, paragraph 1, of the PPL, that is when the purchasing entity has withdrawn the public procurement procedure because there was no longer any need for procurement.

The outcome of the complaints procedure is published on the official public procurement web portal.

The following complaints statistics was provided by the Public Procurement Department of the Ministry of Finance.

**Table 16. Statistics of consideration of complaints on public procurement issues**

Year	Number of complaints and petitions demanding blacklisting of unreliable suppliers (contractors)						
	Lodged	Accepted as reasonable	Refused as unreasonable	Withdrawn	Commented on	Declined	Appealed in court
2015	403	No data	No data	No data	No data	No data	7
2016	1038	340	310	209	124	55	8
2017	1056	368	293	116	17	54	25

In 2016 – 2017, 310 and 368 decisions by purchasing entities were cancelled or recommended for appeal, respectively. The average statistical complaints review period was 7 days.

#### Violations in public procurement

There is data on administrative offences (unrelated to corruption) in public procurement that ended up in administrative sanctions. In 2015 – 2016 there were no administrative sanctions, and in 2017 the total of 67 million som of fines in 29 administrative cases were collected from purchasing entities for their violations of the public procurement legislation.

**Table 17. Statistics of criminal prosecution for public procurement offences**

	2015	2016	2017
According to the Anti-Corruption Service of the Kyrgyz State Committee for National Security, criminal actions initiated by their investigative units and other law enforcement bodies:	27	26	12
Criminal actions initiated by prosecution authorities	72	73	58
Criminal actions initiated by the Financial Police units	11	12	5

Note that there are no statistics collected on this category of offences, including those tried by courts, and criminal prosecution of this type of offences may be conducted jointly with other types of official misconduct.

#### Disqualification

In line with the PPL, suppliers (contractors) blacklisted as unreliable (bad faith) suppliers (contractors) may not be allowed to bid, excluding also those where founders or members of the governing bodies of such supplier (contractor) are affiliated with the purchasing entities.

The purchasing entity shall initiate blacklisting of unreliable suppliers (contractors) in the event that the manager or founder of the supplier's (contractor's) company has been sued in court for fraud, corruption or conspiracy.

The Provisions for the terms of reference of the independent interdepartmental commission on complaints against actions or inaction of purchasing entities, and blacklisting of unreliable public procurement suppliers (contractors) in a database (approved with the order of the Ministry of Finance of 11.10.2017) stipulates among other things the blacklisting procedure whereby unreliable and bad faith suppliers (contractors) in public procurement are put into a relevant database.

In 2015 - 2017 blacklisted as unreliable (bad faith) suppliers (contractors) were 18, 26 and 68 suppliers and contractors, respectively for each year. In the same period, 1, 2 and 2 suppliers appealed successfully against the disqualification to the independent interdepartmental commission. The black list is published on the official public procurement web portal of the Kyrgyz Republic at <http://zakupki.gov.kg>.

#### Institution and capacity building at the Public Procurement Department

Order of the Ministry of Finance dated 19.12.2016 approved a new staff list of 22 for the Public Procurement Department.

The multilateral donor trust fund's project for capacity building in public finance assisted in reforming the public procurement system, helping to develop and promote the new PPL, offered large-scale training across the entire republic and foreign study trips for the Department's staff and other stakeholders.

As part of the state commissioning training for public and municipal servants by the State Personnel Service, staff at the PP Department underwent training on anti-corruption, human resources management, etc.

#### Professionalization of public procurement

The Ministry of Finance's Training Centre offers a regular 5-day training course on managing public procurement of goods, works and services, with relevant certificates. Also, the centre can offer a 2-week upgrading course. They also hold trainings for bodies of local self-government and for business community. The centre has the right to charge a fee for the training. It was accredited with the Ministry of Education. Although the centre has two branches in the cities of Osh and Dzhalsal-Abada to meet the demand for public procurement training, it still needs additional capacity and a training network covering all of the country to address issues of e-procurement and remote education.

In May 2016, the Training Centre launched a new online course on public procurement. This online course is designed to contribute to capacity building in public procurement with the help of innovative learning tools. Its objective is to provide procurement specialists and business community with the extensive knowledge from legal requirements to best practices in public procurement. The course also covers planning and bidding procedures in line with the national public procurement process, and offer video lessons on: "How to make use of the public procurement web portal". The online version of this course is available at the training Centre's website.

To enhance public procurement, the Training Centre of the Ministry of Finance conducts trainings for officers of purchasing entities and other participants in the public procurement system (suppliers and contractors).

Between 2015 and 2017, 6,707, 3,755 and 2,287 people underwent training, respectively for each year.

Currently, the Training Centre has to conduct training for all procurement organizations on the procedure for registering budgetary obligations on the public procurement portal when integrating it with the automated system “1S. Treasury. Budget”.

## **Analysis**

Following from the information above, since the outcomes of the third round of monitoring by the Istanbul Action Plan were approved in 2015, Kyrgyzstan has been working intensely to reform the public procurement system.

Radical amendments to the legislation and introduction of electronic bidding for public procurement are a major accomplishment in mitigating corruption risks in public procurement owing to much stronger control and monitoring throughout.

Nevertheless, oversight and law enforcement bodies continue to detect corruption and other offences relating to public procurement. Journalists report about low efficiency in public procurement and potential corrupt schemes. The involvement of companies in tenders, particularly at the regional level, is not high.

To promote further unbiased oversight in public expenditure and procurement the government should enable higher involvement of civil society in the process, increase the amount of disclosures at all stages of procurement through further development of e-bidding and higher reliance on various e-government initiatives.

The dialogue with the private sector and entrepreneurs should be intensified to attract more companies to public procurement, offering them assistance in training sessions and training materials, and providing them with clarifications. A positive development was the adoption of the Integrity Charter (Kyrgyzstan business against corruption) which was already signed by 23 out of 63 entities listed with Kyrgyzstan’s Chamber of Commerce. It is recommended to extend the Charter membership to small and medium businesses and other companies present in public procurement.

Despite a wide range of implementing acts adopted for public procurement, some more provisions need to be developed to support the emerging system and improve efficiency of procurement procedures.

More efforts are needed to increase the share of competitive contracting procedures in the total public procurement.

The analysis of the situation suggests that Kyrgyzstan has substantially complied with the obligations undertaken under all five recommendations for public procurement reform detailed in the Report on the Third Round of Monitoring.

Major changes in the legislative regulation of public procurement in Kyrgyzstan have impacted the parameters for the assessment of the situation compared to the previous rounds.

During the country visit and following some additional research, the following new issues have been identified:

- 1) Kyrgyzstan should continue its successful work on reforming public procurement so that the stability of the system is ensured, only the online platform is used by all customers in the state and municipal sectors; competition is enhanced, and complete openness and publication of data in open data format (OCDS) is achieved, together with its in-depth analysis.
- 2) Kyrgyzstan is advised to complete the procedure for the signing of the WTO Agreement on Public Procurement.
- 3) There is a need to refine further provisions of the Public Procurement Law bearing on (a) planning, amplifying it with the requirement that the mode of procurement is indicated, (b) appeals against planned procurement and its proposed procedures, allowing potential bidders and public to appeal, and (c) on direct contracting, extending the deadline for the customers' notification about their intent to use direct contracting: this would allow market players and the public to identify improper contracting attempts and move them into competitive bidding.
- 4) The interdepartmental complaints commission should be involved in reviewing complaints against the choice of the procurement mode, including direct contracts.
- 5) Public councils should do a better job as at the moment they are regarded by the market as inefficient.
- 6) For a steady development of the infrastructure and further promotion of the procurement system in general, there should be a three-year procurement planning (or a similar mid-term horizon). Limiting planning to one year is conducive to nepotism, unfair commercial benefits or direct contracting for fairly large amounts. With mid-term planning, and a possibility to hold tenders for contracts that will take more than one year in implementation, or conduct bidding at any time during the year would remove excessive pressure from the customers in terms of the procedural deadlines.  
  
Mid-term planning would allow avoiding peaks of purchasing in November-December every year, as it happens now: it increases, in turn, risks of nepotism and contracting the earlier selected bidder irrespective of the bidding process.
- 7) It is important to consider introducing standard and well-balanced pro forma contracts based on internationally recognized terms and conditions. The current practices in contracting, particularly in supplies and construction, fail to ensure fair and balanced distribution of risks among the parties, creating fertile ground for corruption at the time of implementation, including such aspects as payments, acceptance of work done and imposition of fines and penalties.
- 8) For further improvements in the application of anti-corruption standards, it is advised considering introducing certification of state and municipal companies under anti-corruption standard ISO 37001.
- 9) To raise awareness of the market and promote active involvement of the public sector in the prevention and countering corruption, the membership in the Integrity Charter (Kyrgyzstan Business against Corruption) should be expanded considerably.

Overall, the conclusion is that Kyrgyzstan is **largely compliant** with the previous **Recommendation 21**.

#### **New recommendation No. 34**

**1. Continue reforming the public procurement system in order to ensure its stability, ensure that only the electronic procurement system is used by all procuring organisations in the state and municipal sectors, to increase competition, secure complete openness and publication of information in the open data standard together with an in-depth analysis of the data. For that**

**purpose, in particular, amendments should be made in the Public Procurement Law as regards the planning, appeals in the procurement, and direct contracting.**

**2. Complete the procedure of Kyrgyzstan's accession to the WTO Agreement on Public Procurement.**

**3. Ensure that an independent review body consider complaints and protests against the choice of the procurement method, including direct contracting.**

**4. Introduce mid-term planning in the public procurement system.**

**5. Consider introducing standard balanced contracting procedures based on internationally accepted contracting terms and conditions.**

**6. Expand considerably the scope of members of the Integrity Charter ("Kyrgyzstan's Business Against Corruption").**

## 2.6. Business integrity

### **Recommendation No. 26<sup>69</sup> of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**Strengthen dialogue with the business sector with the aim to increase its awareness about risks of corruption and about practical measures to address corruption in private sector, including through promotion and application of compliance programmes with due attention to international standards and practice.**

Corruption remains a serious risk for Kyrgyzstan business. According to the Ministry of Economy, in 2013, 39% of the economy was outside the formal sectors (compare to 60% in 2006). The Chamber of Industry and Commerce conducts annual surveys of businesses, including small and medium. In 2017, 40% of those polled named corruption as the key challenge for the country's business, and in 2018 the respective figure was 35%, thus no significant change has been achieved in the recent years.

The government has taken numerous and not infrequently unconnected steps to improve the business environment. These measures are to streamline regulation and migrate to e-services, limit the frequency of inspections and other forms of business oversight. The goal of the national project Taza koom is to eradicate corruption by minimizing the human factor involvement while communicating with the state bureaucracy, making administrative process and procedures automatic, and offering government services online. Between 2012 - 2017 there has been the following progress:

- simplified inspection procedures: the Government introduced criteria for determining the degree of risk of the objects on the basis of which the regulatory authorities determine the frequency of their inspections; the time for conducting inspections for legal entities was reduced from 30 to 15 working days, for small businesses – up to 5 working days; the number of the controlling state bodies was decreased from 21 to 10; registration of inspections in the prosecutor's office was introduced; the number of inspections was decreased by five times; information on inspections is published on the website [www.proverka.kr](http://www.proverka.kr); new entrepreneurs are exempted from the inspections for three years; the inspections of entrepreneurs by the sanitary and epidemiological supervision were halved by two times; the controlling bodies are not entitled to conduct unscheduled inspections without supporting information and materials;
- the number of permits and licences was reduced from 586 in 2012 to 98 in 2018; permits and licences are not permanent and they can only be withdrawn by court; consideration is being given to moving some of the functions in licensing to self-regulation;
- statutory regulation has been simplified. Only two procedures are needed to have a business registered; supported by the EBRD, there are plans to introduce e-registration by 2020;
- as part of the regulative reform aimed at the systemic analysis of regulation conducted with the OSCE support, it has been proposed that 193 legal acts be abolished and another 201 legal acts amended. The cumulative economic effect from these recommendations may help save up to 1334.5 million soms and free about 4713.9 hours for entrepreneurs;
- for small and medium businesses, tax payment and reporting deadlines have been changed to quarterly;
- a simplified and free electronic tax reporting through the Tax Service website has been introduced, requiring no electronic signature.

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<sup>69</sup> This recommendation was by mistake numbered as No. 25 in the previous monitoring report.

Kyrgyzstan has a number of forums for the dialogue between government authorities and the private sector. To mention a few, the Business and Entrepreneurship Council works at the Parliament, the Business Development and Investments Council works with the Prime-Minister; there is a working group established at the Security Council, and there are two platforms at the Ministry of Economy: the anti-corruption forum for businesses, and the Coordination Council for Interaction with the Business Community. Apart from that, there are held various regular meetings and consultations too.

These groups operate at various degrees of activism depending on the interest and openness of the leadership at the head of relevant authorities. As confirmed by business representatives, these forums seem to offer a good opportunity for businesses to defend their interests in the context of government decision-making. For instance, the government recently moved again to classify some of their regulations, but business opposed it very vigorously and successfully. It is not clear how these various venues coordinate between each other and how efficient they are in tackling such systemic issues in anti-corruption as lack of stability in legislation, authorities interfering with business, “protection racketeering” of businesses and smuggling, harassment of business, etc.

The information disclosure legislation requires large private and all state-owned businesses to publish their financial statements. Among state-owned enterprises, only one large business, Kumtor, does publish annual financial statements, many joint-stock companies and private financial institutions (banks) also disclose annual financial information on their websites. Kumtor is also the only state-owned enterprise that publishes non-financial reports that may be relevant to anti-corruption policies. There is still no requirement in place to disclose beneficial owners, directors or auditors. The statutory register of legal entities offers information only about the founders, and this register is accessible online in the Ministry of Justice’s database (<http://register.minjust.gov.kg/>). However, it should be noted that since 2016 the new EITI requirements envisage disclosure of information about beneficial owners, board members and audit committees from subsoil users.

Subsidiaries of large international corporations have been implementing internal compliance systems required by their respective headquarters. But businesses were telling us that they were not too keen to talk too much about these programmes as they may provoke unwanted questions from state authorities. A number of trainings for the business community were held in Bishkek and Osh organized jointly by the national alliance of business associations and the anti-corruption unit of the Administration of the Government of the Kyrgyz Republic. According to business representatives, these events failed to draw much interest, particularly on part of the mass media. To encourage the introduction of compliance programmes, the Government is considering setting up “green corridors” in the customs, in registration, at the tax service and in the public procurement system. However, it has not progressed much beyond general plans.

Three years ago, an anti-bribery initiative was proposed jointly by Kyrgyzstan businesses. It was formalized in a Charter on integrity “Business of Kyrgyzstan against corruption”, which to date was signed by 23 organizations that are members of the Chamber of Commerce and Industry. Regrettably, according to the representatives of business with whom the monitoring group met, after a while that initiative came to nought.

#### State-owned enterprises

In Kyrgyzstan, there are 98 state-owned enterprises and 37 joint-stock companies with state participation. In 2017 the assets of the state-owned enterprises amounted to 14,138.8 million soms, and the total annual income for 2017 was 11,125.7 million soms, while the net profit amounted to 922.3 million soms. The total income of joint-stock companies with state participation amounted to 6.8% in the country’s GDP for 2017, without taking into account the largest state-owned enterprise of Kyrgyzstan *Kumtor*, whose share is 17%.

The state-owned enterprises operate in the following areas: 10 – in the transport sector; 7 – in the sphere of communication and innovative technologies; 21 – in the field of agriculture and fisheries (breeding plants, varietal areas, seed farms and fish farms); 11 – in the industry and construction; 7 – in the system of state geology; 17 – in the sphere of trade and provision of various services; 5 – in the field of resort and sanatorium services, and there are 20 other state-owned enterprises.

The State Property Management Fund at the Government is the governing body for joint-stock companies with state participation. In order to ensure the transparency and accountability of financial and business activities, as well as the development of corporate governance, the Fund is currently working on the development of proposals for the Ministry of Economy on the reorganization of seven state-owned enterprises into joint-stock companies.

The State Property Fund of the Government is the managing authority for joint-stock companies with a state equity. In order to implement compliance systems at SOEs, the Fund supported by the energy holding has developed Anti-Corruption Provisions, whereby all state equity businesses should adopt a uniform internal anti-corruption policy document consisting of:

- Notions and definitions of the Anti-Corruption Policy;
- Goals, measures and objective as well as principles of the Anti-Corruption Policy;
- Scope of the Anti-Corruption Policy and the extent of persons governed by it;
- Legal advocacy and basic awareness of the law-abiding behaviour among employees in the state-equity businesses;
- Areas of the Anti-Corruption Policy;
- Corruption prevention and anti-corruption duties of the employees;
- Liability;
- Analysis of the adoption, implementation and review of the Anti-Corruption Policy.

The document stipulates that the state-equity company should retain independent external auditors, and make them report any signs of corruption they identify through their audit.

The 100% state-owned enterprises will be audited by the Audit Chamber. In addition, the Audit Chamber audits enterprises and organizations with private and other forms of ownership, in which there is 51 percent or more of state and / or municipal participation.

The Anti-Corruption Corporate Policy places an obligation on employees at state-equity companies to inform the respective company's anti-corruption units about instances of corruption; employees at state-equity companies are to be advised and trained in various issues of anti-corruption and prevention. To have the Anti-Corruption Policy document introduced, proposals were made for such document to be approved at the general meeting of shareholders. According to the information provided by the government, the Anti-Corruption Policy document was implemented at 15 companies, but there are no other details as to how it might have impacted their operations or prevention of corruption.

In line with the resolution of the Government of 19.12.2014, No 716, "On new principles for establishing and using the candidates pool to fill in positions of the members of the board of directors, audit commissions and corporate secretaries at state-equity companies", nominees for the positions shall be

introduced by the Fund as advised by the interdepartmental candidate pool commission. The Fund has drafted a resolution by the Government on candidate pool procedures whereby the candidates shall be expected to have prior experience of executive management and no criminal record for office or white-collar crime. The document is still being finalized and is yet to be implemented in practice. However, the Fund has already launched a competitive procedure to create a qualified pool of candidates.

The rights, duties and responsibilities of state representatives at board level shall be set on an individual basis and spelled out in the contract between the managing state authority, the Fund and the state representative. Salaries for the directors at state-equity joint-stock companies are set by the general meeting. Salaries for the executive management are established by the Board of Directors. Employees of state-equity joint-stock companies are not civil servants. However, pursuant to Article 6 of the Kyrgyz Law On Conflict of Interest, employees at state-equity joint-stock companies are subject to the rules on prevention of conflict of interest, including the requirement to submit an income declaration.

#### Business ombudsman

There is no single, centralized channel to lodge complaints against government authorities. Complaints have to be sent to the agencies against which one is filing a complaint, or to the superior authority. It is in the same way that business may contribute to the discussion of regulatory acts – at each separate agency.

Back in 2014 the Bishkek Business Club raised the need to set up an institution of business ombudsman in the Kyrgyz Republic. With this in mind, the Ministry of Economy drafted a resolution of the Government “On the authorized officer for the protection of business” which was submitted on 31.10.2014 to the Office of the Government for review. However, the project was never implemented.

In April 2017 the Kyrgyz delegation visited Ukraine for a study trip to learn about the institution of business ombudsman. As the Ukrainian experience suggests, this institution is a good tool for safeguarding the rights of entrepreneurs. Also, representatives from Kyrgyzstan learned from the experience of other countries with business ombudsmen. Following from that, the Ministry of Economy proposed establishing in the Kyrgyz Republic an institution for the protection of the rights of entrepreneurs, a business ombudsman. However, the government has not made any decision, as yet, as to whether there are funds to finance such a body, and proposed that the Chamber of Industry and Commerce foots the bill.

#### Conclusions

The government and private sector in Kyrgyzstan maintain a fairly active dialogue on issues of corruption risks and ways to address corruption. However, numerous dialogue forums are unconnected, and their success often depends on the degree of openness of individual top officials. There have been a number of improvements in the business environment in terms of inspections and e-government but many systemic issues remain outstanding because of frequent reshuffles among the country’s leadership and unstable legislation. Compliance programmes have not become popular as yet, and the institution of the business ombudsman is yet to gain the necessary political and financial support in the government. Initial steps have been made to improve anti-corruption at SOEs. Disclosure requirements are still quite weak and need to be revised and consolidated considerably.

**Kyrgyzstan is largely compliant with the previous recommendation 26.**

#### **New recommendation No. 35**

**1. Take into account surveys and proposals of the Chamber of Industry and Commerce as well as dialogue business forums while drafting and monitoring anti-corruption policies.**

- 2. Ensure centralized collection and publication of data on beneficial owners of legal entities, conduct regular random verification of such data with the possibility of imposing sanctions for the non-submission or submission of inaccurate information. Introduce requirements for the disclosure of members of the board and the audit committee, as well as publication of information about compliance systems at the private and state-owned enterprises.**
- 3. Include in the new anti-corruption plan measures supporting and monitoring the implementation of anti-corruption plans at public companies, including consideration of the possibility of certification of such companies based on the anti-corruption standard ISO 37001.**
- 4. Establish the institution of business ombudsman to protect legitimate interests of business, handle complaints against state authorities and prepare systemic proposals on mitigating business risks and improving the business environment.**
- 5. Take measures to encourage the implementation of the ISO 37001 standard and other voluntary certification anti-corruption programmes in the private sector.**

## **Chapter 3. Criminal liability for corruption and its enforcement**

### **3.1. Criminal legislation on liability for corruption**

**Recommendation No 6 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

- 1. Harmonize the Criminal Code, the Law on Countering Corruption, the Code of Administrative Offences and other legislative acts in the anti-corruption area on the basis of their detailed comparative analysis.**
- 2. Revise the Law on Countering Corruption by regulating its provisions and ensuring the possibility of its implementation and consistency with other laws.**
- 3. Establish criminal liability for all of the elements of corruption-related crimes (both in the public and private sector) in accordance with international standards, including for offering and promise, demand for and acceptance of offering or promise of bribe, use of intermediaries, obtaining of advantages by third parties, undue advantage in an intangible form, an autonomous and integral notion of “public official”**
- 4. Provide for, within the Criminal Code, liability for trade in influence, revise the wording of offences related to malfeasance (abuse) in office to ensure that they are not overly broad in violation of the legal certainty requirements, and abrogate liability for “corruption”**
- 5. Incorporate in law liability of legal entities for corruption offences, with proportionate sanctions, and ensure their implementation.**
- 6. Revise provisions on effective regret to ensure their consistency with the international standards.**

### **Legislative reform, Law on Countering Corruption**

A new **Criminal Code** (CC) of the Kyrgyz Republic was adopted in February 2017 (to become effective from 1 January 2019). Chapter 44 (corruption and other offences against the interests of state and municipal service) of the Code provides for criminal liability for the abuse of office, excess of power, unlawful enrichment, bribe taking, intermediation in bribery, promise or offer of intermediation in bribery, etc. The wording of the abuse and excess of power offences was revised. The definition was given of the terms “official”, “an official occupying a position of responsibility”, “a foreign public official” and “an official of a public international organisation”. The new code has introduced the institution of the liability of legal entities. Also, it has revised procedures applicable to confiscation of property and proceeds obtained through corruption offence (confiscation is treated not as a punishment but as a criminal enforcement measure to be used for all corruption offences, and not just those where it is used as punishment under the effective KR CC).

Developing the new Criminal Code of the Kyrgyz Republic, the key focus was on humanization of justice, abandonment of repressive penal measures, development and implementation of new measures of enforcement against convicts designed to help their resocialisation.

On 1 January 2019 the new **Criminal Procedure Code (CPC)** of the Kyrgyz Republic, adopted on 2 February 2017, will also come into effect. The key changes were:

- revisions in the stage pertaining to the initiation of a criminal action which, within the pre-trial procedure, starts from the time when the application (report) of the crime or minor offence has been registered in a single register. Any procedural actions can only start after the criminal process on the case is initiated. All petitions and reports on criminal offence and minor offence are registered in the Uniform Register of crimes and minor offence (an electronic database that records information about the institution of the pre-trial process, procedural actions, movement of materials and criminal and/or offences files, applicants and parties to the criminal process);

- giving the operative and investigative actions conducted in the course of criminal case investigation a procedural form. There is a separate KR CPC chapter on special investigative actions which are a separate class of investigative actions where neither the fact of such actions nor their method is to be disclosed. Among other things, the simulation of criminal activity is regulated;

- introducing the institution of “procedural agreements”: plea bargaining; procedural cooperation; agreement on the reconciliation of the parties.

The 2012 **Law of the Kyrgyz Republic “On Countering Corruption”** introduced some changes, which, among others, are as follows:

- a ban on bidding in tenders financed by republican and local budgets by companies, whose founders or shareholders, or close relatives thereof, occupy political state, political municipal positions or positions in prosecution authorities or other law enforcement agencies;

- the law stipulates, as grounds for removal from office and dismissal of a person occupying a position in the public or municipal service which is included in the list regulated by KR normative legal acts, or grounds for other legal sanctions, the failure to declare or making intentionally inaccurate or incomplete declaration pursuant to the KR legislation;

- the principle whereby the state shall protect a public or municipal servant who became a whistle-blower reporting corruption to the employer or law enforcement bodies.

The law of 28.07.2015, No 200, introduced amendments to the **Administrative Code** which was amplified with a new chapter 35-3: Administrative offences against the legislation countering legalisation (laundering) of criminal proceeds and terrorism or extremism financing; it introduces a liability for legal entities for taking part in legalisation (laundering) of criminal proceeds or in corrupt acts (Art. 505-22 of the Code).

The previous monitoring reports on Kyrgyzstan pointed out that the Law on Countering Corruption lacked efficiency, was declarative and failed to provide for a clear mechanism for its application. The key deficiency of the new law is that it lacks an enforcement mechanism. The law remains declarative.

Pursuant to Art. 1 of the law, corruption is defined as malicious acts whereby one or more officials vested with powers unlawfully establish a firm connection with individual persons or groups thereof for a purpose of obtaining illegally tangible or other benefits or advantages, or else being granted such benefits or advantages by individuals or legal entities, posing a threat to the society or state. This definition is identical to the elements of the “corruption” crime as defined under Article 303 of the 1997 CC. The above definition is fairly narrow and fails to reflect the generally accepted notion of corruption which does not have to have any firm connection. As a result, formally, the entire Law on Countering Corruption is aimed at fighting only one dimension of this phenomenon and fails to cover prevention and countering the entire spectrum of corrupt and corruption-related offences.

As the previous report pointed out, apart from corruption, the Law on Countering Corruption defines also such terms as corruption offences (Articles 4, 5, 6, 9, 11, 15, 16) and offences conducive to corruption (Art. 14). And whilst the law defines corruption and offences leading to corruption, the notion of corruption offence is not defined at all, although it is the most widely used term in this law. As a result, the correlation between these three terms is unclear, nor is it clear whether they imply each other, mutually exclude each other or complement each other.

Article 14 of the Law on Countering Corruption has a list of offences conducive to corruption and the liability for them. It is unclear how these provisions are applied in practice since relevant provisions on such liability have not yet been introduced in law. Article 14, paragraph 2, states that “commission by public or municipal servants of any of the offences listed in paragraph above, unless it contains elements of criminal offence, shall lead to imposition of disciplinary penalties, including dismissal from the position held followed by discharge from the public or municipal service.” However, the Administrative Code does not provide for any corruption offences.

Note also that in 2017 two comprehensive laws were adopted in preventing and countering corruption: “On declaring income, expenses, obligations and property by persons standing for or holding public or municipal offices” and “On conflict of interest”. In this connection, the question is whether there is any need for the Law on Countering Corruption. Should it be retained, it needs to be radically revised, to remove its declarative nature.

Experts also note that some of the elements of crime that could be defined as corruption-related, were excluded from the Criminal Code and moved to the new **KR Code of Offences** (adopted in February 2017 to come into effect from 1 January 2019). This code criminalises minor offences, i.e. crimes that inflict lesser injury to an individual, society or state compared to proper crimes. Overall this segregation of criminal offences into two types is a welcome development, allowing criminalisation of some offences which while they were used to be treated as administrative, were no such thing. However, experts cannot accept that classified as minor offence are such corruption crimes as:

- bribery of an athlete, sport arbiter, coach, team manager or any other participant in or organiser of a professional sports event, or else organiser or jury member of a commercial competition show, for a purpose of influencing the outcome of such competition or contest (Art. 109 of the Code of Offences);
- abuse of powers in a commercial or other organisation, including by an official or a state-owned or municipal enterprise or business with a state or municipal equity (Art. 113 of the Code of Offences);
- bribery of parties to the criminal process (Art. 164 the Code of Offences).

The maximum penalty for such minor offences is a class II fine (300-600 calculation index units, i.e. 30,000 – 60,000 som, or circa Euro 350-700). The statute of limitations for these offences is set at 2 years. The person that committed a minor offence shall be discharged from the liability, at the request of the victim, provided such person has paid compensation for the damage or rectified the injury done and has been reconciled with the victim. This and other provisions in the Code of Offences deprive the liability for such offences of its efficiency.

Thus, **paragraphs 1-2 of the previous recommendation 6 were partially implemented (harmonisation of the acts)**. See the new recommendation below.

### **Elements of the bribery offences**

#### **Promise, offer, solicitation, acceptance of promise/offer**

Pursuant to the definition in Art. 314 of the 1997 KR CC (bribe giving), giving an official, a foreign official or an official of an international organisation, personally or through intermediaries, a bribe in the form of cash, securities or other assets or benefits, tangible or intangible, intended for this official or another individual or legal entity, for this official to commit some action or inaction while performing his or her official duties.

Bribe giving is a “formal” *corpus delicti* that does not require socially dangerous consequence for the act to be completed. Bribe giving is deemed completed from the moment when the official accepts at least some of the valuables, if the bribe is given in instalments. Leaving, say, cash in an envelope on the table of the official or somewhere else in his office, which he does not accept, is deemed an attempted bribe-giving. To have the elements of the crime present as stipulated by Art. 314 of the Kyrgyz CC, there is no need to prove that the bribe has influenced the official.

Therefore, an oral offer or promise of the bribe does not constitute the crime as defined.

Pursuant to Art. 313-1 of the 1997 CC (Bribe taking), it is illegal for an official, foreign official or an official of an international organisation to take, personally or through an intermediary, a bribe in the form of cash, securities or other assets or benefits, tangible or intangible, in exchange for actions (inaction) in favour of the bribe giver or persons such bribe giver may represent, provided such actions (inaction) are part of such official’s formal duties, or else provided such official, by virtue of his office, may facilitate such actions (inaction), or else in exchange for general patronage or connivance in the office.

The Criminal Code of the Kyrgyz Republic criminalises extortion of a bribe in exchange for having a public servant make a decision, either lawful or unlawful, or take action (inaction) in the interests of the bribe giver. So, if a public procurement bidder, even the most likely to be the best and win the tender, gives a bribe, it is an offence under any circumstances.

So, the 1997 KR CC failed to criminalise a promise, offer, solicitation or acceptance of a promise/offer of a bribe.

At the same time, the Plenary Assembly of the KR Supreme Court issued a resolution “On the application by local courts in the Kyrgyz Republic of legislation criminalising office-related crimes” (No. 7 of 25 March 2016), stating that the expressed intention of a person to accept cash, security or other assets, or allow services to be used unlawfully, may not be qualified as attempted bribe taking where such person has taken no concrete steps to exercise the intention thus expressed.

The 2017 CC introduces liability for an offer or promise of a bribe and for the consent to accept one as autonomous completed crimes, which is a welcome change, because it is in line with the international standards and OECD ACN recommendations. However, with respect to passive bribery (bribe taking), Article 325 of the 2017 CC covers only acceptance of an offer of a bribe. The grammatical interpretation of Art. 325 does not allow a positive conclusion whether “consent to accept a bribe” also includes acceptance of an offer of a bribe. This conclusion is justified because Art. 328 of the CC (“Bribe giving”) provides for a liability for “the offer to accept or promise to give a bribe”. Comparing these two articles, one may conclude that “consent to accept” refers to the corresponding “offer to accept”. For disambiguation of Article 325 and full compliance with the international standards the wording in Article 325 should be extended and provide for a clear liability for the consent to accept an offer or promise of a bribe.

At the same time, the 2017 CC extends the newly criminalised offences only to bribery in the public sector. Article 237 of the CC (“Commercial bribery”) only talks about “unlawful handover” and “unlawful acceptance”, which is not in line with the standards.

## **Undue advantage**

The 1997 CC had no definition of the bribe, but articles on passive and active bribery talked about a bribe “in the form of cash, securities, other property or benefits of pecuniary nature”. In accordance with the resolution of the Plenary Assembly of the KR Supreme Court “On the application by local courts in the Kyrgyz Republic of legislation criminalising office-related crimes” (No. 7 of 25 March 2016), apart from cash, securities or other property, the object of the bribery may include benefits and services of a pecuniary nature only, rendered for free although payable (offers of tourist vouchers, flat refurbishment, summer house construction, etc.). The exception is Art. 314 of the 1997 CC which establishes liability for bribe giving in the form of non-pecuniary benefits.

The Kyrgyz Republic has not provided any examples of convictions in bribe giving cases where the bribe was in the form of non-pecuniary benefits.

In accordance with note 1 to Article 325 of the 2017 CC, the bribe in Articles 325-328 and 343 of the Code shall be deemed to be cash, securities, other property or pecuniary benefits given or taken for actions (inaction) in favour of the bribe giver or persons represented by such bribe giver. Thus, the 2017 CC has excluded from the offence “Extortion of the bribe” the element of the bribe being in the form of non-pecuniary benefit.

Such narrow understanding of the object of the bribe is short of international standards since it fails to include non-pecuniary benefits (i.e. benefits that do not represent any material objects nor are represented thereby, and the value of which may not be measured precisely) or non-monetary benefits (benefits which are not associated with money or do not consist of money).

The KR CC should be amended, establishing that the bribe may also come in the form of an intangible and non-pecuniary benefit.<sup>70</sup>

### **Directly or indirectly**

Similar to the 1997 CC, the new Criminal Code also establishes liability for accepting/giving a bribe “personally or through an intermediary”, which is in line with the standards. However, in both codes this element is missing from the offences of active and passive commercial bribery.

Besides, Article 328 of the 2017 CC (Bribe giving) only mentions the elements of the bribe offer and promise at the end of the article and it is unclear whether they are covered by the element “personally or through an intermediary”. During the country visit the practitioners from the Kyrgyz authorities and experts confirmed that the wording was ambiguous. It should be corrected in the code or clarified in the resolution by the Supreme Court.

In their answers to the questionnaire Kyrgyzstan noted that there were quite a few of cases involving alleged intermediaries or bribes given or taken in the interests of third parties, but unfortunately, in view of complexity of proving the implication of public officials in the interests of whom this remuneration was intended, these persons evaded liability. At the end, the charges are brought only against the arrested person, whose actions are qualified under another, less severe article of the Criminal Code. To give an example, on 10.04.2017 a certain E.M. was detained at the time when he collected a monetary remuneration in the interests of policemen A. and N. E.M. was arrested but during the investigation it proved impossible to find evidence of implication of policemen in this crime, and criminal charges against them were dropped, while E.M.’s acts were qualified as fraud; the charges were brought to the court, where the criminal action was dismissed due to reconciliation. The guilt of the public official where intermediaries are involved can only be proved when all parties to solicitation are detained in flagrante and with the bribe.

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<sup>70</sup> For a detailed reasoning and examples of various intangible and non-pecuniary benefits see the Summary Report on the Third Round of OECD ACN Monitoring, 2016, pp. 89-91, available at <https://bit.ly/2H1LBNr>.

Another example is the case where the district court tried a criminal case against E.A., whose defence lawyer solicited a bribe of USD 300 in favour of the judge and the public prosecutor. After the bribe was accepted, judge A.S., prosecutor's assistant B.Ch. and the lawyer were all detained, and when searched, they each had USD 100 on them. This case is being tried at the moment.

### **Third-party beneficiary**

Art. 313 (Extortion of the bribe) and Art. 314 (Bribe giving) of the 1997 CC incorporate an element of the bribe being intended for a third party (individual or legal entity), but it is not included in Art. 313-1 (Bribe taking). Kyrgyzstan failed to offer any examples of convictions for extortion of the bribe or bribe giving for third parties.

Art. 314 of the 1997 CC creates a liability for giving a bribe to an official, foreign official or a public official of an international organisation, personally or through an intermediary [...], for the official himself or another individual or legal entity, for this official to commit some action or inaction in office. A mandatory element of the objective aspect of this act (actus reus) is giving a bribe to an official while the bribe may be intended for a third party. This wording of Article 314 casts doubts on making it possible to charge the bribe giver wherever the bribe is handed over directly to a third person.

Although Article 313-1 (Bribe taking) of the 1997 CC does not provide for the possibility that the bribe be accepted for third parties, the resolution by the Plenary Assembly of the Kyrgyz Republic Supreme Court No. 7 of 25 March 2016 stated that where tangible benefits were granted to the official's next of kin with his consent, or where he did not object to this and used his official powers in favour of the bribe giver, actions of such official should be qualified as bribe taking. This covers in part the bribe taking in favour of third parties, however includes only a very narrow circle of parties. The definition of "in favour of third parties" is broader than "persons represented by him", hence the latter is not in line with the international standards.

Articles 325, 326 and 328 of the 2017 CC do not mention explicitly that the bribe may be intended for the bribe taker himself or for a third party thus narrowing the possibility of bringing criminal charges for handing over or soliciting a bribe.

This falls short of international standards requiring that relevant elements of the crime cover situations whereby undue advantage is meant not for the bribe taker personally but for a third party (an individual or a legal entity). The aim of this requirement is to cover situations where the official asks for an advantage for a relative of his, an associated political party, trade union, charity or company, when the bribe is going to a third party to which such official is in debt, etc.

To ensure full compliance with the standards, the text of the CC articles should state explicitly that the offence covers bribe taking in favour of any individuals or legal entities.

Additionally, Article 328 of the 2017 CC limits explicitly the beneficiary bribe taker, saying "for the official, a foreign official or an official of an international organisation himself". As a result, it will be impossible to broaden the notion of the beneficiary bribe taker through the interpretation by the Supreme Court.

Article 313-1 of the 1997 CC and Article 325 of the 2017 CC stipulate that the bribe may be given for "actions (inaction) in favour of the bribe taker or persons represented by him", however, this notion of third-party beneficiaries is different from what is required under international standards.<sup>71</sup>

### **National persons as a liable party**

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<sup>71</sup> See the Summary Report on the Third Round of the OECD ACN Monitoring, op. cit, p. 89.

Under Chapter 30 “Office-Related Crimes” of the 1997 CC, persons liable, among other things, for bribe giving and bribe taking shall be “officials”. According to the note to Article 304 of the CC, officials in the articles of Chapter 30 shall be deemed to be any person who is performing, on a permanent or temporary basis or by special authority, the function of a representative of the authority, or is carrying out management and administrative, administrative and economic, or controlling and audit functions at state authorities, bodies of the local self-government, at state and municipal institutions or in the Armed Forces of the Kyrgyz Republic or other army formations.

Another chapter of the code (Chapter 23 “Crimes against the interests of service at non-state enterprises or organisations”) has Article 225 “Unlawful taking of remuneration by an employee” which applies to employees who are not officials at a state authority, enterprise, institution, organisation, public association or a body of public self-government. There is no liability spelled out for giving remuneration to such persons.

Pursuant to Article 325 of the 2017 CC, the person liable for bribe taking is an “official” defined in the Appendix to the Code as follows:

“Officials are persons who are performing, permanently, temporarily or by special authority the functions of a representative of the authority, or carrying out management and administrative, administrative and economic, or controlling and audit functions at state authorities, bodies of the local self-government, at state and municipal institutions or in the Armed Forces of the Kyrgyz Republic or other army formations.

Management and administrative functions mean exercising powers in managing the subordinate persons.

Administrative and economic functions mean exercising of powers to manage and dispose of assets and cash.

Controlling and audit functions entail exercise of powers in conducting inspections, audits of individuals and legal entities...

The representative of authority is a person vested, according to the procedure stipulated in the law, with regulatory powers with respect to persons who are not in his subordination or departmental affiliation, or a person who is involved in the administration of justice as a juror.”

It follows from the above that the definition of the official is limited only to those employees of state authorities, bodies of local self-government, state or municipal institutions or the Armed Forces of the Kyrgyz Republic or other army formation that are vested with certain functions. This definition excludes those employees that perform ancillary or other functions not covered by those spelled out in the definition of officials (e.g., specialists, secretaries, typists, drivers, archive workers, workers at foster services or assistants).

This issue may be partly addressed with the elements of the offence “Unlawful taking of remuneration by an employee” (Art. 225 of the 1997 CC, Art. 238 of the 2017 CC), which provides for the liability for unlawful taking by an employee, who is not an official at the state authority, municipal service, state or municipal institution, of any remuneration in the form of cash, securities, other property or non-pecuniary benefits in considerable amounts, in exchange for performing or failing to perform, in the interests of the bribe giver, some action that the employee should or could perform using his office. However, to achieve legal certainty it would be important to define the “employee” in these articles, to make sure to cover all due categories of persons who perform work for (render services to) a state or non-state organisation.

As for its relevance for Article 225 of the 1997 CC, in its resolution No. 7 the Plenary Assembly of the KR Supreme Court noted that when the person liable for bribe taking is defined as a person who is not an official, his actions are subject to the qualification under Article 225 of the CC. It also noted in this resolution that “with

unlawful remuneration, material valuables are handed over, as a rule, to the party after the actions not covered by any prior agreement, as an alleged ‘gratitude for labours’’. As a result, this article cannot be applied to ‘remuneration’ given prior to the commission of actions, as standards would require. Besides, this liability is only for unlawful taking of remuneration ‘in considerable amount’, which is any remuneration exceeding 10 ‘calculation index units’.<sup>72</sup>

Neither the 1997 CC nor the 2017 CC provides for liability for bribing persons that are not officials at state authorities, bodies of local self-government, state or municipal institutions, because the article ‘Unlawful taking of remuneration by an employee’ in either of the codes apply only to taking an unlawful remuneration. This is serious gap in the criminalisation of corruption.

Hence, the liability of nationals is not fully covered as required by the international standards.

### **Bribery in the private sector**

Liability for bribery in the private sector is criminalised in the 2017 CC in two of its articles: Article 237 ‘Commercial bribery’ and Article 238 ‘Unlawful taking of remuneration by an employee’’. Similar articles are to be found in the 1997 Criminal Code (Articles 224 and 225).

Under Article 237 of the 2017 CC, the liability attaches to unlawful handover to a person performing managerial functions in the commercial or other organisation, of cash, securities, other property or to unlawful rendering of services of property nature in exchange for actions (inaction) in the interests of the giver and in connection with such person’s official position. The same article establishes liability of unlawful receiving, by a person performing managerial functions in the commercial or other organisation, of the property as mentioned above. The person performing managerial functions in the commercial or other organisation is understood as any person who is performing, permanently, temporarily or by special authority, managerial and administrative or administrative and economic duties in a commercial entity irrespective of its ownership type, or else in a non-commercial organisation which is not a state authority or a body of local self-government.

Article 238 of the 2017 CC provided for a liability for unlawful receiving by an employee, who is not an official in a state authority, municipal service, state or municipal institutions, of any remuneration in the form of cash, securities, other property or services of property nature in the considerable amount, in exchange for him performing or failing to perform, in the interests of the giver, a certain action which the employee should or could perform in his official capacity.

It follows from the wording of the article that it applies to the employees of state or municipal authorities or institutions despite the article being included in Chapter 23 of the 2017 CC, which covers corruption in the non-state (private) sector. As a result, parties liable under Article 238 of the 2017 CC will have to include public sector employees not covered by the definition of the public official. As noted in the report on the second round of monitoring of the Kyrgyz Republic, this article should be moved to Chapter 44 of the Criminal Code ‘Corruption and other offences against the interests of the state and municipal service’.

With regards of criminalisation of corruption in the private sector, compared to the 1997 CC, the new 2017 CC has not been amended to rectify non-compliance with international standards to which reports on the second and third monitoring rounds of the Kyrgyz Republic pointed to.

The following inconsistencies with the international standards in the criminalisation of bribery in the private sector can be highlighted (both regarding the new Criminal Code and the 1997 Criminal Code):

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<sup>72</sup> One calculation index unit equals 100 som (about Euro 1.18).

1) the respective offences do not cover such elements as offer/promise of a bribe, acceptance of the offer/promise of a bribe, solicitation of a bribe;

2) not covered are such elements as “personally or through an intermediary”, giving/taking a bribe in favour of a third party (see also above);

3) the scope of these offences extends only to property or services of property nature. However, under the resolution of the Plenary Assembly of the KR Supreme Court, No. 7, the remuneration, as a rule, is understood as valuables that are handed over after the commission of actions that have not been subject to a prior agreement. As a result, Article 238 may not cover giving “remuneration” prior to the commission of actions, thus effectively narrowing down the scope of liability under this article;

4) under Article 237 of the 2017 CC person liable extend only to “persons performing managerial functions in the commercial or other organisations”, whereas Article 238 applies to “servants”, whose definition is not provided in the code or explained by the Supreme Court’s resolution. Besides, Article 238 criminalises only the taking of remuneration. The international standards, in contrast, require extending liability for active and passive bribery to “any person who is the manager or employee (in any capacity) of a private legal entity”, which covers lower level employees and ancillary staff, as well as such persons as consultants and agents working for a private legal entity;

5) sanctions for the main offence in Article 237, paragraph 1, and sanctions under Article 238, paragraphs 1-2, of the CC do not seem sufficient, because their statute of limitations is less than 5 years. In addition, Article 238, paragraph 1, does not offer an imprisonment sanction, which means that Kyrgyzstan will not be able to comply with the extradition request under such offence because the applicable sanction is less than one year of imprisonment;<sup>73</sup>

6) in line with the note to Article 233 of the CC, in the event that the act qualified under any article of Chapter 34 “Offences against the interests of the service in commercial or other organisations” should cause damage to the interests of a commercial organisation only, which is neither a state or municipal enterprise nor a business with a state or municipal equity or interest in the charter capital, the criminal prosecution shall be instituted following the request of this organisation or with its consent. This provision is not in line with international standards that view corruption in the private sector as no less harmful to public interests than corruption in the public authorities.<sup>74</sup> It is therefore important that law enforcement agencies could be in a position to start a prosecution of bribery in the private sector on their own (without any complaint by the victim, or consent of the company, or any other restricting circumstances).

It should be noted that the effective Criminal Code of Kyrgyzstan has a separate article on bribery of participants and organisers of sports competitions and contest shows. This is a progressive provision extending

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<sup>73</sup> Under Article 519, paragraph 2, of the 2017 Criminal Procedure Code of the Kyrgyz Republic, the request to have a person extradited under the reciprocity principle shall be made provided under the legislation of the two states the act in connection with which the extradition request is being sent has been criminalised and its commission is punished with deprivation of liberty for at least one year or a more serious penalty, in the case of extradition for criminal prosecution, or if the persons has been sentenced for at least six month in prison, in the case of his extradition for serving the sentence.

<sup>74</sup> E.g., with respect to a similar provision in the Russian criminal law, GRECO found it problematic because such formal requirement may become an obstacle in the way of criminal prosecution, contrary to the spirit of the Convention of the Council of Europe. GRECO criticised similar provisions in the legislation of Austria, Italy and Switzerland. Source: GRECO (2012), Report of the third evaluation round of Russia, §61, <https://bit.ly/2M8UyHZ>; GRECO (2011), Report of the third evaluation round of Austria, §91, <https://bit.ly/2IQVvq6>; GRECO (2014), Compliance Report for Italy, Third Evaluation Round, §23, <https://bit.ly/2n779AN>; GRECO (2011), Report of the third evaluation round of Switzerland, §86-87, <https://bit.ly/2vxu9g7>.

to the bribery in the private sector that is not covered by the offence of commercial bribery or remuneration taking by an employee. Unfortunately, there is no such provision in the new Criminal Code, as it was moved instead to the new KR Code of Infringement (see above), a step back in the criminalisation of corruption in Kyrgyzstan.

Similar offences have been criminalized in other Istanbul Action Plan countries, e.g., in Armenia, Tajikistan, Ukraine. Importantly, in 2014 the Council of Europe adopted a new Convention on the manipulation of Sports Competitions which requires member countries to “criminally sanction manipulation of sports competitions when it involves either coercive, corrupt or fraudulent practices.”<sup>75</sup>

Enforcement practices. According to the information provided by Kyrgyzstan in response to the Fourth Monitoring Round Questionnaire, no criminal cases of alleged commercial bribery have been started or investigated.

### **Trading in influence**

Neither the 1997 nor the 2017 CC provides for a liability for trading in influence. Kyrgyzstan is thus non-compliant with the relevant part of recommendation No. 6.

During the country visit, practitioners from law enforcement agencies and judiciary as well as other experts from Kyrgyzstan confirmed that the so far criminalized corruption offences failed to cover trading in influence. This is a gap to be filled.

### **Abuse of office**

As was noted in the Third Monitoring Round Report, the offence qualified in Article 304, paragraph 1, of the 1997 CC, “abuse of office”, lacks one of the key elements – obtaining undue advantage. The offence qualified under Article 304, paragraph 1, “abuse of office”, almost mirrors offence in Article 305, paragraph 1, of the CC “exceeding official authority”, but the penalties differ, which may result in problems with qualification and provoke corruption. The difference between the two offences – abuse and excess – as in other Istanbul Action Plan countries - is that excess of official authority implies actions clearly beyond the official’s scope of authority. Such wording may raise questions in terms of compliance with the legal certainty requirement, as they can be interpreted broadly and inconsistently.

Also, the Plenary Assembly’s resolution by the Supreme Court No. 7, of 25 March 2016, in terms of differentiation of acts of abuse of office and excess of official authority (paragraph 12), only quotes the relevant articles of the 1997 Criminal Code. This fact points to potentially excessively vague legal interpretation of these articles in the Criminal Code of Kyrgyzstan. The report of the IAP second monitoring round noted that such vague wordings may as such be conducive to corruption as they allowed for broad discretion in the criminal prosecution.

This assessment remains partly true for the new Criminal Code as well, where Article 320 (“Abuse of office”) stipulates a liability for the official using his official position contrary to the interests of the service, inflicting significant harm, intentionally or unintentionally. The exhaustive list of possible manifestations of significant harm is provided in Appendix 1 to the 2017 CC. The aggravated offence stipulates a liability for the same act but committed for the purpose of gaining benefits or advantages for oneself or other persons, or out of other personal interest. Therefore, if the official has abused his powers to gain a benefit or advantage for himself or other persons, this act will not be criminally punishable in the absence of significant harm. At the same time, Article 321 of the 2017 Code (“Excess of authority”) establishes liability for the commission by an official or on

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<sup>75</sup> Council of Europe Convention on the Manipulation of Sports Competitions, CETS No 215, <https://bit.ly/2sBCBcw>.

his orders, with his knowledge or consent, of action (with the exception of torture) which clearly goes beyond his authority and is combined with violence that does not present danger to life or health, or threat thereof.

Abuse of functions or position as defined in the UN Convention against Corruption is performance of, or failure to perform an act, in violation of the law, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

As was noted in the Summary Report of the IAP Third Monitoring Round, contrary to the UNCAC offences of abuse of office (authority), the IAP countries, including Kyrgyzstan, include such element as inflicting considerable harm to the rights and legitimate interests of individuals or entities or else legitimate interests of the public and state. This element of “considerable harm”, which may have an intangible dimension, is defined in the codes only as far as tangible or monetary damage. Nor is there any clear link with undue advantage: abuse of authority as an offence is considered completed if it pursues private interests or interests of other persons. These additional elements narrow down the offence as it is described in the UNCAC and raise an issue of legal certainty.<sup>76</sup>

An element of legal uncertainty vis-à-vis the scope of the offence “Abuse of authority” has been retained in the 2017 Code as well. The largest concern about legal uncertainty is caused by Appendix 1 to the 2017 CC and its criteria of considerable harm: “violation of constitutional human rights and civil liberties” and also “other consequences, clearly pointing to the considerable extent of the harm done, even if they are not spelled in the law as grievous or particularly grievous harm.”

What is special for the IAP countries is that, apart from the offence of abuse of authority, their legislation has a separate offence – excess of official authority. In the IAP countries’ legislation elements of the latter offence contain the same condition as in the abuse of office (“inflicting considerable harm to the rights and legitimate interests of individuals and entities or else legitimate interests of the public and state”) and one other element, namely, that the actions in question should clearly go beyond the scope of authority of this official. These two elements may also give rise to questions as to the compliance with the legal certainty principle, as both can be interpreted broadly and inconsistently. At the same time, in Kyrgyzstan the offence “Excess of authority” has been narrowed down in the new Criminal Code (compared to the 1997 CC) and requires the mandatory element of “use of violence, posing no danger to life or health, or a threat thereof”.

It is important to note that it is exactly under Articles 304 and 305 of the 1997 CC that most of the corruption cases had been investigated between 2015-2017 (see statistics in the appendix to the Russian version of the report).

### **Illicit enrichment**

Article 308-1 of the 1997 Criminal Code established a liability for illicit enrichment, namely, a considerable increase in the official’s assets that exceeds his legitimate income, for which the official cannot reasonably account. Here, the considerable increase in assets is deemed to be an amount in cash, value of securities or other property or benefits of property or non-property nature, that exceeds 3,000 times the calculation index unit as stipulated by the legislation of the Kyrgyz Republic at the time of the commission of crime.

In the new Criminal Code, the wording of this offence was revised. Under Article 323 of the 2017 CC, the illicit enrichment shall be acquisition by the official in ownership (use) of assets whose value exceeds his

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<sup>76</sup> State of Implementation of the United Nations Convention against Corruption, p. 44, see <https://bit.ly/2JcTbXh>.

official income confirmed by legitimate sources for two full years, or a transfer of such assets to close relatives.

1997 CC	2017 CC
<p>Article 308-1. Illicit enrichment</p> <p>(1) A considerable increase in the official's assets that exceeds his or her legitimate income, for which the official cannot reasonably account, - shall be punishable with imprisonment for a period from three to five years.</p> <p>(2) The same act committed:</p> <ol style="list-style-type: none"> <li>1) in a large amount;</li> <li>2) by an official holding a position of responsibility, - shall be punishable with imprisonment for a period from six to eight years with confiscation of assets.</li> </ol> <p>Note. The considerable increase in assets here shall be an amount in cash, value of securities or other assets or benefits, tangible or intangible, that exceeds three thousand times the calculation index unit as stipulated by the legislation of the Kyrgyz Republic at the time of the commission of crime.</p> <p>The act defined in this article shall be deemed completed in a large amount provided the amount of cash, value of securities or other assets or benefits, tangible or intangible, exceeds five thousand times the calculation index unit stipulated by the legislation of the Kyrgyz Republic at the time of the commission of crime.</p>	<p>Article 323. Illicit enrichment</p> <p>1. Acquisition by the official in ownership (use) of assets whose value exceeds his or her official income confirmed by legitimate sources for two full years, or a transfer of such assets to close relatives , - shall be punishable with a class VI fine or class II imprisonment, with disqualification from holding specific posts or engage in specific activities for the period of up to two years, with a class II fine.</p> <p>2. The same acts:</p> <ol style="list-style-type: none"> <li>1) if committed by an official holding a position of responsibility;</li> <li>2) where the value of assets exceeds official income of the official as supported by legitimate sources for five full years, - shall be punishable with class III imprisonment with disqualification from holding specific posts or being engaged in specific activities for the term of up to three years with a class III fine.</li> </ol>

Importantly, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic reviewed the constitutionality of Article 308-1 of the CC and deemed it compliant with the KR Constitution. At the same time, the Constitutional Chamber pointed out that for a clear understanding of the objective side of this offence, the legislator should improve the definitions in Article 308-1 of the CC. This might have been the reason for the revised article in the new criminal code.

Overall, although the new wording may be different from the definition of this offence under the UNCAC, it can be deemed acceptable as it retains the essence of this offence and has been worded in such a way as not to give rise to questions over constitutional safeguards to a presumption of innocence, freedom from self-incrimination, fair trial and others.<sup>77</sup> Another positive step is that in the new article the acquisition of assets is inclusive of an acquisition in use, as opposed to only in ownership: this is an example of the best practice.

Another positive development is that the new version includes also an element of transfer of assets in excess of legitimate income to close relatives, although it might be reasonable not to limit the last provision to the close family only and include the transfer of such assets to any person.

At the same time, it remains to be seen how the words “official income” will be interpreted in practice.

<sup>77</sup> There is a similar wording of the unlawful enrichment article in the Criminal Code of Ukraine.

It might make sense to have the Plenary Assembly of the Supreme Court clarify in their resolution and provide other guidance for investigators and prosecutors, as well as courts, as to the basic elements of the offence of unlawful enrichment, to make sure it is actively applied in practice.

Enforcement practices. According to the statistics offered by Kyrgyzstan, there was one open criminal case each year in 2015 and 2016 alleging unlawful enrichment under Article 308-1 of the CC; in 2017 there were no such cases. Not a single case was submitted for trial or tried in courts under this article between 2015-2017.

According to the memo provided by the KR prosecution authorities, the practice of criminal prosecution under article 308-1 of the 1997 CC revealed challenges in investigating this category of cases. They referred to the case which is under the investigation by the Military Prosecution Office, initiated on 30.09.2015 against a former deputy minister of defence, whose close relatives between 2013-2014 multiplied their assets many times in excess of their legitimate revenues. In February 2016 the case was suspended. In the course of investigation, the relatives who had the unlawfully gained assets transferred officially in their name, testified that they allegedly acquired these assets with their own or borrowed money. The State Committee for National Security of the Kyrgyz Republic is prosecuting another criminal case under Art. 308-1 of the CC, which was started on 21.01.2016 against a former division head of the State Tax Service: his relatives had in their possessions property and assets in excess of USD 1 million; however, this prosecution was suspended too.

The memo also states that illicit enrichment is a consequence of the predicate offence, i.e. during the investigation it was necessary to establish that assets had been gained unlawfully, and based on that, bring criminal charges for corruption, abuse of office, misappropriation or embezzlement of entrusted assets, etc. It should be noted that this is a misunderstanding of the offence of illicit enrichment, which was devised expressly so as to eliminate the need to prove the fact of the commission of a corruption offence due to which the unlawful assets were acquired. Bribery, abuse of influence and other corruption crimes are difficult to investigate after the fact. But there may be some objective characteristics (significant assets whose origin cannot be attributed to legitimate sources of income), which help to state and prove the presumption of their illegality and, subject to this, prosecute the public official. If the predicate offence has to be proved first, liability of unlawful enrichment loses its sense (similar to money laundering as an offence).

**Kirgizstan is not compliant with this part of the previous recommendation No. 8 (“Ensure enforcement of illicit enrichment in practice”)**

### **“Corruption”**

The new CC has retained the article that establishes liability for “corruption” which is defined as “intentional acts consisting of the creation of an illegal firm connection between one or more officials vested with powers and individual persons or groups of persons for the purpose of unlawful acquisition of tangible or other benefits and advantages, and them granting such benefits and advantages to individuals or legal entities thus posing a threat to the interests of the public and state.” Such an act is punishable with imprisonment for a term from 10 to 12.5 years.

The third round of monitoring report on Kyrgyzstan noted for a similar provision in the effective Criminal Code that that offence overlapped with other offences (e.g., bribe giving and taking, elements of crimes committed by an organized group) and contradicted the principle of legal certainty, one of the constituent elements of the rule of law. The report also pointed out that elements of crime in corruption are formal, that is, for the completed offence it is sufficient to have established an illegal firm connection for the purpose of unlawful acquisition of tangible or other benefits or advantages, which, effectively, is nothing other but preparation for the crime or

attempted commission of other crimes such as abuse of office, unlawful enrichment, bribe solicitation, bribe taking. However, the sanction for corruption (imprisonment for a term of 8 to 15 years) is much stricter than the one used for the above listed offences, which does not correspond to the gravity of the offence. The monitoring report concluded that despite the convenience which this broadly construed offence created for law enforcement agencies, it contradicted the principle of a fair trial and must be removed from both the legislation and practice. If other corruption offences have gaps in their constituent elements, they must be rectified, instead of trying to compensate for them with such an ‘all embracing’ offence.<sup>78</sup> This recommendation of the IAP monitoring report has not been complied with.

Note also that Article 319 of the 2017 CC concerns “officials vested with powers” which are not defined anywhere in the code (contrary to the effective code), which only complicates matters.

Courts tried under Article 303 of the 1997 CC three cases in 2015, two in 2016 and four in 2017.

Overall, **Kyrgyzstan is partially compliant with paragraphs 3-4 of the previous Recommendation 6.**

### **New recommendation No. 36**

**1. Given the adoption of new laws on asset declarations and on conflict of interest, revise the Law on Countering Corruption in order to have it streamlined and remove its declarative nature.**

**2. Align provisions on criminal liability for corruption offences with international standards, in particular:**

**1) establish criminal liability for: acceptance of the promise, offer of a bribe in the public sector; offer/promise of a bribe, acceptance of the offer/promise, solicitation of a bribe, personally or through an intermediary, in the private sector; giving/taking a bribe in favour of a third party;**

**2) broaden the range of persons liable for corruption offences in the public and private sectors;**

**3) make sure that all corruption offences, including those established in the Code of Misdemeanours, be covered by the Criminal Code;**

**4) criminalise trading in influence;**

**5) revise the wording of the offenses of abuse and excess of authority, making sure that they are not too broad contrary to the principle of legal certainty;**

**6) abolish liability for “corruption”.**

**3. Have incorporated in the Criminal Code a clear definition of undue advantage as the object of corruption offences, covering in such definition both pecuniary and any other (including intangible and non-pecuniary) benefits.**

**4. Have clarified in the resolution of the Plenary Assembly of the Supreme Court and other guidelines for investigators, prosecutors as well as courts, the key elements and the autonomous nature of the offence of illicit enrichment in order to have it enforced more actively in practice; ensure enforcement of illicit enrichment offence in practice.**

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<sup>78</sup> IAP (2015), Report on the third round of monitoring of Kyrgyzstan, p. 45, <https://bit.ly/2spn4N3>.

## Foreign bribery

The 1997 Criminal Code, as amended in 2012, and the new 2017 Criminal Code both name, among persons liable for bribe taking, “a foreign official” and “an official of an international organisation”. The bribe giving offence also covers giving bribes to these persons. Their definition is provided in the appendix to the 2017 Code but not in the 1997 Criminal Code. The 2017 Code offers the following definitions:

“Foreign public official shall mean any person, whether appointed or elected, exercising a public function for a foreign country, including for a public agency or public enterprise.

Official of a public international organisation shall mean an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation”.

The definition of the “foreign official” reproduces only partly the definition provided in Article 2 of the UN Convention against Corruption, namely, it misses the element of “holding a legislative, executive, administrative or judicial office of a foreign country” (this element is expressly present also in the text of the OECD Convention).

The definition of the “official of an international organisation” repeats word for word the UNCAC definition but fails to cover the persons to which the Council of Europe Convention and/or the OECD Convention apply, namely: members of parliamentary assemblies of international and supranational organisations; persons holding judiciary offices or officials of the international court.

As was pointed out in the Summary Report on the Third Monitoring Round of the IAP, the definition of a foreign public official must include the following groups of persons in line with international treaties:

1. Persons, holding legislative, executive, administrative or judicial offices in a foreign country (whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority)<sup>79</sup>
2. Officials or agents of public international organisations (including those authorised by such organisations to act on behalf of such organisations)<sup>80</sup>
3. Persons exercising public functions (e.g., for a public agency or public enterprise)<sup>81</sup>
4. Members of parliamentary assemblies of international and supranational organisations<sup>82</sup>
5. Persons holding judiciary offices or officials of the international court<sup>83</sup>
6. Persons providing public services (such as notaries, lawyers and auditors)<sup>84</sup>

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<sup>79</sup> OECD Convention, Art. 1.4(a); Council of Europe Convention, Art. 1 and 6, Explanatory report, §28; UNCAC, Art. 2(a)(i), (b).

<sup>80</sup> OECD Convention, Art. 1.4(a); UNCAC Art. 2(c).

<sup>81</sup> OECD Anti-Bribery Convention, Art. 1.4(a); UNCAC, Art. 2(a)(ii), (b).

<sup>82</sup> Criminal Law Convention of the Council of Europe on Corruption, Art. 10. The Council of Europe Convention contains a qualification, namely that the country should be a member of such international or supranational organisation. However, the OECD Convention has no such restriction.

<sup>83</sup> Criminal Law Convention of the Council of Europe on Corruption, Art. 11; Explanatory report to the Council of Europe Convention, §63. The Criminal Law Convention of the Council of Europe on corruption has a qualification, namely that the Party must accept the jurisdiction of such court. If the international court is deemed to be an “international organisation”, the OECD Convention has no such restriction.

7. Arbiters of national and foreign arbitration (tertiary) courts<sup>85</sup> and
8. Jury members in the judiciary system of another country.<sup>86</sup>

Jurisdiction of Kyrgyzstan. According to Article 6 of the 1997 KR Criminal Code, citizens of the Kyrgyz Republic and stateless persons permanently residing in the Kyrgyz Republic that committed an offence outside the Kyrgyz Republic shall be subject to liability under this Code unless they have served their sentence pronounced by the court of a foreign country.

Experts believe that liability for acts committed abroad should attach not only to Kyrgyz nationals or stateless persons permanently residing in the Kyrgyz Republic, but also to foreign citizens permanently residing in the Kyrgyz Republic.

Also liable under the Kyrgyzstan's Criminal Code should be any foreign national who committed bribery (gave a bribe) in Kyrgyzstan. Pursuant to Art. 5, paragraph 1, of the 1997 CC, all persons committing crimes in Kyrgyzstan are liable under this Code.

However, a foreign national who took a bribe from a Kyrgyz national in the territory of another country, is not liable under the KR CC.

Clarifications are needed whether Kyrgyzstan has jurisdiction in the cases where the offence was committed by two or more accomplices, and one of the accomplices committed part of this crime in Kyrgyzstan, but the offence was completed outside Kyrgyzstan. Also, clarifications are required whether it is sufficient to establish Kyrgyzstan's jurisdiction when only the preparatory part of the commission of the offence took place in Kyrgyzstan (e.g., if a telephone call was made or an email sent from Kyrgyzstan with the offer of a bribe).

Kyrgyzstan should consider best practice and establish a universal jurisdiction for corruption offences. For instance, under Article 7 of the Lithuanian Criminal Code, the list of offences criminalised in line with the international treaties, including active bribery, shall be subject to universal jurisdiction, meaning that Lithuania has jurisdiction to prosecute active bribery irrespective of nationality and/or the place of the crime and irrespective of the fact whether the liability for such offence was established in the country where such offence was committed.<sup>87</sup>

Enforcement practice. No prosecution for the bribery of a foreign official was initiated in 2015-2017.

### **New recommendation No. 37**

- 1. Broaden the definition of foreign officials in line with international standards.**
- 2. Consider establishing universal jurisdiction for the bribery of foreign officials and other corruption offences, namely, establishing jurisdiction over such offences irrespective of the**

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<sup>84</sup> UNCAC, Art. 2(a)(ii). Note that the understanding that the person providing a "public service" is considered a public official is a part of the definition of the "public official" under the UNCAC but is not expressly included in the definition of the "foreign public official" under the UNCAC.

<sup>85</sup> Additional protocol to the Criminal Law Convention of the Council of Europe on Corruption, Art. 1, 2 and 4; Explanatory report to the Additional protocol, §9.

<sup>86</sup> Additional protocol to the Criminal Law Convention of the Council of Europe on Corruption, Art. 6; Explanatory report to the Additional protocol, §37.

<sup>87</sup> OECD/OECD Working Group on Bribery (June 2017), Phase 1, Report on Lithuania, §69, <https://goo.gl/b9Chsp>.

**nationality of the person committing this crime or the place of the crime.**

**3. Provide training to investigators, prosecutors, judges, representatives of diplomatic missions of Kyrgyzstan on issues of effective detection, investigation, prosecution and adjudication of criminal cases of foreign bribery.**

### **Legalisation (laundering) of illicit proceeds**

As the Report on the Third Round of Monitoring of Kyrgyzstan pointed out, elements of the offense of legalisation (laundering) of illicit proceeds (Art. 183 of the 1997 CC) were overall in line with international standards. The 2017 Criminal Code (Article 215) retained the same wording.

At the same time, as demonstrated by the enforcement of this article, similar to many other countries in the region, Kyrgyzstan does not apply this provision in an autonomous way. It means that in practice money laundering is only prosecuted in parallel with or after the conviction for the predicate offence. This is contrary to international standards.

This may also be the reason for the very small number of money laundering cases – see the table.

**Table 18. The number of initiated cases and cases tried in court on legalisation of illicit proceeds**

	2015	2016	2017
Initiated	6	5	2
Tried in court	2	0	3

This practice is also encouraged by the wording of the money laundering offence<sup>88</sup> which uses the words “illicit”, “crime”, etc. everywhere – in the heading as well as in the body of the text, which may be regarded as an indication of the need to prove such predicate crime. Also, according to the note to the article, illicit proceeds are deemed to be any economic gain or assets acquired or captured, directly or indirectly, as a result of commission of crime.

It is therefore recommended to expressly provide in the Kyrgyzstan’s legislation the possibility to prosecute money laundering separately from the prosecution for the predicate crime (see examples of the legislation of Ukraine and Tajikistan).<sup>89</sup>

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<sup>88</sup> “Legalisation (laundering) of *illicit* proceeds, i.e. making seem legal any possession, use or disposal of *illicit* proceeds through some acts (transactions or deals) to transform (convert) or transfer assets where it is known that the assets are proceeds of *crime*, for the purpose of hiding or concealing the *illicit* source of the assets, or assisting some person participating in the commission of *crime*, for purposes of avoiding liability for the acts; or else hiding or concealing the true nature of the source, location, mode of management and conveyance of the assets or rights thereto, or its ownership, where it is known that the assets are proceeds of *crime*; or else hiding or continuously maintaining assets by the person who has not participated in the commission of *crime*, where that person is aware that the assets have been acquired through *crime*; or else acquisition, possession or use of assets where at the time of taking, the person is aware that the assets are the proceeds of *crime*” - description in Article 183 of the 1997 CC.

<sup>89</sup> In Tajikistan Article 262 of the Criminal Code expressly states (Note 9) that criminal liability for the offence of laundering of illicitly gained proceeds shall attach irrespective of the fact whether the wrongdoer was prosecuted under the main (predicate) crime as a result of which these illicit proceeds had been obtained. After the 2015 amendments, Ukraine’s Criminal Procedure Code (Art. 216) expressly stipulates that prosecution in cases of money laundering shall be conducted without prior or simultaneous prosecution of persons committing the predicate crime, in particular in cases where: 1) this predicate offence was committed outside Ukraine and the money laundering, in Ukraine; 2) the fact of the predicate crime was established by the court with due process.

### New recommendation No. 38

1. Prescribe directly in the criminal law the possibility of prosecuting the money laundering without the need of prior or simultaneous criminal prosecution of persons who have committed predicate offences.
2. Conduct training for investigators, prosecutors and judges on issues of autonomous liability for money laundering in line with the international standards.
3. Have clarified in the resolution of the Plenary Assembly of the Supreme Court (following the conclusions of summarizing the judicial practice) and in other guidelines for investigative and prosecution authorities and for courts the need of conducting a financial investigation and the autonomous nature of the offence of money laundering in order to encourage its more active enforcement.

### Corporate liability for corruption offences

The Kyrgyz legislation provides for the following types of corporate liability applicable to legal entities, including for corruption offences:

- 1) under Art. 96, paragraph 2, of the Civil Code the legal entity can be dissolved by court for outlawed activities or for repeated and blatant violations of the legislation, or else, in case of banks, financial and credit institutions or organisations, when their license has been revoked;
- 2) The law of 28.07.2015 introduced amendments to the KR Administrative Offences Code supplementing it with a new Chapter 35-3 – Administrative offences against the legislation in the area of legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities, which, among other things, establishes corporate liability for participating in the legalisation (laundering) of illicit proceeds or in corruption offences (Art. 505-22 of the Code).
- 3) pursuant to Article 55, Chapter 16, of the KR 1999 Criminal Procedure Code, a legal entity is liable with its assets for the damage inflicted as a result of the crime or the act, committed by *a non compos mentis*, that is outlawed by the Criminal Code of the Kyrgyz Republic.

The 2017 KR Criminal Code introduced a new legal institution of the criminal law liability of a legal entity in the criminal procedure: criminal enforcement measures (Chapter 57). Such measures may apply when and where the criminal act was committed in the name of or through a legal entity by an individual to the benefit of such legal entity, no matter whether such individual had been prosecuted under criminal law or not. Such criminal enforcement measures applicable to legal entities include fines, restriction of rights or corporate liquidation. Confiscation of the legal entity's assets can be applied as a supplementary criminal law measure.

**Civil law liability.** Provisions in Article 96 of the KR Civil Code make it possible for the court to wind up a legal entity for activities forbidden in law, or for repeated or blatant violations of the legislation, or else, in case of banks, financial and credit institutions and organisation, if their license has been withdrawn. This provision is hardly efficient in corruption cases, as it is too general and does not provide for any link to the acts committed by employees or representatives of the legal entity, and establishes just one sanction of dissolution, which in the majority of cases would be too extreme. There is no information of this provision being enforced, in particular with respect to corporate involvement in corruption offences.

**Administrative liability.** New Article 505-22 of the KR Administrative Code provides for liability of the legal entity for participating in legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities, and also for “participating in corruption crimes”.

Note please that corruption crimes are only mentioned in the description part 1 of the article and are not mentioned in the headings of either the article or the new chapter itself which contains Article 505-22 (Chapter 35-3 “Administrative offences against the legislation in the area of legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities”). At the same time, the Note to the article defining the standard of liability equally fails to mention participation in corruption crimes.<sup>90</sup> Thus, this article cannot be effectively applied in cases of corporate involvement in a corruption offence.

Even if this article can be applied against a corruption crime, the liability it spells out can hardly be deemed effective, for the following reasons, among others:

- 1) corporate liability under this article is created with the discovery of the fact that the legal entity was involved in legalisation (laundering) of illicit proceeds or in financing of terrorist or extremist activities as confirmed by the final judgment pronounced as a result of a respective criminal trial. What is effectively excluded as a result is the autonomous liability, with the rigid link to the individual liability and prior conviction;
- 2) the liability is limited to direct acts by the person who is holding a leading position in the legal entity in question, excluding liability for actions by other employees or agents of the entity for lack of proper control by the executive management;
- 3) absence of such an element as commission of the act in the interests of a legal entity; instead there is an element “through such legal entity” (this element is not defined in the code either and can be interpreted differently);
- 4) non-dissuasive and not proportionate sanctions: a non-alternative fine of 10,000 calculation index units (equivalent to about Euro 11,800) with the confiscation of instrumentalities of crime or direct objects of the administrative offence and with the suspension of specific activities.

Since the Administrative Offences Code will become ineffective from 1 January 2019, following which corporate liability for corruption acts is to be regulated by the 2017 KR Criminal Code and the 2017 KR Criminal Procedure Code, the defects identified in paras 1, 2 and 3 above will be partly rectified. The new KR Code of Infringement which will replace the KR Code of Administrative Offences from 1 January 2019, does not contain any provisions similar to mentioned Article 505-22.

**Liability under the Criminal Code.** The 2017 KR Criminal Code establishes liability for legal entities in the form of “compulsory measures of criminal law enforcement”. Importantly, the legal entity is not deemed to be the offender, liable party or subject of punishment. As a result, the new code establishes the so-called quasi (*sui generis*) liability of legal entities: it is not in itself considered criminal liability because the criminal intent (guilt) is not imputed to the legal entity, but it is used by courts as a result of crime committed under criminal procedures rules. A similar model is used in other countries as well (for instance, in Azerbaijan, Latvia,

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<sup>90</sup> Note. A legal entity may be prosecuted for administrative liability under this article provided the offence of legalisation (laundering) of illicit proceeds or financing of terrorist or extremist activities has been committed by an individual relying on such legal entity and holding a leading position in such legal entity based on: 1) the right of representation of such legal entity; 2) the powers to make decisions on behalf of such entity; 3) the powers to exercise control in such legal entity or to manage it.”

Poland, Ukraine, Sweden) and is acceptable as long as it complies with international standards which require that corporate liability be effective and dissuasive.<sup>91</sup>

In line with Article 123, paragraph 5, of the 2017 CC, a legal entity shall be subject to criminal enforcement measures if it has committed acts qualified under specific CC articles, in particular: Articles 215 (Legalisation (laundering) of illicit proceeds), 233 (Abuse of authority in a commercial or other organisation), 234 (Breach of the procedures for public bidding, auctions or tenders), 237 (Commercial bribery), 238 (Unlawful taking of remuneration by an employee), 327 (Intermediation in bribery), 328 (Bribe giving).

#### Standard of corporate liability

Under Article 123 of the 2017 CC, the legal entity shall be subject to criminal enforcement measures under the Criminal Code, provided the act has been committed “in the name of or through the legal entity by an individual in the interests of such legal entity, irrespectively of having this individual prosecuted or not”.

The KR CC links liability with actions of any individual, not such legal entity’s employee or agent. This is an uncommon approach. On the one hand, it helps to avoid problems with the narrow definition of the “responsible person” whose actions lead to the corporate liability, but on the other, it may broaden unreasonably the liability of the legal entity. It is compensated by another mandatory element: the act must have been committed “in the name of or through the legal entity”. However, this element sets the liability threshold too high: the element “in the name of” requires that the individual, at the time of commission, clearly identified his or her actions as actions “in the name of” the organisation; “through the legal entity” is too vague as a definition which, too, may unreasonably narrow the liability down. It is therefore recommended either the mandatory criterion of the act committed “in the name of or through the legal entity” be excluded or made an alternative to the criterion “in the interests of”. It is also advisable to narrow the circle of persons whose acts may lead to corporate liability down to the organisation’s employees and persons authorized to act on behalf of the legal entity (or who may be reasonably believed to be authorized to act on behalf of the legal entity) or who effectively control such legal entity (e.g. its beneficiary owner).

Note also that the above conditions for the prosecution are different from those spelled out in the new CPC. The latter (Art. 482, paragraph 1) stipulated that if in the course of the pre-trial proceedings it is found that the suspect acted on his own or as a member of a collective hierarchy of the relevant legal entity stemming from his right to represent such legal entity, act on its instructions or take decisions on behalf of such legal entity or else exercise control within such legal entity or in the office of such legal entity, the investigator shall issue a reasoned resolution to start the pre-trial procedure for the criminal enforcement measures to be applied against the legal entity. At the same time, under Article 483, the pre-trial procedure for criminal enforcement against the legal entity should establish, in particular: the circumstances of the commission of the criminal act through such legal entity; the status of the individual in the legal entity’s structure; the nature of the suspect’s wrongful act in the interests of the legal entity and its implications. As a result, it is no longer clear what set of characteristics would be necessary to establish the corporate liability (commission of the crime “through”, “in the name of” and/or “in the interests of” the legal entity).

It is imperative to harmonize provisions in the 2017 CC and CPC where they bear on prosecution, or else they could cause considerable issues in practice.

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<sup>91</sup> The analysis here and below is based on the Analysis of Draft Criminal and Criminal Procedure Codes of the Kyrgyz Republic (as amended after the second reading) and their provisions on criminalisation of corruption (2016), prepared by the ACN OECD Secretariat as a part of the project to support anti-corruption through law enforcement in Kyrgyzstan funded by the US State Department’s Bureau of International Narcotics and Law Enforcement.

The 2017 CC provides for no corporate liability in cases where there has been no due control (oversight) over employees by a body or persons that manage this organisation (“the rule of the lack of supervision”), resulting in the commission of crime. There are two possible solutions here:

- 1) not to introduce the liability for the lack of supervision and preserve a broad list of persons whose actions lead to corporate liability (see above). Doing that one should allow for the exemption of the legal entity from liability in the event that it has taken all due steps to prevent such offence from happening (it is advisable to define such steps in the code);
- 2) narrow down the liability to acts committed by managing (responsible) employees of the legal entity or committed with their consent (endorsement, connivance), having also introduced liability for improper supervision on the part of such persons.

Both options are acceptable from the point of view of international standards. In its Thematic study on the corporate liability, the OECD ACN tends to prefer the first option:

“Ensure the effectiveness of the corporate liability regime, by covering the actions of lower level agents. The liability model combining vicarious liability (“respondeat superior”) with a due diligence defence is an effective tool in fighting corporate crime. It minimizes the risk that corporate liability can be evaded because of a complex corporate structure, while enabling legal persons to defend themselves. It also motivates corporations to develop proper compliance rules and corruption prevention mechanisms.

Alternatively, if the circle of agents who can trigger the corporate liability is restricted to “responsible persons” (e.g., directors, managers, etc.), the following points should be ensured:

- a) The legal person should be liable when a responsible person’s lack of proper supervision made the commission of the offence possible;
- b) The definition of “responsible person” should be broad enough to cover all persons who are de facto authorized to act on behalf of the legal person, as well as persons who can be reasonably assumed to be authorized to act on behalf of the legal person or who are effective controllers of the legal person (such as a “shadow”, a directing mind, or a beneficial owner). The definition should not be restricted to formal appointments defined by the business law or the company’s statutes.”<sup>92</sup>

The subsidiary responsibility model is understood to be such corporate liability where the commission of offence by any employee acting within his or her labour relations and with the intention of obtaining some benefit for the legal entity, may trigger the corporate liability.

#### Autonomous liability

One of the most important requirements for the corporate liability regime is the autonomous nature of such liability which should not rely on the criminal prosecution and conviction of the individual who committed the criminal act and should allow for separate prosecutions against the individual and the legal entity. Having a quasi-criminal model of liability where the legal entity is not the offender from the outset links enforcement of measures against the legal entity with the liability of the individual. This model of liability therefore requires clearer safeguards to its autonomous nature.

The 2017 CC stipulates that the legal entity shall be subject to criminal enforcement measures “no matter whether such individual has been prosecuted or not”. However, provisions in the new CPC (Chapter 57

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<sup>92</sup> OECD ACN, thematic study “Liability of legal persons for corruption in Eastern Europe and Central Asia”, 2015 p. 71, available at <https://bit.ly/2L4E4Q9>.

“Specifics of proceedings in criminal enforcement against the legal entity”) link procedurally the prosecution of the legal entity with the criminal proceedings against the individual.

Under Article 482 of the CPC the proceedings in the criminal enforcement measures against the legal entity shall be conducted as part of the pre-trial process with respect to the suspect. Under Article 483, the pre-trial procedure for criminal enforcement measures against the legal entity should explore, among other things, the status of the individual in the structure of the legal entity, which means that such individual should have been at the very least identified. Further, Article 484 says that after the completion of the pre-trial proceedings and in parallel with the drafting of the indictment of the suspect, the prosecutor shall, apart from other general requirements, indicate the circumstances established during the pre-trial procedure and enumerated in Article 483 herein, as a requirement for criminal enforcement against the legal entity, and the copy of this document is handed to the representative of such legal entity. During the trial the court must explore whether the act was committed by the accused in the interests of the legal entity (which means that the individual by that time must have been given the status of the accused). Finally, under Article 486, paragraph 1, of the CPC, having found that the accused committed the crime in the interests or through the legal entity, the court in its verdict also rules on the criminal enforcement measures against the legal entity.

At the same time, under Article 482, paragraph 4, and Article 486, paragraph 3, of the CPC when the case against the accused is dismissed or suspended as the whereabouts of the accused are unknown, the proceedings in the criminal enforcement measures against the legal entity must be considered by the court on the merits.

Overall, the new CC and CPC have made an important attempt to assure the autonomous nature of corporate liability (the criminal enforcement measures against the legal entity). The provisions described are quite positive and provide for a degree of autonomy which is lacking in many other countries. However, these provisions are not enough. The CPC provisions require that the individual be identified and charged; hence prior to that stage of the criminal process, independent prosecution of the legal entity is impossible. But in practice there could be situations when it is impossible to identify a specific individual responsible for the crime, although it may be known, e.g., that the bribe giving in the interests of the legal entity did take place. Or take another example: the company’s collective governing body decided to pass a bribe, but it was not handed over and it is impossible to establish who of the members of that body has made that decision.

An example of best practices in legal regulation which allows for the autonomous liability, with the quasi-criminal model of liability, is Latvia. Latvia’s criminal procedures law stipulates that the criminal enforcement proceedings against a legal entity can be conducted separately in the following cases: 1) criminal proceedings against a natural person are terminated for non-exonerating reasons; 2) if the circumstances have been determined that do not allow to ascertain or hold criminally liable a concrete natural person, or the transfer of the criminal case to court is not possible in the near future (in a reasonable term) due to objective reasons; 3) in the interests of solving in timely manner criminal-legal relations with a natural person who has rights to defence; 4) it is requested by a legal person’s representative.<sup>93</sup>

#### Legal arrangements covered by the liability

Art. 123, paragraph 1, of the CC defined the legal person as an organisation established under the civil law of the Kyrgyz Republic and a foreign legal entity. Legal entities do not include the state, bodies of government or municipal service of the Kyrgyz Republic, legal entities that perform specific government

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<sup>93</sup> Art. 439, paragraph 3, of the Criminal Procedure Code of Latvia. Quoted from: OECD (2015 г.), Liability of legal persons for corruption in Eastern Europe and Central Asia, p. 29.

powers vested in them by law, or foreign states, bodies of foreign government, foreign government agencies or legal entities that perform specific state powers, international organisations and their representative offices. The presence of this definition expressly in the text of the code is a very positive fact.

In line with the international standards, liability should attach to the broadest possible range of institutions; not only to those that are legal entities but also to foundations, associations, partnerships and some unincorporated organisations that do not have a status of a legal entity. Since such organisations are capable of performing legally meaningful acts, entering into contracts, etc., they too should be covered by the liability for corruption. Such liability should apply both to commercial and non-for-profit organisations, private companies and enterprises in (full or partial) ownership of the state or controlled by it. Relevant amendments should be passed to make the definition of the legal persons in the 2017 CC compliant with these requirements.

## Sanctions

Sanctions against legal entities should be effective, proportionate and dissuasive, whether criminal or non-criminal, including monetary sanctions. Under the new KR CC, the court may impose on a legal entity the following types of criminal enforcement measures: 1) a fine; 2) restriction of rights; 3) dissolution of the legal entity. The fine and restriction of the rights, as well as the fine and dissolution of a legal entity may be applied concurrently. The confiscation of the legal entity's property can be applied as a supplementary criminal enforcement measure.

Fines imposed on a legal entity shall be appointed by the court in the monetary value, calculated in multiples of calculation index units, and are divided into three classes depending on the amount:

Class I – in case of the commission of an act with elements of a less grievous offence – from 2,000 to 5,000 calculation index units [from about Euro 2,360 to 5,900];

Class II – in case of the commission of an act with elements of a grievous offence – from 5,000 to 10,000 calculation index units [from about Euro 5,900 to 11,800];

Class III – in case of the commission of an act with elements of a particularly grievous offence – from 10,000 to 15,000 calculation index units [from about Euro 11,800 to 17,700].

The amount of the fine shall double after one month of non-payment of the fine. Given continued evasion, in excess of three months, by the legal entity from paying the fine, it is subject to dissolution through court. In the event of material damages the fine shall be collected after the compensation of damages.

If restricted in its rights, the legal entity shall be banned from: 1) engaging in certain types of activity; 2) bidding at tenders or auctions; 3) obtaining loans, tax benefits, subsidies, or subventions from the republic or local budgets. One or more of such restrictions may be imposed by the court for a term of from 1 to 3 years.

The dissolution of the legal entity shall be imposed only in the case of the commission of an act with elements of grievous or particularly grievous crime, where the court finds that the gravity of the act committed makes it impossible for this legal entity to go on, and also in the event of its failure to pay the fine (see above).

The confiscation of assets of the legal entity shall be executed on common grounds and in the manner prescribed by Articles 96 and 97 CC.

The legal entity shall not be subject to criminal enforcement measures after five years of the commission of the act or after ten years after the execution of the conviction verdict by the court.

Overall, the measures imposed on corporate entities by the new CC are hardly sufficient. Take, first of all, the low fines. The efficiency and dissuasion often depend exactly on the amount of monetary sanctions against the legal entity, which could include both the fine and the confiscation of the profits or revenues gained through the wrongdoing. Monetary sanctions should be quite tough to hurt a large corporation.<sup>94</sup>

The best way to go would be to set the amount of the fine in proportion to that of the bribe, damage inflicted or some other indicator (e.g., proportionate to the company's turnover). It is also possible to combine fixed and proportional fines.

Commendable is the inclusion of rights restriction in the 2017 CC's list of enforcement measures against corporates. This is in line with the global best practices. It is however advisable to stipulate cases when such restrictions shall be mandatory (e.g., if the offence was associated with public procurement, there should be a restriction to all future public procurement bidding).

Additionally, there seems to be too much discretion given to the court in their choice of criminal enforcement measures. This is equally true of the choice as well as application of specific measures, such as dissolution (the wording "gravity of the act committed makes it impossible for this legal entity to go on" leaves too much room for construction). In general, dissolution of a legal entity should be an extreme measure applied in exceptional cases. It is the fine that should be the mainstay of measures applied; the imposition of various restrictions may only be a supplementary sanction.

#### Exemption from liability

In accordance with international standards and best practices, to encourage legal entities to prevent corruption offences from being committed by their employees, the legislation may provide for exemptions. When the company has implemented efficient internal anti-corruption controls (an anti-corruption programme, an anti-corruption officer or unit, personnel training, integrity and compliance programmes, etc.) the court may exempt it from liability having considered that it has done its best to prevent offence. Kyrgyzstan is well advised to consider introducing similar provisions.

Additionally, there could be provisions allowing the court to postpone application of sanctions against the legal entity provided such legal entity implements the organisational anti-corruption measures as instructed by the court. In this case the legal entity will be punished if it fails to implement relevant measures or commits another offence.

"In addition, the court can order that any legal entity, given a suspended sentence, be placed under protective supervision for a particular period of time, which means that it has to fulfil one or more of the following obligations:

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<sup>94</sup> For instance, the OECD Working group on bribery in its reports noted as insufficient the uppermost sanctions of Euro 1 million (Germany, Italy), Euro 1 660 000 (Slovakia) or Euro 700,000 (Austria) where's the upper threshold for criminal sanctions of Euro 16 million (Estonia) and 10 million (Belgium) were deemed sufficient. Importantly, in both instances above (Estonia, Belgium) there was also the requirement to confiscate the bribe and proceeds gained with it. In the OECD ASN countries minimum fines vary from Euro 38 (Lithuania) to Euro 1,000 (Montenegro) and maximum fines, from Euro 21,000 (Moldova) to Euro 36 million (Latvia). Source: OĚCP (2016), The 2013-2015 Summary Report, op. cit., p. 127. Starting 1 January 2018, the maximum fine in Latvia was increased to Euro 43 million.

- 1) to develop and implement a programme of effective, necessary and reasonable measures with the aim of preventing perpetration of the criminal offence;
- 2) to establish internal controls with the aim of preventing further committing of criminal offences;
- 3) to make periodic reports on its business operations and deliver them to the authority competent for enforcing the protective supervision;
- 4) to eliminate or reduce the risk of causing further damage from the criminal offence that was committed;
- 5) to refrain from business activities which might provide an opportunity or incentive for re-offending;
- 6) to eliminate or mitigate the damage caused by the criminal offence;
- 7) to do community service for a six-month period, provided that this obligation may not endanger the normal operations of the legal entity.<sup>95</sup>

Conclusions: It does not appear possible to assess compliance with recommendation 6, paragraph 5, as to the practical application of corporate liability, because the 2017 CC will only become effective from 1 January 2019. Given the amendments made, **this part of the recommendation may be considered largely implemented.**

Also, the experts welcome the fact that, according to the information provided by Kyrgyzstan, law enforcement officers are offered training in the application of the new CC and CPC in Kyrgyzstan, including in matters of corporate liability.

### **New recommendation No. 39**

**1. Rectify defects of the corporate liability regime in corruption offences to ensure dissuasive and effective liability in line with international standards and best practices, in particular by ensuring the autonomous nature of such liability.**

**2. Conduct training and provide practical guidelines and clarifications to investigators, prosecutors and judges on the effective application of corporate liability.**

### **Effective regret and other grounds for exemption from liability**

According to note to Article 314 of the 1997 CC, the bribe giver shall be exempt from criminal liability if the bribe was extorted by the official or if the bribe giver voluntarily informed the agency with the powers to start the criminal action about the forthcoming bribe giving.

Kyrgyzstan provided contradictory information on the conditions for applying the note to Article 314 of the Criminal Code. The responses to the monitoring questionnaire indicated that the mandatory condition here was the proven fact of extortion, i.e., the necessary conditions are the extortion of the bribe by the official and the bribe giver's report to the law enforcement authorities about the fact *before* the bribe is given to the extorting official. According to Kyrgyz authorities, these provisions are safeguarded against

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<sup>95</sup> Quoted from: OECD, Thematic study "Liability of legal persons for corruption in Eastern Europe and Central Asia", 2015 г., p. 64-65, available at: <https://bit.ly/2L4E4Q9>.

abuse by their wording itself. It means that the investigation should prove the fact of extortion of the bribe by the official. The other condition is notification of the law enforcement agency about such extortion.

At the same time, Kyrgyzstan noted in their comments to the draft monitoring report that a person's petition to the law enforcement bodies on the fact of the bribe extortion is not a prerequisite for the application of para.3 of the note to Article 314 of the Criminal Code of the Kyrgyz Republic. "A person who gave a bribe shall be released from criminal liability if there was an extortion of the bribe even if the person did not inform about it in advance."

According to the State Service for Combating Economic Crimes, in 2015-2017 this provision was applied in 19 cases (in 2015 - 0, in 2016 - 2, in 2017 - 17).

Similar grounds for exemption from liability are provided also in Article 237 (Commercial bribery) and 328 (Bribe giving) of the 2017 CC.

Since the third round of monitoring of Kyrgyzstan, the note to Art. 314 has not been aligned with the international standards. Moreover, notes to Articles 237 and 328 of the 2017 CC have broadened the possibilities for exempting a bribe giver from criminal liability. By comparison with the 1997 CC, the 2017 Code removes the reference to one mandatory criterion: the report about the forthcoming bribe giving, i.e. before the bribe is handed over to the official. In accordance with the note to Art. 328 of the 2017 CC the bribe giver shall be exempt from criminal liability for the act qualified in this article provided this person has voluntarily informed the agency with powers to start a criminal action about the bribe giving. According to the note to Article 237, the person shall be exempt from criminal liability for active bribery, in the case of extortion of cash, securities, other assets or tangible services, or else if this person has voluntarily informed the investigator or prosecutor about the active bribery. As a result, mandatory exemption from criminal liability also extends to a person who has actually given the bribe (committing active bribery) and who possibly has got the benefit required from the official. This provision may also be applied whenever the bribe was initiated by the bribe giver himself.

While exemption from liability for bribe giving in case of extortion, or if the bribery giver informed the investigative authority about the bribery, does not in itself go against international standards, it should come with certain safeguards against possible abuse of these provisions.

Provision in notes to Article 314 of the 1997 CC and Articles 237 and 328 of the 2017 CC are problematic from the point of view of international standards for the following reasons:

- 1) exemption from liability in the case of extortion is made possible even in the situation where the bribe giver failed to report the fact of extortion;
- 2) either code offers no safeguards ensuring that these provisions on exemption are not applied automatically, namely that the prosecutor and/or court should be in a position to take various circumstances into account, such as the offender's motives. Moreover, the resolution of the Plenary Assembly of the Supreme Court says (with respect to Article 314 of the 1997 CC) that the report about the bribe giving (oral or written) made to the police, prosecutor or any other authority should be deemed voluntary, irrespective of the motives of the applicant;
- 3) the grounds for exemption are not in any way limited in time, although they should be good only for a brief period of time after the offence and in any case, up to the moment when the law enforcement authorities learned about the offence from other sources. And although the Plenary Assembly's resolution says that an application may not be deemed voluntary if made in connection with the bribe giving that became known to the authorities, this provision alone can hardly be sufficient;

4) resolution No. 7 by the Supreme Court's Plenary Assembly points out that active facilitation of the detection and/or investigation of the crime means that the individual should take steps aimed at the identification of parties complicit in the completed offence, detection of the property given as a bribe, etc. It is however unclear what the grounds to require from the applicant to contribute actively to having the crime solved – there is nothing in the provisions of the code itself or the Plenary Assembly's resolution. It would be advisable to require explicitly in the Criminal Code text, that the bribe giver reporting the offence should cooperate with the competent authorities and assist in the investigation and criminal prosecution of the bribe taker;

5) there is no provision stipulating that exemption from liability shall not apply if the bribe was initiated by the bribe giver himself;

6) another provision missing is that the bribe shall not be returned to the bribe giver but has to be confiscated. Resolution No. 7 of the Supreme Court's Plenary Assembly points out that should the bribe giver have reported the extortion and helped with the detention of the bribe taker *in flagrante*, the court should rule to have the item of the bribe returned to the owner. A similar norm is to be found in Article 88 of the 2017 Criminal Procedure Code of Kyrgyzstan. It is an acceptable exception. However, it needs to be stated clearly that in the absence of extortion the bribe itself shall not be returned to the bribe giver;

7) according to Kyrgyzstan's comments on the draft report, a person who has given a bribe shall be released from criminal liability if there was an extortion of a bribe even if he has not informed about it in advance. That is, a bribe-giver is released from liability even if he has not reported the extortion of a bribe before giving the bribe. This approach also does not comply with the standards, as it does not facilitate reporting on the fact of extorting a bribe (a person may not be afraid of the consequences and may report the bribe only after the act has already been identified by the law enforcement agency).

Also, according to the standards of the OECD Working Group on Bribery, these specific grounds for exemption from liability should not extend to the bribery of foreign public officials. If in the case of domestic bribery, such exemption may help to detect the relevant offence and prosecute public official under criminal law, in the case of bribery of a foreign official, there is no guarantee that such official will be prosecuted. Therefore, the exemption provided for in the notes to Articles 314 of the 1997 CC and Article 328 of the 2017 CC should be expressly excluded for any cases of bribery of foreign officials or officials of the international organisation.

It is important to point out that the General Section of the Kyrgyz Criminal Code (both in the 1997 and 2017 CCs) does not provide for any exemption on grounds of effective regret. This distinguishes the criminal law in Kyrgyzstan from the majority of other IAP countries.<sup>96</sup> Overall, from the point of view of liability for corruption offences, it is nothing but positive, since effective regret may be perceived as too inadequate a reason for exemption from criminal liability for corruption offences which, by definition, pose a great public threat.

**Kyrgyzstan is not compliant with paragraph 6 of the previous recommendation 6.** See the new recommendation below.

**Overall Kyrgyzstan is partially compliant with Recommendation 6 of the previous monitoring report.**

### **Statute of limitations**

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<sup>96</sup> Take, e.g., Article 65 the Criminal Code of the Republic of Kazakhstan: “Any person committing a criminal offence or a first-time offender, may be exempt from criminal liability depending on the personal qualities of such offender, his or her voluntary surrender, assistance to solving and investigating the criminal offence, expiation of the injury done by the offence.”

Pursuant to Article 67 of the 1997 CC (Criminal statute of limitations), the person shall be exempt from criminal liability after the following period of time from the day of the commission of the offence: 1) one year after the commission of a minor offence; 2) three years after a less grievous offence; 3) seven years after a grievous offence; 4) ten years after a particularly grievous offence.

The period of limitations starts from the day of the commission of the offence and up to the day when the court's verdict becomes final. In the case of re-offending, the period of limitations is calculated separately for each offence. The course of the period of limitations can be suspended, if the offender has gone into hiding. Then, the course of the period of limitations shall be resumed from such time when the perpetrator has been detained or has surrendered.

In the event that criminal prosecution should have been started against a person with immunity, and such action has been suspended due to the immunity, the period of limitations is suspended too.

According to Art. 303 (corruption) and Art. 304, paragraph 4 (abuse of power by a person holding a position of responsibility) of the 1997 CC, periods of limitations under Art. 67 of the Code shall not be applicable. For other offences qualified in Chapter 30 (Crime in office) of the CC of the Kyrgyz Republic, statute of limitations shall apply on general grounds depending on the sanction applicable for the crime committed.

There is an exception in Article 2, paragraph 4, of the Kyrgyz Law of 28 December 2016, No 218, "On amendments to the Constitution of the Kyrgyz Republic", which stipulates that the statute of limitations under criminal liability shall not apply with respect to persons that committed a crime in office in connection with the preparation for the development and practical exploitation of the Kumtor gold mine, or crime against the interests of the service at non-state enterprises or organisations that develop the Kumtor deposits. The above persons shall be prosecuted under criminal law and tried irrespective of the time when they committed the above offences, except for persons with respect to whom there are enforceable court rulings about the applicable statute of limitations.

Kyrgyzstan has provided the following statistics for the number of criminal prosecutions in corruption cases that were dismissed under the statute of limitations in 2015-2017.

**Table 19. Number of criminal prosecutions for corruption cases that were dismissed under the statute of limitations**

2015	2016	2017
Art. 28, paragraph 1, subpara 11, of the KR CPC, dismissed: - by investigators - 18 cases, - by court - 8 cases, Dismissed by court under Art. 67 - 16 cases	Art. 28, paragraph 1, subpara 11, of the KR CPC, dismissed: - by investigators - 8 cases, - by court - 1 case, Dismissed by court under Art. 67 - 10 cases	Art. 28, paragraph 1, subpara 11, of the KR CPC, dismissed: - by investigators -7 cases, Dismissed by court under Art. 67 - 3 cases

Article 325, paragraph 1, of the 2017 CC provides for the following sanctions for the basic crime of bribe taking: Class VI fine [from 2,600 to 3,000 calculation index units, i.e. from about Euro 3,068 to 3,540] or Class II imprisonment [from 2.5 to 6 years], with the deprivation of the right to hold specific positions or engage in specific types of activity for a period for up two years and a Class II fine. Article 325, paragraph 1, provides liability for bribe taking in the absence of aggravating elements, i.e., in particular, if the bribe is under 1,000 calculation index units [about Euro 1,180]. The statute of limitations for the basic crime of bribe taking (qualified as a grievous crime under Article 19 of the CC) amounts to 7 years (Art. 62 of the CC), which is deemed sufficient.

The period of limitations for the basic crime of bribe giving in the new CC (qualified as a less grievous crime

under Article 19 of the CC) is three years (Art. 62 of the CC). This is not deemed sufficient (the minimum recommended period is 5 years – see, among other things, the OECD ACN 2013-2015 Final Report, op.cit).

A problematic aspect is the calculation of the period of limitations to the time when the judgment of the court becomes final. The number of cases dismissed in the court on the grounds of the statute of limitations (38 in 2015 - 2017) suggests that periods of limitations in the CC not infrequently turn out to be too short to see the judgments in criminal case to become final. The calculation of the limitations to the time when the sentence becomes final gives the defence a lot of opportunities to drag out the criminal proceedings until the period of limitations has run its course, allowing offenders to avoid liability, particularly in cases where there are multiple offenders.

It is advisable to consider other options for the calculation of the periods of limitations which would make it impossible dismissing corruption cases already sent for trial under the statute of limitations. For instance, in Latvia the period of limitations is calculated from the day of commission of the offence till the time when the offender is charged or when the accused is officially informed about the extradition request, where the accused is abroad and on the wanted list, following which the course of the limitations is terminated (Criminal Procedure Law of Latvia, Art. 56).

Note that under Art. 62, paragraph 6, of the 2017 CC, the statute of limitations does not apply in case of certain types of offences, including some aggravated corruption offences, such as qualified under Art. 319 (Corruption), paragraphs 1 and 2; Article 320 (Abuse of office), paragraph 4, Article 323 (Unlawful enrichment), paragraph 2, subpara 1; Article 325 (Bribe taking), paragraph 3, subpara 2; Article 326 (Solicitation of bribe), paragraph 2, subpara 2. This in part addresses the issue of short periods of limitations but not entirely: aggravating elements already have longer statutes of limitations, and the key issue is with the periods of limitations for basic crimes and some other aggravated offences not covered by the exception in Art. 62, paragraph 6, of the CC.

Under Article 129 of the 2017 KR CPC, the legal entity shall not be subject to criminal enforcement measures after five years from the day of the commission of the crime or ten years after the execution of the conviction by the court. As a result, with respect to the criminal act of the same gravity the individual offender and the legal entity will be subject to differing periods of limitations. It is unclear why the legislator thought it feasible to set the limitations at different periods for the individual offender and for the corporate. The common period of limitations of 5 years applicable to legal entities is deemed too short.

#### **New recommendation No. 40**

- 1. Align the grounds for exemption from liability for bribe giving and commercial bribery with the international standards.**
- 2. Increase and revise the procedure for the calculation of the statute of limitations or completely abolish the statute of limitations for corruption crimes as grounds for exemption from liability.**

#### **Confiscation**

##### **Recommendation No. 8 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

- 1. Introduce amendments to the procedure for confiscation of property and proceeds gained as a result of corruption offences to allow the application of confiscation in all corruption crimes irrespective of their gravity.**
- 2. Consider introducing the possibility of reversal of the burden of proof in the proceedings of confiscation. Ensure enforcement of illicit enrichment in practice.**

No amendments have been made in the 1997 CC procedure applicable to the confiscation of illicit proceeds and gains after the approval of the Third Monitoring Round Report for Kyrgyzstan. However, there is a new 2017 Criminal Code which comes into effect on 1 January 2019. Pursuant to Chapter 16 of this new code, confiscation (forfeiture) of assets is not a punitive sanction but rather a criminal enforcement measure: uncompensated appropriation with subsequent conversion of assets into state ownership subject to the conviction sentence. Confiscation will apply to all corruption crimes instead of only those where it is mentioned as a penalty, as is the case under the now effective Criminal Code of the Kyrgyz Republic. This is a correct approach in line with the principle of proportionality of punishment.

The new Criminal Code covers all assets to be confiscated in case of corruption offences under the international standards, including among others: confiscation of instrumentalities and proceeds of the crime, equivalent (value-based) confiscation, confiscation of converted or commingled proceeds of the crime, confiscation of benefits derived from the illicit proceeds, and confiscation from a third party.

Under Article 95 of the 2017 CC other criminal enforcement measures, including confiscation (forfeiture) of property shall be applied by the court on the grounds provided by the present chapter irrespective of the criminal prosecution of the individual or his or her exemption from criminal liability or punishment.

The procedure for the conversion of assets into state ownership shall be laid down by the Government of the Kyrgyz Republic.

In addition, the 2017 Criminal Procedure Code (Article 88) provides for a procedural confiscation of exhibits, and this issue is addressed in the sentence, resolution or in the ruling dismissing the case. Here: 1) instrumentalities of crime belonging to the suspect or accused shall be subject to confiscation; 2) money or other valuables gained illicitly shall be converted into state revenues, the rest of the things shall be returned to legitimate owners, but, if the latter cannot be identified, they shall be converted into state ownership; 3) cash or other valuables that constituted the bribe shall be subject to conversion into state ownership under the court's verdict and in line with the criminal law. Similar provisions are to be found also in the 1997 CPC.

The new CC in its provisions on confiscation covers all items to be confiscated in the case of a corruption offence in line with international standards, namely confiscation of instrumentalities and illicit proceeds, equivalent (value) confiscation, confiscation of converted or commingled proceeds of crime, confiscation of benefits gained illicitly and confiscation from a third party. The only recommendation to be made here is to make it clear that confiscation applies to any gain (benefit) from illicit proceeds, since in the text as it stands now this element is covered only indirectly.

Since confiscation is not considered a punitive sanction but rather a criminal enforcement measure, it will be applicable to all corruption crimes, instead of only those where it is mentioned as a punitive sanction as is the case with the 1997 CC. This is a positive change in line with the standards and recommendations offered to Kyrgyzstan as part of the IAP monitoring.

An interesting and new provision is having confiscation applied by the court on the stipulated grounds whether the individual was criminally prosecuted or made exempt from criminal liability or punishment. This is a progressive procedure although it does not mean that confiscation shall be used without the court's judgment, since pursuant to Article 96 of the CC, confiscation is to be applied subject to the conviction sentence.

The new CC and CPC offer no extended confiscation measures. Although such provisions are not deemed obligatory, in many countries they are used quite often and recommended for implementation in the national legislation. Extended confiscation allows for the seizure of any property from the convicted individual where legitimate provenance cannot be proved. This type of confiscation does not require proof that assets subject to such confiscation actually were acquired through the commission of the crime for which the person was

convicted. Based on certain facts (including the disproportionality of the value of assets owned by the person and his or her legitimate income), the court assumes that these assets are illicit (the court makes a rebuttable presumption). The burden of proof to rebut this assumption is placed on the owner, and the court will make inferences from the accused's failure to explain the origin of the relevant assets.

The Report on the Third Round of Monitoring recommends that Kyrgyzstan should consider reversing the burden of proof in the confiscation proceedings. A similar recommendation is to be found in Article 31 of the UN Convention against Corruption. In their answers to the questionnaire, Kyrgyzstan indicated that the issue of having the burden of proof reversed in the confiscation proceedings was not considered.

Enforcement practices. According to the authorities, confiscation mechanisms have been successfully applied in practice. These were the examples given:

- under the court's judgment, confiscated were assets (residential houses, apartments, trade centres, automobiles, securities) of N.T., member of the Supreme Council of the Kyrgyz Republic, convicted for corruption crime to imprisonment, and that included assets held by third parties, which were converted into state ownership in 2016-2017;

- on 16.08.2017, the Pervomaysky district court of Bishkek found member of parliament O.T. and ex-ambassador D.Ch. guilty of taking USD 1 million in the case of company M, and sentenced each to 8 years in prison, with the confiscation of assets and disqualification from government offices for three years after the release;

- the Pervomaysky district court of Bishkek on 04.01.2018 convicted K.I., a member of Supreme Council of the Kyrgyz Republic, to 12 years in high security prison, with confiscation of assets and disqualification from state offices for three years. K.I was charged with corruption and abuse of office while he was mayor of Tokmok. He was incriminated with unlawful conveyance of municipally owned land plots into private property, accused of selling the library and hostel buildings below the market value and also of an unlawful award of the municipal contract to build an automobile station to a private company affiliated with him. The judgment was appealed (at the stage of the trial).

Kyrgyzstan authorities could not provide any statistics for confiscation in 2015-2017.

According to the authorities, the issue with the confiscation is that, as a rule, illicitly gained assets are registered by public officials to legally unrelated persons.

It is not possible to assess practical enforcement of new provisions on confiscation since the new 2017 Criminal Code shall become effective from 1 January 2019.

**Kyrgyzstan is largely compliant with Recommendation 8 of the previous monitoring report.**

#### **New recommendation No. 41**

**1. Introduce an extended conviction-based confiscation for corruption crimes.**

**2. Ensure collection, analysis and publication of detailed statistical data on the application of confiscation in corruption cases.**

#### **Immunities**

**Recommendation No 9 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**Ensure that immunities of the officials do not impede effective investigation and prosecution of corruption offences, in particular:**

- **introduce functional immunities for all relevant officials subject to immunities under the current legislation;**
- **abolish the immunity of the former President;**
- **streamline procedures for lifting immunity of deputies of parliament, Prosecutor General and Ombudsman.**

Since the time of the Third Round Report, Kyrgyzstan has adopted the following legal acts or amendments to effective legal acts that impact the assessment of the degree to which Kyrgyzstan is compliant with recommendation No 9:

1) pursuant to the KR Constitutional Law “On certain powers of the prosecution authorities as stipulated by the Constitution of the Kyrgyz Republic” of 13.07.2017, the decision to start a criminal action shall be taken by the Prosecutor General with respect to: 1) the KR President impeached by Supreme Council following the procedure defined by the Constitution; 2) a member of the Supreme Council; 3) the prime minister of the Kyrgyz Republic; 4) a member of the KR Government; 5) a judge; 6) chief of the general Staff of the KR Armed Forces; 7) heads of staff of the KR President, KR Supreme Council and KR Government; 8) the secretary of the KR Security Council; 9) the chairman of the KR Audit Chamber; 10) the chairman of the KR Central Election and Referendum Commission; and 11) the KR Ombudsman and his deputy;

2) Chapter 56 of the new KR Criminal Procedure Code of 02.02.2017 specifies categories of persons subject to special order of proceedings in criminal cases and cases of offences: 1) members of parliament; 2) judges of the Supreme Court, judges of the Constitutional Chamber of the Supreme Court judges of local courts, judges of the specialised court established under law; 3) KR President who left the office; and 4) registered candidates for members of parliament.

On the one hand, the above amendments to the legislation expand the normative details of the criminal proceedings with respect to public officials with immunities, something to be welcomed. On the other, though, the approved normative amendments add to the imbalance as a result of inconsistencies in the provisions of all relevant laws.

For instance, Article 478, paragraph 4, of the 2017 CPC says that “the decision to prosecute the President who left his office shall be taken by the Prosecutor General.” Article 479 of the 2017 CPC allows for the former President to be detained under suspicion of having committed a crime or minor offence and subjected to personal search where he was found at the scene of a crime or minor offence. At the same time, Article 12 of the Law of the Kyrgyz Republic of 18 July 2003 “On guarantees to the activity of the President of the Kyrgyz Republic” sets an absolute immunity for the ex-President: “The ex-President of the Kyrgyz Republic shall enjoy immunity. He may not be prosecuted under criminal or administrative liability for his actions or inaction committed during his term in office as President of the Kyrgyz Republic, nor detained, arrested, subjected to search, interrogation or personal examination. This immunity of the ex-President of the Kyrgyz Republic extends to the residential or official rooms occupied by him, or transportation vehicles, means of telecommunications used by him, the archives belonging to him and other property, documents, luggage, or his correspondence.”

Mutually excluding are also Article 479 of the 2017 CPC and Article 24 of the Law “On the status of the member of the Supreme Council of the Kyrgyz Republic”. Pursuant to the latter, a member of the Supreme

Council may not be detained or arrested, subjected to search, personal examination on the grounds stipulated by the criminal procedure legislation, except when the crime committed is particularly grievous. From Article 479, paragraph 1, of the 2017 CPC it follows that the member of parliament may be detained if suspected of a crime or minor offence and subjected to personal examination if found on the scene of the crime or minor offence. The above norms in the laws are in an undisputed conflict, which makes application of provisions in Article 479 of the 2017 CPC doubtful.

During the third monitoring round of Kyrgyzstan, no amendments were made to the legislation that would have streamlined procedures relevant to removing immunities from members of parliament, the Prosecutor General or the Ombudsman.

For the analysis of immunities for judges and prosecutors, see section 2.3. above.

As a result, the amendments to the legislation adopted by Kyrgyzstan have not affected the limits to the immunities of public officials, and the immunity is therefore not functional.

Kyrgyzstan advised the following: the prosecution has been commenced against: 8 judges, 2 members of parliament in 2015; 5 judges and 1 member of parliament in 2016; and 2 judges and 3 members of parliament in 2017.

These members of parliament of the Kyrgyz Republic were prosecuted under criminal law for committing particularly grievous offences for which no consent for criminal prosecution is required to be obtained.

In their additional responses Kyrgyz authorities pointed out that, based on the analysis of the legislation of the Kyrgyz Republic, there was a need to revisit certain provisions in the constitutional laws “On the status of the member of Supreme Council of the Kyrgyz Republic”, “On the status of judges in the Kyrgyz Republic”, laws “On the Ombudsman of the Kyrgyz Republic”, “On the prosecution service of the Kyrgyz Republic”, and “On the rules of the Supreme Council of the Kyrgyz Republic”, since these laws contain somewhat more extended provisions on immunity of the above persons than is provided under the Constitution. To this end, a draft law was developed, which is under consideration now.

**Therefore, Kyrgyzstan is not compliant with the previous Recommendation 9, and it remains valid as Recommendation No. 42.**

### **3.2. Procedures of corruption investigation and prosecution**

#### **Recommendation No. 10 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**1. To amend legislation in order to allow effective access of law enforcement officials to bank secrets, tax and customs information, including before formal institution of a criminal case, while ensuring that proper protection of personal data is safeguarded. To reconcile provisions on access to bank data in the Law on Bank Secrecy and the Criminal Procedure Code.**

**2. To ensure that the Financial Intelligence Unit work closely with the law enforcement authorities in order to identify patterns of possible corruption and establish effective exchange of information and feedback on the action taken based on suspicious transactions reports. To remove legal obstacles to allow that the STRs directed to law enforcement agencies be used as evidence, insofar as they relate to domestic information.**

#### **Recommendation No. 11 of the Report on the Third Round of Monitoring of Kyrgyzstan:**

**1. Increase the prevention potential of the investigators of the law enforcement and prosecution service, to increase their level of willingness to take the initiative, in particular, by a broader use of analytical methods.**

**2. Besides operative information collected by the law enforcement bodies, it is necessary to use other methods of investigative departments, including more thorough analysis of the grounds for initiation of investigations, mass media reports, information from other jurisdictions, information from the tax authorities, auditors and the Pension Funds, as well as complaints received through the governmental website and hotlines, reports from embassies and information received through other channels of filing complaints.**

## **Detection**

According to the information offered by Kyrgyzstan, sources for the detection of corruption offences can come from oral, written and electronic reports of individuals or entities, petitions by citizens, reports from officials, inspections by law enforcement and fiscal authorities, opinions by experts and auditors, summaries produced by the state financial intelligence service, publications in the mass media and online publications. The grounds for initiating an inspection can be served by an anonymous tip, and the inspection, if it proves the fact of corruption, may, in turn, serve grounds for criminal prosecution. With the 2017 CPC coming into effect, information coming from anonymous reports shall be entered in the Uniform register of crimes and offences, to be looked into as part of a pre-trial inquiry.

Kyrgyzstan has provided information only about the sources of information that served the grounds for the prosecution authorities to start a criminal action against the alleged corruption offences: 1) immediate detection of elements of crime by the prosecution officers during inspections - 356 criminal cases; 2) reports from law enforcement agencies - 172 criminal cases; 3) petitions from citizens - 115 criminal cases; 4) reports of officials from various organisations – 45 cases. The balance of criminal cases were started based on the inspection reports of auditors and other monitoring services, or publications in the mass media, online, and from other sources of information.

Pursuant to the Provisions on the State Financial Intelligence Service of the Government of the Kyrgyz Republic of 20.02.2012, No 130, one of the objectives of the financial intelligence is “to conduct, in the manner prescribed, analytical work in order to detect transactions (deals) with cash or assets associated with legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities, as well as to prepare and submit summarized materials to law enforcement and judiciary bodies pursuant to the legislation of the Kyrgyz Republic.”

In this connection, the State Financial Intelligence Service of the Government of the Kyrgyz Republic (SFIS), following the proper procedures, has the right to submit: at the request of law enforcement bodies, prosecution authorities and courts, any information or summary materials on the on-going criminal cases that are associated with legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities; at their own initiative, to the court (judge), prosecutor, investigation or inquiry bodies, any summary materials associated with legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities.

The 2017 report by the State Financial Intelligence Service of the Government of the Kyrgyz Republic<sup>97</sup> offers the following information about the number of summary materials resulting from financial investigations that were submitted to law enforcement:

### **Table 20. The number of summary materials of the financial intelligence unit**

<sup>97</sup> Source: <https://bit.ly/2xAzis2>.

	2016	2017	Difference (+/-)
<b>Summary materials prepared, total</b>	<b>47</b>	<b>37</b>	<b>-10</b>
Regarding countering money laundering	42	27	-15
State Committee of National Security	1	4	3
Ministry of Interior	5	-	-5
State Service of Drug Control (abolished in 2016)	16	-	-16
State Service for Combating Economic Crimes	20	24	4
<b>Number of persons/entities identified, total</b>	<b>56</b>	<b>91</b>	<b>35</b>
Natural persons	41	80	39
Legal entities	14	11	-3
Terrorist organisations	1	-	-1
Estimated shadow proceeds, million som	5,792	5,908	-116

The law of the Kyrgyz Republic of 28.07.2015, No 200, introduced some amendments and amplifications to the Law of the Kyrgyz Republic “On countering legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities” of 31.07.2006, No 135, whereby the definition of “illicit proceeds” has been made more specific to mean any economic benefit or assets obtained or acquired, directly or indirectly, through crime. In this connection and pursuant to Article 183 of the Criminal Code of the Kyrgyz Republic, corruption crimes shall be predicate (basic) crimes preceding legalisation (laundering) of illicit proceeds.

Procedures for the production, submission, registration and consideration of the summary materials as well as procedures for the submission by law enforcement bodies to the State Financial Intelligence Service of the Government of the Kyrgyz Republic of any information about the summary materials being considered were approved by the resolution of the Government of the Kyrgyz Republic of 05.03.2010, No 135. Pursuant to paragraphs 25 and 26 of these provisions, the information contained in the summary materials shall only be used for countering legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities.

To institute the criminal case with the view of the summary material, the law enforcement body must, in the manner prescribed by the legislation, legalise the information contained in the summary materials. The summary material may not be used as evidence or incorporated in the criminal case. The summary material and addenda thereto are confidential and classified.

In accordance with the legislation of the Kyrgyz Republic in the area of countering legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities, suspicious transactions reports (STRs) are to be submitted by financial institutions and the stipulated categories of persons (informants). These suspicious transactions reports are then followed up by a unit of the financial intelligence of the Kyrgyz Republic; should any signs of legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities be detected, this unit shall develop summary materials to be submitted to law enforcement. In this connection, according to Kyrgyzstan, suspicious transactions reports may not be evidentiary in criminal cases, since they are only judgements or suspicions of a compliance officer at the financial institution or the stipulated category of persons.

This position can be accepted only with respect to the document presented in a summary form containing judgements and assessment of facts by a financial institution’s employees or an officer of the State Financial Intelligence Service. However, the same argument does not hold vis-à-vis other documents contained in the summary materials, such as printouts of bank account at domestic banks, copies of contracts of Kyrgyz legal entities, or other internal domestic documents.

Kyrgyzstan disagrees with this position. According to the authorities’ comments, the law enforcement investigators legalise the information of the SFIS by conducting investigative actions. Thus, the investigators can use as evidence the bank statements, copies of contracts of Kyrgyz legal entities and other documents after their seizure or on the basis of an inquiry in the criminal case. Such practice, according to

the authorities of Kyrgyzstan, is ubiquitous, and the FATF Recommendations do not contain a requirement to include reports of suspicious transactions directly to the materials of the criminal case.

As noted in the FATF Report on Operational Issues – Financial Investigations Guidance, although in most countries suspicious transaction reports are used for operational purposes and are not used as evidence in courts<sup>98</sup>, in some countries STRs are directly admissible as evidence in court. Thus, the use of the STR as evidence does not contradict the FATF standards and monitoring experts consider it as a tool to improve the effectiveness of the financial investigations.

To support the close interaction of the financial intelligence and law enforcement, Kyrgyzstan pointed to the Procedures for the submission and consideration of the summary materials approved with the resolution of the Government of 05.03.2010, No 135. These Procedures set out the uniform manner of production, submission, registration and consideration of the summary materials with respect to transactions (deals) associated with the financing of terrorism (extremism) or legalisation (laundering) of illicit proceeds (summary materials henceforth). Subject to these Procedures, an interdepartmental reconciliation act is prepared every quarter with the statistics of submissions and considerations of summary (supplementary) materials for each quarter of the current year; and every six months a reconciliation acts for the half-year outcomes of consideration of summary (supplementary) materials.

As part of their interdepartmental collaboration with the SFIS, law enforcement agencies may turn to the SFIS with a request for information or summary materials on financial wrongdoing associated with the legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities.

References were also made to the cooperation agreements made between the State Financial Intelligence Service and the Ministry of the Interior, Office of the Prosecutor General, the Government's State Service for Combatting economic crimes and State Service for execution of sentences. Note however that, with the exception of the latter agreement, the former three and the referenced Procedures, had already been in place during the Third Monitoring Round of Kyrgyzstan. Kyrgyzstan failed to provide the effective interdepartmental agreements with the SFIS which are classified.

According to the information from the Kyrgyz authorities, the SFIS has the right of full access (use), including automated one, to databases (registers), the creation and (or) maintenance of which is carried out by the state bodies, institutions and enterprises in the procedure specified by the regulatory legal acts of the Kyrgyz Republic. This power is envisaged in clause 5 of Article 5 of the AML / CFT Law, as well as in subparagraph 1 of paragraph 9 of Article 5 of the Regulations on the SFIS. In order to implement these standards, the SFIS has developed the Regulations on the Procedure for Access to Databases (marked For Official Use Only) and has concluded interdepartmental agreements on access to databases of state bodies with the following authorities:

- with the State Registration Service at the Government (marked For Official Use Only);
- with the State Registration Service at the Government on the use of the ARPS (automatic request processing system);
- with the National Statistical Committee (marked For Official Use Only);
- with the State Tax Service at the Government (marked For Official Use Only);
- with the Ministry of Justice (marked For Official Use Only);

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<sup>98</sup> FATF Report, Operational Issues – Financial Investigations Guidance, 2012, par. 63. Available at <https://bit.ly/2MgsMJ6>.

- with the State Customs Service at the Government (marked For Official Use Only);
- with the State Service for Regulation and Supervision of the Financial Market at the Government (marked For Official Use Only).

In addition, the SFIS has concluded interdepartmental agreements on cooperation with the following state bodies: the State Tax Service; the State Service for Regulation and Supervision of the Financial Market; the National Bank; the State Committee for Information Technologies and Communications; the Department of Precious Metals at the Ministry of Finance.

Kyrgyzstan has not provided any information that would confirm closer collaboration between the financial intelligence unit and law enforcement agencies in establishing models of potential corruption or effective information exchanges.

Experts welcome the regular training offered by the Financial Monitoring Centre jointly with the State Financial Intelligence Service for SFIS employees and representatives of law enforcement bodies on detection and investigation of corruption offences and laundering of illicit proceeds: “Typologies of corruption offences, methods of detection and analysis of episodes of potentially corrupt activities using visual data analysis tools”; “Procedural aspects of rendering mutual legal assistance in the area of repatriation of illicitly gained means and assets”; “Financial investigations”; “Relevant issues of interdepartmental collaboration. Experience and practices of legalisation of materials resulting from financial investigation by law enforcement agencies”; “Format, contents, status and procedures for the submission of financial investigation materials to law enforcement agencies” and on other topics.

#### Definition of Politically Exposed Persons

Pursuant to Article 2 of the Law of the Kyrgyz Republic “On countering legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities”, foreign politically exposed persons shall be deemed to include foreign nationals which have been entrusted or are being entrusted with prominent state and political functions in a foreign country (heads of states or governments, high-placed political figures, high-level public officials in the government, courts, armed forces, law enforcement and fiscal agencies, heads and figures in political parties and religious associations), including former such officials.

The effective provisions in the Kyrgyz law are not in line with the international standards, namely, FATF recommendations and the UN Convention against Corruption. Article 52 of the UN CAC says that each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction ... to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.” According to the updated 2012 FATF recommendations, provisions on financial monitoring with respect to foreign public figures should also extend to domestic public officials.<sup>99</sup>

Therefore, Kyrgyzstan is recommended the following:

- extend the definition of politically exposed persons under the legislation on countering legalisation (laundering) of illicit proceeds to national persons performing prominent public functions;
- extend the definition of politically exposed persons to managers of state-owned enterprises and leading officials in the political parties;

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<sup>99</sup> See, FATF guidelines on politically exposed persons <https://bit.ly/1sNfNi0>.

- include in the definition of politically exposed persons members of their families and close (associated) persons.

According to the authorities, the SFIS has drafted a bill that expands the concept of public officials; a draft is being considered by the Parliament of the Kyrgyz Republic<sup>100</sup>.

## **Investigation and criminal prosecution**

### Access to information

In December 2016, laws “On Banking Secrecy” and “On the National Bank of the Kyrgyz Republic” became invalid, to be replaced by a new Law of the Kyrgyz Republic “On the National Bank of the Kyrgyz Republic, banks and banking”. The procedures for sharing information that is part of the banking secrecy is regulated by Article 130 of the new law which stipulates that information that constitutes a banking secret may be disclosed to: 1) the court of the Kyrgyz Republic, pursuant to the legislation of the Kyrgyz Republic; 2) the authorized state authority fighting legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities, pursuant to the law in the area of legalisation (laundering) of illicit proceeds and financing of terrorist or extremist activities; 3) authorized tax authority, for the purposes of taxation and pursuant to the tax legislation of the Kyrgyz Republic; 4) and also any other persons, not indicated in paragraphs 2 and 3 above, exclusively subject to an act of court.

Pursuant to Article 131 of the Law “On the National Bank of the Kyrgyz Republic, banks and banking”, a request for disclosure of information constituting a bank secret, in line with the requirements in Article 130 of the law, must contain:

- 1) the full official name and details of the requesting person, together with the address, telecommunication channels and other contact details indicating the mode of transmission and the person authorized to handle the requested information;
- 2) the name of the person to whom the request is addressed;
- 3) the name of the bank’s client, indicating the limits and scope of the requested information constituting the bank secret;
- 4) the use to which the requested information constituting the bank secret will be put, and legal grounds for the request;
- 5) the stamped signature and information about the authority of the person signing the request.

Should the request for the disclosure of information which constitutes a bank secret fail to comply with the requirements herein, the bank must refuse to disclose any information which constitutes a bank secret. The credit institution is not supposed to be given any details attesting to the significance of the requested information for the purpose of investigation. During the monitoring, the experts did not get any information about instances of undue disclosure of banking secrets from the representatives of law enforcement agencies.

The existence of banking accounts shall be established at the request of the investigative authority to relevant banks or to the State Financial Intelligence Service of the Government of the Kyrgyz Republic. There is no centralized register of bank accounts. It is recommended that such centralized register be set up to facilitate the search for information about any existing bank accounts, their owners and beneficiaries or

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<sup>100</sup> The bill is available at: <https://bit.ly/2tHiQB5>.

else persons with the signing authority.<sup>101</sup> Such register should have all the data of banks' relationships with their clients, including all types of banking accounts (current, savings and correspondent accounts, all financial products, loans, mortgages and safe deposit boxes). The data should be inclusive of the personal data of the account holder, the account number, name of the bank, the date of the opening of the account and (where applicable) the date of closing. It should also have information about the authorized signatories and beneficiary holders.

Hopefully, with the 2017 CPC coming into force any obstacles to access to banking information at the initial stages of inquiry into potentially corrupt wrongdoing will be removed, given the pre-trial proceedings which will be instituted with the mandatory recording of reports about potentially criminal acts in the Uniform Register of crime and offences (an electronic database of information about the initiation of proceedings, movement of materials and cases of crime and/or minor offences, applicants and parties to the criminal process), following which the access to banking information will be allowed pursuant to the CPC provisions.

It also seems that the 2017 CPC, when it comes into force, will also remove problems relating to access to tax information at the stage of inquiry into reports about alleged crime prior to the initiation of the criminal case in accordance with the 1999 CPC. Moreover, pursuant to articles 35 and 39 of the 2017 CPC, the investigator and the authorised inquiry officer both have powers to require documents and materials containing information about the incident and persons concerned. Pursuant to Article 24, paragraph 4, requirements, instructions and requests by the authorized inquiry officer, investigator or prosecutor made within the scope of their authority as prescribed by the CPC, must be complied with by all institutions, enterprises or organisations irrespective of the form of their ownership, as well as by officials and individuals. Such powers appear sufficient to have the required tax information requested and obtained in a timely manner within the framework of pre-trial proceedings.

However, no amendments have been made in the Tax Code of the Kyrgyz Republic with respect to the disclosure of tax information to pre-trial authorities. Article 54, paragraph 2, of the tax Code stipulates that tax information may be disclosed to law enforcement agencies exclusively with respect to the taxpayer who is being prosecuted for alleged tax offence. Such amount of information is not sufficient for an efficient investigation into corruption offences. The permission to have information disclosed to law enforcement authorities in the Tax Code should also apply to any other kind of information held by the authorised state tax and customs body. Authorized inquiry officers, investigators and prosecutors must have full and timely access to tax and customs information they need to investigate criminal acts. To this end, provisions in the 2017 CPC and the Tax Code should be harmonized.

Given that introduction of a Uniform Register of crimes and offences would require considerable resources, the question is whether this Uniform Register could be made accessible to all (however remote) inquiry officers, investigators and prosecutors, and whether it would actually be possible, pursuant to Article 149, paragraph 1, to enter data in the register within 24 hours of the time of the report about a potential criminal act, ensuring proper legal grounds for timely access to the banking information. For this

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<sup>101</sup> Creating such register is recommended by the updated FATF recommendation 31 (powers of law enforcement and investigative authorities): "...countries should ensure that there is adequate, accurate and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. The asset recovery platform led jointly by the Directorate General for Home Affairs of the European Commission and EUROPOL recommended in 2012 that consideration be given to setting up a single register of bank accounts; this register is to be maintained by a competent agency of government (national supervisory authority in the financial sector, central bank, tax service or another body). Source: Final Report on the Third Monitoring Round of the OECD Anti-Corruption Network, 2016, op.cit., p. 183-184. Setting up such registers was also envisaged by the 5<sup>th</sup> EU Anti-Money Laundering Directive, April 2018 r., available at <https://bit.ly/2qzrrVB>.

reason, any conclusions about the practicality of timely access to the banking, tax or customs information can only be made after the 2017 CPC has been put into effect and implemented.

Note also that investigative authorities must have the possibility to promptly locate and check the financial information which, if necessary, can be later corroborated and legalised through access to relevant documents in the manner prescribed in the CPC. It is therefore needed to ensure that investigative authorities involved in financial investigations have direct access to tax and customs databases, with due protection of personal data.

With its adoption, the 2017 CPC rectifies the conflict identified by the experts of the Third Monitoring Round between provisions of Article 10 of the law “On Banking Secrecy” and Article 119, paragraph 7, of the 1999 CPC. Article 123, paragraph 9, of the 2017 CPC stipulates that when the cash or other valuables belonging to the suspect or accused as held on the account, on deposit or in safe-keeping at the bank or other credit institution are seized, the executive management of the banks or other credit institutions must disclose information about such cash or other valuables at the request of the investigating magistrate or court.

However, there is still an outstanding another issue noted in the third round monitoring report, namely, that tax authorities do not conduct any tax inspections into criminal cases unrelated to tax violations.<sup>102</sup>

### **Analysis of individual provisions in the new CPC**

1. That the new 2017 CPC retains the judge’s authority to refer the submitted criminal case back to the prosecutor is bad news. Not only does it contravene the human rights standards (undermines presumption of innocence, speedy trial, lengthy incarceration, etc.), it also creates conditions for corrupt influence on the judge’s or prosecutor’s decision-making.

2. The 2017 CPC provides for such an investigation action as “infiltration in the criminal milieu and/or simulation of criminal activities” for the purposes of acquiring factual data about crimes prepared, committed or completed. Such action may be an effective tool for detecting and solving corruption crimes. It is, however, associated with the risk that offender’s rights may be violated, as a result, thus collected evidence may be ruled inadmissible whenever not all of the safeguards have been maintained, for instance, in case of entrapment in bribery. Therefore, Article 230 of the CPC should contain a more detailed regulation of this investigation action, in particular for the purpose of clear distinction between simulation of bribery and its provocation, which is sanctioned under criminal law pursuant to Article 343 of the 2017 CPC.

The CPC text should expressly stipulate that it shall be prohibited, while preparing for and conducting the simulated corruption crime, to incite the person to commit crime in such a way that the person would commit a crime which he or she would have never committed without such incitement. It should include an interdiction to exerting influence on such persons through violence, threats or blackmail.

Detailed procedures of and tactics for the simulated criminal activity should be regulated by an implementing act, and this should be expressly stipulated in the Code.

3. We welcome introduction of plea bargaining and immunity agreement in Kyrgyzstan’s criminal procedure legislation, in particular under Article 326 of the draft Criminal Code (Bribe giving). It would be advisable to broaden the list of CC articles whereby immunity agreement could be made possible, and extend it to all corruption or corruption-related offences, and prescribe also that the purpose of such

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<sup>102</sup> See OECD, Report on the Third Round of Monitoring of Kyrgyzstan, 2015, op.cit.

agreement may include detecting and solving other corruption crimes either committed by high-level public officials or where the gained advantages are of considerable amount.

### International cooperation

Kyrgyzstan has provided the following statistics on incoming/outgoing MLA requests on corruption cases and cases of laundering of illicit proceeds from March 2015 to 2017.

**Table 21. Number of requests for mutual legal assistance**

	Sent by Kyrgyzstan to foreign states	Received by Kyrgyzstan from foreign states
Criminal cases on corruption	17	23
Criminal cases on illicit proceeds laundering	31	9

Additionally, from March 2015 to 2017 there were 3 extraditions to the Kyrgyz Republic of criminals to be prosecuted for corruption.

### Enforcement practices

According to Kyrgyz authorities, currently Kyrgyzstan cooperates actively in stolen asset recovery with a number of countries, including Lichtenstein, Switzerland, the USA, UK, Latvia and some others. This has been a first attempt at collaboration between the State Committee for National Security, the Office of the Prosecutor General and the State Financial Intelligence Service, followed up by court's conviction requiring repatriation of stolen assets and creating a precedent for similar cases in the Kyrgyz Republic.

The Anti-Corruption Service of the Kyrgyz State Committee for National Security was conducting one of their anti-corruption investigations of the crimes committed by A.A., accused of embezzling money from the state-owned closed joint-stock company A.T. He used purchasing of expensive IT equipment as a pretext to strip the company of over USD 14 million: the transactions were traced with STRs. The Kyrgyz FIU detected suspicious payments from the XYZ account at a Hong Kong bank. The Hong Kong FIU informed their counterpart in the Kyrgyz Republic about consecutive transfers of more than USD 6 million out of USD 14 million to suspicious accounts at the banks in Lichtenstein, Singapore and some other countries.

According to Seychelles FIU, accounts in Lichtenstein belong to a company TCL, registered on the Seychelles Islands in the name of A.A. (beneficiary) where he deposited USD 2 million. As a consequence of the MLAT request sent by Kyrgyzstan, pursuant to Art. 54, para 2 (b), of the UN Convention against Corruption, the court in Lichtenstein ordered the account to be seized.

The FIU in Singapore found out that about USD 2 million was shown as payment for a property deal in the capital city of Kyrgyzstan (A.A.'s spouse as the beneficiary owner). Using their personal accounts at these banks, the criminal group affiliated with A.A. transferred the money out and used it for their illicit activities.

After the illicit assets were frozen in 2012, the KR Office of the Prosecutor General and the Basel Asset Recovery Institute signed a Memorandum of cooperation in the above case. Under this Memorandum, experts from the Institute got the right to represent the Kyrgyz Republic in the jurisdictions of Switzerland and Lichtenstein.

The first stage of asset freezing was completed in November 2012 for two years at the request of the Prosecutor General's Office with the assistance of the Basel Asset Recovery Institute; with the similar Prosecutor General's requests later the freezing of assets in Lichtenstein was extended three more times.

On 13.10.2016, the Pervomaysky district court of the city of Bishkek found A.A. guilty of the crimes incriminated, including under Art. 83 of the KR CC "Legalisation of illicit proceeds", and sentenced him to 25 years in prison with the confiscation of property. On 28.11.2016, the judicial panel of the Bishkek city court upheld the verdict of the Pervomaysky district court of Bishkek. The sentence became final, and on 13.05.2017 the Supreme Court of the Kyrgyz Republic upheld the verdict of the court of the first instance.

Following that, the Office of the Prosecutor General of the Kyrgyz Republic sent its request to the Princely Court of Lichtenstein asking for the confiscation and repatriation of illicit assets. The relevant decision of competence authorities of the Princely Court of Lichtenstein is currently pending.

One of the key practical issues in the work of the international cooperation unit at the KR Office of the Prosecutor General is the communications in dealing with the requests. This is particularly pertinent to the communications with the states that are not CIS or former Soviet countries. Unfortunately, in the absence of direct contacts those requests have to be delivered via diplomatic channels. This factor cannot but affect the time needed for the criminal investigation as well as prompt and effective measures.

However, as noted by Kyrgyzstan, presently the MLAT cooperation in criminal investigation of corruption offences takes place within the framework of multilateral and bilateral treaties, such as, among others, the UN Convention against Corruption.

Kyrgyzstan is not in a position to render or obtain assistance through videoconferencing, since the legislation of the Kyrgyz Republic does not have a relevant rule. At the same time, Kyrgyzstan may use online videoconferences to discuss practical matters of cooperation with the competent foreign authorities. For instance, the KR Office of the Prosecutor General has been using online videoconferences with competent authorities of the US, Canada, Italy, Sweden, Latvia and other countries. Kyrgyzstan's legislation does not provide for joint investigation teams either.<sup>103</sup>

Pursuant to the criminal procedure legislation and provisions of international treaties of the Kyrgyz Republic, the Office of the Prosecutor General is a competent authority for the implementation of treaty-based rights and obligations of the Kyrgyz Republic for international cooperation in the area of criminal justice and collaboration of Kyrgyz law enforcement agencies with relevant bodies of foreign states on matters of criminal justice.

Pursuant to the order of the Prosecutor General of the Kyrgyz Republic of 24.12.2013, the international law cooperation of the Office is an independent structural division that reports to the KR Prosecutor General. The key area of this unit's work is implementation of international treaties of the Kyrgyz Republic in legal assistance in criminal matters, extradition of criminals and their criminal prosecution, transfer of convicts sentenced to deprivation of liberty to serve their sentences, contractual work and protocol matters; it also looks into and addresses other issues of international law within the competence of the prosecution authorities of the Kyrgyz Republic.

There are 6 staff in the unit, including its head, all fluent in English.

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<sup>103</sup> The possibility of forming joint investigation and operational teams is provided for in the Agreement on the procedure for the establishment and operation of joint investigation and operational teams in the territories of the member states of the Commonwealth of Independent States, ratified by the KR Law of July 30, 2016.

Experts note that provisions of the new CPC on international cooperation in criminal corruption cases appear insufficient. Article 516 of the CPC stipulates that the court, prosecutor and investigator shall, in the manner prescribed, comply with the request of competent foreign authorities to perform certain procedural or judicial actions under the general rules of the Code. To comply with the request, procedural rules of the foreign state may be applied, provided it is allowed under the international treaty with the foreign state in question, or based on reciprocity, unless it goes contrary to the legislation or international obligations of the Kyrgyz Republic.

These provisions may not be sufficient to ensure an efficient execution of requests from competent foreign authorities. In particular, there is the need for a more detailed description of the procedure of an interview at the request of the competent foreign authority, including with the help of video or teleconference; procedures for the search, seizure and confiscation of assets; procedures for setting a joint investigation team and for its operation, and more.

Kyrgyzstan is well advised to consider acceding to the 2015 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.

**Kyrgyzstan is partially compliant with the previous recommendations 10 and 11.**

#### **New recommendation No. 43**

**1. Extend the notion of politically exposed persons (PEPs) in the legislation on anti-money laundering to national persons performing prominent public functions. Extend the definition of the politically exposed persons to managers of public companies, political parties as well as family members and persons close to (affiliated with) such politically exposed persons.**

**2. Set up a centralized register of bank accounts that would include, *inter alia*, information about beneficiary owners, and make it accessible to investigative authorities without a court order for speedy identification of bank accounts in the course of financial investigations.**

**3. Ensure direct access of investigative authorities involved in financial investigations to databases held by tax and customs authorities on the condition of proper protection of personal data; harmonise the Criminal Procedure Code and the Tax Code in the matters of access to tax information by law enforcement agencies.**

**4. Improve the criminal procedure legislation, namely:**

**1) provide for more detailed rules regulating investigative measure of the simulated criminal activity in the CPC, and regulate the procedures for carrying out this measure in the bylaws pursuant to the Code;**

**2) expand CPC provisions on international cooperation in criminal matters, among other things, by regulating the procedure for interrogations at the request of the competent foreign authority, in particular, with the help of video- and teleconferences, procedures for the search, seizure and confiscation of assets, procedures for setting up joint investigation teams and their operation, having provided for the grounds for refusing mutual legal assistance;**

**3) consider repealing the judge's right to refer the criminal case back to the prosecutor.**

**5. Consider acceding to the 2015 Council of Europe Convention on Laundering, Search, Seizure**

## **and Confiscation of the Proceeds of Crime.**

### **3.3. Enforcement of criminal liability for corruption**

#### **Statistics, sanctions**

#### **Recommendation No. 7 of the Third round monitoring report on Kyrgyzstan:**

**1. Collect and analyse statistics on application of sanctions for corruption offences to assess their effectiveness in practice.**

**2. Revise sanctions for corruption offences to ensure their efficiency, proportionality and dissuasiveness and eliminate corruption risks.**

#### **Recommendation No. 13 of the Third round monitoring report on Kyrgyzstan:**

**Amend methodology for gathering and processing statistics on corruption-related offences to ensure collecting of comprehensive data which should be made public and allow appropriate monitoring and evaluation of criminal justice system operations by governmental and non-governmental institutions.**

#### **Statistics**

Kyrgyzstan provided the following statistical data:

- In 2015 courts reviewed 568 criminal cases of corruption (malfeasance in office) against 857 persons, including 3 members of parliament, 3 judges, and 33 law enforcement and state officials.
- In 2016 courts reviewed 566 criminal cases of corruption (malfeasance in office) against 791 individuals, including 4 judges, and 17 law enforcement and state officials.
- In 2017 courts examined 465 criminal cases of corruption (malfeasance in office) against 754 persons, including 3 members of parliament, 2 judges and 20 law enforcement and state officials.

See additional data on court cases in the appendix, as well as other statistics provided.

However, Kyrgyzstan was unable to provide statistical information for 2015-2017 on the results of the judicial review of criminal cases and the types of punishment imposed on convicted persons in corruption-related criminal cases, as well as the data on the seizure and confiscation of property. As the reason for the failure to provide this information Kyrgyzstan officials indicated that work was underway to create a unified database of people convicted of malfeasance in office, and that the information in question was related to the documents classified "For internal use".

At the same time, statistical data on the types and scale of sanctions related to Art. 314 of the Criminal Code (Active Bribery) for 2015-2017 were provided.

In general, we can confirm the existence of a problem with the collection and compilation of statistical data on sentences and sanctions applied in corruption cases in Kyrgyzstan. Furthermore, we cannot agree with

the reasons for restricting access to statistical information on corruption offences and their prosecution - this contradicts the standards of openness of information and prevents public oversight of the activities of state bodies in combating corruption.

The Presidential Decree of the Kyrgyz Republic "On Measures to reform the System of Law Enforcement Agencies of the Kyrgyz Republic" of July 18, 2016, which approved a series of measures for reforming the law enforcement system in the Kyrgyz Republic, was a positive step in changing the methodology of collecting statistical data on criminal acts in general and criminal acts of corruption in particular. One of the thrusts of the reform is to transfer the duty of collecting criminal and legal statistics from the Ministry of Internal Affairs to the Prosecutor's bodies. One of the declared goals of this measure is to create a unified system for recording applications and crime reports as well as to introduce an open and automated system for recording the movement of materials and criminal cases - from the moment of registration to the announcement and execution of the court decision (verdict). The transfer of these functions to the KR Office of the Prosecutor General will help avoid departmental interests in the process of forming statistical reports and keeping records, and will provide for receiving objective and reliable information on the progress of criminal cases, including the types and severity of sanctions for corruption-related criminal acts.

In pursuance of this Decree and the Set of Measures, a Legal Statistics and Accounts Department with regional units was created in the central Office of the Prosecutor General without additional financing.

The Office of the Prosecutor General together with the Ministry of Internal Affairs of the Kyrgyz Republic compiled a roadmap for the transfer of the responsibility for criminal and legal statistics. Concrete step-by-step measures and deadlines for their implementation have been determined and the process of transferring documentation from the Ministry of Internal Affairs to the Office of the Prosecutor General has been completed. Similar work is being done in the regions.

Since January 2018, the central office of the Legal Statistics and Accounts Department has already produced a consolidated report on the state of criminality in the country, and regional departments for the first time will establish crime statistics reports jointly with departments of the Ministry of Internal Affairs in the regions including the cities of Bishkek and Osh.

It will only be possible to draw final conclusions on the effectiveness of the Single Register of Crimes and Criminal Offences for the purpose of collecting and summarizing the statistical data on corruption cases after the full electronic database is put into operation (after January 1, 2019). It is also impossible to assess the effectiveness of the measures taken to organize a new statistical system as Kyrgyzstan has not provided sufficient statistical data.

**Kyrgyzstan is partially compliant with paragraph 1 of Recommendation 7 and Recommendation 13 of the previous round of monitoring.**

### **Sanctions**

Optimisation of criminal responsibility, reform of the ways and types of punishment, introduction of probation, etc. were among the top priorities in the development of the new 2017 Criminal Code. In accordance with Chapter 11 of the new Criminal Code, various types of main punishments, from less severe to more severe, can be applied to individuals found guilty of an offence, including corruption.

The types of punishments divided into appropriate categories are related to each other based on the degree of severity in accordance with the rules set forth in Annex 2 to this Code (Table of correlation of types and scale of punishments for Offences for the purpose of a unified set of sanctions). This innovation is aimed

not only at ensuring the effectiveness of sanctions but also at eliminating corruption risks when assigning criminal penalties.

In addition, according to the decision No. 1 of the Coordination Meeting of law-enforcement, fiscal and other government agencies on Anti-Corruption Issues of June 23, 2017, the Government of the Kyrgyz Republic was recommended to consider developing, together with law enforcement, judicial and other government agencies, and on the basis of an analysis of sentencing in criminal cases of corruption (malfeasance) offences, a draft law on the application of criminal legislation prohibiting suspended sentences and the termination of criminal cases for all crimes committed through the abuse of office in state bodies. In July 2017, the Government approved the Action Plan for the implementation of this Coordination Meeting's decision.

The sanction stipulated in Part 1 of Article 325 of the 2017 Criminal Code provides for the following possible penalties for bribe taking: a category VI fine [from 2600 to 3000 calculation index units, i.e. from about 3068 to 3540 euros] or category II imprisonment [from 2.5 to 6 years] with deprivation of the right to hold certain official positions or to engage in certain activities for up to two years and with a category II fine. Part 1 of Article 325 establishes criminal liability for taking a bribe in the absence of qualifying elements, that is, in particular, if the bribe does not exceed 1000 calculation index units [about 1180 euros].

In general, given the more stringent sanctions for aggravated bribe taking, these provisions can be considered acceptable.

The sanction in the Part 1 of Article 328 of the 2017 Criminal Code provides for the following possible penalties for basic bribery: category IV correctional labour [from 2.5 to 3 years] or a category V fine [from 2200 to 2600 calculation index units, i.e. from about 2596 to 3068 euros], or category I imprisonment [up to 2.5 years]. Part 1 of Article 328 provides for the criminal liability for paying bribes in the absence of qualifying elements, that is, in particular, if the bribe does not exceed 1000 calculation index units [about 1180 euros]. In general, taking into account the insufficient statute of limitations for the basic bribe giving (3 years, see above), the sanctions in part 1 of Article 328 should be considered insufficient.

It should also be noted that the 1997 Criminal Code as amended in 2012, provides for punishment for crimes of commercial bribery in the form of a fine both in cash (a certain number of calculation index units) and in the multiplied value of the object in question or the multiplied amount of the commercial bribe. The establishment of a fine as the multiplied amount (value) of the object of a bribe, with a minimum fine available, can be considered a more progressive practice as it allows the use of proportional financial punishment. Kyrgyzstan should consider the possibility of establishing a fine for corruption offences in the form of the multiplied amount of the size of the object of a bribe or bribery.

Kyrgyzstan failed to comply with paragraph 2 of previous recommendation No. 7 on the revision of sanctions for corruption offences to ensure their efficiency, proportionality and dissuasiveness. The third round monitoring report on Kyrgyzstan indicated a disproportionately severe minimum sanction for the basic offence of "Corruption" - 8 years of imprisonment. In Article 319 of the new Criminal Code of the Kyrgyz Republic, the minimum sanction for the basic offence of corruption is increased to 10 years of imprisonment (6 years for minors). At the same time, the minimum sanction for aggravated corruption crime is reduced from 15 years to 12 years of imprisonment.

Moreover, in the new 2017 Criminal Code, the sanction regarding unlawful receipt of remuneration for employees was not revised (Article 238). For the basic and aggravated elements of the crime the maximum penalty is stipulated in the form of a fine. Only a particularly aggravated bribe (unlawful receipt of remuneration in a particularly large amount) is punished by imprisonment: from two years six months to five years, and for minors from one year six months to two years six months.

In addition, as noted earlier in Section 3.1. of this report, experts negatively assess the fact that several offences that inherently qualify as corruption (the bribery of athletes, bribery of participants in criminal proceedings, abuse of authority in a commercial or other organization, including that committed by an employee of a state or municipal enterprise) have been excluded from the Criminal Code and transferred to the new Code of Offences of the Kyrgyz Republic (adopted in February 2017, effective from January 1, 2019). The maximum penalty for such misconduct is a category II fine (300-600 calculation index units, that is 30 000 - 60 000 som or about 350-700 euros). The statute of limitation for offences is set at 2 years. These and other provisions of the Code of Offences make the responsibility for the specified offences ineffective.

The provision of Part 7 of Article 44 of the 1997 Criminal Code could be considered questionable. It stipulates that, in the event of admission of guilt and payment of compensation for harm caused by their offence, the court prescribes to a person guilty of committing crimes under articles 224 (commercial bribery), 225 (unlawful receipt of remuneration by an official) and 303-315 (crimes in public office) of the Code, a penalty in the form of the minimum fine provided for by the said articles of the Criminal Code. Such an easing of the sanction is unreasonable; it undermines the effectiveness of criminal sanctions for corruption. Admission of guilt and payment of compensation for harm may be taken into account in sentencing as mitigating circumstances, but the mandatory imposition of a minimum penalty is excessive. The repeal of this provision is recommended.

The experts welcome the changes introduced in Art. 63 of the 1997 Criminal Code, according to which suspended sentences do not apply to persons convicted of corruption offences. However, this provision does not exist in the 2017 Criminal Code, according to which (Article 83) the court, when imposing a prison sentence for a period not exceeding five years, taking into account the gravity of the crime, the identity of the perpetrator, his agreement to accept probation supervision, as well as other circumstances, may come to the conclusion that it is possible to reform the convicted individual without enforcing the sentence. The court may decide to release him/her from his/her sentence through the use of probation supervision (probation), which is a compulsory-incentive measure in the criminal procedure. Probation supervision does not apply to individuals convicted of serious or particularly serious crimes. Thus, for less serious corruption offences with a possible imprisonment up to 5 years, exemption from serving a sentence can be applied. It is recommended to consider the possibility of excluding corruption offences from those for which probation supervision can be applied.

Examples of criminal cases:

- O.T., a member of the Supreme Council of the Kyrgyz Republic and D.Ch., a former Ambassador of the Kyrgyz Republic to South Korea. were detained by law enforcement agencies upon the request of a Russian businessman, L.M., who accused them of receiving a bribe of 1.0 million dollars. They were charged with corruption and abuse of office. On August 16, 2017, by the verdict of the Pervomaysky District Court of Bishkek, MP O.T. and former ambassador D.Ch. were found guilty of receiving 1.0 million dollars in the case regarding company "M" and sentenced to 8 years imprisonment (each) with confiscation of property and disqualification from holding public office for three years after their release.

- On 4 January 2018, the Pervomaysky District Court of Bishkek sentenced K.I., a member of the Kyrgyz Republic Supreme Council to 12 years in prison with confiscation of property; a sentence in a high-security labour camp and disqualification from holding public office for a period of three years. K.I. was accused of corruption and abuse of office while he was the mayor of Tokmok. He was charged with the illegal transfer of land plots from municipal property to private property, accused of selling library and hostel buildings at reduced cost and of illegally instructing an affiliated private company to perform contractual work for the construction of a service station at the expense of the city budget. The verdict was challenged in the appeal courts (at the stage of judicial review).

On December 19 2017 the Pervomaysky District Court of Bishkek sentenced A.Sh., a member of the Supreme Council of the Kyrgyz Republic, to pay a fine of 5 million som after an accusation of corruption and abuse of office. He was found guilty of selling his wife's car at an inflated cost to the Accounting Chamber of the Kyrgyz Republic in 2011 using his official position as a member of the tender commission in order to obtain unlawful profits. The verdict was challenged in the appeal courts, and is at the stage of judicial review.

The experts note that although Kyrgyzstan did not provide detailed statistics on the prosecution of corruption offences, it can be seen from media reports<sup>104</sup> and information from NGOs that law enforcement agencies are doing a remarkable job of identifying and prosecuting corruption offences including those of top officials. However, according to interviewed NGOs and other sources, such criminal prosecutions are often politically motivated, especially when representatives of previous governments are persecuted. This underlines the importance of reforming the institutional system for fighting corruption (see the next section) as well as publishing and analysing statistical data.

**In general, Kyrgyzstan is not compliant with the previous Recommendation 7.**

#### **New recommendation No. 44**

- 1. Revise sanctions for corruption offences, including in the private sector, to ensure their effectiveness, proportionality and dissuasiveness and to eliminate corruption risks.**
- 2. Ensure the collection, summarising and publication on the Internet of regularly updated statistics on corruption criminal offences, in particular on the number of allegations of such violations, the number of cases registered, the results of investigations, prosecutions and trials (indicating data on the sanctions applied and categories of accused individuals by their position and place of work). Statistical data should be accompanied by analysis of trends in corruption offences.**

#### **3.4. Specialized anti-corruption law enforcement agencies, courts**

**Recommendation No. 12 of the Third round monitoring report on Kyrgyzstan:**

- 1. Ensure that law enforcement agencies dealing with corruption cases be operationally and structurally independent to be able to effectively target high-level corruption. Ensure effective specialisation in investigation of corruption offences in line with international standards.**
- 2. Organise regular training on enforcement of anti-corruption legislation for law enforcement officials, prosecutors and judges, including regular joint trainings.**
- 3. Take measures to ensure a uniform court practice regarding possibility of using the results of special investigative measures as evidence in corruption trials and, if necessary, amend legislation. Introduce in the law regulation of the simulated bribery and establish clear guidelines for law enforcement officers in line with human rights standards.**
- 4. Secure funding for the implementation of witness protection programs.**

The system of investigative authorities

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<sup>104</sup> See, for example: <https://bit.ly/2LJkbzc>, <https://bit.ly/2svK5h6>

In accordance with the Decree of the President of the Kyrgyz Republic "On Measures for Reforming the System of Law Enforcement Agencies of the Kyrgyz Republic" No. 161 of July 18, 2016:

- prosecutors are charged with initiating criminal proceedings against officials of state bodies (the list of which is determined by a constitutional law), with transfer of cases for investigation to the relevant bodies, as well as with the criminal prosecution of individuals who have the status of military personnel (Article 104 of the Constitution of the Kyrgyz Republic as amended by the Law of the Kyrgyz Republic of December 28, 2016);

- The State Service for Combating Economic Crimes under the Government of the Kyrgyz Republic (SSCEC) has the task of fighting corruption in civil bodies (with the exception of top officials who fall under the remit of the State National Security Committee) and, to this end, has the authority to investigate corruption and malfeasance in office. At the same time, the responsibilities of the State National Security Committee (SNSC) for the investigation of economic cases, as well as the responsibilities of the Ministry of Internal Affairs for identifying and suppressing official and corruption offences have been transferred to the SSCEC;

- The State National Security Committee (SNSC) is empowered with the task of combating corruption in the highest echelons of power as well as with corruption offences that threaten national security. Therefore, the SNSC performs the functions of the Prosecutor's Office for investigating corruption offences against high-ranking officials, law enforcement officers and judges without the right to initiate criminal proceedings (this function is assigned to the prosecution authorities). At the same time, the detection of corruption in the Prosecutor's Office is the responsibility of the national security agencies.

The investigation of criminal cases of corruption (malfeasance in office) crimes is determined by Article 163 of the 1999 Criminal Procedure Code (CPC), and Art. 153 of the 2017 CPC.

#### Status and autonomy of investigators

In accordance with Article 35 of the 1999 Criminal Procedure Code the investigator is a public official empowered within his remit to investigate a criminal case and in the event of accelerated pre-trial proceedings. An investigator initiates a criminal case, investigates it and performs all investigative actions stipulated in this Code.

In accordance with paragraphs 3 and 4 of Article 35 of the Criminal Procedure Code of the Kyrgyz Republic, the investigator makes all decisions independently regarding the direction of investigation and the conducting of investigative actions (except in cases when the law provides for obtention of a court decision or the sanction of the prosecutor, in cases established by this Code) and bears full responsibility for their legal and timely fulfilment.

If the investigator disagrees with the decision of the prosecutor in the criminal case, the investigator has the right to apply to a higher prosecutor by presenting his objections in writing. In this case, the superior prosecutor has the right to revoke the decision of a lower-ranking prosecutor or to assign the investigation to another investigator.

The Office of the Prosecutor General of the Kyrgyz Republic is authorised to transfer the criminal case from one investigative body to another.

Specialised investigative anti-corruption authorities (units)

In the Kyrgyz Republic, investigations of criminal cases involving public (corruption) offences are carried out by investigators of the investigative units of the military prosecutor's office, national security agencies and financial police authorities.

Investigative units of the bodies of the military prosecutor's office carry out criminal prosecution of individuals who have the status of military personnel.

As part of the fight against corruption, the Anti-Corruption Service of the State National Security Committee of the Kyrgyz Republic, in accordance with the Law of the Kyrgyz Republic "On Operative and Investigative Activities", carries out operative and investigative activities to identify, prevent and suppress the public (corruption) offences described in Articles 303-316 of the Criminal Code of the Kyrgyz Republic. In this respect, the investigation of criminal cases in the system of national security bodies is carried out by the Main Investigation Department and investigative units of the regional departments of the State National Security Committee of the Kyrgyz Republic.

In accordance with the Law of the Kyrgyz Republic "On National Security Bodies of the Kyrgyz Republic," **the national security bodies** of the Kyrgyz Republic combat corruption and carry out operative and investigative activities, inquiries and preliminary investigations of individuals who have committed offences or are suspected of committing them, including through the use of operational, technical and other means, and keep records of these persons. By the decree of the President of the Kyrgyz Republic No. 27 dated December 14, 2011, the Anti-Corruption Service (ACS) was established in the framework of the State National Security Committee of the Kyrgyz Republic. Its task is to prevent, suppress, identify, and investigate corruption offences, in cases established by law, against individuals occupying political and top administrative state and municipal positions, persons working in law enforcement, judicial bodies, other state and municipal bodies, heads of institutions, organisations which are financed from the state budget or if the state has a share (shares) in their authorised capital. At the same time, the investigation of criminal cases in the system of national security bodies is carried out by the Main Investigation Department and investigative units of the regional departments of the State National Security Committee of the Kyrgyz Republic.

According to the Regulation "On the State Service for Combating Economic Crimes under the Government of the Kyrgyz Republic (Financial Police)," approved by Government Resolution No. 176 of 15 March 2012, **the Financial Police** carries out operational investigation and operational search activities, special investigative actions and pre-trial proceedings in accordance with the legislation of the Kyrgyz Republic; accepts, registers, examines applications, reports, incoming materials from state bodies and individuals on crimes committed, being committed or prepared, and also takes timely measures to prevent, disclose, detain persons who committed them; conducts inquiries and investigations within the framework of the criminal procedure legislation of the Kyrgyz Republic; improves forms and methods of combating economic and official crimes, determines tactics and methods of operative and investigative activities, develops and implements measures to increase the effectiveness of the activities of the Financial Police; carries out measures to counter economic crimes that damage the state with the participation of state officials; carries out the search for individuals in criminal cases under investigation by the Financial Police; develops methods to counter economic and official offences; organises studies, conducts seminars aimed at raising the level of professional skills of staff and forming a methodological database; conducts events on legal propaganda in its field of responsibility; interacts with state bodies, international and public organisations on issues within the competence of the Financial Police; organizes interaction with relevant bodies of the CIS member states to improve the effectiveness of measures aimed at identifying, suppressing, preventing and investigating offences in the fields of economy and finance.

The independence of the investigative body is ensured by the rules of the Criminal Procedure Code of the Kyrgyz Republic.

The Anti-Corruption Service (ACS) and the Main Investigation Department (MID) are structural subdivisions of the State National Security Council (SNSC) and report to the senior management of the SNSC of the Kyrgyz Republic. The Chairman of the SNSC is appointed by decree of the President of the Kyrgyz Republic. The director of the ACS is simultaneously the first Deputy Chairperson of the SNSC, who is also appointed by decree of the President of the Kyrgyz Republic at the proposal of the Chairperson.

The State Service for Combating Economic Crimes (SSCEC) reports to the Government of the Kyrgyz Republic. The Government of the Kyrgyz Republic determines the management system, structure, and size of the Financial Police. The recruitment of personnel on a competitive basis and the distribution of functional duties are carried out by the Chairman of the SSCEC. The Financial Police is headed by the Chairman who is appointed and dismissed by the Prime Minister of the Kyrgyz Republic. The Chairman has deputies who are appointed and dismissed by the Prime Minister of the Kyrgyz Republic on the proposal of the Chairman. The Chairman organises and manages the work of the Financial Police, is independent in making decisions within its competence and is personally responsible for the activities of the Financial Police.

The Military Prosecutor's Office reports to the Office of the Prosecutor General of the Kyrgyz Republic. The Prosecutor General determines the status, competence, structure and staff of the Military Prosecutor's Office. The Military Prosecutor is the Deputy Prosecutor General, appointed and dismissed by the President of the Kyrgyz Republic at the proposal of the Prosecutor General.

The experts consider that the existing units that investigate corruption offences in Kyrgyzstan cannot be considered to be completely autonomous either institutionally or operationally. The Anti-Corruption Service of the SNSC is a structural subdivision of the SNSC; the SNSC leadership is appointed by the President of the Kyrgyz Republic, i.e. by a political body. The appointment is not based on objective criteria of personal qualities and is not transparent. Both the head of the ACS and the head of the SNSC can be dismissed for political reasons. Similar remarks can be made regarding the Financial Police, which reports to the Government. Both the ACS and the SSCEC were created and operate on the basis of regulatory acts, not the law. In general, the structure, management, appointment and dismissal of management and other personnel of these bodies do not comply with international standards developed for specialized anti-corruption bodies.<sup>105</sup>

The investigative authorities also have no operational autonomy because, in particular, the Office of the Prosecutor General can take away any case and hand it over to another body. According to Article 33 of the 2017 CPC, the prosecutor may transfer criminal cases for investigation to the investigator or a group of investigators, irrespective of their jurisdiction, in exceptional cases, which include: a biased conduct by the investigator in the investigation; pressure on the investigator by officials to whom he/she reports to to make a certain decision; the public significance of the case; the expediency of conducting an investigation by the body that identified the crime. The definition of such exclusivity criteria in the new CPC is welcome as they were not available in the 1999 CPC. However, these criteria are not clear enough; they should be detailed and narrowed either directly in the CPC or by a regulatory act/guidance of the Prosecutor General. In general, the possibility of transferring a criminal case of a corruption offence from one authority to another is problematic. If such a possibility persists, clear and transparent criteria for such a decision should be established.

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<sup>105</sup> For more details on relevant standards, see OECD Network publications: Final Report on the Third Round of OECD Network Monitoring, 2016, op. cit., p. 171-176; Specialized institutions for combating corruption: a review of models, 2013, available at <https://bit.ly/2JgdKoX>.

According to the experts, it is also questionable that powers to investigate the criminal offences (in general, and concerning corruption offences, in particular) are given to the national security bodies belonging to the State National Security Committee of the Kyrgyz Republic. For example, according to the standards of the Council of Europe, internal security services should not have the right to investigate criminal cases.<sup>106</sup> The activities of security services, as a rule, are not transparent due to their specific nature; they lack effective public control. Granting the right to investigate criminal offences to the security services can lead to abuses and in itself creates significant corruption risks. Therefore, it is recommended to withdraw from the national security authorities the right to investigate corruption offences.

The investigative function of the Prosecutor's Office is described in section 2.3. of this report. Here it can only be reiterated that, after amending the Constitution of the Kyrgyz Republic, the prosecution authorities should not perform the function of pre-trial investigation but such powers are retained both in the 1999 CPC and in the new Criminal Procedure Code. Moreover, according to the amended Constitution, the function of the Prosecutor's Office "to initiate" criminal cases against certain officials, including corruption offences, is not coordinated with the new procedure for organising pre-trial investigation under the 2017 Criminal Procedure Code, where no such stage as "initiating" the criminal case is envisaged.

#### Specialisation of prosecutors

The specialisation of prosecutors in the investigation and/or upholding of charges in corruption cases is not provided for.

#### The unit for the search and management of seized assets

In Kyrgyzstan there is/are no unit (units) or division (divisions) that would be responsible for identifying, searching and managing criminal assets/proceeds subject to confiscation, including those created abroad. These functions are performed by investigators from pre-trial investigative authorities, and the sale of confiscated property is carried out by the Government Fund for the Management of State Property.

The existence of such units (divisions) is considered a standard in the countries of the European Union and in the best practices of other countries. Pre-trial investigative authorities and other institutions, as a rule, do not have the experience, special knowledge and time to effectively search for assets, seize them and then effectively manage them during the period of seizure of property and after the adoption of the confiscation decision. This is especially true if it is necessary to identify and search for assets abroad.

According to Article 31 of the United Nations Convention against Corruption, each member state shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of the means for use in corruption offences and proceeds from them for the purpose of eventual confiscation. Each member-state shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration of frozen, seized or confiscated property by competent authorities.

According to recommendations 4 and 38 of the FATF, countries should take measures, inter alia, regarding: identifying, tracing and evaluating property that is subject to confiscation; freezing and seizing assets; creation of effective mechanisms for managing such property and, if necessary,

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<sup>106</sup> See, for example, Recommendation 1402 of the Parliamentary Assembly of the Council of Europe (1999) "On the Control of Internal (National) Security Services in the Member States of the Council of Europe", available at <https://bit.ly/2shuz9t>.

expropriation/disposal of seized or confiscated property. These mechanisms should be used in the national procedures as well as be implemented based on requests from foreign countries.<sup>107</sup>

#### Training on anti-corruption legislation for law enforcement officials and prosecutors

Training and professional development for employees in the Prosecutor's Office of the Kyrgyz Republic on issues including the application of anti-corruption legislation is conducted in the Centre for Advanced Training of Personnel of the Prosecutor's Office of the Personnel Department of the Office of the Prosecutor General of the Kyrgyz Republic.

The Centre for Advanced Training of Public Prosecutors, using the experienced staff of the Office of the Prosecutor General and the State Service for Combating Economic Crimes (SSCEC), conducted three training seminars in 2017 for 55 employees of prosecutors' offices on various topics, including:

"Identification and Investigation of Corruption offences", "Implementation of the prosecutor's supervision of the investigation in the investigation of corruption offences"; "Principles of competition in the criminal process".

For example, within the framework of the project "Support to the Prosecutor's Office of the Kyrgyz Republic in strengthening institutional capacity," a Memorandum of Understanding was concluded between the Office of the Prosecutor General of the Kyrgyz Republic and the International Development Law Organization (IDLO) on 08 November 2016, on the basis of which comprehensive training programmes were developed for employees of the Prosecutor's Office on various aspects and issues of combating corruption. Different types of training such as independent targeted training, thematic teaching and methodological seminars, scientific and practical conferences, and the exchange of positive experience are envisaged in the following areas: the international legal toolkit in the field of combating corruption; the study (adaptation) of the new legislation (Criminal Code, Criminal Procedure Code, Code of Offences, etc.); methodical aids and normative acts of the Office of the Prosecutor General of the Kyrgyz Republic; prosecutor's supervision over the implementation and observation of anti-corruption legislation in the state and municipal service; certain issues of prosecutorial and investigative practices in the field of combating corruption; law enforcement practice, positive work experience and reviews of scientific and practical comments on the investigation of corruption cases; anti-corruption expertise of regulatory legal acts; criminal-legal aspects of the participation of the prosecutor in countering corruption, etc.

In the framework of the OECD Anti-Corruption Network project to "Support Anti-Corruption in Law Enforcement in Kyrgyzstan", seminars were held on the following topics on October 31 - November 1, 2016 and July 3-5, 2017.: "The liability of legal persons for corruption offences: challenges and solutions for Kyrgyz Model" and "Financial investigations into corruption cases ". The expert workshops were attended by representatives of the Supreme Council of the Kyrgyz Republic, the Office of the Government, the secretariat of the Security Council, the Supreme Court, the Accounts Chamber, employees of the prosecutor's office, financial intelligence, personnel service, the Ministry of Justice, the Ministry of Finance, the Ministry of Economy, criminal experts and practitioners, representatives of the scientific

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<sup>107</sup> <sup>102</sup>FATF (2012), International Standards on Combating Money Laundering and The Financing of Terrorism and Proliferation, renewed in February 2018, Recommendations 4 and 38, Clarifying notes to Recommendations 4 and 38. Available at <https://bit.ly/2GHXKr9>. See also: FATF Guidance, Best Practices on Confiscation (Recommendations 4 and 38) and Framework for Ongoing Work on Asset Recovery (2012), available at <https://bit.ly/2KLCKSZ>; G8 Best Practices for the Administration of Seized Assets (2005); European Union Decision 2007/845/JHA concerning cooperation between asset recovery offices of the member States for tracing and identification of proceeds of a crime; Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime.

community, expert-members of the working group on drafting the Criminal Code and the Criminal Procedure Code.

In addition, in the framework of the joint Council of Europe/European Union project "Strengthen Prevention and Combating of Corruption in Kyrgyz Republic (SPCC-KY)" in June 2017 in Strasbourg, a training course for prosecutors and law enforcement officers (Financial Police and Anti-Corruption Service of the State National Security Committee) was conducted on the topic: "Effective economic crime and corruption related investigations" covering the investigation of economic and anti-corruption criminal cases.

#### Training of judges

Annually, according to the Curriculum of the Higher School of Justice under the Supreme Court of the Kyrgyz Republic, judges in the Kyrgyz Republic are trained on the following topics: court trials on misconduct and corruption; anti-corruption legislation.

In 2017, 2479 people were involved in the training process. 123 events were held, including: the improvement of the skills of judges of local courts of the Kyrgyz Republic and the staff of the judicial system according to the Comprehensive Training Programme covering 336 people at 14 events; thematic seminars and trainings covering 2103 people at 108 events.

#### Simulation of giving / receiving a bribe

See section 3.2. of this report.

#### Internal investigation divisions

The state bodies below have the following divisions for the implementation of internal investigations and suppression of internal corruption:

- The State Service for Combating Economic Crimes at the Government of the Kyrgyz Republic (Financial Police) has the Office for Internal Investigation and Security;
- The Ministry of Internal Affairs of the Kyrgyz Republic has the Internal Investigation Service;
- The SNSC of the KR has the Internal Security Service;
- The Office of the Prosecutor General of the Kyrgyz Republic has the Internal Investigation Department;
- The State Tax Service under the Government of the Kyrgyz Republic has the Internal Audit Office with the Corruption Prevention Department;
- The State Customs Service at the Government of the Kyrgyz Republic has the Internal Security and Anti-Corruption Department.

The main functions and powers of the internal investigation divisions are defined in the relevant regulatory legal acts and departmental acts of the state bodies regulating the issues of the civil service.

According to Article 33 of the Law of the Kyrgyz Republic "On the Public Service", an official investigation may be conducted to establish or confirm the fact of committing a disciplinary offence. The investigation may be initiated by the head of a state body, local government, an authorised official on their own initiative, upon request of an ethics commission or at the initiative of the employee himself. The

official investigation can be conducted on the basis of appeals from individuals and legal entities or in case of mass media publication about the employee committing an official (disciplinary) misconduct. The official investigation is conducted by the body in which the employee works with the participation of representatives of the ethics commission.

#### Financing of witness protection programmes

In pursuance of the resolution of the Government of the Kyrgyz Republic "On Protection of the Rights of Witnesses, Victims and Other Parties to Criminal Proceedings " of 10 January 2014 and the decision of the Ministry of Internal Affairs of the Republic of Kyrgyzstan of June 24 2014, the Ministry of Internal Affairs of the Kyrgyz Republic established the State Protection Department. After some time the reform of this Department was carried out and the number of employees was increased. From the day the Department was established, the funds for its maintenance were allocated from the budget of the Ministry of Internal Affairs of the Kyrgyz Republic amounting, to date, to more than 17.0 million som (together with wages, travel and other expenses).

In February 2017, an interdepartmental working group organised by the order of the Ministry of Internal Affairs sent to the Government of the Kyrgyz Republic a draft developed by the group for a "State programme on protection of the rights of victims, witnesses and other participants in criminal proceedings" for 5 years (2017-2021).

**Kyrgyzstan is partially compliant with the previous Recommendation 12.**

#### **New recommendation No. 45**

- 1. Ensure that law enforcement agencies dealing with corruption cases be operationally and institutionally independent in order to be able to pursue the effective and politically neutral criminal prosecution of high-level corruption.**
- 2. Ensure an effective specialisation in the investigation and prosecution of corruption offences in accordance with international standards.**
- 3. Consider removing the function of the pre-trial investigation of corruption offences from the national security bodies' remit.**
- 4. Create (determine) a body or a unit responsible for the identification, tracing, seizure and management of assets subject to confiscation, including such assets abroad; establish and apply in practice transparent and, whenever possible, competitive procedures for the management, evaluation and realisation of seized/confiscated assets.**

## Chapter 4. Prevention and prosecution of corruption in the customs administration of the Kyrgyz Republic

This study was conducted using OECD methodology based on responses from authorised representatives of the State Customs Service (SCS) of Kyrgyzstan to the questionnaire, as well as interviews conducted with representatives of the SCS and the business community during the on-site visit.

The study was also based on recommendations on corruption prevention in customs developed with the participation of OECD<sup>108</sup>, as well as on tools to ensure the prevention and fight against corruption developed by the World Customs Organization (WCO).<sup>109</sup>

### General information about the State Customs Service

The State Customs Service (SCS) of the Kyrgyz Republic (KR) is an independent central executive body subordinated directly to the Government. The SCS forms and implements the state policy in the field of customs. The SCS does not perform tasks in the public administration sector which are not directly linked to customs.<sup>110</sup>

The SCS carries out its activities throughout the territory of the Kyrgyz Republic including the places of customs clearance, customs infrastructure facilities as well as at border crossings at the Manas airport and on the borders with China, Tajikistan and Uzbekistan. Since joining the Eurasia Economic Union (EEU) in August 2015, the customs authorities are not represented at border crossing points along the state border of the Kyrgyz Republic with Kazakhstan.

The foreign trade turnover of the Kyrgyz Republic in 2017 amounted to 3.863 billion US dollars. In the same year imports amounted to 2.642 billion dollars, and exports to 1.220 billion dollars.

### Anti-corruption policy in the sector

It should be noted, as a positive development, that the KR Government is fully aware that the implementation of the state's customs policy is a potentially risky area in terms of corruption.

At the international level, the KR adopted the WCO's 2003 Arusha Declaration and acted as the party to the Almaty Integrity Declaration of 19 January 2007. In 2005, the KR also joined the UN Convention against Corruption. Kyrgyzstan has implemented certain domestic procedures to join the Revised Kyoto Convention of the WCO but to date the procedures have not been completed.

Joining the Revised Kyoto Convention of the WCO, as well as the use of the World Customs Organization's tools for developing good governance and combating corruption in customs<sup>111</sup>, will not only strengthen the institutional capacity of the SCS but it would be also a signal to the international community that the Kyrgyz Republic is committed to the best customs practices. Given the absence of arguments against accession to the Revised Kyoto Convention of the WCO, we recommend completing the

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<sup>108</sup> See, for example, <https://bit.ly/2szqDBd>.

<sup>109</sup> Available at <https://bit.ly/2kLvOtr>.

<sup>110</sup> In many countries customs administrations carry out non-customs functions such as, for example, administering excises, controlling gambling, etc.

<sup>111</sup> The Revised Integrity Development Guide (2014), including the Self-Assessment Methodology, the Guide to Corruption Risk Mapping (2014), Guide to Prevent Procurement Corruption in Customs (2015), Model Code of Ethics and Conduct of the World Customs Organization (2011).

relevant domestic procedures, as well as to take further measures to express the commitment and use of the above-mentioned instruments and WCO mechanisms.

At the national level, a number of anti-corruption documents have been approved, in which the SCS is involved as a co-executor. Such documents include, first of all, the Decree of the President of the Kyrgyz Republic of February 2, 2012 No. 26 "On the State Strategy of the Anti-Corruption Policy of the Kyrgyz Republic and Measures to Counteract Corruption" and the Plan of Measures of the State Bodies of the Kyrgyz Republic for Implementing the State Strategy of Anti-Corruption Policy of the Kyrgyz Republic for 2015-2017 approved by the Government of the Kyrgyz Republic on March 30, 2015 (Act No. 170). Based on these documents, a "Plan of Measures to introduce anti-corruption management model in the State Customs Service at the Government of the Kyrgyz Republic" was approved by the Secretary of the Defence Council of the Kyrgyz Republic on December 30, 2014. To date, a draft of the "Updated plan of measures to introduce an anti-corruption management model in the SCS at the Government of the Kyrgyz Republic for 2018-2020" has been developed. As long as this draft was not submitted for analysis during time of the visit, the experts analysed only the current "Updated Action Plan for the Implementation of the Anti-Corruption Management Model in the SCS at the Government of the Kyrgyz Republic" adopted in 2016. The draft of the "Updated plan of measures to introduce an anti-corruption management model in the SCS at the Government of the Kyrgyz Republic for 2018-2020" was delivered to experts on the later stage along with comments to the draft report.

The analysis of the abovementioned (current) Updated Plan shows that the very existence of such a plan, the compliance of the assigned tasks with the generally accepted world practices and WCO anti-corruption standards could be considered as positive. As areas for improvement, the absence in the plan of tasks related to the problem of determining the customs valuation; a certain dilution of the expected final results and responsibility for their non-achievement; lack of definition of financial resources necessary to achieve the objectives should be noted.

The best practice regarding such plans is the establishment of clear end results of the implementation of the tasks set forth, the identification of specific responsible executors, as well as the sources of funding necessary to achieve these objectives.

### **Recruitment and service in the customs administration**

As of March 2018, 1,227 employees worked in the SCS. Service in the customs administration is a form of civil service and is regulated by a separate Law of the Kyrgyz Republic "On Service in the Customs Administration". Service in the customs administration imposes certain anti-corruption restrictions on employees. Employees of the customs administration, in particular, are not entitled to:

- perform simultaneously any paid work, except for pedagogical, scientific and other creative activities,
- engage in entrepreneurial activities personally or through intermediaries,
- take part, independently or through a representative, in the management of economic entities, except for certain cases determined by law,
- be an attorney or representative for third parties in the customs authorities,
- provide any assistance not envisaged by the legislation of the Kyrgyz Republic to any individuals using the employee's official position and receive remuneration, services and benefits for it.

For the period of their service in the customs administration, employees are obliged to transfer to trust management any shares (blocks of shares) they own in the authorised capital of commercial organisations in the manner prescribed by the legislation of the Kyrgyz Republic.

Customs employees who are close relatives or who are related to each other (brothers, sisters, parents and children of spouses) are not allowed to work in the same customs body if their work is related to direct subordination or control one to another.

At the moment, the SCS, unfortunately, does not have a department-level policy to control the absence of conflict of interest among its employees. The Law on Conflicts of Interests adopted in December 2017, in the experts' opinion, does not offer sufficient tools to prevent conflict of interests. In particular, this law treats somewhat narrowly the notion of a "close person", does not clearly define what is conflict of interests and liability for allowing it to happen. Based on the minimal set of measures to control conflict of interests in international practice the following could be recommended:

- Clarify the concept of "close persons" in the legislation, expanding its interpretation as follows: "close relatives" are individuals who live together, are bound by a common household or have mutual rights and obligations with the customs official, including persons who live together but are not married; as well as, regardless of the above: husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brother, sister, son-in-law, daughter-in-law, father-in-law, mother-in-law, foster parent, adopted children, guardian, a person who is under the care of an employee of the customs administration.
- Establish that a conflict of interest during service in a customs body, among other situations, means:
  - a) full or partial beneficial ownership, including indirect, and/or exercising control by an employee of the customs administration and/or his close person over organisations that perform foreign economic activities in the territory of the Kyrgyz Republic or provide intermediary (broker) services in the customs area;
  - b) the employment of close persons of the customs official in leading positions in organisations that carry out foreign economic activities in the territory of the Kyrgyz Republic or provide intermediary (broker) services in the customs area;
- Establish that the detection of a conflict of interest of a customs official is the basis for the immediate termination of service in the customs administration. Detection of a conflict of interest of the applicant for a vacant position in the customs administration is the basis for rejection of the applicant.

The introduction of the abovementioned rules in the legislation of Kyrgyzstan to control conflicts of interests among customs officials, which would be based on the national legislation on the civil service and on the conflict of interests, and would establish the detailed rules of the application of this legislation in the sphere of the SCS, would represent significant progress in the field of prevention and combating corruption. Prevention of conflicts of interests in customs is one of the components of the WCO Model Code of Ethics and Conduct, which, in addition, can serve as an example of best practices on other issues.

The procedure for recruitment and promotion in the SCS, in the experts' opinion, is not sufficiently transparent. Although there is an open competition mechanism, most often vacancies are filled from among people who are in the so-called HR pool (employees released from positions due to their cancellation

and/or removed from the staff list). At the same time, the procedure for filling this personnel pool is non-transparent and uncompetitive.

The requirements regarding military medical commission approval and physical training exams for candidates are also unreasonable and could create risks of non-competitive selection. The restriction often used in the SCS for the candidates to be no more than 50 years of age is purely discriminatory.<sup>112</sup> These restrictions are required because, according to the national legislation, SCS is considered a law enforcement agency and they are approved by the Government resolution of 18 December 2009 No. 771.

In general, the best practice regarding the appointment to the positions in the customs bodies is the widest possible use of open competition. At the same time, open competition should be applied unconditionally to such positions as deputy heads of the SCS, heads of separate subdivisions of the SCS central office, heads of customs. Representatives of the public council at the SCS should participate in the work of the relevant competitive commissions with voting rights. Representatives of the public should be provided with access to the interview process including broadcasting the interviews live on the Internet (the system for recruitment to the civil service is analysed in the chapter on the civil service above).

Although the SCS refused to provide information on the average salary in the customs administration, it was possible to find out during the interviews that the wages in the customs bodies, like in general in the public administration system of the KR, were relatively low. Thus, the average salary in the central office of the SCS is in the range of the equivalent of 200 euros per month, in regional units the compensation is even lower. As no more than 1,300 customs employees jointly manage ¼ of the state budget revenue, and as the fight against corruption is impossible and ineffective without ensuring decent remuneration for employees with integrity, a serious increase in salaries for SCS employees is a necessary and economically justified measure. An adequate level of remuneration, availability of other benefits and conditions that allow customs officers to maintain a decent standard of living are also among the principles of the WCO Revised Arusha Declaration.

### **Determination of customs value**

As in other countries of the region and in the post-Soviet countries in general, the SCS is an important tool for generating revenue for the state budget. In 2017, the share of customs payments in the total revenues of the republican budget was 25.4%. It is important to note that the management and the employees of the SCS consider the fiscal function to be the main component of their activity. This is indirectly confirmed, for example, by the fact that the bonuses of customs officials depend on whether the revenue plan is achieved or not.

The following key factors shape the fiscal activity of the SCS:

1. The imperfection of the existing system for monitoring supply chains of imported goods to the end user. Simply put, this means that if the customs office releases the goods into free circulation at an undervalued rate, the tax authorities will most likely not be able to collect the payment shortfall through income tax and value added tax. This means that "the customs should collect as much as possible" before the release of the imported goods into free circulation. At the same time customs service started to implement some informational exchange with tax authorities which is at the moment at an early stage and needs to be further developed.

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<sup>112</sup> See, for example, <https://bit.ly/2kJqab3>

On a positive note, the SCS recognizes the flaws of such an approach and plans to join the pilot project, which is already being implemented by other EEU member countries in building a supply chain control system in a separate group of goods: fur coats and fur products.

We recommend that the Government of the Kyrgyz Republic start implementing this initiative as soon as possible and gradually spread the gained experience to other groups of goods.

2. The absence of reliable preliminary customs information on goods and means of transport moving across the customs border of the Kyrgyz Republic. Such information can only be obtained from the customs administrations of countries that are trading partners, and currently the SCS does not receive it from any state (except for the EEU member states).

Although in 2013 a Protocol was signed between the SCS and the State Customs Committee of the Republic of Uzbekistan on the organisation of the exchange of preliminary information on goods and vehicles transported across the state border, it does not currently work due to the lack of a mechanism for exchanging such information.

It should be noted that the SCS fully understands the importance of this area of work and its direct impact on reducing corruption risks. Thus, this direction is reflected in the Updated Action Plan for the Implementation of the Anti-Corruption Management Model in the SCS.

The SCS is also aware that negotiations to obtain preliminary customs information from the Chinese Customs Administration are being conducted at the level of the EEU.

3. Fiscal performance is the main indicator by which the efficiency of activities of both the SCS as a whole and of individual customs bodies in the SCS system is assessed. At the same time, it is the Ministry of Finance that determines the planned indicators for collecting taxes and fees on imported goods by the SCS. These planned indicators can depend both on the actual volumes of the foreign trade, and, often, on the need to balance the country's balance of payments and the budget incomes with the expenditure.

The consequence of these three factors is the full-scale usage by the SCS of the so-called indicative prices.<sup>113</sup> It is implemented with the help of an automated risk management system whereby any declaration, in which the declared value is lower than the indicative price, is automatically put into the risk category. In theory, in most cases such a declaration must still be processed using the contract price but then this particular product must be tracked to the final consumer; and larger amounts of VAT, income tax and other internal taxes should be collected due to the initially lower price. In practice, the declarant will be forced either to raise the price to the indicative value or to pay a corruption fee for clearing the goods at a price lower than indicative.

Such processing is also possible because the use of indicative prices in itself contradicts Article VII of the General Agreement on Tariffs and Trade of the World Trade Organization. Because of this, the SCS cannot simply determine and publish indicative prices, so that all participants in foreign economic activity

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<sup>113</sup> The indicative value of the goods (indicative price) in theory is formed on the basis of the value of goods, the customs clearance of which has already been made and the customs valuation has been determined. If the declared value is below indicative, this is the basis for increased control of the corresponding amount of goods after the release of the goods into free circulation. This is done in the absence of reliable preliminary customs information; forged or inaccurate documents can be provided for the purposes of customs clearance. However, in practice, in developing countries this means that the declaration will simply not be accepted until the price is raised to indicative. As a result, the customs authorities receive a tool that actually replaces the legislative decisions regarding the establishment of tariffs and taxes. And, simultaneously, there is a temptation to artificially regulate the levels of indicative prices to increase the revenues of customs taxes and fees.

know the "rules of the game." Thus, only the SCS controls the clearance below indicative prices, and this creates an almost unlimited space for corruption at the top and the middle levels of the SCS. In the opinion of experts, nothing prevents the management of the SCS or its subdivisions from giving an unspoken permission, so that the clearance of goods at below indicative prices could be given to specific firms or, for a certain period, such privileges are received by certain customs offices. According to the SCS, this risk is duly mitigated by efficient automated risk analysis system that is functioning.

Moreover, in order for indicative prices to be applied in practice, customs officials should be armed with appropriate legal tools and, naturally, they have them. At the same time, the declarant does not actually have any legal instruments to obtain clearance of his goods with payment of duties from the value determined methodologically from the value of the transaction with the imported goods (method 1). The declarant can endlessly provide additional supporting documents, however, the exhaustive list of such documents and, most importantly, the criteria of their validity are still missing. The declarant does not have any legal mechanism to compel the customs authority to process the goods at the price that he considers fair. In fact, the customs value of the imported goods is the result of an agreement between the declarant and the customs authority while the negotiating position of the declarant is certainly weaker. The fundament for corruption is laid here already at the lower level: a simple customs official cannot clear the goods at the price below indicative without a command "from above", and at the same time there is every possibility to force a disobedient declarant to raise the price not only to indicative, but even higher and, in case of getting a bribe, to go back down to the level of the indicative price.

It should also be noted separately that the problem of frequent use by the SCS of the 6th method to determine customs value is one of the most painful for the Kyrgyz business community in their relations with the customs administration.<sup>114</sup>

At the same time, the ability of the participant in the foreign economic activity to choose between various customs bodies where exactly to make customs clearance of goods is limited by legislation. In accordance with Article 217 of the Law of the Kyrgyz Republic "On Customs Regulation in the Kyrgyz Republic" of 31 December 2014, a customs declaration for goods may be submitted to any customs authority authorised to adopt a customs declaration. However, the authorised state body has the right to establish (by its orders) certain customs authorities for the declaration of certain categories of goods on the basis of separate orders. At the same time, the internal document of the SCS regulating the procedure for establishing certain customs bodies for declaring certain categories of goods by participants in the foreign economic activity is absent. In practice, this means that if the declarants, who are being subjected to corrupt pressure in a certain customs authority, try to switch to another customs authority to perform the customs procedures, they can be legally forced to "return" to the original customs office.

This report does not state that the described corruption practices are common at the Kyrgyz SCS; the monitoring group has no evidence for such statements. However, the use of indicative prices in itself creates large-scale corruption risks as described above.

At the same time, the experts fully realize that in the medium term, in the absence of sources of reliable preliminary customs information and taking into account the high share of customs payments in the structure of the budget revenues, the SCS will not be able to abandon the use of indicative prices.

Nevertheless, even in these conditions, the SCS and the Government of the Kyrgyz Republic can take a number of measures that will help to reduce corruption risks in this area. Such measures could, first of all, include:

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<sup>114</sup> Based on interviews with Kyrgyz business people.

- 1) Taking into account the limited ability of the SCS to accelerate the negotiation process regarding the establishment of the exchange of preliminary customs information with key trading partner countries of the KR, primarily China, to intensify at the same time a similar negotiation process with Uzbekistan and Tajikistan. We recommend that the government should familiarise itself with the experience of implementing the PRINEX project<sup>115</sup> regarding the exchange of preliminary customs information between Ukraine and the Republic of Belarus, as one of the parties to the exchange is a member of the EEU.
- 2) Determine an exhaustive list of pricing documents and criteria for verifying their reliability: if such documents are provided by the declarant, the customs authority is obliged to perform customs clearance in accordance with Article 39 of the Customs Code of the EEU (method 1).
- 3) Oblige the SCS to maintain and publish statistics on the application of various methods for determining customs valuation; to mandate the SCS to gradually reduce the share of the 6th method in the mid-term period.
- 4) Develop and implement an external mechanism for controlling the clearance carried out when customs valuation is below the indicative value.
- 5) Oblige the SCS to adopt an internal document regulating the procedure for establishing certain customs authorities for declaring certain categories of goods by the participants in foreign economic activities (or for certain foreign economic agents) with clearly defined and exhaustive criteria for making such decisions.
- 6) Recommend the SCS to study and start using the instruments of the WCO Revenue Package.<sup>116</sup>

### **Reliability of declarations**

The issue of the reliability of declarations of goods that arrive in the customs territory of the Kyrgyz Republic has been rightly determined by the Government of the Kyrgyz Republic as one of the most important fields for combating corruption.

There are serious grounds for assuming that a significant proportion of imports from China to the Kyrgyz Republic either reach the customs territory of the Kyrgyz Republic without customs checks (i.e. by so-called smuggling) or are declared incorrectly (not under their own code which leads to the use of other indicative prices and other rates of duty). Thus, according to the SCS, based on the results of the reconciliation of customs statistics between China and the Kyrgyz Republic in 2016, exports from China to Kyrgyzstan amounted to 5.6 billion US dollars, and imports to the KR amounted to 1.5 billion US dollars, creating a discrepancy of 4.1 billion US dollars.

The SCS explains that this discrepancy is due to the difference in the methodologies used by the customs administrations of China and the KR. China, according to the SCS, includes in the volume of exports to the Kyrgyz Republic all cargos that cross the joint border including those that have their final destination in other EEU member states - Kazakhstan and Russia. As such, this assumption is entirely plausible, however it somewhat contradicts the internationally accepted standards for filling customs declarations which China is highly likely to adhere to. Moreover, in the event that the SCS assumption on the difference in methodology is correct, the difference between exports and imports between China and the KR should mirror similar foreign trade data between other EEU member states and China. In other words, if China incorrectly includes part of its exports to Kazakhstan and Russia in the customs statistics of exports to the

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<sup>115</sup> The project was implemented by the customs administrations of Ukraine and the Republic of Belarus in 2015 supported by the EU and the International Organization for Migration. See <https://bit.ly/2HhoBd9>.

<sup>116</sup> See: <https://bit.ly/2LPJthX>.

Kyrgyz Republic, then the export data to these countries should be less for the same amount - the same 4.1 billion US dollars in 2016. Representatives of the SCS declared that they had no official information on the results of reconciliation of the customs statistics of foreign trade between the partner countries of the KR in the EEU, on the one hand, and China on the other. At the same time, experts are aware of the record that Kazakhstan and Russia have deviations of the same nature as the Kyrgyz Republic – their own data on imports is less than the data on exports provided by China.

It is important to note that at the same time an extremely large proportion of imports to the Kyrgyz Republic from China, according to the SCS, are goods with a low average cost (indicative price) per kilogram. For example, according to SCS data, in the 1st quarter of 2017, 19.6% of imports from China to the Kyrgyz Republic in value terms amounted to the goods of subgroup 6402 "Other footwear with outer soles and uppers of rubber or plastics" with an average customs valuation of less than 2.8 dollars per kg. 19,506 tons of such rubber or plastic footwear was imported in just one quarter. This is more than 3kg of rubber shoes imported during only one quarter for every resident of the Kyrgyz Republic including the elderly, infants and labour migrants.<sup>117</sup> At the same time, by means comparison, only 200 tons of "Telephone for cellular networks" were imported to the KR during the same period, according to the SCS, that is 98 times less than for rubber footwear.

The SCS explains this phenomenon by the fact that the KR has a relatively low VAT rate for this product - rubber shoes - and therefore it is allegedly customs cleared in the territory of the Kyrgyz Republic and then "smuggled" to Kazakhstan and the Russian Federation<sup>118</sup>. However, this assumption, as in the case of differences in customs statistics, has a number of obvious logical gaps.

Even a superficial logical analysis of the customs statistics for mutual trade between China and the Kyrgyz Republic published by the SCS allows us to note the existence of a significant risk of imports of consumer goods from China under the guise of goods with lower customs valuation, and of corresponding evasion from customs payments. At the same time, such a large-scale activity cannot be carried out without the corrupt participation of representatives of the SCS and other state supervisory bodies.

It is quite indicative that representatives of the SCS categorically deny the existence of this risk arguing that 100% of the goods imported from China are subject to in-depth physical examination. At the same time, no special control measures for goods with low cost per kilogram ("umbrella goods") are applied.

It should be noted that the SCS applies some customs control measures in a manner that can be considered excessive. For example, as already noted, according to the information provided by the SCS, 100% of the goods imported by road from China are subject to weighing at the checkpoints. After that, these goods are transported exclusively with customs escort to the places of customs clearance where 100% of cargoes are physically examined. However, the number of detected offences resulting from such activities does not match the resources spent on this by the SCS. The results of weighing and physical examinations are recorded in the UAIS, but not automatically. In fact, there is no control over the execution of customs control forms generated by the automated risk management system - a SCS employee who has carried out customs control measures by himself submits data on the results to the UAIS. The reliability of this data is not checked.

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<sup>117</sup> For example, in Ukraine, the specific weight of the whole commodity group 64, which includes both leather shoes and all other types of footwear, does not exceed 1% in any period.

<sup>118</sup> Although the movement of goods between the EEU member countries is not controlled by the customs authorities, it is subject to control by the tax authorities of countries that still have different VAT rates. In the Kyrgyz Republic and Kazakhstan the VAT rate is 12%: in the Russian Federation - 18%.

In the near future, the SCS plans to equip key checkpoints for motor vehicles on the border with China with checking and inspection facilities and, in the medium term, automatic vehicle registration plate reading systems corresponding to the best practices in the customs business.

The SCS has at its disposal and uses an automated risk management system. However, in fact, it is aimed exclusively at monitoring the observance of indicative price levels. In addition, according to the SCS, there are risk profiles aimed at countering the illegal movement of military and dual-use goods, precursors, psychotropic and narcotic substances. However, it remains unclear what exactly results from the triggering of such profiles if 100% of cargo are already subject to physical examination.

Summarizing the above, the experts recommend the adoption of the following measures:

1) Establish and regularly exchange information with the EEU member countries on the results of reconciling customs statistics of bilateral foreign trade with the People's Republic of China. Use this data to confirm or refute the assumption that the difference in methodology is the reason for the extraordinary discrepancy between data from Chinese customs administration and the SCS.

2) After equipping border crossing points with weighing complexes, create an information module that will automatically, without the participation of the SCS staff, post information to the UAIS on the results of weighing vehicles entering the territory of the Kyrgyz Republic from China.

3) Implement customs control measures selectively on the basis of the automated risk management system. Reduce the frequency of physical examination to 30% within 3 years.

4) Create a risk profile aimed at countering unreliable declarations, which will be triggered by the goods declared at low cost per kilogram of weight (in particular, the mentioned subgroup 6402 of rubber footwear).<sup>119</sup> Carry out physical inspections of such goods directly at the checkpoints with mandatory video recording of the inspection and the live transfer of video-fixation results to the central UAIS database.

5) Create a separate central division (possibly in the internal security management framework) which will work on in comparing the data of the preliminary and final declaration with the results of the video recording. Train the staff of this division on the skills of identifying products based on the results of X-ray scanning by checking and inspection facilities (with the help of the partner country of the EEU, developer of the corresponding facilities and software for them). Ensure the real-time delivery of X-ray scanning results in the central UAIS database.

6) Equip (as it foreseen by the Plan of Anti-Corruption Activities for 2018-2020) border crossing points for automobile connection on the border with China with automatic vehicle number plate recognition systems and integrate these systems into the UAIS.

7) Request from the Government of the Kyrgyz Republic the funds necessary for the construction of the above-mentioned information facilities by the SCS, including the purchase of equipment, software licenses and services for the creation of new software, as well as for establishing and supporting communication channels between border checkpoints with China and the central SCS database which sufficient for the live transmission of video information and X-ray scanning results.

8) Apply in practice the WCO compendiums and guides on risk management and intelligence, post-entry audit, customs operational practices and detentions, instruments for controlling trade in strategic goods and other WCO technical tools to counter commercial fraud.

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<sup>119</sup> According to the SCS, the relevant modules within automated risks analysis system have already been created.

## **Minimising the human factor**

The SCS recognizes the importance of minimising the human factor in customs decision-making and takes steps in this direction.

Since 2012, the Uniform Automated Information System (UAIS) is in operation, including an automated analysis and risk management module.

Declarants have the opportunity to create an electronic copy of declarations in free specialised brokerage software (the cost of an electronic digital signature is also quite low.) Moreover, the declaration generated in the said software is submitted to the customs body in paper form and, at the same time, its electronic copy is sent. The barcode is read from the paper copy and, based on that, an electronic copy of the declaration is received by the UAIS. In fact, the SCS stopped just one step away from introducing electronic declaration. It is important to note that after registering a declaration with the UAIS its distribution among the members of the clearance group does not take place automatically: the manager decides who from his staff will be responsible for the particular clearance.

Since 2007, work is under way to introduce the principle of a "single window" in the implementation of customs formalities. To date, this work has not been completed and the "single window" process has not been implemented. This is due both to the opposition of other state supervisory bodies and to the inadequate funding of this project.

Important activities to minimise the human factor in the SCS are carried out by the internal audit division of the SCS. This unit analyses procedures, drafts normative legal acts and suggests appropriate recommendations. Unfortunately, it is likely that this unit will be minimised which would reduce the departmental capacity to prevent and combat corruption.<sup>120</sup>

The experts recommend taking measures that are in line with best practices in the sector:

- 1) Continue the development of the automated risk management system and introduce elements of control over the real fulfilment of the requirements generated by it.
- 2) Adopt a plan for the full implementation of the electronic declaration system, including the financing of the SCS, which is necessary for the implementation of this project.
- 3) Introduce automatic distribution of declarations between employees within the clearance groups, as well as consider the possibility of introducing arbitrary and automatic distribution of other functions and customs operations in the customs business processes: for example, when replacing a customs post, the distribution of responsibilities for organizing control for import and export, control of passenger traffic, by the numbering of corridors, sequence of inspections for inspectors and others, where and to the extent which seems necessary and reasonable.
- 4) Raise awareness of the tools and mechanisms of the World Customs Organization for building a "one-stop-shop".

## **Implementation of ongoing anti-corruption activities**

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<sup>120</sup> The existence of the internal audit unit is consistent with the principles of the WTO Arusha Declaration (element of "Audit and Investigations") and the WCO Guidelines for the Development of Professional Ethics (2014), which position internal audit units as a unit whose tasks include integrated assessment or analysis of corruption risks on an ongoing basis, including to identify the risks created by information systems.

There is an Internal Security and Anti-Corruption Control Department (ISACD) in the structure of the SCS. In addition to the core function, this unit also performs other duties which usually under responsibility of HR departments, namely conducting internal investigations. In addition, the IASCD also performs the function of ensuring protection of classified information as well as several other rather uncharacteristic functions, such as, for example, analysing publications by the SCS staff in the media and looking for publications or information that undermine the image of the customs service.

In total, out of the 24 duties assigned to the ISACD only 14 have any direct or indirect relation to preventing and counteracting corruption. At the same time, the division has 9 employees at the central office level and 4 in the southern region.

Employees of the unit have the power to carry out of operative and investigative activities.

During the monitoring mission, the SCS declined to provide answers to the following questions: How many criminal cases were opened in 2016-2017 concerning SCS employees suspected of committing corruption offences? How many of them went to court? How many sentences were passed? What was the highest position of a SCS official against whom a criminal case on corruption was opened?

As a result, it is not possible to assess the visible results of anti-corruption activities in this area.

The SCS uses a concept of corruption-sensitive positions in its structure. Employees who are appointed to these positions are subject to in-house scrutiny by the ISACD. The monitoring of lifestyle of the employees is not carried out.

Unfortunately, the SCS considers that only lower-level positions directly interacting with foreign economic agents are vulnerable to corruption. According to SCS order No. 5-07 / 96 dated 09 March 2017, the corruption-sensitive positions are: chief inspectors of customs clearance groups of the customs administration; senior inspectors of customs clearance groups of the customs administration; inspectors of the customs inspection group; management of the State Enterprise "Customs Infrastructure"; members of the tender commission of the customs administration.

There is no typology of the most common corruption offences committed by the SCS staff.

On a positive note, it can be mentioned that the ISACD reports directly to the Chairman of the SCS.

To bring the functions and powers of the ISACD in line with the best international practices, it is necessary:

- 1) To review the functions of the ISACD by removing all functions that are not relevant and not related to preventing and countering corruption. To assign to the ISACD the responsibility for monitoring compliance of decisions made by SCS staff with information obtained as a result of the implementation of various types of customs control.
- 2) To expand the list of corruption-prone positions by including in it heads of customs bodies and their subdivisions.
- 3) To obtain from other executive authorities and provide to ISACD staff access to the registers of movable property and real estate so as to monitor the lifestyle of customs officers who hold high corruption risk positions.

**New recommendation No. 46**

- 1. Envisage in the Updated Action Plan for the Implementation of the Anti-Corruption Management Model in the State Customs Service for 2018-2020 more specific outcomes of the tasks envisaged, identify specific responsible implementors and the sources of funding necessary to implement these tasks. Include as one of the tasks the completion of the internal procedures required for the Kyrgyzstan's accession to the Revised Kyoto Convention of the WCO.**
- 2. Amend legislative acts to establish procedures for preventing and resolving conflicts of interests among customs officials, as well as for controlling the implementation of these provisions.**
- 3. In order to reduce the potentially corrupt influence of existing managers in the State Customs Service system on new employees and candidates for managerial positions, revoke age limits and unreasonable requirements for applicants, make maximum use of open competitive procedures and ensure their transparency to the public.**
- 4. Consider increasing the remuneration of the State Customs Service personnel to reduce corruption risks. Consider allocating to the State Customs Service funds needed to automate procedures and reduce the impact of human factor in decision-making.**
- 5. Implement measures aimed at the gradual decrease in the use of the "indicative prices" in customs clearance, as well as limiting the human factor in the decision-making as regards the method for estimating customs valuation, determination of the customs valuation and the place of customs clearance.**
- 6. Implement a set of measures aimed at combating unreliable declarations. Introduce customs control of goods with a pre-declared low cost per kilogram of weight with the physical examination of such goods directly at checkpoints with mandatory video recording of the inspection and live transfer of the video-recording to the central UAIS database. Provide the State Customs Service with the financial resources necessary to develop software and information systems for automated risk management, establishing communication channels and provide it with the modern technical resources for customs control.**
- 7. Put in place the procedures for electronic declaration and automatic distribution of declarations between employees. Consider introducing automatic distribution of other functions and customs operations in the business processes of customs whenever possible. Continue the development of the automated risk management system and introduce elements of control over the actual fulfilment of the requirements generated by it.**
- 8. Review the functions and powers of the internal security and anti-corruption control department, eliminating those that are not related to anti-corruption and provide it with additional necessary powers for ensuring performance of the core anti-corruption function, including monitoring of the lifestyle of employees who occupy corruption-prone positions, and granting it with full access to information related to customs formalities. Expand the list of high corruption risk positions by adding leadership positions. Maintain the internal audit department in the structure of the State Customs Service and strengthen its functions including regarding those that concern the analysis and reduction of the human factor in the implementation of customs procedures.**

## **Annexes**

See annexes attached to the Russian version of the report.

