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

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

## **Second Round of Monitoring**

### **KYRGYZ REPUBLIC**

## **Monitoring report**

The report was adopted at the Istanbul Anti-Corruption Action Plan plenary meeting on 24 February 2012 at the OECD Headquarters in Paris

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## Executive Summary

This report analyzes progress made in the Kyrgyz Republic in developing anti-corruption reforms and implementing recommendations received under the Istanbul Anti-Corruption Action Plan since the first monitoring round in 2007. The report also analyses recent developments and provides new recommendations in three areas: anti-corruption policies; criminalisation of corruption; and prevention of corruption.

### Anti-Corruption Policy

Since 2007 the Kyrgyz Republic has undergone significant political changes, largely as a result of the public's demand for eradication of corruption. New political figures declare their readiness to fight corruption, stressing that this issue is a top priority on their agenda. Still implementation of such declarations remains a challenge.

It is recognized by various governmental and non-governmental institutions, including the leadership of the country, that very few measures foreseen in the previous State Anti-Corruption Strategy for 2006 – 2010 and its action plan were implemented. Moreover, due to lack of co-ordination and monitoring mechanisms the report points out that it was impossible to properly assess the level of their implementation. The new strategy was elaborated without reliance on the analysis of the successes and failures of the previous policy documents and without any involvement of the civil society.

This new State Strategy on Anti-Corruption Policy of the Kyrgyz Republic was adopted on 2 February 2012; the Secretariat of the Defense Council was designated to monitor and control the implementation. The institutions of the legislative, executive and judicial branches were recommended to develop their own action plans to combat corruption in the framework of this strategy. It is important now to ensure appropriate budgetary allocations to the implementing institutions.

In addition, public supervisory councils comprised of civil society, academia, business and other non-governmental stakeholders were established at 41 government bodies, in particular to scrutinise anti-corruption measures. The report points out that while this is a commendable undertaking, this initiative needs to be further developed and improved to become a practical tool for cooperation between public institutions and public at large. It is also of outmost importance to actively involve the civil society in implementation and monitoring of the new anti-corruption strategy and action plans, and to provide for wide publication of the reports on steps taken.

Lack of institutional framework for prevention of corruption in the Kyrgyz Republic is an issue of especial concern. The National Corruption Prevention Agency which was previously in charge of preventative measures was disbanded without handing over its functions to another body. And while a new institution has been created – the Anti-Corruption Service of the State Committee on National Security, its functions are aimed at further strengthening of the law-enforcement capacities to fight corruption and do not cover prevention. It is, thus, important to establish an effective institutional mechanism for raising public awareness and for other anti-corruption prevention measures in the Kyrgyz Republic.

## **Criminalisation of Corruption**

No changes have been introduced in the Criminal Code of Kyrgyzstan to address relevant recommendations since the first round of monitoring. Provisions on criminalization of corruption in Kyrgyzstan, therefore, still fall short of the international standards, in particular the UNCAC. The Law on the Fight against Corruption remains ineffective and lacks proper enforcement mechanisms. The report welcomes preparation of draft amendments to address these concerns and makes a number of suggestions on their improvement.

The report recommends aligning Kyrgyz law with international standards, among other measures, by establishing criminal liability for foreign bribery, for promise/offer of a bribe, as well as for solicitation of and acceptance of a promise/offer of a bribe as completed offences; by providing that a bribe can be of non-material nature; by revising offence of abuse of office, private sector corruption offences, concealment of corruption in accordance with the UNCAC. It is also recommended to introduce an effective liability of legal persons for corruption and money laundering. Provisions on confiscation of instrumentalities and proceeds of corruption crimes should be brought in line with Article 31 of the UNCAC.

While acknowledging that immunities of public officials and procedures for their lifting are regulated in detail in the relevant laws, the report points to a number of existing serious deficiencies which may hinder effective investigation and prosecution of corruption offences committed by officials enjoying immunities. In particular, it is proposed to introduce functional immunities, suspend statute of limitations for persons with immunities and repeal absolute immunity of the ex-President.

Access to financial information (bank, customs and tax data) by the law enforcement agencies remains problematic and requires legislative changes. The report also recommends eliminating legal and practical obstacles, which do not allow the suspicious transaction reports collected by the FIU and results of the operative measures to be used as evidence in criminal trials. It is also recommended to develop an effective specialisation in anti-corruption investigations and improve statistics on corruption offences.

## **Prevention of Corruption**

The Law on Civil Service from 2004 has been amended a number of times. It establishes modern principles of public administration, including delineation between political and professional public servants, although some issues remain in regards to definition of the political officials. The Law also defines the conflict of interests and related prohibitions, post-employment restrictions, prohibition to receive gifts. However, practical application of these provisions remains a challenge. In addition, low pay and high fluctuations in the number of civil servants raise concerns as regards stability of the civil service profession. There is a clear need to strengthen the recruitment process for high level positions, as well as to increase transparency and impartiality of competitions. Remuneration system should be reviewed to ensure its transparency and equality, as well as a decent level of salaries.

Current system of asset declarations appears to be ineffective for the purposes of the fight against corruption or prevention of conflict of interest. A complex system of rules related to disclosure of asset declarations is in place; the report points out that it should be streamlined and unified under common approach allowing the widest asset disclosure. While some efforts to reform existing system have been made, relevant draft proposals appear to be fragmented, not addressing most serious deficiencies, and it is unclear what will become of them.

The report welcomes existing provisions on the anti-corruption screening of draft legal acts and recommends further reform, in particular the introduction of screening of legal acts in force and

publication of the conclusions of such evaluations. In the area of administrative procedures it is recommended to assess practical implementation of the relevant law and conduct an awareness-raising campaign on its better enforcement. The report also recommends establishing separate procedural rules for adjudication of private parties' complaints against the public administration and proposes to set up specialised administrative courts.

Kyrgyzstan made considerable progress in the area of external audit of public finances through strengthening the independence and institutional capacities of the Chamber of Audits, improving its co-operation with law-enforcement and modernizing its work processes. Such progress is commendable and should be further continued. However, poor institutional capacities of the internal audit in public agencies and the lack of transparency in the financial management and control need to be urgently addressed by the Kyrgyz authorities.

On the books current procurement system in Kyrgyzstan is supported with due oversight and provides for a sound public procurement framework. In practice, primary issues faced by the Kyrgyz Republic are the implementation of its well-written legislation and the quality of the public procurement practices. This is due to a number of factors, the main of which is the inadequacy of institutional capacities for the proper conduct of procurement.

Kyrgyzstan has relatively strong legal provisions on access to information, which however are undermined by poor enforcement and awareness on the right to information. The report recommends streamlining relevant provisions, unify them in one law and conduct public campaigns on the enforcement of the person's right to obtain information.

Political party financing is the area where the compliance rating for Kyrgyzstan was upgraded due to a number of legislative changes which took place since 2007. Adoption of the Constitutional Law on Elections of the President of the Kyrgyz Republic and Deputies to the Parliament from 2011 is one of them and demonstrates a clear improvement of the political party financing regulations. Introduction of liability for violation of this legislation, publication of the expenditure reports, as well as monitoring of parties finances by an independent state authority, are recommended to further improve the existing system.

In 2011 Kyrgyzstan conducted a comprehensive judicial reform; many provisions of the new laws are exemplary. However, a number of deficiencies in ensuring judicial independence and accountability remain. The report regrets the cases of large-scale judicial dismissals in breach of the proper procedures and recommends strengthening guarantees of irremovability of judges. A number of further legislative changes are recommended. The report also proposes to abolish the procedure of supervisory review of final court decisions as it violates the rule of law principle and to ensure functioning of the Constitutional Chamber of the Supreme Court of Kyrgyzstan. A separate recommendation is dedicated to strengthening independence of the public prosecution bodies, which should be on a par with that of the judiciary.

According to numerous international surveys corruption is reported by companies to be among their most severe problems for conducting business in Kyrgyzstan, yet there seems to be little done by the government to address the issue. The report recommends to focus first and foremost on establishment of the dialogue between business and the government aimed at raising awareness of the risks of corruption and improving the legislation; as well as to facilitate promotion and enforcement of internal corporate compliance programmes.

## Second Round of Monitoring

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

The review of the Kyrgyz Republic was carried out in December 2004; 31 recommendations were endorsed. The first round of monitoring assessed the implementation of recommendations and established compliance ratings of the Kyrgyz Republic; the report was adopted in September 2007: 2 recommendations were found to be fully implemented; 4 – largely implemented; 15 – partially implemented; and 10 - not implemented. The Kyrgyz Republic provided regular updates about steps taken to implement the recommendations at ACN plenary meetings.

The second round of monitoring of the Kyrgyz Republic was started in 2011; the Government of the Kyrgyz Republic provided answers to the questionnaire on 31 December 2011.

The country visit took place on 17-21 January 2012. The visit involved 11 thematic sessions with state institutions of the Kyrgyz Republic, including: General Prosecutor's Office, Apparatus of the President, Apparatus of the Government, Ministry of Finance, State Financial Control Service, Chamber of Accounts, Supreme Court, Ministry of Education, State Service of the Financial Police, Ministry of Justice, Ministry of Interior, State Customs Service, State Tax Service, State Service on Issues of the Personnel, Ministry of Health, Financial Intelligence Service, Zhogorku Kenesh (Parliament), Anti-Corruption Service of the State Committee on National Security, Central Election Commission, Office of the Ombudsman, and National Defense Council.

The session with civil society and the session with the business sector were organized in co-operation with the OSCE Office in Bishkek and Transparency International-Kyrgyzstan. The session with the international community was organized in co-operation with the OSCE Office in Bishkek.

Mr. Bakyt Osmonaliev, Deputy Prosecutor General of the Kyrgyz Republic, and Mr. Nurlan Sulaimankulov, Head of the Department on Combating Corruption, General Prosecutor's Office of the Kyrgyz Republic, ensured the coordination on behalf of the Kyrgyz Republic. The monitoring team was led by Mr. Daniel Thelesklaf (Principality of Liechtenstein), and included Mr. Vladimir Georgiev (the Former Yugoslav Republic of Macedonia), Ms. Olena Kustova (USA), Ms. Rasa Tumene (Lithuania), as well as Ms. Tanya Khavanska and Mr. Dmytro Kotlyar (both representing the ACN Secretariat).

The report was adopted at the Istanbul Action Plan plenary meeting on 22-24 February 2012. It includes updated compliance ratings with previous recommendations: **2 recommendations are fully implemented, 4 – largely implemented, 20 – partly implemented and 5 recommendations are not implemented.** In total, out of 31 recommendations, 7 ratings were upgraded since the first round of monitoring. The report also includes **22 new recommendations.**

The report is published at <http://www.oecd.org/corruption/acn>. A return mission to the Kyrgyz Republic will be organised to present the report to public institutions, civil society, business and international community. Furthermore, the Government of the Kyrgyz Republic will be invited to provide regular updates about steps taken to implement the recommendations at next plenary meetings.

## Country Background Information



### Economic and social situation<sup>1</sup>

The Kyrgyz Republic covers an area of 200,000 square kilometres (90% mountainous) and has a population of 5.3 million. The official languages are Kyrgyz and Russian. Natural resources of the Kyrgyz Republic include hydropower, significant deposits of gold and rare metals, coal, oil and natural gas, as well as iron, bauxite, copper, tin, molybdenum, mercury, and antimony.

Following independence, Kyrgyzstan was successful in carrying out market reforms, such as an improved regulatory system and land reform. Kyrgyzstan was the first Commonwealth of Independent States (CIS) country to be accepted into the World Trade Organization. In 2010 exports accounted for \$1.49 billion (over 33% of GDP) and included precious metals, non-organic chemical products, fuel, apparel, vegetables. Main export partners remain unchanged since 2007 - Switzerland 26%, United Arab Emirates 20%, Russia 17%, Kazakhstan 12%, United States 6%.

The socio-political crises of April and June 2010 have seriously dented growth prospects and significantly increased fiscal expenditure needs; however, the economy has recovered faster than expected. Real gross domestic product (GDP) fell by 1.4 per cent in 2010 but rose by 5.5 per cent during the first half of 2011, partly reflecting a one-off base effect. The crises have also highlighted the need to tackle deep-rooted corruption. The overall credibility of the public administration and regulatory bodies which was severely eroded under the previous regime needs to be restored so that the private sector can undertake meaningful policy dialogue to improve the investment climate.

### Political structure<sup>2</sup>

The political upheaval in 2010, which triggered a leadership transition and fundamental changes in the system of government, came at a significant human and social cost. A transparent constitutional referendum in June 2010, conducted under difficult circumstances, followed by generally free and fair parliamentary elections in October of the same year and presidential elections in October of 2011, were major milestones in democratic development.

<sup>1</sup> Sources: Transition report EBRD 2011 and EBRD Country Page 2012, US Department of State Background Notes 8/2011, Index Mundi Kyrgyzstan economy profile 2012.

<sup>2</sup> Sources: Transition report EBRD 2011 and EBRD Country Page 2012, US Department of State Background Notes 8/2011, Index Mundi Kyrgyzstan economy profile 2012 and Constitution of the Kyrgyz Republic.



The new constitution adopted by referendum on 27 June 2010 introduced a parliamentary system of governance with three branches of government. President of the Kyrgyz Republic is a head of state and is elected by popular vote for 6 years. Executive branch of government includes the government headed by the prime minister. Legislative branch is represented by Zhogorku Kenesh (parliament), which consists of 120 deputies elected for 5-year term based on the proportional election system. Judicial branch is comprised of the Supreme Court and local courts. The Constitutional Court of Kyrgyzstan was disbanded in April 2010 but a new institution - Constitutional Chamber of the Supreme Court – has not yet been formed. Other state institutions include bodies of the prosecution headed by the Prosecutor General, National Bank, Central Commission on elections and referendum, Chamber of Audits and Ombudsman office.

With its many functioning political parties, a relatively free media and a network of active civil society organisations, the Kyrgyz Republic continues to feature well in the regional context. However, the new system remains untested and the root causes of the inter-ethnic violence in the south of the country – including poverty, unemployment and deeply rooted corruption – are yet to be addressed.

Kyrgyzstan is a member of the United Nations, the Organization for Security and Co-operation in Europe (OSCE), the World Trade Organisation, the Shanghai Co-operation Organization (SCO), the European Bank for Reconstruction and Development, the International Monetary Fund, and the World Bank.

## **Trends in corruption**

With a score of 2.1. Kyrgyzstan ranked 164<sup>th</sup> out of 182 countries in 2011 Transparency International Corruption Perception Index. Kyrgyzstan's score was 2.2. in 2006 (142<sup>nd</sup> out of 163 countries), then fell to 2.1. in 2007, and to record low 1.8. in 2008; from 2009 Kyrgyzstan started to climb back gradually with the score of 1.9. in 2009 and 2.0. in 2010.

Substantial progress was made with regard to increasing transparency in the mining sector culminating in recognition of the Kyrgyz Republic by the Extractive Industry Transparency Initiative (EITI) Board as being EITI Compliant on 1 March 2011. At the same time Kyrgyzstan's rank in the World Bank's "Doing Business" index went down. Other indices also point out to similar tendencies (for more information see table below, as well as Section 3.3.2. and Section 3.9. of the report). Surveys show that corruption is widely seen as the most serious problem in Kyrgyzstan. According to the last round of the Business Environment and Enterprise Performance Survey (BEEPS) conducted in 2008-2009 around 10 per cent of all enterprises and almost one quarter of medium-sized enterprises considered corruption to be the most significant impediment.

<b>Index, organisation</b>	<b>Rank of the Kyrgyz Republic</b>	<b>Overall number of ranked countries</b>
"Doing Business" 2012, World Bank	70	183
Economic Freedom Index 2012, Heritage Foundation	88	179
Global Competitiveness Index 2011-2012, World Economic Forum	126	142
- Burden of government regulation	84	142
- Property rights	139	142
- Irregular payments and bribes	140	142
- Transparency of government policymaking	67	142
- Burden of customs procedures	134	142
International Property Rights Index 2010 <sup>3</sup>	97	125

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<sup>3</sup> Kyrgyz Republic was dropped out of the Index in 2011 due to lack of data.

# 1. Anti-Corruption Policy

## **1.1. Political will to fight corruption**

Following anti-government protests in April 2010 an interim government led by Rosa Otunbayeva came to power. During her interim government in 2010-2011 political regime in the Kyrgyz Republic experienced significant changes. Overall, it is believed that Ms. Otunbayeva's government, as compared to that of her predecessor, had a more transparent and efficient way of governance and also focused on measures to prevent corruption. In 2010 dubious state contracts were reviewed and investigations into alleged embezzlement and corruption by former senior officials initiated.

Prior to October 2011 presidential elections, there were numerous statements made by the running candidates that there is a need to avoid falsification of election results and reduce corruption in the government. Former Prime Minister Almazbek Atambayev was elected President in an election widely believed to be in line with international standards. This is the first time that a new President was elected in Central Asia meeting the OSCE standards. In his inaugural speech on 1 December 2011 President Atambayev stated that the fight against corruption is the second top priority after the fight against organised crime. He stressed the importance of rooting out causes of corruption in the society and called upon those in leading positions not to let their private interests influence them.<sup>4</sup>

Similarly, Coalition Agreement of four political parties elected to the Parliament, signed on 16 December 2011, states that one of the priority areas is to unite all forces for an uncompromised fight against corruption and crime.<sup>5</sup>

The Prime Minister Omurbek Babanov, in the draft governmental program, also states that the fight against corruption is one of the priorities and strict laws against corruption with effective mechanisms for sanctioning corruption and misuse of office are needed to achieve this. The program, among other measures, proposes to reform law enforcement; to introduce e-procurement and electronic mechanisms for privatisation; to co-operate with civil society in the fight against corruption; to update Government's anti-corruption web-site with electronic system of citizen's complaints and opportunity to provide feedback; to reduce control of business sector; and to simplify regulations.<sup>6</sup>

Another expression of declared political will and determination to fight corruption was the adoption of Presidential Decree No. 27 on 14 December 2011 on Creation of the Anti-Corruption Service within the State National Security Committee. The Decree provides for establishment of a new anti-corruption body responsible for prevention and combating of corruption offences committed by the senior administrative and political public officials.

And lastly, on 11 January 2012 a separate Committee, responsible solely for anti-corruption issues, was created in the Parliament – Committee on Anti-Corruption. The Kyrgyz authorities shared during the on-site visit that this was done to give more prominence and highlight the importance of these issues for the Parliament; this was done despite the fact that the overall number of Committees has been reduced from 16 to 13. Some concerns have been raised by the civil society representatives, as well as representatives of the international community, over the fact that due to restructuring processes, this Committee is no longer chaired by the representative of the Parliamentary

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<sup>4</sup> <http://www.knews.kg>

<sup>5</sup> Agreement on coalition of the Parliament factions of the Zhogorku Kenesh, <http://www.ar-namys.org>

<sup>6</sup> Draft Governmental Program of the Kyrgyz Republic "Stability and decent life", <http://republic.kg/ru/news>

opposition. In addition, there seems to be an overlap of functions with other Committees of the Parliament.

## **1.2. Anti-corruption policy documents**

### **Previous recommendation 1**

***Update National Anti-Corruption Strategy of the Kyrgyz Republic, on the basis of the evaluation of the implementation of the current anti-corruption programmes, with the aim to unify multiple documents into a single comprehensive strategy.***

In September 2007 the Kyrgyz Republic was considered **largely compliant** with the recommendation 1.

Formally, Kyrgyzstan had anti-corruption policy documents starting from 1997. Following ratification of the UN Convention against Corruption in 2005 and taking into account relevant recommendation of the Istanbul Action Plan, the State Anti-Corruption Strategy for 2006 – 2010 was adopted by the Presidential Decree, along with the action plan for its implementation. From 2005 to 2010 a National Corruption Prevention Agency was responsible for the implementation of this strategy, with this function later moved under the State Personnel Service.

The National Anti-Corruption Strategy and Action Plan for 2009 – 2011 were adopted by President's Decree No. 155 on 11 March 2009. Both documents correspond to a typical strategy and action plan to fight corruption; the action plan contains a list of 50 concrete and clear measures with expected outcomes, indicators, timelines and responsible institutions – all in all a very comprehensive document.

According to this Decree, the implementation of these documents was entrusted to the Government which elaborated a set of implementation measures adopted by the Government Resolution Nr. 352 on 5 June 2009. The Security Council was supposed to co-ordinate this work and the National Corruption Prevention Agency was put in charge of monitoring of the implementation; nevertheless, the Agency was disbanded in 2010 and no comprehensive monitoring was conducted.

Both in the answers to the monitoring questionnaire, as well as during the on-site visit, the Kyrgyz authorities stated that not many of the measures foreseen in the national strategy were fully implemented; partly for objective reasons due to the April 2010 events. Further, it was shared that due to lack of co-ordinating and monitoring mechanisms it was so far impossible to properly assess the level of implementation of anti-corruption measures. In line with these statements, the Presidential Decree No. 27 on Creation of Anti-Corruption Service from 14 December 2011 reiterates that previously adopted anti-corruption programs have been formal and declarative.

The same Presidential Decree tasked the Defence Council Secretary with developing and submitting for the review of the Defence Council of a new draft national strategy to fight corruption. On 30 January 2012 a meeting of the Defence Council took place; the meeting was chaired by the President of Kyrgyzstan Mr. Atambayev and addressed the topic "On measures to combat corruption in society". At this meeting the Defence Council endorsed a State Strategy on Anti-Corruption Policy of the Kyrgyz Republic which was adopted by the President's Decree on 2 February 2012. The Defence Council also recommended to the Zhogorku Kenesh (Parliament), the Government, the judicial bodies, other state agencies and bodies of local self-governance to develop their own action plans to combat corruption in the framework of the State Strategy of Anti-Corruption Policy. Also at this meeting, the Defense Council decided to submit for consideration in the Parliament the draft Law on the Fight against Corruption and proposals for amendments in the Criminal Code, Criminal Procedure Code and other legislative acts of the Kyrgyz Republic.

It was not possible to assess the quality of this new anti-corruption strategy, as its text was made available to the monitoring team only during the monitoring meeting of the ACN. The Kyrgyz authorities only shared that the new strategy will be directed towards two main segments: strengthening law enforcement agencies and prevention of corruption. The process of development of the new strategy did raise some great concerns. It was apparently developed by the Defence Council with participation of Law Enforcement Agencies but, at the time of the on-site visit, even those agencies involved in the drafting process could speak only on those parts which they themselves have drafted and submitted for inclusion into the document. The Defence Council was the only gatekeeper aware of the overall process and content of the document. The Kyrgyz authorities stated that during the drafting process they have taken into account the previous Anti-Corruption Strategy and Action plan, different evaluations, although none of them could be specifically named. During the on-site visit representatives of the civil society stated that the NGOs were not involved in the creation of the new State Strategy on Anti-Corruption Policy. Similarly, the international community was not included in any capacity in this process either. According to the Presidential Decree of 2 February 2012, the Secretariat of the National Defence Council was designated to monitor and control the implementation of the newly adopted Strategy.

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

#### **New recommendation 1.2.**

***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.***

***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.***

***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.***

***Ensure wide publication of the reports on implementation of the State Strategy in general and action plans in particular.***

#### **1.3. Corruption surveys**

##### **Previous recommendation 4**

***Conduct further surveys and relevant research, based on transparent internationally comparable methodology, to obtain more precise information about the scale of corruption in the country and in order to ascertain the true extent to which this phenomenon affects specific institutions, such as the police, judiciary, public procurement, tax and custom services, education, health system, etc.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with Recommendation 4.

As already noted in the first round monitoring report, in 2006 a methodology for corruption surveys was developed by the National Corruption Prevention Agency and adopted by an Order of the Commissioner of the National Corruption Prevention Agency; the report stated that studies have been carried out using this methodology. Meanwhile, the National Anti-Corruption Strategy and Action Plan for 2009 – 2011, adopted by President's Decree on 11 March 2009, provided for elaboration and adoption in 2009 of a new national methodology for assessment and monitoring of the scale of corruption by the National Corruption Prevention Agency and conducting regular

analysis using this methodology twice a year. However, according to answers to the questionnaire, and confirmation of this information by various representatives of the Kyrgyz authorities during the on-site visit, currently there is no single national methodology to analyse trends in corruption. Moreover, there is no specialized research centre which could conduct such studies. No real analysis of the undertaken anti-corruption measures was conducted and no specific studies could be quoted by the authorities apart from a few *ad-hoc* sector/agency specific ones made by the Ministry of Education and the Ministry of Health.

On a positive note, the population trust index methodology was developed and is being introduced in all state institutions. By using this methodology each agency gets a comparative score on the level of public trust to it; the results are then posted on the web-sites of the public institutions; and the institutions have to work on the improvement of their scores and report on such improvements to the Government.

While recognizing little progress made in this area, the Kyrgyz authorities have expressed their hope that the newly created Anti-Corruption Service will revive it with more systemic surveys on corruption conducted, as its responsibilities, among others, include analysis and monitoring of the trends of corruption, as well as the publication of the reports on implementation of the anti-corruption measures and other relevant documents.

Kyrgyzstan remains **partially compliant** with Recommendation 4.

#### **New recommendation 1.3.**

***Conduct further surveys and relevant research, based on adopted transparent and comprehensive internationally comparable methodology, to obtain more precise information about the scale of corruption in the country and in order to ascertain the corruption risks and the true extent to which corruption affects specific institutions, such as the police, judiciary, public procurement, tax and custom services, education, health system, etc.***

***Ensure wider inclusion of NGOs in anti-corruption researches of corruption based not only on perception, but also focus groups, victims of corruption, assessment of legislation, etc.***

#### **1.4. Public participation**

##### **Previous recommendation 29**

***Expand the application of permanent forms of cooperation (institutionalized councils and the like) between NGOs and the broader public on the one hand and public agencies on the other hand. Institutionalized councils where public officials are present but only NGOs/associations have voting powers are one potentially effective option for ensuring the free expression of public concerns. The decisions of such councils bear advisory character for public agencies. Develop a procedure for the permanent involvement of civil society (not only those represented by particularly active interested NGOs) in policy making.***

In September 2007 the Kyrgyz Republic was considered **largely compliant** with the recommendation 29.

During Bakiyev's presidency from 2005 to April 2010 it was considered that civil society had a limited role and many NGOs were repressed. It is believed that after the regime change in April 2010, local

NGOs were again able to function freely, interim government was open to collaborate with NGOs and civil society played a significant role in the 2011 elections.<sup>7</sup>

According to the first round of monitoring report, various formal measures have been taken to expand co-operation with civil society. In 2006 the National Anti-Corruption Council included 6 representatives of civil society; the National Corruption Prevention Agency had concluded over 20 memorandums about co-operation with civil society to prevent and fight corruption and elaborated a procedure for permanent involvement of civil society in development of national anti-corruption policy.

During the on-site visit the Kyrgyz authorities stated that there are many NGOs which are engaged in anti-corruption projects/activities within public institutions. However, to illustrate this point, no accounts of the specific involvement of the specific NGOs, apart from the Anti-Corruption Business Council (ABC), were made. Moreover, the NGOs on the contrary stated that they are not satisfied with the extent of their inclusion and co-operation with public institutions. The process of the development of the new draft State Strategy on Anti-Corruption Policy confirms this point (See Section 1.2. Anti-Corruption Policy Documents).

On a positive note, an important development was the creation of *public supervisory councils* (PSCs) at ministries and public institutions (общественные наблюдательные советы), in accordance with the Presidential Decree No. 212 on Improving Co-operation between Public Institutions and Civil Society, adopted on 29 September 2010. These councils include members of civil society, academia, business, professional and sector associations, and experts in relevant areas. At present, 41 PSCs have been created. 36 out of 41 councils had their first organisational meetings. Members of the PSCs initially had to be appointed by President's Administration; on 5 March 2011 the Decree was amended and now this function is within the purview of a special commission for selection of members of councils. Annex to these amendments identifies three criteria for selecting members of the councils: (1) not to be close relatives of the head/deputy head of the relevant public body; (2) not to be in direct dependence from the state body (e.g. being a licensee, contractor); and (3) have an uncompromised reputation. Members of public supervisory councils, information on their funding and activity reports are made public and can be found at [www.ons.kg](http://www.ons.kg). While the institute of the Public supervisory councils is a commendable undertaking and was reported as a working instrument also by the representatives of the civil society, it needs to be further developed and improved and should become a practical link between public institutions and citizens (public at large).

Taking into account little progress made on implementation of this Recommendation, the new rating is **partially compliant**.

#### **New recommendation 1.4.**

***Maintain and, where possible, expand the application of permanent forms of co-operation (public supervisory councils) between civil society and public agencies.***

***Establish procedures for the involvement of public at large in the development and monitoring of implementation of the anti-corruption measures, for instance, through public consultations and hearings, publication of the draft legislation with tools for submission of comments on-line.***

#### **1.5. Raising awareness and public education**

##### **Previous recommendation 5**

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<sup>7</sup> Freedom House, Nations in Transit. Kyrgyzstan. 2011, p.307.

***Conduct awareness raising campaigns and organize training for the relevant public associations, state officials and the private sector about the sources and the impact of corruption, about the tools to fight against and prevent corruption, and on the rights of citizens in their interaction with public institutions.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 5.

According to the first round of monitoring report, there has been limited training targeted at the public officials and private sector. The report concluded that there were only incidental attempts to raise awareness on corruption and also training lacked a systematic approach. The report referred to university curricula developed by the Academy of Management under the President, which included a course on administrative ethics; during the on-site visit representatives of the civil society shared that they have been actively involved in this program and it is currently widely applied both for teaching students and in-service training of civil servants.

In the answers to the monitoring questionnaire, it was pointed out that one of the functions of the National Corruption Prevention Agency was awareness raising and education on anti-corruption issues, but, as it was mentioned before, this Agency was abolished in 2010. The Government Resolution No. 352 of 5 June 2009 On Complex of Measures to Implement Action Plan of National Anti-Corruption Strategy only foresaw informing the public through mass media, but its implementation was not monitored.

Numerous fragmented efforts have been reported by the Kyrgyz authorities, including development in 2009 of the methodological guidance on how to counter corruption for pupils of 7 – 10 grades in secondary schools; development of posters and leaflets on customs legislation made available in different border crossing points, as well as a guide for customs officials, with altogether 25 420 copies distributed in 2010 – 2011 as part of the project “Assisting public institutions in countering corruption” implemented by the Anti-Corruption Business Council; seminar on budget transparency and accountability funded by the Soros Foundation; etc.

The Ministry of Education and Science seemed to be the champion on educational and awareness raising activities and the only agency with fairly comprehensive approach to the issue. It undertook: a sector-specific corruption risk assessment, identifying higher education as the most vulnerable area; measures to raise awareness on how the budget of education institutions is formed with the focus on higher education institutions; dissemination of the 6 May 2011 Decision on prohibition of illegal monetary and other collections in public organisations; as well as numerous other related measures. The Hotline for public complaints and reporting of corruption instances has been established with regular public receptions organized at the Ministry with participation of the Minister and his deputies.

Nevertheless, it appears that overall little has been done to raise awareness on corruption and about the tools to fight it. The training in this area is occasional and donor/civil society-driven. The Kyrgyz authorities also confirmed that effectiveness of work in this area has not been assessed.

The Kyrgyz Republic remains **partially compliant** with the recommendation 5.

#### **New recommendation 1.5.**

***Conduct awareness raising campaigns for the citizens and organize trainings for the public institutions, law enforcement agencies, judiciary, local government and the private sector about the sources and the impact of corruption, about the tools to fight against and prevent corruption and include NGOs in providing such trainings and education.***



***Assign the preventive body with developing of a comprehensive methodology for awareness-raising campaigns and plan of trainings.***

## **1.6. Specialized anti-corruption policy and co-ordination bodies**

### **Previous recommendation 2**

***Ensure strengthening institutional support for the public policy elaboration and monitoring in the field of fighting corruption; in the short term, this can be done through the Consultative Council for Good Governance and its Secretariat; in a longer term consider further consolidation and strengthening, taking into account experience of other countries with specialised independent anti-corruption agencies.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with this recommendation.

The National Corruption Prevention Agency was previously in charge of developing a national anti-corruption policy, measures to prevent corruption, and increasing public intolerance towards corruption and public participation in the anti-corruption measures. It was disbanded by the decision of the Interim Government No. 78 on 12 June 2010, without handing over its functions to another body. Furthermore, co-ordination of the implementation of national strategy to fight corruption was previously entrusted to the Security Council secretariat (apparatus) (different from the Defence Council). However, the Security Council secretariat (apparatus) was also abolished.

A new anti-corruption body – the Anti-Corruption Service of the State Committee on National Security was established by the Presidential Decree No. 27 on 14 December 2011. The Decree provides for creation of the institution responsible for preventing and fighting corruption offences committed by senior administrative and political public officials. Mr. Bekten Sydagaliev, First Deputy Head of the State Committee on National Security, was appointed Director of this Service.

One of the issues which raise concern is how the functions of the Anti-Corruption Service will be co-ordinated and delineated with those of the General Prosecutor's Office. The role and competences of the Anti-Corruption Service are still not clear; the regulation on its activities should be adopted.

There are a number of other institutional changes which are underway in the Kyrgyz Republic and correspondingly a number of open questions. For instance, it is still not clear who will be responsible for development and co-ordination of the anti-corruption policy. The draft Law on Anti-Corruption, reviewed at the Defence Council's meeting on 30 January 2012, still mentions two options – the Council itself and the General Prosecutor's Office of the Kyrgyz Republic, - one of which will have to be selected by the President and then further the Parliament, in the course of adoption of this draft law. Preventive functions are also not clearly assigned. According to the President's Decree of 2 February 2012 state bodies and local self-government bodies should develop and present action plans for implementation of the adopted Strategy by 1 March 2012; the situation may become clearer then.

In addition, a new Parliamentary Committee has been established specifically to work on anti-corruption issues, which should hopefully ensure speedy review, development and adoption of the necessary anti-corruption legislation. However, it was not clear how the work of this Committee would be co-ordinated with other Committees active in this area.

In conclusion, it seems to be a moment of significant changes and major transition. However, at present there is no designated body in charge of preventive anti-corruption policies, as required by Article 6 of the UN Convention against Corruption. Meanwhile, some institutional decisions have been made and it is now a matter of getting the substance in line with international standards, as well as ensuring effective implementation of the foreseen reforms.

The Kyrgyz Republic remains **partially compliant** with this recommendation.

**New recommendation 1.6.**

***Ensure that a body (bodies) responsible for development and control over implementation of the state anti-corruption policy is (are) provided with resources, specialised staff, training that are necessary to effectively carry out such functions.***

***Establish an effective mechanism for raising public awareness and other anti-corruption prevention measures.***

***1.7. Participation in international anti-corruption conventions***

**Previous recommendation 6**

***Ratify the UN Convention against Corruption.***

In September 2007 the Kyrgyz Republic was considered **fully compliant** with this recommendation.

Kyrgyz Republic ratified the UN Convention against Corruption on 6 August 2005. According to the ratification law, the Prosecutor's General Office is a central national body in charge of implementation of this convention.

The Kyrgyz Republic remains **fully compliant** with this recommendation.

## 2. Criminalisation of Corruption

### Previous Recommendation 10

***Consider significantly revising the Law on the Fight against Corruption along the following lines:***

- harmonise and clarify the concept of corruption from the Criminal Code and the Law on the Fight against Corruption;***
- remove contradictions between this law and other laws and codes, in particular in the field of declaration of assets, confiscation of property and illicit income;***
- introduce provisions that would enable actual enforcement of the law.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with Recommendation 10.

No major changes were made in the 2003 Law on the Fight against Corruption. Therefore, the assessment made in the report of 2004 is still valid. Many provisions that cover civil servants are duplicated in the relevant law; for example, Article 12 of the Law on the Fight against Corruption (“Activities incompatible with the exercise of state functions”), which extends solely to civil servants, overlaps with Article 11 of the Law on the Civil Service and – on top of that - regulates incompatibilities slightly differently from the Law on the Civil Service.

In general, the Law on the Fight against Corruption appears to be declarative and ineffective; most of its provisions have no direct applicability and no practical implications. This makes one question the need of existence of this law in such a form. This opinion was shared by interlocutors during the on-site visit. According to the Kyrgyz authorities, a draft new wording of the Anti-Corruption Law is being drafted and will be soon proposed as a part of a comprehensive package of amendments in the legislation on anti-corruption matters. The draft law, which was provided to the monitoring team, in general represents a positive development compared with the current Law. However, before adoption it should be further streamlined and simplified; it should also be complemented with amendments in other laws to ensure enforceability of its provisions and coherence with other laws, namely the law on the civil service, criminal and administrative codes, etc.

The Law on the Fight against Corruption provides for two types of offences: “offences that create conditions for corruption” (Article 13) and “corruption offences” (Article 14). Article 13 covers only civil servants and mentions that for its violation civil servants should be punished with disciplinary sanctions, “including dismissal from the office”. At the same time the Law on Civil Service, a special law for issues of civil service, has its own provisions on the disciplinary liability and does not refer to violation of the Law on the Fight against Corruption as a ground for disciplinary sanction. The same concerns Article 12 of the Law on the Fight against Corruption which mentions “dismissal from the office” as a sanction for violation of incompatibility requirements, while the Civil Service Law for the same infringements envisages various disciplinary sanctions with dismissal being only one of them. So it is not clear whether dismissal is the only sanction to be applied in such case or just one possibility in a range of sanctions. It may also lead to disconnect between the two laws, rendering the Law on the Fight against Corruption ineffective.

Article 15 of the Law on the Fight against Corruption stipulates that natural and legal persons who provided an illegal material benefit, gifts, privileges, etc., to civil servants - if the act was not criminal - should be brought to administrative liability in accordance with the legislation. As was confirmed during the on-site visit, there is no article in the Code of Administrative Liability that matches this provision of the Law. Thus Article 15 of the Law contains a provision that cannot be enforced.

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

See new recommendation under 2.1.-2.2.

## **2.1. – 2.2. Offences, elements of offence**

### **Previous Recommendation 9**

***Amend the provisions related to corruption offences to meet the requirements of international standards as enshrined in the Council of Europe’s Criminal Law Convention on Corruption, the United Nation’s Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Consequently, amend the Criminal Code to ensure that:***

- corruption-related conduct, including bribery, of foreign and international public officials is criminalized, either through expanding the definition of a public official or by introducing separate criminal offences;***
- promise and offering of a bribe, both in public and private sector, is criminalized;***
- subject of a bribery, both in public and private sector, covers undue advantages, which include material as well as non-material benefits;***
- bribery through intermediaries is fully covered;***
- clarify the definitions of corruption-related offences in the sphere of abuse of official duties and powers and ensure precise legal definitions which would not invoke interpretative difficulties;***
- “concealment”, “abuse of functions”, “illicit enrichment”, as they are defined by the UN Convention against Corruption, are criminalized.***

In September 2007 the Kyrgyz Republic was considered **not compliant** with Recommendation 9.

Issues raised in the initial review of Kyrgyzstan and confirmed in the first monitoring round report remain valid, as no changes were introduced in the Criminal Code to address Recommendation 9. According to Kyrgyz authorities a package of legislative amendments is being prepared and it includes changes aimed at aligning national law with international standards on criminalisation of corruption. Two relevant draft laws were provided to the monitoring team and are analysed below.

### **Current law**

Criminal Code of Kyrgyz Republic contains **Article 303 “Corruption”**, which establishes an extremely vague offence subject to broad interpretation.<sup>8</sup> It is punished with very severe sanctions – imprisonment of 8-15 years with mandatory confiscation for non-aggravated offence and 15-20 years of imprisonment with confiscation for aggravated offence. Statistics provided by the Kyrgyz authorities shows that 7 criminal cases were opened under this article in 2010 and 4 cases during 6 months in 2011; according to judicial statistics 2 cases were considered under this article during 9

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<sup>8</sup> *‘an intentional act of creating a stable illegal nexus of one or several officials who have authority with separate persons or groups in order to illegally obtain material or any other benefits and advantages, as well as provision by them of such benefits and advantages to natural and legal persons, when it creates a threat to interests of society or state’.*

months of 2011 with guilty verdicts delivered. During the on-site visit representatives of Kyrgyz authorities acknowledged that this offence overlaps with others and that it is usually incriminated together with other corruption-related offences. It was also stated that courts in most cases refuse to convict under Article 303 and discontinue prosecution under this count.

Offence provided by Article 303 of the Criminal Code overlaps with other corruption-related crimes (e.g. bribe-giving and receiving of a bribe, elements of organised crimes) and is contrary to the rule of law principle of legal certainty. Despite the convenience, which such a broadly formulated offence may bear for the law enforcement bodies, it goes against fundamental principles of fair trial to keep it in the law and use in practice. If there are loopholes in other corruption offences, they should be filled but not compensated with such a “catch-all” offence. Practitioners met during the on-site visit agreed that it would be advisable to remove this provision from the Criminal Code.

The initial review of Kyrgyzstan in 2004 pointed out a vague wording of offences of **abuse of official position** (Article 304 CC) and **exceeding of official position** (Article 305 CC). This remains to be the case. These offences also fall short of the relevant provision of the UNCAC, Article 19 of which includes “obtaining an undue advantage” as a necessary element of abuse of functions. This problem is common for many Istanbul Anti-Corruption Action Plan countries<sup>9</sup> and raises the issue of legal certainty. Such vague wording may itself instigate corruption, as it allows wide discretion in criminal prosecution.

Criminal Code of Kyrgyzstan contains several offences of **passive bribery** of public officials: “bribe-reward” for receiving a bribe without prior agreement (Article 310), “bribe-subornation” for receiving a bribe with prior agreement (Article 311) and receiving of a bribe for granting a civil service office (Article 312). There is also a separate Article 313 CC for bribe extortion. Such dispersion does not seem to be well grounded and necessary. It may also lead to problems in qualification of offences and may result in abuse, as the same acts of passive bribery can be qualified differently, e.g. by adding or removing the element of prior agreement. This may itself create possibilities for corruption in the justice system; especially taking into account that sanctions under Article 311 are significantly higher than under Article 310 CC and sanctions under Article 313 are higher than under Articles 310-312. It is, therefore, recommended to simplify and possibly merge various articles dealing with passive bribery.

Also in contrast to Article 310, Article 311 CC covers receiving of a bribe with prior agreement only for legal action/inaction committed in exchange, that is for action/inaction which was within official’s powers. Therefore, receiving of a bribe with prior agreement in exchange for commission of illegal actions is not covered by the Criminal Code of Kyrgyzstan, which represents a serious loophole that needs to be corrected.

**Chapter 23 of the Criminal Code** (Crimes against interests of service at non-state enterprises and organisations) contains an offence of Illegal receiving of reward by an employee (Article 225). It punishes illegal receiving by an employee, who is not an official of a state body, enterprise, establishment, organization, civic association, of material reward or pecuniary benefit in a significant amount for execution or non-execution in the interests of the persons who bribes of a certain action which this employee should or could take with the use of his employee status. As was explained during the on-site visit this article covers also employees of the state authorities and organisations

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<sup>9</sup> See for example Resolution 1862 (2012) of the Council of Europe’s Parliamentary Assembly regarding Ukraine, where the Assembly considered similar articles in the Ukrainian Criminal Code to be overly broad in application and that they effectively allow for post facto criminalisation of normal political decision-making. “This runs counter to the principle of the rule of law and is unacceptable”. Source: <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta12/ERES1862.htm>.

(including public hospitals, universities, schools), despite its placement in Chapter 23 CC that deals with private-sector corruption.

Several interlocutors whom the monitoring team met during the on-site visit indicated that in practice there are problems in application of Article 313 CC “**Extortion of a bribe**”. According to it an official is liable, in particular, for “placing a person in such conditions which force him to give a bribe in order to prevent negative consequences affecting his law-protected interests”. This vague wording itself is further confused by the explanation of the Supreme Court’s Plenary given in its Resolution No. 15 of 27.09.2003 on application by courts of liability for office-related offences. This Resolution, in particular, states that there is no extortion if the official demands a bribe under threat of committing towards the bribe-giver of legal actions (to report about embezzlement, order an inspection due to shortage of certain goods, etc.). Supreme Court also excludes extortion in cases when a bribe is demanded for commission of illegal actions, *e.g.* closing of a criminal case without proper grounds, allocation of residence to person who has no rights thereto. Some of these actions, which according to the Supreme Court should not be considered as extortion, were named by the law enforcement practitioners as valid examples of extortion. This confirms that definition of extortion should be clarified.

According to Note 3 to Article 314 (“Bribe-giving”) “a person who gave a bribe” is released from criminal liability if there was an extortion of a bribe by an official or if the person voluntarily informed the agency which is authorized to open a criminal case “about upcoming giving of a bribe”. It is not clear from this wording whether release from liability due to **effective regret** is applicable only when the reporting took place before the bribe-giving had been executed. If it were the case, then there is a contradiction in the wording of this provision (a person who “gave” a bribe – about “upcoming” bribe-giving). This confusion was shared by representatives of the law enforcement authorities during the on-site visit meetings. This inconsistency is not cleared by the Resolution of the Supreme Court Plenary No. 15. The latter only contains an important commentary that information about a bribe-giving cannot be considered as voluntary if it was made due to the fact that the law enforcement authority had become aware of the bribe-giving. This clarification, however, should be included directly in the Criminal Code.

Initial review of Kyrgyzstan recommended criminalising ‘**concealment**’ in line with the UNCAC. Article 24 of the UNCAC calls for criminalization of concealment or continued retention of property when the persons involved knows that such property is the result of any of the offences established according to the Convention. Article 35 of the Criminal Code of Kyrgyzstan stipulates that concealment of the perpetrator, as well as of instruments and means of a crime, traces of a crime or objects obtained as the result of a crime, is to be punished only in cases specifically provided by the Code. However, none of the corruption offences included in the Criminal Code provides a liability for such concealment. Criminal Code of Kyrgyzstan (Article 339) also prohibits concealment of grave and especially grave crimes as a separate offence. It is not clear whether such concealment covers property obtained as the result of such crimes. In any case, even if it does, it concerns only grave and especially grave crimes, which correspond only to some of the corruption offences (see a table below on the statute of limitations).

### **Draft amendments**

Kyrgyz authorities provided two draft laws which include amendments in the Criminal Code concerning corruption offences: Draft of 26 December 2011 provides amendments solely in the Criminal Code (Draft No. 1); Draft amendments in various legal acts concerning anti-corruption (Draft No. 2). These changes vary in their scope and content and some of them propose different changes in the same provisions. Below is a brief overview of the main amendments (from both draft laws) that are seen as problematic by the monitoring team:

- 1) Draft No. 1 proposes radical increase in the amount of fines for corruption offences (with maximum fines of up to 50,000 ‘estimate indicators’ (“расчетных показателей»<sup>10</sup>). While this may lead to more dissuasive sanctions in some cases, fines should not be used to allow a person buying his liberty after commission of serious corruption offences. Fines should not become the only possible sanction, imprisonment should remain an option for serious corruption cases. Also all corruption offences should lead to mandatory confiscation of the bribe and proceeds received from such offences. It is also not clear why several corruption offences provide as sanction a fine of certain range in absolute numbers (*e.g.* 10,000 to 15,000 ‘estimate indicators’) or, as an alternative, a fine calculated as a multiple of the amount of the bribe (*e.g.* 20 to 30 times of the amount of bribe). This leaves too wide discretion for the prosecution and the court.
- 2) Both Drafts extend offence of commercial bribery to non-commercial organisations, to any person working for relevant entities and to commission of any acts or inaction in exchange for an undue advantage. While criminalization of bribery in private sector is an established international standard, when introducing/revising such offences countries should be careful not to overdo. For example, Article 21 of the UNCAC (‘Bribery in the private sector’) concerns offences when committed in the course of economic, financial or commercial activities, thus excluding non-commercial entities. It also provides for a breach of person’s duties as a necessary element of the offence of passive or active bribery in the private sector (in addition to the element of “undue advantage”).
- 3) Both Drafts propose a new wording of Article 225 ‘Illegal obtaining of a reward by an employee’, which seems to duplicate new wording of the passive commercial bribery offence (Article 224 CC). After revision of Article 224, Article 225 of the Criminal Code can be deleted while offence of passive bribery by an employee, who is not an official of a state authority, be moved in Chapter 30 of the Code (as indeed proposed by one of the drafts).
- 4) Neither of the Drafts criminalises solicitation of a bribe (undue advantage) in private and public sectors, as well as acceptance of an offer or promise of bribe. Also offence of bribe-giving does not include offer or promise of a bribe as complete offences.
- 5) Both Drafts preserve several offences of passive bribery in public sector, differentiated by the existence of prior agreement. See critical remarks in the report above.
- 6) Draft No. 1 uses term “bribe” in several offences without providing its definition that would include non-material benefits. Besides new Article 310-1 CC covers only material advantages provided to an employee.
- 7) Draft No. 2 proposes to decriminalize provocation of a bribe. While international standards do not require that bribe provocation be recognised as a criminal offence, its decriminalization requires careful consideration. It should come along with establishment in the law (and not in the secondary legislation) of clear procedures and guarantees against abuse during the use of imitated bribery as an investigative or operative tool. Law enforcement authorities should also adopt clear guidelines setting apart entrapment, which is prohibited under fair trial standards, and legitimate bribery simulation.

Finally the draft amendments should also address other issues raised in this monitoring report and in the initial review of Kyrgyzstan (in particular, with regard to criminalization of ‘foreign bribery’, ‘abuse of powers’, ‘concealment’, etc. in accordance with international standards).

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<sup>10</sup> About 80,000 EUR.

Despite some positive changes included in the draft amendments mentioned above they cannot affect the rating for this recommendation until they are adopted and enter into force. Therefore, Kyrgyzstan remains **non-compliant** with Recommendation 9.

#### **Previous Recommendation 11**

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

In September 2007 the Kyrgyz Republic was considered **not compliant** with Recommendation 11.

It appears that Kyrgyzstan did not consider how to introduce liability of legal persons for corruption. Two draft laws with amendments in the anti-corruption legislation provided by the Kyrgyz authorities do not deal with corporate liability.

At the same time Kyrgyz Republic introduced administrative corporate liability for a number of offences. For example, to comply with anti-money laundering standards relevant provision of the Code of Administrative Liability (Article 505-17) was revised in October 2008 to cover legal persons. They are now punishable with a fine (a suspension of activity or winding up for a repeat offence) for non-compliance with AML/CTF legislation as concerns internal control and reporting of suspicious transactions. At the same time the Code of Administrative Liability does not specify a standard of liability for legal persons. It extends the requirement of guilt to legal persons, but does not explain how it should be applied to them, as obviously the standard used for natural persons (a psychological attitude to the act) cannot be applied to legal persons. Therefore, this provision does not present an effective corporate liability. In any case, it concerns only liability for offences related to anti-money-laundering requirements.

Kyrgyzstan remains **non-compliant** with Recommendation 11.

#### **Previous Recommendation 31**

***Introduce legislation that fully covers the international standard as to combating money laundering, namely, as to criminalize the laundering of proceeds of crimes, including corruption. Adopt preventive legislation that, among other measures, establishes a financial intelligence unit.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with Recommendation 31.

In October 2008 Kyrgyzstan revised provisions on liability for money laundering, namely Article 183 of the Criminal Code and Article 505-17 of the Code of Administrative Liability. Article 183 CC covers money-laundering of proceeds of any crime, *i.e.* corruption crimes are covered as well. These revised provisions in general seem to be compliant with international standards.

According to Note 3 to Article 183 CC, a person who committed money laundering offence is released from liability if he assisted in its solving and (or) voluntarily gave up money or other assets which were acquired through a crime (if there are no other crimes in his actions).

In October 2008 Kyrgyzstan also introduced administrative liability of legal persons for violation of AML legislation, namely its provisions on internal control and mandatory reporting. It, however, does not cover the corporate liability for actual money laundering which is still lacking. Also provisions on corporate liability introduced in 2008 are not effective (see relevant section of the report above).



Kyrgyz FIU was established in September 2005 by decree of the President (since February 2010 it is called State Service of Financial Intelligence). The Service is currently subordinated to the Government of Kyrgyzstan. The AML Law was enacted in November 2006.

According to the Kyrgyz Government's replies to the second round monitoring questionnaire, 1 criminal case was opened under Article 183 CC in 2009, 11 cases – in 2010, and 3 cases during 6 months of 2011. 2 convictions were delivered by courts in 2010 and 2 more during 9 months of 2011.

**Kyrgyzstan is largely compliant with Recommendation 31.**

**New recommendation 2.1.-2.2.**

***Amend provisions of the Criminal Code related to corruption offences to align them with international standards, in particular, to ensure that:***

***- foreign bribery is criminalised, either through expanding the definition of a public official or by introducing separate criminal offences;***

***- promise and offer, as well as solicitation of and acceptance of promise/offer of an undue advantage, both in private and public sectors, are criminalised as completed offences; passive bribery offences cover illegal actions by the official receiving an undue advantage;***

***- subject of bribery offences, both in private and public sectors, covers non-material benefits;***

***- offences of bribery in the private sector, abuse of office, concealment are compliant with the UN Convention against Corruption.***

***Repeal in the Criminal Code the offence of 'corruption' (Article 303) and revise offences of passive bribery in the public sector to simplify and streamline relevant provisions, including provisions on bribe extortion and effective regret.***

***Introduce an effective liability of legal persons for corruption offences and money laundering according to international standards.***

***Revise the Law on the Fight against Corruption by streamlining its provisions and ensuring their practical enforceability and consistency with other laws.***

### **2.3. Definition of public official**

Officials liable for office-related offences (Chapter 30 of the Criminal Code), including corruption crimes, are defined in the Notes 1 and 2 to Article 304 of the Code. "Official" («должностное лицо») is a person who on permanent, temporary basis or based on a special authorisation (1) exercises functions of a representative of power, or (2) carries out organisational-executive, administrative-economic, control-inspection functions in state bodies, bodies of local self-government, state or municipal establishments, as well as in Armed Forces and other military formations. Persons liable for some aggravated corruption offences are "officials holding a responsible position" ("должностные лица, занимающие ответственное положение"), that is persons who hold state posts established by the Constitution, constitutional laws for direct implementation of powers of state bodies (e.g. President, members of parliament, ministers, judges). Civil servants and employees of bodies of local self-government, who are not "officials", are not liable under Chapter 30 CC (but can be held liable under other articles of the Criminal Code – see below).

Terms used in Article 304 are further elaborated in the Resolution of the Supreme Court's Plenary No. 15 of 27 September 2003:

- “representative of power” (“представитель власти”) – person who exercises legislative, executive or judicial powers, as well as employees of state, tax or control bodies, who according to procedure established by law are assigned with executive powers regarding persons who are not in their work-related subordination or with the right to make decisions mandatory for execution by citizens and organisations. This category includes members of parliament, members of local councils, members of the Government, heads of executive bodies, judges, employees of the prosecution service, tax, customs bodies, bodies of the interior, national security, state auditors, state inspectors, controllers, military servicemen who carry out duties of public order protection.
- “organisational-executive functions” (“организационно-распорядительные функции”) are functions of management of staff, of a field of work, of separate employees, recruitment of staff, organisation of work of subordinates, control and maintaining of discipline, awarding of benefits and imposition of disciplinary sanctions. Any employee having in his subordination other employees is covered by this category.
- “administrative-economic functions” (“административно-хозяйственные функции”) are powers to manage and dispose of state property.
- “control-inspection functions” (“контрольно-ревизионные функции”) mean conducting of any inspections, control purchases, audits of economic entities (e.g. employees of Accounting Chamber, sanitary inspection, fire inspection).

Persons liable for commercial bribery offences (Article 224 in Chapter 23 CC) are defined in the Note 1 to Article 221 CC – “persons who exercise managerial functions in a commercial organisation” (“лица, выполняющие управленческие функции в коммерческой организации”), that is persons who on permanent, temporary basis or based on a special authorisation exercise organisational-executive or administrative-economic duties in commercial organisation regardless of its form of ownership.

Foreign public officials are not covered by the mentioned definition (see previous section of the report).

Law on the Fight against Corruption (Article 6) has its own definition of persons liable for “corruption offences” – all civil servants, as well as employees of municipal service, heads of establishments, organisations and enterprises, whose activity is funded from the state budget or which are partly owned by the state. It does not appear to be a problem, because definitions and subjects of offences in the Criminal Code are autonomous.

## 2.4. Sanctions

The following sanctions can be imposed on persons found guilty of corruption crimes: a) fine; b) deprivation of the right to hold certain position or to engage in certain activities; c) corrective works; d) restraint of liberty; e) deprivation of liberty; f) confiscation. The list of sanctions which can be imposed for various corruption-related crimes under the Criminal Code is provided below.

	<i>Fine</i>	<i>Corrective works</i>	<i>Deprivation of right (main / additional sanction)</i>	<i>Confiscation</i>	<i>Restraint of liberty</i>	<i>Deprivation of liberty</i>
<b>“Corruption” (Art. 303) – main offence</b>	No	No	Yes (add.)	Obligatory	No	8-15 years
<b>“Corruption” – aggravated</b>	No	No	Yes (add.)	Obligatory	No	15-20 years

	<i>Fine</i>	<i>Corrective works</i>	<i>Deprivation of right (main / additional sanction)</i>	<i>Confiscation</i>	<i>Restraint of liberty</i>	<i>Deprivation of liberty</i>
<b>Receiving a bribe-award (Art. 310) - main offence</b>	Yes	No	Yes (add.)	No	Up to 3 years	Up to 3 years
Receiving a bribe-award – aggravated (by person holding a responsible office; in large amount; for an illegal action)	No	No	Yes (add.)	Obligatory	No	3-8 years
<b>Receiving a bribe-subornation (Art. 311) – main offence</b>	No	No	Yes (add.)	Obligatory	No	5-8 years
Receiving a bribe-subornation - aggravated (by a group of person; by an organised criminal group; by person holding a responsible office; in a large amount)	No	No	Yes (add.)	Obligatory	No	7-12 years
<b>Receiving a bribe for providing an office (Art. 312) – main offence</b>	No	No	Yes (add.)	Obligatory	No	5-8 years
Receiving a bribe for providing an office – aggravated (in a large amount; by person holding a responsible office)	No	No	Yes (add.)	Obligatory	No	8-15 years
<b>Giving a bribe (Art. 314) - main offence</b>	Yes	Up to 2 years	No	No	Up to 3 years	Up to 3 years
Giving a bribe – aggravated (in large amount; in interests of an organised criminal group; for illegal actions; “with a purpose to remove an owner”)	No	No	No	No	No	3-8 years
<b>Abuse of official status (Art. 304) – main offence</b>	Yes	No	No	Possible	No	Up to 3 years
Abuse of official status –	Yes	No	No	Possible	No	3-5 years

	<i>Fine</i>	<i>Corrective works</i>	<i>Deprivation of right (main / additional sanction)</i>	<i>Confiscation</i>	<i>Restraint of liberty</i>	<i>Deprivation of liberty</i>
aggravated (with purpose of obtaining benefits and advantages)						
Abuse of official status – aggravated (by person holding a responsible office)	No	No	No	Obligatory	No	8-12 years
<b>Exceeding of official powers (Art. 305) – main offence</b>	Yes	No	Yes (main)	No	Up to 3 years	Up to 3 years
Exceeding of official powers – aggravated ( <i>i.a.</i> by person holding a responsible office)	No	No	Yes (add.)	Possible	No	4-8 years
<b>Laundering of money (Art. 183) – main offence</b>	Yes	No	No	Obligatory (with imprisonment)	No	3-6 years
Laundering of money – aggravated ( <i>i.a.</i> with use of official status)	No	No	No	Obligatory	No	4-8 years
Laundering of money – aggravated ( <i>i.a.</i> in large amount)	No	No	No	Obligatory	No	7-10 years
<b>Commercial bribery (Art. 224) – active bribery</b>	Yes	No	No	No	No	Up to 2 years
<b>Commercial bribery (Art. 224) – passive bribery</b>	Yes	No	Yes (main)	No	No	Up to 4 years
<b>Receiving of Illegal award by an employee (Art. 225)</b>	Yes	Yes	No	No	No	No
<b>Misappropriation or embezzlement of the entrusted property</b> (para. 4, Article 171) – with the use of official status	No	No	Yes (additional, optional)	No	No	5-8 years

The Criminal Code of the Kyrgyz Republic envisages a broad range of possible sanctions for corruption crimes, which, in general, meet the requirements of effective, proportionate and dissuasive sanctions, except for the following:

- disproportionately severe sanctions under Article 303 “Corruption” of the Criminal Code, with a minimum sanction of 8 years of imprisonment for basic offence. This is exacerbated by the extremely vague wording of the offence itself (see section 2.1.-2.2. of this report).
- Article 225 of the Criminal Code deals with receiving of undue benefits and covers employees of state authorities, who are not officials. It provides for relatively low sanctions – public works or a fine from 50 to 200 ‘estimate indicators’<sup>11</sup> (“расчетных показателей”). Such sanctions appear to be disproportionate and not dissuasive as regards taking of bribes by employees of state authorities, which may cause significant harm.

## **2.5. Confiscation**

Provisions of the Criminal Code and Criminal Procedure Code of Kyrgyzstan on confiscation were not amended since the first round of monitoring. Kyrgyz legislation provides for two types of criminal confiscation – as a punishment under specific articles of the Criminal Code and procedural confiscation under CPC (Articles 88 and 142). General provisions on confiscation as a punishment are set in Article 52 of the Criminal Code which defines confiscation as a forced gratuitous seizure into state property of assets of the convicted, which (property) served for or was intended for commission of crime or was obtained as a result of it. Confiscation may be ordered by court for grave or especially grave crimes committed with profit-seeking intentions, when it is provided by specific article of the Special Part of the Code. Article 88 of the CPC orders confiscation of: instruments of crime which belonged to the accused; money or other valuables which were “acquired in a criminal way”; money or other valuables which were object of bribe. If a person has voluntarily reported bribe extortion and assisted in apprehension of the person receiving a bribe, then object of the bribe is returned to its owner upon court decision. Under Article 142 CPC, in cases of crimes for which the Criminal Code foresees confiscation of property, investigator should take necessary measures to ensure enforcement of the sentence as regards possible confiscation of property.

As was clarified during the on-site visit Article 88 of the CPC applies only to crimes for which the Criminal Code specifically provides a possibility of confiscation. Such limitation is not provided in Article 88 itself and it would significantly limit possibilities of confiscation, because not all corruption offences in the Criminal Code include confiscation as a sanction.

Two draft laws with amendments in the Criminal Code provided by the Kyrgyz authorities after the on-site visit propose to change relevant provisions (Article 52) and bring them in line with the international standards. These draft amendments are welcome; they, however, fail to address all issues raised with regard to confiscation and seizure of objects and proceeds of corruption crimes mentioned in this report.

Article 17 of the Law on the Fight against Corruption provides that in cases of “illegal enrichment” as a result of corruption offences the received assets should be recovered by state upon court decision based on the legislation. During the on-site visit representatives of the Kyrgyz law enforcement authorities referred to the civil law procedure that should be used to effect such recovery; however, no specific provisions were mentioned, nor information on practical implementation of Article 17 of the Law was made available.

### **Previous Recommendation 12**

***Consider amending the Criminal Procedure Code, the Criminal Code and the draft Law on Fighting Financing of Terrorism and Laundering of Proceeds of Crime to ensure that the definition of***

<sup>11</sup> From 5,000 to 20,000 soms (from about 80 to 325 EUR).

***proceeds of crime, which are subject to confiscation, includes i) property into which proceeds of crime have been transformed or converted; ii) property with which proceeds of crime have been intermingled; iii) income derived from i) and ii), as well as from proceeds of crime.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with Recommendation 12.

Legislation of Kyrgyzstan was not amended to comply with the recommendation (see above).

Under Article 183 CC, paragraphs 1 and 2 (basic money laundering offence and aggravated offence when committed by a group of persons upon prior agreement or by a person using his official status), “confiscation of property” is mentioned as additional sanction (under paragraph 1 – applied only when the main sanction is imprisonment). While paragraph 3 of Article 183 CC (aggravated money laundering when committed in a large amount or by an organised criminal group) requires confiscation of “property which was the object of the laundering, as well as proceeds received from such activity, without prejudice to the rights of third persons”. It should be clarified what is the difference between “property” to be confiscated under paragraphs 1-2 and “property which was the object of the laundering, as well as proceeds received from such activity” under paragraph 3 of Article 183 CC. Also it is not clear from the wording of the Article in what way the rights of third persons should be protected; the law should be clarified so that it would not be possible to avoid confiscation by transferring property to a third person.

Kyrgyzstan remains **partially compliant** with Recommendation 12.

#### **Previous Recommendation 13**

***Amend the provisions of the Criminal Code and Criminal Procedure Code concerning the definition of proceeds and instrumentalities of crime to bring the provisions of both Codes in compliance with each other and the UN Convention against Corruption.***

In September 2007 the Kyrgyz Republic was considered **non compliant** with Recommendation 13.

No amendments were introduced since the first round of monitoring. Kyrgyzstan, therefore, remains **non-compliant** with Recommendation 13.

#### **Previous Recommendation 14**

***Consider introducing in the legislation the provision requiring an offender to prove the lawful origin of alleged proceeds of crime or other property liable to confiscation.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with Recommendation 14.

First round monitoring report mentioned a draft law prepared by the National Agency for Prevention of Corruption (the Agency was disbanded in 2010). The draft law was supposed to eliminate numerous deficiencies in the provisions on criminalisation; it also proposed to shift burden of proof as regards confiscation. First round report mentioned that proposal on confiscation was not broadly discussed within expert and legal community. It appears that the draft law has been abandoned at some point. Information provided by the Kyrgyz authorities mention no other initiatives in this regard.

Kyrgyzstan remains **partially compliant** with Recommendation 14.

### Previous Recommendation 15

***Review the provisions of the Criminal Procedure Code to ensure that the procedure to identify, trace and seize proceeds and instrumentalities of corruption offences is efficient and operational.***

In September 2007 the Kyrgyz Republic was considered **non compliant** with Recommendation 15.

According to Article 142 CPC, in cases on crimes for which the Criminal Code foresees confiscation of property, investigator should take necessary measures to ensure enforcement of the sentence as regards possible confiscation of property. Investigator should specify such measures in a resolution. Only part of the corruption offences provide for optional or obligatory confiscation of property. Therefore duty of the investigator to secure future confiscation has a limited scope. This provision also lacks precision and details as to how the confiscation can be secured, e.g. what actions should be taken to trace and seize property.

Also according to Article 119 of the Criminal Procedure Code, prosecutor (or investigator upon authorization of the prosecutor) can arrest property of the suspect or accused in order to ensure enforcement of the sentence as regards possible confiscation. Arrest can be imposed on property which is in possession of other persons, if there are sufficient grounds to believe that it was received as a result of criminal acts of the suspect or accused. As was noted during the on-site visit this provision has limited effect, because it does not allow seizure of property *in rem* (against the property without a link to specific person) in criminal cases in which no defendant was determined yet, i.e. when a criminal case is launched with regard to the fact of alleged crime and not against a specific person – possible perpetrator.

Kyrgyzstan remains **non-compliant** with Recommendation 15.

### New recommendation 2.5.

***Amend legislation to ensure confiscation of instrumentalities and proceeds of corruption and money laundering crimes according to Article 31 of the UNCAC, as well as effective procedures for tracing and seizing proceeds of crime even before a suspect in the case was identified.***

***Consider introducing in the legislation provision requiring an offender to prove the lawful origin of alleged proceeds of crime or other property liable to confiscation.***

## 2.6. Immunities and statute of limitations

### Previous Recommendation 19

***Ensure that the immunity granted to certain categories of public officials does not prevent the investigation and prosecution of acts of corruption.***

In September 2007 the Kyrgyz Republic was considered **non compliant** with Recommendation 19.

Legislation of the Kyrgyz Republic grants immunity from criminal liability and certain privileges as regards investigatory measures to the following categories of officials: the President, members of parliament, judges, prosecutors and investigators, members of the Government. These immunities/privileges differ in scope and procedures for their lifting.

According to the Constitution (Article 67) and the Law on the Guarantees of Activity of the President (Article 3), the **President** can be brought to criminal liability (i.e. charged with a crime) only after his impeachment. Accusation against the President can be brought by the parliament and has to be confirmed by the conclusion of the Prosecutor General that there is a crime in actions of the

President; impeachment decision then requires two thirds of votes in the parliament. The Law on the Guarantees of Activity of the President also forbids bringing the President to administrative liability, to apprehend or arrest him, to subject him to search, personal examination or interrogation. This immunity extends to President's residence, office, etc. and to his family. Requirement to obtain a conclusion by the Prosecutor General on the qualification of the alleged crime of the to-be-impeached President appears to be a weak link, since the Prosecutor General himself is appointed and dismissed by the President.

In addition Article 12 of the Law on the Guarantees of Activity of the President grants immunity to the **former President**, who cannot be held administratively or criminally liable for any actions committed during his term of office, nor can he be apprehended, arrested, subjected to search, interrogation or personal examination. This immunity extends to ex-President's residence and office, transport vehicles, communications, any other property, documents and correspondence. This is an extremely broad immunity, which grants absolute protection to the former President for any crimes committed while in office. It is much wider than any other immunity provided in the law for other officials and there is no procedure for removing it. It violates the democratic principle of accountability and allows impunity for any criminal acts, including corruption. Such protection regime may also foster corruption of the President who is given such a *carte blanche* and can avoid any liability if he manages to conceal his acts and not get impeached during his term. It is strongly recommended to abolish immunity of ex-President.

According to Article 72 of the Constitution a **member of parliament** (deputy of Zhogorku Kenesh) can be brought to criminal liability (*i.e.* charged with a crime) upon consent of the majority of the general composition of the parliament, except for commission of especially grave crime (for the list of especially grave corruption-related crimes see below the table on statute of limitations). Also a member of parliament cannot be apprehended or arrested, subjected to search and personal examination except for commission of especially grave crimes (Article 24 of the Law on the Status of Deputies of Zhogorku Kenesh). Procedures for lifting immunity are set in the Law on the Status of Deputies and the Law on the Parliament's Rules of Procedure. Criminal case against a member of parliament can be opened only by the Prosecutor General. Request for lifting immunity can be filed by the Prosecutor General or a court. Upon such request the parliament has to set up within 48 hours a special commission, which has one month to consider request for lifting immunity. Conclusion of the special commission is to be considered at the nearest plenary meeting. If the request was denied, the criminal case has to be closed. Requirement to set up a special commission within 48 hours is commendable, but the duration of commission's deliberations (one month) and the fact that its report is to be considered only at the next regular plenary meeting is problematic, as it can significantly delay the investigation and make it ineffective.

According to the Constitution (Article 94) **judges** have immunity and cannot be apprehended or arrested, subjected to search or personal examination, except for cases when caught *in flagrante*. Bringing of judges to criminal or administrative liability is allowed only upon consent of the Council of Judges (a body of judicial self-government) in accordance with the Constitutional Law on the Status of Judges. According to the latter, a criminal case against a judge can be opened only by the Prosecutor General, who can charge a judge with a crime after obtaining consent of the Council of Judges. Request for lifting immunity should be considered by the Council of Judges within 10 days after relevant submission. According to Article 30 of the Constitutional Law, the Council of Judges, having established that the criminal or administrative liability of a judge is caused by the position held by judge during exercise of his judicial functions, shall refuse in giving its consent to bringing a judge to the responsibility. It is not clear whether this is the only ground for rejecting request for lifting immunity. The Constitutional Law prohibits repeat submission of the request for lifting immunity that was previously rejected by the Council. It is also specifically stipulated that operative and detective measures, which infringe on judge's human rights or immunities, are allowed only after opening of a criminal case with regard to the judge.



The procedure for lifting immunity of judges appears to be effective. During the on-site visit law enforcement officials mentioned that restriction that only Prosecutor General can open a criminal case against a judge obstructs effective investigation into judges, due to difficult geographical conditions of the country and the fact that obtaining authorization of the Prosecutor General may take a lot of time; there is a proposal to allow other prosecutors to launch investigation into judges, which seems reasonable. It is also recommended to consider changing the provision that operative measures concerning a judge can be carried out only after a criminal case is opened – this significantly limits possibilities of law enforcement agencies in uncovering corruption in the judiciary. It is sufficient that the judicial self-government body (Council of Judges) has to give authorization to bring charges against judge, thus providing guarantee against undue prosecution of a judge.

**Members of the Government** have limited immunity – they cannot be apprehended or arrested, subjected to search, interrogation or personal examination, except for cases when caught *in flagrante* for commission of a grave or especially grave offence, as well as “in other cases provided by the legislation” (Article 19 of the Constitutional Law on the Government of Kyrgyz Republic). No other immunities are provided. Exemption for situations of *in flagrante delicto* only for grave and especially grave crimes raises concern, as it may be difficult or impossible to establish at the crime scene how relevant act should be qualified. It is therefore recommended to provide a general exemption for all *in flagrante* situations. It should also be clarified what does “other cases provided by the legislation” mean.

**Prosecutors** and **investigators** have limited immunity as well. According to Article 48 of the Law on the Procuracy, it is forbidden to apprehend, to bring in by force, to conduct personal examination of prosecutor or investigator, examination of their belongings and transport, except for cases when caught *in flagrante*. A criminal case against a prosecutor and investigator from prosecutor’s bodies can be opened and investigated only by the prosecution bodies. There are no other immunities or privileges for these officials (except for the Prosecutor General – see below).

Constitution of Kyrgyzstan (Article 74) also grants immunity from prosecution to the **Prosecutor General** and **Ombudsman**/his deputies. Parliament can lift their immunity, thus allowing that these persons are charged. Relevant procedure is regulated by the Law on the Rules of Procedure of Zhogorku Kenesh (Article 126). Request for lifting immunity can be made by the Prosecutor General or a person exercising his powers. A special investigative commission is to be formed according to general rules; the commission has to provide its opinion within 21 days. Consideration of the issue is then included in the nearest ordinary plenary meeting of the parliament. Immunity can be lifted by majority of present deputies by secret ballot, but not less than 50 votes (overall there are 120 deputies). It should be noted that the parliament’s Rules of Procedure and the Law on the Prosecutor’s Office (Article 12) stipulate different scope of immunity of the Prosecutor General than the Constitution by including not only immunity from criminal liability, but also from arrest and administrative liability. It is also not clear what is the procedure for making a request to lift immunity from the Prosecutor General, namely who is authorized to file such request with the parliament instead of the Prosecutor General himself. Besides procedure for lifting immunity by the parliament does not seem effective as it can be significantly delayed at various stages.

None of the above mentioned immunities are functional, that is extending only to actions committed in the exercise of official duties. Exemption from immunity when caught *in flagrante* is provided for judges, prosecutors/investigators and members of the Government (for latter only in case of grave or especially grave crimes). Immunity of members of parliament is waived in case of especially grave crimes. It is recommended to introduce functional immunity for all categories of officials and harmonise exemptions in cases of *in flagrante* situations.

Criminal Procedure Code (Article 221) stipulates that investigation should be suspended if it cannot be continued, in particular, due to the immunity of the person. At the same time statute of

limitations in such cases is not suspended and continues its course, which may result in that a person cannot be prosecuted even after his immunity ceased to exist or was lifted.

Due to changes in the laws and events of April 2010 Kyrgyz authorities could not provide proper statistics on the requests for lifting immunities from relevant officials. The only information available is that in 2011 the Prosecutor's General Office submitted requests with regard to 2 deputies of Zhogorku Kenesh, which are now under consideration. Since June 2011 (when amendments in the Constitutional Law on the Status of Judges were introduced), the PGO requested lifting immunities from 5 judges, from which the Council of Judges denied one request (remaining requests are under consideration). No information was provided on conviction for corruption offences of persons enjoying immunity. This information is insufficient to assess whether procedures related to lifting immunities are effective in practice.

Kyrgyzstan's new rating is **partially compliant** with Recommendation 19.

**Statute of limitations.** The Criminal Code of the Kyrgyz Republic provides for the following terms of statute of limitations for corruption-related offences.

<i>Crime</i>	<i>Category of crime</i>	<i>Statute of limitations</i>
<b>"Corruption" (Art. 303) – main offence</b>	Especially grave	10 years
<b>"Corruption" – aggravated</b>	Especially grave	10 years
<b>Receiving a bribe-award (Art. 310) - main offence</b>	Less grave	3 years
Receiving a bribe-award – aggravated (by person holding a responsible office; in large amount; for an illegal action)	Grave	7 years
<b>Receiving a bribe-subornation (Art. 311) – main offence</b>	Grave	7 years
Receiving a bribe-subornation - aggravated (by a group of person; by an organised criminal group; by person holding a responsible office; in a large amount)	Especially grave	10 years
<b>Receiving a bribe for providing an office (Art. 312) – main offence</b>	Grave	7 years
Receiving a bribe for providing an office – aggravated (in a large amount; by person holding a responsible office)	Especially grave	10 years
<b>Giving a bribe (Art. 314) - main offence</b>	Less grave	3 years
Giving a bribe – aggravated (in large amount; in interests of an organised criminal group; for illegal actions; "with a purpose to remove an owner")	Grave	7 years
<b>Abuse of official status (Art. 304) – main offence</b>	Less grave	3 years
Abuse of official status – aggravated (with purpose of obtaining benefits and advantages)	Grave	7 years
Abuse of official status – aggravated (by person holding a responsible office)	Especially grave	10 years
<b>Exceeding of official powers (Art. 305) – main offence</b>	Less grave	3 years
Exceeding of official powers – aggravated ( <i>i.a.</i> by person holding a responsible office)	Grave	7 years
<b>Laundering of money (Art. 183) – main offence</b>	Grave	7 years
Laundering of money – aggravated ( <i>i.a.</i> with use of official status)	Grave	7 years
Laundering of money – aggravated ( <i>i.a.</i> in large amount)	Grave	7 years
<b>Commercial bribery (Art. 224) – active bribery</b>	Small gravity	1 year
Commercial bribery– passive bribery	Less grave	3 years
<b>Receiving of illegal award by an employee (Art. 225)</b>	Small gravity	1 year
<b>Misappropriation or embezzlement of the entrusted property (para. 4, Article 171) – with the use of official status</b>	Grave	7 years

According to Article 67 of the Criminal Code duration of statute of limitations is suspended if the perpetrator evades investigation or court. However, no suspension is provided for persons enjoying immunity from prosecution (see also above).

## New recommendation 2.6.

*Revise provisions on immunities of officials to ensure that they do not obstruct effective investigation and prosecution of corruption offences, in particular:*

- introduce functional immunities for all relevant officials and harmonise exemptions in cases of in flagrante situations;*
- repeal immunity of the former President;*
- streamline procedures for lifting immunity of deputies of the parliament, Prosecutor General and Ombudsman;*
- provide for suspension of the statute of limitations for the period when a person enjoyed immunity;*
- consider changing provision not allowing to conduct operative measures with regard to a judge until the criminal case is opened and revising restriction that only Prosecutor General may open a criminal case as regards a judge.*

## 2.7. International Co-operation and mutual legal assistance

### Previous Recommendation 18

*Consider introducing amendment to the Code of Criminal Procedure to ensure that extradition and mutual legal assistance are given on reciprocity basis and contribute to ensuring effective international mutual legal assistance in investigation and prosecution of corruption cases.*

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 18.

No amendments were introduced or contemplated since the first round of monitoring and no information was provided on the implementation of this recommendation. According to Article 425 of the Criminal Procedure Code mutual legal assistance is possible based on a treaty or international agreement.

Kyrgyzstan remains **partially compliant** with Recommendation 18.

## 2.8. Application, interpretation and procedure

### Previous Recommendation 16

*Bring in compliance with each other the Law on Banks and Banking and the Law on Bank Secrecy with regard to the authority, which gives a sanction for accessing bank records. Consider giving the right to access bank records before criminal proceedings are officially instituted, subject to either a court or a prosecutor order.*

In September 2007 the Kyrgyz Republic was considered **non compliant** with Recommendation 16.

Issue raised in the initial review of Kyrgyzstan was that the Law on Banks and Banking Activity (Article 55) allowed the law enforcement authorities to access bank accounts of natural and legal persons under a sanction of prosecutor, while the Law on Bank Secrecy (Article 10) allowed it only

according to court decision. This problem appears to be solved, as in May 2008 Article 55 of the Law on Banks and Banking Activity was repealed. Article 10 of the Law on Bank Secrecy in force provides that bank secrets are disclosed by banks based on a court decision, as well as upon request of authorised agencies for purposes of countering money laundering and control over tax payments.

At the same time, according to Article 119, paragraph 7, of the Criminal Procedure Code, which regulates procedure for arrest of money in a bank account of the suspect (accused), banks are obliged to disclose information on such money based on a court request, as well as a request of the prosecutor (or investigator with prior authorisation from the prosecutor). This seems to contradict Article 10 of the Law on Bank Secrecy.

Representatives of the law enforcement authorities confirmed during the on-site visit that the problem of accessing bank data before a criminal case is instituted was not solved and it affects effective inquiry into corruption offences. It is recommended to change relevant provisions and allow access to bank secrets for law enforcement authorities as regards specific natural or legal persons, if such information is necessary for conducting preliminary inquiry of possible crime and when the request to disclose it is duly authorised.

Kyrgyzstan is **partially compliant** with Recommendation 16.

Another problem cited by practitioners was access to tax and customs data held by the relevant authorities. It is recommended to make changes that would give law enforcement bodies investigating specific allegations an effective access and the right to use data collected and held by the tax and customs authorities. The law should provide necessary safeguards (including sanctions) against the use of personal data for purposes other than investigation of crime.

Kyrgyzstan has established a system of financial monitoring, including an FIU body. According to the Kyrgyz authorities FIU concluded co-operation and information exchange agreements with the Financial Police, Prosecutor's General Office, Customs Service, etc. There is, however, lack of interaction and feedback from law enforcement authorities. It is recommended that the FIU work more closely with the law enforcement authorities in order to identify patterns of possible corruption, train reporting entities on detecting and reporting such patterns. Kyrgyzstan should also remove legal obstacles in order to ensure that the suspicious transaction reports submitted by the FIU to law enforcement agencies can be used as evidence, when they relate to domestic information.

While Kyrgyzstan has introduced the money laundering offence in its criminal law the court case law under Article 183 CC remains scarce. 3 cases were considered by courts in 2010 with 2 convictions; in 2011 – 2 cases with 2 convictions; none of these cases had corruption crimes as a predicate offence. There is so far no unified treatment of this offence by the courts. As was explained by the Supreme Court judge during the on-site visit, there is a debate among practitioners on how to treat and prove that the laundered money were obtained illegally, that is whether final conviction on the predicate offence should be required or not. As none of the relevant cases have yet reached the Supreme Court, the latter has not had the opportunity to rule on this matter. Lower courts so far do not require prior sentence on the predicate offence as a necessary element to establish money laundering. Such approach is in line with international best practice and it is recommended to support it by the Supreme Court's guidelines (position).

#### **New recommendation 2.8.**

***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.***

***To ensure that the FIU 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 STRs. 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.***

## **2.9. Specialized anti-corruption law-enforcement bodies**

### **Previous Recommendation 3**

***Carry out the inventory and analyse existing functions of the law-enforcement bodies involved in the fight against corruption with the view to further consolidate and specialise them. The coordination function currently implemented by the Prosecutor General's Office should be strengthened. Furthermore, provide adequate resources for the enforcement of anti-corruption legislation.***

In September 2007 the Kyrgyz Republic was considered **not compliant** with this recommendation.

In August 2011 through amendments in the CPC the prosecutor's office was assigned to conduct all anti-corruption investigations. It was based on the 2010 Constitution's provision (Article 104) that included in the prosecutor's office competence criminal prosecution of all state officials, regardless of the crime committed. It is quite unusual to have criminal prosecution jurisdiction fixed in the constitution. It makes it very difficult to adjust scope of powers of various law enforcement authorities, including establishment of anti-corruption specialised agencies/units. It is recommended in the future to re-consider this constitutional restriction.

According to the Criminal Procedure Code, as amended in August 2011, investigation of corruption-related crimes falls into sole competence of the Prosecutor General's Office (all crimes committed by state officials) and the Financial Police (economic crimes and private sector corruption). Money laundering offence can be investigated by the Ministry of Internal Affairs and the Financial Police, depending on who detected the case first. Prior to August 2011 amendments corruption-related offences could be investigated by various law enforcement authorities (alternative jurisdiction). Despite this current formal separation and seemingly exclusive power of the Prosecutor General's Office to investigate corruption-related crimes, Criminal Procedure Code allows the PGO to refer any criminal case to any investigative body regardless of its investigative competence fixed in the Code. This practice is widely used, as was explained during the on-site visit. Such unfettered discretion of the Prosecutor General's Office raises concern, as it may result in the abuse of authority. It is understandable that in some exceptional cases (*e.g.* when the case concerns employees of the prosecutor's office or when it is closely linked to the investigation of another crime within competence of certain investigative body) it indeed may be reasonable to allow changing investigative jurisdiction, however there should be clear guidelines on such referrals.

On 14 December 2011 President of Kyrgyzstan issued a decree setting up an Anti-Corruption Service within the State Committee of National Security. The decree mentions that the Service should prevent, stop, detect and investigate – “in cases provided by law” – corruption offences committed by political and high-level administrative state and municipal officials, law enforcement officers, judges, heads of organisation funded from the state budget or partly owned by the state. However, it is unclear whether the newly established Anti-Corruption Service will have the exclusive power to investigate corruption offences by the mentioned officials or will be able to do it only when the prosecutor's office refers to it specific corruption cases.

The new agency is a part of the State Committee of National Security; its head is *ex officio* First Deputy Head of the Committee. At the time of evaluation there were no detailed regulations on the

Anti-Corruption Service and it was not clear what would be its functions, powers and resources. It is therefore impossible at this stage to assess whether the new agency complies with international standards on the specialised anti-corruption law enforcement authorities.

As described, there are a number of agencies which have law enforcement functions as regards corruption offences (Ministry of Internal Affairs, State Committee on National Security, Financial Police, Customs Service, and Prosecutor General's Office). All of them are authorized to conduct pre-investigation checks in corruption cases. Only Customs Service is limited in such inquiries to its own officers. The rest can collect intelligence as regards all government officials. This system creates confusion on what agency should target high-level corruption. This may partly explain why very few high-level corruption cases were identified and prosecuted. Hopefully, establishment of the Anti-Corruption Service will address this problem (although there remains the problem of exclusive power of the prosecutor's office to investigate public officials).

Agencies which are responsible for enforcement of the anti-corruption legislation lack necessary resources. For instance, forensic capabilities remain at the very low level; some important types of forensic analysis cannot be carried out in Kyrgyzstan at all since there is no appropriate equipment and knowledge. The Law on Witness Protection, which was adopted in 2006, remains ineffective and not implemented in practice mainly due to the lack of funds (see also assessment under Recommendations 17 and 20).

Level of co-operation among law enforcement agencies appears to be relatively high. MOI, GPO, Financial Police, Customs Service and other law enforcement agencies reported that they conduct monthly high-level co-ordination meetings. The PGO ensures co-ordination in anti-corruption investigations. Such practice should be maintained and further developed through exchange of information and joint trainings.

Kyrgyzstan is **partially compliant** with Recommendation 3.

#### **Previous Recommendation 8**

***Continue with efforts in the area of corruption-specific trainings for police, prosecutors, judges and other law enforcement officials; consider providing joint training for these bodies on the fight against corruption.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 8.

No information was provided on joint specialized training on anti-corruption. Such training is necessary to develop specialization and implement unified standards in all law enforcement agencies which are all responsible for detection of corruption crimes. It is also important to share these standards with prosecutors and judges. Although some training activities have been conducted for young law enforcement and procuracy professionals, regular in-service training for mid-level professionals on anti-corruption - both separate ones and joint for police, prosecutors and judges - are needed.

Kyrgyzstan remains **partially compliant** with Recommendation 8.

#### **Previous Recommendation 20**

***Study special investigation techniques for fighting corruption, consider introducing the legal basis for these techniques and methods in the Criminal Procedure Code - with due regards to international human rights standards - and secure funding for implementation of witness protection programmes.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 20.

Special investigative techniques are provided in the Law on the Operative and Detective Activity and include a number of special measures, e.g. interception of electronic communications, sting operations, etc. According to Article 14 of the Law, results of the operative and detective activity can be a ground for instituting a criminal case, can be submitted to a body of inquiry, to investigator, prosecutor or court which has criminal case in its proceedings, and can be used as evidence in criminal cases in line with criminal procedure law. According to Article 8 of the Law on the Operative and Detective Activity, implementation of special investigative methods is allowed even before a criminal case is opened. In practice, however, use of results of operative measures as evidence is problematic since courts rarely accept them. This explained by the restriction set in Article 165 of the Criminal Procedures Code, according to which only crime scene examination and forensics analysis are permitted before the criminal case is opened. When the corruption case is opened the risk of information leak becomes high. It can render any covert operative activities, like imitated bribery, ineffective. Therefore, law enforcement personnel and judges need clear guidance on how materials resulting from special operative measures can be used as evidence in court. It is also recommended to amend relevant legislation to allow use of operative results as evidence.

Imitation of bribery is used in practice as a main tool to document bribery, but it is not formally regulated in the law. Law enforcement authorities refer to controlled delivery mentioned in the law, which, however, is a different measure. Such situation can be found to be in violation of fair trial standards and should be corrected. Reportedly law enforcement authorities also face practical problems in securing cash money to use in imitated bribery, because no agency has a special operations fund for such cases. When the money of the person who reported about planned bribery and agreed to co-operate with authorities are used, they often cannot be returned to such collaborator until after the sentence is delivered as such money are considered evidence.

Witness protection law was adopted in 2006. However, it still remains on paper and is not properly implemented due to lack of resources. Ministry of Internal Affairs drafted a National Plan for its implementation but it has not been adopted yet. No measures on witness protection were implemented in corruption cases. Interlocutors during the on-site visit also mentioned deficiencies in the law itself which hinder its effective implementation.

Kyrgyzstan remains **partially compliant** with Recommendation 20.

#### **New recommendation 2.9.**

***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 crimes in line with international standards.***

***Organise regular training on enforcement of anti-corruption legislation for law enforcement officials, prosecutors and judges, including regular joint trainings.***

***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.***

***Secure funding for implementation of witness protection programmes.***

## **2.10. Statistical data on enforcement of criminal legislation on corruption**

### **Previous Recommendation 7**

***Upgrade monitoring and reporting of corruption and corruption-related offences on the basis of a harmonised methodology. Ensure the provision of regular information to the Consultative Council for Good Governance, covering all spheres of the Civil Service, the Police, the Public Prosecutor's Offices, and the Courts, which would enable comparisons among institutions.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 7.

Reporting on corruption offences is centralized: all data goes to the Information Centre at the Ministry of Internal Affairs. However, such data should be more comprehensive: some important information is missing, such as profile of corrupt officials, areas of public activities where corruption offences were committed, specific sanctions used to corrupt officials.

Kyrgyzstan remains **partially compliant** with Recommendation 7.

### **New recommendation 2.10.**

***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.***



## 3. Prevention of Corruption

### 3.1. Corruption prevention institutions

This topic is covered under section 1.6 “Specialized anti-corruption policy and coordination bodies and corruption prevention institutions”.

### 3.2. Integrity of public service

#### 3.2.1. Political and professional public officials

The Law on Civil Service of Kyrgyz Republic was adopted in 2004, and last amended in November 2011. The Law establishes two main categories of public officials - political and administrative. Political officials are appointed (elected) and dismissed by the President, Parliament, and the Prime Minister, in accordance with the legislation of the Kyrgyz Republic; administrative officials hold positions in public bodies and implement tasks of a state body established by the Constitution. The Law is applicable to the administrative public officials and to the civil servants from the apparatus of the courts, Ombudsman, bodies of justice and prosecution, as well as servants with the status of public law enforcement officers. The definition of the political officials is not clear; it is also not clear which laws and regulations are applicable to the political officials. There are registers of both political and administrative officials.

The Law on Civil Service establishes the position of State Secretaries, as senior non-political civil servants. Article 14 of the Law on Civil Service provides that the State Secretaries hold permanent positions and should not be replaced following political changes. There are 22 State Secretaries in their positions in 2012. Since 2010 some of the state agencies have been liquidated, some have been merged and 12 new ones have been created - as a result 12 new State Secretaries have been appointed. More specifically, 3 have been fired as a result of the initiation of the criminal cases against them, 2 left positions for other jobs, and 2 new State Secretaries have been appointed by the new heads of the agencies, in 5 agencies they will be reappointed because the functions of the agencies have not changed. Article 14 is called to ensure stability of the State Secretaries position, taking into consideration a big number of the new State Secretaries appointed, although, as explained by the Kyrgyz authorities mostly due to the reorganization, this issue needs to be monitored closely to prevent abuse and politicizing of the professional Civil Service.

The Law on Civil Service contains several provisions which aim to strengthen professionalism of civil servants, *e.g.* Article 4 contains paragraph 12 which stipulates that political influence and undue interference in the activities of civil servants should be excluded; Article 10 on ethics contains a similar provision. Article 29 states that the change of the head of the public body cannot be a reason for firing, downgrading, rotation or attestation of civil servants. From 2007 to 2010 25.6 % of civil servants positions were reduced, and if compared to 2008, the reduction rate is even higher and stands at 32.4 %.

Period	Positions filled	Number of political positions	Number of administrative positions
Total for 2008	27456	510	17009
Total for 2009	25396	375	16980
Total for 2010	18571	537	17561

Kyrgyz authorities informed that a further reduction of the number of civil servants by 20% is planned for 2012. Such high fluctuations in the number of civil servants raise concerns with regard to stability of the civil service profession.

### 3.2.2. Recruitment and promotion

#### Previous recommendation 21

***Strengthen recruitment and promotion process to the civil service by enhancing the significance of objectively verifiable and merit-related criteria and limiting to the extent possible opportunities for discretionary decisions. Reconsider the necessity of internal and national reserves, which may provide advantages for insiders as opposed to outside candidates.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 21.

The Law on Civil Service establishes the main provisions for the recruitment, promotion and dismissal from civil service. The Law explicitly states that all citizens have equal right to be recruited in the civil service; the Law does not, however, state that the recruitment should be based on merits of the applicants. According to Article 24 of the Law on Civil Service, recruitment to civil service is carried out through competition. Recruitment can also be carried out on a contract basis. Advisors, assistants and consultants of political public officials and former political public officials can be recruited to civil service without competition. In 2008-2009 a total of 60% of civil servants were appointed without competition, but the situation has changed dramatically, with only 0.6% of civil servants appointed without competition in 2011; this is a commendable trend and it should be sustained.

The State Personnel Service of the Kyrgyz Republic is the body responsible for the development of unified mandatory rules for competitive recruitment. Temporary Regulation on the conduct of competitions was adopted by the Government on 29 November 2011. According to this Regulation, the competition is organised in three stages: (1) internal competition among the persons included in the internal reserve of a public agency, (2) if the vacancy is not filled through the internal competition, competition among the persons included in the national reserve of the civil service, and (3) if the vacancy is not filled through the previous stages, open competition for all citizens of the country. As a matter of fact, the internal and national reserve lists seem not to work in practice, and very often persons from the reserve lists participate in open competitions. For instance, in 2011 – 918 open competitions were organised to fill 2787 positions with 4291 participants applying through these competitions and 1487 being appointed; 149 were advised to be included into the national reserve list.

Only announcements about open competitions must be published in the media. The competitions are organised by the attestation and competition commissions, which are chaired by a state secretary of a public agency (senior civil servant) or by another civil servant appointed by the head of the agency. The selection procedure includes 3 main elements: (1) review of applications by the commission and selection of applicants who will be invited for tests; (2) computer based tests carried out by the Testing Centre, including a test of general knowledge, as well as a test of professional knowledge; (3) interview with those candidates who received 50% of total scores or above and, thus, have successfully passed the tests. Database of questions for the tests includes 25,000 questions: 600 – administrative, 200 – on management issues, and the rest cover specific areas; to prevent fraud 10 % of the tests is renewed each month. Interviews are based on a set list of questions and are assessed on a 10-score basis. The questions are the same for all participants and are evaluated by each member of the commission. There are guidelines on how to evaluate the answers of participants. The commission then selects the winner of the competition and

recommends him or her for recruitment. In practice, the number of commission members could be too large and if representatives from civil society participate in the competitions, their evaluation of an interview does not affect the final outcome. In this case, the commissions can recruit desirable persons even when civil society representatives raise objections. The head of the agency may refuse to recruit the recommended candidates only if there were violations in the competition process. Disputes related to the competition for recruitment are reviewed by the State Personnel Service. In 2011, 81 of such complaints were submitted and 18 applicants were reinstated to the positions.

The Law on Civil Service does not contain specific provisions for the promotion, but it contains provisions for the attestation of civil servants (Article 20). The attestation is carried out by the attestation and competition commissions. The attestation process is of two types: (1) conducted at the end of the probation period in order to determine if a new civil servant meets job requirements and if further training is needed; and (2) for all other civil servants, conducted on a regular basis but no more than once every 3 years, in order to determine if they meet job requirements, and for decisions concerning promotion and attribution of ranks. The attestation is carried out on the basis of a short report on the activities carried out by the civil servant and achieved results, and assessment of professional knowledge and potential for taking up higher positions. When attestation is carried out for State Secretaries a “360° method” is used. Temporary Regulation on the conduct of attestation was adopted by the President on 24 October 2005. It is not clear if any measures were taken since the first round of monitoring to enhance the significance of objectively verifiable and merit-related criteria, especially in the recruitment interviews and attestation process. The same methods of recruiting civil servants to the positions – knowledge test and interview - are used for different positions of specialists and managers.

Article 18 of the Law on Civil Service establishes the system of civil service reserves. Temporary regulation on the National Reserve and Temporary Regulation on Internal Reserve were adopted by the Government on 29 November 2011. The national reserve is managed by the State Personnel Service. It can include university graduates, civil servants who were recommended for promotion, civil servants whose posts were suppressed, and persons who were recommended for recruitment to civil service positions, but were not recruited due to external reasons. Candidates to the reserve should be recommended by the universities or by the heads of public agencies, and are selected by a commission based on computer tests and interview. In 2011, as a result of the open competition procedure, 149 applicants were advised to be included on the national reserve list. Those who are included in the reserve have a preferential right to receive further training, as well as advantages during the completion for recruitment. A person can stay in the reserve for no longer than 3 years.

The internal reserves are managed by individual public agencies. They may include public servants who were recommended for promotion during the attestation, and those applicants who demonstrated good results during the competition for recruitment, but were not recommended for recruitment. The individual public agencies develop individual development programmes for the members of the internal reserves; they also have advantages during the competition for recruitment. The system of national and several internal reserves can be a useful tool if managed properly; but appears cumbersome for this small country. It puts additional burden on the management; advantages provided by the reserves, such as training, should be available to all civil servants; while privileges during recruitment competitions undermine the right of all citizens to apply for civil service positions, especially for the senior positions. It appears that no consideration was given to the necessity of internal and national reserves.

Kyrgyzstan remains **partially compliant** with recommendation 21.

### **New recommendation 3.2.2.**

***Clarify the definitions of political and administrative officials, as well as the regulations which are applicable to the political officials. Prevent further politisation of civil service by limiting the number of political posts and ensuring the stability of professional civil service and the continuity of the institution of State Secretaries.***

***Strengthen recruitment process for high-level positions by applying different recruitment procedures and evaluating not only knowledge of applicants but also abilities and competencies.***

***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.***

***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.***

***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.***

### **3.2.3. Remuneration**

The Law on Civil Service (Article 44) established a unified system of remuneration for public officials. The salary of a public official is composed of the fixed amount, as well as bonuses for personal performance and for the rank and length of service. Besides, material assistance can be provided to the public officials for various household and social needs. Article 44 includes a reference to the Resolution of the Ministry of Economy, Industry and Trade of 10 February 2005 on Regulation for the personal bonuses for professionalism for the employees of the central and territorial offices of the Ministry. It is not clear if this regulation applies to other public officials regulated by the Law. It is not clear if there are any other regulations on personal bonuses or material assistance which would establish transparent and merit based criteria for such payments in order to avoid undue political influence on the civil servants. No information was provided about the relative share of the fixed and variable parts of the salaries of the public officials. As a matter of fact, the salaries of civil servants are very low, and, as it was reported during the on-site visit by the Kyrgyz authorities, in practice only some agencies can pay bonuses. This devaluates civil service as prospective career sector and even further undermines abilities of the public institutions to recruit and retain qualified staff. No comparative analysis of civil servants salaries versus those requiring similar qualifications in private sector has ever been made but according to the Kyrgyz authorities the gap is very big.

### **New recommendation 3.2.3.**

***Perform comparative study of the salaries in civil service in different public institutions 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. Based on the findings, review remuneration system to ensure decent salaries for civil servants as well as transparency and equality of remuneration for similar jobs across the civil service.***

### **3.2.4. Legality and impartiality**

The Law on Civil Service establishes main **principles** of the civil service in Article 4, including: the supremacy of the Constitution and laws of Kyrgyzstan, priority of human rights, professionalism, honesty, transparency, impartiality, and prevention of political influence and undue interference into the civil service.

The Law also contains Article 9 on **conflict of interests**, which states that "conflict of interest emerges when decisions of public officials may be influenced by their personal interest by using the advantages of the position in promoting personal interests. The conflict of interests leads to a situation when public officials take decisions which do not necessarily coincide with the interests of the state". This definition does not fully correspond to the international standards, and does not cover potential or apparent conflict of interests. Article 12 of the Law establishes that the State Personnel Service is responsible for the development of rules and procedures for the prevention of conflict of interests, which should be implemented in all public institutions. However, there is no public institution or public officials who are responsible according to this law for the enforcement of the conflict of interest regulations; a mechanism for the head of the institution to control civil servants' public and personal interests is not foreseen either. The Law on Civil Service only requires the civil servants to report to their managers about such conflicts. Creation of the mechanism of public and private interests' declarations, which could be checked by the managers, by the persons responsible for personnel management and by the head of institution could help address this issue. Declarations of managers and heads of institutions could be checked efficiently by the State Personnel Service or other created independent agency; with the results published on the web-site.

The Law, Article 11, establishes **incompatibility rules** for civil servants, in particular prohibition: to be engaged in any other remunerated activities except for teaching, scientific and creative work; to be engaged personally in commercial activity and to use public position to promote any commercial activity in exchange of any advantages to the public official or his/her family. The Law on the Government, Article 18, also contains similar incompatibility rules for the members of the government. It is not clear if there are rules on conflict of interest and incompatibility that apply to elected public officials, such as MPs, and political officials (apart from the provisions provided in the Law on the Government).

#### **Asset declarations of public officials**

##### **Previous recommendation 23**

***Streamline the system for the public disclosure and control of the income and assets declarations of all public officials; study and employ the experience of other countries that have been successful in this area. Explore possibilities to expand the circle of relatives of public officials who are required to submit income and assets declarations.***

In September 2007 the Kyrgyz Republic was considered **non-compliant** with the recommendation 23.

The system of public disclosure and control of the income and assets (asset declarations) is regulated by three laws in the Kyrgyz Republic: the Law on Civil Service (Chapter V, Articles 33-35) in relation to administrative officials (or civil servants); the Law on Declaration and Publication of Information about Income, Liabilities and Property of Persons Occupying Political and other Special Public Positions and of Their Close Relatives, in relation to the political officials; and the Law on the Fight against Corruption (Article 11) which covers candidates for civil service.

The Law on Civil Service establishes an obligation for all civil servants to declare their income and property, as well as the income and property of their close relatives. The declarations are submitted to the public institution that employs the civil servant; this institution further sends the declarations to the State Personnel Service. The managers do not examine declarations of their subordinates. Failure to submit the declaration or provision of false information can be a reason for the dismissal of civil servants. During the on-site visit Kyrgyz authorities shared that 17,850 persons have been reprimanded for violations of asset declarations requirements. Unfortunately, no further information in regard to the break-down of sanctions applied to them was provided by the Kyrgyz

authorities, which makes it difficult to draw any meaningful conclusions as to how much deterrence this clause provides in practice.

The Law on Declaration and Publication of Information about Income, Liabilities and Property of Persons Occupying Political and other Special Public Positions and of Their Close Relatives was adopted in 2004 and amended in 2006. The Law establishes the requirement for political and special public officials to declare their assets, as well as the assets of their close relatives. They should declare information about their property, including real estate, vehicles, financial means, and various types of income. Declarations should be submitted upon the recruitment, then annually during the service and during two years after the completion of the service. There is a standard form for the declarations. The declarations are submitted in paper form to the State Personnel Service. It analyses the declarations and can ask the officials to provide corrections if needed.

Transparency and access to asset declarations is one of the most important elements of the asset disclosure system, as it is necessary to build public trust in the public administration and to ensure public scrutiny of such information. Different laws regulating asset declarations of public officials in Kyrgyzstan establish different requirements and exemptions from publication of information from the declarations. The Law on the Fight against Corruption (Article 11) prohibits disclosure and assigns the status of “official secrets” to the information on assets and income submitted by candidates for civil servants to the tax authorities and data on bank accounts opened by certain public officials and heads of organisations, institutions, companies funded or partly controlled by the State. This does not correspond to the definition of “official secrets” in the 2006 Law on Access to Information (see Section 3.6. on Access to Information of the report). Such information should be open for public scrutiny (with certain exceptions, like data on residence address, tax and personal ID numbers). According to the Law on Civil Service (Chapter V) declarations of persons holding higher administrative posts are subject to publication in the mass media. Also the Civil Service Agency provides public access to information from declarations according to the established procedure (Article 35). The Law on Civil Service contains a list of information exempted from publication due to privacy considerations (including information on income and assets of close relatives) and mentions that the head of the Civil Service Agency is liable under criminal law for disclosure of such confidential information. The third relevant law – Law on Declaration and Publication of Information on Income, Liabilities and Assets of Persons Holding Political and Other Special State Offices, as well as their Close Relatives (Article 7) – includes a different set of requirements: the Civil Service Agency is mandated to publish in an “official bulletin” “summarised data” on income and assets of the persons covered by the Law and their close relatives; certain data, different from the Law on Civil Service, is prohibited from publication.

Described provisions establish a complex system of rules related to disclosure of asset declarations. It should be streamlined and unified under common approach, even if contained in different laws. There should be the same requirements to disclosure of information from declarations, which should include mandatory publication of data from declarations of political officials and persons holding special offices, as well as higher administrative officials, on the web-site of the Civil Service Agency; there should also be unified exemptions from disclosure that are strictly necessary to protect privacy and outweigh the public interest in knowing this information. It is unjustified that data from declarations of political officials and persons holding special offices are published only in the form of a summary. These offices (which under the Law include the President, the Prime Minister, ministers, judges, prosecutors) should be subject to the highest public scrutiny; therefore, they should possess the least stringent protection of privacy. Declarations of all public officials should also be provided on request according to the Law on Access to Information (with possible exemptions for sensitive data as described above).

Current system of asset declarations appears to be ineffective for the purposes of the fight against corruption or prevention of conflict of interest. Officials are not required to declare information about their interests and interests of their relatives, such as memberships and association to commercial and non-profit organisations, board functions. The State Personnel Service can start the verification of the information provided in the declaration only if there is a criminal case opened against the public official; it does not have access to any other databases, such as tax, real estate, land or other registries in order to verify declared data. Issues of disclosure present a serious problem and current arrangement does not allow for meaningful public oversight over and control of the declarations. Currently only four persons in the State Personnel Service are responsible for the management of the declarations.

Some efforts to reform existing system have been reported by the Kyrgyz authorities during the on-site visit. This includes draft changes into the Law on Declaration and Publication of Information about Income, Liabilities and Property of Persons Occupying Political and other Special Public Positions and of Their Close Relatives, allowing prosecution bodies access to the declarations to use them as a tool assisting in corruption investigations; publication of the data on persons who did not submit their declarations in a timely manner or submitted false information in their declarations in the mass media and referral of such cases to the bodies of prosecution, etc. However, these proposals appear to be fragmented, not addressing most serious deficiencies, as well as they are just drafts and it is unclear what will become of them.

Thus, since the first round of monitoring almost no measures were taken to reform the system of asset declarations. Kyrgyzstan remains **non-compliant** with recommendation 23.

#### **Code of ethics and training**

Article 7 of the Law on Civil Service establishes main duties of the public officials, which include the duty to comply with the Code of Ethics. Article 10 further provides a definition of ethics of public officials and establishes main principles of ethical behaviour. In practice though, enforcement of the Ethics Code does not seem to work, this was confirmed by the Kyrgyz authorities during the on-site visit. They also informed that the new version of the Code of Ethics is under development and will be revised in the first part of 2012; once it is adopted training on the new Code of Ethics will be conducted.

#### **New recommendation 3.2.4.**

***Further improve the definition of the conflict of interest established in the Law on Civil Service. Create 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.***

***Reform the asset declarations system by:***

***- Introducing effective sanctions for failure to submit asset 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 asset declarations, introducing the same requirements on disclosure and exemptions from disclosure of information with mandatory publication of data from declarations of political officials 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 asset declarations with law enforcement agencies.***

### **3.2.5. Gifts**

According to Article 11 of the Law on Civil Service, public officials are not allowed to accept any gifts from third parties in exchange for actions or lack of actions in relation to their public duties. This regulation would not cover situations when public officials accept gifts which are not directly related to specific actions/inaction in relation to their public duties, and therefore opens a broad possibility for public officials to accept gifts. This provision does not cover a situation when a gift may be given to the relative or other third party related to the public official.

### **3.2.6. Post-employment restrictions**

Article 11 of the Law on Civil Service provides that the civil servant within 1 year after departure from civil service cannot contact his former office on behalf of third parties, or act on behalf of natural or legal persons on issues which were in his/her competence during the service. The Law on Declaration and Publication of Information about Income, Liabilities and Property of Persons Occupying Political and other Special Public Positions and of Their Close Relatives obliges these categories of officials to declare their assets during 2 years after the departure from the service. However, it is not clear what is the mechanism to enforce these provisions, and if there are any mechanisms available to use these declarations for the management of possible conflict of interest of such former officials, or for any other anti-corruption measures.

### **3.2.7. – 3.2.8. Obligation to report corruption and whistle blower protection**

Under the Law on Civil Service, civil servants are required to report violations of law to their management or to other public bodies (Article 7, paragraph 9). In addition, the Criminal Code establishes criminal responsibility applicable to all persons for hiding information about a crime.

### **Previous recommendation 17**

***Introduce effective law on protection of witnesses, experts, victims, and reporting persons.***

In September 2007 the Kyrgyz Republic was considered **largely compliant** with the recommendation 17.

The report from the first round of monitoring referred to a Law on Witness Protection which was adopted on 16 August 2006 and dealt with the issues of protection of witnesses, experts, victims and persons reporting corruption. However, it was not clear during the first round of monitoring if this law was supported by an implementation mechanism and was implemented in practice.

The Law on the Fight against Corruption, which was last amended in 2009, provides guarantees of state protection to the persons who provide assistance to the fight against corruption (Article 9); it goes so far as to make information about a person who assists the fight against corruption a state secret which can only be provided on a written request from the bodies responsible for the fight against corruption, or from the court. The Kyrgyz authorities during the on-site visit have been quite sceptical as to how this provision is implemented in practice and whether it would cover whistle-blowers. Moreover, the Law on Witness Protection is not being enforced due to lack of funding (See Section 2.9. and New Recommendation 2.9. addressing this issue).

Kyrgyzstan is **partially complaint** with the recommendation 17.



## Previous recommendation 22

***Provide mechanisms of permanent control over the implementation of the Laws on Public Service, on Disclosure and Publication of Income and Property of High Officials and Members of their Families, and on the Fight against Corruption.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with the recommendation 22.

According to the Law on Civil Service, the Agency on the Civil Service Affairs (the State Personnel Service) is responsible for the monitoring of implementation of the civil service legislation. More specifically the Agency is responsible for the following tasks: 1) development of the state policy in the field of civil service and development of draft legal acts on civil service, 2) development of rules for recruitment and rotation of civil servants, 3) selection of state secretaries, 4) development of proposal concerning ethics and disciplinary responsibility of civil servants, 5) development of rules and collection of asset declarations, 6) development of rules for the management of conflict of interest, 7) review of complaints of civil servants against the decisions of their employers, 8) development of training programmes for civil servants, 9) analysis of effectiveness of civil service, 10) development of remuneration regulations for civil servants, and 11) maintenance of the registers of civil servants.

According to the Law on Civil Service, the Agency on the Civil Service Affairs is responsible for the management of the asset declarations system. The Law on Declaration and Publication of Information about Income, Liabilities and Property of Persons Occupying Political and other Special Public Positions and of Their Close Relatives further clarifies the responsibilities of the Civil Service Agency in this field. The Agency: maintains the register of persons who must declare assets, collects and analyses the declarations, requests the persons who submitted declarations to provide corrections if necessary, publishes summary of information from declarations.

It appears that the mechanism for the permanent control of implementation of Law on Civil Service and the Law on Declaration and Publication of Information about Income, Liabilities and Property of Persons Occupying Political and other Special Public Positions and of Their Close Relatives is also provided by the Civil Service Agency. It is difficult to assess the effectiveness of this mechanism.

It was noted in the first round of monitoring report, that there was no public institution responsible for implementation of the Law on the Fight against Corruption; various public authorities were responsible for its implementation within the limits of their competence. The report also noted that the draft new Law on the Fight against Corruption provided for the establishment of a responsible public authority. However, a new draft Law on the Fight against Corruption was reviewed at the meeting of the Defence Council on 30 January 2012; its text was provided to the monitoring team. It contains Articles 5 and 6 which similarly identify responsibility of various public authorities for implementation of various parts of the Law and identify either General Prosecutor's Office or the Defence Council as main bodies for development, coordination and monitoring of anti-corruption policy of the Kyrgyz Republic.

Nevertheless, at present there is no institution responsible for control over the implementation of the Law on the Fight against Corruption. The National Agency for the Prevention of Corruption, which was created in 2005 and, among other tasks, was responsible for the assessment of effectiveness of anti-corruption measures, was abolished by the Government in June 2010; its functions were not transferred to any other agency. For more information about the Agency, see Pillar I.

Kyrgyzstan remains **partially complaint** with this recommendation.

### **New recommendation 3.2.8.**

***Introduce effective protection of whistle-blowers from arbitrary dismissal and harassment***

## **3.3. Transparency and discretion in public administration**

### **Anti-corruption screening of legal acts**

Article 20 of the Law on Normative Legal Acts of Kyrgyzstan sets the general requirement that draft normative legal acts should undergo various types of “scientific expertise” (screening), including an anti-corruption one. It is not clear from this Law, draft legal acts on what topics should be reviewed for corruption-prone provisions. For draft laws this is clarified in the Standards for Conducting Some Types of Specialised Screening of Draft Laws in the Zhogorku Kenesh (parliament) of Kyrgyzstan, approved by the parliament’s resolution of January 2008. The Standards provide that anti-corruption screening is mandatory for draft laws regulating: (1) constitutional rights, freedoms and obligations, legal status of public associations and mass media, issues of state budget, tax system, fight against law violations, new types of state regulation of business activity; (2) powers of public authorities, their officials, including powers to establish legal norms, control powers, registration, jurisdictional, regulatory powers.

The new Law on the Rules of Procedure of the Zhogorku Kenesh, adopted in October 2011, sets a number of requirements to anti-corruption screening of draft laws: all submitted draft laws should include a description of its impact on corruption; Expert Department of the parliament’s secretariat prepares an anti-corruption assessment of draft laws before their initial consideration in the parliament’s commission, of amendments made in the draft law in preparation for the second reading, and of the revised draft law that takes into account objections of the President (if there were such). The Parliament’s Rules of Procedure also allow independent experts and civil society organisations to submit their evaluations of draft laws, including on anti-corruption matters; such evaluations are to be considered by the relevant parliament’s commission at a meeting with participation of the persons who conducted the evaluation; the commission then has to prepare a substantiated reply explaining why proposals contained in the evaluation were endorsed or rejected.

In December 2010 the Government of Kyrgyzstan approved Instruction on the procedure for conducting legal, human rights protection, gender, environmental, anti-corruption screening of draft secondary legislation. It covers all draft normative legal acts, except for draft laws, and includes draft normative acts of the President, Government, Zhogorku Kenesh, National Bank, Central Election Commission. Special section of the Instruction explains what issues should be reviewed during anti-corruption screening of draft acts.

These are commendable provisions, which should be implemented in practice. What is missing, however, is the requirement to publish results of the anti-corruption screening of draft legal acts. It would significantly increase the transparency of the decision-making process, build trust in the public authorities, contribute to awareness-raising about corruption and corruption-prone legal provisions and enable civil society to better scrutinise activity of authorities.

It is also recommended to consider introducing screening of active legal acts, which could be implemented gradually, *e.g.* by areas of regulation, and focus first of all on areas most prone to corruption (tax, customs, business regulations, licensing, public procurement, etc.). It was reported that the Government is developing a draft law on the anti-corruption screening of legal acts. This draft law should take into account the above recommendations.

## Simplification of regulations

During recent years Kyrgyzstan achieved significant progress in de-regulation of business environment. According to the World Bank “Doing Business” 2011 Index Kyrgyzstan was ranked in the Top-10 world leaders on simplifying business regulation over the last five years (together with Georgia and Kazakhstan). Although in the 2012 Index Kyrgyzstan lost three points<sup>12</sup> (continuing fall from the 41<sup>st</sup> rank in the 2010 Index). Ranking 70<sup>th</sup> among 183 countries, Kyrgyzstan still ranks relatively high compared with some other Istanbul Anti-Corruption Action Plan countries.<sup>13</sup> Achievements of Kyrgyzstan in simplification of business regulations are uneven, as can be seen from rankings under different topics of the 2012 Index below. These areas should become a focus of special efforts to further improve business environment.

<i>2012 Doing Business Index Topics</i>	<i>2012</i>	<i>2011</i>	<i>Change</i>
Starting a business	17	13	-4
Dealing with construction permits	62	59	-3
Getting Electricity	181	179	-2
Registering property	17	17	0
Getting credit	8	8	0
Protecting investors	13	12	-1
Paying taxes	162	155	-7
Trading across borders	171	171	0
Enforcing contracts	48	50	+2
Resolving Insolvency	150	144	-6

Competitiveness rating of Kyrgyzstan calculated by the World Economic Forum remains approximately at the same level (taking into account the change in the number of analyzed countries)<sup>14</sup> and it is quite low.<sup>15</sup> By key indicators of the state regulation efficiency Kyrgyzstan occupies the following ranks (place among 142 countries in the 2011-2012 Global Competitiveness Report rating<sup>16</sup>):

	Burden of state regulation	Protection of property rights	Transparency of the state policy-making	Burden of customs procedures	Irregular payments and bribes
Armenia	52	95	35	132	97
Azerbaijan	33	90	68	105	118
Georgia	7	120	36	27	33
Kazakhstan	65	107	53	102	99
<b>Kyrgyzstan</b>	<b>84</b>	<b>139</b>	<b>67</b>	<b>134</b>	<b>140</b>
Tajikistan	25	93	83	99	87
Ukraine	130	137	116	136	134

<sup>12</sup> Source: <http://www.doingbusiness.org/data/exploreeconomies/kyrgyz-republic>.

<sup>13</sup> Rank out of 182 countries: Georgia – 16<sup>th</sup>, Kazakhstan – 47<sup>th</sup>, Armenia – 55<sup>th</sup>, Azerbaijan – 66<sup>th</sup>, Tajikistan – 147<sup>th</sup>, Ukraine – 152<sup>nd</sup>, Uzbekistan – 166<sup>th</sup>. Regional average for Eastern Europe and Central Asia is the rank of 77.

<sup>14</sup> 126<sup>th</sup> place out of 142 countries in the report for 2011-2012, 121<sup>st</sup> place out of 139 countries in 2010-2011 and 123<sup>rd</sup> place out of 133 countries in 2009-2010 report.

<sup>15</sup> In the 2011-2012 report: Azerbaijan ranks 55<sup>th</sup>, Kazakhstan – 72<sup>nd</sup>, Ukraine – 82<sup>nd</sup>, Georgia – 88<sup>th</sup>, Armenia – 92<sup>nd</sup>, Tajikistan – 105<sup>th</sup> (Uzbekistan is not covered by the report).

<sup>16</sup> Source: [http://www3.weforum.org/docs/WEF\\_GCR\\_Report\\_2011-12.pdf](http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf).

According to the Global Competitiveness Report 2012, business representatives of Kyrgyzstan named the following most problematic factors for conducting business in the country: government instability (22.8% of responses), corruption (20.4%), policy instability (20%), and inefficient government bureaucracy (8.4%).

A survey of 1,200 entrepreneurs of Kyrgyzstan conducted in 2011<sup>17</sup> found that top three barriers for entrepreneurship in the country were political instability, corruption and access to financing. One of the mentioned serious problems was lack of professionalism of public officials and red-tape, as well as lack of accountability of officials, poor access to information, weak government institutions. Also 34% of respondents were victims of raider attacks, while other 34% knew someone whose business was raided, which proves weak property protection in Kyrgyzstan. Tax and customs authorities were named the most corrupt government offices, followed by the Ministry of Internal Affairs and prosecutor's office. Administrative barriers constitute a problem for all respondents, first of all in tax collection, customs regulations and access to financing. 78% of respondent businesses were inspected by state authorities during the previous year, with average of 22 inspections per year. Among measures to address the situation most popular were fight against corruption and reform of the tax code. *See also Chapter 3.9. of this report on corruption in the private sector.*

According to the replies of Kyrgyz authorities to the monitoring questionnaire, no analysis of corruption risks in specific sectors and action plans to tackle them were undertaken.

According to the Law on Normative Legal Acts (Article 19) draft regulatory acts should be analysed for their regulatory impact (Regulatory Impact Assessment). RIA is to be conducted by the drafting agency according to the methodology, which was adopted by the Government in 2007. Lack of RIA conclusions should lead to rejection of the draft act. Special working groups were set up at the government agencies to conduct RIA. There is a positive feedback of the business community on the implementation of the RIAs. Although some concerns are raised due to the uneven implementation of the RIA mechanism by various agencies.<sup>18</sup>

### **Administrative procedures**

Administrative procedures in Kyrgyzstan are regulated by the special law of 2004 and some other laws, *e.g.* the Law on the Procedure for Consideration of Citizens' Petitions. Filing of an administrative complaint does not preclude a simultaneous or subsequent appeal in the court. The 2004 Law on Administrative Procedures is generally in line with international standards and best practice. However, it is unclear whether it is properly implemented in practice. According to some reports the Law is rarely used by citizens or the state bodies. It is therefore recommended to conduct an assessment of the Law's implementation and take relevant measures to ensure its application (training for civil servants, awareness-raising campaign among population, etc.).

Court proceedings in administrative cases (appeals against acts or decisions of the public authorities) are regulated in Kyrgyzstan by the Civil Procedure Code (Chapter 26). There are no specialised administrative courts: administrative cases are considered by local courts; appeal and cassation complaints – by oblast courts' panels on administrative and commercial cases; supervisory review in administrative cases is conducted by the Supreme Court's Chamber on Administrative and Commercial Cases. As a result of consideration of an administrative case court may repeal a part or the whole legal act (normative or individual) that was challenged.

Judicial proceedings in administrative cases require special adjudication procedures, which should be adapted to the special nature of disputes between a private person and a public authority,

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<sup>17</sup> Conducted by company "Promotank HQA" for CIPE. Source: <http://www.cipeeurasia.org>.

<sup>18</sup> Bulletin of the National Alliance of Business Associations, No. 41, September 2011, available at <http://www.bdk.kg>.

guarantee protection of the private person's rights vis-à-vis the public administration, shift burden of proof and establish presumption of fault of the public authority and include other elements which are not natural for civil proceedings. This is best achieved by establishing special adjudication rules. It is therefore recommended to regulate adjudication procedures in such cases in a separate set of procedural rules and to consider establishing specialized courts (court panels) for consideration of complaints against the public administration.

### **New recommendation 3.3.**

***Implement in practice provisions on anti-corruption screening of draft legal acts and ensure publication of conclusions of such screening. Introduce anti-corruption review of effective legal acts, first of all in the most corruption-prone areas of regulation.***

***Conduct awareness-raising campaign on the rights of persons in administrative procedures according to the respective law.***

***Adopt special procedural rules for adjudication of administrative cases, i.e. complaints of private parties against public authorities, and consider setting up specialised administrative courts.***

### **3.4. Financial control and audit**

Public financial control and audit are important instruments in identifying corrupt practices; their efficient functioning and co-ordinated approach contribute to reducing level of corruption in the state.

#### **Financial management and control**

Very limited information was provided by the Kyrgyz authorities on this issue which makes it difficult to draw reliable conclusions. According to the Public Expenditure and Financial Accountability (PEFA) assessment of Kyrgyzstan carried out by the World Bank in 2009, the implementation of the annual budget law and thereby the credibility of the budget has not improved compared to the 2005 PEFA assessment; the distribution of additional funds was undertaken in a non-transparent way outside the annual budgeting process, and late distribution of additional budgets resulted in hasty procurement decisions. It also states that there is still no systematic process by which the government can comprehensively monitor the level of expenditure arrears and improvements can only be expected once the planned Treasury Modernization will be implemented, which includes a commitment accounting system.<sup>19</sup>

Treasury of the Ministry of Finances of the Kyrgyz Republic is the main institution responsible for the management of the state budgetary and tax activities of the governmental institutions and bodies of the local self-governance. It plays a leading role in control of state expenditures and incomes, in management of the monetary resources of the state, control over state debt and state assets.

Its responsibilities include drawing up and management of the Plans of accounts for:

- Keeping of records of all republican and local budgetary institutions;
- Drawing up of the monthly and annual balance reports of the Treasury, which reflect monetary transactions of the state institutions and bodies of local self-governance;
- Book-keeping of the financial assets of the government.

<sup>19</sup> Kyrgyz Republic Public Expenditure and Financial Accountability Assessment 2009, Public Financial Management Performance Report, December 2009. Source: <http://www.minfin.kg>.

Monthly and quarterly reconciliations between budgetary organisations' records and those of the central treasury lead, each quarter, to reports being made to the President, Zhogorku Kenesh and the Prime Minister. Annually a cash-based budget execution report, in respect of the previous financial year, is produced by the government for submission to the Zhogorku Kenesh by the middle of May. The Chamber of Accounts is responsible for auditing the budget execution report, prepared by the Ministry of Finance. The Chamber of Accounts produces a report of errors and violations in September-October with no audit opinion issued within it. According to PEFA 2009 report findings, the absence of a set of financial statements prepared in accordance with internationally recognised accounting standards represents a limitation on what the Chamber of Accounts can do.

The same report highlights the lack of transparency not only in the way allocations are being distributed but also in the accessibility of the budget information to the Parliament, Civil Society and others who wish to monitor the budget processes. This undermines the legitimacy of the budgetary process and raises distrust for the work of the Treasury. During the on-site visit representatives of the Civil Society have expressed strong dissatisfaction with the way key fiscal information is presented, they found it difficult to find or were not aware of its availability at all.

### **External audit**

Chamber of Accounts is the main body in charge of external audit on the use of state and municipal funds, extra-budgetary funds and state and municipal property, as provided in Article 107 of the 2010 Constitution of the Kyrgyz Republic. According to the Law on Chamber of Accounts, it is an independent body accountable to the President and to the Parliament (Article 3); it has 9 auditors in the Council (its Supreme body) and a staff of 201 persons. The auditors are appointed by the Parliament in a very balanced manner: with 3 persons nominated by the coalition majority, 3 – by the opposition and 3 – by the President. The Chamber of Accounts began its work in the new composition from 2011. Its reputation is held in high esteem, which was confirmed during the on-site visit both by various state institutions and civil society representatives referring to it as exemplary on issues of independence and integrity.

The Chamber of Accounts operates on the basis of strategic, annual and current audit plans and can conduct unplanned audits. The work plan of Chamber of Accounts is approved by its Council (Article 11); it can include requests from the President, the Parliament and its relevant commission, as well as from the Government. Moreover, unplanned audits are also conducted upon requests of the President, the Parliament and its relevant commission, the Government, as well as law enforcement bodies in regard to initiated criminal cases; such audits represent 40% of audit work of the Chamber of Accounts which is a very high percentage. The Chamber of Accounts also analyzes the work and reports of the internal audit services, it can rely on the results of reports prepared by the internal audit services, as well as plan its own audit and risk assessment based on such information.

The Chamber of Accounts conducts financial audits, compliance audits and audits of effectiveness. The Law also allows looking into matters related to integrity and legality in deals concluded by institutions, officials and organisations. The Chamber of Accounts is a member of INTOSAI, ASIAsAI, and ECOSAI, it uses international audit standards and has recently developed guidelines on conduct of financial audits and audits of effectiveness based on these standards.

The Law (Article 55) provides for an audit of the Chamber of Accounts itself by an independent auditor who is selected through a tender and appointed by the parliament. This is a commendable provision in line with the best international practice.

Although the Chamber of Accounts does not conduct specific audits to uncover misuse of public funds or corruption, it can indicate that corruption patterns have been discovered in the course of its

regular work. Moreover, during the on-site visit the Kyrgyz authorities shared that the co-operation between the Chamber of Accounts and law enforcement bodies has dramatically increased. Thus, if in 2009 the Chamber of Accounts referred to the law enforcement authorities materials in 168 cases, in 2010 the number has gone up to 333 cases, and in 2011 it made referrals in 245 cases, out of which 84 have already been reviewed resulting in 7 convictions, 12 are at the stage of adjudication, the rest are either part of the on-going investigations or have been rejected. To further facilitate co-operation, a special Department on legal issues and co-operation with law enforcement agencies has been created; among other functions it follows up on the results of the referrals made by the Chamber of Accounts and ensures speedy exchange of information. In addition, a special instruction "On rules for preparation of the audit materials and their referral to the law enforcement and prosecution bodies" was developed.

The Chamber of Accounts presents an annual report on its activities to the Parliament, besides the results of the audits. The report contains recommendations to the Government, state institutions, including law enforcement agencies, as well as information on how previous recommendations have been implemented. Among others, recommendations that deal in one way or another with prevention of corruption are taking a prominent role. For instance, in the report for 2011 the Chamber of Accounts made a big number of proposals to the Apparatus of the Government on legislative changes aimed at prevention of corruption.

To increase transparency and reduce corruption in its own work, the Chamber of Accounts is working on introduction of the automated system for the work of its inspectors, through which each inspector has to file all discovered violations instantly on-line and their supervisors can provide immediate comments on the findings. With the support from GIZ project, special software was purchased and training of the personnel on its use is underway. Such progress is commendable and should be encouraged and sustained.

## **Internal audit**

### **Previous recommendation 26**

***Introduce internal auditing in the system of executive authorities in order to reveal corruption, as well as to stipulate free and permanent collaboration of bodies that provide financial control and audit.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with this recommendation.

Significant changes took place since the first round of monitoring of the Kyrgyz Republic in this area. Most notably the Law on Internal Audit was adopted on 29 January 2009. The Program on establishment and development of the system of internal audit of the state institutions and entities of the Kyrgyz Republic for 2008-2013 was adopted on 27 June 2008. The same Governmental Resolution approved the Standards on internal audit of the state institutions and entities of the Kyrgyz Republic.

The Law on Internal Audit establishes a framework for organization and conduct of the internal audit in state institutions. The Law requires establishment of the internal audit services in ministries, state committees, administrative institutions and other bodies of executive power. In view of implementation of this Law current internal audit system has been established. Accordingly, internal audit is carried out through a decentralized system with internal audit services (units) established in 14 state institutions. These services report directly to the head of the institution in which they have been set up and structurally are not connected to any other divisions of the institution. Internal audit policy is developed and co-ordinated by the Ministry of Finance of the Kyrgyz Republic, which has its own internal audit service.

Main functions of the internal audit services (units) include:

- development of the long-term and annual work plans on the conduct of audits;
- drawing up of the quarterly reports on implementation of the work plans and reporting in this regard to the head of the institution;
- evaluation of the effectiveness of the system of internal control and its compliance with the goals of the institution;
- evaluation of the accuracy and sufficiency of the financial, accounting, management and other types of information;
- assurance of compliance of the activities of the structural units of the institution with the legislation, functions vested in them and their work plans;
- evaluation of the efficiency of the control over effective use of resources and safeguards from losses;
- development of recommendations on improvement of the institution's work;
- co-ordination of activities of the services of internal audit of the reporting organizations, consultations and methodological support to such services;
- development of the plans for professional trainings of internal auditors.

According to the Kyrgyz authorities, practice shows that review and analysis of the system of internal control of an institution subjected to internal audit often allows determining fraud and corruption.

Audits are to be conducted in accordance with the detailed procedures described in the Guidelines on Internal Audit for State Institutions and Entities, adopted in April 2008. These guidelines contain recommended methodology and regular training is conducted for auditors using these guidelines. Nevertheless, it was noted that the Guidelines require improvement, as they are overly theoretical; general level of qualification of the staff is still inadequate; the handbook/manuals or other types of training materials need to be developed for trainings to become successful. Another problem in the opinion of the Kyrgyz authorities, shared during the on-site visit, rests with the low level of awareness and knowledge of these procedures by the heads of the institutions where such services have been established. This impedes efficient implementation of the newly created system.

Taking into consideration major reform undertaken, the Kyrgyz Republic is **largely compliant** with this recommendation.

#### **New recommendation 3.4.**

***Update Guidelines on Internal Audit to make them more practical and user-friendly.***

***Develop training materials on internal audit standards and responsibilities of the internal auditors, as well as special materials targeted at the management of the institutions where such services have been establish, and conduct regular trainings with the use of the developed training materials.***

### **3.5. Public procurement**

The Law on Public Procurement of the Kyrgyz Republic regulates procurement carried out in all state institutions, bodies of the local self-governance, state and municipal enterprises, services and funds, as well as joint stock companies with a state or municipal share; concessions are also covered by the Law. The Law, however, does not regulate procurement related to the state security, national defence, state secrets, food security and natural disasters, which are regulated under special procedures defined by the Government of the Kyrgyz Republic. Such arrangement is not uncommon and with due oversight provides for a sound public procurement framework.



The Law has been amended four times since the first round of monitoring – in 2008, 2009 and twice in 2011. The changes represent a number of positive developments, to name a few - the ban to lower the prices of the tenders or to break up tenders into parts for avoiding regular procedures; establishment of the clear criteria for excluding a bidding organization from the bidding process, complimented by the establishment of a Database of the Non-reliable Bidders; introduction of the anti-bribery clause, violation of which is among the criteria for inclusion into the Database; prohibition to conduct a procurement tender if it was not foreseen in the procurement plan of the state institution carrying out the procurement. Moreover, standardized tender documents for all types of procurement have been introduced since the first round of monitoring.<sup>20</sup>

Another major change since the first round of monitoring took place in the institutional arrangement of the public procurement system of the Kyrgyz Republic, which became decentralized. State Agency for Public Procurement and Material Reserves under the Government has been abolished in 2010 with most of its functions transferred to the Division on Public Procurement Methodology within the Ministry of Finance of the Kyrgyz Republic (Procurement Division) and some functions handed over to the Internal Audit Division of this Ministry.

The Procurement Division is responsible for: development of the public procurement policies, laws, regulations and guidelines; establishment and update of the unified registers of procuring agencies, contracts, and the Database of the Non-reliable Bidders; organization of trainings; as well as oversight and co-ordination of the procurement activities and review of complaints.

In addition, procurement units have been set up in all state institutions which carry out public procurement and a tender commission of no less than 3 persons is to be formed for each individual tender. Regulations on procurement units and tender commissions have been adopted in 2011, along with the list of data which have to be submitted to the Procurement Division, including annual procurement plans developed by each procurement unit within the 10 days period from the adoption of the state budget.

A number of institutional safeguards were put in place to ensure that the tender procedures are conducted in an unbiased and fair manner, including the following:

- Ban on participation in the tendering commissions for the heads of the agencies where procurement is carried out;
- Requirement for at least one person on the tendering commission to be a certified procurement specialist;
- Ban on participation in tenders of members of the tendering commission or representatives of the procuring agency;
- Requirement to conduct an audit confirming that the requirements of the tender have been met before a winner is determined.

While the above legislative and institutional framework is commendable, primary issues faced by the Kyrgyz Republic remain with implementation of its well-written legislation and in the quality of the public procurement practice. This is due to a number of factors, the main of which is the inadequacy of institutional capacities for the proper conduct of procurement. For example, to carry out all of the

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<sup>20</sup> Government Order of the Kyrgyz Republic from 25 February 2011 No. 74 “On adoption of the standard tender documentation for procurement of goods by the non-limited, limited and two-tier methods; Standard tender documentation on procurement of goods through requests for bids, template protocols for the procuring procedures, template protocols for the bidding procedures, template protocols for opening of the tendering bids”.

above-mentioned functions, the Procurement Division has a staff of 5 persons and no representation in the regions. EBRD when reviewing procurement in countries of its operation, similarly identifies that insufficient enforcement in the Central Asia, the Caucasus and Mongolia sub-region are due to the lack of capacity of the regulatory authorities.<sup>21</sup> In addition, the Kyrgyz authorities shared during the on-site visit that many of the Division's responsibilities are difficult to fulfil, not only due to the limited human resources, but also because the rules and requirements are widely ignored by the procurement units of various state institutions. For instance, procurement plans, in most cases, are not submitted to the Division on time if at all; the recommendations from the Procurement Division developed as a result of the review of complaints are often ignored, with no feed-back on their implementation provided. Such non-compliance seriously undermines the system in place and in the opinion of the Kyrgyz authorities is due not only to unwillingness of the parties to follow the rules, but often is the result of the lack of knowledge of such rules. Trainings provided by the Division are conducted in limited numbers, again due to the lack of human capacities. Enforceability is the core principle of the efficient public procurement system and requires serious attention from the Kyrgyz government.

And finally, it is important that adequate remedies system is put in place. Currently the remedies system provides for administrative (first complaint goes to the procuring institution, then to the Procurement Division) and judicial means of review of public procurement disputes in the Kyrgyz Republic. The system appears to be straightforward and simple and Kyrgyzstan is rated the highest in the region on this criteria in the EBRD 2011 study, although current timelines for decisions on complaints can be shortened. On the other hand, the issue of costs associated with the public procurement review raises serious concerns due to the fact that the fee is calculated at the 2% value of the claim, making it potentially a prohibitive factor.<sup>22</sup> Another area of potential concern is the number of complaints reviewed by the Procurement Division (10 in 2011) which does not seem to be sufficiently high if compared to the total of procurement tenders held; although this may be explained by the fact that it is already a second tier of the remedies system.

A figure of KGS 14 billion spent in 2011 through approximately 4,000 public procurement tenders was cited by the Kyrgyz authorities, which amounts to over 14% of the total expenditures from the state budget.<sup>23</sup> Taking into account difficulties faced by the Kyrgyz economy in the time of crisis, such large amount should be closely monitored for potential abuse and corruption. However, according to the same EBRD assessment, the weaknesses are concentrated specifically in areas which are designed to strengthen resistance to corruption. The report identifies problems of nonexistence or non-enforcement of ethics codes, shortcomings in the regulations of the internal procurement processes, and, similarly to findings of this report, among the main identified problems is the lack of trainings and resources.<sup>24</sup>

It is essential for the tendering to ensure fair competition, equal treatment of bidders, with full integrity and transparency of the process. One of the ways to address these issues could be introduction of the e-procurement, which is a goal set by the Kyrgyz authorities and was reflected in the Recommendation 24.

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<sup>21</sup> For further information, see Public Procurement Assessment: review of laws and practice in the EBRD region, EBRD 2011, p.58.

<sup>22</sup> For further information, see Public Procurement Assessment: review of laws and practice in the EBRD region, EBRD 2011, pp. 137 – 138.

<sup>23</sup> According to the changes in the Law on the Republican Budget for 2011 and forecast for 2012-2013, the total amount of budget expenditures was adjusted to KGS 97,6 billion for 2011. Ministry of Finance official website, 20.10.2011.

<sup>24</sup> For further information, see Public Procurement Assessment: review of laws and practice in the EBRD region, EBRD 2011, p.98.

#### Previous recommendation 24

***Explore possibilities for an electronic system of public procurement purchase realization in order to enhance the transparency of state purchases. Information on state purchases, except for narrowly defined information subject to state secrets, should be available for the public.***

In September 2007 the Kyrgyz Republic was considered **fully compliant** with this recommendation.

The first round monitoring report described various possibilities pursued by the Kyrgyz authorities to introduce such system, which was sufficient to implement the recommendation. In addition, Article 37-1 of the Law on Public Procurement was amended on 8 July 2011 to introduce Electronic procurement and electronic return auction. The Law provides that electronic public procurement and electronic auction are two methods where the state establishes an initial price and bidders make offers by decreasing the price, the winner is the bidder who first proposed the lowest price. Nevertheless, besides setting up of the web-site of all public procurement announcements<sup>25</sup>, which still needs to be made operational and filled with appropriate content, there has been no further progress on actual introduction of this system due to lack of resources.

Best practice shows that transparency and access to information in public procurement should also be ensured through broad publication of the future procurement plans for each fiscal year; publication of the contract notices or wide circulation of the invitation to participate in tenders; grounds for exclusion should be clearly and narrowly written and must not discriminate; and finally results of the tenders should be made public.

Legislation of Kyrgyzstan offers a big number of important instruments for compliance with such benchmarks and a lot has been done to further improve it since the first round of monitoring. Namely, all procuring institutions are obliged to draw up their procurement plans after the state budget is adopted and announcements for public procurements are published in the mass media and in the *Public Procurement Bulletin*. Further on, Article 17 of the Law on Public Procurement requires that information on procurement for amount equal or higher than a maximum threshold is published in *Public Procurement Bulletin*. Legislation was also amended to require publication of the tenders which do not reach a maximum threshold; this used to be an optional requirement during the first round of monitoring. Article 30 of the Law on Public Procurement requires informing of the tender results and publishing them in *Public Procurement Bulletin*. Moreover, amended Article 58 of the Law on Procurement stipulates that the procuring organisation should publish information on the conducted procurement (indicating name of the supplier, date of tender, information on the procured product, price, etc.) within 5 working days after conclusion of the procurement contract. This is a commendable amendment and is very progressive for Istanbul Anti-Corruption Action Plan region. It should, however, be further extended to require publication on the web-site and allow provision on request of the following documents: tender documentation, procurement procedures protocols, main information on single source procurement.

There are still a number of drawbacks in the current legislation which call for further improvement. For instance, Article 20 of the Law on Access to Information Held by State Authorities and Local Self-Government Bodies is in accordance with best practice in stipulating that the information on rules for tenders conduct, procedure for participation in them, composition of tender commissions, minutes of tender commissions, procedure for appeal on tenders should be published “annually and in accessible form” by the state authorities and bodies of local self-government. This provision, however, appears to be ineffective because it does not specify that such information should be

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<sup>25</sup> “Electronic Procurement” at [www.goszakupki.gov.kg](http://www.goszakupki.gov.kg) – the link was not functional at the time of the drafting of the report.

published in regard to each public procurement tender conducted and the Law uses different terms from those in the Law on Public Procurement. Such deficiencies need to be eliminated.

And finally Article 16 of the Law on Public Procurement (“Confidentiality Principle”) seems overly restrictive. It forbids disclosure of any information constituting a commercial secret, and the company itself, with certain exceptions stipulated in the law, makes such judgement. It also prohibits the procuring organisation to disclose information the disclosure of which “is not in line with state interests, damages important commercial interests of the parties or principles of fair competition”, as well as information on review, assessment and comparison of tender proposals, quotes or their prices. This provision is too general and vague and may lead to withholding of the publicly important information on public procurement.

Kyrgyzstan remains **fully compliant** with this Recommendation.

#### **Previous recommendation 25**

***Limit the possibilities of state purchases from the single source.***

In September 2007 the Kyrgyz Republic was considered **non-compliant** with Recommendation 25.

As regards single source procurement, Article 38 of the Law on Public Procurement (“Procurement from a single source and application of this method”) was amended in July 2011 by writing out in more details instances when a single source procurement method can be used. This provides for a narrower and a more defined scope and, thus, addresses at least on the books Recommendation 25. Practical application of this method and real progress in this regard is difficult to assess as the statistical information provided by the Kyrgyz authorities shows that single source method was applied in around 4.3% of the procurement procedures, comparative information from before the first round of monitoring is not available.

Taking into account progress made on implementation of this Recommendation, the new rating is **partially compliant**.

#### **New recommendation 3.5.**

***Ensure that adequate resources are allocated to the Main Procurement Unit to carry out its functions and that established rules and requirements are diligently enforced and supplemented by effective system of internal control in purchasing organisations.***

***Provide continuous training on integrity in public procurement, especially to the officials of purchasing organisations.***

***Ensure that confidentiality principle is well balanced with the need of public access to information on procurement, in particular ensure that tender documentation, procurement procedure protocol, main information on single-source procurement can be obtained on request by any person.***

***Reconsider policy on the costs of the remedy procedures to allow a wider access to complaint system.***

### **3.6. Access to information**

#### **Previous recommendation 27**

***Government held information, which is not subject to disclosure, should be delineated as concretely as possible in the law (rather than in any internal documents, instructions and the like),***

***the discretion of public officials as to what constitutes such information should be limited to the maximum extent feasible.***

In September 2007 the Kyrgyz Republic was considered **partially compliant** with Recommendation 27.

**Access to public information** is an important prerequisite for uncovering and preventing corruption by securing openness of public agencies' activities and allowing NGOs and mass media to exercise public oversight. The legislation of Kyrgyzstan establishes guarantees of such access in the 2010 Constitution, Article 33 of which foresees a specific right of access to information about activities of state agencies, local self-government bodies and their officials, legal entities with government or local self-government bodies' participation therein, as well as of organizations funded from the state and local budgets. The same article guarantees access to information held by state agencies, local self-government bodies and their officials. These are progressive provisions which should be further elaborated in laws and duly implemented in practice.

In Kyrgyzstan, there are two special laws that regulate issues of access to information: the 1997 Law "On Guarantees and Freedom of Access to Information" (in the wording of December 2006) and the Law "On Access to Information Within the Competence of State Bodies and Local Self-government Bodies of the Kyrgyz Republic" of December 2006. Numerous provisions of these laws overlap, sometimes contradict each other, and may result in different enforcement in practice. It is recommended to streamline regulation of access to information in a single law and abrogate the 1997 Law.

The Law "On Access to Information Within the Competence of State Bodies and Local Self-government Bodies of the Kyrgyz Republic" of December 2006 (the Law on Access) contains many good provisions, which comply with international best practice. At the same time, the Law on Access contains a number of serious deficiencies which can hamper an effective realization of the access to information right and which fall short of the international standards. They include the following:

- 1) The Law regulates relations pertaining to access to information "within the competence of state bodies and local self-government bodies". Because the word "competence" is used, the object of regulation of the Law may be understood to be information whose creation or receipt is provided for by the relevant body's mandate, while access should be guaranteed to any kind of information which is in that body's "possession" (control), regardless of the manner in, and the grounds under which, the body in question has obtained it;
- 2) The definition of "state bodies" needs to be further clarified, as it refers to bodies authorized to exercise functions of the legislative, executive or judicial power. It appears that the Law thus fails to encompass "other state bodies", as defined by the Constitution of Kyrgyzstan (the prosecutor's office, the Central Bank, the Central Electoral and Referendum Commission, the Accounting Chamber, and the Ombudsman). The Constitution does not classify these bodies under any of the mentioned three branches of power;
- 3) The remit of the Law fails to cover commercial organisations which can also possess publicly important information (e.g. natural monopolists, companies with dominant market share, organizations in control of information about the environmental situation, etc.);
- 4) The Law does not extend to information "access to which is restricted in compliance with legislation of the Kyrgyz Republic". This significantly undermines the efficacy of the whole Law, which is supposed to establish basic provisions with respect to access and in particular set up grounds for exceptions with respect to access provisions, and it should prevail over other laws that can regulate certain kinds of classified information, such as state secrets. The reference to the "legislation" is also problematic, because 'legislation', according to the Law of Kyrgyzstan on Normative Legal Acts, includes secondary legislation. It allows exceptions

from the general regime by adopting secondary legal acts and, consequently, making provisions of the Act hollow. Also it conflicts with another provision of the Law, that is, “Restrictions in access and dissemination of information shall be established solely by law” (Article 3);

- 5) The Law does not include conditions with which, according to international standards, any restriction of access to information should comply, namely: 1) such a restriction may take place only for the protection of legitimate interests, when 2) divulging of such information may inflict substantial harm to such legitimate interest, and if 3) such harm outweighs the public interest in access to information (the public’s right to know such information). Attribution of a classified status to any information, as well as refusal to grant access to information which was earlier recognized as classified, should comply with the aforementioned three criteria;
- 6) It is recommended to consider reducing terms for provision of information; the maximum term of four weeks appears to be excessive, as the Law regulates provision of the information which already exists and requires a mere technical processing (copying, printing, etc.). Also the Law should provide grounds for deferment in provision of information (*e.g.*, the need to search through a large array of information);
- 7) The Law fails to provide for publication of information specified in Article 20 (“The duties of state bodies and local self-government bodies with respect to dissemination of information”) on the official web-pages of the relevant bodies. Likewise, the Law does not establish that respective information should be subject to regular posting and updates (rather than just being published “annually”);
- 8) The Law does not provide for a state agency with a mandate to control compliance with the Law on Access, consider complaints and remedy violations.

The Law should also foresee release from responsibility in the event of disclosure of classified information if the public’s right to know such information prevails over protection of respective interests (*e.g.* certain information of personal nature about individuals in public office). This is an important provision to encourage exposure of corruption offences and protect mass media engaged in investigative reporting and unearthing facts of corruption.

The Law “On Protection of State Secrets” should be brought in line with the 2006 Law on Access, in particular with respect to the definition of “non-state secrets”, by deleting from it such categories as “information for official use”, “not for print”, and by harmonizing the notion of “official secret” used in both Laws. After correcting deficiencies of the Law on Access it should become a principal law regulating issues pertaining to the status of information and restriction of access to it.

Individual provisions of the Law “On Guarantees and Freedom of Access to Information” also raise concern. Article 7 of this Law provides for the possibility for any person to familiarize him/herself with mass media’s sources of information “in cases provided for by law”. This provision conflicts with international standards and should be replaced with the right of the mass media or a journalist not to disclose their sources of information and, in line with international standards<sup>26</sup>, establish cases of their mandatory disclosure through judicial proceedings. According to Article 11 of this Law, mass media are responsible, together with the source of information, for authenticity of information; mass media are bound to examine authenticity of information due for publication. These are too broad requirements: the obligation to verify information should be limited by practical possibilities and requirements to journalists’ professional ethics; mass media should not be held responsible for dissemination of information which was earlier published in other mass media, official sources or press announcements of organisations.

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<sup>26</sup> See, for example, Recommendation No. R (2000) 7 of the Council of Europe’s Committee of Ministers on the right of journalists not to disclose their sources of information, [http://www.coe.int/t/dghl/standardsetting/media/doc/CM/Rec%282000%29007&ExpMem\\_en.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/CM/Rec%282000%29007&ExpMem_en.asp).

Responsibility for breaching the laws on access to information is established by Article 63 (“Ungrounded Denial of Familiarization with Documents”) and Article 409-1 (“Violation of Duties with respect to Provision of Information”) of the Code of Administrative Liability (CoAL), and Article 138 of the Criminal Code (“Refusal of Provision of Information to a Citizen”). Given their contents, the provision of the Criminal Code, as well as Article 63 of the CoAL, aim at holding one liable for violating the 1997 Law “On Guarantees and Freedom of Access to Information”, while Article 409-1 of the CoAL does so with regard to violation of the 2006 Law on Access.

The three articles in question duplicate each other, which may result in one’s avoiding responsibility for violation of the access to information right. This does not conform to the principle of legal certainty either, which is particularly unacceptable in matters of legal liability. Overall it would be sufficient to establish administrative responsibility for violating the right to information, should there be established dissuasive and proportional sanctions. It is also recommended to alter the wording of Article 409-1 of CoAL in order to more adequately formulate this offence, *e.g.* by providing for responsibility for a illegal refusal to provide information, failure to comply with terms for responding to an information inquiry, an unjustified attribution of classified status to information, etc., with a reference to the special Law on Access to Information.

According to statistics provided by Kyrgyzstan, no one was held liable under Article 409-1 of the CoAL in 2009-2011, while just one case was opened under Article 138 of the Criminal Code in 2009, which was later discontinued.

In 2010-2011, Transparency International-Kyrgyzstan conducted a sociological survey<sup>27</sup> on access to information and openness of public agencies. The survey showed a very low awareness of citizens of their right to receive information (some 60% of respondents were unaware that state bodies are bound to provide information). There are very few inquiry sent to state bodies: only 8-10% of surveyed private individuals and some 5% of corporate respondents (these figures include both requests for information and petitions). Meanwhile, there have been quite few cases of refusals to provide information (5.7%), which, however, can be ascribed to a very small number of information requests as such. Only two respondents tried to appeal against an agency’s refusal to provide information (one of them filed a complaint with the prosecutor’s office, while the other one – to a district court). These data suggest that public agencies together with civil society organizations should carry out a broad awareness-raising campaign to inform the public of their right to information and possibility to file information requests.

**Defamation.** In the past, provisions on defamation were used in Kyrgyzstan to crack down on mass media.<sup>28</sup> That is why the decriminalization of defamation by the Law adopted in June 2011 should be welcomed. Kyrgyzstan became the first state in the Central Asia to decriminalize defamation.<sup>29</sup> Also already in June 2007, the offence of insulting a public official was deleted from the Criminal Code (Article 342).

Meanwhile, the Criminal Code still retains liability for insult (Article 128), while the Code on Administrative Liability – for insult of a public official of the customs authority (Article 504-32). Notably, Article 128 has been actively applied: in 2009, under this Article as many as 143 criminal cases were opened and 19 individuals were found guilty; in 2010 - 104 cases and 29 convicted, and in 9 months of 2011 – 48 cases and 5 convicted, accordingly.

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<sup>27</sup> “Assessing access to information of state bodies of different levels by the population of Kyrgyzstan”, TI-Kyrgyzstan, Bishkek, 2010-2011.

<sup>28</sup> *E.g.* the closure of *Nazar* and *Achyk Sayasat* newspapers in March 2010 following the lawsuit on protection of the Kyrgyzstan President’s honor and dignity filed by the Prosecutor General’s Office.

<sup>29</sup> <http://www.osce.org/fom/81026>.

These provisions should also be revoked, which will be in line with international standards of freedom of expression and Article 33 of the Constitution of the Kyrgyz Republic (“*No one may be prosecuted for disseminating information tarnishing or humiliating one’s honor and dignity*”).

According to Article 4 of the Law on Guarantees of Activities of the President of the Kyrgyz Republic, in case of dissemination of information tarnishing honor and dignity of the President, the Prosecutor General is obligated, where other measures of prosecutor’s reacting have failed to deliver necessary results, to apply to the court on the President’s behalf to protect his/her honor and dignity. A Prosecutor General’s acting as the President’s personal attorney does not fit into democratic standards. Honor and dignity of the President should be protected in a civil court following a general legal procedure and without any privileges. The existence of such a provision, even if it is not vigorously enforced, as well as provisions on criminal responsibility for defamation/insult, have a chilling effect and affect freedom of expression and investigative journalism.

It is also required to revise provisions on civil liability for defamation, in particular to establish exemption from responsibility for expressing value judgment and for reporting factual information; extend the requirement of proving the guilt to cases of compensation of immaterial damage by dissemination of information tarnishing honor, dignity and business reputation.

Kyrgyzstan scored poorly in the **2010 International Index of Budget Transparency** – with just 15 points out of 100<sup>30</sup>, the lowest ranking among the countries in the region. This is attributed to the scarce information about the national budget and government’s financial performance, as well as to poor control over execution of the budget.

Kyrgyzstan’s active participation in the **Extractive Industries Transparency Initiatives (EITI)** is welcome. Kyrgyzstan was among the first to commit to implement the Initiative’s standards and in March 2011 Kyrgyzstan was granted the EITI Compliant status. The Kyrgyz government should continue preparing and publishing respective reports according to the Initiative’s methodology.

Kyrgyzstan remains **partially compliant** with Recommendation 27.

#### **Previous recommendation 28**

***Ensure that the information provided in non-public complaints cannot be used for unjustified prosecutions for slander. Introduce additional measures to increase the protection of the citizens making complaints and proposals to the public bodies on issues of corruption.***

In September 2007 the Kyrgyz Republic was considered **largely compliant** with the recommendation 28.

Kyrgyzstan decriminalised libel in July 2011; although liability for insult remains in the Criminal Code (Article 128). At the same time the 2007 Law on Consideration of Citizens’ Petitions (Article 11) established a prohibition to persecute a person in relation to his petition to the state authority (which includes complaints, criticism of authorities). This Law was mentioned in the first round report, but it was found not sufficient to consider this recommendation fully complied with. It follows from the report that the reason was the existence of criminal liability for libel (Article 127 CC). Even though libel was decriminalized in 2011, liability for insult remains (and can theoretically be applied to applicants who submit complaints to the state authorities containing insulting statements). Therefore, Kyrgyzstan remains **largely compliant** with Recommendation 28.

*Issue of whistle-blower protection (second sentence of Recommendation 28) is addressed under Recommendation 17.*

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<sup>30</sup> <http://internationalbudget.org>.



Article 9 of Law on the Fight against Corruption states that a person who provided knowingly false information about facts of corruption should bear responsibility according to the procedure established by the legislation. It is not clear what legal act establishes such procedure. Criminal Code (Article 329) punishes “knowingly false denunciation of a crime”, covering any crime, including corruption-related criminal offences. Prosecution should be normally limited to false crime reports submitted to investigative or prosecution agencies; otherwise, whistle-blowing reports to management of the public authority can also be considered as a false denunciation and this provision may be abused by instituting prosecution under Article 329 CC as a retribution. Criminal liability for false denunciation does not exhaust Article 9 of the Law on the Fight against Corruption because corruption is broader than relevant criminal offences. Therefore, it should be further clarified and if no other law, except for Criminal Code, provides for such liability relevant provision should be deleted from Article 9 of the Law.

#### **New recommendation 3.6.**

***Reform legislation on access to information according to international standards and best practice by consolidating relevant provisions in one law and by aligning other legislative acts (and first of all the law on state secrets) with the access to information law. Carry out a campaign to raise awareness of citizens on the implementation of the access to information right.***

***Repeal criminal and administrative liability for insult, and review the civil law provisions concerning liability for defamation, in particular by introducing an exemption from liability for expression of value judgments. Abolish duty of the Prosecutor General to protect honour and dignity of the President.***

### **3.7. Political corruption**

There are 156 registered political parties in Kyrgyz Republic; 29 of them participated in the last Parliamentary elections in 2011, and five of them have won MPs seats.

#### **Previous recommendation 30**

***Make sure that financial reporting of parties and candidates reflect actual situation adequately. Make sure that agencies in charge of party/candidate/campaign financing control operate with maximum public accountability (including vis-à-vis the civil society) to ensure that no opportunities exist to discriminate against some parties/candidates, make sure that funds used for campaigns are acquired and spent in a transparent manner. Define the notion of “administrative resource”, which is used by incumbent candidates in their campaigns, and prohibit the use of this “administrative resource”. Annual financial reports of political parties shall be not only submitted but also published. Financial reports must be introduced and published also for election funds.***

In September 2007 the Kyrgyz Republic was considered **non-compliant** with the recommendation 30.

#### **Financing of political parties and electoral campaigns**

Rules regarding financing of political parties are set out in the Law on Political Parties adopted in 1999 under Chapter 4 (Financing and material support to the activities of the political parties), as well as in the Constitutional Law on Elections of the President of the Kyrgyz Republic and Deputies to the Zhogorku Kenesh (parliament) of the Kyrgyz Republic from 2011 under Chapter 8 (Financing of elections). The Law on Political Parties has not been amended since 1999; however, the Kyrgyz

authorities shared during the on-site visit that the new Law on Political Parties is currently being drafted.

According to the Law on Political Parties, political parties in the Kyrgyz Republic for their routine activities can be financed through private means/donations from natural persons and private entities. It is forbidden to receive donations from foreign countries, foreign political parties, and legal and natural persons from foreign countries. The sources of funding of political parties can be membership fees, donations, credits, income from property, dissemination of printed materials and other activities not forbidden by law. There is no limit for donations.

According to the Law on Political Parties, public funding can be provided to political parties to finance electoral campaigns. During the on-site visit, the Kyrgyz authorities confirmed that the mechanism for public financing of political parties which participate in elections is still in place and all organizers of electoral campaigns receive equal amount of funds.

For the purposes of the electoral campaign the organizers of electoral campaigns open a special bank account limited to KGS 100.000.000 (approx 2.000.000 USD) for the campaign activities. It was stated that donations for the electoral campaign are limited to amounts of KGS 500.000 (approx 10.000 USD) for private entities and KGS 100.000 (approx 2.000 USD) for natural persons. While requirements on mandatory opening of such special accounts are contained in Article 41 of the Law on Elections of the President of the Kyrgyz Republic and Deputies to the Zhogorku Kenesh of the Kyrgyz Republic, the actual limitation amounts are not indicated in this Law.

The Central Commission for Election and Referendum is in charge of control over the financing of electoral campaigns (Article 42 of the Law on Elections of the President of the Kyrgyz Republic and Deputies to the Zhogorku Kenesh (parliament) of Kyrgyz Republic). It establishes a special Control and Revision Group, composed of no more than 7 persons; the regulation and procedures of its work are defined by the Central Commission for Election and Referendum. This Control and Revision Group checks the financial reports of the political parties, puts together documents on financial violations which took place during elections, and proposes sanctions which should be applied for such violations.

Organizers of electoral campaigns (political parties) during the campaign period submit interim and final reports on sources and expenditures for electoral campaigns to the Central Commission for Elections and Referendum. In addition, Article 41 of the Law on Elections of the President of the Kyrgyz Republic and Deputies to the Zhogorku Kenesh (parliament) of Kyrgyz Republic requires that banking or other financial institutions where such special accounts have been opened submit weekly, and on request from the Central Commission for Elections and Referendum within 24 hours, reports on incoming and outgoing funds within these special accounts. Such information is published on the web-site of the Commission. Similarly, according to the authorities, electoral campaign reports submitted by political parties containing detailed information, including donors, are made available to the public. Nevertheless, representatives from the NGOs stated that they were not involved in monitoring of the financing of electoral campaigns.

In regard to disclosing sources of funding and financial reporting by political parties, Article 20 of the Law on Political Parties provides only that further government regulation should be adopted containing rules on financial accountability. There is no information on whether such regulations were adopted or what has been done to adopt it. Political parties submit quarterly and annual reports on routine (not related to elections) financial activities. Political parties are not subject to regular audit by the Chamber of Accounts of the Kyrgyz Republic; instead they have internal revision commissions and can be audited by private audit firms. Control over the use of routine funding received by political parties should be ensured by territorial bodies of the tax administration, according to Article 22 of the Law on Political Parties.

While sanctions for non-publication of the expenditure reports by the heads of the Territorial Commissions are foreseen in the Code of Administrative Liability, no information on liability and sanctions for violations of the political party financing requirements was provided by the Kyrgyz authorities and it is difficult to make any conclusions on this matter.

The first round monitoring report states that there is no provision prohibiting the use of “administrative resource” for electoral campaigns. Meanwhile, Article 12 of the Law on Political Parties “Activities incompatible with public functions” contains a provision that use of material-technical, financial, informative resources, service transport and other public property or service information for other purpose than public service is forbidden. Prosecution bodies are in charge of oversight over enforcing of this law.

### **Conflict of interest of political officials**

According to the Law on the Status of Members of Parliament, a Member of Parliament cannot have another employment in the public service or private sector, have business activities, be in a management body or supervisory council of a business organisation or foreign non-governmental organisation represented in Kyrgyz Republic. Members of Parliament can only engage in scientific, teaching or other creative activities. These provisions were amended on 8 July 2011 and are slightly, but not significantly, different from the first round of monitoring.

Article 8 “Ethics of the Member of Parliament” was introduced in the Law on Status of Members of Parliament since the first round of monitoring. It stipulates that a Member of Parliament in his/her activities has to respect commonly acknowledged norms of moral, keep his/her dignity and respect the dignity and honour of others and avoid activities that would compromise the Parliament and the country in general. Article 8, paragraph 2, forbids to use one’s of position for private goals. Finally, this article requires from Members of Parliament to follow the Code of Deputies’ Ethics. However, the Code of Deputies’ Ethics has not been provided by the Kyrgyz authorities on the request of the monitoring team and it is not possible to assess its content.

Article 18 of the Law on the Government provides that private interests of members of the Government should not prevail over their functions as members of the Government, and they should also respect ethical and moral norms. There is no Code of Ethics for Members of the Government.

Taking into account progress made in implementation of this Recommendation, the new rating is ***partially compliant***.

### **New recommendation 3.7.**

***Set a limit for the amount of a membership fee and a single donation from natural and legal persons for the routine (not related to elections) activities of the political parties. Ensure publication of detailed reports submitted by parties on their income and expenditures, as well as monitoring of their finances by an independent state authority in line with international standards.***

***Establish liability for violations of the regulations on political party/elections financing.***

***Ensure wider involvement of the civil society in monitoring of the financing of the electoral campaigns to make sure that funds used for campaigns are acquired and spent in a transparent manner.***

### **3.8. Integrity in judiciary**

#### **No previous recommendation.**

#### **Judiciary**

Judiciary is essential for countering corruption and maintaining trust in public authorities on the whole. This explains significant attention paid to the issues of judicial independence and ensuring integrity of judges and their accountability for commission of offences, first of all corruption-related ones. According to the World Bank survey of court users, in 2008 less than 30% of respondents agreed that courts in Kyrgyzstan were accessible, prompt and not corrupt.<sup>31</sup>

After adopting a new Constitution in June 2010, Kyrgyzstan has significantly revised its legislation on the court system, status of judges, procedures for their selection, disciplining, etc. In June 2011, based on the new constitutional provisions, the following laws were adopted or revised: Constitutional Laws “On the Status of Judges of the Kyrgyz Republic” and “On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic”, Laws “On the Supreme Court of the Kyrgyz Republic and Local Courts”, “On the Council for Selection of Judges of the Kyrgyz Republic”, “On Judicial Self-government Bodies”. In October 2011 Kyrgyzstan adopted the Law “On Approval of the Structure of Local Courts and Number of Local Court Judges of the Kyrgyz Republic”.

Many provisions of these laws can be considered exemplary as concerns legislative guarantees for the judicial independence. Main positive aspects of the new system of organization of the judiciary in the Kyrgyz Republic are highlighted below, as they might prove instrumental for formulation of respective standards:

- 1) The Government incorporates in the draft state budget proposals by the Council of Judges without any changes and in case of objections the Government attaches its opinion to such proposals. The Chairman of the Council of Judges takes part personally in the debate on the state budget taking place in the *Zhogorku Kenesh*;
- 2) Establishment, reorganization and liquidation of local courts, changes in the number of judges of local courts are determined only by law;
- 3) Selection of judges is carried out by the Council for Selection of Judges, which is formed from judges and representatives of the civil society. The Council of Judges, the parliamentary majority and the parliamentary opposition each elect one-third of the Council for Selection of Judges (see below, however, remarks regarding composition of the Council for Selection of Judges);
- 4) Matters of early dismissal of a judge from office, bringing him/her to disciplinary responsibility, lifting of judicial immunity, formation of the budget of courts, and many others are decided by the Council of Judges, which is an elected body of the judicial self-government. The Council is composed of 15 members who are elected by the congress of all judges from among members of the judicial community (judges and retired judges);
- 5) All vacancies within the judiciary, including those of judges of the Supreme Court and of the Constitutional Chamber of the Supreme Court, shall be filled by competitive selection;

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<sup>31</sup> Kyrgyz Republic Judicial System Diagnostic: Measuring Progress and Identifying Needs, World Bank, 06.08.2011. Source: <http://www-wds.worldbank.org>.

- 6) Information about vacant judicial positions, lists of candidates for the position of judge and the selection outcomes are published, including on the official web-page of the Council for Selection of Judges. The Council holds its meetings in an open manner and they are subject to mandatory audio- and video recording;
- 7) The President of Kyrgyzstan appoints judges of local courts and submits to the Parliament recommendations on candidates for the Supreme Court and the Constitutional Chamber of the Supreme Court; the President has the right to return the earlier approved candidacy to the Council for Selection of Judges along with his reasoned opinion. If the Council for Selection of Judges once again submits the same candidate, the President is obligated to approve it (submit it to the Parliament) within 10 days;
- 8) The chairperson of the court and his/her deputies are elected by the gathering of judges of the respective court;
- 9) The decision to lift judge's immunity from administrative or criminal responsibility is taken by the Council of Judges, a judicial self-government body;
- 10) The law provides for declaration of judge's income and assets (see the respective section of the Report – more specifically, remarks on disclosure of the respective information).

Meanwhile, there are a number of deficiencies which, in the opinion of the monitoring team, can have an adverse effect on the judicial independence or promote corruption<sup>32</sup>:

- 1) Appointment of judges for the initial five-year term after which they have to undergo an interview with the Council for Selection of Judges (see also comments on the procedure of the interview). This may result in exerting political influence on such judges, particularly taking into account critical remarks on the composition of the Council for Selection of Judges.
- 2) Only one third of the current composition of the Council for Selection of Judges are judges elected by their peers, while the international standards require that it should be at least half of judges. This deficiency is partly compensated by the fact that a large number of matters related to judicial career fall under competence of the Council of Judges which is formed exclusively from representatives of the judiciary. Also it remains unclear why the full composition of the Council for Selection of Judges, including those members who were elected by the Council of Judges, is subject to the Parliament's approval. It is also recommended to consider electing the Council for Selection of Judges members by the judges' congress as the supreme self-government body, rather than by the 15 member-strong Council of Judges.

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<sup>32</sup> For the purpose of the present evaluation respective international standards we used, in particular, those contained in the following documents: Kyiv Recommendations on Judicial Independence in Eastern Europea, South Caucasus and Central Asia, OSCE, 2010, <http://www.osce.org/ru/odihr/73487>; Opinions of the Consultative Council of European Judges, Council of Europe, [http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis\\_en.asp](http://www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp); Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities, November 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1707137>; opinions of the Venice Commission on draft laws and draft Constitution of Kyrgyzstan regarding judicial reform issues, [http://www.venice.coe.int/site/dynamics/N\\_Country\\_ef.asp?C=45&L=E](http://www.venice.coe.int/site/dynamics/N_Country_ef.asp?C=45&L=E).

- 3) Judges are still elected and dismissed by a political body, namely the Parliament. Meanwhile, appointment of judges by the President does not pose a problem, as the President's discretion is limited by recommendations of the Council for Selection of Judges;
- 4) The Law on the Supreme Court and Local Courts provides that court chairpersons form judicial panels and assign cases on their own, should the respective automated system go out of order. During the visit to the country, it was noted that the automated system of case assignment was not yet running, which means that court chairpersons continue to set up judicial panels and assign cases to judges. Open access to information on the automated case assignment should be secured, meaning that anyone could obtain it on request.
- 5) The powers assigned to the Chairman of the Supreme Court appear overly broad, particularly with regard to appointment of heads of the body responsible for maintenance of courts and the Training Center for Judiciary. It is recommended to reassign these institutions under the mandate of the Council of Judges as an independent judicial self-government body.
- 6) The President assigns qualification ranks upon recommendation of the Council of Judges; the grounds for assigning a rank include, among others, "quality of administration of justice, impeccable behavior", which are subjective criteria, not defined by law. While awarding qualification ranks, it is recommended to apply objective criteria only (*e.g.* years of service and position) and to transfer this function to the Council of Judges.
- 7) The competitive selection consists of just an interview, with no selection criteria established, and the provision that the successful candidate is the one who meets the best these criteria; while conducting an interview the Council for Selection of Judges "has the right" to request the candidate's declaration of income and "other information as a proof of the candidate's integrity" – this can result in a selective approach to assessment of candidates.
- 8) The ban on appeals against decisions of the Council for Selection of Judges with respect to competitive selection and decisions of the Council of Judges on bringing judges to disciplinary responsibility contravenes the human right to a fair trial.
- 9) In addition to the Judicial Code of Honour, judges should comply with the rules of civil servant ethics set by law (Article 5-1 of the Constitutional Law "On the Status of Judges"); violation of Article 5-1 serves as a ground for bringing a judge to disciplinary responsibility. This requirement is an interference with the judicial independence, as civil servants ethics standards are established by the executive power and not all of them may apply to judges (*e.g.* the obligation to retain loyalty to the administrative authority).
- 10) Overly broad grounds for bringing judges to disciplinary responsibility, including dismissal from office, for breaching the 'impeccability' (*e.g.*, violating such duties as "remaining true to the judge's oath", "avoiding anything which could tarnish the judge's authority and dignity", etc.).
- 11) Members of the Disciplinary Commission, as well as member of the Council of Judges – rapporteur on the disciplinary case of a judge, take part in the decision making by the Council of Judges as regards bringing a judge to disciplinary liability. This contravenes the fair trial principles ("*No one should be a judge in his own case*").

- 12) Remuneration conditions for judges, including its size, should be set forth directly in law, rather than in secondary legislation as is currently determined in the Constitutional Law on the Status of Judges (by the President of Kyrgyzstan on recommendation of the Council of Judges).

It should also be noted that the new legislation on the judiciary and status of judges of Kyrgyzstan consists of five main laws, some provisions of which overlap and duplicate each other. It is recommended to develop and adopt a single law to regulate these issues in a consistent manner.

After the April 2010 events, Kyrgyzstan witnessed a wave of dismissals of judges in violation of the relevant procedures. At the time, more than 60 judges were dismissed from office (out of a total of 440), with some of them subsequently reinstated in office in late 2011. The Prosecutor General's Office played a leading role in compiling the list of persons for dismissal. This is unacceptable and will have an extremely adverse impact on the real judicial independence in the future. Such a practice sets a bad precedent and violates the principle of judicial irremovability and independence. The practice of early ungrounded dismissal of judges from office without strict observance of legal procedures should be avoided.

According to statistics provided by Kyrgyzstan, in 2009-2011 the Council of Judges imposed on judges the following disciplinary sanctions: 28 judges were dismissed from office; 31 - reprimanded, while another 28 were given a warning. Also during the on-site visit to the country, a representative of the judiciary noted that in 2011 the Council of Judges received 8 submissions on lifting judicial immunity, of which only one was rejected. This shows that the Council of Judges is capable to independently consider matters of judicial liability and bring perpetrators to account.

There is no possibility to access court decisions in the electronic form in Kyrgyzstan. It is planned to implement an electronic case-management system using donor funding. In this respect it is recommended to ensure that all court decisions are posted on the Internet. This will promote transparency of courts, foster uniform case-law, and encourage exposure of judgments influenced by corruption.

The procedural law of Kyrgyzstan provides for the possibility of reconsidering judgments which have taken effect through the procedure of supervisory review. Such a review is exercised by the Supreme Court and it may be initiated both by parties to the trial and a prosecutor, even if the latter has not earlier taken part in the trial, "to protect state or public interests". The procedure of supervisory review of court decisions contradicts the *res judicata* principle (principle of observing final binding court decisions), undermines legal certainty, thus conflicting with the rule of law<sup>33</sup>, and creates opportunities for corruption. Yet even more unacceptable is the proposal to introduce a "proactive supervisory review", which can be initiated by the Presidium of the Supreme Court at its own discretion. This would result in the creation of a court of fifth instance. It is recommended to abrogate the possibility for supervisory review of judgments as such.

The monitoring group shares the concern raised by the civil society representatives and national experts regarding significant delay in the launching of a new constitutional jurisdiction body in Kyrgyzstan. The Constitutional Court of Kyrgyzstan was disbanded in April 2010 and according to the Law of June 2011 a new institution - Constitutional Chamber of the Supreme Court – had to be set up. However, at the time of consideration of this report the Constitutional Chamber has not yet been formed, although the process for selecting judges of this body had been started in the summer of 2011. Lack of a functioning constitutional jurisdiction body is a serious problem, as it excludes the

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<sup>33</sup> See, for instance, case-law of the European Court of Human Rights (*Brumarescu v. Romania*, application No. 28342/95, judgment of 28.10.1999; *Ryabykh v. Russia*, application No. 52854/99, judgment of 24.07.2003, and others).

possibility of challenging legal acts due to their unconstitutionality, in particular as regards legal acts which were adopted under corrupt influence or which contain provisions that foster corruption and contradict the Constitution. It is therefore strongly recommended to form and ensure functioning of the constitutional appeal body in Kyrgyzstan as soon as possible.

Kyrgyzstan has retained military courts, where judges are military servicemen and, accordingly, report to the military commandment and are dependent from the Ministry of Defence hierarchy when it comes to promotion. This contradicts the principle of judicial independence and can also hamper anti-corruption efforts in the army and military commandment. Hence, the need to consider liquidation of military courts and reassignment of respective cases to other courts.

According to the Training Center's information, in 2008-2009, there were several seminars on issues of the judicial ethics. No information on training on enforcement of the anti-corruption legislation was made available.

**Prosecutor's office.** Public prosecution bodies constitute an important element of the justice system and should enjoy guarantees of independence and non-interference in their operation similar to judges. Unlike the judicial system, no reform of the Kyrgyz prosecution authorities has been conducted so far, nor there are any plans to carry out such a reform. In contrast with the previous versions the Constitution of 2010 reduced the prosecution authorities' powers by limiting the general oversight function to supervision over legality by bodies of state power.

The Constitution and legislation of Kyrgyzstan lack sufficient provisions on guarantees of independence of prosecutorial bodies. According to the Constitution, the Prosecutor General is appointed by the President of Kyrgyzstan upon consent of the Zhogorku Kenesh; President of Kyrgyzstan dismisses the Prosecutor General from office "in cases provided for by law" upon consent of 1/3 of members of the Parliament or upon decision of 2/3 of members of the Parliament. However, neither the Law on the Prokuratura, nor any other law contains the above mentioned grounds for dismissal of the Prosecutor General from office. Equally problematic is the situation with the term of office, which for all prosecutors is 5 years (except for the 7 years for the Prosecutor General), after expiration of which a prosecutor can be dismissed from office. This seriously undermines individual prosecutors' independence and makes them totally dependent on their superiors.

Overall, it is recommended to establish such guarantees of irremovability from office, conditions of recruitment and service, material compensation, etc. for prosecutors that would to a maximum extent be similar to the ones set for judges. That should include establishment of a collegial body in charge of recruitment of prosecutors, their promotion, dismissal from office, training, and disciplinary responsibility.

### **New recommendation 3.8.**

***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:***

- 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; establish uniform criteria for selection of judges on the basis of personal qualifications;***
- provide clear grounds for, and modify the procedure of, bringing judges to disciplinary responsibility in order to comply with the fair trial guarantees and prevent arbitrary dismissal of judges from office while ensuring effective accountability of judges;***
- establish the amount of judicial remuneration in law.***



***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.***

***Consider abrogating the procedure for revision of court decisions through supervisory review.***

***Ensure that the constitutional jurisdiction body is formed and functions.***

***Reform the public prosecution bodies to ensure their independence and accountability; in particular, define an exhaustive list of clear grounds for dismissal of the Prosecutor General and other prosecutors.***

### **3.9. Integrity in the private sector**

***No previous recommendation.***

Article 12 of the UNCAC requires Kyrgyz Republic to take measures to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide sanctions for failure to comply with such measures.

In addition, the OECD Recommendation for further combating bribery of foreign public officials in international business transactions of 29 November 2009 also calls on governments to support anti-corruption awareness raising in the private sector and proper accounting requirements, external audits, internal controls, as well as ethics and compliance measures helping to prevent and detect bribery.

The main constraint on healthy business competition in the Kyrgyz Republic as reported by the Freedom House 2011 and the Bertelsmann Foundation 2010 is corruption. According to the World Bank & IFC Enterprise Surveys from 2009, almost 59% respondents identified corruption in Kyrgyzstan as a major constraint on doing business. According to the EBRD & World Bank BEEPS Kyrgyzstan 2008, corruption related to taxes and tax collection is reported by companies to be among their most severe problems for conducting business. Many SMEs prefer to operate in the informal sector in order to avoid paying taxes and bribes to tax officials, who are often unclear in their application of the rules.<sup>34</sup> As mentioned before, business representatives of the Kyrgyz Republic identify corruption and red-tape as the most problematic factors for conduct of business, and companies continue to consider the occurrence of irregular payments and bribes in the country as fairly common.<sup>35</sup>

The same report reveals that the Kyrgyz Republic performs poorly in relation to the companies' ethical behaviour when interacting with public officials, politicians and other companies. According to the report, public funds are fairly commonly diverted to companies, individuals, or groups due to corruption. Furthermore, according to the US Department of State, well-connected local companies are able to exploit their contacts to achieve their business aims. Nevertheless, it warns of the liability for corruption acts and stresses the need for companies to develop, implement and strengthen integrity systems and to exercise due diligence when planning to do or already doing business in Kyrgyzstan.<sup>36</sup>

Functioning of the judicial system is not held in high esteem by the international investors, resulting in, for instance, Business Anti-Corruption Portal recommending that companies include provision for

<sup>34</sup> The World Bank Group BEEPS At-a-glance 2008 - Kyrgyz Republic, January 2010.

<sup>35</sup> The World Economic Forum Global Competitiveness Report 2011 – 2012.

<sup>36</sup> For more information see 2011 Investment Climate Statement - Kyrgyz Republic at <http://www.state.gov>.

international arbitration within their contracts, due to potential legal complications and judicial deficiencies.<sup>37</sup>

Very limited information on this issue was provided by the Kyrgyz authorities, stating that companies are now more often looking into the issues of ethics, establishing their own internal security/compliance services and developing their internal controls. In the responses to the questionnaire it was stated that ethics and compliance measures are supported by the state but there was no further information provided on how exactly it is done. No information was provided in the answers to the questionnaire, as well as during the on-site visit, in regard to any specific efforts undertaken by the government of the Kyrgyz Republic to raise anti-corruption awareness or engage in a dialogue with representatives of the private sector.

### **Accounting and auditing**

Kyrgyz Republic is generally compliant with international standards on accounting: the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents are all prohibited by law. The Code of Administrative Liability foresees administrative sanctions in form of a fine.

The Law on Accounting stipulates that the only methodological basis for reporting on accounting are the International Standards of the Financial Reporting, they apply to all entities (apart from individual businessmen) including to those privately owned, as well as affiliates and representation offices of the foreign entities. State Commission on Standards of Financial Reporting and Audit is the main regulatory institution in this area, although licensing and certification of accountants is outside of the scope of its duties and is not performed by the state.

According to the Law on Audit Activities, banking institutions, insurance companies, publicly traded companies, investments funds, non-public pension funds are subject to the external audit, the standards for which are developed by the state. When an auditor or auditing company uncovers illegal acts, including corruption, s/he has to report to the State Commission on Standards of Financial Reporting and Audit, as well as to the audited entity, within 5 days from the date of the signing of the audit report.

Law on Joint Stock Companies provides that in order to control financial and business activities of an enterprise, the general meeting elects from its stake-holders a revision commission. Reports by revision commission should be made available to external audit, public bodies and the public in general.

### **New recommendation 3.9.**

***Establish a dialogue with business to raise awareness about risks of corruption and solutions for private sector, to solicit inputs for the review of the legal acts relevant for private sector with a view to reducing possibilities for corruption.***

***Facilitate, in close co-operation with business unions and civil society organizations, promotion and enforcement of internal corporate compliance programmes with due account of the best international practice and standards, in particular, Annex 2 to the OECD Council Recommendation of 26 November 2009.***

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<sup>37</sup> See <http://www.business-anti-corruption.com>

## Summary Table

	<i>New recommendations</i>	<i>Previous recommendation</i>	<i>Updated rating for previous recommendations</i>			
			Fully	Largely	Partially	Not compliant
1.1-1.2. Expressed political will and a-c policy documents	✓	1. Strategy		+		
<b>Pillar I. Anti-Corruption Policy</b>						
1.3. Corruption surveys	✓	4. Corruption survey methodology			+	
1.4. Public participation	✓	29. Public participation			+	
1.5. Awareness raising and education	✓	5. Information campaigns and trainings			+	
1.6. Policy/co-ordination institutions	✓	2. Policy and monitoring body			+	
1.7. international conventions		6. Ratify the UNCAC	+			
<b>Pillar II. Criminalisation of corruption</b>						
2.1-2.2 Offences and elements of offences	✓	10. Harmonise various concepts of corruption			+	
		9. Corruption offences				+
		11. Corporate liability				+
		31. Money laundering		+		
2.3. Definition of public official						
2.4. Sanctions						
2.5. Confiscation	✓	12. Definition of proceeds of crime			+	
		13. Proceeds of crime and instrumentalities of crime				+
		14. Burden of proof			+	
		15. Procedure to identify, trace and seize				+
2.6. Immunity, statute of limitations	✓	19. Immunity			+	
2.7. International cooperation, MLA		18. MLA			+	
2.8. Application, interpretation and procedure	✓	16. Access to bank information			+	

2.9.Specialised law-enforcement bodies	✓	3.A/C law enforcement bodies			+	
		8.Trainings			+	
		20. SITs			+	
2.10. Statistics	✓	7. Statistics			+	
<b>Pillar III. Prevention of corruption</b>						
3.1. A-c prevention body		See 1.6.				
3.2. Integrity of public service	4 new recommendations	21. Recruitment and promotion			+	
		23. Asset declarations				+
		17. Whistle blower protection			+	
		22. Public service integrity laws enforcement			+	
3.3. Administrative discretion	✓					
3.4. Financial control and audit	✓	26. Internal audit		+		
3.5. Public procurement	✓	24. E-procurement	+			
		25. Single source purchases			+	
3.6. Access to information	✓	27. Information not subject to disclosure			+	
		28. Protection from unjustified prosecutions		+		
3.7. Political corruption	✓	30. Party financing			+	
3.8. Judiciary	✓					
3.9. Private sector	✓					

## **Annex 1: Extracts from Legal Acts**

To consult the below mentioned texts, see the Russian version of the report.

***Constitution of the Kyrgyz Republic (extracts)***

***Criminal Code of the Kyrgyz Republic (extracts)***

***Criminal Procedure Code of the Kyrgyz Republic (extracts)***

***Law of the Kyrgyz Republic “On the Fight against Corruption”***

***Law of the Kyrgyz Republic “On Civil Service” (extracts)***