



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ANTI-CORRUPTION NETWORK FOR EASTERN EUROPE AND CENTRAL ASIA

# Anti-Corruption Reforms in Kazakhstan

## Round 3

### Monitoring of the Istanbul Anti-Corruption Action Plan

The report was adopted at the Istanbul Anti-Corruption Action Plan plenary meeting on **10 October 2014** at the OECD Headquarters in Paris.

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

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

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## Executive Summary

This report offers an analysis of the progress achieved by the Republic of Kazakhstan in carrying out anti-corruption reforms and in implementing the recommendations adopted during the Second round of monitoring under the Istanbul Anti-Corruption Action Plan in September 2011. The report also contains new recommendations in two areas: anti-corruption policy and criminal liability for corruption.

### Anti-Corruption Policy

Fighting corruption remains an important public policy priority in Kazakhstan, as reflected in the statements of its highest officials. The principal anti-corruption policy document – the Sectoral Programme for the Fight Against Corruption – has not been significantly amended since the previous monitoring round. Public authorities carried out a regular monitoring of the Programme’s implementation, but it was insufficient to assess Programme’s impact on the corruption level. The monitoring report welcomes development of a new anti-corruption strategy, which, however, should be based on a thorough analysis of the corruption situation and its trends. Public authorities, civil society and business sector representatives should be involved in the process of the strategy development. The new strategy should provide for a more effective mechanism of its monitoring.

Kazakhstan conducts regular research into situation with corruption, but it does not have a comprehensive nature and its results are not widely disseminated and used for anti-corruption policy making. While noting a number of steps of the Kazakhstan authorities towards a closer co-operation with the civil society, such co-operation cannot be recognised so far to be substantial and effective. The report gives a positive assessment of the active work of Kazakhstan authorities to foster intolerance of corruption among population and cover its anti-corruption activities in the media. However, there is no practice of measuring the effect on corruption of the public campaigns, which makes it impossible to evaluate their effectiveness. Public campaigns results are also not being used when planning further campaigns. The institutional mechanism for anti-corruption policy development and implementation has not been stated in the legal acts with sufficient clarity since the adoption of the second monitoring round recommendations. There were also no changes in terms of establishing independence guarantees of the anti-corruption agency, hence the risk of improper influence on its activity that still remains.

### Criminalization of Corruption

Since the previous monitoring round Kazakhstan has conducted a substantial reform of its criminal law by adopting new Criminal, Criminal Procedure and Administrative Offences Codes and also by aligning with them the Law on the Fight against Corruption. However, the IAP recommendations with regard to corruption crimes and their elements have not been taken into account. Kazakhstan considered the possibility of introducing criminal liability for illicit enrichment (and as a result decided against it). Liability of legal persons for corruption criminal offences has not been established (the government refused from its earlier draft law on criminal liability of legal persons). Liability for corruption offences covers law enforcement officials as was recommended, but still fails to cover jurors. The term “foreign public officials” was not defined in the law.

Concerning sanctions for corruption crimes and confiscation Kazakhstan received new recommendations, namely to analyse application of sanctions for corruption offences provided in the new Criminal Code of 2014 and verify that they are dissuasive and proportionate, as well as to ensure mandatory confiscation for all corruption offences. Kazakhstan should also consider introducing progressive provisions of the 2014 Criminal Code on confiscation earlier than the current deadline of 2018.

Kazakhstan was also recommended to introduce specialisation of prosecutors regarding investigation supervision and representation in courts in corruption cases and to ensure free Internet access to regularly updated detailed statistics on criminal and other corruption offences.

### Prevention of Corruption

In the area of **civil service integrity** the report notes positive changes in the legal regulation of the civil service, including split of administrative positions into two categories – corps A and B. It is important to note that the civil service reform was conducted not only in the law, but also in practice within one year after enactment. The number of political positions was significantly reduced (although the list still includes positions which are not in fact political). The legislation does not provide that the competitive selection to civil service positions is carried out based on merits. Since the second monitoring round clear legal limits on the amount and regularity of payment of the

additional remuneration (bonuses), which is not included in the main fixed salary, have not been set, while discretionary powers concerning decision-making on such bonuses have not been limited. The system for declaring income and assets of civil servants have not been reformed (while the planned introduction of the universal declaring will not solve the issues indicated in the previous monitoring report – first of all, verifying and publishing information from declarations of higher public officials and other officials subject to high risk of corruption). Kazakhstan has revised provisions of the Ethics Code of Civil Servant, as was recommended, and introduced an office of ethics adviser, which is a positive step. A regular training on ethics and corruption prevention has been conducted. However, detailed guides for civil servants on the application of the provisions on gifts and conflict of interests have not been developed.

The requirement of mandatory **anti-corruption screening** has not been extended to legal acts of the President; the legislation does provide though for publication of the anti-corruption screening conclusions together with draft laws and draft government regulations. The **law on administrative procedures** has not been aligned with international standards. There was also no progress in reforming of the **administrative justice** system (although relevant measures are still planned for the upcoming years).

In the area of **public financial control and audit** the report welcomes the adoption in 2013 of the Concept for introduction of public audit in Kazakhstan and preparation of the draft law on public audit and financial control. After adoption of the law Kazakhstan will be able to implement relevant audit standards and set up internal audit units. Provisions on the Accounting Chamber in the mentioned draft law so far do not comply with the given recommendations on ensuring independence of the supreme audit institution.

Kazakhstan made significant changes in its legislation on **public procurement** and introduced some elements of the e-procurement. However the number of areas that are exempted from the scope of the law has not been reduced significantly. Also the law on procurement in the national companies and other similar entities has not been adopted as yet, although the work on the draft law has been carried out. It is positive that a system of statistics and analysis of data on conducted procurement, complaints and results of their consideration, frequent violations and liability has been introduced.

The law on **access to information** has not been adopted in Kazakhstan as recommended, while the work on the relevant draft law has been suspended. Provisions on liability for non-provision or incomplete (untimely) provision of information upon request of natural or legal persons have not been revised. Kazakhstan achieved compliance with the EITI standards. It also properly considered the possibility of decriminalizing libel and insult, thus fulfilling relevant recommendation (although the results of the consideration, in the monitoring group's opinion, are negative, because instead of repealing the liability for such acts it was made more severe in the new Criminal Code). Liability for libel and insult has been applied in practice contrary to the previous recommendation. Effective legislative measures for preventing lawsuits with excessive monetary claims of moral damages have not been introduced.

In the area of **political parties and election campaigns financing** and rules on political officials integrity, no substantial changes were made and the relevant recommendation was not implemented. There was also almost no progress in the area of **judicial reform** and the previous recommendations remain valid (in particular concerning strengthening independence of the judicial authorities and judges, maximum restriction of subjective influence on the judicial selection procedure). At the same time Kazakhstan ensured publication of detailed information on all stages of judicial selection.

As regards **integrity in the business sector** Kazakhstan largely complied with the recommendation to review legislative and other measures to establish proper systems of reporting, information disclosure, internal and external audit, financial control and ensuring in general transparency of national companies and other similar entities. Measures to promote corporate compliance programmes, taking into account best international practice and standards, have not been taken.

## Third round of monitoring

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

The initial review of Kazakhstan's legal and institutional framework was carried out in October 2005, with resulting recommendations. The first round monitoring report was adopted in September 2007, assessing Kazakhstan's compliance with the recommendations and offering compliance ratings. The second round monitoring report was adopted in September 2011 and showed updated Kazakhstan's compliance ratings for the earlier recommendations, and included some new recommendations. At the ACN plenary meetings in between Kazakhstan regularly submitted progress updates on measures taken to implement the recommendations. Kazakhstan has been an active participant and contributor to other ACN activities. All monitoring reports are available on the ACN web-site at [www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm](http://www.oecd.org/corruption/acn/istanbulactionplancountryreports.htm).

The third round of monitoring under the Istanbul Action Plan was endorsed by the participating countries in December 2012. The Government of Kazakhstan submitted its responses to the questionnaire specially developed for Kazakhstan for the third round of monitoring in March 2014 and responses to additional questions in May 2014. Also, according to the methodology of the third round, replies to the questionnaire were obtained from non-governmental partners, namely Transparency Kazakhstan and Internews-Kazakhstan.

The country visit to Astana took place on 26-30 May 2014 and consisted of 10 thematic sessions with representatives of state authorities, including: Presidential Administration; Chancellery of the Prime Minister; Parliament; Supreme Court; High Judicial Council; Agency for the Fight against Economic and Corruption-related Crimes (Financial Police); the Civil Service Agency; Office of the Prosecution General; National Security Committee; Ministry of the Interior; Ministry of Justice; Ministry of Economy; Ministry of Regional Development; Ministry of Finance; Tax Committee; Customs Committee, Accounting Committee; Committee for Financial Monitoring of the Ministry of Finance; Central Election Commission; Financial Police Academy; Civil Service Academy, and other departments and agencies. The OECD Secretariat arranged for separate meetings with representative of civil society, business and international organisations.

Kazakhstan's national coordinator for the monitoring was the Agency for the Fight against Economic and Corruption-related Crimes (Financial Police); in Kazakhstan the monitoring was coordinated and supported by: First Deputy of the Agency's Chairman Mr Andrey Lukin; officials of the Agency's Department for legal support and international cooperation (Ms Aigul Bazarbayeva, Ms Aizhana Berikbolova and others) and other units at the Agency. After organisational changes in August 2014 coordination of the monitoring from the Kazakhstan side was carried out by the newly established Agency for Civil Service Issues and Countering Corruption; Kazakhstan national delegation during plenary meeting was chaired by the Deputy Head of the Agency Mr Sayan Akhmetzhanov.

The monitoring team for the third round of Monitoring of Kazakhstan consisted of: Mr Dmytro Kotlyar (ACN Secretariat, team leader); Ms Inese Kuske (ACN Secretariat), Ms Eliza Niewiadomska (European Bank for Reconstruction and Development), Mr Andriy Kukharuk (Ministry of Justice, Ukraine), Mr Evgeniy Kolenko (Prosecutor General's Office, Uzbekistan), Mr Edvardas Zhukauskas (Civil Service Department, Lithuania), and Mr Jan van Tuinen (Ministry of Finance, the Netherlands).

The monitoring team would like to express their gratitude to the Government of Kazakhstan for excellent cooperation during the third round of monitoring, and in particular, officers of the Agency for the Fight against Economic and Corruption-related Crimes (Financial Police). The monitoring team is also grateful to Kazakh authorities and non-government organisations for open and constructive discussions that took place during the country visit.

This report was prepared on the basis of answers to the questionnaire and findings of the on-site visit, additional information provided by the government of Kazakhstan and NGOs and research by the monitoring team, as well as relevant information received during the plenary meeting.

The report was adopted at the ACN/Istanbul Action Plan plenary meeting in Paris on 10 October 2014. It contains the following compliance ratings with regard to recommendations of the second round of monitoring: **out of 17 previous recommendations Kazakhstan was found to be partially compliant with 13 recommendations and not compliant with 4 recommendations (no fully compliant or largely compliant ratings were assigned). 3 new recommendations were made as a result of the third monitoring round; 16 previous recommendations were recognised to be still valid.**

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

Third round of monitoring under the OECD/ACN Istanbul Anti-Corruption Action Plan is carried out with the financial support of the United States, Switzerland and the United Kingdom.

## Country background information



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

Kazakhstan covers an area of 2.7 million sq. km. and is the ninth largest country in the world. It has a population of 17.2 million (15.4 million in 2006). The GDP amounts to USD 264 billion (more than USD 15,000 per capita PPP in 2014), and in 2013 the economy grew by 5% (5.1% in 2012, and 7.5% in 2011). Oil, gas, and mineral exports are key to Kazakhstan's economic success. Kazakhstan's extractive industries have attracted more than 75% of the total direct foreign investments in the country. Kazakhstan has significant deposits of coal, iron ore, copper, zinc, uranium, and gold. Starting in 2004, the Government of Kazakhstan increased its take of oil deals by increasing taxation of new oil projects. In 2000 a National Fund of Kazakhstan was set up; the Fund is formed by contributions of oil sector organizations and its size as of July 2014 amounted to ca. USD 77 billion.<sup>2</sup>

The majority of Kazakhstanis are ethnic Kazakh; other ethnic groups include Russian, Ukrainian, Uzbek, German, and Uighur. Religions are Sunni Muslim, Russian Orthodox, Protestant and other. Kazakhstan is a bilingual country. Kazakhstan has two main languages. The Kazakh language has the status of the "state" language, while Russian is declared the "official" language.

### Political structure

Kazakhstan is a constitutional republic with a strong presidency. It is divided into 14 oblasts and the two municipal districts of Almaty and Astana. Each is headed by an *akim* (provincial governor) appointed by the President. Municipal akims are appointed by oblast akims. The Government of Kazakhstan transferred its capital from Almaty to Astana on 10 June 1998.

President of Kazakhstan is a head of state, its highest official. Since 1990 the President of Kazakhstan is Mr. Nursultan Nazarbayev, who having received 95.5% of votes at the election on 3 April 2011 was re-elected for the fourth time to serve as the President till December 2016. According to the Kazakhstan's Constitution the same person cannot be elected as President more than twice in a row. This restriction does not apply to the First President of the Republic of Kazakhstan. By a special constitutional law of June 2010 Kazakhstan's President Mr. Nazarbayev was assigned a status of the First President of the Republic of Kazakhstan – Leader of the Nation.

Kazakhstan has a bicameral Parliament, comprising a lower house (the *Majilis*) and an upper house (the Senate). 98 Majilis members are elected in the national voting district according to the proportional system with a 7% election threshold. Additional 9 members are elected by the Assembly of the People of Kazakhstan (a consultative and advisory body under the President of the Republic of Kazakhstan). Term of office of the Majilis members is 5 years. The Senate consists of 47 members. Two senators are elected by the legislative assemblies (*maslikhats*) of each of

<sup>1</sup> Sources: US Department of State background notes ([www.state.gov/p/sca/ci/kz/](http://www.state.gov/p/sca/ci/kz/)); International Monetary Fund (IMF) - World Economic Outlook April 2014 ([www.imf.org/external/Pubs/ft/weo/2014/01/](http://www.imf.org/external/Pubs/ft/weo/2014/01/)); Kazakhstan's Agency on Statistics ([www.stat.gov.kz](http://www.stat.gov.kz))

<sup>2</sup> Finance Ministry of Kazakhstan: <http://www.minfin.kz/index.php?uin=1294660514&lang=rus>.

the 16 country's main administrative units (14 oblasts and cities of Astana and Almaty). 15 more senators are appointed by the President of Kazakhstan. Term of office of the Senate members is 6 years; half of the elected senators are re-elected every 3 years. Majilis deputies and the government both have the right of legislative initiative, though the government proposes most of the draft legislation considered by the Parliament.

Early election to the lower chamber of Parliament took place in January 2012, with the *Nur Otan* Party led by President Nursultan Nazarbayev getting 80.9 % votes. Other parliamentary parties also included the Democratic Party of Kazakhstan Ak-Zhol, and the Communist Party of Kazakhstan, with 7.47 and 7.19 % votes, respectively. As a result, 83 members of Parliament belong to Nur Otan Party, 8 to Ak-Zhol, and 8 to the Communist Party of Kazakhstan, with 9 independent members. The previous Parliament had only one party represented – that of Nur Otan.

## Trends in corruption

With a score of 26 (2.6 under the previous methodology) Kazakhstan ranked 140<sup>th</sup> out of 177 countries in the 2013 Transparency International Corruption Perception Index.<sup>3</sup> Kazakhstan's score in 2005 was 2.6 (107<sup>th</sup> out of 158 countries), then fell to 2.1 in 2007 (150<sup>th</sup> out of 179 countries) and rose significantly in 2009 to 2.7 (120<sup>th</sup> out 180 countries) and to 2.9 in 2010 (105<sup>th</sup> out of 178 countries), decreasing gradually ever since.

In 2013 Kazakhstan was included for the first time in the Transparency International Global Corruption Barometer,<sup>4</sup> see tables below for the results. The survey presents clearly the extent, types, causes and trends of corruption in the country.

**Table 1.** Kazakhstan in 2013 Global Corruption Barometer

Over the past two years how has the level of corruption in this country/territory changed? Percentage of respondents			To what extent do you believe corruption is a problem in the public sector of your country?	In your dealings with the public sector, how important are personal contacts and/or relationships to get things done?	To what extent is this country's government is run by a few big entities acting in their own best interests?	How effective do you think your government's actions are in the fight against corruption?		
Decreased	Stayed the same	Increased	On a scale of 1 to 5 (5 = a very serious problem)	Important or very important (% respondents)	To large extent or entirely (% respondents)	Effective	Ineffective	Neither effective nor ineffective
22%	45%	34%	3.9	59%	38%	25%	40%	35%

**Table 2.** Corruption perception in Kazakhstan by institutions, 2013 Global Corruption Barometer

Percentage of respondents who felt these institutions were corrupt/extremely corrupt in this country/territory											
Political parties	Parliament	Army	NGOs	Mass media	Religious organisations	Business	Educations system	Judiciary	Medical and health care services	Police	Public officials/civil servants
23	27	32	23	20	15	40	55	63	54	66	53

<sup>3</sup> <http://cpi.transparency.org/cpi2013/results>.

<sup>4</sup> [www.transparency.org/gcb2013/country/?country=kazakhstan](http://www.transparency.org/gcb2013/country/?country=kazakhstan).

**Table 3.** Corruption experience by public sectors, 2013 Global Corruption Barometer

Have you or anyone in your household paid a bribe to one of these eight services in the last 12 months? (results shown for those who came into contact with a service)							
Education	Judiciary	Medical and health services	Police	Registry and permit services	Utilities	Taxes and/or customs	Land services
31	29	28	54	21	2	6	36

**Table 4.** Grounds for corruption, 2013 Global Corruption Barometer

What was the most common reason for paying the bribe? (% responses)			
As a gift or to express gratitude	To get a cheaper service	To speed things up	It was the only way to obtain the service
39	8	33	19

**Table 5.** Civic activism in fighting corruption, 2013 Global Corruption Barometer

“Would you be willing to do one of the following?” (percentage of those willing to do the following)				
Sign a petition asking the government to do more to fight corruption	Take part in a peaceful protest or demonstration against corruption	Join an organization that works to reduce corruption, as an active member	Pay more to buy good from a company that is clean/corruption-free	Spread the word about the problem of corruption through social media
44	29	19	29	41

**Table 6.** Corruption experience, 2013 Global Corruption Barometer

Refusing to pay a bribe			
Have you ever been asked to pay a bribe?		If yes, have you ever refused to pay a bribe?	
Yes	No	Yes	No
44	56	61	39

**Table 7.** Corruption reporting, 2013 Global Corruption Barometer

Will you report a case of corruption? (%)		If yes, will report to ... (%)					If no, will not report because... (%)			
Yes	No	Directly to the institution	General public hot line	Independent NGO	Mass media	Other	Don't know where to report	Fear of reprisals	It wouldn't make any difference	Other
42	58	24	54	6	13	3	6	31	61	2

As the research suggests, corruption is widely perceived in Kazakhstan as one of the grave problems, mostly in the area of government expenditure. Official data show that the most corrupt are the spheres of road police, customs control, land allocation, tax collection and public procurement.

During last several years Kazakhstan has improved its rank in various indexes on conditions for doing business (see table below, as well as Section 3.3.2. of the report).

**Table 8.** Kazakhstan in international ratings

<b>Index and organisation</b>	<b>Kazakhstan's ranking</b>	<b>Countries in the index</b>
Doing business, 2014, World Bank	50 (59 in 2011)	189
Economic Freedom Index 2014, Heritage Foundation	67 (78 in 2011)	186
Global Competitiveness Index 2014-2015, World Economic Forum	50 (72 in 2011)	148
- Burden of government regulation	63 (65)	
- Property rights	70 (107)	
- Transparency of government policy making	40 (53)	
- Illicit payments and bribes	80 (99)	
- Independence of the judiciary	86 (111)	
- Nepotism in government decision making	53 (100)	
- Burden of customs procedures	77 (102)	
International Property Rights Index 2013	114 (100 in 2011)	130

## Acronyms

JSC	Joint-stock company
ODIHR/OSCE	Office for democratic institutions and human rights at the Organisation for Security and Cooperation in Europe
MLA	Mutual legal assistance
SJC	Supreme Judicial Council
WTO	World Trade Organisation
EU	European Union
PPL	Public Procurement Law
EAG	The Eurasian group on combating money laundering and financing of terrorism
EITI	Extracting Industries Transparency Initiative
CSTI	Construction Sector Transparency Initiative
MCR	Monthly calculation rate
NGO	Non-government organisation
NCS	National Council of stakeholders
UN	United Nations Organisation
OECD	Organisation for Economic Cooperation and Development
UNDP	United National Development Programme
RK	Republic of Kazakhstan
IAP	Istanbul Action Plan
USA	United States of America
CC	Criminal Code
CPC	Criminal Procedures Code
FATF	Financial Action Task Force
CIC	Central Election Commission
COSO	Committee of Sponsoring Organisations of the Treadway Commission
GRECO	Council of Europe Group of States Against Corruption
EU-PIFC	EU standards in Public Internal Financial Control
IIA	Institute of Internal Auditors
INTOSAI	Internal Organisation of Supreme Audit Institutions

# I. Anti-corruption policy

## 1.1.-1.2. Political will and anti-corruption policy

### *Previous Recommendation 1.1.-1.2.*

- To consider amending the Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan in 2011-2015, as well as the Plan of Actions for Implementation of the Sectoral Programme, in accordance with international standards and world best practices (as regards its structure, contents, setting clear priorities and objectives, interconnection among priorities, objectives and measures aimed at their implementation, defining clear indicators oriented at achievement of specific results) on the basis of results of monitoring of the Programme's implementation as well as studies on the situation with corruption.
- To ensure proper monitoring of implementation of the Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan for 2011-2015, including transparent and unrestricted participation in the monitoring process of the civil society.
- To ensure that results of monitoring of implementation of the Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan for 2011-2015 be considered at the meetings of the Presidential Commission for the Fight against Corruption with broad public coverage of the results of implementation of the Sectoral Programme and decisions taken as a result of the meetings. To engage general public representatives in the Commission's work.

Fight against corruption remains the focus of attention by the leadership of Kazakhstan. This topic continues to feature as part of the annual addresses to the nation by the President of the Republic.

Specifically, development and implementation of a new anti-corruption strategy, ensuring transparency and accessibility of the judiciary, integrity of law enforcement officers and accountability of local governments to the public were reflected upon in the Address by the President of the Republic of Kazakhstan of 17 January 2014, which focused on the country's development strategies through 2050. An important development on 6 August 2014 was marked by the institution of a new anti-corruption agency – Civil Service and Anti-Corruption Agency.

The Nur Otan ruling party<sup>5</sup> also reaffirms its position for the need to prioritize fight against corruption in the country. The party sponsors an active public anti-corruption council.

In addition, Kazakhstan has demonstrated its interest in the activities of international anti-corruption mechanisms, having, inter alia, spearheaded Kazakhstan's accession to the Council of Europe Group of States Against Corruption (GRECO), and in February 2014 the country became a fully-fledged member of the International Anti-Corruption Academy (IACA).

A great deal of attention is paid to building corruption intolerance among the general public through anti-corruption information and awareness campaigns, and progressive improvement of anti-corruption laws.

However, there continue to remain a number of pressing challenges in the anti-corruption area which require appropriate reforms.

### **Amending the Sectoral Programme for the Fight Against Corruption**

The 2011-2013 Sectoral Programme for the Fight Against Corruption in the Republic of Kazakhstan (the Programme henceforth), approved on 31 March 2011, is currently the key framework document for Kazakhstan's anti-corruption policies. In the Report for the Second Round of Monitoring of Kazakhstan, the Programme was reviewed and some of its drawbacks were highlighted: it was said to have failed to ponder on the results of the 2006 – 2010 predecessor

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<sup>5</sup> The largest political party in Kazakhstan, founded and led by President Nazarbayev, with 80.99 % ballots during the 2012 parliamentary election.

programme; there was no obvious link between issues of corruption and the announced goals and activities or between the outcome of the previous programme and the activities that Kazakhstan plans to implement under the new Programme. The recommendation was to improve the formulation of its goals and identify priorities.

In his address of 27 January 2012 entitled “Social Economic Modernisation as Key Direction in the Development of Kazakhstan”, the President of the Republic instructed the government to develop a Comprehensive Anti-Corruption Programme.<sup>6</sup>

In keeping with the instruction and with the Istanbul Action Plan recommendation, the Government of Kazakhstan issued on 28 June 2012 a resolution, No 866, “On amendments and amplifications to the resolution of the RK Government of 31 March 2011, No 308,” On approving the Sectoral Programme for the Fight Against Corruption for 2011 – 2015. With this resolution, Kazakhstan has amended both the Programme and its implementing Action Plan.

In the general chapter of the programme, there are all-embracing changes and additions in all of its sections. Specifically, in the section “Analysis of the current situation” a number of paragraphs have been deleted, in particular, those on “shadow” economy or internal security services, or else some wording has been changed. The chapter on aims, goals and targets, one goal has been worded more specifically, but without any drastic changes. Chapter “Stages of Implementation” now offers a summary of those new measures that have been incorporated in the Programme. The Programme’s “passport” provides for additional allocation of public expenditure of around KZT 7 mln (almost Euro 29,000) to the Programme.

The implementing Action Plan now incorporates new and better worded 14 activities out of the total 73. Among newly incorporated activities are declarations of large expenses by civil servants; improved mechanisms for the verification of income and property declarations by civil servants; possibility for the introduction of liability for illicit gains; a new version of the Administrative Procedures Law; broader engagement of the general public in the prevention of corruption and establishment of regional anti-corruption commissions.

As for the grounds of these changes, Kazakhstan has communicated that they took into account the outcomes of the monitoring exercise for the 2006-2010 State Anti-Corruption Programme. No specific information as to who and when conducted the analysis was provided. During the peer visit, it was indicated that the grounds for changes in the Programme were served by the analysis of criminal cases, court rulings and investigative practices.

At the same time, the new wording of the Programme takes into account some of the recommendations by the Ministry of Economy and Budgetary Planning laid down in the conclusions of the monitoring exercise for 2011. In particular, the Programme has been amplified with some activities relating to the implementation of new legal mechanisms, awareness capacities and broader engagement of the public in prevention and disruption of corruption, and the institution of regional anti-corruption commissions involving the general public and the mass media. These and some other amendments in the implementing Action Plan (pertaining to assets declaration and administrative procedures) also reflect the relevant provisions of the January 2012 address by the President. They also provide for a more focused control over the execution of the Programme through annual evaluation of interim results by the Presidential Anti-Corruption Commission.

At the same time there is no evidence that amendments and amplifications have been grounded in any corruption research as suggested by the recommendation. That there had been a lot of such research conducted in Kazakhstan was mentioned both in the Report for the Second Round of Monitoring and during the on-site visit at the third round. References to such research are also given in the replies to the 3<sup>rd</sup> Round questionnaire. The amended Programme makes no references to any corruption research, surveys or indices that might have been conducted by public authorities or non-government entities and predicated the amendments. This is something that the Programme also notes: “*Sociological surveys and research on corruption issues are conducted in Kazakhstan by independent institutions at the request by authorized public authorities. However, (...) their practical outcomes are not used to adjust government’s anti-corruption policies*”.

One example of that is the fact that the updated Programme has failed to reflect the downgrading of Kazakhstan’s ranking (from 105<sup>th</sup> to 120<sup>th</sup>) in the 2011 Transparency International Corruption Perception Index, although the improvement of this rating is the Programme’s only target indicator. Another example is the Global Competitiveness

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<sup>6</sup> [www.akorda.kz/ru/page/poslanie-prezidenta-respubliki-kazakhstan-n-a-nazarbaeva-narodu-kazakhstanu\\_1339760819](http://www.akorda.kz/ru/page/poslanie-prezidenta-respubliki-kazakhstan-n-a-nazarbaeva-narodu-kazakhstanu_1339760819).

Report 2011-2012,<sup>7</sup> published in September 2011, which suggested that it was corruption that was the key obstacle to doing business in Kazakhstan; meanwhile, the amendments to the Programme attempted to address this issues only indirectly and insignificantly (minor changes in administrative services).

The above suggests that amendments to the Programme could have been more a way to implement various anti-corruption initiatives, rather than a result of a prior review of either broad or sectoral research of corruption issues or any monitoring of the earlier programme's implementation.

As a result, despite the adjustments in the Programme, it still fails to offer a detailed description of the state of corruption in the country, and to serve as the basis for the identification of priority areas for anti-corruption reform. Whatever amendments and amplifications have been made, the priorities and goals have not become more specific, and thus the changes have not impacted the Programmes overall structure.

Moreover, amendments and amplifications have not affected indicators. They have failed to introduce additional targets, interim targets or any additional performance indicators. Besides, the only target indicator on record is still for Kazakhstan to move up to no lower than the 90<sup>th</sup> ranking out of 180 countries in the Transparency International Corruption Perception Index by 2015. Significantly, while the Programme is being implemented, Kazakhstan's ranking in the index has been steadily deteriorating: 120<sup>th</sup> in 2011; 133<sup>th</sup> in 2012; and 140<sup>th</sup> in 2013. The risk of failing the target has also been noted by the Ministry of Economy and Budgetary Planning in their assessment.<sup>8</sup> However, out of the 10 performance indicators available (such as the rate of growth of electronic licensing, quality and accessibility of government services, etc.), in 2013 three were achieved.<sup>9</sup> At the same time, admittedly, the links between the Programme's activities and 10 performance indicators are not easy to see. This is attested further by the fact that basing on the results of the Programme's implementation in 2011-2013, while all 57 planned activities for the period were executed, only 3 out of 6 performance indicators have been achieved. Also, there is no information suggesting that the authorities responsible for the implementation of the Programme have been systematically monitoring these indicators.

#### **Monitoring execution of the Sectoral Programme for the Fight against Corruption**

The execution of the Programme is monitored by a public authority responsible for the elaboration of the sectoral programme, i.e. RK Agency for the fight against economic and corruption related crimes, jointly with the public authorities involved in the implementation of the Programme. The monitoring takes place under the Rules for the development, implementation, monitoring, assessment and control of sectoral programmes approved with the Government's resolution No 218 of 18 March 2010.

Based, among other things on the consolidated information received from other authorities, the Agency prepared an *annual interim monitoring report on the Programme*. In practice, such interim reports are drawn up in a table listing activities and offering brief information on each of them completed and things still to be done. While reports are fairly hefty, they are mostly reduced to statements and fail to offer any assessments on the status of activities being executed. Interim reports for each of the years between 2011 and 2013 are available at the Financial Police Agency's web-site.<sup>10</sup>

When completed, the interim reports would be submitted to the *Ministry of Economy and Budgetary Planning*, which, based on the Agency's reports, would draft their *conclusions* that are to go to the Government. Three such sets of conclusions have been prepared based on the Programme's assessment for 2011, 2012 and 2011-2013. All three have been made available to the monitoring team. The conclusions have more analytical data to offer than the Agency's interim reports. The conclusions allow one to draw more qualitative opinions on the execution of the Programme and highlight some issues and areas to focus on in future.

Neither interim reports nor conclusions provide any comprehensive and critical performance assessment of the activities, their efficiency, compliance with the strategy's goals or the impact that the implemented steps have had on corruption.

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<sup>7</sup> See <http://www.weforum.org/reports/global-competitiveness-report-2011-2012>

<sup>8</sup> Conclusions on the results of the 2011-2015 Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan in 2011- 2013, P. 6.

<sup>9</sup> *ibid*, P. 1-2.

<sup>10</sup> [http://finpol.gov.kz/rus/pravoprimerenie/antikorrupcionnoe\\_zakonodatels/](http://finpol.gov.kz/rus/pravoprimerenie/antikorrupcionnoe_zakonodatels/), <http://finpol.gov.kz/>

As the Ministry's conclusions for 2011 – 2013 point out, the Agency's report on the implementation of the Sectoral Programme fails to comply with the requirements of the sectoral programme monitoring methodology guidance, specifically, *"information is lacking on the results achieved or performance efficiency of the Programme for the entire period of assessment; [there is a lack of] information on the extent to which issues and challenges to be addressed by the document have been resolved, or on the impact that this document's implementation has had on the socioeconomic development of the country, or else any information on the level of satisfaction of the beneficiaries"*.<sup>11</sup>

Indeed, the Programme states that "the most corrupted areas are <...> public procurement, use of mineral resources, land matters and construction, customs and taxation, where there has been a significant growth in the resulting damage over the recent years".<sup>12</sup> At the same time, the reports available do not allow one to learn how the work done on the execution of the Programme helps address issues in those most corruption-affected areas. Additionally, it is hard to judge the effect of anti-corruption measures solely from the number of measures implemented, since different measures have different impact weights.

At the same time, a memo on measures not implemented which was made available to the monitoring team by the Agency points to a number of measures for the implementation of which there was no relevant information, suggesting lack of efficient coordination in the Programme's monitoring.

The Ministry of Economy and Budgetary Planning also points to the non-compliance of reports by public authorities responsible for the implementation of activities, in particular insufficient information about the work done and weak coordination between the Agency and these authorities.<sup>13</sup>

Notably, the Programme's implementation status was also discussed at the meeting of the Public Council for the Fight against Corruption and "Shadow" Economy advising the Agency on 19 March 2014. It resulted in a recommendation to submit a letter to the Government reporting about the low quality of implementation by public authorities and akimats of the activities provided for by the Programme.<sup>14</sup> Additionally, the Government also received reports from the Ministry of Economy and Budgetary Planning offering, inter alia, information on the problem aspects of the Programme's implementation.

Besides, the monitoring team learned during its visit to Kazakhstan that in May 2014 the Presidential Administration carried out their inspections of the way the Agency and some other authorities that participate in the implementation of the Programme had been executing it. As a result, it was decided to submit a relevant report to the President of the Republic. The monitoring team was not made aware of any details of the inspections, and thus is in no position to judge about its role in the monitoring of the Programme. Kazakhstan additionally notified that the said inspection was indeed conducted and its results were presented to the President as intended.

While feeling positive about the engagement of a range of authorities in the monitoring of the implementation of the Programme, given lack of information about the outcomes of any consideration of this issue by various presidential entities or by the Government, the team feels unable to elaborate any final conclusions on the practical effectiveness of the approach used.

### **Engagement of civil society in the monitoring**

As already mentioned, the interim reports on the monitoring of the Programme drafted by the Agency for the Fight against Economic and Corruption-related Crimes have been made public on the Agency's web-site.

The status of the Programme's implementation has also been addressed at the meetings of the Public Council for the Fight against Corruption and "Shadow" Economy advising the Agency. The discussions about the status of implementation of the Programme have been based on the report elaborated by the Agency itself.

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<sup>11</sup> Conclusions on the results of the 2011-2015 Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan in 2011- 2013, P. 6.

<sup>12</sup> Resolution of the Government of the Republic of Kazakhstan No 308 of 31 March "On approving the Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan in 2011 – 2015".

<sup>13</sup> See Conclusions on the results of the 2011-2015 Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan for 2012 and 2013 and the Conclusions on the results of the 2011-2015 Sectoral Programme for the Fight against Corruption in the Republic of Kazakhstan for 2012.

<sup>14</sup> Minutes of the meeting of the Public Council for the Fight against Corruption and "Shadow" Economy on 19 March 2014.

Civil society did not attempt its own independent monitoring of the implementation of the Programme. The monitoring team did not find any examples of public authorities engaging or encouraging the general public, or any initiatives proposed directly by public associations for the development of independent, “shadow”, reports on the status of implementation of the Programme.

### **The role of the Presidential Commission for the Corruption-related issues in the monitoring**

The Sectoral Programme was amended on 28 June 2012 so that “for purposes of continued control over the execution of the Programme, apart from the established procedure for the monitoring, interim results of its implementation will also be considered annually at the sessions of the Commission advising the RK President on corruption-related issues”

One of the functions of the Presidential Commission for the corruption-related issues is indeed to perform a monitoring exercise and analyse the status of the fight against corruption. As envisaged by the Programme itself even prior to the 28 June 2012 amendments, the Commission was to consider information on the progress of implementation of regional anti-corruption plans developed based on the Programme.

In its replies to the questionnaire, Kazakhstan referred to a meeting that the Commission held in Q4 of 2013 to discuss, inter alia, the progress of implementation of regional plans by the akimats in East Kazakhstan and Zhambyl regions. Additionally, in April this year the Commission looked into the issues concerning anti-corruption efficiency in the execution of court rulings, and also improvements in the ranking system that assesses the level of corruption across public authorities; in June the Commission held an enlarged session devoted to the efficiency of anti-corruption measures in education, and in the Aktyubinsk region. Until the end of the year, there are plans to consider the progress in the implementation of regional anti-corruption plans by the akimats in the West Kazakhstan and South Kazakhstan regions. However, no reports on the results of the Programme’s monitoring in general have been discussed by the Commission.

At the same time, judging from the information made available to monitors by the Kazakhstan public authorities, the outcomes of the monitoring of the Programme’s implementation are addressed regularly by a Working Groups of the above Commission. The Working Group consists of deputy heads of the authorities that make up the Commission. However, the monitoring team failed to obtain any information on the results of the discussions that the Working Group has on this issue or on any broad public coverage of the relevant decisions.

### **Engaging the general public in the work of the Presidential Commission**

Under the Terms of Reference of the Presidential Commission for the corruption-related issues, the Commission may include representatives of non-government organisations and other persons; they also provide that public officials that are not members of the Commission or the mass media can be invited to its sessions.

However, in actual fact, NGOs have no permanent representation in the Commission. Judging from the information obtained during the monitoring visit, NGOs had never been invited to the Commission’s sessions before. The only invitees were the mass media, including TV channels *Khabar*, *Kazakhstan* and internet news media [www.tengrinews.kz](http://www.tengrinews.kz), [www.nur.kz](http://www.nur.kz) and [www.zakon.kz](http://www.zakon.kz). Kazakhstan additionally informed that the possibility of including an NGO representative in the Commission’s composition is being considered.

At the same time, according to the information published on the official web-site of the President of the Republic of Kazakhstan, the Commission held its first ever enlarged session on 30 June 2014 with the participation in a conference regime of the akims of regions and cities of Astana and Almaty, and members of regional anti-corruption commissions. Invited to the meeting were the leaders of Nur Otan Party, the National Chamber of Entrepreneurs. Kazakhstan’s Civic Alliance, representatives of the Transparency International Kazakhstan, and other NGOs. While it is a positive fact, it is imperative that the public’s engagement in the work of the Commission is made ongoing, in particular, through incorporation of NGO representatives in the Commission.

### **New anti-corruption strategy of Kazakhstan**

In his address on 27 January 2012, the President of the Republic of Kazakhstan instructed the Government to draft a new comprehensive anti-corruption programme.<sup>15</sup> The presidential address “The way of Kazakhstan-2050” of 17 January 2014 emphasized that continued efforts to develop and implement a new anti-corruption strategy was an urgent priority.<sup>16</sup>

According to the plan of actions to implement President’s address of January 2014 the draft Anti-Corruption Strategy for 2015-2025 and its Action Plan were developed. As informed by the Financial Police Agency to prepare the strategy an inter-ministerial working group was set up and it was headed by the Prime Minister. Text was drafted by expert working group that included representatives of the President’s Administration, Prosecutor’s General Office, central government authorities. Kazakh and international experts (from Italy, Russia, Turkey) were engaged as well<sup>17</sup>. In parallel, the Nur Otan Party has come up with its own new anti-corruption programme, and its draft was published in July 2014 and discussed by the party’s grass-roots organisations and in government authorities.<sup>18</sup>

During the on-site visit the monitoring team studied the draft Anti-Corruption Strategy of the Republic of Kazakhstan through 2025 made available by the Financial Police Agency (the version dated 19.03.2014). The draft suggests drawing up long-term priority of anti-corruption policies and mid-term activities. The draft strategy was presented by the Financial Police Agency at the conference entitled “Anti-Corruption Mechanisms” in June 2014, attended by NGOs, SMEs, researchers and political analysts. The draft has also been made available at the Agency’s web-site where anyone is invited to leave their suggestions on the draft.

The draft outlines in general the anti-corruption policies of Kazakhstan, experience of other countries and international standards. It also delineates and described briefly the key areas of the new strategy: harmonizing anti-corruption laws, in particular criminal legislation, in line with international standards and broadening international cooperation in the anti-corruption sphere; achieving zero tolerance of corruption, transparency, including fighting against the use by Kazakh enterprises of the offshore jurisdictions and countering the “shadow” economy. During the on-site visit Kazakhstan pointed out that the new strategy will aim, as a priority, at reducing barriers to doing business, controlling authorities and e-government. They stressed the importance of punishment, fighting corruption at the highest levels, introducing a moratorium on inspections at businesses, and engaging the general public.

Importantly, most of the critical remarks made by the monitoring experts at the Second Monitoring Round bearing on the Programme remain equally relevant for the draft new strategy: lack of analysis of the implementation of earlier programme anti-corruption tools, or analysis of research that provide a comprehensive information about the status of corruption in the country.

In the draft version of the strategy of 19 March 2014 that was studied by the monitoring team, in spite of the proclaimed continuity with the successful anti-corruption foreign practices, there is practically no holistic assessment of the corruption-induced problems and risks in Kazakhstan, or assessment of the level of corruption (drawing on statistics and analysis), which is in fact needed for the proposed actions to be in line with the actual situation. What is also absent is the prioritization of the proposed actions, which are of particular importance given the long-term nature of the document. Moreover, the strategy must come with a mechanism to monitor its efficiency and performance. It is also important to sum up and take into account the proposals of civil society and business community (it was, for instance, proposed by civil society to incorporate transparency measures in the recruitment and promotion across civil service and national companies, and accountability of national companies<sup>19</sup>).

## Conclusions

Kazakhstan has moved a certain way toward an improved national anti-corruption strategy, having, in particular, added new anti-corruption measures, some of which are based on world good practices and requirements of the UN Convention (illicit enrichment, assets declaration). Regular monitoring of the implementation of the Programme also deserves a positive remark. Monitoring reports are published; they were made available to the mass media and at

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<sup>15</sup> Source: [www.akorda.kz/ru/page/poslanie-prezidenta-respubliki-kazakhstan-n-a-nazarbaeva-narodu-kazakhstana\\_1339760819](http://www.akorda.kz/ru/page/poslanie-prezidenta-respubliki-kazakhstan-n-a-nazarbaeva-narodu-kazakhstana_1339760819).

<sup>16</sup> Source: [www.akorda.kz/ru/page/page\\_215750\\_poslanie-prezidenta-respubliki-kazakhstan-n-nazarbaeva-narodu-kazakhstana-17-yanvary-2014-g](http://www.akorda.kz/ru/page/page_215750_poslanie-prezidenta-respubliki-kazakhstan-n-nazarbaeva-narodu-kazakhstana-17-yanvary-2014-g).

<sup>17</sup> Source: [www.finpol.gov.kz/rus/narodnoe\\_normotvorchestvo/?cid=0&rid=7228](http://www.finpol.gov.kz/rus/narodnoe_normotvorchestvo/?cid=0&rid=7228).

<sup>18</sup> Source: <http://nurotan.kz/ru/news/3928>.

<sup>19</sup> Presentation by Zhanar Zhandosova, Sandj Research Centre: “Why the anti-corruption strategy in Kazakhstan does not work”, OECD workshop on 26-27 June 2014, Tirana, Albania.

the meeting of the Public Council for the fight against corruption and the shadow economy. Issues relating to the implementation of the Sectoral Programme for the fight against corruption have been covered by the mass media.

However, the Programme has not been drastically amended. It makes no reference to analytical research, sociological surveys, or analysis of the earlier programme. There is no analysis of the efficiency of measures, no linkages between measures and corruption issues in Kazakhstan. Public authorities responsible for specific activities do not always provide exhaustive information about the work done by them.

The recommendation suggested considering not so much any change in the Sectoral Programme but rather about such adjustments that would comply with international standards and best practices (in terms of the structure, contents, clear priorities and goals, linkages between priorities and goals, on the one hand, and the implementing activities, or identification of clear result-oriented targets) based on the monitoring of the Programme's implementation and the research into the current status of corruption. It is not clear from the materials made available and replies during the on-site visit whether these points had been at all considered when the Sectoral Programme was being amended. Therefore, this part of the recommendation has not been complied with.

Conclusions by the Ministry of Economy and Budgetary Planning based on their assessment of interim reports have not been published. Neither has Kazakhstan ensured that the results of the monitoring of the implementation of the Sectoral Programme were discussed at the Presidential Commission for the fight against corruption with a broad public coverage of the outcomes of the execution of the Sectoral Programme and decisions made following on the meetings.

The new strategy should draw on a more comprehensive analysis of corruption in Kazakhstan and the key issues prompted by such analysis, to be reflected in the goals and activities under the new strategy. Also, the new strategy would benefit from some analysis of the progress made under the 201—2015 Sectoral Programme and issues still outstanding, preferably to be performed not only by the Agency but also by some independent entities.

***Kazakhstan is partially compliant with Recommendation 1.1.-1.2.***

**New recommendation 1.1.-1.2.**

- **To ensure adoption and proper implementation by responsible authorities of a new anti-corruption strategy and action plan based on a thorough analysis of the status of and trends in corruption; assessment of the earlier efforts against corruption, results of the research on corruption in Kazakhstan, including the research conducted by NGOs, statistical and other data on the performance of public authorities fighting corruption, and suggestions and analysis by public authorities, civil society and representatives of the business sector.**
- **To provide in the new anti-corruption strategy and implement in practice a proper mechanism for its monitoring and assessment of implementation results, which would involve an analysis of implementation of the measures, their effectiveness, achieved performance indicators, impact of the strategy on the level of corruption, and the elaboration and implementation of the necessary actions following up on the monitoring results. To ensure civil society engagement in such monitoring process and publication of all monitoring reports (assessments).**

### 1.3. Corruption surveys

#### **Recommendation 1.3.**

- **To develop and apply in practice a national methodology for evaluation of corruption on the basis of the respective international experience. Such methodology should cover both public and private sectors and include at least such components as the most corrupt areas, frequency and models of corruption practices, actors taking part in corruption, types of corruption benefits. To ensure regular evaluation of the corruption situation in the country based on such methodology and also to continue the practice of sectoral corruption surveys in specific, most corrupt-prone areas.**
- **To consider a possibility of assigning the co-ordination role in the field of evaluation of the corruption situation and conducting corruption surveys to the body which is responsible for implementation of the anti-corruption strategy.**

#### **Corruption rankings across government authorities**

As was noted by the Report for the Second Round of Monitoring, Kazakhstan develops ratings of the level of corruption across public authorities based on the methodology designed by the Financial Police Agency and the Presidential Commission for the fight against corruption, in collaboration with Transparency Kazakhstan. The rating is performed based on the guidelines which were approved by joint ordinances in 2007, 2008 and 2012.<sup>20</sup> The Report for the Second Round of Monitoring gave a detailed description of the rating methodology and concluded that it could be improved to generate a more complete, relevant and better-quality information on the current corruption situation in the country.<sup>21</sup>

The ratings are composed of three aggregated indices: corruption index, corruption counteraction index and corruption perception index. But at the time when the new Guidance was drafted and approved, it did not take into account some improvements suggested by experts during the second round of monitoring to make the research conducted more practicable (specifically, present the indicators relative to the types of corruption benefits, involvement of intermediaries, incentives for the choice of corrupt behaviour, etc.).

During the on-site visit Kazakh authorities confirmed that such rankings did really take place, and the authority responsible was the Civil Service Agency. The Civil Service Agency commissions compiling of the ratings every year to the Civil Service Academy, and the resulting data is submitted to the Presidential Administration, however, this research has not been made public so far. The monitoring team was not given a chance to get itself acquainted with the existing ratings. The only example of the way these ratings are used, which was reported during the monitoring visit, was reference to the list of the most corrupt authorities given by the President of the Republic during one of the meetings of the Security Council. According to NGOs, the reason for not publishing the ratings is that the Agency is not certain in the validity of the survey methodology, which could be addressed by wider public discussion of the methodology with experts.

At the same time, a new comprehensive methodology for the assessment of corruption, compliant with the recommendation and embracing both the public and private sector, as well as other components of the recommendation, is yet to be drafted in Kazakhstan. Significantly, in its interim report in September 2013 Kazakhstan noted that *“it appears appropriate to ask the newly created coordination centre to develop a methodology for the assessment of corruption based on the applicable international experience”*.<sup>22</sup>

Therefore, this part of the recommendation was not complied with.

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<sup>20</sup> Joint ordinance approving the Guidance for the calculation of the corruption level rating of public authorities, effective as of 24 December, signed by the head of the Agency (Financial Police), Prosecutor General, head of the Civil Service Agency, Minister for Transport and Communications, Finance Minister and Chairman of the Republic Budget Accounting Committee.

<sup>21</sup> Report of the Second Round of Monitoring of Kazakhstan, P. 21.

<sup>22</sup> Kazakhstan Interim Report to the 12<sup>th</sup> IAP monitoring visit 23–25 September 2013, [www.oecd.org/corruption/acn/ProgressUpdateKazakhstanSept2013RUS.pdf](http://www.oecd.org/corruption/acn/ProgressUpdateKazakhstanSept2013RUS.pdf).

## **Sectoral research of corruption-prone areas**

The Financial Police Agency has been sponsoring academic research and development on areas relevant to the financial police.<sup>23</sup> In 2012, the Agency's Information and Analysis Department instituted an office on deterrence and prevention of corruption and white-collar crime. One of its purposes is to identify the causes and conditions leading to corruption-related and economic offences. The office is to look into the situation in certain areas of economy and industries, public authorities and other organisations to detect and eliminate corruption-inducing factors.

Kazakhstan reported that the Agency in fact was conducting research into corruption in some sectors, identifying risks and submitting proposals to address them. The Agency reviews processes, legislative standards and gaps in each sector. In conclusion, they offer their recommendations to the Government, and ministries and department are issued certain time frames for discussing these recommendations and responding to them.

One such research was on corruption in pre-school institutions; in allocation of social housing in Astana; in the work of the road police; Emergency Situations Ministry (specifically conditions and causes of corruption in the fire service); in the implementation of the State Programme for the accelerated industrial and innovative development of the Republic of Kazakhstan in 2012 – 2014; in the regulation of government services; overpricing in public procurement by the Ministry of Transport.

The monitoring team was shown examples of practical implementation of the Agency's recommendations. For instance, the Agency's suggestion on the reduction of the level of crime in fisheries export have been supported by the public authorities concerned, and are now in process of being implemented (as of June 2014).

There were a few attempts by the Nur Otan Party to assess corruption in various spheres, but those were more of a populist nature.

## **Corruption perception surveys in Kazakhstan**

According to official responses, Kazakhstan has plans to conduct corruption perception surveys. In 2014 some of the public social procurement will be used to contract non-government entities to conduct research/surveys on anti-corruption matters. The outcomes will be presented to the general public. As a result of the competitive selection conducted by the Civil Service Agency, Research Centre Sange was selected and started conducting research of satisfaction in public services with a separate question on anti-corruption. Results will be available in December 2014.

Also, during the on-site visit was mentioned that there were plans for a comprehensive study on corruption, to be conducted in collaboration with the Chamber of Entrepreneurs of Kazakhstan.

Within the competition held by the Ministry of Culture upon initiative of the Financial Police Agency, Civic Alliance of Kazakhstan was recognised as a winner for the project called *Organisation of a set of measures to prevent corruption and economic crime among the population with engagement of the civil society*. Measures within the project planned until the end of 2014 include: 1) conducting two national round-table discussions with participation of state authorities, NGOs, mass media, business associations, law enforcement officials with a view to discuss measures to counteract and reduce corruption and promote transparency. First discussion is scheduled for 30 September 2014, second – for 28 November 2014; 2) development of a guide for the population on the anti-corruption legislation, and a leaflet on main results of activity of the financial police (to be amended due to liquidation of the Financial Police Agency) in Kazakh, Russian and English languages; 3) conducting a survey (at least among 1400 respondents) to review situation with combatting corruption and public perception of this phenomenon.

## **The coordinating role in assessment**

Current regulations in Kazakhstan do not specify a coordinating role for any government authority in the area of corruption assessment and research. In practice, the Financial Police Agency is responsible for scientific research in areas bearing on the fight against corruption, as it is one of its functions; the Agency is also responsible for implementing the anti-corruption strategy. Kazakhstan plans to set up a Coordination Council of anti-corruption units of central government authorities. The Council then will arrange for the research to be done into the activities of government authorities to identify causes and conditions inducing corruption. According to the Kazakhstan

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<sup>23</sup> Terms of Reference of the Agency No 1557 approved by the Presidential Decree of 21 April 2005.

Interim Monitoring Report of April 2014<sup>24</sup>, during the drafting of a new anti-corruption programme, the Agency approached the Government with a proposal to entrust these functions with it, apart from a new anti-corruption policies coordination council to be set up.

However, at the time of the monitoring this issues was not finalized, and needed to be looked into in future, in the context of the most recent institutional changes in the anti-corruption sphere (see Recommendation 1.6). So, this part of the recommendation is not complied with.

### **Research by non-government organisations**

Professionally addressed, independent research on corruption may prove very useful as it highlights the level of corruption/ key risk areas, correlation with other reforms and also allows one to follow changes in the level of corruption and trust enjoyed by public authorities as well as offer an independent assessment of their performance.

The Sange Research Centre, Transparency Kazakhstan and other organisations has been conducting useful studies on corruption since 1998. The Sange Research Centre has completed studies on corruption in Kazakhstan (1998, 2002-2003), on corruption in the judiciary, banks, and on corruption through public eye. In 2006, the market for corruption in Kazakhstan was assessed and its government authorities ranked by the level of corruption in 38 areas. This massive research was published. Issues of corruption in the extractive industries and in banks have been studied (2008-2010). There are regular surveys of the quality of services rendered by tax authorities (by the Public Opinion Research Centre and the Sange Research Centre at the request by the association of tax payers (2007-2013)) and customs authorities (by the Sange Centre at the request of the Customs Committee and the World Bank, 2010-2013), in which one of the issues is monitoring corruption in the relevant authorities and customs stations by regions in Kazakhstan, and to identify specific corruption practices and bribe amounts.

The monitoring team was also informed about several attempts to assess corruption in various spheres by the Nur Otan Party but, as was mentioned in the information provided by Kazakhstan, those were more of a populist nature.

### **Conclusions**

In Kazakhstan there are a few examples of corruption research. In particular, they rate public authorities for the level of corruption, and the Financial Police Agency periodically conducts sectoral analytical studies of corruption risks, with certain practical implications. However, it is difficult to judge about the practical effectiveness of these rankings since there is no information on the results of the studies themselves or any tangible results from their application.

The research conducted is not comprehensive as it fails to cover corruption in the private sector, or qualitative side of corrupt practices and hence can be source of information only for sectoral or targeted reforms, but not for the efforts to draft the anti-corruption policy as a whole. Therefore, the recommendation to develop and apply in practice a national methodology for evaluation of corruption on the basis of the respective international experience, and to ensure regular evaluation of the corruption situation in the country based on such methodology cannot be deemed complied with.

The issue that the body responsible for the anti-corruption policies should be arranging and conducting corruption surveys in the country is also pending. It is partly due to the lack of clear legislative assignment of duties related to the elaboration and implementation of anti-corruption policies to one single authority. It is also unclear how the possibility was addressed of assigning this role to the body responsible for the implementation of the anti-corruption strategy, in line with the recommendation.

***Kazakhstan is partially compliant with Recommendation 1.3., which remains applicable.***

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<sup>24</sup> Interim report for Kazakhstan at the 13<sup>th</sup> IAP monitoring meeting, 16-18 April 2014, see <http://www.oecd.org/corruption/acn/KazakhstanProgressUpdateApril2014RUS.pdf>

## 1.4. Public participation

### *Recommendation 1.4.*

- **To ensure broad involvement of the civil society organizations in development and implementation of the anti-corruption policy, having excluded a selective approach towards such co-operation. To maintain dialogue with the civil society in consultations on anti-corruption policy and anti-corruption screening; to consider broadening the composition of the Interdepartmental Commission for Improvement of the Legislation in Anti-Corruption Area by inclusion of non-governmental experts. To consider introducing rules on mandatory public discussion of the most important draft legal acts with an obligation of the drafting body to publicly provide explanation in case of rejection of proposals from non-governmental organizations and other civil society institutions.**
- **To revise the ways of establishment and work of the public and expert councils in order to exclude intervention of the State into the process of nomination of delegates from non-governmental organizations into such councils. To spread into other areas positive experience of the National Council of the interested parties for the EITI promotion.**

As was noted during the second round of monitoring, Kazakhstan has a range of tools to engage public organisations and entrepreneurs in policy making: public councils advising authorities and the Nur Otan Party, regional anti-corruption commissions, and expert councils.

The People's Democratic Party of Nur Otan has a public anti-corruption council at the regional level, with a regional network. During the country visit for the third round of monitoring of Kazakhstan the monitoring team attended a meeting of this council on 26 May 2014. The meeting was to discuss the work done to ensure anti-corruption protection to entrepreneurs in the East Kazakhstan region. The meeting was addressed by a representative of the National Chamber of Entrepreneurs, a regional business chamber.

The Public Council For The Fight Against Corruption And the Shadow Economy has been functioning under the auspices of the Financial Police Agency and its territorial divisions. On 18 June 2012 an ordinance by the Agency approved new terms of reference of the Public Council. As of late May 2014, the Public Council had 16 members, including 4 representatives of the Agency, 6 representatives of the republican Parliament, 3 representatives of public associations, 2 representatives of the business community and one representative of the TV company that belongs to the Nur Otan Party's holding. The council is chaired by a member of Parliament. Among the council members are such representatives of the civil society as the chairman of the "Sange" Research Centre Public Foundation, chairman of the republican public association "Zhanary National Movement against corruption"; Public Foundation of the Centre for Economic Studies, Assessments and Monitoring; deputy executive director of the Forum of Entrepreneurs of Kazakhstan; manager of the Department of legal protection of entrepreneurs at the RK National Chamber of Entrepreneurs. As a result, the majority of the Public Council's members are coming from government entities.

As noted by the NGOs, it is positive that each meeting of the Council is held on-line with regional offices of the Agency participating, which facilitates direct relay of information and receiving feedback from the regions; negative is that the intent to improve corruption indicators by the government authorities results in propaganda work with survey respondents.

The monitoring team found that the Agency's Public Council For The Fight Against Corruption And Shadow Economy was indeed functioning, and some of the non-government organisations represented in the council, took an active part in its work. Kazakhstan presented the Council's Work Plans for 2013 and for the earlier half of 2014, together with the minutes of their meetings. In particular, the Public Council was informed about the outcomes of the Sectoral Programme; the council discussed administrative barriers to doing business; protection of entrepreneurs; examples of effective anti-corruption strategies; implementation of the UN Convention Against Corruption, draft Anti-corruption Business Charter, etc. As for NGOs, the only rapporteur mentioned was the head of the Sange Research Centre.

There are also public councils at other public authorities, acting as advisory and consultative bodies. Pursuant to the instruction of the head of state of 30 January 2013, law enforcement agencies instituted or reactivated their public

councils and undertook steps to review the ways their work was organized. As a result, on 13 February 2013 the Public Council advising the Office of the General Prosecutor on issues of rule of law had its member rotated, and as a result the council had a member of Parliament as a chair, instead of a representative of the General Prosecutor's Office as before. Also, the council now has only one member from the prosecutors, and tends to practice extended meetings drawing on broader public circles.

Certain progress must be recorded in the issue of improved process of establishing public councils. Under the terms of reference of the Financial Police Agency's Public Council For the Fight against Corruption and the Shadow Economy, the decision to incorporate new members is passed by the council's majority present at the meeting. At the same time, it is still common to have public councils at state authorities to be chaired by members of Parliament, or heads or representatives of the said authorities. One such example is the patients' rights council at the Healthcare Ministry which is chaired by an MP.

As for holding consultations on anti-corruption policies with civil society, Kazakh authorities noted that the Financial Police Agency as the authorized anti-corruption body has been working to engage the public in the process aimed at improving anti-corruption policies. Thus, the new draft Anti-Corruption Strategy was circulated among the Public Council members for conceptual comments and proposals. The text of the strategy was published at the Agency's web-site for comments.<sup>25</sup> As noted above, at the end of June 2014 the draft was presented at a conference attended by public organisations and entrepreneurs. The Agency insists that comments from the public are being taken into account during the elaboration of the new anti-corruption strategy.

The Agency also reported about 144 memoranda of cooperation concluded with public organisations and related to anti-corruption issues. The information provided points to active steps taken within framework of such memoranda in various joint events devoted to anti-corruption topics.

In line with the Sectoral Programme for the fight against corruption Kazakhstan has set up regional anti-corruption commissions with members from civil society and the mass media. Such commissions have been established at akimats. Public information also shows that these commissions have indeed been established and are functioning<sup>26</sup>.

Legislation of Kazakhstan provides for scientific anti-corruption screening of draft legal acts conducted by the academic institutions and universities. Selection of experts or institutions is carried out according to public procurement procedure. In practice conducting of such screening is commissioned to state and private institutions, for example "Scientific and research Institute of State and Law named after Gairat Sapargaliev" and JSC "Kazakh Humanitarian and Legal University". However, there is no information on conducting dialogue with the civil society concerning anti-corruption screening of draft legal acts. Placing orders for conducting the screening itself cannot be deemed as such dialogue, as relevant organisations are contractors of state authorities who implement respective contracts.

The resolution of the Majilis of the Parliament of the Republic of Kazakhstan of 8 February 1996 on the Terms of Reference of the Majilis of the Parliament of the Republic of Kazakhstan stipulates that the chamber's committee, may invite to relevant working groups, apart from the authors of the draft law or representatives of state and advisory bodies, also representatives of public associations, research institutions, experts, specialists and executive managers of business entities.

The Report for the Second Round of Monitoring referred to the Extractive Industries Transparency Initiative (EITI) for which civil representatives designate their own delegates. There was no evidence or examples of similar approaches in other spheres or public authorities, however, representatives of the general public reported about the Memorandum of Understanding and Cooperation signed between the Road Committee of the RK Ministry of Transport and Communications, companies contracted to build motorways, and the Association of Research and Industrial Organisations "Azamattyk Kurylta – Civil Assembly", signed on 14 June 2012, which established the acting trilateral Expert Council for transparency and sustainable development along the lines of the model of the National Council of Stakeholders (NCS).

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<sup>25</sup> The draft was published in the section aimed at foreign experts: <http://finpol.gov.kz/rus/ekspertam/>

<sup>26</sup> See, e.g., the Regional Commission at the akimat of the Karaganda region, <http://karaganda-region.gov.kz/rus/news/8080/>

As for possible broadening of the composition of the Interdepartmental Commission for Improvement of the Legislation in Anti-Corruption Area by inclusion of non-governmental experts, note that this Interagency commission has been abolished.

Re *mandatory public discussion of draft legal acts*, the team was informed that pursuant to the Law of the Republic of Kazakhstan “On normative legal acts”, the draft laws circulated to the relevant public authorities for coordination are simultaneously published on the web-site of the responsible authority. The same rule applies to draft resolutions of the Government pursuant to the terms of reference of the Government of the Republic of Kazakhstan (Resolution of the Government No 1300 of 10 December 2002). This duty of the drafting body is connected with the need to give the civil society an opportunity to read the text of the proposed draft, offer comments on its provisions, or submit suggestions and proposals to make the draft better.

Additionally, according to paragraph 10, section 19-1 of the Rules for the organization of legislative drafting in the authorized bodies of the Republic of Kazakhstan approved with Resolution of the Government of the Republic of Kazakhstan No 840 on 21 August 2003, in the event that the draft law affects the interests of private business, the draft law must be published together with expert opinions of the National Chamber of Entrepreneurs of the Republic of Kazakhstan and accredited associations of private businesses. If the drafter disagrees with the expert opinion, the drafter must detail in writing substantiated reasons for disagreeing with the expert opinion. The team received no other examples where non-acceptance of proposals on legal drafts coming from the public should be reasoned.

The monitoring team points out that in general, in view of the representatives of the public, the work involving public organisations is not sufficiently equitable, and it is not always that public authorities heed the opinion of such an organisation, especially in the case of criticism. Public councils often remain nothing but formality, and the initiated issues are not always addressed. Studies conducted by public organisations are not always taken into account either.

A positive signal was served by the address of the President of the Republic of Kazakhstan to the people of Kazakhstan of 17 January 2014 stating the need to update available tools for collaboration of the State with the non-government sector.<sup>27</sup>

Significantly, the Nur Otan Party has prepared a draft anti-corruption law which is proposed to be regulating public involvement in fighting corruption, among other things, by introduction of public anti-corruption screening, submission of proposals to legislative initiative agents on improving anti-corruption legislation, and holding research on corruption deterrence and prevention. As experts believe, if implemented, such provisions may facilitate broader involvement of the public in the formulation and implementation of policies.

Draft Action plan for implementation of the Anti-corruption strategy of Kazakhstan till 2025 provides for development of draft law On Counteraction to Corruption, as well as draft law On Public Control (with period of implementation in 4Q of 2015). Within these laws it is proposed to determine: system of control and mechanisms for evaluation of effectiveness of anti-corruption policy, state of law enforcement practice in the area of anti-corruption, corruption prevention measures with regard to public officials and other persons authorised to perform state functions; the list of corruption offences leading to disciplinary or administrative liability; mechanisms and procedures of public control (hearing of reports, public hearings, monitoring, examination, inspection, investigation).

However, those are just drafts so far and no legal changes can supplant daily routine work aiming to engage public associations in the process of elaboration and implementation of the anti-corruption strategy; therefore, the appropriate indicator of the improved situation in this sphere could be examples of instances when public opinion was in fact taken on board, when there was an effective public dialogue, and when positions of the non-government sector impact decision-making.

## Conclusions

Kazakhstan authorities have made a number of steps towards closer contacts with the public in the establishment and implementation of anti-corruption policies, drafting of regulatory acts, and in passing important state decisions.

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<sup>27</sup> [http://www.akorda.kz/ru/page/page\\_215750\\_poslanie-prezidenta-respubliki-kazakhstan-n-nazarbaeva-narodu-kazakhstan-17-yanvarya-2014-g](http://www.akorda.kz/ru/page/page_215750_poslanie-prezidenta-respubliki-kazakhstan-n-nazarbaeva-narodu-kazakhstan-17-yanvarya-2014-g)

However, this cooperation is not so much broad and inclusive as just emerging. It is still rather hard to describe the role of public institutions in decision-making, including that of anti-corruption, as substantial.

***Kazakhstan is partially compliant with Recommendation 1.4. and it thus remains valid.***

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

### ***Recommendation 1.5.***

- **To carry out an evaluation of how awareness-raising campaigns influenced the dynamics of qualitative and quantitative characteristics of corruption. To use the research data during development of the strategy for further awareness-raising campaigns taking into account the pursued goals and the target audiences. To direct awareness-raising campaigns to the practical aspects of preventing and fighting corruption.**

The state authorities of the Republic of Kazakhstan pay much attention to the efforts to generate an attitude of zero tolerance to corruption among the general public.

The 2011-2015 Sectoral Programme for fighting corruption and its implementing plan of actions prioritise, among other things, “enhanced anti-corruption mentality” and broader collaboration with the institutions of civil society.

Breeding zero tolerance in the legal mentality of citizens is proposed to be defined as one of the key areas of the proposed draft anti-corruption strategy.

Kazakhstan provided information on various awareness events, as part of the topic of awareness campaigns held after the second round of monitoring and the extent to which they are spearheaded towards the practical aspects. The current practice in Kazakhstan is to conduct meetings with “high-risk” government authorities or state enterprises. During such meetings, one of the efficient practices is believed to be demonstration of videos showing apprehension of this authority’s employees. There also have been awareness-raising meetings with university students. Together with the Regional Chamber of Entrepreneurs of the West Kazakhstan region, the Agency initiated a “Don’t be afraid – you are protected” campaign. An educational workshop was held for representatives of small and medium business discussing the topic “My rights during the inspections of businesses conducted by the financial police”. Information and awareness materials were circulated, indicating a mobile phone number, which is, according to Kazakhstan, deemed efficient practice.

In September 2013 together with the Alliance of Undergraduates and the Ministry of Education and Science, the Agency held a republican campaign called “Clean Exams”. The purpose of the action was to promote proper legal mentality and civil activism among university students, and intolerance to violations of anti-corruption laws.

In Kazakh regions meetings were held with business community. For instance, territorial divisions of the Financial police, together with regional chapters of the Forum of Entrepreneurs and National Economic Chamber “Atameken”, held question and answer sessions with small and medium businesses and anti-corruption workshops, attended by heads of all supervisory and law enforcement agencies, public organisations and the mass media. In 2014 in North Kazakhstan region a meeting with entrepreneurs, representatives of “Atameken”, trade and industry chamber concerning issues of barriers for business activities and ways of resolving them, on complying with requirements of non-interference in activities of SMEs and on results of the previous work done.

In September 2013 the Financial police held in Mangistau region a training seminar for SMEs on the topic “On my rights during inspection conducted by the financial police” in order to improve awareness of legal provisions and provide for possibility to address questions entrepreneurs may have.

Apart from the above methods, the financial police make steps to report in the mass media about the work being done, which is also part of the propaganda of anti-corruption efforts. They draw, for that, on the capacities of central and regional mass media, together with other general awareness mechanisms. In 2013, the total number of anti-corruption materials reached 7,103. Visualization of propaganda materials is done with street boards and LED

screens in the streets of larger cities and in crowded downtown areas (railway terminals, airports, catering services, etc.).

At the same time, Kazakhstan failed to provide any assessment as to the impact that awareness campaigns against corruption might have had on the changing qualitative and quantitative characteristics of corruption, or whether any such assessments has been used to generate new awareness campaigns against corruption.

As mentioned above, there are future plans to conduct population surveys of corruption perceptions, and it has been decided, as part of these efforts, to survey awareness anti-corruption campaigns.

Kazakhstan also informed that the draft Anti-Corruption Strategy for 2015-2025 includes a separate chapter on forming of the anti-corruption culture.

## Conclusions

Overall, the fairly active efforts by public authorities of Kazakhstan in generating in the public zero tolerance to corruption and to ensure coverage in the mass media of the State's corruption activities should be rated as positive. There have been numerous awareness campaigns and events in the area of public legal education, some of which have focused on practical aspects of preventing and fighting corruption.

At the same time, there is a lack of practice allowing one to assess the impact of campaigns held on corruption, making it impossible to judge their effectiveness; nor is there any account taken of the campaign effects when planning for subsequent similar events.

***Kazakhstan is partially compliant with Recommendation 1.5., which remains applicable.***

## 1.6. Specialised anti-corruption policy and co-ordination institutions

### ***Recommendation 1.6.***

- **To introduce legislative amendments aimed at assigning the powers of developing and coordinating anti-corruption policy to a specific state agency.**
- **To ensure compliance with Articles 6 and 36 of the UN Convention against Corruption concerning the independence of the specialised anti-corruption agency.**

### **Agency responsible for development and coordination of anti-corruption policy**

Since its establishment in 2003 *The Agency for the fight against economic and corruption-related crimes (financial police)* has effectively been the central agency in matters of anti-corruption policy, prevention and disruption of corruption in Kazakhstan. Pursuant to the Financial Police Law, the purpose of the financial police units is to contribute to the development and implementation of state and legal policies pertaining to the fight against corruption. The Sectoral Programme for the fight against corruption states that the Financial Police Agency shall be the body responsible for the elaboration and implementation of anti-corruption policy. However, at the legislative level, neither the Financial Police Law, nor the terms of reference of the Financial Police Agency approved with the decree of the President of the Republic of Kazakhstan on 21 April 2005, No 1557, spell out the duties of the Financial Police Agency as the body responsible for developing and coordinating anti-corruption policy.

There has been since 2002 a working advisory body: *Presidential Anti-Corruption Commission*. According to its terms of reference approved by the Decree of the President of the Republic of Kazakhstan of 2 April 2002, No 839, its functions include, inter alia, developing and submitting to the head of state its suggestions on issues of anti-corruption, improved anti-corruption laws, methods and techniques of fighting corruption. However, according to the information provided, the work of this Commission is focused on anti-corruption efforts in separate spheres or regions. The team was not given any evidence suggesting that the Commission was involved in the elaboration or implementation of anti-corruption policy in general.

As a result, in practice the Financial Police Agency has until recently been the very body responsible for the development and implement of anti-corruption policy. At the same time, legislation should have clear rules stipulating the assignment of relevant duties, their substance and implementing procedures.<sup>28</sup> This is still pending as since the second round of monitoring there have been no changes in the legislation that would assign anti-corruption policy duties to a specific state agency.

There were important developments on 6 August 2014 when, pursuant to Presidential decree No 883 “On measures to improve further public administration in the Republic of Kazakhstan”, a new body was established: *Agency for matters of civil service and anti-corruption*. The newly established agency was assigned functions and duties in preventing, identifying, disrupting, detecting and investigating corruption crimes and offences. By Decree of 29 August 2014 President of Kazakhstan adopted Regulations on the Agency of RK on Civil Service Issues and Counteracting Corruption. According to the Regulations, the tasks of the new agency include: “participation in development and improvement of the state policy in the areas of civil service, counteraction to corruption and provision of state services”; “forming of the anti-corruption culture and corruption prevention system, as well as minimisation of reasons and conditions for corruption offences”. Among the new agency’s functions: “participation in the development and implementation of strategies and programmes in the areas of civil service and counteraction to corruption”; “development of proposals concerning improvement of legal framework in the areas of civil service and counteraction to corruption”.

The Regulations on the new Agency, therefore, do not directly refer to powers of coordinating the development and the implementation of the anti-corruption policy. The monitoring group believes that the coordinating role of the new Agency with regard to development and implementation of the anti-corruption policy has not been fixed not sufficiently clear in the said Regulations.<sup>29</sup> Possibly, it would be covered by the task of implementation of the anti-corruption strategy, but this can be confirmed only after conducting analysis of the new agency’s activity.

It should also be noted that information about relevant organisational changes was provided after the deadline, so it may not change the evaluation (according to the third round methodology – not later than one month before the report consideration at the plenary meeting).

Also there is draft law “On Preventing Corruption”<sup>30</sup> the version of which of 6 June 2013 was reviewed by the monitoring group. It proposes, inter alia, to establish and define the competence of the *body authorized to counteract corruption in Kazakhstan*, which, among other issues, is proposed to include development of State Programmes for fighting corruption; control of their implementation and performance results; coordinating public authorities, non-government and international organisations and other anti-corruption entities; developing anti-corruption standards preventing the emergence of conditions inducing corruption; and other duties relating to anti-corruption policy and prevention of corruption. Experts believe that such changes may help streamline regulation of the institutional setting for anti-corruption policy development and implementation in Kazakhstan.

The monitoring team was also informed about the Financial Police Agency’s initiative to set up a *Coordination Council of anti-corruption units of central executive authorities*. Draft provisions stipulated that such council will be set up under the auspices of the Financial Police Agency, with permanent membership of the heads of anti-corruption units of central executive authorities, and representatives of the General Prosecutor’s Office, Civil Service Agency, Nur Otan Party, and National Chamber of Entrepreneurs. The monitoring team tends to believe that such a coordinating mechanism could facilitate better coordinated and more efficient anti-corruption efforts on part of the agencies involved. As reported by Kazakhstan, setting up and functioning of the Coordination Council of anti-corruption units of central executive authorities will be considered during development of the draft law on Authorised Agency for Fighting Corruption (no further details were provided on this draft law).

Therefore, the country is largely non-compliant with this part of the recommendation.

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<sup>28</sup> “Whatever the range of duties, the agency or agencies will need official legislative authorities to carry out its functions”. More about the need to have clear legislative definition of duties of anti-corruption agencies, see Legislative Guide for the implementation of the UN Convention Against Corruption, issued by the UN Office on Drugs and Crime in 2010 (comments on the implementation of Article 6 of the Convention, pp. 8-14).

<sup>29</sup> As is the case in other countries, see e.g. laws of Slovenia and Latvia.

<sup>30</sup> Draft Law of the Republic of Kazakhstan “On Preventing Corruption”, as amended on 06.06.2013

## Independence of the specialized anti-corruption agency

As, since the Second round of monitoring, there have been no amendments to legislation in Kazakhstan, promoting stronger independence of the Financial Police Agency, the earlier criticism on this part is still valid.

The Agency for the fight against economic and corruption-related crime (financial police) – the specialized anti-corruption agency of Kazakhstan until 6 August 2014 – was established with the decree of the President of the Republic of Kazakhstan, No 1557, of 21 April 2005 stipulating the Agency's terms of reference. Under its terms of reference, the Agency is a state agency of the Republic of Kazakhstan which is subordinated and reports directly to the President of the Republic. Its chairman and his deputies are appointed or dismissed by the President of the Republic of Kazakhstan. During the country visit, representative of Kazakhstan explained that in practice the agency's chairman and his deputies are selected by a commission of staff officers of the Presidential Administration and heads of state agencies. Heads of departments combating white collar and corruption crimes (the financial police) in the regions and in the cities of Astana and Almaty, and that of the Agency's Financial Police Academy are appointed by the Chairman of the Agency in coordination with the Presidential Commission on human resources policy at law enforcement agencies (formerly, in coordination with the Head of the Presidential Administration). The Chairman of the Agency and his deputies are politically appointed civil servants.

According to the President's Decree of 29 August 2014 No. 900 the Agency for Civil Service Issues and Countering Corruption is a state authority that is directly subordinated and reports to the President of Kazakhstan. Head of the Agency and his deputies are political officials and are appointed by the President.

Because a new anti-corruption agency was created in Kazakhstan, it is vital to consider issues of independence, it being one of the key conditions ensuring efficient performance of specialized anti-corruption agencies. In contrast to other crime, corruption is often to be found across various levels of government, and the lesser the pressure exerted on the agency that has been called forth to combat corruption, the more efficient it will be. International standards and practices from countries around the world that have set up their anti-corruption services, are rich in examples and solutions suggesting how to ensure in practice independence of the specialized anti-corruption agency.<sup>31</sup> In particular, these standards rely on such principles as: appropriate, exhaustive and stable legal framework; sufficient resources and highly qualified personnel; selection of leadership that is transparent and based on objective criteria; the maximum length of office for the leading positions specified in law; the service's ability to act without interference, seeking approval or without improper reporting requirements, particularly in criminal investigations.<sup>32</sup>

It is particularly essential to ensure a transparent and proper selection and dismissal process for the leadership of the anti-corruption agency. The procedure is more perfect if the head of the specialized agency is appointed by a special commission or by representatives of different branches of power subject to an open and transparent competitive process. The purpose of selection is to appoint a political neutral leader, with unblemished reputation and competent in fighting corruption, with experience in administration and with strategic mentality.<sup>33</sup>

On a positive note, the financial police receive appropriate funding and material and technical support. It is essential to maintain this positive impetus in funding and logistical support for the newly established Agency. According to the information reported, the financial police are funded from the republic budget with allocations from budgetary programmes. Those budgetary programmes define expenditures in line with the strategic aims, goals, objectives and performance targets stipulated in the Agency's strategic plan which contains performance indicators and levels of funding. The statistics of expenditures through all budgetary programmes of the Agency together show: KZT 9.4 bln (Euro 38.5 mln) in 2010; KZT 11.5 bln in 2011; KZT 14.1 bln in 2012; KZT 18.8 bln in 2013 (Euro 77 mln) (budgetary allocations grew 98.9 % in 2010 – 2013).

During the onsite visit the monitoring team was informed about the recent special personnel appraisal across law enforcement agencies, including the financial police. The grounds for the personnel appraisal were served by the Decree of the President of the Republic of Kazakhstan of 8 April 2012, No 292. As a result, the top leadership in the financial police was rotated by 85% and the mid-level management by 27%. It was also reported during the onsite visit, that such personnel appraisal was a tool to help improve professional qualifications in law enforcement as part of the drive to reform law enforcement services (specifically, pursuant to the adoption of the Law Enforcement Law).

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<sup>31</sup> OECD, *Specialized anti-corruption institutions: review of models*, 2013 (only in English).

<sup>32</sup> See, e.g.: Martin Kreutner, *10 Guiding Principles and Parameters on the Notion of Independence of AC Bodies*, in Kreutner M. (ed.), *Practice Meets Science*, IACSS, Vienna, 2010.

<sup>33</sup> OECD, *Specialized anti-corruption institutions: review of models*, 2013, pp. 26-27 (in English).

Experts pointed out that since application of such mechanisms to anti-corruption officers may undermine their independence, it requires a highly refined approach and should be applied only subject to the law.

## **Conclusions**

The institutional mechanism behind the development and implementation of state anti-corruption policy has failed to gain sufficient legal clarity since the adoption of the recommendation. Any legislative amendments in that respect exist only in drafts. Nor were there any changes ensuring safeguards to independence of the anti-corruption agency, with the remaining risk of improper influence. The team underscores the importance of having this anti-corruption standard implemented, and urge Kazakh authorities to take steps to comply with this recommendation during the review of legal and normative acts in connection with the establishment of a new anti-corruption agency, as well as to maintain the current positive trend in funding and logistical support of the agency.

Recent changes in the status of the Financial Police Agency confirm issues with regard to the anti-corruption agency's independence that were highlighted in the Second round monitoring report and have not been addressed since then. Abolishing of the Financial Police Agency and its merger with another agency (Civil Service Agency) happened based on the presidential decree, as far as the monitoring group is aware, without prior discussion and justification of such decision. This resulted also in replacement of the management and personnel of the anti-corruption agency. The very possibility of such reorganisation of the agency responsible for countering corruption, changing of its mandate and staff cannot but affect its independence. Such situation is problematic from the point of view of Articles 6 and 36 of the UN Convention against Corruption and standards on independence of anti-corruption agencies.<sup>34</sup>

***Kazakhstan is not compliant with recommendation 1.6. and it remains valid.***

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<sup>34</sup> See, for example, Jakarta Statement on Principles for Anti-Corruption Agencies, UNODC, November 2012, in particular the following provisions: «Principle of permanence: ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA». Source: [www.unodc.org/documents/corruption/WG-Prevention/Art\\_6\\_Preventive\\_anti-corruption\\_bodies/JAKARTA\\_STATEMENT\\_en.pdf](http://www.unodc.org/documents/corruption/WG-Prevention/Art_6_Preventive_anti-corruption_bodies/JAKARTA_STATEMENT_en.pdf).

## II. Criminalization of corruption

### 2.1-2.2 Offences and elements of offence

#### *Recommendation 2.1.-2.2.*

- To continue harmonisation of the legislation on corruption offences (Law on the Fight against Corruption, Criminal Code, Code of Administrative Offences).
- To bring provisions on criminal liability for corruption offences in compliance with international standards, namely:
  - - to establish criminal liability for: promise/proposal of a bribe, acceptance of promise/proposal of a bribe, as well as for solicitation of a bribe as completed corruption crimes in the public and private sectors; giving a bribe and commercial bribery for the benefit of third parties; trading in influence;
  - - to define the notion of 'bribe' in the Criminal Code and to envisage that the object of corruption crimes and administrative offences can be both material and any other (non-material) benefits;
  - - to consider establishing criminal liability for illicit enrichment.
- To ensure that the offence of money laundering is criminalized in line with the international instruments and definitions from the Criminal Code and the Law on Combating Money Laundering and Financing of Terrorism are consistent.
- To envisage an effective and dissuasive liability of legal entities for corruption crimes with proportionate sanctions, which should be commensurate with the committed crime. Both commission of a crime by certain officials and lack of proper control by the governing bodies / persons of such legal entity, which facilitated commission of the crime, shall trigger corporate liability. To conduct additional consultations with business representatives regarding criminal liability of legal entities and the respective draft law; to envisage deferred enactment of the law introducing criminal liability of legal entities.
- To analyse application of provisions on effective regret in administrative and criminal corruption offences and, if necessary, introduce changes which will exclude possibility of unjustified avoidance of liability.

**Legislative amendments.** There have been certain amendments to the provisions of the Kazakhstan's laws on liability for corruption or corruption-related offences since the Second Round of Monitoring:

- 1) The list of "corruption offences" referred to in paragraph 5 of notes to Article 307 of the RK CC was supplemented with some new offences: paragraph (b), part three, of Article 177-1 (Creation of and/or leadership over financial (investment) pyramid, committed by a person authorized to carry out state functions or other equal-status persons, should it be associated with the use of his office); paragraph (b), part three, of Article 226-1 (illegal takeover, committed by persons authorized to carry out state functions or other equal-status persons, should it be associated with the use of his office); abuse of power or official misconduct, or equally inaction, committed by army personnel (Articles 380-1 and 380-2 CC);
- 2) Sanctions have been amended for some corruption offences, namely, such punishment as a fine amounting to the total of wages or other income of the accused received during a specified period of time, has been abolished (still effective are fines in the multiples of monthly calculation rates<sup>35</sup> - see below for details on amendments in fines). Relevant amendments have been made in all other CC articles with similar fines.

<sup>35</sup> In 2014 1 MCR equalled KZT 1,852 (about Euro 7.3).

- 3) General provisions on confiscation have been supplemented with a provision specifying that confiscation is extended also to assets that are instruments or means of crime;
- 4) It is stipulated that custodial sentences shall not apply in money laundering offences given voluntary and full reimbursement of the pecuniary damage inflicted through the offence to a citizen, organization or the State, except when this offence has been committed by a person authorized to carry out state functions or other equal-status persons, should it be associated with the use of his office (in the new CC this rule does not cover all offences of money laundering);
- 5) There is now a longer list of offences not eligible for the statute of limitations: added to crimes against peace and security of humanity, and terrorist crimes, are now particularly grievous violent crimes, crimes against the constitutional system and security of the State, in the sphere of economic activity, against public security and public order. These changes have not been extended to corruption offences. (In the new CC the statute of limitations is not applied to corruption offences – see below).
- 6) Article 231 of the CC “Commercial Bribe” has been amended: the liability has been introduced for general patronage or connivance in office in return for illicit transfer of cash or other assets; some new offences have been introduced: commercial bribe in large amounts (in excess of 500 MCRs) and particularly large amounts (in excess of 2,000 MCRs);
- 7) The July 2013 Law abolished Article 532 in Chapter 30 of the Code of Administrative Offences “Financial Control Abuses” (*“Deliberate omission or submission of incomplete or falsified declarations of income, assets and other information provided for by the corruption legislation, by persons nominated for some state office or office associated with the performance of state of equal-status functions, or else by such person’s spouse”*). A similar but not identical article though was incorporated in the Chapter on administrative offences in the tax area (newly amended Article 206-2 CAO<sup>36</sup>).

In July 2014 Kazakhstan adopted a **new Criminal Code** (see some excerpts in the appendix), which comes into force on 1 January 2015. Similar to the previous version, the Code has a separate Chapter on corruption and other crimes (criminal offences in the amended version) against the interests of civil service and public administration. Comparing it to the still effective 1997 Criminal Code, some of the amendments made are as follows:

- 1) Definitions used throughout the Code are grouped in a glossary in Article 3 of the Code, which is overall a positive result, as it improves legal certainty;
- 2) New definitions have been added for the terms: “functions of organization and management” (*“the right granted in the order prescribed by the law of the Republic of Kazakhstan to issue orders and ordinances mandatory for execution by the subordinates in the office, and to apply to subordinates incentives or disciplinary sanctions”*) and “business and administrative functions” (*“the right granted in the order prescribed by the law of the Republic of Kazakhstan to manage and dispose of assets on the balance sheet of the organisation”*); previously they had not been defined by the code and were interpreted by the RK Supreme Court through its regulations;
- 3) The definition of the “person in the position of authority” has been broadened: (*“a person employed by the civil service”* replaces the earlier *“public official of a state agency”*; examples of persons in the position of authority are listed: *“officer of a law enforcement or specialized state agency, military police, serviceman assisting public order”*). The 1997 CC had this definition of the “person in the position of authority” in Article 320, but it extended to the entire body of the code;
- 4) The list has been extended of persons holding an important public office, which now includes a group of persons who, pursuant to the RK legislation on civil service, hold Corp A administrative public office; it is specified that persons holding an important public office include members of Parliament and judges;
- 5) The definition has been amended for “persons authorized to perform public functions”: *“civil servant under the Civil Service legislation of the Republic of Kazakhstan; member of maslikhat”, which replaced*

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<sup>36</sup> “Deliberate non-submission of a declaration of income and assets subject to taxes by a person holding a state office; by a person dismissed from the civil service for wrongdoing, or else by the spouse of such persons, within the deadlines stipulated by the legislation of the Republic of Kazakhstan”.

*the earlier: "public officers, members of Parliament and maslikhats, judges and all civil servants under the Civil Service legislation of the Republic of Kazakhstan";*

- 6) Persons enjoying equal status with persons authorized to perform public functions now include employees of the National Bank of the Republic of Kazakhstan and its agencies;
- 7) There has been a change in the approach to sanctions for corruption offences (see below for the relevant section in this report):
  - Fines in a fixed amount (specified multiple of monthly calculation rates) are replaced by a fine divisible by the bribe amount (e.g., the main offence of bribe taking is punishable by a 50-fold amount of the bribe; the main offence of bribe giving, by a 20-fold amount of the bribe);
  - The fine which is a multiple of the bribe is applied as an alternative sanction in all offences of bribe taking or bribe giving, whereas before aggravated offences allowed only for custodial sentences;
  - In the offences of bribe taking and bribe giving, acts committed by public officials and persons holding important offices have been included in the main offence (used to be aggravated offences), and as a result, sanctions against such persons have effectively decreased (e.g., while in the 1997 CC, bribe taking by a person holding an important office could lead to 5 to 10 years in prison, in the new code the sentence is up to 5 years);
  - Assets confiscation is a mandatory sanction for all offences of bribe taking and a possible sanction for some of the bribe-giving offences;
  - Forfeiture of the right to hold certain offices or be engaged in certain activities for a specified period of time has been replaced by the mandatory life forfeiture of the right to hold certain offices or pursue certain activities for all types of corruption offences;
  - In corruption cases courts are obliged to make submission on depriving convicted person of awards and ranks (before it was discretionary);
- 8) Amounts of large and particularly large bribes have been changed: the "large amount" was raised from 500 MCRs (about Euro 3650) to from 3,000 (about Euro 21,900) to MCRs 10,000 (about Euro 73,000), and the "particularly large amount" from 2,000 MCRs (ca Euro 14,600) to over 10,000 MCRs;
- 9) The bribe taker is also defined to include "public officials of a foreign state or an international organization";
- 10) Probation or discharge from criminal liability following a reconciliation, discharge from criminal liability against surety may not apply to offenders who committed a corruption crime;
- 11) Corruption offenders are not eligible for the discharge from criminal liability due to statute of limitations.

***"To continue harmonisation of the legislation on corruption offences (Law on the Fight against Corruption, Criminal Code, Code of Administrative Offences".***

Judging from the responses given by Kazakhstan to the Third Round Questionnaire, there have been no amendments to the Criminal Code, Code of Administrative Offences and the Law on the Fight against Corruption to resolve the discrepancies mentioned in the Report for the Second Round of Monitoring. Responses mentioned to the draft new Criminal Code but referred to its provisions on liability, which is discussed below under Recommendation 2.3.

Kazakhstan reported about great amount of work conducted to improve the criminal law and that this work is continued; in particular, new Criminal Code and Code of Administrative Offences were adopted, as well as amendments in the Law on the Fight against Corruption. This, in Kazakhstan's opinion, attests to the partial fulfilment of the recommendation.

However, the monitoring group believes that issues raised in the Second Round Report remain valid even after adoption of the new versions of the Criminal Code and the Code of Administrative Offences, which come into force on 1 January 2015.

Article 206-2 CAO ("Violations of Financial Controls"), which was implemented in 2013 (see above) does not specify the offence of "submission of incomplete or falsified declarations of assets and income", although it is mentioned in

paragraph 5 of Article 9 of the Anti-Corruption Law; whereas paragraph 5-1 of the same article of the law stipulates that acts identified in paragraph 5 of Article 9, if committed with malice, or repeatedly, are subject to administrative liability. Thus, after the amendments, there is one more inconsistency between different legislative acts. This drawback is not addressed in the new 2014 Code of Administrative Offences. In addition, there is no clarity on paragraph 6 of the same article of the law, which says that acts defined in paragraph 5 of Article 9, if committed for the first time with three years after the person was relieved of public or equal-status functions, or if committed repeatedly, are subject to administrative liability under law – but there is no mentioning of the mandatory element of intent.

The new CC, as in the previous version of the Criminal Code provides a list of corruption offences. But while in the 1997 Code a condition for making an act corruption was defined as *“obtaining by the offenders material benefits and advantages”*, the new code does not have it. In addition, the new Criminal Code of Kazakhstan has a separate Chapter 9 “Criminal offences against the interests of service in commercial and other organisations” which consists of five Articles: “Abuse of Office (Art 250); “Abuse of authority by private notaries, assessors, private court bailiffs, mediators and auditors working for an audit organizations” (Art 251); “Abuse of authority by employees of private security firms” (Art 252); “Commercial bribe” (Art 253) и “Malpractice” (Art 254). Most of the listed offences effectively criminalize corruption in private sector but they were not qualified as “corruption offences”. Nor was deemed corruption the offence of “Obtaining illicit remuneration” (Art 247 2014 CC; Art 224 1997 CC) which specified liability for *“illicit obtaining by an employee of a public agency or public organization who is not a person authorized to perform public functions or an equal-status person, or else by an employee of a non-public organization who does not perform managerial functions, of pecuniary remuneration, privileges or services of material nature in exchange for doing work or rendering a service which is part of his duties”*.

There is no clarity also about the criteria for qualifying certain offences as corruption. As it follows from the analysis of the new RK CC, there are issues with defining “corruption offence” or “corruption crime”, which, in turn, may result in distortions and inaccuracies in monitoring changes in the level of corruption crimes based on the statistics, or in the choice of approaches to combat each of the category of crimes.

Art. 3 RK CC (explanation of some definitions in the Criminal Code) provides an exhaustive list of corruption offences. Specifically, it includes acts qualified under articles 189 (para 2) part three), 190 (para 2) part three), 215 (para 3) part two), 216 (para 4) part two), 217 (para 3) part three), 218 (para 1) part three), 234 (para 1) part three), 249 (para 2) part three), 307 (para 3) part three), 361, 362 (para 3) part four), 364, 365, 366, 367, 368, 369, 370, 450, 451 (para 2) part two), and Article 452 of the Criminal Code. In spite of the list in Art 3 of the Criminal Code, only some of them are covered by Chapter 15 CC (Corruption and other criminal offences against interests of public service and public administration), which seems to point to a discrepancy in the substance of these norms.

One may assume that the key criterion for deeming offences as corruption might have been the qualifying attribute of “a person authorized to perform public functions or an equal-status person, or an executive officer, or person holding an important public office”. However, from the norms of the Special part of the RK CC it follows that the bulk of offences shows a qualifying attribute of “using his office”, which is broader in meaning, and yet these offences have not been included in the list of corruption offences.

There is doubtful merit in including, among corruption offences, e.g., acts involving issue of an invoice without any actual work done, or service rendered, or goods dispatched by a person authorized to perform public functions or an equal-status person, or by a person holding an important public office (para 4, part 2 of Article 216 CC), and not including there, e.g., human trafficking by a person in office, which complies with the mandatory requirements (offender, motive and purpose). In opinion of the monitoring group, under certain circumstances both of these offences can be treated equally as offences committed through corruption.

Definitions in the RK Anti-Corruption Law use the term “corruption-related offences”, which equally was not addressed when attempting to classify corruption offences.

Because of these omissions, there is an obvious conflict between provisions of the Criminal Code and other legal acts, resulting in inappropriate treatment as corruption crime some offences committed through corruption, whereas some corruption offences (commercial bribe, etc.) and offences committed through corruption are not treated as such.

Criticism for such classification of corruption offences can be levied for purely technical reasons. Specifically, embezzlement by a person authorized to perform public functions or an equal-status person, or by an executive official, or by a person holding an important public office, in particularly large amount, will be qualified, pursuant to Article 13 RK CC, under para.2, part 4, Art 189 RK CC, and there is no requirement for an additional qualification under para 2, part 3, Art 189, and as a result, formally, it may not be treated as corruption offence.

Additionally, with a new Criminal Code adopted, there was an amendment in the definition of the term “ person holding an important public office”: it is a “person holding an office which is stipulated by the Constitution of the Republic of Kazakhstan, constitutional and other laws of the Republic of Kazakhstan for direct performance of the functions of the State and authorities of state agencies, including a member of Parliament or a judge; or a person who, pursuant to the civil service laws of the Republic of Kazakhstan, holds a political public office or a Corps A administrative public office.

As before, the new Code of Administrative Offences has a separate chapter on administrative corruption offences. It specifies liability, in particular, for “inaction by heads of anti-corruption state agencies” or for “retaining persons who committed a corruption offence before”. Such offences are not corruption offences in the interpretation of the Anti-Corruption Law because there is no transfer of material benefits.

***“To bring provisions on criminal liability for corruption offences in compliance with international standards, namely:***

- ***to establish criminal liability for: promise/proposal of a bribe, acceptance of promise/proposal of a bribe, as well as for solicitation of a bribe as completed corruption crimes in the public and private sectors; giving a bribe and commercial bribery for the benefit of third parties; trading in influence;”***

In the responses to the Third Round Questionnaire, Kazakhstan reported that criminalization of offer/promise of a bribe or solicitation of a bribe was discussed by an interagency working group drafting the new CC and CAO, and was not supported by the members of the group. Kazakhstan lists a number of arguments that they believe must substantiate this decision. What follows below are both arguments and comments to them.

To start with, the recommendations offered to Kazakhstan are not unique; similar recommendations have been offered to all Istanbul Action Plan countries and are based on clear and unambiguous international standards to be found in the documents binding on its signatories (UN Convention Against Corruption; Council of Europe Criminal Law Convention on Corruption; OECD Convention on Combating Bribery of Foreign Public Officials). Arguments against introduction of completed offences for “promise/offer/solicitation of a bribe” have been time and again analysed and refuted in IAP reports – see Report of the Second Round of Monitoring for Kazakhstan (p.32) and the Summary Report on the IAP Second Round of Monitoring in 2009-2013 (pp. 68-70)<sup>37</sup>. Also, “attempt and preparation” of corruption crime have not been accepted as functionally equivalent to the above act by any other international monitoring mechanisms (e.g., GRECO and the OECD Working Group on Bribery – see references in the OECD/ACN Summary Report for 2009-2013).

Significantly, after the Report for the Second Round of Monitoring of Kazakhstan was approved, there was work ongoing to draft a new version of the Criminal Code, which was adopted in July 2014 and will come into force on 1 January 2015. It opened up a wonderful opportunity to comply with the recommendations. Regrettably, the new code does not include the provisions that would comply with the IAP recommendations.

Arguments of Kazakhstan authorities:

1) According to Kazakhstan authorities, the act of “promise/offer of an undue advantage to a public official” effectively manifests itself in the communication to the official, orally or otherwise, the intention to give him a bribe. Deeming the intention to commit a crime as completed offence is unacceptable in the criminal law doctrine of Kazakhstan. Criminal can only be actions (inaction) that pose danger for the public, entail public injury or create immediate threat of such injury.

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<sup>37</sup> [www.keepeek.com/Digital-Asset-Management/oecd/governance/anti-corruption-reforms-in-eastern-europe-and-central-asia\\_9789264204294-ru](http://www.keepeek.com/Digital-Asset-Management/oecd/governance/anti-corruption-reforms-in-eastern-europe-and-central-asia_9789264204294-ru).

Comments of the monitoring team: This is exactly where the conflict with international standards lie as they treat promise, offer of a bribe, solicitation of a bribe, acceptance of the promise or offer as actions that pose sufficient public danger to be treated as completed offences and, moreover, be punished with sanctions at least as high as bribe giving or bribe taking. For instance, in its report on the third evaluation round for the Russian Federation, GRECO notes that *“under the Convention, corruption offences are to be considered completed once any of the above-mentioned unilateral acts is carried out by the bribe-giver or the bribe-taker. The GET therefore takes the view that the offer and the promise, the request and the acceptance of an offer or promise which are key components of the bribery offences established under the Convention need to be explicitly criminalised in order to clearly stigmatise such acts, submit them to the same rules as the giving and receiving of a bribe and avoid loopholes in the legal framework”*.<sup>38</sup> Similar conclusions are offered in other GRECO reports, and in the reports by the OECD Working Group on Bribery.

2) Kazakhstan also notes that *“under the criminal law theory, the idea of accepting the beginning of preparatory actions as completion of offence can only apply to grave and particularly grave crimes, which, under the effective national criminal legislation, the unaggravated offences of taking and giving a bribe are not. Crimes with truncated construction of the elements of offence are exceptions to the rule in the Criminal Code of the Republic of Kazakhstan. Those exceptions include, among others, planning, preparation and starting a war of aggression (part 1 Art 156 RK CC), spying (Art 166 RK CC), or crimes of terrorism; deeming corruption their equal would result in the inadequate toughening of criminal liability. Therefore, criminalization of offer or solicitation of undue advantage, or their acceptance, is premature at this moment in time”*.

Comments: The criminal law theory is not an unshakeable absolute, and with progress in public relations and international standards it may and should change. Kazakhstan agreeing to accept the standards enshrined in international instruments is sufficient reason for reviewing the doctrine. This was the way followed by other countries, including IAP countries (Georgia, Azerbaijan, Ukraine and others). In addition, as Kazakhstan’s responses indicate, even the current Criminal Code has relevant exceptions, which means that criminalizing corruption offences can be done without amending the General Part of the Criminal Code.

3) Further, Kazakhstan argues: *“Elements of the bribe offence under Article 15 of the Convention, are stipulated as “offer” and “promise” of undue advantage in the General Part of the RK CC and pertain to the attempt and preparation for crime (bribe giving) (Article 24 CC). In Russian, terms “promise” and “offer” cover instances of unilateral expression of intention to do something. Pursuant to the Legislative Guide for the implementation of the UNCAC, the Convention treats promise as reaching an agreement to give (take) a bribe. Such kinds of actions are defined in the legislation of Kazakhstan as conspiracy and are treated as a type of preparation. Pursuant to the Guidance, an offer in the Convention is a unilateral intention to do something. Such act is qualified by Kazakh legislations as preparation for crime. An offer of a bribe does not presuppose any agreement between parties”*.

Comments: The Report for the Second Round of Monitoring of Kazakhstan offers a detailed discussion whether attempt/preparation to bribe giving/taking is equivalent to criminalising these acts as completed offences. The Report (p. 32) also lists the arguments against as follows:

- The liability for preparation for a crime (Article 24 of the Criminal Code) is applied only to grave or especially grave crimes, while not all offences of bribery are classified as grave and especially grave crimes (the first and the second paragraphs of Article 312 of the Criminal Code provide for crimes of medium gravity). Accordingly, there is no criminal liability for promise and offer of a bribe which is not a grave or especially grave crime;
- According to Article 24 of the Criminal Code liability for inchoate (incomplete) crime is applied only if the crime was not completed due to the circumstances beyond the person’s control, while in accordance with Article 30 of the Criminal Code a person shall not be liable if he voluntarily and finally refused from completing the crime, even if there was preparation for a crime or attempted crime. Thus, a person will avoid criminal liability if he refuses from his offer or promise of a bribe before receiving an unambiguous refusal from a potential bribe-taker.
- Article 56 of the Criminal Code provides for lower sanctions for incomplete crimes – the term or amount of sanction cannot exceed half (for preparation) or  $\frac{3}{4}$  (for attempted crime) of the maximum term or amount of the most severe sanction envisaged by the respective article of the Special Part of the Criminal Code for the completed crime. Such ‘discount’ is disproportionate to the gravity of the offence in the form of promise or offer of a bribe (since it concerns an intentional attempt to bribe an official, which was not

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<sup>38</sup> See GRECO Report on the third round of evaluation of the Russian Federation (Theme I), pp. 22-23, [www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3\(2011\)6\\_RussianFed\\_One\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round3/GrecoEval3(2011)6_RussianFed_One_EN.pdf).

- completed due to circumstances beyond the control of the offender).
- Effectiveness of the liability for promise or offer of a bribe – it is unnecessary to wait for completion of a crime, it is sufficient to prove the fact of promise or offer of a bribe and the respective intention rather than proving existence of intention to give a bribe which was not realised due to circumstances beyond the person’s control.
- Prosecution for promise / offer of a bribe as an incomplete crime does not cover all practical situations, for example, case of an oral promise, which will be considered as demonstration of intention to give a bribe and without performance of minimal actions, which will constitute preparation for bribery or attempted bribery, will not be punished.

4) Further, Kazakhstan argues that incorporating terms of “offer” and “promise” of a bribe in Article 312 CC (Bribe giving) would improperly focus law enforcement authorities on detecting only separate elements of the completed offences of bribe taking and giving, which, essentially, should be qualified through attempt and preparation for a criminal offence; it would also create problems of qualification of crime and distinguishing between bribe giving and provocation. As a result, what would happen is that, to establish the offence of offer and promise of a bribe, evidence would be collected without recording of the fact of taking or giving the bribe, which is in fact the key proof of bribery: without it prosecution would be based solely on supposition of intent to commit bribery. According to Kazakhstan, it is likely that in detecting corruption, the completed offence of the bribe taking and giving would be left without due attention.

Comments: Such issues in law enforcement could be avoided, if the relevant CC article provides that “offer” and “promise” of a bribe are completed offences, same as bribe giving. With this, the purpose of criminal prosecution for corruption offences would be achieved; moreover, it may even lead to better corruption prevention, since it will be sufficient to prove intentional act of promise/offer or solicitation of a bribe to prosecute, without any need to wait and prove the reciprocal action. Otherwise, a more lenient sanction or even no liability for promise or offer as for preparation encourages corruption, because the perpetrator has this opportunity to “recall” his promise/offer/solicitation until he gets a positive response from the other party: it encourages offers or solicitation of a bribe. As for segregating bribery and provocation, provocation of bribe giving is banned for public officials (provided it is provocation and not the allowed imitation of bribe giving as part of a police operation) while for other persons promise/offer of a bribe will be treated as a completed offence.

*“As a result, what would happen is that, to establish the offence of offer and promise of a bribe, evidence would be collected without recording of the fact of taking or giving the bribe, which is in fact the key proof of bribery: without it prosecution would be based solely on supposition of intent to commit bribery...”* – it is not clear what the issue is, since the proof of intent in offer or promise of a bribe will be enough to prosecute for the relevant actions. And, indeed, the recording of the bribe giving or taking will no longer make sense if it is possible to prove a completed offence based on the promise/offer without any need to prove intent of bribe giving/taking.

*“it is likely that in detecting corruption, the completed offence of the bribe taking and giving would be left without due attention”*.- As the best world practices suggest, investigating corruption offences should not be limited to proactive measures (catching red-handed at the time of the corrupt deal) but instead rely actively on retrospective methods of investigation (e.g., financial investigations) after the crime was committed. In the latter case, as a rule, the bribe will be taken or given, which can be established by tracing the money trail, actions by the official while in office, etc.

5) Kazakhstan also refers to paragraph 9 of Article 30 of the UN Convention Against Corruption, in which qualification of offences recognized as such under the Convention is the matter of domestic legislation of each member state, and the criminal prosecution and sentencing for such crimes are based on this legislation.

Comment: In the Legislative Guide for the implementation of the UNCAC (paragraphs 20-21), “... Article 30, paragraph 9, of the Convention reiterates the principle that the description of the offences is reserved to the domestic law of States parties (see also art. 31, para. 10 and chap. III of the present guide, on criminalization). States may have offences that are different in scope (such as two or more domestic crimes corresponding to one crime covered by the Convention), especially where this reflects pre-existing legislation or case law. 21. It is emphasized that the mandatory provisions of the Convention serve as a threshold that States must meet for the sake of conformity”.

Thus, the Convention states that provisions of domestic law may implement the requirements of the Convention differently, but they all must reach the minimum threshold of compliance with mandatory provisions. In addition, under para. 1, Article 65 of the Convention, each member state shall pursue, in accordance with the fundamental

principles of its domestic law, steps as required, including legislative and administrative measures, to ensure compliance with its commitments under the Convention. Therefore, the provision of the Convention referred to may not be sufficient grounds for refusing to implement mandatory provisions on criminalization of certain corruption acts as provided for by the UN Convention Against Corruption.

Therefore, Kazakhstan is not compliant with this part of the recommendation.

Also, there are some doubts over arguments substantiating legal differentiation in the current and new RK Criminal Code between receiving gifts, which is prosecuted in the disciplinary or administrative order, and criminal bribe taking. Notes to Article 366 (Bribe taking) specify that it is not an offence, by virtue of its insignificance, and is not prosecuted otherwise in disciplinary or administrative order, taking - for the first time by a person specified in part one of this article – of property, rights to property or another material benefit as a gift, in the absence of prior agreement, in exchange for the earlier performed lawful actions (inaction) unless the value of such gift exceeded two monthly calculation rates (about Euro 15). Under part 2, Art 115 RK CC, property includes, among other things, cash, and, therefore, receiving a gift, subject to disciplinary or administrative prosecution, may be taking cash, and this we deem unacceptable.

***“To establish criminal liability for: ... giving a bribe and commercial bribery for the benefit of third parties;”***

In the replies to the Third Round Questionnaire Kazakhstan reported that the Law of 7 December 2009, No 222-IV, amended Article 311 CC (Bribe taking) to criminalize bribe taking by officials for the benefit of third parties (“for oneself or other persons”). Hence, according to the Kazakh authorities, bribery committed for the benefit of third parties was criminalized through establishing criminal liability for taking bribes for third parties. Actions committed by the bribe giver for the benefit of third parties are covered by the disposition of the elements of offences “Bribe giving” and “Bribe taking”.

Such explanations are hard to accept. Bribe giving and bribe taking are different offences, and one offence does not cover the other one. Bribe giving for the benefit of third parties may not be criminalized through the offence of bribe taking, as the latter deals with the actions of the bribe taker and does not establish the liability of the bribe taker. It is also unclear what is wrong with amending Article 312 (Bribe giving) similarly to the way Article 311 RK CC has been amended, providing explicitly for the liability for bribe taking “for oneself or other persons”. Such amendments would then comply with clear-cut international standards and to IAP recommendation.<sup>39</sup>

The new RK Criminal Code (Art 367 “Bribe giving” and Art 253 “Commercial bribery”) also fails to comply with the recommendation of the previous monitoring round.

***“To establish criminal liability for: ... trading in influence;”***

Kazakhstan authorities report that Article 18 (Trading in influence) of the UN Convention Against Corruption does not require mandatory criminalisation of the offence. Under this Article, State Parties shall consider the possibility of establishing trading in influence as a criminal offence. This issue was discussed as part of the drafting of the new RK Criminal Code.

Under the UN Convention Against Corruption establishing this act as criminal offence indeed is optional. However, the Istanbul Action Plan monitoring is not limited to provisions of the UN Convention or only its mandatory provisions. The IAP monitoring is based on a broad list of standards, where the UN Convention is only one of many. Thus, abuse of influence (trading in influence) is mandatory for member countries under the Council of Europe Criminal Law Convention on Corruption (Art 12). Overall, as was noted in the IAP Summary Report for 2009-2013 (p. 77), *since the Istanbul Action Plan monitoring mechanism is formally not limited to any conventions and covers broad international anti-corruption standards, during its monitoring trading in influence was accepted as a standard to be implemented by all Istanbul Action Plan countries.* That is why Kazakhstan got this recommendation, with which it agreed, having voted in favour of approving the second round of monitoring report.

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<sup>39</sup> See also the IAP Second round summary report for 2009-2013, p. 71.

In its responses to the questionnaire Kazakhstan also refers to such offences as “Abuse of office” (Article 307 CC) and “Abuse of authority or official duties” (Art 308). However, even in the IAP Report for the Second Round of Monitoring was noted that these offences did not cover all elements of the offence “Trading in influence” as qualified by Article 18 of the UN Convention against Corruption. Specifically, acts by “any other persons” that do not belong in the category of “persons performing public functions or equal-status persons” are not criminalized at all. Nor can one deem that the “mediation in bribery” under Article 313 CC, defined as the act of a person who acting on commission of the bribe taker or briber gives passes on the bribe (para 5 of the RK Supreme Court regulation, No 9) can be accepted as liability for trading in influence. In fact, the offence of trading in influence must provide for liability for promise/offer/transfer of illicit assets to a person who claims to be in a position to affect illicit influence on an official, or else solicitation/obtaining/accepting the offer or promise of such advantage in exchange for such influence, irrespective of the fact whether any such influence was in fact used or whether the influence used had the desired effect.

The new RK Criminal Code does not include the recommended offence of the trading in influence either.

***“to define the notion of ‘bribe’ in the Criminal Code and to envisage that the object of corruption crimes and administrative offences can be both material and any other (non-material) benefits;”***

In the questionnaire, Kazakh authorities inform that the definition of bribe in the Republic of Kazakhstan is provided in the disposition of part One, Article 311 of the Criminal Code (Taking by a person authorized to perform public functions, or equal-status person, personally or through an intermediary, of a bribe in the form of cash, securities, other property, rights to property or benefits of pecuniary nature for oneself or other persons in exchange for actions (inaction) ...). Under Article 2 of the UN Convention Against Corruption, “property” shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. Hence, according to Kazakhstan, the meaning of “property” in the definition of “bribe” in the RK Criminal Code incorporates non-material benefits.

In keeping with the provisions of the UN Convention Against Corruption bearing on the criminalization of certain offences (Article 15-16, 18-19 21), the object of bribe and trading in influence is not the “property” but “undue advantage”. The meaning of “undue advantage” in the UN Convention is not defined; however the Legislative Guide for the implementation of the UN CAC (paragraph 196) says that *“The required elements of this offence are those of promising, offering or actually giving something to a public official. The offence must cover instances where no gift or other tangible item is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary”*.

Therefore, the meaning of “advantage” should include benefits of non-material nature (i.e. benefits that are not a physical item and whose value cannot be quantified precisely) and/or non-pecuniary nature (i.e. not associated with cash or composed of cash). The explanatory report to the Council of Europe Criminal Law Convention on Corruption notes that to qualify advantage as undue it is important to remember that the offender (or any other person, for example, a relative) is better off than before the offence was committed, and also that this person has no right to have that benefit.

Advantages of non-material nature include: sexual favours; accelerated settlement of an issue or other types of preferences; better career opportunities, including promotion or horizontal rotation to a better position inside the organization; symbolic or honorary benefits, e.g., titles of distinctions; positive coverage in the mass media; scholarships or education grants; offer of free internship; passing exams at school or other selection processes; etc. Experience of some of the IAP countries makes it possible to extend the meaning of advantage to any sort of benefit which may have a market value, including certain non-material benefits. However, such an approach is not fully in line with the requirements of international standards because there is no legal market for some types of benefits (e.g. prostitution) while the fair market value of others is difficult assess (take, e.g. honorary titles).<sup>40</sup>

It was noted in the Report for the second round of monitoring that in Kazakhstan the object of bribery continues to be limited to benefits of material nature. Moreover, Note 5 to Art 307 CC, which establishes the list of corruption offences, limits them to instances where “persons committing such offences receive property benefits and advantage”. The same approach is followed by the RK Supreme Court Regulation No 9 of 22.12.1995 on the way courts should apply laws establishing liability for bribery, where in paragraph 2 it says that the object of bribe can be cash, securities, material valuables, services rendered for free where they should be paid for, and also preferences

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<sup>40</sup> Summary IAP report for the second round of monitoring, 2009-2013, p. 72.

that offer rights to property (performance of construction or maintenance work; grants of sanatorium or tourist vouchers; travel passes; soft loans or credits, etc.).

We cannot accept as proper, for the definition of “bribe”, the description to be found in the disposition of part 1, Article 311 of the 1997 Criminal Code, and part 1 of Article 366 of the 2014 Criminal Code (*“Taking ...bribe in the form of cash, securities, other property, rights to property or benefits of pecuniary nature ...”*), since it points to “types” of bribes but does not offer its definition; besides it only covers Article 311 and does not extend automatically to Article 312 RK CC. Therefore, Kazakhstan should amend the meaning of bribe to “undue advantage” and provide its clear definition in the Criminal Code in line with the above international standards.

Thus, neither the 1997 Criminal Code, nor the new 2014 Criminal Code complies, in this part, with international standards and the IAP recommendation.

***“to consider establishing criminal liability for illicit enrichment.”***

Kazakhstan informed that pursuant to paragraph 77 of the National Plan of activities aimed at implementing the address of the Head of State to the people of Kazakhstan on 14 December 2012, approved with Decree No 449 of 18 December 2012, it was envisaged to elaborate and submit to Parliament a draft law on improving the system of prevention, deterrence, disruption and punishment for corruption crimes by making the criminal liability they incur stronger. The Agency for the fight against economic and corruption crimes was made responsible for the drafting of the law. The proposed draft law suggests amendments to the Anti-Corruption Law, introducing the notion of “illicit enrichment” and liability for this type of corruption offence.

Note that the recommendation was to consider the possibility of a criminal, not disciplinary or administrative, liability for illicit enrichment, through amendments to the Anti-Corruption Law or other legal acts. In their comments to the draft report Kazakh authorities indicated that possibility of establishing criminal liability for illicit enrichment was considered during preparation of the draft new Criminal Code. As a result it was decided to refuse from this idea because in case such liability is established the accused would bear the burden of proving his own innocence, which in Kazakhstan is considered incompatible with the presumption of innocence principle used in the criminal law.

However, this information is insufficient to establish that such possibility was indeed considered in full. As noted in the IAP Third monitoring round methodology, if the recommendation required that the country considered implementing a certain measure, full compliance would require that the country demonstrates that it assessed the feasibility to introduce the required measure and an official grounded decision was taken to introduce it or not. Kazakhstan did not provide materials of such consideration (for example, minutes of the meeting of the body responsible for preparation or consideration of the draft new Criminal Code, publication in the media about discussion of such possibility on the official level and so on). At the same time Kazakhstan provided Internet publications from which it follows that introduction of criminal liability for illicit enrichment was indeed discussed, which attests to the partial fulfillment of this part of the recommendation.

***“To ensure that the offence of money laundering is criminalized in line with the international instruments and definitions from the Criminal Code and the Law on Combating Money Laundering and Financing of Terrorism are consistent.”***

In June 2014 Kazakhstan adopted the Law “On amendments and amplifications to certain legislative acts of the Republic of Kazakhstan on combating money laundering and financing of terrorism”, which introduced amendments, among other things, to the 1007 Criminal Code and the Law on Combating Money Laundering and Financing of Terrorism (AML/CFT Law). In line with this law, the title and paragraph 1 of Article 193 of the 1997 RK Criminal Code were amended (see Table). In addition, throughout the AML/CFT Law, the phrase “by illegal means” was amended to the words “by criminal means”. In July 2014 the AML/CFT Law was again amended by the Law No. 227-V of 3 July 2014 that enters into force on 1 January 2015.

**Table 9.** Comparison of money laundering provisions

AML/CFT Law (as of 1 October 2014)	Art. 193 1997 CC (prior to June 2014 amendments)	Art. 193 1997 CC (as amended in June 2014)	2014 RK CC
Article 1: ...	Article 193. Legalization of cash and/or	Article 193. Legalization (laundrying) of cash and/or	Article 218. Legalization (laundrying) of cash and/or

<p>Legalization (laundering) of proceeds obtained by criminal means, – to introduce, into legitimate circulation, cash and/or other property obtained by criminal means, through transactions or application of the above cash and/or property.</p>	<p>other property obtained by criminal means</p> <p>1. Conducting financial operations and/or other transactions with cash obtained by criminal means, or other application of the above assets or property for the purpose of concealing their criminal origins - ...</p>	<p>other property obtained by criminal means</p> <p>1. To introduce, into legitimate circulation, cash and/or other property obtained by criminal means, through transactions by way of conversion or transfer of property being income from crime, to hide or conceal the genuine nature, source, origin, means of disposal, movement, right to property or its ownership, knowing that such property is income from crimes, or to possess and use such property -...</p>	<p>other property obtained by criminal means</p> <p>1. To introduce, into legitimate circulation, cash and/or other property obtained by criminal means, through transactions by way of conversion or transfer of property being income from criminal and/or administrative offences, to hide or conceal the genuine nature, source, origin, means of disposal, movement, right to property or its ownership, knowing that such property is income from criminal and/or administrative offences, or to possess and use such property, or to offer mediation in legalization of cash and/or other property obtained by criminal means, should such acts be committed in significant amount – ...</p>
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The definition of criminal liability for money laundering as part of the list of acts that were criminalized with the June 2014 amendments and stipulated in the new CC is believed to be overall in line with international standards. However, the 2014 CC now has a new element – relevant actions are prosecuted under criminal law only if they have been committed in “significant amount”. Under Article 3 2014 CC, the significant amount is taken to mean in Article 218 an amount in excess of 2,000 MCRs, i.e. in excess of almost Euro 14,500. This provision is in direct contravention with international standards. According to the Explanatory Notes to FATF Recommendation No 3, the money laundering offence must mean to include any type of property, irrespective of value, which is direct or indirect income generated by crime.<sup>41</sup> Similar legislative changes in other countries were ruled by FATF as non-compliant with international standards, with recommendations to abolish them (see, e.g., FATF 6<sup>th</sup> Follow-up Report on Mutual Evaluation of the Russian Federation<sup>42</sup>).

Besides, the definition of legalization offered in the AML/CFT Law (see Table above), even after the June and July 2014 amendments, is different from the definition offered both in the current CC and in the new 2014 CC.

Analysis of the disposition of Article 218 RK CC shows certain inconsistencies in the provision. Legalization (laundering) of cash and/or other property obtained by criminal means is defined as introduction into legitimate circulation of cash and/or other property obtained by criminal means through transactions by way of conversion or transfer of property being income from criminal and/or administrative offences, to hide or conceal the genuine nature, source, origin, means of disposal, movement, right to property or its ownership, knowing that such property is income from criminal and/or administrative offences, or to possess and use such property, or to offer mediation in legalization of cash and/or other property obtained by criminal means. In this case, it is not believed to be proper to use the set phrase “obtained by criminal means” in conjunction with the transaction with property which is income generated by administrative offences.

<sup>41</sup> See [http://eurasiangroup.org/Rekomendacii\\_FATF.pdf](http://eurasiangroup.org/Rekomendacii_FATF.pdf).

<sup>42</sup> Source: [www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Russian-2013.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR-Russian-2013.pdf), p.6: «After the mutual evaluation, in 2010 Russia amended its Criminal Code (in 2010) and decriminalised self-laundering of amounts lower than RUB 6 million (approximately EUR 150 000 /USD 200 000) (article 174.1, Criminal Code). The reintroduction of a financial threshold was motivated in part by the need to focus attention on 3rd party laundering. That said, a threshold is not within the FATF Recommendations, and this amendment introduced a new deficiency that did not exist at the time of the evaluation. Russia was advised that the threshold for criminalisation of self-laundering should be reconsidered and removed in a timely fashion. Russia removed the threshold through Federal Law No.134-FZ, which rewords Articles 174 and 174.1 of the Criminal Code to eliminate the decriminalisation of self-laundering below the threshold. This amendment rectifies the identified deficiency. This deficiency has been addressed.”

In their written comments to the draft report Kazakh authorities noted that in June 2014 at the 20<sup>th</sup> Plenary meeting of the EAG Second progress report on implementation of EAG mutual evaluation of Kazakhstan was considered and it was recognised, taking into account adopted Law “On amendments and amplifications to certain legislative acts of the Republic of Kazakhstan on combating money laundering and financing of terrorism”, that the definition of the term “Legalization (laundering) of proceeds obtained by criminal means” was in line with FATF Recommendation 1.

In the public statement issued after the 20th Plenary meeting of the EAG progress by Kazakhstan was acknowledged in eliminating deficiencies in key and basic FATF recommendations, in particular R.1, R.5, R.13, R.23, R.35, CP.I, CP.III, CP.IC, as well as with regard to R.6, R.7, R.8, R.11, R.15, R.16, R.18, R.21, R.29, R.33. Kazakhstan also informed that the Financial Monitoring Committee of the Ministry of Finance has developed concept of the draft law on further amendments in legal acts of Kazakhstan on the AML/CFT and relevant draft law is being prepared, which will address the remaining FATF recommendations.

It should be noted in this regard that the EAG conclusion on the compliance of the definition of “Legalization (laundering) of proceeds obtained by criminal means” with international standards concerned Criminal Code of 1997 with the recent amendments of June 2014. However, in the new Criminal Code that enters into force on 1 January 2015 this definition is amended and it is not fully in line with the FATF standards. Moreover definition of the same notion included in the AML/CFT Law (as amended in July 2014) is different from the definition both in the 1997 Criminal Code and 2014 Criminal Code.

Therefore, Kazakhstan remains non-compliant with this part of the recommendation.

There is also an issue of inconsistency in amendments to the criminal law that specified the liability for money laundering: in the matter of just two months (in June and July 2014) Parliament in Kazakhstan approved two different versions of the relevant offence – one in its amendments to the 1997 Criminal Code and the other in the new Criminal Code which comes into force on 1 January 2015.

Note that in November 2011 the Criminal Code was amended to include a provision (part 5-1 Article 53) whereby in the event that the sanction in the article stipulated by Chapter 7 CC (Offences in the sphere of economic activity), under which the offender was convicted, provides for different (alternative) sentences, custodial sentence is not applied in case of voluntary and full repayment of the pecuniary damage inflicted by this offence on any citizen, organisation or on the State. This provision does not apply to offenders charged under paragraph (a), part three of Article 193 CC – money laundering by a person authorized to perform public office functions, or an equal-status person, if it involves the use of his official authority. Part 5-1 of Article 53 CC applies to all other money laundering offences. Kazakhstan informed that these measures were taken with a view to bringing out from the shadow economy of illegal assets.

Kazakhstan authorities inform that this provision was introduced to relieve the pressure on business: the law offered a possibility to avoid custodial sentences in white-collar crimes on the condition of voluntary and full repayment of the damage by the wrongdoer. It means that the person charged for a white-collar crime will have a choice – to repay the damage and stay free, or avoid paying and get a prison sentence. In this way, Kazakhstan argues, the law will be motivating wrongdoers to do something useful for the public.

The new 2014 Criminal Code retains this provision. Under Article 55, if the article or part of the article in the Special Part of the Criminal Code, under which the persons was convicted, provides for lesser punishment than imprisonment, the custodial sentences are not applied if the person was convicted for committing offences: 1) of minor or medium gravity provided the person has voluntarily repaid the pecuniary damage, and undone moral or other damage inflicted by his offence; 2) in the area of economic activity, with exception of offences qualified under Article 218, 248 and 249 of the Criminal Code provided the person has voluntarily repaid the pecuniary damage caused by his offence. Article 218 CC establishes liability for money laundering and is therefore in its full scope not subject to the above provision which should be welcomed.

As for **actual application**, Kazakhstan has provided detailed statistics for criminal prosecutions initiated by the Financial Police Agency (see the table below). Overall, in 2013, charges under Article 193 RK CC were brought by the financial police in 138 criminal cases, which is 3.5 times more than in 2012 (39). In 4 months of 2014, 69 charges were brought (twice as many compared to the same period in 2013 (34)). Of 138 criminal cases initiated in 2013, in 23 cases the predicate crime, formally, was corruption offence (see below), however, there were no charges of bribe taking or giving in the public or private sector.

According to some other statistics provided by Kazakhstan on judgements which have become final:

- in 2011, 9 persons were convicted under Article 193 CC, with prison sentences applied to 6, while 3, in line with Article 63 CC, were given suspended sentences;
- in 2012, 4 persons were convicted under Article 193 CC, with prison sentences applied to 1 while 2, in line with Article 63 CC, were given suspended sentences, and 1 person was sentenced to supervised release;
- in 2013, 5 persons were convicted under Article 193 CC, and all five were given prison sentences.

By comparison with the statistics on criminal charges brought, it shows a low percentage of prosecutions resulting in convictions. This raises a question about the efficiency of law enforcement agencies of Kazakhstan in money laundering investigations. Also, as it follows from the table, in 2013 there was not a single money laundering case in which bribe giving or taking was the predicate crime.

**Table 10.** Money laundering cases investigated by the Financial Police Agency

<b>Predicate crime</b>	<b>Number of criminal cases initiated under Article 193 RK CC in 2013</b>
Article 176 Misappropriation or embezzlement of property in trust	8 (5.7%), of which 3 are corruption offences
Article 177 Fraud	35 (23.3%), of which 17 are corruption offences
Article 182 Inflicting pecuniary damage by deception or abuse of trust	1 (0.7%)
Article 183 Acquiring or disposing of property obtained knowingly by criminal means	3 (2.1%)
Article 183-1 Transporting, selling or storing oil and petroleum products, and refining oil in the absence of documents testifying to its legitimate origin	66 (48.8%)
Article 192 Sham entrepreneurship	13 (9.4%)
Article 194 Wrongful acquisition and misuse of loans	1 (0.7%)
Article 209 Economic smuggling	1 (0.7%)
Article 222 Evasion of taxes and/or other mandatory charges to government payable by organisations	2 (1.4%)
Article 259 Illegitimate manufacturing, processing, acquisition, keeping, transportation, mailing or sale of narcotic drugs or psychotropic substances	5 (3.6%)
Article 307 Abuse of office	3 (2.1%)
Total	138, of which 23 are corruption offences, or 16.6%

An important practical aspect of criminal prosecution under money laundering charges is the self-contained nature of such prosecution. Money laundering must be recognized as a separate offence and should not depend on the earlier conviction for the predicate crime. As was noted in the IAP summary report for 2009-2013, all IAP countries have issues with the implementation of this standard. While it is not made explicit in the criminal law, judiciary practice in money laundering cases commonly requires that the offender has already been convicted for the predicate offence or, at the very least, that the predicate crime and money laundering were joined in both criminal prosecution and trial. As a result, what is effectively prosecuted is just self-laundering whereas other forms of money laundering are not covered. The same is true of Kazakhstan, as was borne out during the country visit. This should be remedied either with amendments to the Criminal Code or with the help of RK Supreme Court clarifications.

***“To envisage an effective and dissuasive liability of legal entities for corruption crimes with proportionate sanctions, which should be commensurate with the committed crime. Both commission of a crime by certain officials and lack of proper control by the governing bodies / persons of such legal entity, which facilitated commission of the crime, shall trigger corporate liability. To conduct additional consultations with business representatives regarding criminal liability of legal entities and the respective draft law; to envisage deferred enactment of the law introducing criminal liability of legal entities.”***

In its responses Kazakhstan largely makes reference to Article 36 of the Code of Administrative Offences, whereby a legal entity is subject to administrative liability if the administrative offence, as qualified under the special part of the

CAO, was committed, authorized, approved by a body or person performing the management functions in the legal entity (the new 2014 CAO has the same provision, with an added phrase: “or by an employee of a sole entrepreneur or legal entity, who was performing functions of organization and management or business and administrative functions”). Unless otherwise stipulated in the Code, these norms apply equally to either person, except where by the meaning of the legal norm it can only apply to an individual.

Note that the Report of the Second Round of Monitoring has already discussed provisions of the Code of Administrative Offences and made a clear conclusion of their insufficiency:

*«Article 534 of the Code of Administrative Offences of the Republic of Kazakhstan stipulates liability of legal entities for provision of illegal material remuneration, gifts, benefits or services to persons authorized to perform state functions or persons equated to them, unless the committed act contains elements of a crime. The existing administrative liability is not efficient and effective liability of legal entities for corruption for various reasons, including the following: the liability is envisaged only for one offence; an entity is liable only if the offence was committed, approved, authorized by a body / person performing management functions in the legal entity (Article 36 of the Code of Administrative Offences); the existing sanctions under Article 534 (fines from USD 100 to 5,000; in case of a repeat offence – prohibition of activities) are not dissuasive and proportionate.*

*Also Article 534 of the Code of Administrative Offences provides for administrative liability of a legal entity “if the committed act does not contain elements of a crime”. Since at the time of preparation of this report legislation of Kazakhstan did not envisage criminal liability of legal entities, such provision [of the Code of Administrative Offences] leads to exclusion of the legal entity from liability in cases where an individual commits a corruption crime. Obviously, this makes corporate liability ineffective and allows legal entities to be held liable only for minor administrative corruption offences.’*

To add to that, note that the Council of Europe and UN anti-corruption conventions provide for a specific obligation to establish the liability of legal entities for corruption offences, described in their relevant texts (Under Council of Europe convention: for active bribery, abuse of influence and money laundering; and under UN convention: for all offences established in the convention). Therefore, notwithstanding the existence of administrative liability of legal entities, it must have a reference to criminal offences in line with the requirements of the above conventions, or else elements of the administrative offences should replicate relevant criminal offences.<sup>43</sup>

Further, Kazakhstan notes that while the Criminal Code was being drafted, the issue of criminal liability of legal entities was discussed. Various stakeholders among public authorities, academia and business community raised a number of problem issues which should be addressed before criminal liability of legal entities can be established. According to Kazakhstan, these problem issues are as follows:

- 1) Legal entity is a specific legal vehicle as it does not possess individual conscience or will, and thus the definition of guilt cannot be applied to it. It may not be judged as criminal, it may not be found guilty. And if not, there are no elements of offence, and no prosecution.
- 2) Certain principles of justice under Article 77 of the Constitution do not apply to legal entities. They have to do with the individual, as opposed to collective, fault-based liability and the right to attend trial in person.
- 3) Whereas the Legislative Policies Concept of the Republic of Kazakhstan for the period till 2020 aims to establish criminal liability of legal entities (*caused by the need to honour international obligations assumed by Kazakhstan to introduce liability of legal entities for corruption, organized crime, money laundering and financing of terrorism*), the UN Convention Against Corruption, and against transnational organized crime, and the International convention for the suppression of the financing of terrorism, all ratified by Kazakhstan, offer different options. Depending on the domestic legal principles, the liability of legal entities may be criminal, civil law or administrative.
- 4) There are reasons to believe that this construction may potentially threaten to destabilize business and other economic activity. It is not improbable that the country’s investment attractiveness or business activity will be hampered.

With reference to the above, establishment of criminal liability of legal entities was deemed premature.

Importantly, Kazakhstan authorities have revised their position on this issue. As noted in the Report for the Second Round of Monitoring, in May 2010 the RK Government submitted to Parliament the draft Law “On amendments and amplifications to some legal acts of the Republic of Kazakhstan concerning introduction of criminal liability of legal

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<sup>43</sup> IAP summary report for the second round of monitoring 2009-2013, p. 83.

entities”, which was adopted in the second reading in December 2010. Responses to the Third Round Questionnaire indicate that the draft law was discussed by the Economic Policies Council and the Interagency Working Group on improvements to criminal law, criminal procedure legislation and laws on operative and detective work, sponsored by the Office of the general Prosecutor; the draft law was also vetted by the academic and anti-corruption screening. But, at the request of the Financial Police Agency, the draft law was recalled from Parliament with the resolution of the Government of the Republic of Kazakhstan of 12 March 2012, No 324. *“The outcome of almost two years of work on the draft law shows that members of Parliament failed to reach unanimity. The opposition to the introduction of criminal liability of legal entities was mounted by representatives of business community who argued that introduction of this concept would have serious negative repercussions for the country’s economy. Specifically, it would increase administrative pressure exerted on business by supervisory and controlling authorities; open more opportunities for corruption and illegal takeovers, which, in turn, would cause assets to move abroad.”*

Kazakhstan was also recommended to hold further consultations with representatives of business to discuss criminal liability of legal entities and the relevant draft law. Kazakhstan indicates that at the time when the Criminal Code was drafted, there was a discussion on the issue of criminal liability of legal entities, and the positions of stakeholders among public authorities, academia and business community were explored. However, no more details about the consultations held were provided (when, which organisations, in what way, etc.).

In this context, note that the recommendation was not about mandatory introduction specifically of criminal liability. The type of liability is left to the discretion of the country authorities; however, provisions detailing liability must comply with the standards of effectiveness and dissuasiveness.

Overall, Kazakhstan is not compliant with this part of the recommendation.

***“To analyse application of provisions on effective regret in administrative and criminal corruption offences and, if necessary, introduce changes which will exclude possibility of unjustified avoidance of liability.”***

Kazakhstan has provided the following information:

*With regard to administrative proceedings*

The review conducted found that for reasons of low significance and effective regret of the offender (Articles 67, 68 CAO), in 2011, out of 509 dismissed administrative charges, 272, or 53.4%, were dismissed on the above grounds, in 2012, out of 168, 71 (42.2%) were thus dismissed, and in 2013, out of 52 thus dismissed were 20 (38.4%).

Under the current CAO (Art. 67), a person who has committed an administrative offence for the first time, may be discharged by the judge, or agency (officer) authorized to consider a case of administrative offence, provided such person, after having committed the offence, has voluntarily and fully repaid the damage inflicted or otherwise undone injury caused by his offence.

The new version of the CAO approved in July 2014 no longer has this article, because – as the RK Ministry of Justice maintained – of the lacking differentiation or clear cut criteria for the application of Article 67 in practice, leading to misinterpretation and lack of uniformity in the application of this rule in similar cases. For instance, non-declaration of an insignificant amount of pension savings is punished under the administrative law, whereas in the case of failure to declare real estate or other income, a person may be discharged of liability subject to the above rule. There seems to be similar practice in segregating offenders whereby low-level and technical employees of state agencies are prosecuted, whereas higher-level official are discharged of the liability.

This part of the recommendation (concerning analysing and amending provisions on effective regret with regard to administrative offences) was implemented.

*With regard to criminal proceedings*

In 2013, Article 65 of the 1997 CC was applied 48 times, including charges for grave offences, against persons who assisted in the investigation of crimes committed by organized groups.

Provisions of Article 65 CC (see Table below) on effective regret extend to all offences, including corruption. Part one of this article covers all corruption offences of minor or medium gravity, and part two, all corruption offences, including grave and particularly grave ones, provided the offender offered active assistance to the prevention, detection or investigation of offences committed by an organized group, criminal society (criminal organization), transnational organized group, transnational criminal society (transnational criminal organization) or well-established armed group (gang); helped expose other accomplices in crimes committed by an organized group, criminal society (criminal organization), transnational organized group, transnational criminal society (transnational criminal organization) or well-established armed group (gang).

In view of the above, Kazakhstan authorities are of the opinion that rules of Article 65 CC should be deemed to extend to all corruption crimes (as provided for in the new CC) because they offer effective assistance to the investigation of sophisticated, grave and particularly grave offences, including corruption crimes. At the same time, with the application of this article, there is no reason to argue that the offender has effectively avoided criminal liability, because this person has proved with his actions that he was capable of rehabilitation without having to suffer repressive means of criminal punishment.

**Table 11.** Comparison of the Criminal Code provisions concerning effective regret

1997 RK CC	2014 RK CC
<p><b>Article 65. Discharging of criminal liability due to effective regret</b></p> <p>1. A first-time offender committing an offence of low or medium gravity may be discharged of criminal liability, provided after the commission of crime he voluntarily gave himself up, or assisted in the detection of the crime, or otherwise mended the injury inflicted by the crime.</p> <p>2. An offender, except in grave and particularly grave and violent offences, may be discharged of criminal liability, provided he actively assisted in the prevention, detection or investigation of offences committed by an organized group, criminal society (criminal organization), transnational organized group, transnational criminal society (transnational criminal organization) or well-established armed group (gang); helped expose other accomplices in crimes committed by an organized group, criminal society (criminal organization), transnational organized group, transnational criminal society (transnational criminal organization) or well-established armed group (gang).</p> <p>3. Offenders committing offences of other category, provided the qualifications stipulated in paras one and two above hold, may be discharged of criminal liability only in cases specifically entailed in the relevant articles of the Special part of this Criminal Code.</p>	<p><b>Article 65. Discharging of criminal liability due to effective regret</b></p> <p>1. An offender committing a criminal offence or committing a criminal offence for the first time, may be discharged of criminal liability taking into account the character of the offender, his acknowledgement of guilt, assistance in detecting and investigating the criminal offence, and undoing the injury inflicted by the criminal offence.</p> <p>2. Provisions of para one above do not apply to offenders committing a terrorist crime, extremist crime, offence committed as part of the criminal group, offence of sexual assault against minors; a grave and particularly grave violent crime unless otherwise provided for by relevant articles of the Special part of this Criminal Code.</p>

Additionally, in justification of effective regret, Kazakhstan noted that discharging of criminal liability on these grounds had important practical implications. Corruption crimes usually involve two or more persons, which makes this type of crime more socially dangerous. Offering incentives of dropped charges based on effective regret makes it possible to prosecute not only the immediate perpetrators, but also organizers, aiders and abettors. It is also noted that with corruption getting increasingly more systemic and large-scale, this rule enables corruption crimes to be detected.

Discharging from criminal liability on grounds of effective regret is a non-rehabilitating circumstance, i.e. the person is actually believed to be criminally liable, with relevant legal implications banning him from certain public offices. In this context, the new RK CC has retained a provision offering an option of effective regret to be used as grounds for discharge for offenders in corruption crimes.

In their comments Kazakhstan also indicates that “the issue of specific time allowed for the offender to have his effective regret, is still to be looked into”.

The purpose of this provision is not only to move the offender to regret but also to stimulate him to offer active assistance to detection of crime and help remedy the injury caused. Regrets comes together with acknowledgement of guilt and may occur both before the charges are brought and at any other stage of criminal proceedings. The offender may be deemed to show regret even if this person does not accept his wrongdoing but performs all the acts required by law in view of the unavoidable punishment, willing to improve his prospects.

The legislator does not give any legal interpretation to the reasons of acknowledgement of guilt, which could be various (regret, wish to break away from crime; desire to remove suspicions from an innocent person or disrupt criminal acts of accomplices; pity or compassion with the victim; plans to conceal another more grievous crime or mislead the investigators; fear of exposure). The concept of effective regret is intended to stimulate the offender to repay the damage caused by his crime. Additionally, it reflects the government's desire to cut the costs associated with criminal investigation and trial.

Significantly, the Report for the Second Round of Monitoring never doubted the need for the concept of effective regret as such; similar provisions are used in other countries and may indeed prove useful in detecting and prosecuting corruption crimes. At the same time, the respective provisions may be abused, among other things, to avoid liability, if they are too broad, and in particular when the discharge is automatic, and does not leave the prosecution or the judge any choice in assessing the specific circumstances of the case. The bribe giver may use this defence mechanism to his ends, blackmailing and putting pressure on the bribe taker, to squeeze further benefits, or reporting the crime only some substantial time after the fact, having learned that law enforcement agencies may be close to detecting the crime.<sup>44</sup>

The IAP summary report for 2009-2013 noted that if the country decides to retain effective regret in its legislation, the following safeguards against the risk of abuse should be considered:

- this defence should not be applied automatically: the court must be allowed to consider various circumstance, e.g., motives of the wrongdoer;
- it should apply only for a brief period of time after the commission of the crime and in any case BEFORE such time as the police have obtained information about the offence from other sources;
- the bribe giver reporting the crime must cooperate with the competent authorities and offer them assistance with the criminal prosecution of the bribe taker;<sup>45</sup>
- it should not apply to cases where the bribe was solicited by the bribe taker himself;
- the bribe may not be returned to the bribe giver, but must be confiscated.<sup>46</sup>

In addition, the OECD Working Group on Bribery objects to effective regret defence as such in bribery of foreign public officials. While in domestic bribery effective regret may facilitate detection of the relevant crime and lead to criminal prosecution of public officials, in the event of bribery of a foreign public official there is no guarantee that this official will come under criminal prosecution. *"If this occurs, the defence serves no useful purpose: the crime may come to light, but the offenders remain unpunished and the ends of justice remain unserved."*<sup>47</sup>

Overall, Kazakhstan has reviewed application of effective regret in administrative and criminal trials, and even introduced certain amendments to the new Criminal Code and Code of Administrative Offences. However, arguably, the specific comments offered by the Report on the Second Round were not taken into account, and the review conducted failed to cover them. It is only in its complementary remarks that Kazakhstan admitted that "the issue of specific time allowed for the offender to have its effective regret, is still to be looked into". This, however, may not be accepted as appropriate compliance with the recommendation.

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<sup>44</sup> See, inter alia, GRECO reports for the 3<sup>rd</sup> round of evaluation of Croatia (§57, <http://www.coe.int>), Latvia (§96, <http://www.coe.int>), FYR Macedonia (§74, <http://www.coe.int>), Moldova (§64, <http://www.coe.int>), Poland (§70, <http://www.coe.int>), Romania (§112, <http://www.coe.int>).

<sup>45</sup> In its report for the 3<sup>rd</sup> round of evaluation of Russia (§66, <http://www.coe.int>) GRECO notes that the May 2011 amendments to the law that require that the bribe giver should facilitate actively the detections and/or investigation of the crime (to be eligible for the effective regret defence) may help limit the risks of abuse of this mechanism. However, GRECO had misgivings about other aspects of this mechanisms offered in the Russian law.

<sup>46</sup> See, inter alia, IAP Reports on the Second Round of Monitoring for Kazakhstan (p. 34-35, <http://www.oecd.org>) and Kyrgyzstan (p. 27, <http://www.oecd.org>).

<sup>47</sup> Slovak Republic Phase 2 Report of the OECD Group on Bribery, §160, <http://www.oecd.org>.

In addition, the monitoring identified some other grounds calling for a broader analysis of the application of effective regret in criminal corruption offences and possible amendments that would rule out unjustified avoidance of liability.

Specifically, provisions stipulating liability for bribery in Kazakhstan tend to aim at detecting the fact of a bribe taken by officials, whereas those who incite bribery and give bribes, under certain circumstance, avoid prosecution, with negative implications for the efficiency of prevention of such type of crime.

As experience suggests, most of such offences are committed at the initiative of bribe givers who abet public officials in bribery.

According to Note 2 to Article 367 CC (bribe giving) the bribe giver is discharged of the criminal liability, if he suffered extortion from a person defined in part one of Article 366 RK CC, or if this person has voluntarily reported the bribe to law enforcement or specialized state agency.

This norm therefore should be considered in the context of the above recommendation, because such reporting of the already committed crime bears certain elements of effective regret defence against criminal liability (the Criminal Code does not offer other, suitable grounds), although the note does not state that explicitly.

At the same time, note that if the person gave the bribe under extortion by the bribe taker, such person is not to be prosecuted under any circumstances.

Such provisions only facilitate crime because by abetting a public official, actively involving him in crime, the bribe giver may, through this bribe, obtain the desired benefit (e.g., be awarded a contract), and only then report to the police the bribe and avoid liability, while retaining the benefit.

Such provisions that allow corruption to go unpunished are the legacy of the Soviet legislation. In international practice, such rules are either unknown or come complete with specific deadlines for reporting the bribe (e.g., 10 days in Spain).

***Kazakhstan is not compliant with Recommendation 2.1.-2.2. which remains valid.***

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

### ***Recommendation 2.3.***

- **To harmonise provisions of the Criminal Code which determine the subjects of criminal liability for corruption crimes. To ensure application of the legislation on liability for corruption offences to all persons assigned with state powers.**
- **To envisage criminal liability of foreign public officials for all bribery offences and also to provide definition of such foreign public officials in accordance with international standards.**

***“To harmonise provisions of the Criminal Code which determine the subjects of criminal liability for corruption crimes.”***

Article 3 of the new 2014 Criminal Code offers the definition of corruption offenders, including such definitions as “persons authorized to perform public functions”, “persons equated to persons authorized to perform public functions”, “officials” “persons holding an important public office”, “persons performing management functions in a commercial or other organization” (See Appendix with the relevant text of definitions).

These definitions basically replicate those that can be found in the notes to Article 307 of the current Criminal Code (with minor variations). That these definitions are incorporated now in the general part of the new Criminal Code seems to address some of the problem issues mentioned in the Report for the 2<sup>nd</sup> Round, namely, the ambiguity of the scope of application of definitions contained in the notes to Article 307.

But there remains still an unresolved issue of the meaning of the term *“person performing management functions in a commercial or other organization”*. The Report for the Second Round of Monitoring noted that under Articles 228, 231 and 232 of the Criminal Code the subject of liability is “a person performing managerial functions in a commercial or other organization”. According to the Note to Article 228, a person performing managerial functions in a commercial or other organization mentioned in the Criminal Code shall mean a person who permanently, temporarily or by special authorization performs organizational and regulatory or administrative and financial functions in the organization not being a state authority, local self-government body or organization, where the state-owned share is not less than 35 percent. Therefore, this definition of “organisation” does not exclude state organizations (which include, inter alia, state establishments). However, “persons performing managerial functions in the state organizations” are also subject to liability under Articles 307, 308, 310, 311, 314, 315 of the Criminal Code. Accordingly, it is unclear under which article of the Criminal Code such persons can be held liable. This issue remains unresolved in the new Criminal Code.

Apart from the above definitions, the new Criminal Code contains other relevant definitions (*“functions of organization and management”*, *“business and administrative functions”*, *“representative of authorities”* - see the Appendix). Incorporation of these definitions directly in the body of the code is compliant with the Second Round recommendations. Besides, the definition of the “representative of authorities” is no different from that to be found in Article 320 of the current Criminal Code and criticized in the Report for the Second Round of Monitoring.

Note however that definitions of the above terms in the Anti-Corruption Law have not yet been harmonized with the new Criminal Code.

***“To ensure application of the legislation on liability for corruption offences to all persons assigned with state powers.”***

This recommendation proceeded from the provisions of the Report for the Second Round of Monitoring arguing that it was not clear whether members of the jury could be subjected to liability for corruption offences, as the Law “On Members of the Jury” of 16.01.2006 No. 121-III does not clearly define their status. The same was true of the law enforcement officers as their status was governed by special regulations. The report further recommended amending the legislation accordingly to provide for liability for corruption offences and to make sure it applies to all public servants and persons performing public functions.

Responding to the question whether liability for corruption offences attaches to member of the jury and law enforcement officers whose service is governed by special legislation, and if so, which provisions of the law do that, Kazakhstan referred to Article 3 of the Anti-Corruption Law, noting also that subject to provisions of the Criminal Code, Code of Administrative Offences, the Anti-Corruption Law, Civil Service Law, laws of the Republic of Kazakhstan “On specialized public agencies of the Republic of Kazakhstan”, “On National security of the Republic of Kazakhstan”, “On law enforcement service”, and “On ratification of the Convention of the United Nations against Corruption, liability for corruption offences shall apply to all of the above persons.

Indeed, the law of the Republic of Kazakhstan on law enforcement service defines law enforcement as a specialized type of public service through the offices of law enforcement agencies. An officer of law enforcement is a citizen of the Republic of Kazakhstan employed by law enforcement agencies who has a special rank or service grade. According to the definitions of the new Criminal Code and the Anti-Corruption Law, “persons authorized to perform public functions” shall be, among others, public servants in compliance with the public service legislation of the Republic of Kazakhstan. Also, in line with the new definition in the 2014 Criminal Code “the representative of authorities” is deemed to include an officer of law enforcement; and in turn, a person performing the function of a representative of authorities, is an official, according to the CC. Therefore, liability provisions in the new Criminal Code clearly cover officers of law enforcement agencies.

As to member of the jury, they are not public servants and they cannot be classified with any of categories defined in the Criminal Code (either of the two). They are closest to the term “officials” who include persons, permanently, temporarily or by special commission performing the functions of the representative of authorities. However, a representative of authority is someone in public service. Therefore, jurors do not seem to be covered by liability provisions, and this part of the recommendation is only partially complied with. Kazakhstan informed additionally that covering jurors by the scope of corruption crimes will be considered during further improvement of the criminal legislation.

***“To envisage criminal liability of foreign public officials for all bribery offences and also to provide definition of such foreign public officials in accordance with international standards.”***

On the point of criminal liability of foreign public officials “for all bribery offences”, Kazakhstan notes that that pursuant to the note to Article 311 CC, public officials for the purpose of this article and Article 312 of the Criminal Code, comprise the officials specified in Notes to Article 307 of the Criminal Code, and also public officials of foreign states or international organisations. *“Therefore, criminal liability of foreign public officials for all bribery offences is established.”*

However, this conclusion cannot be accepted for the same reasons that were invoked in the Report for the Second Round of Monitoring (which, in fact, prompted the recommendation itself): *“The Law of 21.07.2007 supplemented Article 311 of the Criminal Code of Kazakhstan (“Receiving a bribe”) with Note 4, which provides that the term ‘officials’ mentioned in that Article and Article 312 of the Criminal Code (“Giving a bribe”) also includes the officials of foreign states or international organizations. However, in these Articles the “officials” are subjects of only qualified offences (paragraph 2 of Article 311 and paragraph 2 of Article 312); other offences in these Articles refer to other subjects (“a person authorized to perform public functions or a person equivalent to them”, “a person holding a responsible public office” – for more details see above). Therefore, Articles 311-312 of the Criminal Code apply to officials of foreign states or international organizations only partly, which does not comply with the OECD recommendation.”*

At the same time, this issue is resolved in the new RK Criminal Code, where Articles 366-367 establish liability of “official of a foreign state or international organization” for all offences of active and passive bribery, along with other offenders in this type of crime. Thus, with the new Criminal Code coming into force, this part of the recommendation will be complied with.

As for the definition of foreign public officials in line with international standards, there is no such definition in the current Criminal Code or in the 2014 Criminal Code, although the latter has a separate article with definitions, covering a range of subjects of liability (see above).

It is necessary to take into account relevant international standards in the definition of foreign public officials. According to Article 2 of the UN Convention Against Corruption, foreign public official shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Article 1) defines a foreign public official as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization. The Council of Europe Criminal Law Convention on Corruption makes reference to the definition of public officials of foreign states, and additionally explicitly mentions members of foreign legislative assemblies, officials of public international or supranational organisations or bodies, parliamentary assemblies of international or supranational organisations of which the Signatory is a member; and judges and officials of international courts. Additional Protocol to the Council of Europe Convention includes in the list also members of foreign arbitration tribunals and members of the jury of foreign states. All these categories of persons must be covered by the definition of foreign public officials.

During discussion of the draft report Kazakhstan noted that it was not necessary to introduce a separate definition of foreign public officials because they were covered by the definition of “officials” included in the Criminal Code. However, the existing definition of “official” (e.g. in the 2014 CC: *“a person who permanently, temporarily or under special authorisation carries out functions of the power representative or carries out organisational and managerial or administrative and economic functions in state agencies, bodies of local self-government, as well as in the Armed Forces of Kazakhstan, other military formations of Kazakhstan”*) concerns only national employees, which is clear from the definition itself. Also the Criminal Code of Kazakhstan contains a number of other related notions (“person authorised to perform state functions”; “person equated to person authorised to perform state functions” and so on), which will complicate application of the notion of “official” to foreign public officials. This was exactly why the Second Monitoring Round recommendation was for Kazakhstan to clearly define such officials in line with international standards.

***Kazakhstan is partially compliant with Recommendation 2.3. and it remains valid.***



## 2.4.-2.5. Sanctions, confiscation

### Recommendations 2.4.-2.5.

Report on the Second Round of Monitoring offered no recommendations

#### Sanctions

The new Criminal Code of Kazakhstan adopted in July 2014 reviewed sanctions for corruption offences. A comparison of custodial sanctions is in the table below.

**Table 12.** Comparison of deprivation of liberty sanctions in the Criminal Codes of Kazakhstan

1997 Criminal Code		2014 Criminal Code	
Offence	Deprivation of liberty	Offence	Deprivation of liberty
<i>Bribe taking</i> , Art. 311 (main offence)	Up to 5 years	<i>Bribe taking</i> , Art 366 (main offence, including bribe taking by public official or a person holding an important public office)	Up to 5 years
Bribe taking (by public official; for illicit actions)	3-7 years	Bribe taking (significant amount of bribe; in exchange for illicit actions)	3-7 years
Bribe taking (important public office)	5-10 years	Bribe taking (extortion; by a group of persons; large amount; <sup>48</sup> repeatedly)	7-12 years
Bribe taking (extortion; by a group of persons; large amount <sup>49</sup> ; repeatedly)	7-12 years	Bribe taking (by a criminal group; in particularly large amount <sup>50</sup> )	10-15 years
Bribe taking (particularly large amount <sup>51</sup> )	10-15 years		
<i>Bribe giving</i> , Art. 312 (main offence)	Up to 3 years	<i>Bribe giving</i> , Art. 367 (main offence, including bribe giving to a public official or a person holding an important public office)	Up to 3 years
Bribe giving (to public official; for illicit actions)	Up to 5 years	Bribe giving (significant amount)	Up to 5 years
Bribe giving (to a person holding an important public office)	5-10 years	Bribe giving (by a group of persons; large amount; repeatedly)	7-12 years
Bribe giving (by a group of persons; large amount; repeatedly)	7-12 years	Bribe giving (particularly large amount; by a criminal group)	10-15 years
Bribe giving (particularly large amount)	10-15 years		
<i>Abuse of office</i> (part 1 Art. 307)	Up to 2 years	<i>Abuse of office</i> (part 1 Art. 367)	Up to 3 years
<i>Abuse of office</i> (part 4 Art. 307)	Up to 8 years	<i>Abuse of office</i> (part 4 Art. 367)	4-8 years
<i>Exceeding authority</i> (part 1 Art. 308)	Up to 3 years	<i>Exceeding authority</i> (part 1 Art. 362)	Up to 3 years
<i>Exceeding authority</i> (part 4 Art. 308)	Up to 10 years	<i>Exceeding authority</i> (part 4 Art. 362)	5-10 years
<i>Money laundering</i> (part 1 Art. 193)	Up to 3 years	<i>Money laundering</i> (part 1 Art. 218)	Up to 3 years
<i>Money laundering</i> (part 3 Art. 193)	3-7 years	<i>Money laundering</i> (part 3 Art. 218)	3-7 years
<i>Commercial bribery</i> (part 1 Art. 231 – active bribery)	Up to 3 years	<i>Commercial bribery</i> (part 1 Art. 253 – active bribery)	Up to 5 years
<i>Commercial bribery</i> (part 3 Art. 231 – passive bribery)	Up to 5 years	<i>Commercial bribery</i> (part 4 Art. 253 – passive bribery)	Up to 5 years
<i>Embezzlement or misappropriation of property in trust</i> (para “d”, part 3 Art. 176*)	5-10 years	<i>Embezzlement or misappropriation of property in trust</i> (para 2, part 3 Art. 189**)	5-10 years

<sup>48</sup> In excess of 3,000 MCRs (ca Euro 21900).

<sup>49</sup> In excess of 500 MCRs (ca Euro 3,650).

<sup>50</sup> In excess of 10,000 MCRs (ca Euro 73,000).

<sup>51</sup> In excess of 2,000 MCRs (Euro 14,600).

<i>Fraud</i> (para “d”, 3 Art. 177*)	5-10 years	<i>Fraud</i> (para 2, part 3 Art. 190**)	3-7 years
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\* For persons authorized to perform public functions and equal-status persons, if combined with the use of their official status...

\*\* For persons authorized to perform public functions and equal-status persons, and also public officials or persons holding an important public office, if combined with the use of their official status

As follows from the table above, key sanctions for corruption offences stayed largely the same. Except, bribe taking by public officials and persons holding important public offices, and bribe giving to such persons were reclassified from aggravated into main offences, resulting in shorter prison sentences as possible sanctions imposed on such persons for this type of crime.

There have been other changes in sanctions for corruption offences:

- 1) Fixed amounts of fines (fixed number of monthly calculation rates) have been replaced by fines that are divisible by the amount of the bribe (e.g. the main offence of bribe taking is fined at 50-fold amount of the bribe; the main offence of bribe giving, at 20-fold amount). In view of the definition of the “large” and “particularly large” amount of bribes (see below), the minimum fine for a main offence will amount to Euro 182,500; main offence of bribe giving, to Euro 73,000; the minimum fine in case of aggravated bribe taking (by a criminal group or in a particularly large amount) amounts to Euro 5,840,000; and a similar offence in bribe giving is Euro 3,650,000;
- 2) The fine which is a multiple of the bribe amount is applied as an alternative sanction in all offences of bribe taking or giving, whereas previously aggravated offences were punished with custodial sentences only;
- 3) Instead of bans on holding certain offices or being engaged in certain types of activities for a period of time, now it is mandatory life-time deprivation of right to hold certain offices or be engaged in certain types of activities for all corruption offences. Under Article 50 of the new Criminal Code, it means a life-time ban on holding offices in public service, of a judge, in bodies of local self-government, at the National Bank of the Republic of Kazakhstan and its agencies, in public organizations and organizations with more than fifty per cent government equity, including national management holdings, national companies, national development institutions where the government is a shareholder and in subsidiaries where they hold over 50 per cent of the voting shares (stock), and at legal entities where over 50 percent of voting shares (stock) belong to the above subsidiaries.

The new Criminal Code has also changed the thresholds of the large and particularly large bribe: “large” has been raised from 500 MCRs (Euro 3,650) to no less than 3,000 MCRs (Euro 21,900) but no more than Euro 10,000 MCRs (Euro 73,000), and the “particularly large amount” increased from 2,000 MCRs (Euro 14,600) to no less than 10,000 MCRs.

The 2014 Criminal Code also prohibits applying conditional sentencing, or discharge of criminal liability on grounds of mediation, or discharge against surety, or use statute of limitations to the discharge of criminal liability for corruption offenders. It is a positive innovation, facilitating dissuasive punishment for corruption offences.

Under Article 55 of the 2014 CC, if the article or part of the article in the Special part of the Criminal Code under which the charges were brought allows for non-custodial sentences as the main sanction, the offender is not sentenced to deprivation of liberty if he is convicted for an offence: (1) of low or medium gravity provided the offender has voluntarily repaid the damages, and mended moral and other injury caused by the crime; 2) in the sphere of economic activity, except when qualified under Articles 218, 248 and 249 of the Criminal Code, provided the offender has voluntarily repaid the damages. A few corruption offences have been classified in the category of low or medium gravity crimes (main offences of bribe taking, bribe giving and bribe giving in a significant amount; main offences of active and passive commercial bribery; abuse of office). Thus, the monitoring group is doubtful that, provided the damage is repaid, the offender may not be put in prison and, e.g., in cases of bribe taking or bribe giving, the sentence imposed may only be a fine, which is a multiple of the amount of the bribe. This provision is questionable, at least when applied to persons authorized to perform public functions or equal-status persons, who must not be excused from a punishment in the form of deprivation of liberty by making a cash compensation.

The overall result is a relative lessening of sanctions for bribe taking and giving, particularly for public officials and persons holding an important public office. The latter include member of the Government, members of Parliament,

judges, political public servants, i.e. top public officials. Taking or giving bribes inflicts serious public danger and must be punished seriously. And although the above sanctions are reinforced with additional types of punishment (confiscation and a life-time ban on holding certain offices), it may give a wrong signal to corruption in the public sector and undermine effectiveness of sanctions. Besides, it creates an environment where punishment becomes exclusively financial: for some corruption offences, compensation of pecuniary damages allows the offender automatically to avoid custody.

### **Confiscation**

Under the current, 1997 Criminal Code, confiscation means compulsory and uncompensated seizure by the government of all or part of the property owned by the convicted as well as the property which was the instrument or means of crime. In addition, corruption and some other offences (including money laundering), apart from the property owned by the convicted offender, confiscation extends to property obtained by criminal means, or transferred by the accused to other persons. As an additional sanction, confiscation may be imposed only in cases stipulated by relevant articles of the Special part of the Criminal Code. As a sanction, confiscation is imposed not for all offences but only for aggravated offences of bribe taking and giving, and aggravated commercial bribery.

Furthermore, the 1997 Criminal Procedures Code provides for the so called special (or procedural) confiscation which applies irrespective of confiscation as a sanction, and may be imposed for any offence. Under Article 121 CPC, before sentencing, dismissing the case or refusing prosecution, the court must dispose of exhibits. Exhibits may include certain physical items if there are reasons to believe they may have been used to commit crime, or bear traces thereof, or could be the target of criminal actions; they can also be cash and other valuables, things and documents that could have helped to detect the crime, establish the factual circumstances of the case, identify the guilty parties, or counter charges, or commute the sentence. Here, instruments of crime are subject to confiscation; money and other valuables, derived from crime, are seized by the government based on court judgment.

Importantly, provisions of the Criminal Code and the Criminal Procedures Code regulating confiscation are not properly harmonized, leading to conflicts. E.g., Article 51 RK CC establishes a strict requirement whereby confiscation of property (instruments and items of crime and illicit gains) is imposed for crimes committed for pecuniary motives, and may only be sentenced in cases provided for by relevant articles of the Special part of the Criminal Code. Conversely, provisions on mandatory confiscation of instruments and items of crime and illicit gains in Article 121 CPC require the courts to confiscate the above property. It is thus possible to conclude that rules of the Criminal Code requiring confiscation as a sanction play no role because even in their absence instruments and items of crime and illicit gains are subject to confiscation under the CPC, with both set of rules applied independently of each other.

Under the new 2015 Criminal Code, the scope of confiscation as a supplementary punishment is narrowed. The confiscation is taken to mean compulsory uncompensated attachment and seizure by the government of the property owned by the convicted offender, obtained illicitly or acquired with proceeds of crime, as well as property which is instrument or means of commission of a criminal offence. Limiting the scope of confiscation is generally the right way to go, since confiscating of all of the convicted offender's property is disproportionate.

Confiscation is imposed on money and other property: (1) obtained through a criminal offence, and any income generated from such property, except property and income on it to be returned to their rightful owners; (2) into which the property obtained through a criminal offence, together with income on such property, was fully or partly converted or transformed; (3) or which are instruments or means of crime. Should confiscation of a certain item at the time of the confiscation ruling by the court be impossible because it has been used up, sold or for any other reason, court must rule to confiscate an amount in cash equivalent to the value of such item.

These new provisions are largely compliant with international standards since they provide for: confiscation of instruments, means and gains from bribery; confiscation of equivalent value; and confiscation of benefits arising from criminal gains. However, the Criminal Code may benefit from provisions on protection of a bone fide buyer of property subject to confiscation, and on confiscation of property conveyed to the third party that knew or must have known that the property in question was proceeds of crime.

Although it is not explicitly states in the General part of the Criminal Code, stemming from the Special part provisions, confiscation will be imposed in cases stipulated in the relevant articles of this Special part of the Criminal Code. As before, mandatory confiscation follows many but not all corruption offenses. As a mandatory sanction, confiscation is established for all offences of bribe taking and money laundering; aggravated bribe giving

and mediation in bribery; passive commercial bribery and aggravated active commercial bribery; as an optional sanction, confiscation is stipulated for main offences of bribe giving, mediation in bribery and illicit remuneration.

As a result, under the provisions of the RK CC, confiscation of the instrument of crime in bribe giving is optional and, in theory, if the sentence does not provide for confiscation of property, this property must be returned to the bribe giver.

Also doubtful, arguably, are arguments in favour of having confiscation as a criminal sanction. Specifically, the relevant international standard is a mandatory requirement to confiscate proceeds of crime and property which is an instrument or means of a criminal offence. Along with the incomplete range of all corruption offences covered, as detailed above, confiscation of proceeds of crime and means and instruments of crime established as a possible sanction provides courts with unjustifiably broad discretionary powers.

Take, e.g. Article 55 2014 CC, where given certain circumstances pertaining to aims and motives of offence, the role of the guilty party, his behaviour during or after the fact, or, equally, given active cooperation of such person with the investigation, the court may choose not to apply the additional sanction established as a mandatory one. A similar norm is to be found in the current RK Criminal Code. With this in mind, confiscation of means and instruments of crime and criminal proceeds established under the Criminal Code, may not be considered unconditional, in the broad sense.

Provisions of the 2014 Criminal Code on confiscation will be put in effect only on January 2018 (contrary to other provisions of that code which come into force on 1 January 2015). Until such time, Article 51 of the 1997 Criminal Code will apply.

Important are also provisions of the new 2014 Criminal Procedures Code on confiscation without a sentence (Section 15 CPC "Confiscation prior to sentencing"). Article 667 of the new CPC states that in the event that the suspect or the accused is put on an international arrest warrant, or else where criminal charges are dismissed on the grounds of paras 3), 4) and 11), part one, Article 35 CPC (following an act of amnesty, expiration of the statute of limitations, or with respect to a deceased), given evidence of property obtained by illicit means, the person conducting the pre-trial investigation shall start the confiscation proceedings prior to adjudication.

The pre-trial confiscation proceeding should prove: 1) that the property in question belonged to the suspect, or the accused, or a third party; 2) the link between the said property and the crime which serves the grounds for the confiscation; and 3) that the circumstances underlying the acquisition of that property by a third party give reasons to believe it was acquired illicitly. If proved that the suspect, or the accused intended to conceal the property by transferring rights to it to other persons, the person conducting the pre-trial investigation makes a motion to the prosecutor requesting a plea be made to court, upholding the interests of the State or victims in the criminal case, to invalidate the respective transactions (sale, gift, lease, trust, etc.) by way of civil law proceeding.

Having satisfied that confiscation proceedings have collected sufficient evidence proving that the property in question was obtained by illicit means, the person conducting the pre-trial investigation makes a determination indicating: (1) the suspect's or the accused person's full name (if known), place of residence or stay and the address and date of birth; (2) evidence of the crime which serves grounds for the confiscation, qualification of the crime, its circumstances, and nature and extent of injury inflicted by the crime; (3) inventory and location of the property subject to confiscation; (4) evidence proving the circumstances to be tried; and (5) the conclusion of the need to ask the court for confiscation. This procedural determination is submitted to the prosecutor without delay. Having considered the determination, the prosecutor makes a plea of confiscation to the court of appropriate jurisdiction over the criminal proceedings against the crime being investigated by a criminal prosecution authority. The plea of confiscation is adjudicated by the judge.

Having considered the plea for confiscation, the court will issue a ruling. To make the ruling, the court should find the following: (1) is there a link between the property of the suspect or the accused and the crime which serves the grounds for confiscation; (2) was the property of a third party acquired by means qualified by Article 48 of the RK Criminal Code; (3) is confiscation due and which part of the property shall it attach to; (4) what shall be done with the seized or forfeited property which is not subject to this confiscation; and (5) the amount of costs arising from the confiscation proceedings and who shall bear them?

Provisions on confiscation outside sentencing are believed to be progressive and compliant with the best international practices and standards (see, e.g., a 2014 EU Directive on seizure and forfeiture of proceeds of crime).

However, it is also necessary to strengthen safeguards protecting the person whose property is seized prior to conviction. In particular, what is needed is the requirement that court proceedings are held in the presence of the suspect's or the accused person's defence attorney (however, failure of appearance of these persons in court, after due and proper notification, should not stand in the way of the process and the hearing of the confiscation plea).

Whereas the new Criminal Code has improved significantly the range of possibilities for the confiscation of corruption proceeds, the 2014 Criminal Code (as well as the current Criminal Code) does not stipulate mandatory confiscation for all corruption offences (see above). Besides, the progressive provisions bearing on the scope of confiscation will only come into force in 2018, and the deficiencies of the 1997 CC, commented on in the Report for the Second Round of Monitoring, will remain effective.

### **Amnesty in connection with the legalization of property**

In June 2014 Kazakhstan approved the Law "On Amnesty of citizens of the Republic of Kazakhstan, *oralmans*<sup>52</sup> and persons holding a residence permit of the Republic of Kazakhstan in connection with their legalization of property", which came into force on 1 September 2014.<sup>53</sup> The law provides for one-time legalization of property, including cash once withdrawn from legal money circulation, in connection with the introduction of universal income and assets declaration for all citizens of the Republic of Kazakhstan (that commences in 2017).

Subject to this legalization is the following property: 1) cash; 2) securities; 3) shares in the capital of a legal entity; 4) immovable property the title to which was executed in the name of another person; 5) buildings, facilities and structures in the Republic of Kazakhstan owned by the subject of legalization; and 6) immovable property outside the Republic of Kazakhstan. Not to be subject to legalization is, among other things, any property obtained by means of corruption offences or crimes, or other crimes against the interests of the public service and public administration.

The period of legalization starts on 1 September 2014 and finishes on 31 December 2015. Pursuant to the process established by law, the relevant persons will be allowed to credit money to special savings accounts in the RK banks where it should be held for at least five years, during which period the owner will collect remuneration at market rates. In the event of early withdrawal of cash from the special savings account, banks will charge 10 per cent in favour of the State.

Additionally, the legalizing person will be given right to invest the money in the RK economy, through acquisition of privatized assets or assets of the agencies of the National Welfare Fund "Samruk Kazyna", including shares floated through the People's IPO programme or IPOs of the Republic's government paper, bonds of national management holdings, national companies, national development institutions, second-tier banks, or other securities traded at the Kazakhs Stock Exchange. A 10 per cent charge applies to the legalized property (except cash) outside the Republic of Kazakhstan.

It is reported that Kazakhstan has already held legalization of capital twice. The very first campaign was carried out in 2001, when USD 480 mln was legalized in one month. The second round was held in 2006-2007 and covered not only capitals but property as well, and its resulting total amounted to USD 6.8 bln.<sup>54</sup>

The property allowed for legalization does not include proceeds of corruption crime, something which should be welcomed. At the same time, this amnesty extends to persons holding public offices as they are discharged thus from disciplinary liability for non-declaration or submission of incomplete or inaccurate declarations or evidence required under Article 9 of the Law of the Republic of Kazakhstan "on the fight against corruption", for the entire period prior to the effective date of this law. This may have a negative effect on the future practice of property and income declaration by public officials.

### **New recommendation 2.4.-2.5.**

- **To analyse the application of the sanctions established by the 2014 Criminal Code for corruption offences from the point of view of their effectiveness and proportionality to crime committed.**
- **To provide for mandatory confiscation for all corruption offences. To consider enforcing the new confiscation provisions of the 2014 Criminal Code ahead of the schedule.**

<sup>52</sup> Repatriated ethnic Kazakhs who move to Kazakhstan from neighbouring countries

<sup>53</sup> See the text of the law: <http://adilet.zan.kz/rus/docs/Z1400000213>.

<sup>54</sup> Source: <http://newskaz.ru/economy/20140901/6893150.html>.

- To provide for the confiscation from those third parties who knew or must have known about the criminal origins of the property in question, together with protection for the bona fide buyers of the property to be confiscated.

## 2.6. Immunities and statute of limitations

### *Recommendation 2.6.*

- To improve procedures for lifting immunity from criminal prosecution, in particular, to specify in the legislation clear procedures for taking such decision by the President with the participation of the Supreme Judicial Council in established cases, to specify the terms for consideration of issues related to lifting of immunity by the relevant authorities. To limit immunities to acts committed in the course of execution of official duties.
- To consider increasing the statute of limitations for bringing to administrative liability for corruption offences. To ensure consistency among provisions of laws concerning suspension of terms for imposing disciplinary and administrative sanctions.

***“To improve procedures for lifting immunity from criminal prosecution, in particular, to specify in the legislation clear procedures for taking such decision by the President with the participation of the Supreme Judicial Council in established cases, to specify the terms for consideration of issues related to lifting of immunity by the relevant authorities. To limit immunities to acts committed in the course of execution of official duties.”***

Kazakhstan informs that there have been no changes in legislation improving procedures for lifting immunity from criminal prosecution. Under Article 79 of the Constitution, judges may not be subjected to arrest, detention or criminal prosecution without consent of the President of the Republic of Kazakhstan based on the opinion of the Supreme Judicial Council of the Republic of Kazakhstan, or in the specific case established by subpara (3) of Article 55 of the Constitution, where the consent of the Senate of the Parliament of the Republic of Kazakhstan is required, except in cases of apprehension at the scene of crime or grave and particularly grave crimes. The same constitutional provision is reiterated in Article 498 CPC. Additionally, part 3 of Article 498 CPC stipulates that to obtain consent to have a judge subjected to criminal prosecution, arrest, or detention, the General Prosecutor of the Republic of Kazakhstan must make a plea to the President of the Republic of Kazakhstan, and in cases stipulated in subpara (3) of Article 55 of the Constitution, to the Senate of the Parliament of the Republic of Kazakhstan. This plea is made before the judge is charged, or sanctioned to arrest, or arraigned to make appearance before a criminal investigation authority. In this context, mindful of the provisions of the Constitution, Kazakhstan authorities believe that the current procedure for lifting immunity is regulated sufficiently well, and there is no further need to establish the procedures for taking such decision by the President in law.

It is hard to agree with this conclusion since the powers of the President, established in the Constitution, to consent to arrest, detention, criminal prosecution of judges do not regulate the procedure for the execution of the relevant powers (the time allowed for consideration is not established, or, similarly, criteria on which this consent or refusal is to be based, etc.).

Besides, the lack of procedure for lifting immunity of judges was not the only criticism in the Report on the Second Round of Monitoring, which noted further that terms of reference for both chambers of Parliament provide that the decision in the issue of lifting of immunity (of members of Parliament, the General Prosecutor, Chairman and judges of the Supreme Court) shall be taken within 14 day of the relevant determination of the Central Election Commission. It does not, however, establish the final deadline by which the Central Election Commission must provide such determination. It undermines the efficiency of the immunity lifting procedure.

Immunities have not been limited to actions committed in the course of execution of official duties (functional immunities).

Therefore, Kazakhstan is not compliant with this part of the recommendation.

Practical implementation of the relevant provisions was illustrated by Kazakhstan with the following information:

- In 2011, sentenced to 5 years of imprisonment was judge G.S. Zholdasova, of Petropavlovsk municipal court, for taking USD 5,000; to 10 years of imprisonment - judge N.N. Kozybayev, of Talgar district court, Almaty region, convicted under Articles 24, part 3; Article 311, part 5, RK CC; to 6 years of imprisonment – K.S. Imankhonova, member of the Pavlodar district maslikhat, director of a utility enterprise, convicted under Articles 176, part 3, para “d”; 312, part 2; 314, part 1, RK CC;
- In 2012, sentenced to 5 years of imprisonment, with confiscation of assets, was judge D.S. Nygmetzhanov, of Oktyabrsky district court of Karaganda; sentenced to 9 year of imprisonment under Article 311, part 4, para “a” RK CC; G. Almakhan, chairman of the Shiyeli district court of Kyzyl-Orda region; sentenced to 7 years of imprisonment prosecutor B.T. Askarov, of Korgalzynsky district, under Article 311, part 4, para “c” RK CC;
- In 2013, sentenced to 7 year of imprisonment was judge Ye. Zhambulbayev, of Aral district court of Kyzyl-Orda region, under Article 311, part 3, RK CC; sentenced to 5 year of imprisonment judge S.B. Kashkinbayev, of Kostanai city court, under Article 311, part 3, RK CC; sentenced to 7 year of imprisonment S.B. Mukhtarov, chairman of the Kostanay city court; sentenced to 6 years of imprisonment, with confiscation of assets, K. Agrgenov, member of the Aktau municipal maslikhat, under Article 177, part 4, para “b” RK CC; sentenced to 5 years of imprisonment, with confiscation of assets, A.B. Toleybekov, senior prosecutor assistant of Zhetysusky district, under Article 177, part 3, para “d” RK CC. In addition, the Financial Police Agency has completed the investigation and charged Tashenova, chair of the civil law and administrative judicial panel of the Supreme Court of the Republic of Kazakhstan; judge Dzakishev of the Supreme Court of the Republic of Kazakhstan; judge Nygmetdzanov, of the Oktyabrsky district court in Karaganda; judge B.A. Satybaldiev, of the Zelensky district court. They all have been tried and convicted.

At the same time, as reported by Kazakhstan, there were no incidents involving requests for lifting immunity of members of Parliament and their criminal prosecution for misconduct or corruption offences in 2011- 2013.

***“To consider increasing the statute of limitations for bringing to administrative liability for corruption offences. To ensure consistency among provisions of laws concerning suspension of terms for imposing disciplinary and administrative sanctions.”***

Kazakhstan reports the following conclusions drawn from the consideration of the possible need to increase the statute of limitations in administrative and disciplinary sanctions for consideration of the possible need to increase the statute of limitations in administrative and disciplinary sanctions for corruption crimes. Under part 2 of Article 69 CAO, an individual may not be prosecuted under administrative liability for corruption offence after one year of the commission of the offence, and a legal entity, after five years. Experience shows that there are really no reasons for increasing the limitations. However, no statistical data was offered.

Meanwhile, under paragraph 5 of Article 69 of the Code of Administrative Offences, in the event that criminal proceedings are refused or criminal charges dismissed, should there be evidence of administrative wrongdoing by the offender, he may be found liable under the administrative process no later than three months from the day when the criminal charges or the case were dismissed. Kazakhstan officials maintain that this provisions should be interpreted to mean that in the event that a criminal prosecution is terminated after the terms of limitations in the administrative offence, the Code of Administrative Offences gives three additional months to prosecute under the administrative process, despite the expiration of the one-year term.

In Article 13-1 of the Anti-Corruption Law (Term for imposition of disciplinary sanctions for corruption offences and corruption-inducing offences): 1. In cases of corruption offences and corruption-inducing offences committed by a person authorized to perform public functions or an equal-status person, the disciplinary sanction is to be imposed within three months of the day when the wrongdoing was detected, and may not be imposed later than one year from the day when the wrongdoing was committed. 2. In cases when criminal charges or the criminal case are dismissed, given the actions of persons specified in para 1 above show evidence of corruption administrative offence or disciplinary wrongdoing, the sanction can be imposed within the time limit specified in para 1 above. As suggested in the Report on the Second Round, provisions as such may result in such person avoiding any liability for the acts qualified in the Anti-Corruption Law, if criminal charges against this person were dismissed after three months from the day when the act had been detected.

Therefore, the recommendation to make sure that criminal charges lead to the suspension of the three-month’ limitations period has not been complied with. The limitations of one year and three months are effectively

suspended only for the time when the public official stayed away from office due to temporary incapacity, dismissed from work to perform public or state duties, was on leave or on a business trip (para 3 of Article 28-1 of the Civil Service Law of the Republic of Kazakhstan).

*Kazakhstan is partially compliant with Recommendation 2.6., which remains valid.*

## **2.7. International co-operation and mutual legal assistance**

### ***Recommendation 2.7.***

**To provide in the legislation measures for direct asset recovery as envisaged by Article 53 of the UN Convention against Corruption, as well as procedure for and conditions of recovery and disposal of assets in accordance with Article 57 of that Convention.**

The new Criminal Code of the Republic of Kazakhstan has certain innovations regulating issues of asset recovery and disposal in accordance with some of the provisions of the UN Convention. Specifically, under Article 577 2014 CPC “Detection, seizure and confiscation of property”:

“1. Based on the request (motion, plea) for legal assistance, the competent authorities of the Republic of Kazakhstan shall perform the relevant procedures established herein to detect and seize the property, cash or valuables obtained by criminal means, and also any property owned by the suspects, accused or convicted persons.

2. When the property listed in para (1) above is seized, relevant steps should be taken to ensure its integrity until such time when the court makes its ruling concerning such property, of which the requested party shall be notified.

3. At the request of the requesting party, the property thus detected:

1) may be seized in compliance with the requirements of Article 571 herein and transferred to the competent authority of the requesting party as evidence in criminal proceedings or to be returned to the owner; and

2) may be confiscated, in compliance with the verdict or other ruling of the requesting party’s court that have become final.

Recognition of the verdict or other ruling by the court of the requesting party on confiscation of property shall be carried out in accordance with the procedure stipulated by Article 608 herein.

4. The property which has been seized in compliance with para (1) above, shall be detained or its transfer suspended or be temporary, if such property is required in civil law or criminal process in the Republic of Kazakhstan, or cannot be transported abroad for other reasons provide for by law.

5. The property confiscated in compliance with para (2) above, shall be conveyed into the revenue of the Republic of Kazakhstan, unless otherwise provided for in para 6 below.

6. At the motion of a central agency of the Republic of Kazakhstan, the court may order the transfer of the property confiscated under para (2), part three above, or its equivalent in cash: (1) to the requesting party that made a decision to confiscate to recompense the victim the damage caused by the criminal offence; and (2) in accordance with the international treaties of the Republic of Kazakhstan setting out the procedure for the allocation of the confiscated property or its equivalent in cash.”

The above provisions comply with Article 54 of the UN Convention Against Corruption (“Mechanisms for recovery of property through international cooperation in confiscation”).

Additionally, Article 601 of the new CPC (“Verdicts and rulings by foreign court recognized in the Republic of Kazakhstan) specifies that in accordance with the procedure stipulated in the Code and by international treaties of the Republic of Kazakhstan, the Republic of Kazakhstan may recognize and execute judgment and rulings of foreign courts, in particular on matters of confiscation of property found in the Republic of Kazakhstan, or its equivalent in cash. The decision in the issue of recognition and execution of a civil law judgment by a foreign court is regulated by the Civil Law Procedures Code of the Republic of Kazakhstan. Competent agencies of the foreign state may turn to the General Prosecutor of the Republic of Kazakhstan with a plea to recognize and execute a judgment or ruling of the foreign court on confiscation of property found in the Republic of Kazakhstan or its equivalent in cash (Article 607 CPC).

These provisions can be deemed as implementing Article 57 of the UN Convention Against Corruption.

However, provisions of Article 53 of the UN Convention Against Corruption (Measures for direct recovery of property) have not been reflected in the new CPC.

According to Article 53 UNCAC, each State Party shall, in accordance with its domestic law: (a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention; (b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and (c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

In their written comments Kazakh authorities argue that in accordance with Article 71 of the new CPC public authority of a foreign state which suffered damage is recognized as a victim of crime and, according to Article 73 CPC, as a civil plaintiff in the criminal case with all the rights following from such legal status (according to Article 71.12 CPC foreign state's interests can be represented by the official counsel). According to paragraphs 4 and 5 of Article 60 CPC an investigator (with a view to ensuring enforcement of the verdict as concerns civil lawsuit, other property claims or possible confiscation) should establish property of the suspect, including that was obtained by criminal means or acquired for the money obtained by criminal means and transferred to possession of third parties. According to Article 163 CPC, investigative judge issues an authorization for seizure of property of the suspect, which is enforced by bailiff. Procedure for deciding on property-related issues in criminal proceedings is defined in the separate chapter of the new CPC; according to Article 170 CPC of the latter decision is made, *inter alia*, on the full or partial satisfaction of the civil lawsuit. Therefore, as claimed by Kazakhstan, there are no obstacles in the national legislation of Kazakhstan for direct recovery of assets to the victim, including a foreign state.

However, from the mentioned CPC provisions, it does not follow unambiguously that a foreign state – a Party to the UNCAC can be recognised as a victim or a civil plaintiff. For example, under Article 71 CPC a victim means a person with regard to whom there are grounds to believe that the criminal offence had directly caused this person moral, physical or pecuniary damage. Who could be such “person” and whether a foreign state would qualify as one is not clear. According to Article 73 CPC, a civil plaintiff is a natural or legal person who filed a civil lawsuit for compensation of pecuniary or moral damage caused by the criminal offence or by the act of an incapable person. It is not clear from the text of the Code that such person could be a foreign state. Due to this it is impossible to recognise that the new CPC RK explicitly provides for possibility of direct asset recovery in line with Article 53 UNCAC. It should also be noted in this regard that similar provisions on the victim and civil plaintiff are included in the 1997 CPC. Therefore there are no new provisions in this regard in the CPC of 2014. Kazakhstan did not provide proof that the said terms extend to foreign states (e.g. court case law under 1997 CPC).

It is worth noting that the Civil Procedure Code includes a separate and detailed notion of a “foreign person” (*“Foreigners and stateless persons, foreign and international organisations (hereinafter – foreign persons) have the right to apply to courts of Kazakhstan for protecting their violated or contested rights, freedoms and lawfully protected interests”* – Article 413, Civil Procedure Code). Relevant provisions could also be transferred in the CPC.

Also, in its information Kazakhstan points to some practical obstacles to proper MLA from European countries which fail to execute requests for mutual legal assistance in criminal matters or explain reasons for not doing so. Similarly unfulfilled are requests to competent authorities of the People's Republic of China and Republic of Turkey. The reasoning for refusing assistance include non-authenticity of translation of documents, notwithstanding the fact that Kazakhstan, in compliance with the bilateral MLA treaties with these countries, submits requests translated into several languages. At the same time, all MLA requests by the above countries (mostly Turkey) are fulfilled by the Republic of Kazakhstan promptly within the framework of the respective bilateral treaties, or, in their absence, in compliance with the UN Convention Against Corruption.

***Kazakhstan is partially compliant with Recommendation 2.7., which remains valid.***

## 2.8.-2.9. Application, interpretation and procedure, specialized anti-corruption law enforcement bodies

### *Recommendations 2.8.-2.9.*

- **There were no new recommendations in the Report on the Second Round of Monitoring**

**Agencies responsible for the investigation of corruption crimes.** Under Article 192 CPC, corruption criminal offences are referred to the jurisdiction of the financial police. This article was amended by the Law of the Republic of Kazakhstan of 18.01.2011, No 393-IV, to put Articles 307, 308, 310-315 RK CC in the exclusive jurisdiction of the financial police. In the new 2014 Criminal Procedures Code the financial police agencies continues to enjoy the exclusive jurisdiction over criminal offences of this category.

Already after the onsite visit, the monitoring team learned from the media reports about the decision to abolish the Financial Police Agency and transfer its functions to the newly established Agency of the public service and fight against corruption.<sup>55</sup> In the absence of more detailed information from Kazakhstan, these developments cannot be assessed (see also section 1.6 of this Report).

### **Specialized prosecutors**

Kazakhstan's prosecution agencies do not have specialized bodies (units) responsible for the detection, investigation and criminal prosecution of corruption offences. But in 2009 the CPC was amended so that prosecutors could be allowed to recall cases from the agencies for pre-trial investigation into their own jurisdiction (before the amendments, they could only transfer a case from one pre-trial investigation agency to another irrespective of the investigative jurisdiction). The CPC is silent on the criteria or grounds for such recall, although it is treated as an exceptional measure. More procedures are detailed in the Guidelines for the organization of pre-trial investigations in the prosecution agencies (as amended on 07.03.2012, No 22), which specify that the function of criminal prosecution in the form of a pre-trial investigation shall be performed by the Department of specialized prosecutors of the Office of the General Prosecutor of the Republic of Kazakhstan ("Department") and divisions of specialized prosecutors in regional and equivalent offices of prosecution.

A specialized prosecutor means a public official authorized to conduct a pre-investigation screening, investigation of a criminal case within his direct competence or lead an investigative group, as head of the Department, deputy head of the Department, senior assistant (assistant) of the General Prosecutor (for investigation and supervision of investigative groups, forensic officer), head of a division, senior assistant (assistant) of the regional prosecutor and of equivalent status (for investigation and supervision of investigative groups, forensic officer), senior prosecutor, prosecutor (forensic officer) of the division.

The guidelines define the grounds for the recall of the case from the pre-trial investigation agency. Pursuant to the guidelines, the issue of pre-investigation inquiry into the available evidence, initiation of the criminal proceedings into the matter or pre-trial investigation, among other things, in the form of the supervision of the investigative group is treated as priority when: there has been serious violation of constitutional rights of citizens, inter alia, torture; high-profile public or economic crime, including corruption, affecting the interests of the State. In exceptional cases, to ensure a comprehensive and unbiased investigation, a pre-investigation inquiry into the available evidence by the specialized prosecutor or investigation of other type of criminal offence can be perpetrated at the instruction of the General Prosecutor, the supervising deputy, regional prosecutor or an equivalent. Specialized prosecutors may conduct an investigation not only after the case has been recalled from other agencies, but may themselves bring charges and start an investigation.

The Department is also governed by the terms of reference of the Department of specialized prosecutors of the Office of the General Prosecutor of the Republic of Kazakhstan, approved pursuant to the order of the General Prosecutor of the Republic of Kazakhstan, No 3, on 10 January 2013. The Department's key objectives are to: (1)

<sup>55</sup> "Kazakhstan abolishes the financial police", 6 August 2014, <http://newskaz.ru/politics/20140806/6803226.html>; "Reshuffles in Kazakhstan: 12 ministries out of 17" 6 August 2014, [http://vlast.kz/article/kadrovye\\_perestanovki\\_v\\_kazahstane\\_12\\_ministerstv\\_vmesto\\_17-6770.html](http://vlast.kz/article/kadrovye_perestanovki_v_kazahstane_12_ministerstv_vmesto_17-6770.html).

conduct comprehensive, complete and unbiased crime investigation; (2) expose and prosecute criminal offenders; (3) ensure compensation of injury inflicted by the crime; and 4) determine causes and conditions leading to the commission of crimes, mitigate them and to protect the public interest and constitutional rights of citizens.

The Department of specialized prosecutors has a staff of 21 prosecutors. In 2012-2013, out of all the criminal charges brought by the financial police for corruption offences, 11 cases were transferred by prosecutors for pre-investigation inquiry by other agencies (3 to the Minister of the Interior, and 8 to the National Security Committee). Prosecution agencies took over criminal proceeding in 47 cases.

The prosecutor, overall, has a very broad discretion in the choice of cases he may want to work on. This may have a negative implication for the independence of the pre-trial investigation agencies, e.g., the financial police, when cases in their investigative jurisdiction may be taken over by the prosecutor for investigation at his discretion. In addition, as was noted in the Report for the Second Round of Monitoring, such a broad discretion in the choice of cases for investigation and the fact that one agency (prosecution) combines functions of pre-trial investigation and supervision over investigation may lead to abuse and conflict of interest.

Specialized prosecutors, however, are not meant to specialize in anti-corruption. "Specialization" of the said prosecutors is about their powers to conduct pre-trial investigation. Therefore, Kazakhstan has not in fact introduced the specialization of prosecutors in corruption offences.

**Coordination of law enforcement agencies in fighting corruption.** Coordination is vested in the Coordination Council of the Republic of Kazakhstan for ensuring law and order and fighting crime, whose terms of reference were approved with the Decree of the President of the Republic of Kazakhstan of 2 May 2011, No 68. This Coordination Council is chaired by the General Prosecutor of the Republic of Kazakhstan. Other permanent members of the Coordination Council are: Chairman of the Financial Police Agency; Director of the Foreign Intelligence Service Syrbar; Chairman of the Accounting Committee for the control over the execution of the republican budget; Minister of the Interior; and Minister of Justice. Among the members with temporary delegated powers are: Chairman of the Public Service Agency; Minister for Emergency Situations; Chairman of the Customs Control Committee of the Ministry of Finance; and Chairman of the Tax Committee of the Ministry of Finance.

Kazakhstan also informs that the Financial Police Agency has initiated the creation of a Coordination Council of anti-corruption units of state agencies.

**New methods of analysis of anti-corruption measures or analytical methods for the detection of corruption offences.** It was reported by Kazakhstan that the financial police focus, by way of priority, on prevention and deterrence of corruption and white-collar crime, as well as on early detection of evidence of crime to pre-empt damage to the State. This objective is addressed through continued improvement of methods and implementation of new techniques.

Kazakhstan has studied foreign practices suggesting that about half of the total intelligence, collected by secret and law enforcement agencies and important for operational needs, comes from databases accumulated by public agencies. For that purpose, the Financial Police Agency has set up its Situation Centre, which is an automated analytical facility capable of analysing a range of sources to identify risky events, draw diagrams of crime, and identify obvious or hidden links between the subjects based on kinship or other attributes. The relevance of information sources for the financial police is very high, because all data on the movement of budgetary assets and net settlements between businesses are accumulated in public databases. The purpose of the Situation Centre is to reduce time, money and labour costs in the detection and disruption of corruption crime and increase the efficiency of the financial police in its fight against crime.

The Situation Centre monitors public procurement by state agencies and national companies identifying evidence of overpricing early at the planning stages. The quoted prices for the purchases are compared with market prices and in cases of overpricing, a report is made requiring either the tender to be cancelled or the price adjusted. Overpricing is most common in purchases of petrol and lubricants, food and office equipment.

The focus in analysis is to identify systemic corruption and disrupt organized criminal groups. Based on the Treasury Committee databases and electronic public procurement web-site, it is possible to identify groups of affiliated companies that for years have been dominating public procurement by a single agency. Then, the most suspicious tenders, with the highest risk of misappropriation, are identified.

In 2013, such monitoring of public procurement by state agencies for overpricing helped prevent abuses for about KZT 3.5 bln of government monies (KZT 5.6 bln in one year since the centre became operational).

Owing to special analytical training, investigators and detective officers going onsite did not have to conduct blanket checks of all tenders and bidders. In the shortest time, they complete targeted screening of the identified suspicious contracts and businesses. Prior to going on the site, they trace illicit proceeds assets to be frozen efficiently and to be used subsequently to repay public damages.

Apart from the prevention of misappropriations, advanced methods of analytical forecasting help to improve significantly the efficiency of exposing corruption and white-collar crime already committed. Illicit proceeds of corruption are often laundered through so-called sham (fictitious) businesses which are established without any intention to conduct entrepreneurial business.

In this context, this area was identified as priority, requiring urgent actions, because it is where the State suffers significant damage and where high-risk corrupt practices are concentrated.

Based on the joint ordinance of the Tax Committee and the Financial Police Agency, the Agency receives from the Tax Committee lists of risky companies based on the criteria used in the risk management system of tax authorities (low tax burden vs significant cash flows, frequent change of the legal address, use of mailbox addresses, absence of employed labour, etc.) The resulting list of risky companies is thoroughly vetted. Based on experience, over 70% of sham businesses are registered in the names of people with previous criminal record, drug addicts, drunkards and homeless or other outcasts. Often, each may have up to a few dozens of such sham companies registered in his name. The actual business address is either non-existent or is not suitable for commerce.

From the system of information sharing of the law enforcement and specialized agencies of the Office of General Prosecutor, the Financial Police Agency receives electronically the necessary public data (61 databases of state agencies and national companies), enabling them to quickly analyse data and identify risky targets.

Over 630 criminal prosecutions were started based on the data of the Situation Centre since it was launched. The analysis is focused on identifying systemic corruption and disrupting organized crime groups.

To give but one example, analysts of the Situation Centre have identified a group of affiliated companies which for a number of years dominated public procurement in one of the provinces. Controlled by one person, the companies would bid all together for construction tenders, with one of them pricing their offer slightly lower than others. With such practices of simulated competition, one of the firms would invariably win large public procurement tenders. The suspicion was caused by the fact that JSC Gaysh Sapary subcontracted all of its large construction contracts (in excess of KZT 15 bln total) to a limited partnership, Kulager Construction Company. CEOs of both companies have been arrested when a KZT 75 mln bribe was paid; the case is pending trial at the moment.

This establishment by the Financial Police Agency and operations of the Situation Centre is a welcome change promoting best practices in line with the world leading experience in proactive detection and prevention of corruption and other crime with analytical methods and computer technologies.

**Statistics.** Statistics on detected crime and the work of law enforcement agencies is collected and accumulated by the Committee on legal statistics and specialized statements of the Office of the General Prosecutor of the Republic of Kazakhstan. A large amount of requested statistics was not made available to the monitoring team during the Third Round of Monitoring, with reference to restricted access. However, some data for the Financial Police Agency was provided. Also, law enforcement statistics are available on the web-site of the Committee on legal statistics and specialized statements (<http://service.pravstat.kz/>). What was missing was statistical data on trials of corruption offences in criminal courts (number of convictions, sentences, commuted sentences, etc.). Overall, lack of the classified nature of statistical data on detection, investigation and prosecution of corruption offences makes it impossible to conduct and form an independent, public assessment of the efficiency of law enforcement and judiciary bodies in those matters or evaluate the level of corruption crime and its trends in the country.

### **Training activities in investigation and criminal prosecution of corruption crimes**

Kazakhstan reported on the following completed activities:

- On 3 June 2011, online training for the management staff of the prosecution offices on “Prevention of Corruption: issues of supervision and collaboration with other state agencies”;
- 27 February - 2 March 2012: a course of high-level professional retraining for candidates for the position of deputy regional prosecutors. The course was attended by 20 prosecution officers from district offices and heads of departments of regional and equivalent prosecution offices, and 2 representatives of the prosecution service from the Republic of Tajikistan.
- 27 April 2012: a sectoral e-learning workshop on “Legal mechanisms to fight corruption” conducted by the Office of the General Prosecutor and experts from the Institute.
- 22 November 2012: the Institute, together with the US Embassy, held a workshop through a video-conference on “Recent development in fighting corruption and money laundering”. The training session was attended by a Judge of Supreme Court of Canada and a prosecution assistant from Liege.
- The Institute of Justice of the RK President’s Academy of Public Administration, in collaboration with the Supreme Court of the Republic of Kazakhstan, conducts training in anti-corruption for the students of professional upgrading courses. The Institute of Justice offers courses of professional upgrading to judges of district and equivalent courts, regional and equivalent courts and heads of chancelleries, court clerks and staff workers of local courts chancelleries. In line with the approved curriculum for the upgrading courses, lectures about the National anti-corruption programme were delivered by the Institute of Justice faculty members and professors of the Financial Police Academy. In 2013, a lecture on this subject was held for all streams of students of the course (17 streams, 572 students). In addition, judges of the Supreme Court of the Republic of Kazakhstan delivered lectures to judges of local courts specializing in criminal trials discussing corruption and other type of crime against the interest of the public service and public administration. The series of lectures focused on judicial practice in corruption offences, including practices of sentencing for corruption offences.
- The Department of Court Administration of the Supreme Court of the Republic of Kazakhstan (Supreme Court secretariat) held training for 120 workers of chancelleries of local courts on crime prevention in the judiciary system, also covering anti-corruption issues.

There has not been and there are no plans for joint anti-corruption training for judges and law enforcement offices.

#### **New recommendation 2.8.-2.9.**

- **To introduce specialization of prosecutors to supervise investigations and to press charges for corruption crimes during trial.**
- **To ensure free access via Internet to regularly updated detailed statistic data on criminal and other corruption offences, in particular, on the number of reports of such offences, number of registered cases, the outcomes of their investigation and criminal prosecution, and the outcome of trial (among other things, data on sanctions imposed, and categories of the accused depending on their position and place of work). The above data should come together with analysis of current trends and causes of changes in trends.**

### III. Prevention of corruption

#### 3.2. Integrity of public service

##### *Recommendation 3.2.*

**Legal framework.** To revise the existing legislative differentiation between administrative and political civil servants, in particular to substantially decrease the list of political servants, in order to ensure professionalism and real protection of administrative civil servants as well as law enforcement officers from political influence.

**Recruitment and promotion.** To continue reforming the system of recruitment and promotion of civil servants by establishing clear criteria for evaluation based on personal merit and qualifications; to eliminate the possibility of occupying administrative positions without a competitive selection; to envisage in the law a procedure for merit-based promotion and procedure for carrying out internal competitions.

**Remuneration.** To set clear statutory limitations on the amounts and frequency of additional remuneration (awards), which is not included in the basic fixed salary, and to envisage criteria for such awards in order to limit discretionary powers in taking decisions on such issues and to ensure transparency of such payments.

**Conflict of interest.** To develop and broadly disseminate among employees of state authorities practical guides on prevention and resolution of conflict of interest with taking due account of the specifics of work of certain authorities. To introduce a practice of consulting employees with respect to observance of the regulations on conflict of interests, requirements of incompatibility and other restrictions both at the level of separate authorities and on a centralized basis (by the authorized body in the field of civil service). To carry out monitoring and analysis of implementation of the regulations on conflict of interests and restrictions in the civil service.

**Internal control.** To strengthen preventive work of the internal control (security) units, including work on raising awareness of anti-corruption regulations, assistance in prevention and resolution of conflicts of interests. To ensure methodological support of and guidance to such units.

**Declaration of assets.** To amend legislation and practice of asset and income declarations in order to ensure their effectiveness, in particular, to envisage verification of part of declarations (for example, of high-level administrative civil servants, political civil servants, judges, prosecutors, employees of bodies which are most prone to corruption). To envisage mandatory publication of data from declarations of the high-level officials, political servants, judges, as well as availability of all other declarations of public servants upon request.

**Codes of ethics and anti-corruption training.** To define in the Code of Ethics the observance of the rule of law principles and ensuring professionalism of civil service as the main duty of civil servants; to revise provisions on obligatory refutation of public accusations; to ensure regular and practical training on observance of the codes of ethics (codes of conduct). To create a system of annual education and continuous training on the issues of preventing and combating corruption with the focus on the practical implementation of the legislation.

**Restrictions in receiving gifts.** To develop and disseminate detailed guidelines on the implementation of provisions on gifts in order to clarify established restrictions and liability for their violation. To carry out monitoring of the implementation of provisions on gifts and to develop proposals on their improvement.

**Protection of whistle-blowers.** To stipulate in the legislative acts detailed provisions for the protection of whistle-blowers, in particular, effective guarantees of their protection from oppression and persecution. Review provisions of the Code of Administrative Offences, which establish administrative

**liability for reporting false information about corruption, as the corruption facts are difficult to prove and information about them can be purposefully presented as intentional disinformation.**

### Civil service reform

On 14 December 2012 amendments were made into Law on 23 July 1999, No 453-I, "On civil service", and on 7 March 2013, the RK President issued his Decree No 523 "On approving the Register of offices of civil servants". Pursuant to these amendments in the civil service legislation, made effective on 26 March 2013, a new model of public service was introduced in Kazakhstan, composed of three corps:

- **Corps "A" administrative public offices** – administrative public offices of the executive level with distinct procedures for recruitment in the human resources reserve, competitive selection, performance of service and retirement from public service, defined by the President of the Republic of Kazakhstan, together with distinct qualifications requirements.
- **Corps "B" administrative public offices** – other administrative public offices outside Corps "A";
- **Political public offices** – civil servants whose appointment (election), dismissal, and performance are of a political and directive nature, and who are responsible for the implementation of political aims and objectives.

The key outcome of the above changes has been the creation of a separate category of top-level executive offices: Corps "A" administrative public offices. Corps "A" was set up to make the public service professional and improve the efficiency of state machinery. Corps "A" contains 539 public offices at the executive level. Corps "A" positions enjoy a new, distinct procedure for recruitment, performance of service, assessment, rotation and training. There are intentions to introduce distinct career planning and remuneration. Corps "A" offices are listed in the register of public servants positions (see Table below).

Civil servants that make the state policies, lead a sector of the public administration, define the strategic areas of development of the country, and the civil servants whose appointment is of political and directive nature, are included in the political public servants corps. The respective offices are also listed in the Register of the public service offices (see below).

Significantly, the number of political offices has been drastically reduced. With the amendments to the Civil Service Law, the number of staff for political servants has been slashed 8-fold – from 3,272 to 439 positions. Reductions covered such political positions as some of the categories of top officials in the central executive authorities, some categories of akims, heads of sections of the Presidential Administration, heads of akim staff.

Decree of the President of the Republic of Kazakhstan of 7 March 2013, No 523  
*"On approving the Register of public service offices"*

#### **Political public offices**

Prime Minister, first deputy and deputies

State Secretary

Head of the Presidential Administration of the Republic of Kazakhstan, his first deputy and deputy heads

Chairman and members of the Constitutional Council\*<sup>56</sup>

Chairman, deputy Chairman, Secretary and members of the Central Election Commission, \* Assistant to the President  
– Secretary of the Security Council, his deputies

Chairman of the Supreme Judicial Council \*

Chairman and members of the Accounting Committee for the control over execution of the republican budget

Head of the President's Chancellery, his deputies

Assistants to the President

Advisers to the President

Heads of state agencies directly subordinated and accountable to the President, their first deputies and deputy heads

Minister, their first deputies and deputy ministers

Akims of the regions, the capital city and the city of republican status, their first deputies and deputy akims

Ambassadors Extraordinary and Plenipotentiary

<sup>56</sup> Asterisk marks the political positions in the Register which despite the criticism in the IAS Report of the Second Round of Monitoring stayed in the new list.

Head of the Prime-Minister's Chancellery, his deputies\*  
Human Rights Ombudsman \*  
Managers of sections and heads of other structural divisions of the Presidential Administration, their first deputies and deputy heads  
Heads of central executive authorities other than the Government, their first deputies and deputy heads  
President's special envoys  
Director of the Presidential Archives, his deputies  
Director of the Museum of the First President, his deputies  
Director of the Central Communications Service, his deputies  
Heads of staff of the Senate and the Majilis of Parliament, and their deputies  
State Inspectors of the structural division of the Presidential Administration  
Skims of the cities that are regional administrative centres  
Head of the Medical Centre of the Department for Administration and General Services of the President and his deputies

### **Administrative public offices**

#### **Corps "A"**

##### CATEGORY 1

Executive Secretaries of central executive authorities  
Heads of staff of the Constitutional Court, Administrative and General Services Department of the President of the Republic of Kazakhstan, Central Election Commission of the Republic of Kazakhstan, Accounting Committee for control over the execution of budget of the Republic, Civil Service Agency of the Republic of Kazakhstan, head of the Department for courts administration of the Supreme Court of the Republic of Kazakhstan (staff of the Supreme Court of the Republic of Kazakhstan)  
Heads of staff of akims of the regions, the capital city and the city of republican status  
Heads of staff of central executive authorities that lack the position of Executive Secretary; head of the National Human Rights Centre  
Deputy heads of the Department for courts administration of the Supreme Court of the Republic of Kazakhstan (staff of the Supreme Court of the Republic of Kazakhstan)  
Section managers at the Presidential Administration of the Republic of Kazakhstan  
Heads of structural divisions of the chambers of the Parliament of the Republic of Kazakhstan, Chancellery of the Prime Minister of the Republic of Kazakhstan, Constitutional Court of the Republic of Kazakhstan, Central Election Commission of the Republic of Kazakhstan, Department for administration and general services of the President of the Republic of Kazakhstan, Accounting Committee for control over the execution of budget of the Republic, Department for courts administration of the Supreme Court of the Republic of Kazakhstan (staff of the Supreme Court of the Republic of Kazakhstan);  
Heads of the territorial divisions of the Civil Service Agency of the Republic of Kazakhstan – chairpersons of the Disciplinary Boards of the Civil Service Agency of the Republic of Kazakhstan in regions, the capital city, and the city of republican status  
Chairpersons of committees of central executive authorities  
Head of the Administrative Department of the Parliament of the Republic of Kazakhstan and his deputies  
Akims of cities of regional status (except akims of the cities that are regional centres), regional districts and municipal districts

##### CATEGORY 2

Chairpersons and members of audit commissions of regions, the capital city and the city of republic status

The monitoring team is of the opinion that some of the civil servants in the political group can hardly be taken as performing political duties. Many of such positions were already commented on in the Report for the Second Round of Monitoring in 2011. Based on the criteria established by the law, among the political public servants who have been unreasonably included in the political group are the Chairman and member of the Constitutional Court; the Chairman, Deputy Chairman, Secretary and members of the Central Election Commission; Chairman of the Supreme judicial Council; Human Rights Ombudsman; Director of the Presidential Archives and his deputies; Director of the Museum of the First President and his deputies; Director of the Central Communications Service and his deputies; State Inspectors of the structural division of the Presidential Administration; and Head of the Medical Centre of the Department for Administration and General Services of the President and his deputies. The above positions fail to comply with the "performance of political and directive nature" criterion, and the majority of them also fail to fit the other criterion of being "responsible for the implementation of political aims and objectives". Kazakhstan noted that

some of the mentioned officials are appointed and dismissed by the President and therefore “their appointment is based on political trust”. However, such characteristic of political officials does not comply with democratic principles – existence of political trust on behalf of the president of the country is not sufficient to determine a political nature of the office, these persons still do not define public policy; moreover for some of them (CEC members, Judicial Council members, Ombudsman) the defining feature of the office is quite the opposite – independence from political relations and from politicians.

Significantly, although the civil service corps have been established in law, there is still much of the discretion left to regulatory acts to provide which positions belong to which of the three categories. This is what the Civil Service Register, approved by the Presidential Decree, does. According to the monitoring team, the Presidential Decree broadens the political servants framework established in law. It is generally recommended that the classification of positions among civil service categories be prescribed directly in law.

Kazakhstan quite recently also carried out a reform of law enforcement agencies.<sup>57</sup> Over 5,500 law enforcement officers were put into the administrative public servants ranks. As a result, the number of administrative public servants in law enforcement increased more than 2.8 times - from 3,151 to 9,009.<sup>58</sup>

**Table 13.** Civil Service of the Republic of Kazakhstan

	<b>At the time of the Second Round of Monitoring (Report for Kazakhstan, 29 September 2011)</b>	<b>As of 1 January 2014 (following the reform of the state service in March 2013)</b>
Political civil servants	3 116	439
Administrative civil servants of which:	84 273	97 392
<i>Corps “A”</i>		539
<i>Corps “B”</i>		96853

Source: Report for the Second Round of Monitoring; data provided by Kazakhstan in June 2014.

As data provided by Kazakhstan suggest, following the 2013 reform of the civil service 90,220 civil servants, or 92.2% of the staff positions were appointed under the new regulations, including 439, or 96.8%, political civil servants; out of 539 administrative Corps “A” offices 527 or 97.8% have been appointed, and out of 96,853 Corps “B” offices, filled were 89,268 positions, or 92.2%.

### **Civil service recruitment and promotion**

Following the Second Round of Monitoring, the civil service in Kazakhstan has been exposed to a number of activities aimed at improving recruitment and promotion in the service. A number of implementing acts passed, methodological guidelines approved, and practical events conducted.

*Recruitment to Corps “B” positions* is based on the Rules for the competition-based vacancies in administrative civil service offices and the evaluation commission, approved with the ordinance of the Chairman of the Civil Service Agency of 19 March 2013, No 06-7/32.

One of the innovations in the civil service reform was centralized testing before the admission to the civil service, on top of the competition for vacancies in state agencies. The tested applicant is issued with a certificate which makes him eligible for competitions for Corps “B” offices in any state agency for one year. Eligible for Corps “B” competitions are the individuals who have cleared the test threshold established by the authorized agency. According to Kazakhstan, the number of those who are willing to enter the civil service has increased as a result. Compared to 2011, when tests were taken by on 1,950 people monthly, there were 2,300 in 2012, and by 2013, it grew to 4,700 a month.

<sup>57</sup> Law enforcement agencies include prosecution agencies, Ministry of the Interior, the financial police, State Fire Fighting Service, and the customs authorities of the Republic of Kazakhstan. .

<sup>58</sup> Kazakhstan Progress Update at the 13<sup>th</sup> Istanbul Action Plan monitoring meeting, 16-18 April 2014, p. 20, <http://www.oecd.org/corruption/acn/KazakhstanProgressUpdateApril2014RUS.pdf>.

On the positive side, there are plans in 2014-2015 to improve the centralized tests by evaluating the applicants' competences. Apart from improving human resources management techniques, centralized testing is less biased, improves the general public's perception of transparency in the civil service recruitment, thus boosting the number of civil service applicants.

Another innovation is the possibility for observers and experts to attend meetings of the evaluation commission during the recruitment competitions at public agencies. The observers are allowed to be present during interviews with contestants, learn about the work of evaluation commissions and present their conclusions on its performance to the leadership of the public agency. Observers may come from the mass media, public associations or other organisations.

To improve transparency and access to the civil service, information about all vacancies and notifications about completions to be held at public agencies must be published at their respective websites. In the same way they should also publish the relevant information about possibilities open to observers and experts. Anyone could put down his name for the testing through the e-government web-portal.<sup>59</sup>

The competition consists of an interview with applicants who must comply with the established qualification requirements. The applicant must also comply with the standard qualification requirements for the Corps "B" categories of administrative public offices, approved by the ordinance of the First Deputy Chairman of the Agency of 9 January 2008, No 02-01-02/5 (as amended on 19.03.2013). The requirements cover education, work experience, knowledge of legal acts and, as the regulation states, "other compulsory knowledge required for the performance of functional duties". The purpose of the interview during the competition is to assess professional and personal qualities. The law says that a contestant who is cleared by the evaluation commission is eligible for a Corps "B" administrative public office vacancy. The law also stipulates that any contestant who did not get a positive result but was recommended by the evaluation commission for the civil service may be put in a human resources reserve of the Corps "B" administrative service at the recommendation of the evaluation commission of the public agency, and has the right, for one year, to fill a relevant vacancy in the Corps "B" administrative service in the same agency without having to compete again, provided he complies with the qualification requirements.

As for *recruitment in Corps "A"*, the Civil Service Law provides for a separate procedure for filling in vacancies in Corps "A" public offices, which is established by the President. Relevant rules were approved with the Presidential Decree of 22 March 2013, No 524.

The rules provide for a *Corps "A" human resources reserve to be set up*. The reserve is recruited by the newly established *National Human Resources Policies Commission under the auspices of the President of the Republic of Kazakhstan*. This Commission was approved with the Presidential Decree of 7 March 2013, No 520, and is led by the Head of the Presidential Administration. As indicated by Kazakhstan, Commission comprises representatives of the legislative and executive branch, higher public officials who have managerial experience and skills necessary to evaluate professional and personal qualities and its decisions are based, *inter alia*, on the results of testing and information on prior rewards awarded to candidates. However, the monitoring group notes that members of the Commission include political civil servants and members of Parliament. The National Commission, in the opinion of the monitoring group, with such a composition appears to be focused not so much on the professional as on the political criteria.

The Corps "A" recruitment is public. The applicants willing to be recruited in the Corps "A" reserve must submit certain documents. Interestingly, one of the necessary documents is a letter of reference that can be issued only by a limited number of people specified in the rules – members of Parliament, Corps "A" public servants, or chairmen of the board of national companies, national holdings, etc. appointed by the President of the Republic of Kazakhstan. Here again, in the opinion of the monitoring group, there are elements of political bias (i.e. the requirement of the letter of reference from MPs), and there is a risk that the equitable right of access to the civil service (Constitution of the Republic of Kazakhstan, paragraph 4, Article 33) may be undermined.

Special qualification requirements for the administrative public offices in Corps "A" were approved with the Presidential Decree of 10 December 2013, No 708, to include requirements as to education, work experience, professional knowledge, and knowledge of law and key strategic policy documents.

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<sup>59</sup> See <http://egov.kz/>, Section on career opportunities and employment > Civil service > Apply for testing.

The documents and compliance with the qualification requirements are screened by the Civil Service Agency, and subject to that screening, the contender will be allowed to sit the test.

What follows is that the National Commission will study the applicants' documents and test results, and hold an interview to make a recommendation to admit the applicant to the human resources reserve. Technically, the HR reserve is built by the Agency based on such recommendations.

Then the state agency, which has the right of appointment to the specific office, will stage a competition. Applicants from the HR reserve will be selected and during the competition their documents are evaluated and interviews held. The interviewer is the person who will make the appointment, but a group interview is also an option.

As was noted in the Report for the Second Round of Monitoring, the law stipulated a competitive selection but it does not say that it should be based on personal merits and qualities. This drawback was not addressed. Based on other countries, such provision can be incorporated either in the constitution, civil service law or implementing acts, but the best option would be to have this principle established at least in the law.

Also in the Report for the Second Round of Monitoring it was noted that Kazakhstan failed to establish the criteria for the last stage in the selection of the best contender for recruitment to the specific administrative position during the competition, namely, there is no requirement to state the reasons for the selection of the applicant based on his merits and qualities and explain the best choice. It is important that any party concerned will be clear which objective criteria were used in selecting the specific applicant for the vacancy. There are different ways to do it, e.g., in Latvia there is a system of scoring which defines the meaning of which score; the competition is recorded on a video which could be used in evidence in litigation. In Kazakhstan, the reasoning for the selection of the contender may be detailed in the final conclusions of the evaluation commission. The general requirement is for a reasoned written resolution, stating in what way the selected applicant is compliant with the requirement, why his skills and knowledge are the better choice for the position compared to other contenders.

Kazakhstan informed that in 2014 selection to the Corps "A" reserve was carried out with the use of new approach of selecting persons to be recommended for enrolment in the staff reserve. A system of marks and final points was used. Each candidate was given a mark based on the test results for the knowledge of legislation, interview. Then a threshold number of points was determined. This is a positive practice, however criteria and rules for selection should be clearly established in the legal acts.

Since the Second Round of Monitoring, the option to be appointed for an administrative public office *through horizontal rotation* among agencies without any competition has been narrowed; earlier, it was commonly used to replace the head of the state agency. Now, such horizontal rotation can only be allowed within the agency and its territorial branches, as stipulated in the Civil Service Law and in the rules governing promotion in public service approved by the Presidential Decree of 10 March 2000, No 357 (as amended on 22.03.2013.).

According to Kazakhstan, such changes resulted in a 30-fold reduction in the number of rotations between state agencies. In 2012, out of 20,000 appointments, over 70% was subject to horizontal rotation; in 2013, appoints through horizontal rotation dropped to under 20%. In 2012, there were on average 3,500 horizontal rotations between public agencies every quarter, compared to fewer than 80 on average in one quarter of 2013 (following legislative amendments).

However, still effective is the provision saying that former members of Parliament, full-time members of maslikhats, political public servants, and judges may be appointed to administrative public office positions within one year by the President of the Republic of Kazakhstan (previously it was based on the procedure defined by the President). This is not compliant with the recommendation of the Second Round of Monitoring.

According to official information of Kazakhstan, in practice this provision has rarely been used – in 2013 it concerned 0.9% (246 persons) of all appointments. While the number of such transfers in 2013 has significantly dropped compared with the previous year – 30 times less. This is a positive trend, but the possibility of such transfer itself is problematic – the number of transfers is not limited and in any other period it may balloon again.

There have been changes also in civil servants performance evaluation and its criteria. The Presidential Decree of 22 March 2013, No 527, sets out a new procedure for the *annual performance evaluation and attestation* of civil servants, together with a distinct procedure for the evaluation of performance of Corps "A" administrative public

servants. Also, the Civil Service Agency has developed performance evaluation methodologies with respect to Corps "A" and Corps "B" administrative public servants, effective since early 2014.

The new evaluation rules link incentives and performance results of Corps "A" and Corps "B" administrative public servants. Each civil servant will be evaluated based on annual performance. The evaluation will test the efficiency and quality, and the outcome will underpin any decisions on bonuses, incentives, training or career planning. The attestation follows after three years in service if the performance of the civil servant is deemed unsatisfactory. The attestation commission will decide whether to keep such civil servant. Each public agency is responsible for the evaluation of their civil servants.

Also, on 13 January 2014, there were adopted the Rules for the rotation of Corps "A" administrative public servants. Such rotation is prescribed by the Civil Service Law. Notably, the rules say that one of the purposes of rotation is to prevent corruption.

A positive step was to revise qualifications requirements for civil service applicants, also in the 2013 rules approved by the Civil Service Agency for Corps "B"<sup>60</sup> and by the President, for Corps "A".<sup>61</sup> Also in 2014 a number of ordinances were issued by agencies and ministries detailing requirements for job seekers in their respective agencies. The competence and experience of the civil service applicants are examined both in tests and in interviews.

Legislation does not provide a procedure for promotion based on personal merits, as well as procedure for internal competitions. As explained by Kazakhstan, if there are candidates for the vacancy from among current officials they can be appointed to this position by way of transfer within career promotion. When deciding on such promotion results of performance evaluation, opinion of the manager and colleagues (subordinates) will be taken into account. If a competition is announced to fill in the vacancy, civil servants can take part in the competition on the same basis as other citizens.

Generally, there has been certain progress in civil service recruitment, including: introduction of centralized testing of knowledge and skills of Corps "B" civil servants and somewhat similar centralized recruitment of the Corps "A" service reserve; introduction since 2013 of the competitive procedure applicable to the recruitment for category "A" public offices and since 2014, evaluation of civil servants' performance, where positive assessment leads to incentives; and a radical reduction in the number of political public servants. At the same time, there is still some risk of bias in the recruitment for administrative offices: selection procedures for Corps "A" and "B" must stipulate specifically how and on the basis of what personal qualities and merits the winning contender is chosen. Also, procedures for internal competitions have not been approved. It is still possible to take an administrative public office without any competition. Overall, this recommendation has been partially complied with.

## **Remuneration**

The Civil Service Law stipulates that the system of remuneration of political public servants will be established by the President of the Republic of Kazakhstan. The Presidential Decree of 17 January 2004, No 1284, approved the Uniform System of Remuneration of employees of the agencies of the Republic of Kazakhstan supported by the state budget or the budget of the National Bank of the Republic of Kazakhstan. This document is only partly available, being classified.

In the remuneration system the position salary is linked with an index which is approved by the Government (Government Resolution of 23 January 2004, No 74): the basic rate of pay is KZT 17,697 (Euro 73). The position salary increases with seniority. Government Resolution of 29 August 2001, No 1127, approving the rules on bonuses, assistance allowances, and salary supplements payable to public agencies employees in the Republic of Kazakhstan from the state budget, and details specific circumstances when civil servants may get additional payments on top of their salaries.

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<sup>60</sup> Ordinance of the Chairman of the Agency of the Republic of Kazakhstan for the affairs of the civil service of 19 March 2013, No 06-7/35 o: Model qualifications requirements for the categories of Corps "B" administrative public offices

<sup>61</sup> Decree of the President of the Republic of Kazakhstan, No 708 of 10 December 2013 approving Special qualifications requirements for Corps "A" administrative public offices

Kazakhstan failed to provide any specific information suggesting which portion of the wages comes from *supplementary allowances* on top of the position salary. Issues of remuneration are also touched upon in some other legal acts listed below.

According to the Uniform System of Remuneration of employees of the agencies of the Republic of Kazakhstan above, the total payroll for civil servants includes position salaries, military rank salaries, supplements payable for special titles and class ranks; health allowances of twice the yearly position salary; and two position salaries a year in bonuses to administrative civil servants at the central offices of public agencies, etc.

Under the same regulation, additionally, heads of state agencies have the discretion to give bonuses, pay assistance allowances and introduce supplements to position salaries of civil servants out of any savings they have achieved in the relevant budget of his agency against the financial plan.

Government Resolution of 29 August 2001, No 1127, approving the rules on bonuses, assistance allowances, and salary supplements payable to public agencies employees in the Republic of Kazakhstan from the state budget prescribes that the amount and frequency of bonuses are defined by the head of the central agency. The document details a number of indicators of the employee's performance that may give grounds for a bonus incentive, including: official and work discipline; work results in the established period of time; model performance of office duties; distinguished service; performance of critical missions; anniversaries and state holidays; and contribution of legislative drafting.

The requested information on the highest and lowest wages, or on civil servant pay in relation to the average wages in Kazakhstan was not provided. There are some indications in the available data: level of remuneration of the chief specialist at the central headquarters of the public agency (category C-4), with less than one year work experience, is KZT 106,344 (Euro 437), and KZT 143,501 (Euro 590) above 2 years. The Executive Secretary pay to that of a specialist (e.g., employee of the central headquarters with 9-11 in civil service) is 9.5/1 (Executive Secretary earns KZT 862,930 to KZT 91,154 of the specialist (category C-6). The salary of the head of the territorial department of the Civil Service Agency to that of a specialist (with 9-11 years in service) is 8.3/1 (KZT 541,730 of the department head to KZT 65,192 of the specialist (category C-O-6). In the Financial police, officers in territorial branches draw salaries of KZT 155,000 (Euro 627) and those in the central headquarters, KZT 215,000 (Euro 870).<sup>62</sup>

It follows that administrative civil servants do not enjoy high salaries (before various supplements). In his address to the people of Kazakhstan on 17 January 2014, the President of the Republic of Kazakhstan instructed the Government to enable salaries paid to Corps "B" civil servants to be increased by 15 per cent from 1 July 2015, and by a further 15 per cent from 1 July 2016.<sup>63</sup>

On the positive side, pursuant to the Presidential Decree of 22 March 2013, No 527 on the rule of annual performance evaluation and attestation of administrative public servants, bonuses and achievements of Corps "A" and "B" administrative servants are now linked through the evaluation system.

But overall, there are no clear-cut regulatory *ceilings to the amount and frequency* of payment of all supplementary bonuses on top of the fixed salary; and discretionary powers in incentive awards have not been limited either. As a result, the only change in that area - an attempt to link performance with cash incentives – was not really instrumental in making bonuses more transparent. Therefore, Kazakhstan is not compliant with that recommendation.

Kazakhstan also informed that within the action plan for implementation of the concept of the new budgetary policy it is foreseen to improve remuneration system in the budgetary area with a link to the performance results (the Government of Kazakhstan established deadline for submitting proposals on improving the system of civil servants' remuneration at December 2014).

### **Conflict of interest**

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<sup>62</sup> Deputy chairman of the Agency discloses financial police salaries, Tengri News, 5 May 2014, [http://tengrinews.kz/kazakhstan\\_news/razmer-zarplat-finpolitseyskih-ozvuchil-zampred-agentstva-256536/](http://tengrinews.kz/kazakhstan_news/razmer-zarplat-finpolitseyskih-ozvuchil-zampred-agentstva-256536/)

<sup>63</sup> Source: [www.akorda.kz/ru/page/page\\_215750\\_poslanie-prezidenta-respubliki-kazakhstan-n-nazarbaeva-narodu-kazakhstana-17-yanvarya-2014-g](http://www.akorda.kz/ru/page/page_215750_poslanie-prezidenta-respubliki-kazakhstan-n-nazarbaeva-narodu-kazakhstana-17-yanvarya-2014-g)

As was noted in the Report for the Second Round of Monitoring, the Civil Service Law was amended in December 2010 to include provisions regulating conflict of interest for civil servants (Article 18-2 "Conflict of Interest"). The conflict of interest is defined by the Law as a contradiction between personal interests of the civil servant and his official duties where such civil servant's personal interests may undermine performance of his official duties.

At the same time, provisions bearing on prevention of conflict of interest are included also in the Presidential Decree of 3 May 2005, No 1567, "On the Code of Honour of Civil Servants in the Republic of Kazakhstan" (Rules of civil service ethics, hereinafter the Code of Ethics). The code provides, among other things, that should a conflict of interest arise, the civil servant must take such steps to prevent and resolve it as specified in the Civil Service Law.

Besides, Kazakhstan has drawn up a draft anti-corruption law which too has provisions on conflicts of interest. The draft law (as amended on 06.06.2013.) offers a new definition of conflict of interest, a new procedure for the resolution of conflicts of interest, among other things, through challenge and recusal. Also, the anti-corruption draft law stipulates that conflicts of interest will be resolved by the *conflict of interest commission* of the authorized civil service agency. Failure to comply with the conflict of interest provisions is to be prosecuted. During the onsite visit it was noted that the discussion of the draft law was suspended pending a new draft anti-corruption strategy of Kazakhstan.

Draft Anti-Corruption Strategy of Kazakhstan for 2015-2025 and Action plan for its implementation provide for development of Rules on preventing and resolving conflict of interests taking into account specific nature of work of different agencies. Implementation of this measure is planned for 2015.

A model practical guide on prevention and resolution of conflict of interest will be drafted by the Civil Service Agency in 2014. During the onsite visit, the monitoring team was provided with the draft grant application of the Civil Service Agency for a linked grant in the project "Support of the civil service reform in the area of service ethics, promotion of meritocracy and prevention of corruption", with the UN Development Programme (UNDP) as a donor. The amount of the linked grant is USD 1,500,000. In addition, the proposed project "Support of the civil service reform in the areas of administrative ethics and government services" will have a component: "Development and wide dissemination among civil servants of agency-specific manuals on the prevention and resolution of conflicts of interest". The total cost of the project is USD 75,000.

As was explained by the representatives of the Civil Service Agency, the Agency conducts consultations and inspections on compliance with the Civil Service Agency Law and in particular its conflict of interest provisions. The Agency plans to practice civil servants counselling on matters of compliance with conflict of interest provisions, criteria of incompatibility and other restrictions both at the agencies level and globally (by the authorized civil service agency). So far, the Agency does not have a specific function like that. In practice, this work is done by the Agency's legal department. It would be instrumental to set up this function to introduce clarity in that area and also appoint a specific agency that would be responsible for the methodological support and consultations on matters of conflict of interest.

At the agency level, duties of coordination and compliance with the restrictions applicable to civil service as well as with the Civil Service Law of the Republic of Kazakhstan have been vested with the human resources departments and services of the public agencies (Article 6 of the Civil Service Law of the Republic of Kazakhstan).

Additionally, in 2013 the Agency for fighting economic and corruption crime (the financial police) drafted a practical guide for financial police officers called "Practical manual on legal regulation of bans, restrictions and duties in conflicts of interests". The manual details: restrictions and bans applicable to financial police officers; definition and circumstances of conflict of interest in the context of the financial police; and duties to prevent conflicts of interest. It is positive that this manual is meant to be practical and most of it describes case studies relating to conflicts of interest and steps to take to prevent and resolve conflicts of interest. Kazakhstan explained that the manual was distributed to the units of the financial police, their territorial branches, and to the Financial Police Academy for students.

Meanwhile, the Civil Service Agency has conducted a review of disciplinary actions involving civil servants or other persons authorized to perform public functions or equal-status persons for violations of conflict of interest provisions in 2012, 2013 and 5 months of 2014.

It was found that over the period the Disciplinary boards looked into a total of 14 disciplinary actions against 14 individuals in the context of an alleged conflict between personal interests and official duties of the civil servant. Of these, 7 disciplinary actions were in 2012, 4 in 2013 and 3 in 5 months of 2014.

According to the Civil Service Agency, the service inspections identified the following number of transgressions against service ethics: 738 in 2012, 393 in 2013, and 120 in the first quarter of 2014; relevant disciplinary sanctions were applied.

In spite of certain steps to implement the conflict of interest prevention and resolution practices throughout civil service, on the whole, Kazakhstan did not follow through with the recommendation to develop, and ensure wide dissemination among civil servants, of practical manuals on conflict of interest prevention and resolution with due account of the specifics of work of certain authorities.

### **Internal control**

Kazakhstan did not provide information about measures to strengthen the preventive component in the work of internal control bodies in public service, raise awareness of anti-corruption provisions and provide such units with methodological guides.

Certain work on internal control is being done at the Ministry of the Interior, in the Financial Police Agency. The Financial Police Agency has strengthened the role of internal security service, raised the status of its territorial branches by making them subordinate directly to the Agency. A special unit focusing on awareness and compliance has been set up at the Human Resources Department of the financial police to facilitate compliance with the anti-corruption legislation and the Civil Service Code of Ethics.

One of the preventive tools is the practice whereby officers of the financial police are made aware of the verdicts in corruption trials against accused police officers, and visiting court sessions holding trials in the presence of fellow workers.

Officers and personnel of the financial police attend workshops and lectures focusing on prevention of corruption crimes and offences.

Additionally, pursuant to the plans of the Istanbul Anti-Corruption Action Plan, the Internal Security Department of the Financial Police Agency made a substantial contribution to the Agency's efforts to develop a practical guide on legal regulation of bans, restrictions and on duties to prevent conflict of interest among financial police officers; and detailed guidelines on gifts, explaining relevant restrictions and liability for non-compliance.

In a way, appointment of *ethics officers* at the Civil Service Agency and its territorial branches is linked with internal control (see Service ethics below).

### **Declaration of assets and income**

Under the Anti-Corruption Law, all persons in public office shall make a declaration of assets and income to the tax authority at the place of resident. They should only declare those assets and income that are taxable under the effective tax legislation. The current system of declarations was described in the report for the second round, and has not changed since then.

Meanwhile, pursuant to the Sectoral Programme on fighting corruption, Kazakhstan intended to implement assets declarations as an anti-corruption measure. The Sectoral programme called for the establishment of declarations of large expenditure by civil servants and universal income declaration for all; the procedure for the declaration of assets and income by civil servants was to be improved through a better system of verification of the accuracy of declarations.<sup>64</sup>

Since the Second Round of Monitoring it has been the intention to introduce universal declaration of assets and income by individuals in Kazakhstan. During the onsite visit to Kazakhstan, there were reports about the draft law on universal declarations, allegedly coordinated with 29 state bodies and agencies; with appropriate legal, economic, anti-corruption and language examinations completed; comments by the Presidential Administration and the Prime-

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<sup>64</sup> Sectoral Programme for the fight against corruption, pp. 12, 13, 33, 35.

Minister's Chancellery were incorporated. Pursuant to this draft law, universal declaration was to be implemented from 2017.

Declarations are submitted to tax authorities upon entering the civil service, and also by members of Parliament and judges. It is unclear how systematic or effective the declaration vetting is. As was reported during the onsite visit to Kazakhstan, there have been no corruption offences detected on the basis of declaration submissions by civil servants. A possible assumption is that this system is pure formality.

This part of the recommendation remains.

### **Code of ethics**

On 14 December 2012, the Civil Service Law was supplemented with Chapter 4-1 "Ethics of civil servants". It sets out requirements for civil servants on service ethics and personal integrity, and public statements.

The Presidential Decree of 1 October 2013 amended the Decree of 3 May 2005, No 1567, "On the Code of Honour of civil servants of the Republic of Kazakhstan" (Rules of ethics of civil servants, the Code of Ethics henceforth). By way of general ethics rules, the Code dictates the need "to be guided by the principle of legality, requirements of the Constitution, laws and other normative legal acts of the Republic of Kazakhstan, and "to improve one's professional qualities and qualifications to be able to perform efficiently one's duties". With the amendment to the civil servant duties, it is now ruled that "in the event of unjustified public accusations of corruption, a civil servant must within one month of learning about such accusation, take steps to refute it". Thus, the Code of Ethics no longer requires explicitly going to court under such circumstances.

Of note is a certain inconsistency in the legal regulation of ethical issues: the same matters are being regulated by the Civil Service Law and by the Code of Ethics, although some specific rules differ in the scope of regulation in them.

Take, e.g., the Code's duties "to be guided by the principle of legality, requirements of the Constitution, laws and other normative legal acts of the Republic of Kazakhstan, and "to improve one's professional qualities and qualifications to be able to perform efficiently one's duties, or that "in the event of unjustified public accusations of corruption, a civil servant must within one month of learning about such accusation, take steps to refute it", which are not regulated in the law. Regulating similar legal matters by legal acts of differing juridical power is not only unreasonable from the enforcement point of view, but may also cause various issues of implementation, interpretation for civil servants and, hence, clarity of application.

There is no sense, from the preventive point of view, in the requirement of the civil service rules approved by the Presidential Decree of 22 March 2013, whereby political public servants who are heads of state agencies or akims have to resign, if the subordinate civil servant in the executive position, appointed by them, was convicted of a corruption offence.

Another positive development was the introduction of *Ethics Officers* in Kazakhstan's civil service. So far, ethics officers have been set up only at the Civil Service Agency and its territorial branches. The list of ethics officers was approved on 14 May 2014. His key mission is to engage in prevention of corruption or ethical wrongdoing, as well as to advise and facilitate compliance by the Agency's civil servants and those of its territorial branches with the legislation on civil service, corruption, and the Code and rules of ethics.<sup>65</sup> The ethics officer shall inform the Agency's leadership, head of the territorial branch and, if need may be, Chairman of the Agency of violations of rules of anti-corruption behaviour or service ethics by the civil servants of the Agency or its territorial branches. Ethics officers are selected from the officers of the Agency and its territorial branches by secret ballot. Since ethics officer were only established on 14 May 2014, the monitoring team at the moment is not in a position to assess the practical effect of such decision.

### **Anti-corruption training of civil servants**

As noted by Kazakhstan, the Institute of Extended Education of the Academy of Public Administration under the auspices of the President of the Republic of Kazakhstan, offered to civil servants in 2011-2013 twice a year the following courses and seminars:

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<sup>65</sup> Terms of reference of ethics officers of the Civil Service Agency and its territorial divisions were approved by the ordinance of the Chairman of the Civil Service Agency of the Republic of Kazakhstan of 14 May 2014, No 04-2-4/79

- Ethical standards and leader's image building (retraining course);
- Professional ethics in civil service. Code of Ethics of civil servant (retraining course);
- Ethics of the leader in civil service (retraining course);
- Civil service and imageology, ethics in business communication and office culture (retraining course);
- Building individual image of a civil servant (retraining course);
- Building a positive image of civil servants (retraining course);
- Ethics and image of civil servants of the Republic of Kazakhstan (upgrading course);
- Ethical culture as the framework of individual image (distance learning)
- Code of Ethics of civil servants as a factor of efficiency of civil servants (workshop, Astana);
- Ethics and image of civil servants (workshop, Astana).

In 2011-2014, all students of the upgrading courses for judges and judicial workers were involved in classes on anti-corruption subjects: "Crime prevention in the judicial system" (2 academic hours; led by staff members of the RK Supreme Court); "National anti-corruption programme" (4 academic hours, led by the faculty members of the Institute of Justice); "Trial practice in corruption and other crimes in office" (2-4 academic hours, led by judges of the Supreme Court of the Republic of Kazakhstan).

The first of the above topics focuses on the review of the disciplinary practices and crime, including corruption crime, in the judicial system, with comments on actions taken to deter such acts. The second topic details provisions of anti-corruption policies of the State and measures to implement the national anti-corruption programme. The third topic is meant only for judges who try criminal and administrative cases and explains trial practices in corruption and other type of crimes and offences in office.

In addition, the training calendar of the Judicial Upgrading courses in 2011 - 2013 offered a module on personal competences, which included basics of work ethics. In 2011-2014, anti-corruption topics at the judicial upgrading courses were taught to 1,580 students, of which there were 1,186 judges and 394 civil servants working in the judicial system.

The financial police, as part of skills upgrading, hold training on crime prevention and anti-corruption. At the headquarters and in territorial branches, part of the on-going vocational training is devoted to ethical standards, with lectures on anti-corruption topics and Code of Ethics.

In 2013, the Civil Service Agency's Disciplinary Boards held 993 workshop meetings, round tables and conferences on anti-corruption and compliance with the standards of the Code of Ethics: 1,024 in 2012 and 1,352 in 2011.

The possible conclusion is that since 2011 there have been regular events, courses and workshops, on issues of ethics and prevention of corruption, for civil servants, judges, judiciary workers, financial police officers, although no arrangement for annual training were made. It is not clear from the information provided whether courses or workshops which were held covered issues of practical application of the anti-corruption legislation, Code of Ethics, or internal rules that apply to the students. The impression is that most of the focus was on personal development and management. In future, Kazakhstan must make this training in ethics and prevention of corruption of civil servants more practically useful. As best practices around the world suggest, it is necessary to focus more on the study and discussion of the immediately relevant standards of ethics and corruption prevention (what they mean in practice, how to apply, what ethical dilemmas may arise and how to address them).<sup>66</sup> It is particularly important to include these elements in the Corps "A" training programmes.

### **Gifts to civil servants**

In the above mentioned anti-corruption draft law, provisions relating to gifts have been reworded. In particular, the draft law described the circumstances when civil servant may be allowed to accept gifts and items that cannot be gifts. According to the draft Anti-Corruption Strategy of Kazakhstan for 2015-2025 and Action plan for its implementation, enactment of the draft law on counteraction of corruption is planned for Q4 of 2015. Development of a detailed guide for application of the new provisions on gifts is planned after enactment of the law.

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<sup>66</sup> For applicable world practices and methodical recommendations for the training in civil service ethics see: [www.oecd.org/corruption/acn/library/EthicsTrainingforPublicOfficialsRUS.pdf](http://www.oecd.org/corruption/acn/library/EthicsTrainingforPublicOfficialsRUS.pdf).

The draft law will determine cases when officials are allowed to receive gifts and other objects that are not considered gifts. It will also allow to accept symbolical signs of attention and symbolical souvenirs according to generally accepted norms of courtesy and hospitality or during protocol and other official events with the value of up to 10 monthly calculation rates, as well as diplomatic gifts and official gifts.

However, at the moment, detailed guidelines for the application of provisions on gifts, clarifying the existing bans and the respective liability for their violation have not been either developed or disseminated as recommended.

### **Whistle-blowers**

On 14 December 2012, the Civil Service Law was supplemented with Chapter 4-1 “Ethics of civil servants”, and its article on anti-corruption behaviour of civil servants stipulates the obligation of the leadership of the public agency to ensure protection for civil servants, who have disclosed credible evidence of corruption offences or attempts to involve them in such offences, from persecution which prejudices their rights or legitimate interests (Article 20). However, there are no regulations in the legislation that would implement such protection for any whistle-blower in Kazakhstan.

Notably, the number of whistle-blowers among civil servants remains low, and the situation did not change after the new regulation 43 allegations in 2011, 49 in 2012 and 46 in 2013. There are more registered applications and allegations on corruption crimes made to law enforcement agencies by the general public: 56,661 in 2013. World practice often relies on special mechanisms that encourage citizens to report corruption by “hot” lines or similar tools.<sup>67</sup>

Kazakhstan has introduced the practice to stimulate whistle-blowers. The Government passed its Resolution No 1077 on 23 August 2012 “On approving the Rules on rewarding those who disclose facts of corruption offences or otherwise assist in the fight against corruption”. According to Kazakhstan, 172 people were rewarded to a total of KZT 19 mln in 2013. According to Kazakhstan’s data, whistle-blowers helped to initiate 216 criminal prosecutions leading to trial. The new draft anti-corruption strategy notes that “material rewards to people engaged in social activism have become yet another effective instrument countering systemic corruption which involves or is known to a large number of people.”

Kazakhstan was also recommended to amend the provisions of the Code of Administrative Offences that establish administrative liability for inaccurate allegations about corruption, because corruption facts are hard to prove, and relevant information can be deliberately presented as intentional disinformation. The Code of Administrative Offences continues to provide liability under Article 334-1 for knowingly false disclosure of the fact of a corruption offence (making knowingly false allegations about a corruption offence to the anti-corruption agency is punished by a fine of one hundred to two hundred monthly calculation rates, or an administrative arrest for up to 30 days). The new Code of Administrative Offences, adopted in July 2014 and effective as of 1 January 2015, has retained the same offence (Article 439), and set a fine of two hundred monthly calculation rates. Therefore, Kazakhstan is not compliant with this part of the recommendation.

### **Conclusions**

The monitoring team points to the positive changes in the legal regulation of the civil service introduced by the amendments to the Civil Service Law. There have been significant changes in the legal framework of the civil service administration, with the necessary prerequisites for higher transparency. There have been, among other things, positive changes in the classification of civil servants: the differentiation of offices into political and administrative was supplemented with the division of the latter into Corps “A” and “B”. Importantly, the civil service reform not just addressed the legal framework, but was implemented in practice within a year. The requisite implementing acts and practical steps were in place to ensure implementation of the law. As a result, Corps “A” and “B” have been established in practice.

At the same time significant part of the recommendation remains valid.

***Kazakhstan is partially compliant with Recommendation 3.2., which remains valid.***

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<sup>67</sup> See, e.g., Hong Kong: [www.icac.org.hk/en/report\\_corruption/index.html](http://www.icac.org.hk/en/report_corruption/index.html), Latvia: [www.knab.gov.lv/en/enforcement/report/](http://www.knab.gov.lv/en/enforcement/report/).

### 3.3. Promoting transparency and reducing discretion in public administration

#### **Recommendation 3.3.**

- **To envisage mandatory anti-corruption screening of all draft normative acts. To consider the possibility of placing on the web-sites of the respective state authorities draft laws and draft normative acts of the Government and other central state authorities, accompanied with conclusions of the anti-corruption screening. To consider the possibility of assigning to a state authority functions of carrying out anti-corruption screening.**
- **To revise the Law on State Control and Supervision, namely to bring it in line with the Law on Private Entrepreneurship, to eliminate inaccuracies and clearly define its sphere of regulation, which should not cover internal control issues, to put emphasis on protection of rights of the inspected entities from possible infringements by the inspection bodies.**
- **To bring the legislative act on the administrative procedure in line with international standards of regulation of the procedure for considering administrative cases.**
- **To reform the system of administrative justice in accordance with international standards and best practices, namely to adopt the Administrative Adjudication Code, which should not regulate issues of bringing to administrative liability, and to set up specialized administrative courts for consideration of private persons' claims against public administration.**

#### ***“To envisage mandatory anti-corruption screening of all draft normative acts.”***

As was noted in the Report for the Second Round of Monitoring, Kazakhstan has in place a system for anti-corruption screening of draft acts. However, legislative initiatives or draft legal acts by the President of the Republic of Kazakhstan are not subject to mandatory anti-corruption screening. Besides, the anti-corruption screening system could be made more efficient through higher publicity of the process. Specifically, it would be good to publish on the Parliament's web-site all draft laws with attachments including, among other things, anti-corruption screening assessments. It was also recommended to consider publishing, on the website of the Ministry of Justice or other relevant public authorities, draft resolutions of the Government, central agencies, together with the anti-corruption screening assessments.

Since the Second Round of Monitoring there have been no amendments in the list of draft normative legal acts that should be exposed to anti-corruption screening. Under RK Law of 24 March 1998, No 213, “On normative legal acts”, all draft normative legal acts submitted to the Parliament of the Republic of Kazakhstan require academic anti-corruption assessment. In contrast, draft legislative acts submitted to Parliament as part of the legislative initiative of the President of the Republic of Kazakhstan, academic screening “does not have to be done” (Article 22)

Academic anti-corruption screening is mandatory for the following draft normative legal acts:

- 1) draft normative legal acts of the Government of the Republic of Kazakhstan;
- 2) normative legal ordinances by the ministers of the Republic of Kazakhstan or other heads of central public agencies; normative legal resolutions of central agencies and normative resolution of the Central Election Commission of the Republic of Kazakhstan;
- 3) normative legal resolutions of maslikhats; normative legal resolutions of akimats, normative legal resolutions of akims.

Because legislative initiatives and draft normative acts by the President of the Republic of Kazakhstan continue to be outside the requirement for mandatory anti-corruption screening, Kazakhstan has not complied with this part of the recommendation.

#### ***“To consider the possibility of placing on the web-sites of the respective state authorities draft laws and draft normative acts of the Government and other central state authorities, accompanied with conclusions of the anti-corruption screening.”***

According to Article 14 of the Law on Normative Legal Acts developed draft laws when being sent for endorsement to state authorities should also be placed on the Internet resource of the authorised agency. Draft normative acts that concern rights, freedoms and duties of citizens should be placed on the Internet resources of authorised agencies. At the same time there is no mandatory requirement to publish conclusions of the anti-corruption screening concerning those drafts.

Paragraph 34-1 of the Rules of Procedure of the Government indicates that the state authority that developed the draft Government regulations, when sending the draft text for endorsement to other interested authorities, should also place on its Internet resource relevant draft document, explanatory note thereto and other necessary materials, including conclusions of the anti-corruption screening. Whereas draft laws are submitted to the Parliament through a Government resolution. Therefore, as stated by Kazakhstan, paragraph 34-1 of the Rules of Procedure of the Government covers draft laws as well.

The RK Law on normative legal acts and the Rules of academic screening (approved by the Resolution of the Government of the Republic of Kazakhstan, 30 May 2002, No 598, as amended on 05.04.2011) do not require publication of screening results. But analysis of public web-sites of Kazakhstan state agencies suggests that anti-corruption screening assessments are very rarely published together with the relevant draft acts.<sup>68</sup>

Therefore this part of the recommendation can be considered implemented.

***“To consider the possibility of assigning to a state authority functions of carrying out anti-corruption screening.”***

As it follows from the responses of Kazakhstan, a possible transfer of the functions of anti-corruption screening to a public authority was not given any consideration.

Responsible for the organisation of academic screening of draft law concepts and normative legal acts are the authorized state agencies. One of such agencies is the ministry of Justice of the Republic of Kazakhstan with respect to academic legal, anti-corruption, criminological and other types of screening of normative legal acts. The selection of experts and academic institutions for the screening of the normative legal acts and draft law concepts follows the procedure established by the legislation of the Republic of Kazakhstan on public procurement.

Under para 1 of the Screening Rules, academic screening of draft laws and draft normative legal acts shall be carried out by research institutions and universities of the relevant field of discipline depending on the substance of the draft law concepts or draft normative legal acts assessed.

It was indicated by Kazakhstan authorities in their responses to the questionnaire that research institutions and universities were chosen for the performance of the anti-corruption screening of draft normative legal acts because, by its nature and method, the anti-corruption screening, to be unbiased, is and must be in fact a scholarly effort. If the functions of screening are to be transferred to a public agency, its academic and unbiased nature, as well as independence, will be questioned.

According to the information from the Ministry of Justice, in 2011-2013 233 anti-corruption screening of draft laws were completed (together with repeat screening on amended drafts); at that time the anti-corruption screening was performed by the Kazakhstan University of Arts and Law, Sapargaliev Research Institute, and Kazakh National University of Al-Farabi which won the tenders for the anti-corruption screening of draft legislation. For more detailed statistics see Table below.

**Table 14.** Statistics of anti-corruption screening of normative legal acts

No	Contractor	Developer	2011		2012		2013	
			Pass*	Risk*	Pass	Risk	Pass	Risk
1	Sapargaliev Research Institute of Law	CSA	1 489 - 1050 resolutions,	479 - 310 resolution	1 628 - 1181 resolutions,	514 - 342 resolutions,	2 396 - 1581 resolutions,	935 - 530 resolutions,

<sup>68</sup> See, e.g., the section for draft normative legal acts at the web-site of the RK Ministry of Justice [www.adilet.gov.kz/ru/taxonomy/term/110](http://www.adilet.gov.kz/ru/taxonomy/term/110), The information legal system of normative legal acts of the Republic of Kazakhstan see at <http://adilet.zan.kz/rus>.

			- 439 orders	s, - 169 orders	- 447 orders	- 172 orders	- 815 orders	- 405 orders
		LSA*	2 636	733	4 453	622	3 204	815
Total			<b>4 125</b>	<b>1 212</b>	<b>6 081</b>	<b>1 136</b>	<b>5 600</b>	<b>1 750</b>
2	Kazakh University of Arts and	CSA	921 - 491 resolutions, - 430 orders	405 - 204 resolution s, - 201 orders	1 076 - 485 resolutions, - 591 orders	348 - 176 resolutions, - 172 orders	484 - 255 resolutions, - 229 orders	110 - 51 resolutions, - 59 orders
		LSA	3 670	2 431	3 977	1 921	2 730	549
Total			<b>4 591</b>	<b>2 836</b>	<b>5 053</b>	<b>2 269</b>	<b>3 214</b>	<b>659</b>
<b>TOTAL</b>			In 2011 – 2013, anti-corruption screening was performed on <b>28,664</b> draft implementing normative legal acts ( <i>resolutions – 5 043, orders – 2 951, acts by LSAs – 20,670</i> ), of which <b>9,862</b> ( <i>resolutions – 1 613, orders – 1,178, LSA acts – 7,071</i> ) had assessments of corruption risks.					

\*Notes:

CSA – central state agencies

LSA – local state agencies

Passed – number of drafts that satisfied the screening

Risk – number of drafts where screening discovered corruption risks

Although the responses to the questionnaire offer an explanation of the existing procedures for the anti-corruption screening (by research institutions and universities), Kazakhstan did not comment whether any changes were considered; whether, for instance, this issue was raised in the discussion between agencies or there was a public discussion. Therefore, Kazakhstan is not compliant with this part of the recommendation.

Kazakhstan also informed that its Ministry of Justice, when carrying out legal examination of draft legal normative acts in accordance with the Law on the Justice Bodies (Article 15), is supposed to detect corruption-prone, duplicating and contradictory provisions. Also according to Article 43-1 of the Law on Normative Legal Acts, authorised agencies are obliged to carry out legal monitoring of legal acts that were adopted or developed by them and take timely measures to amend or repeal them. To implement this provision Government of RK by its decision of 25 August 2011 No. 964 approved Rules for conducting legal monitoring of legal acts which state that such monitoring is conducted, in particular, with a view to detect contradictory legal provisions, obsolete and corruption-prone norms, to assess effectiveness of their enforcement.

***“To revise the Law on the State Control and Supervision, namely to bring it in line with the Law on Private Entrepreneurship, to eliminate inaccuracies and clearly define its sphere of regulation, which should not cover internal control issues, to put emphasis on protection of rights of the inspected entities from possible infringements by the inspection bodies.”***

Kazakhstan authorities note that the RK Law on State Control and Supervision is to introduce uniform principles of supervisory and controlling activity as well as to protect rights and legitimate interests of state agencies, individuals and legal entities subject to state control and supervision. Under the law, subject to control are individuals and legal entities, as well as the state agencies that are supervised and controlled. Therefore, the law regulates matters of organization of control and supervision over the inspected entities irrespective of the legal status, form of ownership or type of activity.

The RK Law on Entrepreneurship, in turn, defines legal, economic and social conditions and safeguards to the freedom of private entrepreneurship in the Republic of Kazakhstan. The main purpose of this law is to create a favourable environment promoting private business (classification of entities; government support to private entrepreneurship, including financial support, establishment of business associations, etc. There is only one norm on state control over private entrepreneurship detailing with the restriction that any requirements to private entrepreneurial entities may only established at the level of the laws of the Republic of Kazakhstan, Presidential Decrees and RK Government Resolutions, which is in line with the Law on State Control and Supervision.

It was noted in the Report for the Second Round of Monitoring that representatives of entrepreneurs referred to the 2011 Law on State Control and Supervision, some provisions of which, in their opinion, contradicted the Private Entrepreneurship Law. The overview of the Law on the State Control and Supervision indeed calls for certain

remarks. First, it appears to be incorrect in principle to bring together control over private entities with internal control in state agencies. While the former is a type of administrative procedure and is governed by relevant principles and requires a whole mechanism of safeguards for private entities, the latter relates to the internal functioning of the state machinery and is subject to completely different rules. Secondly, the distinction between “control” and “supervision” is not clear, namely, the use of “law restricting measures of operative reaction”, which are not defined in the Law. Thirdly, there is no definition of “other forms of control and supervision”, which at the same time do not require prior notification of the entity subject to inspection or registration with the Legal Statistics Committee. Fourthly, there are exemptions from the Law’s regulation throughout its text, which complicates implementation of the Law and also puts into question the necessity of such legal act, if at the end it applies only to a small number of matters. Fifthly, the Law duplicates provisions of the Law on Private Entrepreneurship, which contains such chapters as “State regulation”, “State control over private entrepreneurship” (which has, among others, several detailed articles on the inspection procedure), “Responsibility of state bodies and officials in the course of state control, licensing”. Overall, the new Law introduced a lot of confusion over issues of state control of entrepreneurial activity, which is further exacerbated by lack of clarity in provisions and scope of the new Law.

Meanwhile, in July 2009 (under the Law No. 188-IV) numerous amendments to Kazakhstan legislation were made to improve business environment and limit the powers of controlling bodies. In particular, the above-mentioned sections of the Law on Private Entrepreneurship were reworded. That caused more questions about the need for another law adopted in 2011, which regulated the same issues. Such frequent amendments in the legislation on entrepreneurship and administrative procedures did not facilitate legal certainty or confident conduct of commercial business. It also contradicted the declared policy of deregulation and simplification of private sector regulation by the State.

In 2011, the Law on Private Entrepreneurship was amended significantly; specifically it lost its Chapter 8 “State control over private entrepreneurship”. This seems to address some of the issues raised in the Report for the Second Round of Monitoring, but not all of them (see above).

Although the Law on State Control and Supervision in the Republic of Kazakhstan was adopted relatively recently (6 January 2011), it may soon be abolished: in October 2014, the RK Government planned to submit to the Parliament **draft Entrepreneurial Code** of the Republic of Kazakhstan, which will cancel the above law (and a whole range of other laws in this sphere). Overall, so frequent change of rules does not promote certainty in regulation of business, which by itself may favour corruption.

Let it be remembered that in the Report for the Second Round of Monitoring it was noted that similar acts were adopted in several ex-USSR countries and were based on the flawed concept of a separate branch of economic law, rooted in the principles of centrally planned economy. Experience of other countries (for example, Ukraine) shows that such acts have no practical advantage but only add to the confusion and inconsistencies in legislation by duplicating provisions of other laws. Such matters should be regulated by civil law based on the principles of optionality (free choice) and equality of parties, as well as by separate acts on state regulation (for example, ant-trust legislation). The report acknowledged the justified and strong criticism of this idea on part of the legal community in Kazakhstan<sup>69</sup> and noted further that a parallel legal regime for the regulation of private law matters may undermine the principle of legal certainty and thus facilitate corruption.

Therefore, this recommendation was observed only partially, when some provisions of the Law on State Control and Supervision, criticised in the Report for the Second Round of Monitoring, were abolished. Meanwhile, only three years after the new law on state control and supervision was adopted, Kazakhstan plans to endorse a new comprehensive legislative act in the same sphere, the Entrepreneurial Code, which will cancel both the Law on state control and supervision and the Law on Private Entrepreneurship.

***“To bring the legislative act on the administrative procedure in line with international standards of regulation of the procedure for considering administrative cases.”***

As noted in the Report for the Second Round of Monitoring, Kazakhstan was one of the first countries in the CIS to adopt a special law on the administrative procedure (Law “On Administrative Procedures” of 27 November 2000). However, its scope did not fully correspond to the generally accepted approach to such legal acts. Even after major changes to the Law in 2007, only a small part of it deals with issues directly related to administrative procedure as

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<sup>69</sup> Source: <http://www.zakon.kz/pravovye-novosti/220595-28-izvestnykh-juristov-obratilis-s.html>.

such, i.e. the work of an administrative body as regards consideration of administrative cases and adoption of administrative acts, including those related to provision of administrative services. The bigger part of the Law regulates issues of organization of work of state machinery.

As a result, the administrative procedure is quite often regulated by sectoral laws and subordinate legislation, leading to a lack of continuity and to inconsistency in legislation and violating the fundamental principles of administrative law such as legality and legal certainty.

The Law itself (Articles 2 and 24) brings to the minimum the scope of regulation, through negative definition (“The administrative procedures envisaged by this Law, to the extent to which they are not regulated by legislative acts, shall apply to the activities...”), whereas such law should be the principal act comprehensively and holistically regulating the administrative procedure; therefore, it is often adopted in the form of a code. Quite often, provisions of the Law are in conflict with other legal acts, for example, the Law “On the Procedure for Consideration of complaints from Individuals and Legal Entities” (see below for the analysis of legislation on access to information). The Law fails to establish such basic principles of administrative procedure as fairness, impartiality, openness and transparency, reasonable time of consideration, justification of decisions, etc. Administrative process is regulated incompletely, without proper details or definition of the rights of parties in the process (for example, the right to be notified about the consideration of the case, to be heard before such consideration). Only one article deals with appeals and it allows only for the complaint to be filed with the superior state body (superior official) or with the court, and the time for appeal.

Since the adoption of the previous Monitoring Report, no significant amendments to the Law on Administrative Procedure were made to rectify the above deficiencies.

***“To reform the system of administrative justice in accordance with international standards and best practices, namely, to adopt the Administrative Adjudication Code, which must not regulate issues of administrative liability, and to set up specialized administrative courts for consideration of private persons’ claims against public administration.”***

Kazakhstan reports that the draft Code of Administrative Offences (CAO), which is currently drafted, was supplemented by the Ministry of Justice by provisions of Chapter 26 of the Civil Procedure Code that govern the procedure for contesting decisions of bodies (public officials) authorized to try administrative offences, as well as rules for contesting procedural decisions and appealing against procedural actions of such bodies (public officials). The Ministry has started to incorporate elements of administrative justice (rules of appeal against decisions, actions, or inaction of bodies of public administration) in the CAO. However, the changes are not fully in line with the recommendation above as they do not allow for differentiation between administrative offences or set up a procedure for considering actions against public administration. Later Kazakhstan stated that relevant provisions will be reflected not in the CAO but in the draft Code of Administrative Procedure.

In his presentation to the VI Congress of Judges of the Republic of Kazakhstan the President of the Republic of Kazakhstan pointed to the need to phase in administrative justice. In this context, note also certain provisions of the Concept of RK Legal Policies through 2020, which says: “In future, based on the existing administrative courts, a system of administrative justice must be set up to deal with public-private disputes, while administrative offences could be transferred to the jurisdiction of the general courts of law.”

With the established targets in view, a working group was set up to draw up plans for the implementation of the administrative justice system in Kazakhstan. Among the discussed proposals is the adoption in 2017-2019 of the Administrative Procedure Code and an amended version of the Law of Administrative Procedure. There are also plans to set the administrative justice aside from administrative offences, and provide for the mandatory requirement of pre-trial (administrative) appeal. There are no proposals to set up specialized administrative courts, and relevant offences will be tried by general courts of law.

In their comments to the draft report Kazakh authorities noted that adoption of the Administrative Procedure Code and the Law on Administrative Procedures in the new wording is planned within the following timeline: development of drafts in 2014-2015; submission of drafts to the parliament in 2016; enactment in 2017. Also, contrary to the previous information provided by Kazakhstan, creation of administration justice is planned on the basis of existing specialised inter-district administrative courts; cases of administrative offences will be referred to the jurisdiction of general courts; hence administrative justice will be separated into an autonomous branch of adjudication dealing

only with consideration of cases in the area of public governance and aimed at protecting public rights and freedoms of citizens and other law subjects.

While welcoming the work in progress for forthcoming administrative justice reform, it needs to be stated that the recommendation of the previous round of monitoring at this stage has not been complied with. It is also recommended to clarify and clearly state main directions of the administrative justice reform.

## **Other issues**

**Business environment.** The information by Kazakhstan authorities mentions that the reviews of the inspections carried by controlling agencies (ministries, agencies and territorial divisions) showed certain abuses in planning; mistakes in risk-based classification of businesses (low-risk entities are classified in the medium-risk group); inspections are planned for entities that have been registered for less than three years (in violation of para 6-1 Article 16 of the Law on State Control and Supervision in the Republic of Kazakhstan); unjustified extensions of inspections and improper supervision over inspections planning at territorial branches by their central agencies.

To rule out abuses at the stage of inspection planning and recording, the Legal Statistics Committee of the Office of General Prosecutor of the Republic of Kazakhstan developed projects for e-registration and e-planning of inspections to monitor all stages of inspections online, and improve the efficiency of coordination in state control and supervision.

On 18 April 2014 the RK Government approved the Concept for state regulation of entrepreneurial activity until 2020, which envisages creation by 2020 of a centralized system for public regulatory impact assessment of the current and newly established norms in laws and instruments of regulation in the economy; it is planned to delegate to the business environment some of the government functions in business regulation, together with a higher liability of entrepreneurs for violations that damage consumers. Also, the Concept, when implemented, will promote further improvements in the risk management systems and introduction of new principles of public-private relationship, excluding interference with production or internal business of private companies and narrowing the focus of government control to quality and security of the end product.

Pursuant to the Concept for state regulation of entrepreneurial activity until 2020, there have been some recent reforms in Kazakhstan in areas such as starting a business, taxation, and investor protection. Among other things, amendments have been made in the standards of the government service of state registration, and re-registration of legal entities and tax reporting were streamlined. The Concept outlines the following problems in the sphere of business regulation in Kazakhstan:

1) permit and licensing: inconsistency in the existing licensing system; absence of risk management systems in the licensing practice in Kazakhstan; ongoing and uncontrolled growth of required permits; cumbersome licensing laws; lack of accountability of officials for the negative effect the issued permits may have had; and inefficient implementation.

2) state control and supervision: bias of abuse screening over prevention and deterrence; too many requirements that the government is controlling, many of which are unrealistic, duplicating, obsolete, contradictory, unfair; and lack of fully implemented risk assessment systems. The high percentage of fines suggests that sanctions are applied even to non-existing transgressions, although world best practice tends to rely more on notification and cautioning. It seems to suggest that sanctions have been applied disproportionately to the gravity of the violation.

3) business self-regulation: lack of competition in the business environment which is needed for self-regulation; areas with elements of self-regulation are not mature enough yet for fully-fledged regulation; and ineffective legislation on self-regulating entities in Kazakhstan.

4) standard-setting – the inefficient current system of regulatory impact assessment in regulatory drafting in the absence of an organized discussion forum; academic screening which assesses socioeconomic impact of draft laws alone; inefficiency of business engagement in standard-setting, and formalistic attitude of state agencies (drafters) toward business community and their suggestions.

5) technical regulation: multiplicity of effective normative legal acts that rely heavily on reference norms, leading to the duplication of requirements; and lack of a single database of normative and technical documents or monitoring on part of the state agencies.

The reform of instruments of state control and supervision, under the Concept, will envisage the following. To promote further optimization of state agencies' supervisory functions, it is proposed to introduce risk-based planning of inspections and phase out routine inspections of businesses; reduce the number of requirements to be checked by state control and supervision; clear regulation of other types of control and surprise inspections; full automation of the risk management system; and elimination of duplication in the controlling function of state agencies. It is also proposed to "consider alternative forms of control and protection (liability insurance, personal financial guarantees, public monitoring)". With the risk assessment system automated, planning of inspections and collected data processing can be supported with a much smaller staff. After automation is complete, it would be possible to build a reliable database of data about all the inspections, which could be used to assess the regulatory impact. At the stage of inspections planning, selection of targets will no longer be done manually, but based on risk assessment criteria handled by the automated system. At the stage of actual inspections, the automatic regime will be used to: (1) register the start of the inspection electronically at the legal statistic agencies; (2) record all stages of the inspection and monitor all deadlines (beginning, suspension, extension, completion) of the inspection; and (3) capture the results in the system (including violations if detected).

Overall, Kazakhstan continues to demonstrate significant progress in de-regulation. It is supported, among other things, by the world leading business indices. According to the World Bank's Doing Business Project in 2014, in the East Europe and Central Asia region Kazakhstan is ranked 8<sup>th</sup> out of 26 countries (up from 12<sup>th</sup> in 2011). In the global rating Kazakhstan has been moving up from 86<sup>th</sup> in 2006 to 59<sup>th</sup> in 2011 and 50<sup>th</sup> in 2014. For more details on Kazakhstan's 2014 index rankings (out of 183 countries) see Table below<sup>70</sup>.

**Table 15.** 2014 World Bank Doing Business – Kazakhstan's rankings

	2014	2011	Change
Starting a business	30	47	+17
Dealing with construction permits	145	147	+2
Registering property	18	28	+10
Getting credit	86	72	-14
Protecting investors	22	44	+22
Paying taxes	18	39	+21
Trading across borders	186	181	-5
Enforcing contracts	27	36	+9
Resolving insolvency	54	48	-6

Kazakhstan has significantly improved its ranking in the World Economic Forum's Global Competitiveness index in 2013-2014 compared to 2011-2012 Report (up from 72 to 50),<sup>71</sup> and Kazakhstan today is one of the leaders among the Istanbul Plan of Action countries<sup>72</sup> (see Table).

**Table 16.** Global Competitiveness Report indicators and score out of 148 countries:<sup>73</sup>

	Burden of government regulation	Property rights	Transparency of government policy-making	Burden of customs procedures	Irregular payments and bribes	Favouritism in decisions of government officials	Judicial independence
Azerbaijan	21	81	43	119	87	41	93

<sup>70</sup> Source: <http://www.doingbusiness.org/data/exploreeconomies/kazakhstan> .

<sup>71</sup> 72 of 139 countries in the 2010-2011 Report; 72 of 142 countries in the 2011-2012 report; 51 of 144 countries in the 2012-2013 Report and 50<sup>th</sup> out of 148 countries in the 2013-2014 Report.

<sup>72</sup> 2013-2014 Report: Azerbaijan – 39<sup>th</sup>, Kazakhstan – 50<sup>th</sup>, Georgia – 72<sup>nd</sup>, Armenia – 79<sup>th</sup>, Ukraine – 84<sup>th</sup>, Mongolia – 107<sup>th</sup>, Kyrgyzstan – 121<sup>st</sup> (Tajikistan and Uzbekistan are not covered).

<sup>73</sup> Source: [www.weforum.org/issues/competitiveness-0/gci2012-data-platform](http://www.weforum.org/issues/competitiveness-0/gci2012-data-platform).

Armenia	34	54	24	123	75	68	110
Georgia	10	120	33	12	28	50	91
<b>Kazakhstan</b>	<b>54</b>	<b>68</b>	<b>29</b>	<b>75</b>	<b>65</b>	<b>77</b>	<b>88</b>
Kyrgyzstan	100	136	97	131	134	129	140
Mongolia	119	110	105	135	94	132	111
Ukraine	137	143	130	140	130	133	139

Still, according to the 2013-2014 Global Competitiveness Report, corruption remains the most frequently reported barrier to doing business (government inefficiency – 3<sup>rd</sup> most reported, and tax regulation – 5<sup>th</sup>).

**Regulatory impact assessment.** According to the Concept of business regulation until 2020, Kazakhstan introduced some elements of assessment of the regulatory impact by normative legal acts adopted. For instance, to ensure better quality of legal drafting and assessment of the impact on the regulatory environment and to mitigate corruption risks, the methodology was introduced to assess the socioeconomic impact of the drafted legislative acts, which is rather close to the regulator impact assessment model. The Law on Private Entrepreneurship calls for the need to calculate the costs of private businesses incurred as a result of adoption of normative legal acts. There is a legal monitoring mechanism for effective normative legal acts. However, as was acknowledged in the draft Concept, it is too early to say that Kazakhstan has in place a fully-fledged regulatory impact analysis.

In accordance with the above Concept, plans for 2016-2018 require: develop the regulatory impact assessment methods; implement planning procedures; develop or review regulations; establish a dialogue with public associations; and develop the regulatory impact assessment and standard costs methodologies. Following the development and testing of the relevant methodologies, civil servants will need to be trained in them.

The Concept delineates the following areas for the regulatory impact assessment in the Republic of Kazakhstan:

- 1) Regulatory impact assessment is used exclusively to design regulatory decisions that affect business interests. Decisions that affect business interests but do not alter mandatory requirements set in the legislation or their implementing instruments and procedures will be designed without regulatory impact assessment (government investment, subsidies, procurement, etc.). Proposed measures to manage emergency situations, disasters or other extraordinary temporary events, even if such measures are regulatory in nature, shall be designed without any regulatory impact assessment.
- 2) Regulatory impact assessment is used to draft laws of the Republic of Kazakhstan, technical regulations of the Customs Union, resolutions of the RK Government, decisions by maslikhats drafted by akimats.
- 3) Regulatory impact assessment is used if the scope of the drafted decision extends to more 100 businesses irrespective of the costs.
- 4) Regulatory impact assessment is used if the proposed decision worsens requirements, makes their procedures more complex, and leads to additional costs incurred in its implementation by businesses only.
- 5) Regulatory impact assessment is used if the originally planned period of regulation is to be extended.

According to additional information provided by Kazakhstan, in accordance with the President's Decree No. 757 of 27 February 2014, the Government of Kazakhstan developed and on 30 September 2014 submitted in the Parliament draft law "On amendments in some legislative acts of RK concerning radical improvement of entrepreneurship conditions in Kazakhstan". The draft law will revise approach to organisation of state control and supervision, in particular by repealing scheduled inspections, except for areas and objects of danger; the list of requirements to be inspected will be reduced; provisions are included to implement Concept for state regulation of entrepreneurial activity till 2020, as well as other measures aimed at reducing administrative barriers and improving business climate. According to the President's instruction consideration of the draft law was made urgent and it should be adopted by the end of 2014.

***Kazakhstan is partially compliant with Recommendation 3.3., which remains valid.***

### 3.4. Public financial control and audit

#### **Recommendation 3.4.**

- To specify the main directions of reforms in the area of the public financial control in order to clearly separate the key functions: external audit, internal audit, internal control, and financial inspections.
- To adopt and ensure enforcement of the legislative provisions on public internal audit and internal control in compliance with international standards and best practice. To approve and implement in practice general standards of internal audit and relevant guidelines and codes of conduct for internal auditors in accordance with international standards of internal audit. To establish internal audit units in the executive authorities and the Central Unit of Harmonization of Methodology of Internal Audit in the Ministry of Finance.
- To prepare and adopt a separate law on the Accounting Committee in order to regulate principles of its activity and to ensure the necessary level of functional and institutional independence of the Accounting Committee in line with the Lima Declaration and other international standards; to strengthen legislative guarantees of the financial independence of the Accounting Committee.
- To introduce a practice of detection and response to corruption risks, especially in state authorities who face a high level of corruption risk.

***“To specify the main directions of reforms in the area of the public financial control in order to clearly separate the key functions: external audit, internal audit, internal control, and financial inspections.”***

***“To adopt and ensure enforcement of the legislative provisions on public internal audit and internal control in compliance with international standards and best practice.”***

The system of public financial control and audit is needed for Kazakhstan because the existing system is not compliant with international standards. Specifically, the current system of public financial control is focused on detecting violations of rules and facts of abuse in the use of government money, through numerous inspections aimed at punishing the transgressors. Currently public financial control is performed by internal control services at ministries and other public authorities, by the Financial Control Committee of the Ministry of Finance, and by the Accounting Committee. For more detailed description of the current system and its deficiencies see the Report for the Second Round of Monitoring.

It is reported that the Decree of the President of the Republic of Kazakhstan of 3 September 2013, No 634, approved the Concept for the implementation of public audits in the Republic of Kazakhstan (the Concept) which laid down key principles and general approach to the implementation of public audits and the development of public financial control. All activities under the Concept are proposed to be divided into two stages:

- *Stage One* (2013-2014) – to establish a legislative and methodological framework of public audit and improve the legislative and methodological framework of the current system of public financial control.
- *Stage Two* (2015-2017) – promote establishment of the public audit system.

Pursuant to the proposed Concept and in line with paragraph 66.2 of the National Plan of actions for the implementation of the address of the Head of State to the people of Kazakhstan “Kazakhstan’s strategy 2050: new political course of a successful nation”, of 14 December 2012, a draft law on public audit and financial control was developed (the draft Law). The draft Law was introduced to the Parliament of the Republic of Kazakhstan by the resolution of the Government on 31 December 2013.

The key purpose of the draft Law is to lay down the legal foundations for the public audit system and the continued functioning of the measures of response under financial control. As Kazakhstan maintains, the draft Law is to implement fully the Lima Declaration and international audit standards (standards of internal audit by the Institute

of internal auditors, international audit standards of the International Federation of Accountants and international standards of the International Organisation of Supreme Audit Institutions).

Overall, the draft Law envisages the following: a public audit will be introduced for the purposes of assessment of management aimed at improving and enhancing the audit target, while the system of public financial control is to detect abuses and respond; the draft Law defines the agencies, their authority and collaboration with other public agencies, key types, principles, standards and framework of public audit and financial control; it broadens the list of definitions with such terms as “the Code of Ethics of public auditors”, “materiality” (the maximum allowable is a 10% error in financial statements); also, to differentiate abuses, the draft Law introduces the definition of “deficiency”, as well as Audit and Risk Council, performance audit, and IT audit.

At the same time, the proposed draft Law establishes uniform requirements for a public audit as defined by the standards of public audit and financial control based on international standards.

The system of agencies of public audit and financial control will include: the Accounting Committee; accounting commissions of regions, the republican city and the capital city; the authorized agency for internal audit; internal audit services of central public agencies, akim offices of the regions, the republic city and the capital city; and internal audit services of the department of central public agencies. The draft Law specifies the following types of public audit: audit of financial statements, compliance audit and performance audit.

As the outside agency of public financial control, the Accounting Committee will perform some additional functions, including assessment of the draft budget of the Republic, and a consolidated financial statements audit (at the republican level).

The draft Law describes the audit’s procedural framework: planning, evidence collection, auditing restrictions in conflict of interest (engagements or relations that might undermine objectivity and independence of the officials of a public audit body: close kinship; previous employment at the audited institution; public officials with personal property interests) and mutual recognition of audit results across all public audit agencies; the draft Law also harmonises acts to be compiled at the end of the audit including: audit statement; auditor’s opinion; compliance order, and internal audit report.

Public audit will be implemented for the purposes of assessment of management aimed at improving and enhancing the audit target, while the system of public financial control is to detect abuses and respond (starting an administrative action; compelling compensation (redress) for damages; disciplinary action; and submission to law enforcement for procedural actions).

Thus, if non-compliance with current legislation is identified at the audited institution, public audit will seek to apply functions of public financial control through response measures. Public financial control will be applied by the Accounting Committee, audit commissions and the authorized agency for internal audit.

Depending on the audit target, there will be an external or internal audit. The main purpose of the external public audit is to analyse (assess, check) the efficiency of national resources management (financial, natural, production, labour and information resources); and to stimulate a dynamic growth in the living standards of the people and national security of the country. The mission of internal audit is to look into the direct and end results of the audited public agency as stated in the strategic and policy documents; efficiency of internal processes of public authorities, including the delegated functions, quality of services and compliance of accounting with the new accrual methodology.

Subjects of external public audit and financial control are the Accounting Committee and review commissions. As an audit instrument in assessing efficiency and appropriate use of budgetary means, the Accounting Committee shall submit to the President and Parliament of the Republic of Kazakhstan its audit statement of the RK Government’s report on the execution of the budget of the Republic, and a report on the work of external public audit agencies, thus assessing performance of both the executive government, quasi-government sector and the public audit and financial control agencies. The Accounting Committee’s methods will be dominated by the study and analysis of cause-and-effect factors in cases of non-compliance with the mission and policy documents. Audit (controlling, analytical) functions of the review commissions in the regions shall be identical with those of the Accounting Committee, except in the assessment of the draft government budget.

Subjects of the internal public audit and financial control shall include the authorized agency for internal audit and IA services at central public agencies and offices of akims in the regions, the republican city and the capital city. The authorized IA agency is to provide the RK Government with unbiased and accurate information on the execution of the budget; assess performance of public agencies and IA services; and conduct onsite inspections only in the event of inferior information collected from IA services or at the instruction of the RK Government.

IA services must be subordinated to the top leader of the public agency who must ensure lack of bias in their assessment and recommendations as well as reporting to the authorized IA agency, in line with the quality requirements and compliance with standards and regulations. Thus, Kazakhstan informs, the implementation of a public audit is not to eradicate the existing system of public financial control but merge it smoothly with the system of the public audit being implemented.

The distinction between audit and control lies in the fact that an audit is not to punish but prevent. Public audit is not there to just point to incompliances but to identify resources and capacities in public finance in order to manage them more efficiently and effectively.

As noted by Kazakhstan, all bodies of public audit and financial control will be carrying out both the public audit (analysis, evaluation and verification of effectiveness of management and use of budgetary funds, public assets and assets of quasi-state entities, related grants, state guaranteed loans, based on the risk management system) and financial control (activity aimed at eliminating violations detected during public audit).

The assessment of the Concept and the draft Law from the point of view of international standards and practices (COSO, INTOSAI, IIA, EU-PIFC) shows the following. Both the Concept and the draft Law are hefty documents that strive to regulate all aspects of internal and external financial control (inspections) and public audit.

It is recommended that Kazakhstan should examine the proposed legal acts for their compliance with international standards and best practices (e.g. legislation on public internal financial control promoted by the European Union), possibly with the help of international experts.

Kazakhstan reported that by the order of the chairman of the Accounting Committee of January 2014 a working group was set up to study and analyse international standards on the supreme audit institutions (ISSAI), a schedule for such work was approved as well. The goal is to use results of the study during development of documents related to public audit transition. Chairman of the Accounting Committee by his order of February 2014 set up another working group – on development of legal and methodological framework for transition to public audit. The group includes representatives of the Accounting Committee, other state authorities, NGOs, advisor on public audit from the USAID Macroeconomic project.

The draft Law offers a good definition of the system of internal control,<sup>74</sup> however, what is missing from both the Concept and from the draft Law is a further elaboration of this important concept. Under international standards, internal control means management, control and accountability of the management of the agency. Broadly interpreted, internal control includes internal audit; narrowly interpreted, internal control and internal audit are separate functions and responsibilities. Internal audit must provide the management with assurances and advice on the organization and functioning of management and operational systems of control, including anti-corruption controls.

As to definition of public auditor (“an administrative public servant enabling or performing public audit and financial control”). From the position of international standards, a public official may not be an auditor and financial inspector at the same time. As reported by Kazakhstan, these deficiencies will be removed during consideration of the Draft Law in the Parliament. Definition of the internal controls system will be detailed in Article 59 of the Draft Law; definition of the public auditor will also be amended.

During the on-site visit the monitoring group was given the following explanation by representatives of the Accounting Committee and the Financial Control Committee of the Ministry of Finance. The Concept supports gradual transformation of the existing internal control (inspections) into management control and accountability and Internal Audit. Internal audit will not be able cope with its present role, according to the Concept, until such time as agencies acquire advanced management controls and accountability. During the progressive change, while

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<sup>74</sup> “System of internal control is a system of policies and procedures accepted by the leadership of the audited public institution to ensure efficiency in managing the institution”.

management control and accountability are only emerging, the bodies of internal audit will act as inspectors. The same, more or less, is true of External audit carried out by the Accounting Committee. The Accounting Committee may phase out inspections when effective management control and internal audit systems are in place. Thus, the Accounting Committee will be able to concentrate not on pouring over financial accounts and statements, but on the performance and efficiency of management control and internal audit at public agencies within its jurisdiction.

The monitoring team respects Kazakhstan's approach to the strategy of progressive transition to management control and internal audit from the current internal control (financial control). The team shares the opinion of the representative of the Accounting Committee and the Financial Control Committee of the Ministry of Finance that building effective systems of financial management and control should be the key priority for Kazakhstan. The team believes that internal audit, even when only emerging, may play an important role through its investigations and recommendations to the management on efficient systems of financial management and control. In other words, it makes no sense to commit, from the outset, all IA resources to detecting such abuses as corruption. The monitoring team believes that the added value of internal audit must, from the outset, be focused more on the examination of management control systems and on preventive capacities of the existing anti-corruption control systems.

For the anti-corruption role of audit and financial control (prevention and detection) the following elements of anti-corruption strategy are essential: functioning databases and information systems with up-to-date information about corruption-prone spheres and offices, facts of corruption and outcomes of investigations and inspections. Audit opinions from audit and financial control agencies must be part of the risk detection and information sharing. These elements are clearly in place in the Concept and in the draft Law. The key players here should be the Financial Police, Accounting Committee and the leadership of public agencies responsible for the implementation of the anti-corruption strategy.

Internal audit may not be focusing too much, let alone exclusively, on corruption detection. The main focus should be on the review of the structuring and functioning of anti-corruption controls. It would be useful to refer here to excerpts from the 2014 Practice Guide of the Institute of Internal Auditors:<sup>75</sup>

*"Internal auditors must have sufficient knowledge to evaluate the risk of fraud and the manner in which it is managed by the organization, but are not expected to have the expertise of a person whose primary responsibility is detecting and investigating fraud (Standard 1200: Proficiency and due professional care). Auditing anti-bribery and anti-corruption programs requires a team of auditors with collective skills, knowledge, and expertise in compliance, fraud, investigations, regulatory affairs, IT, finance, culture, and ethics. Internal auditors in organizations with formal anti-bribery and anti-corruption programs have the opportunity to assess the effectiveness of each component and how all of the components work together to deter, curtail and detect bribery and corruption. The hallmark components of effective anti-bribery and anti-corruption programs include tone at the top, governance structure, risk assessment, policies and procedures, training and communication, monitoring and auditing, investigations and reports, enforcement and sanctions, and reviews and updates. Internal auditors in organizations with non-existent or informal anti-bribery and anti-corruption programs have the opportunity to help their organizations establish a baseline by identifying and investigating red flags in high-risk areas such as third-party relationships, gifts and entertainment, political contributions, and procurement. Audit observations in these and other areas can be leveraged by the organization to prioritize its anti-bribery and anti-corruption initiatives as input to developing and sustaining a formal anti-bribery and anti-corruption program. Auditing anti-bribery and anti-corruption programs requires varying levels of collaboration and information sharing with other governance functions such as regulatory compliance, external auditors, investigators, and the governing board."*

It is essential that the Accounting Committee and the Financial Control Committee of the Ministry of Finance cooperate with each other in developing and implementing the various parts of the Concept and the draft Law. Documents presented to the monitoring team during the onsite visit point to intense collaboration of these two agencies.<sup>76</sup>

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<sup>75</sup> Auditing anti-bribery and anti-corruption programmes. Practice Guide, Institute of Internal Auditors, June 2014 (in English), [www.iaa.nl/SiteFiles/Nieuws/PG-Auditing-Anti-bribery-and-Anti-corruption-Programs.pdf](http://www.iaa.nl/SiteFiles/Nieuws/PG-Auditing-Anti-bribery-and-Anti-corruption-Programs.pdf).

<sup>76</sup> Action Plan ("road map") for the transition of public audit and the implementation of the Concept for the implementation of result-based public planning (Appendix to the ordinance of the Head of the Audit Chamber of 18 March 2014); Rules for the state financial control (audit) bodies on uniform principles and approaches to the risk assessment system (draft appendix I to Joint Ordinance of the Accounting Committee and the Ministry of Finance).

Adopting the Concept, Kazakhstan has made an important step in detailing key areas of reform in public financial control. The Concept's provisions were reflected in the draft Law on public audit and financial control. These are important, welcome achievements. However, the above documents so far do not ensure full and clear-cut segregation of key functions (external audit, internal audit, internal control, and financial control) in line with international standards, as was recommended in the Report for the Second Round of Monitoring for Kazakhstan. However, monitoring experts take note of the Kazakhstan intention to correct remaining deficiencies during finalisation of the Draft Law in the Parliament. After completion of this work and adoption of the Law on public audit and financial control this part of the recommendation could be considered as fulfilled. At the moment Kazakhstan is partially compliant with this part of the recommendation.

***“To approve and implement in practice general standards of internal audit and relevant guidelines and codes of conduct for internal auditors in accordance with international standards of internal audit.”***

Audit standards have not been approved, however, as Kazakhstan reports, such standards will be implemented under the approved Concept for the implementation of public audit in the Republic of Kazakhstan. Public audit standards are divided into general and procedural. General public audit standards shall be developed on the basis of international standards and stipulate fundamental requirements for public audit agencies. The general public audit standards and the financial control standards shall be developed by the Accounting Committee and approved by the President of the Republic of Kazakhstan.

Procedural public audit standards contain fundamental requirements for the process (procedure, mechanism and methods) of public audit. Procedural standards of external public audit shall be developed and approved by the Accounting Committee. Procedural standards of the audit of financial statements and procedural standards of internal public audit shall be developed by the authorized IA agency together with the Accounting Committee. Procedural standards of the external audit and financial control agencies shall be developed on the basis of codified standards approved by the Accounting Committee. In turn, such standards will be mandatory for implementation by all public audit and financial control bodies and entities (organisations) contracted to perform public audit.

Also, under the draft Law, the Accounting Committee, together with the authorized IA agency, shall draft and approve the Code of Ethics for workers in the public audit and financial control agencies. According to the draft Law the Code of Ethics for workers in the public audit and financial control agencies is deemed to be a unique collection of ethical rules for the profession of the workers of public audit and financial control institutions, and compliance with it will be required from all those who are to be involved in public audit and financial control.

Therefore, Kazakhstan (Accounting Committee together with the Financial Control Committee of the Ministry of Finance) has started to develop recommended standards, and when those are approved and implemented, this part of the recommendation will be complied with.

***“To establish internal audit units in the executive authorities and the Central Unit of Harmonization of Methodology of Internal Audit in the Ministry of Finance.”***

As envisaged by the Concept, implementation of public audits and development of public financial control will proceed in stages. At Stage Two (2015-2017) the public internal audit agency authorized by the Government of the Republic of Kazakhstan is to be set up (authorized IA agency), together with IA services at central public agencies and akim offices in Astana, Almaty and the regions.

In accordance with the draft Law on public audit and financial control, the RK Government shall appoint the authorized IA agency, and provide for IA services to be set across all central public agencies, except the National Bank of the Republic of Kazakhstan, and in the offices of akims in the regions, in the republic and capital cities, at the discretion of the head of the public agency and within the staffing plans approved in accordance with the legislation of the Republic of Kazakhstan.

In line with international standards and to promote implementation of elements of corporate governance and efficient interaction within the framework of internal audit and risk management at the public agencies, it is planned to set up an Audit and Risk Board, as an advisory body, led by the head of the public agency and consisting of heads of departments and units.

The Board shall coordinate the work of units, allocation of resources and information support in the process of planning for and implementation of activities in internal audit and risk management through discussion of reports, plans and programmes.

The monitoring team welcomes the creation of the authorized IA agency at the Ministry of Finance which essentially will be acting as the Central Unit of Harmonization of internal audit. However, it is unclear for the experts what harmonizing role will be played by the Coordination Council of public audit and financial control bodies (Article 45 of the draft Law). The team is also positive about the introduction of public audit and risks boards at public agencies: such boards may become audit committees which play such an important role in the harmonization of risk management at the heart of the public institution and in supporting functional and institutional independence of internal audit services.

Kazakhstan reported additionally that according to draft Regulations on the Coordination Council that is being developed to implement the Draft Law, goals of the Coordination Council are: 1) coordinate activity of public audit and financial control bodies to review law enforcement practice in the area of public audit and financial control, issues of compliance with standards of public audit and financial control; 2) effective interaction of public audit and financial control bodies by means of joint discussion of problems, unified enforcement of legislation in the area of public audit and financial control; 3) strengthening financial discipline during execution of budgets of all levels and ensuring transparency and objectivity in activity of public audit and financial control bodies; 4) avoiding interference and influence of stat authorities and other organisations during conduct of public audit and financial control, adoption of objective decisions based on their results, strengthening trust towards public authorities.

Kazakhstan also noted that the Coordination Council of external public financial control bodies functions successfully since 2011. Its meetings are held usually once in 6 months. The council acts as forum for dialogue to discuss problematic issues in the area of public financial control, especially in the view of 16 regions which have 16 separate public agencies – review commissions with regard to which the Accounting Committee performs methodological guidance and provides assistance, etc. As a result of the Coordination Council meetings recommendations are developed in order to improve existing legislation, adopt joint acts on cooperation, etc. Rules for creation and functioning of the Coordination Council of external public financial control bodies are approved by the normative ruling of the Accounting Committee in August 2011.

As these initiatives on setting up internal audit units in the executive authorities and the Central Unit of Harmonization of Methodology of Internal Audit will be implemented at stage two of the Concept's implementation, this part of the recommendation can be accepted as partially complied with.

***“To prepare and adopt a separate law on the Accounting Committee in order to regulate principles of its activity and to ensure the necessary level of functional and institutional independence of the Accounting Committee in line with the Lima Declaration and other international standards; and to strengthen legislative guarantees of the financial independence of the Accounting Committee.”***

The draft Law on public audit and financial control has a separate chapter regulating the activity of the Accounting Committee for the control over the execution of the budget of the Republic in line with the Lima Declaration and other international standards, as well as powers and status of its officials, and collaboration with other public agencies. There was earlier an intention to regulate the Accounting Committee through a separate law, and the relevant draft law was submitted to Parliament, only to be recalled later. Terms of reference of the Accounting Committee are incorporated in the draft Law on public audit and financial control in order to consolidate the legislative framework, avoid multiplication of laws and ease enforcement.

The Report for the Second Round of Monitoring recommended that a separate law on Accounting Committee should be adopted, to ensure the required level of functional and institutional independence of the Accounting Committee. According to international standards, supreme audit institutions may only perform their duties objectively and efficiently when they are independent of the audited agencies and protected against outside pressure. Independence of the supreme audit institution is inseparable from independence of its members and from financial independence (see Report for the Second Round of Monitoring for details).

Also, among other things, the Report for the Second Round of Monitoring highlighted the following problems:

- Procedure for the appointment of Accounting Committee members does not assure their independence;

- Excessive control over the Accounting Committee by the President (emphasis on direct accountability and subordination of the Accounting Committee to the President).

The fact that a separate Law on Accounting Committee was not drafted and approved is deemed to mean that Kazakhstan is not compliant with this part of the recommendation. However, of more importance is the wording of provisions which regulate the status and activity of the Accounting Committee and which are to be found in the draft Law. The review of the draft Law seems to suggest that it has not addressed the problem over the independence of the Accounting Committee, highlighted by the Report for the Second Round of Monitoring of Kazakhstan. It retains the Accounting Committee's heavy dependence on the President. The draft Law covers only a brief list of issues relating to the status, organization and procedures of the Accounting Committee; it follows that all other issues will be governed by implementing acts, which in itself is short of the standards. For example, Constitution of RK determines only procedure for appointment of the Accounting Committee members and contains no regulation the grounds for their dismissal; these grounds are absent also in the Draft Law – this will result in establishing of such grounds in the bylaws, as it is now according to the Regulations on the Accounting Committee approved by the President (relevant provisions of the latter were criticised in the Second Monitoring Round report). The chairman and members of the Accounting Committee continue to be classified as political civil servants (despite the changes in the register of offices approved by the Decree of the President of the Republic of Kazakhstan back in 2013). Nor does the draft Law resolve the issue of instructions to the Accounting Committee as to inspections: in practice such instructions are issued to the Accounting Committee by the President and bear on certain high-profile cases or, as Kazakhstan representatives referred to them – “strategic issues”.

Thus, Kazakhstan is not compliant with this part of the recommendation.

***“To introduce a practice of detection and response to corruption risks, especially in state authorities who face a high level of corruption risk.”***

As it is noted by Kazakhstan, the draft Law on public audit and financial control calls for collaboration across public audit and public financial control agencies, to be ensured within the framework of:

- shared database of materials of public audit and public financial control;
- a risk management system based on uniform principles and approaches;
- awareness, assisted by the information system of legal statistics bodies and based on inspections carried out by public audit agencies and by agencies of public financial control; and
- mutual recognition of auditors' reports.

This shared database will collect entire information on audit plans and outcomes; analytical reports by public audit and other data essential for public audit. For purposes of the risk management system data on audited institutions, financial and other indicators shall be consolidated in the shared database.

Supervisory and controlling authorities, except the National Bank of the Republic of Kazakhstan, and law enforcement agencies shall assist the public audit and public financial control agencies in their mission, comply with their requests for information on their respective inspections, while observing requirements for classified information, official, commercial and other secrets protected by law in accordance with the procedure prescribed by law.

Pursuant to the Anti-Corruption Law, the Accounting Committee, on a permanent basis and within its jurisdiction, counters corruption in two key areas:

- 1) if monitoring detects evidence of crime (*including corruption*) in the action of public officials at the audited institution, relevant materials are submitted to law enforcement for procedural follow-up (*Article 145 of the Budgetary Code*);
- 2) when corruption risks are identified, recommendations are made on improvements to legal acts affecting the budgetary process, and to the agency's acts, if those contain legal gaps, discretionary powers or mechanisms conducive to corrupt practices.

The work of the Accounting Committee in detecting corruption risks contributes to partial fulfilment of this part of the recommendation. However, relevant risk identification should become the work for internal audit services at public agencies and institutions, which services Kazakhstan is still to establish.

The team welcomes the fact that the Accounting Committee, together with the Office of the General Prosecutor, drafted a new ordinance on risk prevention in corruption and other crimes. This will help address some of the existing problems. For instance, the Accounting Committee is not aware about the outcome of damage compensation in offences that it detects. Also, when the Accounting Committee's data points to risks but no specific wrongdoing, relevant agencies will be warned of the need to respond.

***Kazakhstan is partially compliant with Recommendation 3.4., which remains valid.***

### **3.5. Public procurement**

#### ***Recommendation 3.5.***

- **To continue reforming public procurement legislation, in particular, by substantially decreasing the number of areas which are exempt from the scope of regulation of the Public Procurement Law, by stipulating a competitive public procurement procedure - based on the law and in line with international standards - for national management holdings, national holdings, national management companies, national companies and legal entities affiliated with them.**
- **To establish a system of statistical recording and analysis of data on the performed procurement, complaints and results of their consideration, frequent violations and sanctions, etc. These materials should be updated and made public on a regular basis.**

Kazakhstan has reported the following steps to reform public procurement legislation:

- 1) In December 2010, as part of the Single Economic Space, the country signed an Agreement on public (municipal) procurement ratified by the Law of the Republic of Kazakhstan on 8 July 2011. Pursuant to subpara (1) of Article of the Agreement, the laws of the Signatory State and its public procurement must comply with the Agreement and a number of requirements, including ensuring the rights and legitimate interests of suppliers and potential suppliers. The Agreement is being implemented in stages. Stage 2 of the Agreement (for Kazakhstan) calls for amendments to the law of the Signatory State aimed at ensuring compliance of the domestic law with the Agreement and implementation of information systems supporting electronic public procurement in line with the Agreement: by 1 July 2012.
- 2) On 28 February 2012 the law of the Republic of Kazakhstan of 13 January 2012, No 543-IV, "On amendments and amplifications to some legislative acts of the Republic of Kazakhstan pertaining to public procurement" came into effect.
- 3) On 29 January 2014 the law of the Republic of Kazakhstan of 14 January 2014, No 161-V, "On amendments and amplifications to some legislative acts of the Republic of Kazakhstan pertaining to public procurement" came into force.

The law of 13.01.2012 introduced significant changes in the Public Procurement Law (PPL) and other acts, specifically:

- Article 1 PPL has been reworded and now contains definitions;
- The list of exceptions from the PPL is broadened, by the addition of 8 new items of procurement that can be performed outside the PPL norms that regulate the choice of the supplier and awarding public procurement contracts, specifically: purchasing by a public agency of goods, work or services from a state enterprise managed by such agency; purchasing goods, work or services in support of the activities of the President of the Republic of Kazakhstan and other guarded officials, ensuring maintenance and operation of government facilities, transport vehicles and aircraft in the service of the President of the Republic of Kazakhstan and other officials under security, and also purchasing goods, work or services for the needs of events attended by the President of the Republic of Kazakhstan and other officials under security in accordance with the law of the Republic of Kazakhstan; purchasing services of publishing information in the foreign mass media and services of internet publishing; purchasing homogenous goods, work or

services provided their annual amount does not exceed one hundred monthly calculation rates<sup>77</sup>; placing orders for entertainment at the zoo, theatre, cinema theatre, circus, museum, exhibitions or sport events; any purchasing by theatres of goods and services needed for stage performances and public artistic performance;

- At the same time, 14 exceptions now have the rule that they do not apply to public procurement by public agencies and public institutions;
- The customer now, within five working days of the approval, must publish the annual public procurement plan or changes thereto on the public procurement web-portal;
- Restrictions to participation in public procurement have been broadened, specifically, a ban is introduced for the participation of a potential supplier if its CEO is an individual entrepreneur featuring in the list of dishonest public procurement participants;
- There is now a single period of ineligibility for black-listed suppliers - 24 months from the day of the court's ruling on bad faith participants came into force (previously the time varied between 18 and 30 months depending on the type of transgression);
- The scope of electronic public procurement has been broadened and some procedures for such procurement specified;
- The list of eligible single source procurement has been broadened; and
- Procurement through electronic trading has been replaced with an online auction on the public procurement web-portal in electronic format, complete with detailed description of the procedures involved in such auctions.

The public procurement law was amended heavily again with the Law of 14 January 2014, showing, among others, the following:

- New definitions are introduced such as "single public procurement operator", "public procurement organizer", "electronic contract for public procurement", ("contract for public procurement in electronic and digital format authenticated with electronic digital signature and executed on the public procurement web-portal"), "national treatment", etc.;
- The principle "support domestic business" is replaced by the principle "support domestic manufacturers of goods, and suppliers of work and services";
- The list of exceptions from PPL has been revised: 2 new paragraphs added and 4 deleted;
- It is ruled that the Government of the Republic of Kazakhstan shall establish for suppliers a single public procurement organiser for goods, work and services under the list of budgetary programmes and/or goods, work and services defined by the Government; the customer may act as a single public procurement organiser for several public agencies subordinate to the customer or its affiliated entities; the customer may appoint out of several public agencies subordinate to such customer, one single public procurement organiser.
- As of 01.01.2015 the akim of the region, republic or capital city shall establish for customers the single public procurement organiser for budgetary programmes and/or goods, work or services identified by such akim;
- Some procurement procedures have been changed;
- Repealed are provisions about state support available under public procurement for domestic producers and domestic suppliers of work and services, or domestic entrepreneurs (support used to be offered by the Government). Instead, public procurement of goods from foreign countries, or work and services rendered

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<sup>77</sup> In 2014, 1 MCR = KZT 1,852 (about Euro 7.3).

by foreign potential suppliers will rely on national treatment on equal terms and conditions with respect to goods of Kazakh provenance or work and services by Kazakh potential suppliers, as provided for in the international treaties ratified by the Republic of Kazakhstan.

Before amendments to the PPL came in 2014, the public procurement systems were criticized by President Nazarbayev at the extended session of the Government in October 2013. President Nazarbayev said that the system of public procurement favoured the interests of certain suppliers. "Some would deliberately undermine the tender to be able to do single purchasing", maintained the President. PPL amendments were developed by the Ministry of Finance. According to the finance minister, "to eliminate risks associated with unprofessional tender and auction commissions, lacking legal competence to select the winning bidder, there will now be a single public procurement organiser."<sup>78</sup>

These are not the only changes. In line with the Action Plan of the Cabinet of Minister to comply with the instruction of the Head of State issued at the extended session of the Government on 11 October 2013, it is planned to draft amendments to the legislation improving the procedure of appealing against the tender award (adoption is planned by June 2015).

***"...substantially decrease the number of areas exempt from the scope of regulation of the Public Procurement Law"***

The effective public procurement Law continues to have 67 items of exemptions, of which 15 do not apply to public procurement by public authorities and public institutions. As a result, the number of areas exempt from the scope of the public procurement Law has been increased, not decreased (the law effective at the time of the Second Round of Monitoring had 58 exemptions).

Kazakhstan informed that existing exemptions are in line with the Agreement on state (municipal) procurement concluded on 9 December 2010 between Governments of Kazakhstan, Belarus and the Russian Federation within the Single Economic Space which was ratified by the RK Law of 8 July 2011 (Agreement). Article 3.15 of the Agreement provides that legislation of the state parties and their procurement should comply with the Agreement and a number of requirements, including with regard to protection of rights and legitimate interests of suppliers and potential suppliers.

At the same time, according to instruction of the President of Kazakhstan given at the opening of the fourth session of the Parliament on 2 September 2014, in December 2014 a draft law should be submitted to the Parliament on Public Procurement which is supposed to decrease the number of cases of procurement from single source and without application of provisions of the Law on Public Procurement. Therefore the work on decreasing the number of areas falling outside of the scope of the Law will be continued, taking into account requirements of the Kazakhstan's international treaties.

***"...stipulate a competitive public procurement procedure - based on the law and in line with international standards - for national management holdings, national holdings, national management companies, national companies and legal entities affiliated with them."***

Article 1 of the PPL has deleted, from the definition of the customer, national management holdings, national holding, national management companies and their affiliated entities, the National Bank of Republic of Kazakhstan, its agencies and the legal entities where it is either a founder (authorized agency) or a shareholder. These organisations may pass their own rules on procurement. As it was noted in the Report for the Second Round of Monitoring, exempting such entities that operate with substantial capitals and government assets from the scope of regulation is a serious deficiency, potentially leading to corruption. In the National Welfare Fund group (Samruk-Kazana) alone, the annual total public procurement is over KZT 3 mln (about Euro 12 bln). By comparison, public procurement by central government agencies in Kazakhstan in 2013 totalled almost KZT 1 trillion.<sup>79</sup>

In July 2013, the Financial Police Agency and the Ministry of Finance of Kazakhstan approached the OECD ACN Secretariat with a request to clarify Recommendation 3.5. of the Report for the Second Round of Monitoring concerning national companies in public procurement. The question was whether the PPL should extend to national

<sup>78</sup> Source: [www.avestnik.kz/?p=26166](http://www.avestnik.kz/?p=26166).

<sup>79</sup> Source: [www.zakon.kz/4585153-dejjstvujushhaja-v-kazahstane-sistema.html](http://www.zakon.kz/4585153-dejjstvujushhaja-v-kazahstane-sistema.html).

(management) holdings, national (management) companies and their affiliated entities, or it was better to have a separate law. At the same time, the Ministry of Finance launched the drafting of a law “on public procurement by some legal entities” to take out of the scope of the Public Procurement Law state enterprises and legal entities where fifty or more per cent of voting shares (shares in capital stock) is owned by the State, and also their affiliated entities (henceforth state-owned and state controlled enterprises).

Responding to the request, following consultations with the SIGMA programme experts, the OECD ACN Secretariat informed Kazakhstan as follows. In accordance with international standards, including those of the WTO, and OECD countries’ best practices, state-owned enterprises of industrial or commercial nature, which are not controlled by the Government directly, and act as independent economic agents on competitive markets, must be managed like private businesses and compete on equal terms and conditions. Therefore, they should be excluded from the scope of general rules of public procurement that apply to government authorities. However, if state-owned enterprises have been set up for a specific public purpose such as utility services and concessions, or those of them that use public resources and are in the operational control of the State, or depend greatly on various forms of government support and the like, they must apply the general public procurement rules or special rules established by Parliament or the government such as a special law or regulation.

Further, it was noted that state-owned enterprises in Kazakhstan account for a large part of the economy and public procurement, and Samruk-Kazana, the national holding group, is by far the largest purchaser in Kazakhstan. State-owned enterprises are controlled by the government, and their managers are appointed at the top political level. These companies make use of important public resources, enjoy preferences in licensing and free access to funding at state-owned banks and credit facilities, and often receive various forms of subsidies. It is essential that such companies are subject to effective outside control, with proper transparency, including in public procurement rules and practices.

It was therefore concluded, that this part of recommendation 3.5. can also be complied with if a special law is drafted and adopted to improve public procurement procedures at state-owned companies in Kazakhstan, ensuring their transparency and competitiveness. The phrase “based on the law” in the text of the recommendation does not have to mean a general public procurement law, as it can also be a special law. Adoption of special legislative rules for public procurement should be supplemented with measures facilitating better corporate governance in state-owned companies, including rules, procedures and practices of transparency, better external and internal audit, internal controls and compliance.

According to additional information of Kazakhstan, Government by its decision of 21 January 2014 created an Inter-departmental working group for preparation of a Unified Law on Procurement which would regulate procurement of economic entities with participation of the state. Preparation of the draft law is carried out by the Ministry of National Economy.

Kazakhstan also reported that procurement of Samruk-Kazana Fund and organisations in which the Fund owns directly or indirectly 50% and more of voting shares is regulated by the Law on the National Welfare Fund of 1 February 2012. However, as analysis of the law shows, issues of procurement of the mentioned entities is regulated just by one article in this Law and detailed rules of procurement should be approved by the Fund’s Board of Directors (Art. 19).

Since Kazakhstan has not passed any special legislative provisions on public procurement by state-owned enterprises, this part of the recommendation is not deemed complied with.

***“To establish a system of statistical recording and analysis of data on the performed procurement, complaints and results of their consideration, frequent violations and sanctions, etc. These materials should be updated and made public on a regular basis.”***

Kazakhstan reported that the Ministry of Finance had developed technical specifications for the E-complaints module. This module is to ensure automatic registration of complaints, rate state authorities by number of complaints and perform the function of monitoring and analysis of complaints on public procurement. To facilitate collection, monitoring and analysis of complaints from public procurement participants, in June 2014, at the Single public procurement organiser’s web-site, a link to e-complaints on the e-government portal was created, and on the website of the ministry of Finance - a link to the electronic applications module on the e-government web-portal.

The latter module keeps an automated register of complaints, rates state authorities by number of complaints and performs the function of monitoring and analysis of complaints on public procurement.

The statistics on public procurement offered by Kazakhstan is shown in Table below.

**Table 17.** Public procurement in 2011-2014

	<i>2011</i>	<i>2012</i>	<i>2013</i>	<i>2014 (as of 01.07.)</i>
<b>Total procurements and value</b>	<b>2 417 939 worth KZT 2 662 bln</b>	<b>1 939 101 worth KZT 1 601 bln</b>	<b>1 188 717 worth KZT 1 374 bln</b>	<b>368 736 worth KZT 214.2 bln</b>
of which:				
- tenders	25 566 worth KZT 566.9 bln	15 630 worth KZT 290.8 bln	12 832 worth KZT 199.9 bln	1 713 worth KZT 21.3 bln
- Request for quotation	1 658 561 worth KZT 138.5 bln	1 057 399 worth KZT 101.8 bln	823 332 worth KZT 90.8 bln	149 043 worth KZT 16.1 bln
- Single source procurement	251 556 worth KZT 1 352 bln	139 219 worth KZT 638 bln	133 616 worth KZT 674.4 bln	19 356 worth KZT 67.1* bln
- Procured on open commodity exchanges	55 150 worth KZT 24.5 bln	<i>No data</i>	1 118 worth KZT 5.2 bln	106 worth KZT 270.4 mln.
- auctions	<i>No data</i>	36 worth KZT 4.2 bln	355 worth KZT 13.7 bln	44 worth KZT 1.6 bln
- procured outside the scope of RK Law	427 106 worth KZT 579.3 bln	627 450 worth KZT 522 bln	911 464 worth KZT 389.8 bln	198 474 worth KZT 107.9 bln

\*Of which, cancelled tenders – 3, 913 worth KZT 58.3bln; cancelled auctions – 152 worth KZT 2.5bln; cancelled request for quotations – 8,823 worth KZT 0.9 bln.

It is also reported by Kazakhstan that the public procurement web-portal at [www.goszakup.gov.kz](http://www.goszakup.gov.kz) makes available for free statistics by type, number of public procurement, imputed savings and number of suppliers.

This part of the recommendation is largely complied with.

**Electronic public procurement.** According to Kazakhstan authorities, PPL allows five types of public procurement: tender; request for quotations, single source procurement, auction and commodity exchanges. Currently public procurement through tenders, RFQ and auction are held only electronically on the public procurement web-portal. If the procured goods, work or services are part of state secret, public procurement is paper-based.

At the same time, the Public Procurement Law allows for public procurement from single source both on paper and electronically. The web-portal is currently in progress of implementing web-based single source public procurement. The public procurement on commodity exchanges is electronic only.

According to the mass media report, in late 2013 in Kazakhstan the imputed savings (difference between budgeted amounts and the effective price in contracts) of government monies in less than 7 years since introduction of electronic public procurement amounted to almost KZT 185 bln (about Euro 740 mln). Similarly, in the National Welfare Fund group of companies which from 2013 have introduced full electronic public procurement and implemented treasury operations, in the earlier half of 2013 saved almost KZT 19.6 bln (of which public procurement resulted in the savings of KZT 4.6 bln, or 14 per cent of the budgeted prices). The group expects that electronic procurement will achieve 20 per cent in imputed savings.<sup>80</sup>

The system of electronic auctions was fully implemented in Kazakhstan in 2012. The law requires that electronic auctions can only be used for the procurement of goods, services or work whose total annual budgeted amount exceeds 4,000 MCRs.

<sup>80</sup> Ibid

Between 2010 and May 2014 the Electronic Public Procurement web-portal had registered and participating about 170,000 suppliers (individuals and legal entities)<sup>81</sup> and thanks to online procedures, in 2013 alone, they earned over KZT 556 bln (about Euro 2.2 bln)<sup>82</sup>. The following information was provided on non-resident suppliers:

- in 2012, the number of suppliers was 110 274, of which 5 were non-resident suppliers registered at headquarters, and also 685 non-resident suppliers whose details were registered by the customers. Non-residents performed 427 procurements worth KZT 13.8 bln;
- in 2013, 152 328 suppliers, of which 8 were non-resident suppliers registered at headquarters and 764 non-resident suppliers whose details were registered by the customers. Non-residents performed 456 procurements worth KZT 9. bln;
- in 2014, as of June 2014, about 171 000 suppliers, of which 71 were non-resident suppliers registered at headquarters and 178 were non-resident suppliers whose details were registered by the customers.

It is reported that access, both inside the country and from abroad, to announcements of procurement and statistics on the public procurement web-portal is available without registration.

**Appeal and controls.** Under the PPL, there can be no appeal to public control agencies against the customer's decision (1) to choose the type of public procurement and (2) to waive public procurement under paragraph 10, Article 5, of the PPL. According to the latter, the customer may waive public procurement in the following cases: (1) reduction of expenses on procurement of goods, work or services as budgeted in the approved annual public procurement plan (adjusted annual public procurement plan) as a result of amendments (adjustments) in the relevant budget; (2) amendments to the strategic plan of the public agency, customer's budget (business plan, estimates) which abolished the need to procure goods, work or services stipulated in the approved annual public procurement plan (adjusted annual public procurement plan), in accordance with the legislation.

The right of appeal is given to all subjects of the public procurement system, individuals or legal entities operating in the public procurement system. Article 6 of the RK Law "On the procedure for considering applications of individuals and legal entities" stipulates the requirements for a written application. The appeal should indicate the name of the subject or position, full names of the officials whose actions are being appealed, reasons for appeal and the claim.

Note that the presence of exemptions to the right to appeal public procurement runs contrary to international standards. The right to appeal should cover all key decisions about procurement, including the method of procurement.<sup>83</sup> Kazakhstan reported that this proposal will be considered during preparation of the draft Law on Public Procurement.

**Table 18.** Number of complaints received and considered by the Financial Control Committee of the RK Ministry of Finance and its territorial branches

Year	Complaints received	Number of violations of the public procurement legislation identified
2011	1009	517
2012	856	445
2013	1177	633

Public sources offer the following information about the checks and inspections in public procurement which were conducted by the Financial Control Committee of the RK Ministry of Finance in January-September 2013:

- 3 111 inspections conducted;
- in 1 399 cases, violations of the public procurement legislation were identified;
- the total value of procurement with the identified violations stood at KZT 186.76 bln;
- 918 checks were made following complaints from potential suppliers against improper actions by customers or procurement organisers in public procurement (of which 486 checks showed violations to the total value of KZT 32.55 bln);
- Based on the injunctions served, the violations were redressed through cancellation or revision of the results of 279 public procurement procedures;

<sup>81</sup> The number of suppliers registered in the system of public procurement: in 2012– 110 274, of which 52 576 – legal entities, 57 698 – individuals; in 2013 – 152 328, of which 71 011 – legal entities, 81 317 – individuals.

<sup>82</sup> Source: [www.zakon.kz/4585153-dejjstvujushhaja-v-kazahstane-sistema.html](http://www.zakon.kz/4585153-dejjstvujushhaja-v-kazahstane-sistema.html).

<sup>83</sup> UNCITRAL Model Law on Procurement of Goods, Construction and Services of 1994 allowed for such exemption, but the new version of the Model Law (2011) abolished this exemption.

- 343 claims were served to court demanding cancellation of tenders and voiding the public procurement contracts executed in violation;
- 88 cases with identified violations were referred to law enforcement agencies for procedural follow-up; administrative fines were imposed on 662 public officials for the total KZT 60.1 mln, of which KZT 42.4 mln were paid to the government;
- Disciplinary sanctions were imposed on 3,100 public officials for abuse of public procurement legislation, and 13 dismissed from office for tenders held in violation of the applicable legislation.<sup>84</sup>

***Kazakhstan is partially in compliance with Recommendation 3.5., which remains valid.***

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

#### ***Recommendation 3.6.***

- **To ensure speedy adoption of the Law on Access to Public Information, which would comply with international standards and recommendations. To revise provisions on liability for non-provision or incomplete (untimely) provision of information upon request of individuals and legal entities.**
- **To achieve compliance with standards of the Extractive Industries Transparency Initiative.**
- **To avoid using liability for defamation to suppress the freedom of speech and reports of corruption; to consider repealing criminal liability for libel and insult as well as similar special offences against public officials.**
- **To provide effective legislative mechanisms for preventing lawsuits that seek compensation for moral damages in excessive amounts (for example, by setting court fees in proportion to the declared amount of claims, introducing shorter periods of limitations for such lawsuits, exempting from liability for expression of value judgments), and to carry out relevant training for judges.**

***“To ensure speedy adoption of the Law on Access to Public Information, which would comply with international standards and recommendations.”***

The Report for the Second Round of Monitoring welcomed the drafting of a special law on access to public information which was being developed at the time jointly by NGOs, donor institutions and representatives of the government and was in general fairly progressive. The adoption of such law was included, in particular, in the 2009-2012 National Human Rights Action Plan in the Republic of Kazakhstan. However, in June 2011 the draft law was shelved, and no progress has been made since.

According to Internews – Kazakhstan, in 2013 a working group composed of representatives of international and Kazakh non-government organisations, and public access experts, supported by UNDP, finalized the text of the Public Information Access Law, with the advice of experts from ODIHR/OSCE, “Article 19”, and the Centre for democracy and Law. The finalized draft law should have been submitted to Parliament’s lower chamber, but it never was. The current status of this draft law is unclear. The RK Government’s legislative drafting plans for 2014-2015 does not provide for the Public Information Access Law.<sup>85</sup> No submission of the draft law to Parliament by way of an MP initiative is expected in the near future.

<sup>84</sup> Source: [www.zakon.kz/4585153-dejjstvujushhaja-v-kazahstane-sistema.html](http://www.zakon.kz/4585153-dejjstvujushhaja-v-kazahstane-sistema.html).

<sup>85</sup> Law Drafting Plans of the RK Government for 2014-2015. Accessed at: <http://adilet.zan.kz/rus/docs/P1300001547>

Meanwhile, the need for the drafting and adoption of the Public Information Access Law is recognized publicly in many official documents both at the international and national level.<sup>86</sup> But in actual fact, neither recommendations of international organisations, nor the plans of Kazakhstan’s human rights institutions on access to information have been followed through. That there were no official plans to draft or discuss the Law on Access to Public Information was confirmed during the onsite visit by the monitoring team to Kazakhstan.

However, in the amended draft Anti-Corruption Strategy till 2025, which was developed by the Financial Police Agency, it is noted that one of the instruments for ensuring transparency should become the Law on Access to Information that would determine rights of the public information receivers, procedure for its provision, registration and use (whereas the initial draft strategy there were no provisions on access to information legislation<sup>87</sup>). This a positive provision which should be preserved in the final version of the new Anti-Corruption Strategy.

Therefore, this part of the recommendation is not complied with. According to public organisations, lack of progress for the law on public access to information had a negative effect on the mass media, civil society, fight against corruption, transparency of public governance in Kazakhstan and protection of whistle blowers. The monitoring team agrees with this conclusion and urges Kazakhstan authorities to resume the work on the law for public access to information in accordance with international standards.

***“To revise provisions on liability for non-provision or incomplete (untimely) provision of information upon request of individuals and legal entities.”***

Liability for refusal to provide information to an individual and the illegal limitation of the right of access to information is established under Article 84 of the Code of Administrative Offences. Liability is envisaged only for refusal to provide information to an individual and does not apply to legal entities; liability is established for “illegal refusal to provide duly collected documents and materials directly affecting rights and liberties of individuals” which limits the sphere of liability (“duly collected documents”, “directly affecting rights and liberties of individuals”). According to the Report for the Second Round of Monitoring, such provisions do not ensure effective liability for violation of the right to information. There is no liability for violation of terms for provision of information, incomplete responses, failure to respond to the inquiry, etc. The fines for violation of this article are too low (5-10 monthly calculation rates, or about Euro 70, at maximum).

The Law on the Fight against Corruption (Article 12) envisages liability for “unjustified refusal to provide information to individuals and legal entities, provision of which is stipulated by legislation, its delay, provision of unauthentic or incomplete information”. Such violation is considered to be one of the “offences facilitating corruption”, which results in demotion or imposition of a disciplinary sanction in the form of a warning notice on partial service compliance. In case of repeated commission of this offence within a year after imposition of disciplinary sanction the person is to be dismissed.

That is why it was recommended that Kazakhstan harmonize the relevant offences stipulated in the Anti-Corruption Law and in the Code of Administrative Offences, and prescribe explicitly whether disciplinary sanctions are imposed in parallel prior to administrative sanctions. Since the previous round of monitoring, these provisions have not been revised.

In July 2014, Kazakhstan adopted a new RK Code of Administrative Offences which comes into force on 1 January 2015. The relevant article on liability for non-provision of information is reworded although elements of the main offence were not affected. In the new Code of Administrative Offences, the respective provision reads:

“Article 78. Refusal to provide information to an individual

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<sup>86</sup> Action Plan of the RK Government for the implementation of the recommendations of the member-state of the United Nations Organisation as part of the Universal Period Review of the Human Rights Council for 2011-2014 ([http://online.zakon.kz/Document/?doc\\_id=31072672](http://online.zakon.kz/Document/?doc_id=31072672)); The 2011 Human Rights Report for the Republic of Kazakhstan ([http://online.zakon.kz/Document/?doc\\_id=31231113](http://online.zakon.kz/Document/?doc_id=31231113)); Plan of actions for the implementation of the Nur Otan election programme: “Kazakhstan. Goals 2017. National Action Plan” ([http://online.zakon.kz/Document/?doc\\_id=31342575&sublink=711](http://online.zakon.kz/Document/?doc_id=31342575&sublink=711))

<sup>87</sup> Draft Anti-Corruption Strategy of RK until 2025, <http://finpol.gov.kz/rus/about/law/?cid=0&rid=14675>.

1. Undue refusal to provide duly collected documents or materials which directly affect individual rights and liberties, or the provision to an individual of incomplete or knowingly false information, or else undue classification of public information with limited access information –  
incur a fine imposed on public officials and amounting to thirty monthly calculation rates.
2. Acts by the public official stipulated in part one above, should such acts inflict injury to individual rights and legitimate interests –  
incur a fine of one hundred monthly calculation rates.”

Compared to the effective provision (Article 84 COA): the new version expunged part two with the administrative liability for the violation of the right of access to information resources; eliminated the range of fines as a potential corruption risk, leaving the currently effective top ceiling of the fine (e.g., under part one of Article 84, currently the fine ranges from 5 to 10 MCRs, and in Article 78 of the new code the fine is set at 30 MCRs. Under part three of Article 84, the fine imposed is from 20 to 100 MCRs, and in Article 78 of the new code the fine is 100 MCRs).

At the same time, as pointed out by Internews-Kazakhstan, neither the current nor the new code provide that administrative sanctions may attach on the grounds of violation of the deadlines for the provision of requested information, while it is the most common violation of the legislative provisions on access to information.

Therefore, adoption of the new Code of Administrative Offences which will come into effect on 1 January 2015 will not affect in any way the sanctions imposed on public officials for the violation of the right of access to information (fines grew insignificantly, while other administrative sanctions are not invoked). In addition, there is now a shorter list of grounds for administrative liability (it is not good grounds to unduly restrict access to information resources). No liability is specified for breaking the deadlines for the provision of information established by the applicable legislation.

The new Code of Administrative Offences does not have a separate provision on liability for unjustified refusal or non-provision in the established time for the information requested by a journalist (Article 352 of the 2011 Code of Administrative Offences). It would not present a problem if the general provisions on liability for undermining access to information were efficient enough.

The authorities did not supply the statistics on the number of information requests and the results of their consideration or liability for relevant violations.<sup>88</sup> Only some general statistics was provided on handling application from individuals and legal entities (see Table below), where requests for information are included in “other submissions”. The latter seems to confirm that issues of access to information are not given enough priority and that the respective provisions must not be combined with rules on submissions.

**Table 19.** Statistics of submissions from individuals and legal entities

Period	Number of submissions registered	Of which			Number of submissions considered	Submissions satisfied
		Statements	Complaints	other (requests, feedbacks, suggestions)		
2011	20 522 915	15 238 260	140 856	5 143 799	19 955 908	18 110 696
2012	19 143 786	15 809 488	126 866	3 207 432	18 561 094	17 093 249
2013	10 836 385	8 625 168	127 020	2 084 197	10 333 293	9 102 093

Kazakhstan’s legislation provides for a special procedure for information requests by journalists (para 2-1 Article 18 of the RK Law On the Mass Media). Under this procedure, the response to the media request must be provided within three days of the request. The law does not specify the grounds for refusing the request from a journalist.

According to the International Foundation for the Freedom of Speech (Adil Coz) ([www.adilsoz.kz](http://www.adilsoz.kz)), there were the following numbers of recorded refusals of publicly important information at the mass media requests or violations of the time for granting: 2011 - 247; 2012 – 199; and 2013 – 162. In 2011, the mass media started 3 actions against

<sup>88</sup> It was only reported that in 2013 the financial police prosecuted 2 officials authorized to perform public functions and equal-status persons for undue refusal to provide information to individuals or legal entities, delay in provision, or provision of inaccurate or incomplete information (Article 12 of the Anti-Corruption Law).

public officials for non-provision of information (in two, the court ruled in favour of the journalists). In 2012 and 2013, no complaints against public officials for refusing information or breaking the deadline were recorded.

Kazakhstan is overall not compliant with this part of the recommendation.

***“To achieve compliance with standards of the Extractive Industries Transparency Initiative.”***

Official statistics says that in 2012-2013 there was the following progress made towards compliance with the Extractive Industries Transparency Initiative (EITI):

- On 28 April 2012, the procedural decision by the Deputy Prime Minister approved a new composition of the National Council of Stakeholders (NCS) on EITI. It comprised Members of Parliament and public authorities concerned; members from extracting industries included the KazEnergy Association from the oil sector, and the Mining Association from the mining sector; non-government organisations were represented by members of the Dialogue Forum. The NCS was headed by the Deputy Prime Minister, boosting the status of the council and facilitating a number of issues.
- NCS approved working groups on reconciliation, validation, Memorandum of Understanding and communications.
- NCS holds regular meetings chaired by the NCS Chairman, the Deputy Prime Minister, to coordinate work of all members, including Parliament, RK Government, civil society and business.
- As part of the EITI implementation, Kazakhstan has drawn up seven National reports on government revenues and payments made by extracting companies in the financial years 2005-2011.
- The 6<sup>th</sup> and 7<sup>th</sup> National reports have a broader scope of data, namely, on social charges and dividends paid by companies with government equity.
- Pursuant to the recommendation of the EITI International Board within the framework of the Joint Economic Surveys Programme, a Scoping Study was conducted to establish a payment materiality threshold.
- 4 national and 4 regional conferences promoting EITI were held in Kazakhstan; a video was produced entitled “What does this country get from its natural resources?”; and teleconferences were held.
- Between 25 March and 1 April 2013, Kazakhstan completed the repeated validation procedure during the visit of a group of validators from Hart Resources Limited, endorsed by the International Board.

On 17 October 2013 the EITI Board recognized Kazakhstan as EITI Compliant, fully in line with this part of the recommendation. The next round of validation of Kazakhstan will take place in October 2016. The validation report suggested a number of recommendations for Kazakhstan to follow up.

Note the recorded discrepancies between the revenues disclosed by the government and payments made by the companies. In the 2010 report, for instance, the discrepancy amounted to KZT 7 932 168 000, or about USD 43.5 mln.<sup>89</sup>

National reports by Kazakhstan and the underlying methodology are being criticized by some NGOs. Blago, a public organisation, offered the following comments on the 6<sup>th</sup> National Report of the EITI implementation in the Republic of Kazakhstan for 2010:

- The report does not cover 69 oil companies (41%);
- There are gaps in the coverage of dividends by companies with government equity;
- Disaggregated reports on charges for social development of the regions – made by oil and gas companies in 2010 and by all companies in 2011 - are not publically accessible;
- No explanation for the reasons for 118 discrepancies (against 8 discrepancies explained) and 31 without a full breakdown of the amounts in discrepancy.

It is recommended to consider and accept the above comments, and also:

- 1) Continue to use the Accounting Committee to do the audit of the RK Government’s reports on revenues collected from extracting companies and ensure full publication of the relevant reports of the Accounting Committee;
- 2) Enable various NGOs working in the EITI area, not limited to the Dialogue Forum ones, to be represented in the NCS, increasing the number of its members from NGOs;
- 3) Ensure regular rotation of NCS members from companies and civil society and their accountability to their target groups;

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<sup>89</sup> <http://eiti.org/Kazakhstan/reports>.

- 4) Make sure that companies and NGOs represented in the NCS do background work on coordinating positions of the business community and civil society on EITI before they are presented to the NCS;
- 5) Allow enough time for the publication of technical specifications for the drafting of EITI national reports and subject them to a broad public discussion;
- 6) Arrange for open meetings of the NCS for the consideration of draft national reports and validator reports.

Overall, in view of Kazakhstan’s compliance with the EITI standards by decision of the EITI International Board, this part of the recommendation is deemed complied with.

Note that Recommendation 1.4. of the Report for the Second Round of Monitoring Kazakhstan was encouraged to extend to other spheres the positive experience of the National Council of Stakeholders for the promotion of the Extractive Industries Transparency Initiative. In this context, we welcome the Memorandum of Understanding and Cooperation signed between the Motorways Committee of the RK Ministry of Transport and Communications, highways construction companies and the Association “Azamattyk Kuryltai – Civic Assembly” on 14 June 2012, which also created the functioning trilateral Expert Council for transparency and sustainable development.

In addition, proposed by the above Association, there has been an ongoing discussion for more than a year to have Kazakhstan join the international **Construction Sector Transparency Initiative (CSTI)**;<sup>90</sup> so far a number of official letters in support of this move have been received from ministries and departments (Ministry of Economy, Ministry of Transport and Communications, Ministry of Regional Development and the Financial Police) whereas the CSTI International Secretariat included Kazakhstan in the list of potential members of the Initiative.

In this context Kazakhstan is recommended to:

- 1) Continue active efforts to enhance transparency and accountability of the road construction sector in Kazakhstan in a trilateral format;
- 2) Involve in these efforts other construction projects, both national and local; and
- 3) Join the Construction Sector Transparency Initiative and implement relevant methodology of accountability and transparency.

***“To avoid using liability for defamation to suppress the freedom of speech and reports of corruption”***

The Report for the Second Round of Monitoring pointed out that Preservation of criminal liability for libel and insult (Articles 129, 130 of the Criminal Code) has an utterly negative effect on freedom of speech in Kazakhstan and activity of mass media, which, in particular, carry out journalistic investigations and expose facts of corruption. Moreover, special protection is provided to the President of Kazakhstan, Members of Parliament and other representatives of power, whose insult or infringement of honour is criminalized under special articles of the Criminal Code (Articles 317-1, 318, 319, 320, 343) envisaging more severe sanctions. These provisions have on many occasions been criticized by the international community and non-governmental organizations. The Report strongly recommended the repeal of criminal liability for libel and insult as well as special offences related to insult or infringement of honour of the President, Members of Parliament and other public officers. The respective matters should be regulated by civil law.

No statistics have been provided by Kazakhstan authorities as to the application of criminal liability for libel and insult in 2012-2013. Similar statistics (drawing on the data of the RK General Prosecutor’s Office) are available at the website of NGO Adil Soz:

**Table 20.** Data on criminal actions under Articles 129 and 130 of the Criminal Code tried by RK courts in 2010-2012 and the earlier half of 2013.

	2010 год	2011 год	2012 год	1 полугодие 2013 года

<sup>90</sup> [www.constructiontransparency.org](http://www.constructiontransparency.org).

	Total completed prosecutions	Tried with verdict	Tried and dismissed by court	Total completed prosecutions	Tried with verdict	Tried and dismissed by court	Total completed prosecutions	Tried with verdict	Tried and dismissed by court	Total completed prosecutions	Tried with verdict	Tried and dismissed by court
Defamation (Article 129 RK CC)	495	185	257	376	144	195	394	140	213	215	100	95
Insult (Article 130 RK CC)	364	108	239	322	86	216	314	69	227	107	27	78

**Table 21.** Number of convictions under Articles 129 and 130 RK CC by RK courts that come into force in 2009-2012 and in the earlier half of 2013

	2009	2010	2011	2012	1 <sup>st</sup> half of 2013
Defamation (Article 129 RK CC)	41	39	26	19	5
Insult (Article 130 RK CC)	55	41	43	31	9

As a result, although the number of prosecutions and convictions for defamation and insult has decreased in recent years, such criminal actions continue to be brought and criminal sanctions applied, still with a negative effect for the freedom of speech or anti-corruption.

As it follows from the information about criminal cases, the discussed provisions are being used to prosecute allegations of corruption or abuse in office. Here are some examples.

(1) In April 2014 charges were brought against Valery Surganov, the chief editor of portal Insiderman/Total Truth for defamation of a judge of the Astana municipal court (potential sanctions – up to 4 years in custody). In 2012 the “Insiderman/Total Truth” media covered a trial on charges of rape by two persons one of whom was a son of a high-ranking public official. In 2012 a criminal action was initiated by the judge against “persons unknown” under part 3 of Article 343: defamation of a judge. In July 2014, Surganov’s trial ended in reconciliation of the parties.<sup>91</sup>

(2) In June 2014 three members of the Karaganda municipal council (maslikhat) lodged a complaint against Sergei Perkhalsky, Vzglyad na sovytiye editor, for an article in the paper with critical remarks about the inspection of local public transport. The police are currently investigating this case of “public insult”.<sup>92</sup>

3) In 2014, Aktyubinsk reporter Natalia Sadykova was charged for defamation in the context of allegations of corruption, grave or particularly grave crime (para 3, Article 129 RK CC), with possible sanctions of three years in prison. The charges were brought by former MP Marat Itegulov, who claimed in his statement that Sadykova, under a pen name Bakhyt Ilyasov, published an article on the Republika web-portal entitled “Too few tenders for all”, which allegedly contained deliberate libel and injured his business reputation.<sup>93</sup>

Overall, according to non-government organisations, such systemic restrictive measures and the environment of persecution have resulted in the effective disappearance of investigative journalism, which cannot but affect whatever prospects were there for detecting corruption and other offences by officials.

<sup>91</sup> Source: [www.respublika-kz.info/news/doslovno/37388/](http://www.respublika-kz.info/news/doslovno/37388/); Statement by the OSCE Representative on Freedom of the Media, 5 June 2014, [www.osce.org/ru/fom/119563](http://www.osce.org/ru/fom/119563).

<sup>92</sup> Source: Statement by the OSCE Representative on Freedom of the Media, 5 June 2014, [www.osce.org/ru/fom/119563](http://www.osce.org/ru/fom/119563); <http://rus.azattyq.org/content/vzglyad-na-sovytija-isk-deputatov-protiv-sergeja-perkhalskogo/25411664.html>.

<sup>93</sup> Source: [www.newskaz.ru/society/20140401/6313832.html](http://www.newskaz.ru/society/20140401/6313832.html); <http://ru.odfoundation.eu/a/3320.zhurnalisty-prosyat-ukrainu-i-evrosoyuz-o-zashchite-ot-presledovaniy-kazahstanskih-vlastey>.

Therefore, Kazakhstan is not compliant with this part of the recommendation.

***“to consider repealing criminal liability for libel and insult as well as similar special offences against public officials.”***

On 3 July 2014 Kazakhstan adopted a new Criminal Code which will come into force on 1 January 2015. The adoption was preceded by a discussion of the new draft code, including debates in Parliament. According to the authorities, as confirmed by representatives of civil society, at all stages of drafting and discussion of the new Code there were separate debates on decriminalization of defamation and insult – at the General Prosecutor’s Office, and in Parliament.

As it was noted in the information provided by Kazakhstan, the regulation of this issue by civil law alone, according to official authorities, would not act as a deterrent for those who intend to spread deliberate lies discrediting honour, dignity or business reputation. According to them, it is wrong to compare freedom of speech - both in the context of individual expression of opinion and in the context of freedom of the mass media, - with such socially dangerous acts as deliberate circulation of knowingly false information discrediting another person’s reputation.

Kazakhstan’s official responses also pointed out that none of the international instruments that bind Kazakhstan prescribes decriminalization of circulation of deliberate misrepresentations, discrediting somebody’s honour, dignity or undermining business reputation. According to the authorities, decriminalization of defamation and insult will not promote freedom of expression but will boost malicious attacks on honour and dignity of citizens, which contradicts the International Covenant on Civil and Political Rights and its provisions on respect for the rights and reputation of others in the exercise of the right of free expression.

It was also noted current criminal legislation and the draft new Criminal Code are in no way supporting censorship on information about public officials because they make a distinction between deliberate lies and critical expressions that do not incur criminal liability.

However, it should be reminded that the recommendations to Kazakhstan to revise criminal liability for defamation and insult were made in the Concluding observations of the Human Rights Committee based on the consideration of the Initial report by Kazakhstan in 2011,<sup>94</sup> in the Report of the Working Group on the Universal Periodic Review for Kazakhstan of the United Nations Human Rights Council,<sup>95</sup> in the recommendations of the OECD/Istanbul Action Plan, OSCE, and Kazakh human rights institutions (Presidential Human Rights Commission).

Internews-Kazakhstan notes that the need to repeal criminal liability for defamation and insult is supported by the fact that criminal prosecutions under such charges are most often brought against either reporters or citizens who may be sources of information for reporters. Lately, this trend has only been on the rise: in the few months of 2014 alone, several charges were brought against journalists for defamation (see above).<sup>96</sup> Some citizens who served as sources of information for the media were convicted for defamation.<sup>97</sup> Practically in all cases, defamation prosecution was instigated by the press reports or TV stories exposing corruption offences.

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<sup>94</sup> Concluding observations of the Human Rights Committee on Consideration of reports submitted by States parties under article 40 of the Covenant for Kazakhstan, August 2011. Source (in Russian): [www.ccprcentre.org/doc/2012/05/G1144890.pdf](http://www.ccprcentre.org/doc/2012/05/G1144890.pdf) (paragraph 25: “... *The Committee, in particular, expresses concern at reports that threats, assaults, harassment and intimidation of journalists and human rights defenders have severely reduced the exercise of freedom of expression. The Committee also expresses concern at the existence of provisions under the Criminal Code on defamation of public officials, and recently the enactment of the Law on the Leader of the Nation, which introduces a new article 317-1 to the Criminal code prohibiting and punishing insults and other offences against the honour of the President (arts. 19). ... In this regard, the State party should review its legislation on defamation and insults to ensure that it fully complies with the provisions of the Covenant. Furthermore, the State party should desist from using its law on defamation solely for purposes of harassing or intimidating individuals, journalists and human rights defenders.*”)

<sup>95</sup> Report of the Working Group on the Universal Periodic Review - Kazakhstan, 2010.

Source: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/124/94/PDF/G1012494.pdf?OpenElement>

<sup>96</sup> Against Valery Surganov ([www.adilsoz.kz/news/zhurnalista-valeriya-surganova-obvinyayut-v-klevete-na-sudyu-v-sostave-opg/](http://www.adilsoz.kz/news/zhurnalista-valeriya-surganova-obvinyayut-v-klevete-na-sudyu-v-sostave-opg/)), Natalia Sadykova ([www.adilsoz.kz/news/v-kazaxstane-vpervye-vydan-order-na-arrest-zhurnalista-podelu-o-klevete](http://www.adilsoz.kz/news/v-kazaxstane-vpervye-vydan-order-na-arrest-zhurnalista-podelu-o-klevete)), Karaganda Channel 5 journalists, Stepnogorsk media reporters, etc.

<sup>97</sup> See: [www.zakon.kz/4617786-chetverykh-selchan-osudili-za-klevetu-v.html](http://www.zakon.kz/4617786-chetverykh-selchan-osudili-za-klevetu-v.html).

Against this background of criminal persecution, the Office of the General Prosecutor, as the drafter of the new RK CC (which was approved and will come into force on 1 January 2015) instead of decriminalizing, maintained and tightened (compared to the current RK CC) the criminal liability both for defamation and insult, and for similar offences against public officials: fines have been increased considerably, and deprivation of liberty will also be used as punishment (e.g., the unaggravated offence of defamation incurs up to 1 year in prison, in contrast to the current Criminal Code which has no such sanction).

Altering these provisions in the Criminal Code indeed was repeatedly considered by the working group of the Committee on Legislation and Judicial and Law Reform of the RK Parliament, expert sessions with representatives from NGOs, the mass media, MPs, academia, experts and representatives of government authorities (in September 2013 and in January-March 2014). Internews-Kazakhstan notes with regret that public debates led to a directly opposite outcome: instead of decriminalization, liability for defamation and insult and for similar offences against public officials was significantly tightened.

Among arguments in favour of such decision were the need to retain criminal liability for defamation as a measure of prevention,<sup>98</sup> criminal liability for defamation in the codes of 27 European countries,<sup>99</sup> that over 40 reporters in European countries were criminally prosecuted in the recent years, and also that “based on current reality, it is still premature to raise this issue.”<sup>100</sup>

Therefore, Kazakhstan has complied with this part of the recommendation since the drafting and discussion of the new Criminal Code involved debates and consideration of an option for having criminal liability for defamation and insult, and similar offences is repealed. And while, according to the monitoring team, the result is highly negative, as not only did criminal liability stay, but it was made more severe, the recommendation “to consider” was complied with.

It should be noted that Kazakhstan’s Agency for the fight against economic and corruption crime, as part of the implementation of the recommendation of the Second Round of Monitoring, was suggesting abolishing criminal liability for defamation and insult. As Agency’s Chairman Andrei Lukin noted, this proposal was reflected in the agency’s plans and incorporated in the Sectoral Anti-Corruption Programme.<sup>101</sup> In the opinion of the monitoring group, it is a great pity that these sound suggestions from the Agency, which would have been in accord with the substance of the Report for the Second Round of Monitoring, have not been followed by other government authorities of Kazakhstan.

The monitoring team believes that, as interim measures until full decriminalization of defamation, insult and related offences, Kazakhstan should to limit the maximum the capacity of these provisions to obstruct reporters and other persons or entities facilitating fight against corruption. To this end, it is recommended:

- 1) To downgrade all offences of defamation and insult into criminal misdemeanours, resulting in the shorter period of limitations for bringing criminal charges under these articles to up to one year.
- 2) To prescribe, as mandatory prerequisites of the liability, *deliberate* infliction by defamation of *considerable* injury to honour, dignity or reputation (instead of phrases like “information discrediting...” or “attack”).
- 3) Offences should not be punished with the sanctions that entail any restriction of deprivation of liberty, including a short-term arrest, correctional or public work.

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<sup>98</sup> “Making defamation a criminal matter facilitates prevention – Office of the General Prosecutor”, [www.zakon.kz/4599598-otnesenie-klevety-k-ugolovnym.html](http://www.zakon.kz/4599598-otnesenie-klevety-k-ugolovnym.html).

<sup>99</sup> “Defamation in Kazakhstan will be punished with imprisonment” [http://total.kz/politics/2014/01/29/za\\_klevetu\\_v\\_kazahstane\\_mogut](http://total.kz/politics/2014/01/29/za_klevetu_v_kazahstane_mogut).

<sup>100</sup> MP Abdirrov: it is “premature” to consider repealing the defamation article from the RK CC, [www.zakon.kz/4615435-deputat-abdirrov-vopros-ob-iskljuchenii.html](http://www.zakon.kz/4615435-deputat-abdirrov-vopros-ob-iskljuchenii.html).

<sup>101</sup> “Criminal liability for defamation in Kazakhstan could be repealed”, [http://tengrinews.kz/kazakhstan\\_news/ugolovnyu-otvetstvennost-za-klevetu-mogut-otmenit-v-kazahstane-245540](http://tengrinews.kz/kazakhstan_news/ugolovnyu-otvetstvennost-za-klevetu-mogut-otmenit-v-kazahstane-245540). See also “Kazakhstan is to retain criminal liability for defamation”, [http://tengrinews.kz/kazakhstan\\_news/v-kazahstane-sohranitsya-ugolovnaya-otvetstvennost-za-klevetu-230813](http://tengrinews.kz/kazakhstan_news/v-kazahstane-sohranitsya-ugolovnaya-otvetstvennost-za-klevetu-230813).

- 4) To repeal the aggravated offence of defamation linked with the allegation of corruption, grave or particularly grave crime: this provision runs quite contrary to anti-corruption policy.
- 5) To repeal explicitly liability for expressing value judgements, including in cases of criticism of officials performing functions of public authorities.
- 6) To repeal explicitly liability for dissemination of information which related to the execution by public officials of their functions and powers.
- 7) To repeal explicitly liability for dissemination of information which conveys, without alterations (or approving comments) expressions or statement of other persons (official statements or reproduction of observations published by the mass media).
- 8) to eliminate, in the relevant offences, vague wording which results in legal uncertainty and leaves too much discretion to the enforcing bodies (e.g., “expressed in the obscene form”, “pressure ... to obstruct performance of duties”, “intervention in any form in the work of the court for the purpose of obstructing the course of justice”)<sup>102</sup>.

***“To provide effective legislative mechanisms for preventing lawsuits that seek compensation for moral damage in excessive amounts (for example, by setting court fees in proportion to the declared amount of claims, introducing shorter periods of limitations for such lawsuits, exempting from liability for expression of value judgments)...”***

According to Kazakhstan authorities, possible changes to compensation of moral damages under civil law process are being currently discussed as part of the drafting of the new version of the Civil Law Procedures Code. In particular, one of the discussed options is to introduce a state duty in proportion of the value of the claim.

According to Internews-Kazakhstan, 2011 saw the adoption of the RK Law “On amendments and amplifications to some legislative acts of the Republic of Kazakhstan relating to improvements in civil law legislation” (No 421 of 25 March 2011).<sup>103</sup> This law amended Article 143 “Protection of rights of individual” and Article 951 “Compensation of moral damage” of the RK Civil Law Code, which effectively deprives legal entities of right to demand redress of moral harm and compensation of damages. Prior to the amendments, claims by legal entities of compensation for the inflicted moral damage in actions to defend honour, dignity and business reputation against the mass media and journalists were common and extensive practice. Currently, legal entities may sue the mass media and journalists to defend business reputation, with general rules for the compensation of damages under the Civil Law Code applicable.

No other issues listed in the recommendation have been either debated or resolved since. The state duty payable in moral damages suits is low and amounts to 50% of the monthly calculation rate,<sup>104</sup> irrespective of the value of the compensation sought. The period of limitations in actions for protection of the rights of individual and compensation of moral damage is not restricted in law.

The civil law liability attaches only in the event of dissemination of “information”, not value judgments. However, as indicated by Internews-Kazakhstan, in the court practices the line between information, that is facts that can be verified, argued against or prove, and opinions, that is value judgements which cannot be tested against reality, is not always crystal clear for the judge even with the forensic linguistic conclusions.

Note also that the Regulatory ruling of the RK Supreme Court, No 6, of 18.12.1992 (as amended further) “On application by courts of the legislation on protection of honour, dignity and business reputation of individual and legal entities” failed to offer a clear-cut distinction between these two notions (statement of facts and value judgements); it only goes on to say that “it shall not be possible to deem valid claims that demand refutation of information that contains true criticism of deficiencies observed in office, in a public place, in the work team or at home”. In contrast, value judgements cannot be proved per se (i.e. be recognized as “corresponding to reality”) – this is all the difference.

<sup>102</sup> See also [www.internews.kz/newspage/24-02-2014/4775](http://www.internews.kz/newspage/24-02-2014/4775).

<sup>103</sup> Text of the law can be accessed here: <http://adilet.zan.kz/rus/docs/Z1100000421#z43>

<sup>104</sup> i.e. Euro 3.

Therefore, Kazakhstan is not compliant with this part of the recommendation.

Kazakhstan provided additional information that issues of redress for moral damages are reflected in the Normative resolution of the Supreme Court of Kazakhstan of 21 June 2011 No. 3 “On application by courts of legislation on compensation of moral damages”. Paragraph 5 of the Resolution provides that the amount of redress for moral damages in the monetary form should be considered fair and sufficient if, when deciding on it, the court took into account all specific circumstances related to the violation of personal non-pecuniary rights and if the amount of redress established by the court allows to draw a justified conclusion that the plaintiff’s demands were met in a reasonable manner. Therefore, the court, having studied comprehensively all specific circumstances of the case, should determine real amount of inflicted damage. Moreover, Article 13 of the Constitution of Kazakhstan provides for the right of everyone to judicial protection of his rights and freedoms. In this regard Kazakhstan considers that creation of legislative mechanisms for preventing lawsuits that demand excessive moral damages compensation would restrict constitutional rights of citizens for judicial protection.

### “...to carry out relevant training for judges.”

Kazakhstan informed that in accordance with the Study Plans of the courses for professional upgrading at the Institute of Justice of the Academy of Public Administration under the auspices of the President of the Republic of Kazakhstan for 2014, coordinated with the Chairman of the Supreme Court of the Republic of Kazakhstan and approved by the President of the Academy, students have a number of lectures on topics relating to the application of legislation on compensation of moral damage. In the course of 2013, 452 judges attended the courses.

Classes on this topic (1) acquaint the students with the judicial practices in cases of compensation of damages, including moral damage, in criminal trials, and compensation of moral damage as part of the civil law process; (2) teach the relevant statistics; (3) examine case studies; (4) debate ambiguous issues; and (5) receive recommendations for conducting the examination and issuing the judgment in trials on compensation of damages and claims of compensation of moral damage.

At the same time, it is not clear from the information produced whether the above learning activities touched on the matters of inadmissibility of disproportionate civil law sanctions for the violation of the right to honour and dignity; need to differentiate between factual statements and value judgements, etc. Besides, this part of the recommendation only complements the main recommendation (“To provide effective legislative mechanisms for preventing lawsuits that seek compensation of moral damages in excessive amounts...”).

Meanwhile Internews-Kazakhstan reports that regular training of judges in standards in the area of freedom of expression takes places within the framework of joint projects of the RK Union of Judges, the RK Supreme Court and NGOs. For example, the RK Union of Judges and the International Freedom of Speech Foundation (Adil Soz) annually conduct training for judges on matters of mass media access to judicial information; how to try cases involving protection of rights of the individual or compensation of moral damage; how forensic linguistic examinations should be appointed and conducted, etc., all within the framework of the established forum “The Judiciary Power and the Mass Media”.<sup>105</sup>

**Additional information.** According to the reports of NGOs, the forecast for the right to freedom of expression, including access to information in Kazakhstan is negative. Over the recent years, not one legislative act adopted favoured the press or ensured right of access to information in Kazakhstan in line with the international obligations accepted by the country. At the same time, extremely strict legislative restrictions have been adopted contrary to the spirit or letter of the international standards underpinning freedom of expression and access to information. In the most recent time alone some grave changes have happened in the legislation:

- in April 2014 with the amendments to the Criminal Code, a new Article 242-1 “Dissemination of knowingly false information” was introduced, with sanction ranging up to 10 years in prison for aggravated offences. This offence was also included in the new Criminal Code (Article 274). During the onsite visit to Kazakhstan, representatives of the authorities referred to a specific case of dissemination of false information alleging bank insolvency that led to a run on the banks and considerable financial damage. This incident was invoked in justification for the introduction of the

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<sup>105</sup> For study materials see: [www.adilsoz.kz/category/programms/sudy-i-smi](http://www.adilsoz.kz/category/programms/sudy-i-smi).

new offence. At the same time, the phrasing of the new Article is extremely broad<sup>106</sup> and vague, and it will therefore affect negatively the freedom of expression, the mass media, etc. It is therefore imperative to revisit and narrow down significantly the scope of this provision, provided it is really needed and provided the same actions are not already covered by other offences (e.g., fraud).

- in April 2014 amendments were made in the RK Law “On Communications”, which effectively give the prosecutors right to block access to sites, blogs, social media, messengers or any other internet-resources (or communications means) in Kazakhstan without seeking court injunction, if such resources are used in criminal purposes, inflicting damage to the interests of the individual, public and state, and also to disseminate information that violates election legislation of the Republic of Kazakhstan, calls to extremist or terrorist actions, civil unrest, or participation in mass (public) events that are conducted in violation of order.

On top of the prevalent environment, which does not favour freedom of speech or investigative journalism, the State has created a system of information dissemination in the mass media based on social procurement by the State. The materials contracted by the state authorities are not relevantly marked in the mass media, with a risk of misleading the public. It also has a negative effect for the mass media’s independence as media become dependent on government financing, encouraging self-censorship and abstaining from criticism of the authorities, in particular, from focusing on possible corruption stories.

Kazakhstan is ranked 161<sup>st</sup> in the 2014 Press Freedom Index of 180 countries, and Kazakhstan’s rank is getting worse every year.<sup>107</sup> The effective legislative restrictions are being eagerly applied in practice to close down newspapers with independent editorial policies; to restrict access to sites, blogs and social media or restrict access to government data. In addition, they impose severe restrictions on reporters and civil activists, investigating corruption offences, whistle-blowers and other sources, obstructing acquisition and dissemination of information about corruption.

***Kazakhstan is partially compliant with Recommendation 3.6., which remains valid.***

### **3.7. Political corruption**

#### ***Recommendation 3.7.***

- **To revise legislation on political parties’ financing by limiting the maximum size of private donations and membership fees, removing unjustified limitations on such donations, defining the term “donations” which should include non-material benefits, and by clearly prohibiting financing of parties by companies with state participation.**
- **To consider allocating budgetary funding to parties which received a certain percentage of votes (for example, 2-3%), even if they were unable to pass the election threshold.**
- **To ensure transparency of party finances, including during elections, in particular, by setting detailed requirements for the contents and form of annual reports, which have to undergo prior control by the state body, ensuring publication of detailed reports on both receiving and spending of funds by parties and candidates in the course of election campaigns. To consider cancelling the possibility of revoking election registration for providing false information in declarations and violating the financing rules.**
- **To ensure independence of the body in charge of control over political parties’ financing, assign to it a duty of carrying out regular monitoring and control over observance of the legislation on**

<sup>106</sup> “Dissemination of knowingly false information, creating a threat of public order disturbance or infliction of considerable injury to rights and legitimate interests of citizens or entities, or the interests of the public or state protected under law.”

<sup>107</sup> The 2014 Press Freedom Index, *Reporters Without Borders*, [http://rsf.org/index2014/data/index2014\\_en.pdf](http://rsf.org/index2014/data/index2014_en.pdf)

**financing and transparency of political parties and election campaigns.**

- **To strengthen integrity rules for political servants, which are not covered by the Law on the Civil Service (conflict of interest, codes of ethics, financial control, liability for corruption and related offences).**

***“To revise legislation on political parties’ financing by limiting the maximum size of private donations and membership fees, removing unjustified limitations on such donations, defining the term “donations” which should include non-material benefits, and by clearly prohibiting financing of parties by companies with state participation.”***

Kazakhstan has not provided any information about the compliance with the above recommendation, having effectively indicated that there was no need to amend current legislation. For justification of the need to have such amendments in Kazakhstan’s legislation, with reference to applicable international standards, see the Report for the Second Round of Monitoring.

As Kazakhstan’s responses indicate, under the existing obligations to conduct democratic election in the OSCE countries, any restriction on the funding of political campaigns must be justified. Excessive restrictions on private funding would be considered a violation of the rights of the donor to freedom of expression and association. Setting a ceiling to an individual donation can be interpreted as undue restriction of political campaigning.

At the same time, the RK Constitutional Law “On Elections in the Republic of Kazakhstan” (Constitutional Law on Elections) set an upper limit to the size of the election fund of political parties and nominees, ensuring a level playing field in campaigning. Overall, according to Kazakhstan, election funds of nominees or political parties are not that big to allow, through donations, any pressure to be put on nominees or parties in future.

Note the recommendation was talking about donations not in the context of elections, and therefore comments by Kazakhstan do not relate to the recommendation.

Kazakhstan also noted that paragraph 2 of Article 18 of the RK Law on Political Parties bans donations to a political party or its units (branches and offices) by certain persons, in particular state authorities and state organisations. Donations from the persons listed in that paragraph shall be forfeited to the government through court. However, the recommendation talks about donations by state-owned companies, and not by the “state authorities”. Also, as was noted in the Second Round Monitoring report, notion of “state organisations” is not clearly defined in the legislation.

The definition of donation is given in the Civil Law Code of the Republic of Kazakhstan (“a bestowal of an object or right in the publicly beneficial aims”), but it concerns civil relations and may not be applicable to party donations. Besides, the recommendation also concerned inclusion in the definition of non-pecuniary benefits. Procedures for donations by individuals and non-government organisations of the Republic of Kazakhstan, under para. (2) of paragraph 1, Article 18 of the RK Law on Political Parties, is established by the central executive authority that is responsible for tax obligations monitoring.

Kazakhstan is not compliant with this part of the recommendation.

***“To consider allocating budgetary funding to parties which received a certain percentage of votes (for example, 2-3%), even if they were unable to pass the election threshold.”***

This recommendation concerned changes in the rules of government funding of parties, increasing such funding for non-parliamentary parties. In the Report for the Second Round of Monitoring it was pointed out that limiting government funding to parliamentary parties, i.e. parties that cleared the fairly high election threshold (7%)<sup>108</sup>, undermines the positive effect of this positive measure. It was recommended that prior to the next parliamentary election, legislative amendments should be adopted to extend government funding to parties which won a

<sup>108</sup> For instance, in Council of Europe countries the permissible upper threshold, from the point of view of democratic development, should not be over 3% (Resolutions of the Parliamentary Assembly of the Council of Europe No 1547 (2007) of 18.04.2007 and No 1705 (2010) of 27.01.2010).

considerable amount of the votes (e.g., 1-3% or more; this threshold must anyway be by a few percentage points lower than the established election threshold). It is particularly important given the fact that the last election in 2007 brought only one party in Parliament (Nur Otan) that won 88% (although now, after the 2012 early election there are three parties in Parliament). Such step will reinforce the democratic capacity of the country, strengthen the party system and limit possibilities for corrupt influences in the political system.

As it follows from Kazakhstan's official information, such option was not considered.

***“To ensure transparency of party finances, including during elections, in particular, by setting detailed requirements for the contents and form of annual reports, which have to undergo prior control by the state body, ensuring publication of detailed reports on both receiving and spending of funds by parties and candidates in the course of election campaigns.”***

According to Kazakhstan's information, pursuant to paragraph 4 of Article 34 of the Constitutional Law on Election, reports on the use of election funds by political parties and nominees must be published in the local mass media. Pursuant to subpara (1) of Article 12 and para 6 of Article 34 the Constitutional Law On Election, the central Election Committee passed a resolution on 7 August 1999, No 19/222, approving the rules for the use of election funds (registered at the Ministry of Justice of the Republic of Kazakhstan on 20.08.99r., No 870). The same resolution of the Central Election Commission sets requirements for the form and content of the reports.

The monitoring over the use of election funds, under the Constitutional Law on Election, shall be performed by election commissions jointly with the bank institutions. Banks provide respective elections commissions with weekly reports on funds credited to special call accounts and their spending. In the event of need, the election commission may retain experts from public authorities, in line with their competence, to assist in monitoring of the spending of election funds.

Data about the total amount of collections into the fund and their sources are published on the Central Election Commission's official web-site; election funds' spending reports are published in local mass media. All that, according to Kazakhstan's authorities, ensures transparency in funding and spending of election funds during the election.

Note that the above recommendation concerns (1) steps to ensure transparency of party finances without any particular reference to elections, in particular, by making detailed requirements for the form and content of annual reports that must be vetted by a state authority; and (2) publishing detailed reports about the incomings and outgoings during election campaigns run by parties and nominees.

On the first of the above, Kazakhstan's responses do not offer any information of any changes. Therefore, the narrative and conclusions of the Report for the Second Round of Monitoring are still relevant suggesting that the only provision on the financial reporting of parties (unrelated to election) is the norm of the Law on Political Parties (para 5, Article 18), whereby annual financial reports by political parties shall be published in the republican press. However, there are no provisions on the form or content of such reports, their details, time of publication and reporting to the state authority, etc. Nor is there any regulation of financial statements and accounting in political parties or any references to applicable legislation.

Control over political parties funding is performed by bodies of the tax committee monitoring tax obligations. Under the terms of reference of the Central Election Commission of the Republic of Kazakhstan, the CIC “lays down the procedure for the funding of political parties”. This may be interpreted to mean approval of the procedures for government financing of parties introduced since 2009. No specific powers to monitor and control party funds are given to either the CIC or other bodies, and they are not detailed, apart from the monitoring over spending of the government financing that is done by bodies of public financial control as part of their general procedure. Hence, since Rounds One and Two there has been no progress in complying with these recommendation.

As for the second part of this recommendation (para 2 above), it was all about publication of detailed reports on incomings and outgoings during the election campaigns by parties and nominees. The Report for the Second Round of Monitoring mentions that in accordance with the Constitutional Law on Elections, a candidate or a political party shall submit, not later than within five days following establishment of the election results, to the respective election commission a report on using money from their election fund (paragraph 9, Article 34). Information on the total amount of funds received by the election funds and their sources shall be published in the mass media within 10

days following the publication of the election results: in case of elections of the President, deputies of the Majilis by party lists – by the Central Election Commission; in case of elections of the deputies of the Senate of the Parliament – by regional election commissions; and in case of elections of the deputies of maslikhats – by regional election commissions. The detailed information on the sources and amounts of revenues, on spending money of the funds is not published although it is submitted to the Central Election Commission according to the Rules of Expenditure of the Election Fund and Submitting Reports on its Use During Elections of the President, Members of the Parliament, and Maslikhats of the Republic of Kazakhstan (approved by the resolution of the Central Election Commission of 7 August 1999 No. 19/222). It was concluded that no visible progress was achieved as regards the transparency of formation and expenditure of the election funds, or exercise of control by the Central Election Commission, and this conclusion is still valid.

Kazakhstan is not compliant with this part of the recommendation either.

***“To consider cancelling the possibility of revoking election registration for providing false information in declarations and for violation of the financing rules.”***

In their responses Kazakhstan authorities point out that the Constitution Law on Elections does not have any strict requirement to cancel registration for minor errors in financial reporting, and that this is the issue of enforcement practices. The legislation allows nominees to rectify minor errors with a supplementary financial declaration under Article 71 of the RK Code “On taxes and other mandatory charges” (Tax Code). In addition, this measure seeks to limit access to elected positions to wrongdoers who are in violation of tax or anti-corruption legislation.

At the same time, the possibility of eliminating from the legislation the provision on revoking election registration for providing false information in declarations and for violation of the financing rules was discussed at the meeting of the Central Election Commission where it was decided that at this moment in time cancelling provisions concerning the withdrawal of the election registration for providing false information in declarations and for violation of financing was not feasible. However, this issue will be considered in future, after the implementation of the universal declaration by individuals. No materials concerning this discussion in the CEC were provided.

Kazakhstan also reported that the CEC has developed amendments in the Constitutional Law concerning relieving requirements to candidates with regard to accuracy of tax declarations by setting the upper limit on amount of funds which may be covered by mistake. When the amount of false financial statement in the declaration is lower than the limit the candidate will not be withdrawn from registration. These proposals were sent to the Ministry of Justice.

At the 2012 early parliamentary election in Kazakhstan, 21 candidates out of 362 nominees had their registration revoked for false information in their declarations. In the same year, at the maslikhat election, the registration of 397 persons out of 10,035 nominees was cancelled on the same grounds.

In 2013, during the akim election in district towns and in rural districts, townships and villages in Kazakhstan, the registration of 102 candidates out of 7,173 nominees was revoked.

No violations of funding during the 2011-2013 elections were recorded.

***“To ensure independence of the body in charge of control over political parties’ financing, assign to it a duty of carrying out regular monitoring and control over observance of the legislation on financing and transparency of political parties and election campaigns.”***

As Kazakhstan informs, the Central Election Commission does not monitor political parties’ funding but controls the spending of election funds by political parties and nominees at the time of election campaigns. The Central Election Commission is independent in its activity as it is not part of the government authorities that are directly subordinated and accountable to the President, nor is it a central executive authority. The Central Election Commission’s key function is to organize the preparation for and completion of elections.

The Central Election Commission of the Republic of Kazakhstan adopted Resolution of 3 September 2009, No 166/314, “On approving rules for the funding of political parties”. The rules stipulate that government allocations are made annually to political parties represented in the Majilis of the Parliament of the Republic of Kazakhstan based on the outcome of the most recent election. The amount of the allocation to fund the activities of political parties is defined in the law on the budget of the republic for each specific year.

The spending of government funding is monitored in accordance with Article 135 of the RK Budgetary Code and paragraph 12 of the funding rules approved by the resolution of the Central Election Commission on 3 September 2009, No 166/314.

The Report for the Second Round of Monitoring pointed out that after the constitutional reform of 2007 the Commission's procedure was changed, and its members are now appointed by the President, Majilis and Senate (two members each), while the Chairperson of the Commission is additionally appointed by the President. Previously all members of the Central Election Commission were elected by the Majilis. The powers of the Central Election Commission are specified in the President's Decree, but not in the law. Members of the Central Election Commission are political civil servants (the new Register of public service positions approved by the Decree of the RK President in March 2013, left this status unchanged). The remuneration of political public servants is determined by the President (Article 21 of the Civil Service Law); besides, the grounds and procedure for the dismissal of political servants too are defined by the President (Article 26 of the Civil Service Law). Such status and procedure for forming the Commission do not meet the independence requirements, which apply to bodies responsible for elections, control over financing of political parties and, moreover, exercising certain control over members of the legislative body.<sup>109</sup>

During the discussions of the previous report in their written responses, Kazakhstan authorities referred to the practices of other countries in the procedure and status of election commission, in particular, that in many countries of Europe bodies that administer elections are part of the executive branch of power. However, in that regard the practices of the "old" democracies are hardly illustrative. In this context, the Code of Good Practice (paragraph 3.1.b., Section II), adopted by the Venice Commission, states clearly: "Where there is no longstanding tradition of administrative authorities' independence from those holding political power, independent, impartial electoral commissions must be set up at all levels, from the national level to polling station level." The Code further states that a Central Election Commission "should include: i. at least one member of the judiciary; ii. representatives of parties already in Parliament or having secured at least a given percentage of the vote; and these persons must be qualified in electoral matters" (paragraph 3.1.b., Section II).<sup>110</sup>

Hence, this recommendation has not been complied with.

***"To strengthen integrity rules for political servants, which are not covered by the Law on the Civil Service (conflict of interest, codes of ethics, financial control, liability for corruption and related offences)."***

The Report for the Second Round of Monitoring noted that members of Parliament and of maslikhats are not classified as political civil servants under the Law on the Civil Service<sup>111</sup> and they are covered by the Anti-Corruption Law. However there are no provisions on conflict of interest in the Anti-Corruption Law. Although the Anti-Corruption Law obliges members of Parliament to declare their income and assets to tax authorities, the financial control system is not effective, as was noted before.

The Law sets restrictions regarding incompatibility of activities of a member of Parliament with any other paid activity and also specifies the procedure for transferring assets into trust management for the period of performance of MP functions. According to Article 52 of the Constitution of the Republic of Kazakhstan and the Law "On the Parliament of the Republic of Kazakhstan and Status of its Deputies" (Article 24), a member of Parliament may not be a member of any other representative body, occupy any other paid position, except for teaching, scientific or any other creative activities, or carry out entrepreneurial activity, or be a member of a managing body or supervisory council of a commercial organization. Violation of this rule results in termination of the MP's powers upon submission of the Central Election Commission.

Members of Parliament and of maslikhats, as persons authorized to perform public functions, are subjects of liability under two categories of offences envisaged by the Anti-Corruption Law: offences facilitating corruption (Article 12)

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<sup>109</sup> Code of Good Practice in Electoral Matters (Section 3.1.), Venice Commission, Council of Europe, October 2002, [http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-rus.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-rus.pdf); Recommendation of the Cabinet of Ministers of the Council of Europe Rec (2003)4 on common rules against corruption in the funding of political parties and electoral campaigns (Article 14), April 2003, [http://www.coe.int/t/dghl/monitoring/greco/documents/instruments\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/documents/instruments_en.asp).

<sup>110</sup> Op cit.

<sup>111</sup> According to the Register of civil service positions, approved by the RK President on 7 March 2013, members of Parliament and of maslikhats do not belong in any of the positions of the civil service.

and corruption offences connected with illegal receipt of benefits and advantages (Article 13). The same provisions apply to persons enjoying equal status with persons authorized to perform public functions, including presidential nominees, members of Parliament and of maslikhats, and candidates running for elected local self-government bodies. In case where a member of Parliament or candidates for the said positions (but not a member of a maslikhat) commits one of the above offences, the anti-corruption bodies should notify the respective election commission (the Central Election Commission for MPs), which should then inform the Parliament accordingly within five days. The Laws "On the Parliament of the Republic of Kazakhstan and Status of its Deputies" and "On the Local State Management and Self-Governance" do not envisage such grounds for termination of the powers of member of Parliament and of maslikhats as violation of the Anti-Corruption Law. With respect to many of the offences mentioned in Articles 12 and 13 of the Anti-Corruption Law liability is envisaged neither in the Criminal Code nor in the Code of Administrative Offences, and as a result there are no legal grounds for prosecuting member of Parliament and of maslikhats for such offences (unless it is a criminal offence).

There are no codes of ethics for members of Parliament and maslikhats, while the Code of Ethics for Civil Servants does not apply to them. The Parliament's Rules of Procedure, adopted at the joint session of both chambers of Parliament, contains a separate Chapter "Rules of Ethics of Deputies", but it does not mention issues of conflicts of interest, their disclosure, prevention of corruption, etc. Also there are no parliamentary bodies in charge of these issues, which is contrary to Article 8 of the UN Convention against Corruption ("Codes of conduct for public officials"), which applies to the members of legislative assemblies as well.

No steps have been taken to ensure compliance with this part of the recommendation.

In addition, the role of the Central Election Commission in issues of ethics and liability of MPs has not changed. Under Article 52 of the Constitution, preparation of issues concerning imposition of penalties on the MPs, their observance of the incompatibility requirements, ethical principles, as well as termination of the members' powers and withdrawal of their powers and immunity, is vested with the Central Election Commission. Additionally, according to Article of the Constitutional Law on Parliament and the Status of its Members, the Central Election Commission deals with issues of sanctions against MPs, and its members exercise control over attendance by MPs during the sessions of Parliament and its bodies, and monitor inadmissibility of transfer by an MP of his vote. It was already pointed out in the previous report that such powers of the Central Election Commission are rather unusual and can be viewed as limitation of independence of members of Parliament. In addition, the Report had some critical remarks on the independence of the Central Election Commission itself (see above).

***Kazakhstan is not compliant with Recommendation 3.7., which remains valid.***

### **3.8. Judiciary**

#### ***Recommendation 3.8.***

- **To amend legislative acts in order to strengthen the independence of the judiciary and judges, in particular: to change the legal status and the arrangement for providing for the activities of the Supreme Judicial Council, where the majority of members should be judges elected by their peers; to limit, to the maximum extent possible, the influence of political bodies (the President, and Parliament) on the appointment and dismissal of judges; to consider the possibility of having administrative positions in courts be elected by judges' vote in the relevant courts; to revoke court chairmen's powers in relation to careers of judges, their material provision, or liability; to envisage in the law a detailed procedure for making judges subject to disciplinary liability, as well as - in accordance with the principle of legal certainty and the right to defence - to limit the number of, and provide clear definition of, the grounds for disciplinary liability and dismissal, envisage a uniform system of bodies disposing of such issues and the possibility of appeal against their decisions in court; and to specify in law the salary rates for judges and an exhaustive list of all possible wage increments, eventually cancelling bonuses for judges.**

- **To limit to the maximum extent possible subjective influence on the procedure for selecting judges, to ensure publication of detailed information at all stages of selection (list of candidates, results of tests and other components of the qualifications exam, results of competition, etc.) and to ensure access of the public and representatives of the mass media to the respective meetings. To consider introducing mandatory training at the Institute of Justice to be able to qualify for the judicial selection and to consider re-subordination of the Institute of Justice to the body of the judiciary.**
- **To introduce mandatory declarations (without a link to tax obligations) of assets, income and, possibly, expenses of judges and their family members, with subsequent publication.**

As it was reported in Kazakhstan's responses, recommendation of the Report for the Second Round of Monitoring on the judiciary reform were discussed at the meeting of the Supreme Judicial Council on 5 December 2012 and noted. We want to welcome the discussion of recommendation to Kazakhstan at such a high level, however, regrettably, the discussion did not result in the initiation of amendments to legislation in order to comply with the above recommendations. Overall, since the Second Round of Monitoring, Kazakhstan has not taken any steps to comply with the recommendations of the Istanbul Action Plan pertaining to the judiciary reform.

***“To amend legislative acts in order to strengthen the independence of the judiciary and judges, in particular: to change the legal status and the arrangement for providing for the activities of the Supreme Judicial Council, where the majority of members should be judges elected by their peers;”***

As was pointed out in the Report for the Second Round of Monitoring, the vital role of the judiciary in combating corruption requires not only establishing mechanisms ensuring the integrity of judges and suppression of corruption among them but, first of all, requires a real independence of the judiciary.<sup>112</sup> In the absence of external and internal independence of courts they cannot effectively perform their functions and guarantee protection of rights and freedoms. In this respect and also in the light of international standards on judicial independence<sup>113</sup>, the Report for the Second Round of Monitoring highlighted a number of pertinent issues in the organization of Kazakhstan's judiciary system. These remarks were generally in line with those offered by other international organisations, among others, in the Joint Opinion on the Constitutional Law “On the Judiciary and Status of Judges in the Republic of Kazakhstan” prepared by the Venice Commission and OSCE/ODIHR in June 2011,<sup>114</sup> and in the July 2011 conclusions of the UN Human Rights Committee on the consideration of the report for the implementation of the International Convent for Civil Political Rights by Kazakhstan (see excerpts below).

In particular, the UNHRC report points to the need to change the legal status and arrangements of the Supreme Judicial Council (SJC), where the majority of members should be judges elected by other judges. The concern was caused by the fact that members of the SJC, which plays the key role in the appointment of judges and termination of their powers, are picked by the President. Under international standards,<sup>115</sup> the SJC majority (no less than half) must be elected by judges themselves from among themselves to ensure proper representation of all levels of the judiciary system.

The status of the SJC raises much concern: the Law on the SJC defines it as “an institution without establishment of a legal entity created for ensuring constitutional powers of the President of the Republic of Kazakhstan on formation of courts, guarantees of independence of judges and their immunity”. The essence of the status of this constitutional body is more precisely regulated in the Law “On the President of the Republic of Kazakhstan”, which provides that

<sup>112</sup> See, e.g., Article 11 of the United Nations Convention against Corruption.

<sup>113</sup> Including: Universal Declaration of Human Rights, International Covenant for Civil and Political Rights, documents of Copenhagen, Moscow, and Istanbul meetings of the OSCE Conference on the Human Dimension, The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, OSCE/ODIHR.

<sup>114</sup> Source: [http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)012-rus.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)012-rus.pdf).

<sup>115</sup> Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec (2010)12 regarding the judges: independence, efficiency and responsibility, 17 November 2010 (clause 27), Opinion No. 10 of the Consultative Council of the European Judges “Council for the Judiciary at the service of society” of November 2007 (Section III), *Magna Carta* for judges approved by the Consultative Council of the European Judges in November 2010 (clause 13), Kyiv recommendations OSCE / ODIHR (clause 7).

the SJC is a consultative and advisory body to the President of Kazakhstan (Article 33). The President receives quarterly reports by the SJC Chairman; and the SJC staff are employees of the Presidential Administration.

This situation is contrary to international standards and seriously affects the judiciary's independence. The Supreme Judicial Council should be a judicial body (body of the judiciary), and be independent from the legislative and executive bodies and even from the Head of the State.

No legislative amendments have been initiated. Kazakhstan is not compliant with this part of the recommendation.

***“to limit, to the maximum extent possible, the influence of political bodies (the President, and Parliament) on the appointment and dismissal of judges;”***

Kazakhstan authorities maintain that judges are independent in their work, and any control over their activity can only be executed on grounds established by the Constitution of the Republic of Kazakhstan. Currently, the judiciary system benefits from established human resources policies based on a professional approach to promotions. This is done jointly with the Supreme Judicial Council which has authority over appointment and dismissal of judges. The procedure for the selection of judges is regulated by the Constitution Law on the Judiciary System and Status of Judges of the Republic of Kazakhstan. Under paragraph 2 of Article 30 of the above law, the Supreme Judicial Council selects candidates in a competitive procedure to nominate them to the President of the Republic of Kazakhstan for appointment. Disciplinary sanctions or dismissal of judges are also governed by the Constitution and the Constitutional Law. All judges are appointed and dismissed by the Decree of the Head of State. According to Kazakhstan authorities, the procedures for the selection, appointment and dismissal of judges in the legislation are generally compliant with international standards.

Such assertions contradict the conclusions of the Report for the Second Round of Monitoring of Kazakhstan, which listed a whole range of criticisms for a lack of internal or external independence of courts in Kazakhstan. These remarks are based on clear international standards for the independence of courts,<sup>116</sup> and correspond to conclusions of other international organisations (see above).

The Report for the Second Round of Monitoring pointed to the unlimited discretion of the President of the Republic of Kazakhstan in the appointment of judges for local and other courts (except the Supreme Court). Submission of recommendations (on such appointments) by the Supreme Judicial Council does not limit the right of the President to reject the proposed candidate. The fact that in practice incidents with the President rejecting the proposed candidates are very rare may indicate that there are prior arrangements with the President and his Administration as to the future candidates, which is not be surprising since the SJC itself is formed by the President. The same is true of the appointment of the Supreme Court's judges, since the candidates are nominated by the President to the Senate based on the recommendation of the SJC.

In addition, under Article 10 of the SJC Law, it appoints the Qualifications Commission which runs the qualifications examinations for perspective judges to test their knowledge. At the moment, the Qualifications Commission is chaired by the Deputy Head of the State Legal Department of the Presidential Administration. This too runs counter to the standards of independence of judicial councils and procedures for the selection of judges.

Kazakhstan is not compliant with this part of the recommendation.

***“to consider the possibility of having administrative positions in courts be elected by judges' vote in the relevant courts;”***

The Report for the Second Round of Monitoring criticized the current procedure for the appointment of court chairmen by the President at the SJC recommendation (Chairman of the Supreme Court, by the Senate at the recommendation of the President advised by the JSC). The best way to appoint court chairmen, ensuring the highest level of their independence, would be to have them elected either by judges of the respective courts or by a judicial self-governing body (conferences of judges or even the Supreme Judicial Council should its composition be changed).

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<sup>116</sup> Including: Universal Declaration of Human Rights, International Covenant for Civil and Political Rights, documents of Copenhagen, Moscow, and Istanbul meetings of the OSCE Conference on the Human Dimension, The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, OSCE/ODIHR.

Kazakhstan has not provided any information that they considered an option of having administrative positions in courts filled by elections in the respective courts. The SJC consideration of the recommendation following the Report for the Second Round of Monitoring is not deemed sufficient, since it is unclear whether the recommendation were addressed separately, or whether there was a discussion and why it led to the respective decision.

Kazakhstan pointed out that, pursuant to subpara 2, paragraph 2 of Article 20 of the Constitutional Law on the Judiciary System and Status of Judges in the Republic of Kazakhstan, the Chairman of the Supreme Court proposes for the discussion at relevant plenary court sessions a range of nominees to fill the vacant positions of chairmen of court and chairmen of judiciary panels in local and other courts, as well as chairmen of the judicial panels and judges of the Supreme Court. Referral to the Judicial Jury is made by the decision of the plenary session of a regional court or the Supreme Court, or the recommendation of the chairman of the regional court or the Chairman of the Supreme Court.

Therefore, in the opinion of Kazakhstan authorities, functions of court chairmen, including those of the Chairman of the Supreme Court, are fairly well restricted by the powers vested in the bodies of the judiciary community: courts' plenary sessions and the Judicial Jury.

Also, Kazakhstan noted that there was the human resources reserve acting as an efficient instrument for the selection of the best qualified, professionally trained and capable judges to the leading positions in the judiciary. The appropriately trained cadre of the reserve serves to exclude random and incompetent promotions to administrative offices and counter corrupt practices. To arrange for the selection of reserve candidates, the Supreme Court has set up a republican commission for the human resources reserve of potential chairmen of regional and equivalent courts, chairmen of panels and judges of the Supreme Court. Similar commissions act in regional and equivalent courts to raise the reserve candidates for the positions of chairmen of judicial panels in the regional and equivalent courts, and chairmen of district and equivalent courts. The commissions nominate judges known for good results, with leadership skills and unblemished integrity.

The advice of the regional commission is discussed at the plenary session of the regional or equivalent court, and with its leave, the nomination is entered in the reserve list. The reserve lists of chairmen of regional and equivalent courts and chairmen of panels are submitted to the republican commission which, after checking for compliance with the existing requirements, enters it in the consolidated Republican List of Human Resources Reserve. The established procedures for the selection, according to Kazakhstan authorities, serve to avoid nepotism or populism in the nomination to the leading positions in the judiciary.

Kazakhstan is not compliant with this part of the recommendation.

***“to revoke court chairmen’s powers in relation to careers of judges, their material provision or liability;”***

The Report for the Second Round of Monitoring highlighted as problematic the vague and excessively broad definition of the powers of chairmen of courts (e.g., “organizes consideration of court cases by judges”, “ensures work on combating corruption and observance of the judicial ethics”, “issues orders”). Court chairpersons keep excessive powers and possibilities to influence the career growth of judges, bringing them to liability, assigning qualification classes, etc.

There have been no amendments to the legislation in this respect. Kazakhstan is not compliant with this part of the recommendation.

***“to envisage in the law a detailed procedure for making judges subject to disciplinary liability, as well as - in accordance with the principle of legal certainty and the right to defence - to limit the number of, and provide clear definition of, the grounds for disciplinary liability and dismissal, envisage a uniform system of bodies disposing of such issues and the possibility of appeal against their decisions in court;”***

Charging a judge for a disciplinary offence is part of the jurisdiction of the single republican body, the Judicial Jury. Referral to the Judicial Jury is made by the decision of the plenary session of a regional court or the Supreme Court, or the recommendation of the chairman of the regional court or the Chairman of the Supreme Court. The disciplinary transgression, under Article 39 of the Constitutional Law on the Judiciary System and Status of Judges in the Republic of Kazakhstan, which manifested itself in the violation of legality during the trial, commission of a discrediting act contrary to judicial ethics; or gross violation of the workplace discipline, incur disciplinary sanctions in the form of rebuke,

reprimand, or dismissal from the position of the court chairman or chairman of the judicial panel for improper performance of official duties, or dismissal from the position of a judge.

Under para 35 of the terms of reference of the Judicial Jury, judges can be prosecuted under disciplinary charges only subject to the grounds listed in the Constitutional Law on the Judiciary System and Status of Judges of the Republic of Kazakhstan. Under para 45 of the terms, the decision of the Judicial Jury is not subject to appeal. However, the Constitutional Law on the Judiciary System and Status of Judges of the Republic of Kazakhstan (para 3, Article 44) provides for the refusal by the Supreme Judicial Council to recommend the dismissal of the chairman of the court, chairman of the judicial panel or the judge from office, which should serve as the grounds for the Judicial Jury to rescind their own decision and revise it.

The Report for the Second Round of Monitoring noted that the Constitutional Law on the Judiciary System and Status of Judges of the Republic of Kazakhstan fails to determine which and how many particular disciplinary offences may trigger dismissal from the office. The same grounds may be used for dismissal from the office of a judge by the Judicial Jury and the Disciplinary Board (violation of legality), while functions of the Judicial Jury and the Disciplinary Board are partially overlapping. Such grounds for dismissal as violation of workplace discipline seem to be unjustified.<sup>117</sup> The requirements for the judge are stated vaguely (for example, the wording “doubts in honesty, fairness, objectiveness and impartiality” of a judge may cover many situations, likewise violation of the requirement to adhere to the judge’s oath). Such terms as “professional unfitness”, “low rates in delivering justice”, and “violation of legality” are also quite vague. It is not allowed to file an appeal against decisions of the Judicial Jury and disciplinary boards, which contradicts the human right for a judicial remedy. Moreover, the respective procedures are not specified in the law but are regulated in subordinated legal acts. There is no separation of functions of initiating a disciplinary proceeding and taking decisions in the disciplinary boards, which violates the principles of a fair trial (“nobody can be a judge in his own case”).<sup>118</sup> Generally, there is no legal certainty in provisions on the grounds for dismissal of judges from office and their prosecution,<sup>119</sup> which violates the rule of law principle and seriously undermines independence of judges. Besides, in practice the term “low rates” of work mean any cases of quashing of court decisions by the higher court instances regardless of the ground for quashing. This also contravenes international standards.<sup>120</sup>

Note also the procedures for the establishment of the Judicial Jury that rules on matters of disqualification of judges on professional grounds, or the dismissal of judges for disciplinary transgressions or other misconduct. Members of the Judicial Jury are elected by secret ballot at the plenary session of the Supreme Court, but nominated only by the Chairman of the Supreme Court. Besides, disciplinary actions against chairmen of judicial panels, courts of the Supreme Court, chairmen of regional courts and chairmen of their judicial panels may also be brought only by recommendation of the Chairman of the Supreme Court (or recommendation of the Chairman of the Supreme Court or chairman of the regional court for all other judges). Hence, the decision on the judge’s liability is ruled by the Judicial Jury on the recommendation of a public official who plays the decisive role in the establishment of the Judicial Jury itself. This is hardly in line with the fair trial principles.

There have been no changes to the law in that respect. Kazakhstan is not compliant with this part of the recommendation.

Kazakhstan has provided the following statistics on disciplinary actions against judges.

**Table 22.** Number of disciplinary actions against judges, with the type of offence, 2011-2013

Year	Number of disciplinary	Grounds for the disciplinary action (types of transgression)
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<sup>117</sup> See Joint Opinion of the Venice Commission and OSCE / ODIHR, paragraph 62.

<sup>118</sup> Ibid, paragraph 66.

<sup>119</sup> In this connection one can refer to the resolution of the Constitutional Council of the Republic of Kazakhstan, which noted that “the law should comply with requirements for legal accuracy and predictability of consequences, i.e. its norms should be formulated with the sufficient level of precision and be based on clear criteria, excluding possibility of arbitrary interpretation of the provisions of law” (Normative Resolutions of 27 February 2008 No. 2 and of 11 February 2009 No. 1).

<sup>120</sup> See, for example, Recommendation of the Committee of Ministers of the Council of Europe No. CM/Rec(2010)12 of 17 November 2010 (paragraph 70): “Judges should not be personally accountable where their decision is overruled or modified on appeal.”

	actions against judges (number of sanctions)	Violation of legality during trial	Discrediting action contrary to judicial ethics	Gross violation of the workplace discipline	Improper performance of official duties by the chairman of court or chairman of judicial panel
2011	120 (129)	99	13	7	10
2012	44	26	11	4	3
2013	56 (57)	29	12	3	13

**Table 23.** Number of disciplinary actions with the type of sanction, 2011-2013

Year	Number of disciplinary actions against judges (number of sanctions)	Types of sanctions			
		Rebuke	Reprimand	Dismissal from the position of chairman of court or chairman of the judicial panel, retaining the position of the judge	Dismissal from the position of the judge
2011	120 (129)	71	45	1	12
2012	44	9	25	-	10
2013	56 (57)	18	25	3	11

***“to specify in law the salary rates for judges and an exhaustive list of all possible wage increments, eventually cancelling bonuses for judges.”***

Pursuant to the Decree of the President of the Republic of Kazakhstan of 17 January 2004, No 1284, “On the uniform system of remuneration of employees of the agencies of the Republic of Kazakhstan supported by the government budget and the budget of the National Bank of the Republic of Kazakhstan, the payroll of the judges is composed of the position salary and health allowances amounting to two position salaries a year.

There have been no changes to the law in that respect. Kazakhstan is not compliant with this part of the recommendation.

Kazakhstan has provided the following information about the remuneration of judges.

**Table 24.** Table of comparison of remuneration of judges and that of civil servants (in tenge<sup>121</sup>)

Position	Position salary (average)	Position salary of an employee of the Department for court administration (average)	Difference
Judge of a regional or equivalent court	351 707	188 346	163 361
Judge of a district or equivalent courts	264 581	188 346	76235

**Table 25.** Table of comparison of remuneration of judges and the average wage in Kazakhstan (in tenge)

Position	Position salary (average)	Average wage (as of January 2014 according to the Statistics Agency)	Difference
Judge of a regional or equivalent court	351 707	104 654	247 053
Judge of a district or equivalent	264 581	104 654	159 927

<sup>121</sup> KZT 100 = ca Euro 0.4 or USD 0.5.

courts			
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***“To limit to the maximum possibilities of subjective influence on the procedure for selecting judges, to ensure publication of detailed information at all stages of selection (list of candidates, results of tests and other components of qualifications exam, results of competition, etc.) and to ensure access of the public and representatives of the mass media to the respective meetings.”***

As it follows from the responses of Kazakhstan authorities, amendments were not considered necessary. They maintain that the judiciary system currently benefits from established human resources policies based on a professional approach to promotions. This is done jointly with the Supreme Judicial Council which has authority over the appointment and dismissal of judges. The Supreme Judicial Council is set up by the President of the Republic of Kazakhstan to exercise constitutional powers relating to the establishment of courts, and safeguard the independence and immunity of judges. The procedure for the selection of judges is regulated by the Constitution Law on the Judiciary System and Status of Judges of the Republic of Kazakhstan. Under paragraph 2 of Article 30 of the above law, the Supreme Judicial Council selects candidates in a competitive procedure to nominate them to the President of the Republic of Kazakhstan for appointment.

On the issue of transparency it was reported that, to promote openness and transparency, all stages of selection of candidate judges are subject to publication. The Supreme Court’s web-site publishes information about those who have successfully passed the qualifications tests as well as those who are running for the vacant positions of judges of local and other courts. The official republican periodic press and the Supreme Court’s web-site publish details of the candidates nominated for the positions of chairman of local court and chairmen of local court panels; chairmen of the Supreme Court panels, and also publish announcements of vacancies for judges of local and other courts.<sup>122</sup> Local official press and web-resources of regional courts publish details of: candidates to the position of a judge at study placement with courts; and candidates to the position of a judge who entered the competitive selection for the vacancy of a judge. During the onsite visit representatives of Kazakhstan provided examples of such announcements about the competitive selection for the vacancy of a judge.

Therefore, Kazakhstan has enabled publication of information about all stages of judges’ selection, having fulfilled this part of the recommendation.

Other parts of this recommendation have not been fulfilled.

Apart from issues covered in the Report for the Second Round of Monitoring, there are some more issues in the judiciary selection procedure:

- 1) Article 12 of the SJC Law stipulates that candidates for the position of a judge become eligible for qualifications tests after a special vetting procedure. The procedure itself, its extent and the way its results affect the final outcome, are not regulated in law. The candidate must be allowed access to the vetting file as well as the right to appeal its results.<sup>123</sup>
- 2) The negative decision must be reasoned, and the candidate must be allowed to appeal it to court (minimum for procedural grounds).<sup>124</sup>

***“To consider introducing mandatory training at the Institute of Justice to be able to qualify for the judicial selection and to consider re-subordination of the Institute of Justice to the body of the judiciary.”***

According to the information provided by Kazakhstan, graduates of the Institute of Justice of the Academy of Public Administration under the auspices of the President of the Republic of Kazakhstan have a preference in filling vacancies in the judiciary. Pursuant to Article 16 of the Law on the Supreme Judicial Council of the Republic of Kazakhstan, the selection of candidates to vacant positions of judges of district court the first choice is for candidates with a Master’s degree. However, while enjoying this preference in the selection for vacancies, graduates of a Master’s programmes must also show the best training among other contenders. To this end, the Supreme Court

<sup>122</sup> See, e.g., <http://sud.gov.kz/rus/content/obyavlenie-konkursa-na-zanyatie-vakantnyh-dolzhnostey-sudey-mestnyh-i-drugih-sudov>.

<sup>123</sup> Independence of the judiciary system in Kazakhstan. Recommendations of the UN Human Rights Committee and ways to implement them. R. Kuybida, 2013, <http://pravo.zakon.kz/4610316-nezavisimost-sudebnoj-sistemy-v.html>.

<sup>124</sup> Ibid

together with the Public Administration Academy are working to revise Study Plans, Master's curricular, and increase the term of study placement at courts for the graduate students.

Compared to earlier years when every year judge appointments were given to 20-25 graduates of the Master's programme on average, in more recent years the numbers have been growing. The presidential decree of 18.02.2014, No 754, alone has appointed 21 graduates of the Institute of Justice.

There have been no legislative amendments to judge appointment procedures, in particular, requisite training at the institute of Justice.

Kazakhstan reported that the issue of re-subordination of the Institute of Justice was considered by the Head of State on 1 August 2012 and refused. However, there were no more details about this consideration and reasons for refusal.

This part of the recommendation has not been fulfilled.

Importantly, initial specialist training of future judges should not be equated with the Master's degree from an educational establishment. The Master's programmes are meant to train academics or professors, whereas the aim of essential special training of judges is acquisition of specialized knowledge, skills and competences they will need in their profession. Therefore, the initial specialist training is not part of the education system and must be offered to those candidates who already have a university degree in law. This specialist training should be offered subject to transparent and competitive procedures. Such specialist training must be outside the accreditation system of the Ministry of Education.<sup>125</sup>

***“To introduce mandatory declarations (without a link to tax obligations) of assets, income and, possibly, expenses of judges and their family members, with subsequent publication.”***

Kazakhstan noted that paragraph 2 of Article 185 of the RK Code “On Taxes and Other Mandatory Charges to the Budget” (Tax Code) stipulates that members of Parliament, *judges*, as well as individuals who are obliged to submit declarations under the Constitutional Law of the Republic of Kazakhstan “On Elections in the Republic of Kazakhstan”, Criminal procedures Code of the Republic of Kazakhstan and the Anti-Corruption Law of the Republic of Kazakhstan, shall declare their income and assets, which are subject to taxation, both inside and outside Kazakhstan.

However, there are plans to change the system of assets and income declaration by civil servants, including judges, as part of the transition to universal declaration of assets and income by individuals. The draft law on universal declaration by individuals, including judges, prescribes that at the point of entry declarations of assets and tax obligations are made to record the data on assets and savings. Subsequently judges will make declarations on assets and income reflecting income for the reported period as well as information about the sale and/or acquisition of assets and rights and/or transactions requiring statutory or other registration.

Additionally, the draft law on universal asset declaring proposes amendments to the Anti-Corruption Law of the Republic of Kazakhstan providing that persons authorized to perform public functions, including judges, if they acquired, in the course of the reported period, any real property, transport vehicles or trailers subject to state registration, or shares in the capital of a legal entity, securities need to indicate in their assets declarations sources of the funds used to purchase the above property (own means, loans, and/or grants), as well as about overall amount of income, expenses and their sources when acquiring such property. The above information is to be published by the authorised public authority, where the person works, at its Internet-resource.

Also the draft law on declarations proposes amendments to the Anti-Corruption Law of the Republic of Kazakhstan that require publication of information by political civil servants, Corps “A” administrative civil servants, members of Parliament, judges, and also by their spouses – about real property, transport vehicles, securities, interests and income. Significantly, declaration of property shall be published by the individual himself on the basis of the assets and income declaration, while information about the income received is published by the authorized agency on the e-government portal based on the individual's assets and income declaration.

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<sup>125</sup> Ibid

It was pointed out in the Report for the Second Round of Monitoring that, even if this declaration obligation before tax authorities under paragraph 2 of Article 9 of the Anti-corruption law applies to judges, still, as noted elsewhere in the report, the existing general declaration regime is not effective.

This part of the recommendation is not complied with.

### Other issues

**Statistics for appointment, rotation and dismissal of judges.** In 2013, 335 received appointments, of which 113 were appointments to positions of chairmen of courts and chairmen of judicial panels –. In 2012, there were 341/151 appointments, and in 2011 – 155/88. In 2013 126 representative of the judiciary were dismissed from their offices, compared to 124 in 2012 and 87 in 2011.

Grounds for dismissal were:

- retirement: 49 in 2013, 46 in 2012 and 26 in 2011;
- election to another office: 3 in 2013, 3 in 2012 and 2 in 2011;
- change of office: 17 in 2013, 8 in 2012 and 18 in 2011;
- voluntary severance: 28 in 2013, 29 in 2012 and 15 in 2011;
- non-compliance with requirements for judges, including by resolution of the Judicial Jury: 12 in 2013, 16 in 2012 and 14 in 2011;
- death: 4 in 2014, 9 in 2012 and 6 in 2011;
- pensionable age retirement: 4 in 2013, 0 in 2012-2011.

Additionally, demotion from the position of the chairman to judge: 9 in 2013, 10 in 2012 and 6 in 2011.

The Report for the Second Round of Monitoring criticized the reduction of the maximum number of judges and their subsequent dismissal in the late 2010 in Kazakhstan. These measures were taken to implement the President's Decree of September 2010 "On the Measures for Optimization of the Number of Personnel in the Bodies Financed at the Expense of the State Budget...", which envisaged a universal 15% reduction in the staff numbers at state authorities, including the maximum number of judges (a 292 reduction among district courts judges, and 86 among judges from the regional courts). The report went on to say that such dismissal of judges, even when performed within the general redundancy of the public servants, appears to be problematic both from the standpoint of international standards and the laws of Kazakhstan, since the Constitutional Law on the Judiciary and Status of Judges (Article 34) does not envisage such a ground for dismissal of a judge from office, but provides that "powers of judges can be terminated only on the grounds and in accordance with procedures envisaged by the present Constitutional Law" (Article 24). Judges should enjoy a special status and guarantees of immunity that are different from other public servants. It is essential to disallow dismissal of judges in that way. Redundancies among judges, if there is a need for that and if the current judicial workload permits, can be done through gradual cancellation of vacant positions, but not through dismissal of existing judges. It transpired during the third round of monitoring that there have been no subsequent redundancies by dismissal, which is a positive development. Additionally, the 2014 presidential decree increased the total number of judges and of court secretaries (by 450 each), which again raises doubts about the 2010 dismissals, and confirms the conclusions drawn in the previous report.

**Allocation of cases.** According to Kazakhstan authorities, the automatic allocation of trial cases has been fully implemented throughout the courts of the country. The ordinance by the Chairman of the Supreme Court of the Republic of Kazakhstan, No 164, of 25 July 2013, approved the Rules for Automatic Allocation of Cases in the Single automated information and analytical system of the judiciary of the Republic of Kazakhstan (SAIS henceforth) (the Rules).

Automated allocation takes into account the individual situation of each court instance, separate for cases and materials. All cases to be tried in courts of the country, following registration and opening of an electronic filing record (the file) by staff workers, will be allocated automatically. The automatic allocation is performed by an operator, assigned in local courts by the chairman.

The staff responsible for document flow at the court register, open up the file and input data for pleas and claims received at the Supreme Court, which will be heard by way of judiciary review. The technical work of allocation in the Supreme Court is also handled by an operator, an executive member of the structural unit which supports the work of the supervisory judicial panel. The operator is given the necessary authorisation to access the allocation functions. Before allocation, data details on record are verified. Upon verification, the allocation is done in the

automated regime, and a printout is generated to be signed by the chairman of the court (panel) and attached to the trial documents.

At the start of each calendar year, operators are assigned; also determined is the upper threshold for the number of cases and materials (this value is adjusted for each form of proceedings separately) to be allocated to judges on a daily basis, prior to their leave and, and for those who return from business trips, holidays or sick leave; cases may be allocated depending on a judge's specialty subjects or the complexity of the cases. The threshold is set as a relative permanent value, not subject to random change on a daily basis, thus allowing for a transparent and fair treatment of work load of judges of the court (panel). The automated allocation is based on the following criteria: cumulative number of cases and materials heard by the judge since the start of the year; category of cases and materials (judge's specialisation); the language of proceeding; and the complexity of the case. Judges are aware of the mechanism behind the allocation in each individual court or panel, excluding any doubt as to the fairness in the distribution of the work load.

The file maintains the entire trail of the automatic allocation. The record of allocation is filed with the trial case and is available to the parties.

To ensure efficiency and fair allocation of cases in the SAIS, the head of the Department for courts administration of the Supreme Court of the Republic of Kazakhstan (the Supreme Court's secretariat), No 72 of 10 February 2014, approved the guidelines for the operator of automated allocation of cases in the SAIS (the Guidelines). The Guidelines detail the stepwise algorithm for the computer operator, from launching the system and setting up the database describing the court's structure. The Guidelines describe and list the operator's sequence of actions during the allocation of cases and materials.

**Publication of court judgments.** It is reported that for the purpose of timely sharing of information among the participants in the proceedings about the movement of the case and rulings passed, a Manual of cases was developed as part of the SAIS (the Manual). The Manual explains how to use the electronic information resource, and it has an interface where one can choose the language of inquiry. The electronic manual shows details of cases that do not have state or commercial secrets or any other secrets protected by law.

There is public access to judicial acts heard in an open trial and the minutes of court sessions. Information on court cases published in public domain is generated from the SAIS database. Court rulings made during the hearings in the first, appeal, cassation or review instances; rulings by the judges of the Supreme Court in preliminary hearing of pleas and motions entered by way of review are made available on the official web-sites of the courts. Texts of judicial acts (including interim rulings) and the minutes of court sessions are published after those have been signed with the electronic digital signature (verdicts are published after they have entered into force).

Publication of court judgments and rulings in the internet is a positive step, to be ensured in future.

### **Independence of courts in practice**

On 21 July 2011, the UN Human Rights Committee, having considered the Initial report submitted by Kazakhstan on the implementation of the International Covenant on Civil and Political Rights, presented the following remarks on the efficiency of the judiciary system in Kazakhstan:

*"21. The Committee expresses concern at reports that corruption is widespread in the judiciary. The Committee also expresses its concern at the lack of an independent judiciary in the State party and at the conditions for the appointment and dismissal of judges, which do not guarantee the proper separation of powers between the executive and the judiciary, and also expresses concern regarding the State party's response on the President's role as a "Co-ordinator" of all the three branches of government. The Committee is particularly concerned at reports that the Office of the Prosecutor/Procurator General has a dominating role in the judicial system such that it has power to stay the execution of judgements handed down by courts (art. 2 and 14).*

*The State party should take steps to safeguard in law and practice the independence of the judiciary and its role as the sole administrator of justice and to guarantee the competence, independence and tenure of judges. The State party should, in particular, take measures to eradicate all forms of interference with the judiciary, and ensure prompt, thorough, independent and impartial investigations into all allegations of interference, including by way of corruption; and prosecute and punish perpetrators, including judges who may be complicit. The State party should*

review the powers of the Office of the Prosecutor/Procurator General to ensure that the office does not interfere with the independence of the judiciary.

22. The Committee expresses concern at reports that the prosecution has undue influence on the judiciary affecting the outcome of judicial decisions such that acquittals in criminal cases are as low as 1%. The Committee is also concerned at increased reports that judges admit into evidence testimony obtained under torture (art. 2 and 14).

The State party should conduct a study to establish the causes of the low acquittals in criminal cases in order to ensure that the rights of accused persons under the Covenant are guaranteed and protected throughout the trial process. Furthermore, the State party should ensure that measures are put in place to guarantee the exclusion by the judiciary of evidence obtained under torture.<sup>126</sup>

The powers and actual influence by the prosecution authorities on the judiciary are revealed in the case of judge Zhumasheva. In October 2012, the International Commission of Jurists (ICJ) issued a statement expressing their concern over the disciplinary action and threats of criminal prosecution against Judge Aliya Zhumasheva of the Kachirsk District Court of Pavlodar Region in Kazakhstan. The Judge was subjected to disciplinary sanction after refusing to abide by wrongful demands from senior colleagues as well as the Prosecutor's Office to issue convictions in two criminal cases. The ICJ was concerned that the disciplinary process may have been misused to sanction Judge Zhumasheva for her independent decision to acquit defendants, against the wishes of the Prosecutor's Office and demands of her court president.

*"Such misuse of the disciplinary process severely undermines the independence of the judiciary and the ability of judges to administer fair justice, in contravention of international standards. The UN Basic Principles on the Independence of the Judiciary underscore that "it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary". In addition, "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper interferences, inducements, pressure, threats or interferences, direct or indirect, from any quarter or for any reason".*

*"The ICJ recalls that the United Nations Special Rapporteur on the independence of judges and lawyers, in his report following a mission to Kazakhstan in 2004 observed that the low acquittal rate in Kazakhstan, of about one per cent, can be explained by the fear of judges over their security of tenure. The case of Judge Aliya Zhumasheva demonstrates how this fear is fostered to achieve the low percentage of acquittals, which may amount to a denial of the presumption of innocence in the criminal process."<sup>127</sup>*

However, as reported by the Kazakhstan authorities, according to Judicial Jury decision of 25 April 2013 Judge Zhumasheva was recommended for dismissal for the reason of violation of terms for compiling judicial acts in 8 criminal cases, as was established based on complaints of the convicted persons and victims.

The problem of excessive influence of the prosecution bodies on courts, in the opinion of the monitoring group, is highlighted also by the statistics of acquittals offered by Kazakhstan (see Table). Although the percentage of acquittals has slightly increased in 2013 against the 2012 figure, it is still too little.

**Table 26.** Statistics of acquittals in 2012-2103

Period	Number of convictions	Number of acquittals	%
2012	23 322	400	1.7
2013	27 475	507	1.8

Kazakhstan authorities note that a great number of cases are terminated on exonerative grounds during pre-trial investigation stage (see statistics in the Annex).

***Kazakhstan is not compliant with Recommendation 3.8., which remains valid.***

<sup>126</sup> Concluding observations, CCPR/C/KAZ/CO/1, [www.ccprcentre.org/doc/2012/05/G1144890.pdf](http://www.ccprcentre.org/doc/2012/05/G1144890.pdf).

<sup>127</sup> Original: <http://www.icj.org/kazakhstan-disciplinary-action-against-judge-zhumasheva-is-an-attack-on-judicial-independence>. Russian translation: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/10/PS-Judge-Zhumasheva-RUS.pdf>



### 3.9. Private sector

#### *Recommendation 3.9.*

- **To consider legislative and other measures for establishing proper systems of reporting, information disclosure, internal and external audit, financial control and ensuring general transparency of national management holdings, national holdings, national development institutes, national holding companies and other similar legal entities.**
- **To conduct a monitoring of activities of expert councils at state authorities and to engage representatives of business organizations in dialogue on anti-corruption mechanisms in the public and private sectors. To set the minimal period of consultations to be held with the business community, and the deadline for publication of draft legal acts before their adoption.**
- **To facilitate, in close co-operation with business unions and civil society organisations, promotion and enforcement of internal corporate compliance programmes having taken due account of the best international practice and standards, in particular, Annex 2 to the OECD Council Recommendation of 26 November 2009.**

#### **Systems of reporting, internal control and transparency of national companies**

Kazakhstan has adopted a number of legislative and practical steps aimed at the implementation of appropriate systems for reporting, information disclosure, internal audit and transparency of the joint-stock company Samruk Kazyna. The Law of 1 February 2012, No 550-IV, "On the national welfare fund"<sup>128</sup> stipulates that one of the Fund's goals is to have in place principles of corporate governance at the Fund (Fund, national development institutions, national companies and their subsidiaries). The Law prescribes such principles as transparency and accountability of the Fund and its entities, and the governance principles across the Fund group, including efficiency of corporate governance, disclosure of information and transparency. In addition, the law states that the internal audit services shall assess the quality of internal controls, risk management and corporate governance. In line with the Fund's Charter, approved by the Resolution of the Government on 8 November 2012, The Fund shall publish in the mass media annual consolidated accounts and the auditor reports and report about its activities on its web-site ([www.sk.kz](http://www.sk.kz)).

The Fund has been working to implement its corporate governance system since 2008. During 2008-2014, the Fund has been publishing quarterly and annual financial statements, development plans and reports on their execution. The Fund has its Corporate Governance Code and a Code of Business Ethics. Since 2009 KPMG published 7 reports on corporate governance at the Fund companies, and in 2011 that of the Fund itself.<sup>129</sup> Since 2008, there is a functioning Accounting Committee.

The Joint-Stock Company Law specified that every public company must run a web-site, and stipulates what information must be published there. Companies must have corporate governance codes, and their boards must monitor the efficiency of corporate governance practice in the company.

In 2011 the country also adopted a Law on State Property, which provides, among other things, for the national management holding, national holding, national company to implement 10 year strategies (the document stating the mission, vision, strategic goals and objectives), and for state-owned enterprises or companies and partnerships where the State is a controlling shareholder, including the national management holding, national holding and national company to have in place 5-year development plans.

The State Property Law, regrettably, fails to offer detailed provisions on the transparency of assets of state-owned companies or their activities, or requirements for their proper governance and internal controls. But the Law says that for the purpose of coordinating the national management holdings or national holding groups, the RK Government may set up specialized councils on corporate governance. The terms of reference of such specialized

<sup>128</sup> National Welfare Fund is the largest holding group in Kazakhstan managing state assets and investments.

<sup>129</sup> [www.sk.kz/page/diagnostika-korporativnogo-upravlenija](http://www.sk.kz/page/diagnostika-korporativnogo-upravlenija)

corporate governance councils were approved by the Government of the Republic of Kazakhstan in 2007 (subject to an older version of the Law); however, it does not detail the composition of such councils or provide information about their functioning.

Under the Law, the Procedures for the assessment of corporate governance state-controlled companies were approved with the ordinance of the Minister for Economic Development and Trade. Kazakhstan reported that such assessment has been conducted in practice. For example, in 2012 the Ministry carried out assessment of 6 joint stock companies with state shares (JSC “KazAgroInnovation”, JSC “National Agency for Export and Investment KAZNEX INVEST”, JSC “National Company Kazakhstan Garysh Sapary”, JSC “Kazakhstan Centre for Public-Private Partnership”, JSC “Social Entrepreneurship Corporation Tobol”, JSC “National Scientific Technological Holding Parasat”). Among main problems which were detected during assessment was lack of documents concerning risk management system; in some companies there were no risk management committees at the boards of directors.

Kazakhstan also informed that in January 2013 the Government decided to improve legislation on corporate governance and develop new Rules for assessment of corporate governance in the state controlled JSCs. However, there is no information whether such measures have been implemented.

Also, Kazakhstan has a Depository of Financial Statements which is an electronic database of financial accounts (annual financial statement and auditor reports), submitted annually by public interest organisations, with open access for users. The Depository’s web-site is to be found at [www.dfo.kz](http://www.dfo.kz). As was mentioned in the Report for the Second Round of Monitoring, establishment of the Depository with an open access on the internet is a positive example of financial disclosure. As of mid-2014, the Depository was receiving data from more than 3,800 public interest entities which, under the Law on Accounting and Financial Reporting, include financial institutions, joint-stock companies (except non-profit ones), extracting organisations (except the ones which mine widespread mineral deposits) and entities with government equity, as well as state-owned enterprises founded based on the right of economic jurisdiction. In particular, national management holdings, national holdings and national companies submit on time and according to established procedure to the depository their financial reports, audit reports and corporate events for publication on the Depository’s web-site.

Significantly, the draft Anti-Corruption Strategy until 2025 (the Financial Police Agency’s draft) notes, among other relevant issues, the use of offshore vehicles by domestic companies, and a lack of transparency in the ownership structure of Kazakhstan’s strategic companies. Lack of transparency in business, as well as in the selection and promotion of officers, at national companies has also been highlighted by civil society.

In addition, during the onsite visit, the monitoring team was informed about the assessment of transparency at state-owned companies run by the Ministry for Economic Development and Trade (later – Ministry of National Economy). However, there has been no detailed information about the results of such assessment.

This part of the recommendation has been largely fulfilled.

### **Monitoring of expert councils**

During the onsite visit Kazakhstan authorities pointed out that the activity of expert councils advising state agencies has been subject to annual monitoring by the Ministry of Regional development, and that the monitoring reports were drawn up in 2011, 2012 and 2013. Unfortunately, these reports were not published and are not available for the general public. The monitoring team was provided with data on the monitoring of normative legal acts by expert councils in 2013. From the table submitted it follows that expert councils at 23 ministries and state agencies screened a total of 532 draft acts. It also follows from the table that for many normative legal acts, comments and suggestions were offered. At the same time, the monitoring team learned that only an insignificant number of suggestions coming from business are taken into account during such consultations.

### **Promotion of corporate compliance rules in line with the best international practice and standards**

Overall, since the second round of monitoring, Kazakhstan authorities have failed to take specific steps aimed at compliance with this part of the recommendation (apart, to some extent, measures regarding the National Welfare Fund, as above, and requirements of the Joint-Stock Law).

In this context, it is recommended promoting, jointly with business associations, among Kazakhstan's companies, and in particular among the national and largest companies, Appendix 2 to the OECD Council recommendation of 26 November 2009 for the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance. This document offers a useful guide, based on the best practices of OECD countries in the implementation of internal controls and measures to prevent corruption in business. It would be also be useful to review in a more systematic way issues of corporate governance, based, among other things, on the above guidance, in the Business Road Map 2020, e.g., through guidelines and entrepreneurs' training.

In 2013, Kazakhstan was working on a draft national concept for corporate social responsibility. In May-June 2014, the draft concept was presented by the National Chamber of Entrepreneurs. While it is a positive development, it is essential that, in line with best practices, it also reflects on issues of corruption prevention and business integrity.<sup>130</sup>

As reported, on 21 July 2013 the Government approved a Comprehensive plan of actions to implement corporate governance standards of the OECD countries and to further improve investment business climate within the Customs Union of Belarus, Kazakhstan and Russia, which provides for reform of the legislation of RK concerning corporate governance and development of new rules for assessment of corporate governance in stat controlled JSCs. As a result Kazakhstan intends to implement OECD corporate governance standards.

In 2013, the Sange Centre conducted a study of corporate social responsibility in Kazakhstan. The study found that while businesses in Kazakhstan are implementing corporate social responsibility programmes, it mostly concerns larger companies in oil and gas or mining, and at branches of foreign businesses. One of the conclusions in the study was that the State should encourage business to promote corporate social responsibility.<sup>131</sup>

#### **Other information**

There are ongoing efforts in Kazakhstan to draft an Anti-Corruption Charter for Business. The monitoring team examined the document drafted by the Financial Police Agency and sent for feedback to the National Chamber of Entrepreneurs of Kazakhstan. It states a number of principles for a corruption-free business; business entities will be invited to join the Charter. The expectations are that the Charter will be adopted under the auspices of the National Chamber of Entrepreneurs. It is a good initiative, which must be pursued in close collaboration with business associations: the Charter should become a document which is accepted and implemented by the business community.

On 19 March 2014, the Financial Police Agency held a meeting of the Public Council for the fight against corruption and the shadow economy of the Agency, which discussed protection of business against interventions in their legitimate activities and anti-corruption in private sector, debating the Anti-Corruption Charter for Business, among other things.

As already mentioned above, Kazakhstan has been implementing measures aimed at protecting entrepreneurs, in particular small and medium businesses. The number of inspections of businesses has decreased in the past two years. Facts of interference with business by controlling agencies have been addressed. On 27 January 2014 the Chairman of the Financial Police Agency approved an Action Plan for the protection of small and medium businesses from undue interference by state agencies' officials. In February 2014, a Memorandum on cooperation was signed between the Agency and the National Chamber of Entrepreneurs aiming at protecting the rights of entrepreneurs.

Since the Second Round of monitoring in Kazakhstan, the National Chamber of Entrepreneurs has been set up. The Chamber was established pursuant to the Law "On the national Chamber of Entrepreneurs in the Republic of Kazakhstan" in 2013, and all businesses must sign up to it (and pay membership fees). Hence at this moment in time, the Chamber is the key partner for the State, representing the business community. It is welcome that, according to Kazakhstan authorities, the Chamber takes part in the drafting of the new anti-corruption strategy. It is important to continue this cooperation and extend it, among others, to the implementation of the future strategy with regard to business integrity. It is also possible to promote the work done by the Chamber in corporate governance and anti-corruption training among its members.

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<sup>130</sup> See, e.g., [www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/](http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/)

<sup>131</sup> "Development of corporate social responsibility in Kazakhstan: status, issues and prospects", Sandj Centre, 17 July 2013 (presentation).

It is essential that Kazakhstan should continue the ongoing dialogue with business organisations, including the Chamber of Entrepreneurs, but also with other business associations on all issues of corruption in Kazakhstan and ante-corruption mechanisms in the public and private sector.

***Kazakhstan is partially compliant with Recommendation 3.9., which remains valid.***

## Summary table

	New recommendation	Previous recommendation	Rating for previous recommendation			
			Fully	Largely	Partially	Not compliant
<b>Pillar I. Anti-Corruption Policy</b>						
Political will and anti-corruption policy	+	1.1.-1.2. Strategy, action plan			+	
Corruption surveys	Previous rec. valid	1.3. Corruption surveys			+	
Public participation	Previous rec. valid	1.4. Public participation			+	
Awareness raising and public participation	Previous rec. valid	1.5. Awareness raising and public participation			+	
Policy and co-ordination institutions	Previous rec. valid	1.6. Co-ordination body and specialised agency				+
<b>Pillar II. Criminalisation of corruption</b>						
Offences and elements of offences	Previous rec. valid	2.1. - 2.2. Offences and elements of offences				+
Definition of public official	Previous rec. valid	2.3. Definition of public official			+	
Sanctions, confiscation	+					
Immunities, statute of limitations	Previous rec. valid	2.6. Immunities, statute of limitations			+	
International cooperation, MLA	Previous rec. valid	2.7. MLA			+	
Application, procedure, specialised law-enforcement bodies	+					
<b>Pillar III. Prevention of corruption</b>						
Integrity of civil service	Previous rec. valid	3.2. Integrity of civil service			+	
Promoting transparency and reducing discretion	Previous rec. valid	3.3. Promoting transparency and reducing discretion			+	
Public financial control and audit	Previous rec. valid	3.4. Public financial control and audit			+	
Public procurement	Previous rec. valid	3.5. Public procurement			+	
Access to information	Previous rec. valid	3.6. Access to information			+	
Political corruption	Previous rec. valid	3.7. Party financing				+
Integrity in the judiciary	Previous rec. valid	3.8. Integrity in the judiciary				+
Private sector	Previous rec. valid	3.9. Private sector			+	

## Annex

### Statistics

Statistics on activities of criminal prosecution bodies in 2012-2013 (data of the Committee on Legal Statistics and Special Accounting of the RK Office of the General Prosecutor, <http://service.pravstat.kz/>)

	Number of crimes under prosecution in the reported period		Number of crimes registered in the reported period		Number of crimes completed in the reported period		Number of crimes where criminal cases have been submitted for trial		Number of crimes where criminal charges were dismissed on the rehabilitating grounds		Number of crimes where case was dismissed		of which dismissed for lack of elements or fact of crime (para.1,2 part 1, Article 37 CPC RK)		of which indictments were cancelled by the prosecutor	
	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013
Defamation (Article 129)	10	6	9	6	1		1					4		4	2	7
Insult (Article 130)	18	17	23	17								2		2	1	7
Misappropriation and embezzlement of entrusted property (Article 176)	2751	4158	2479	3757	1141	1525	800	992	341	533	137	403	135	400	21	40
Laundering of money or other assets obtained by illicit means (Article 193)	75	172	57	147	32	121	24	114	8	7	6	7	6	7	3	10
Obtaining illicit remuneration (Article 224)	4	3	2	2	2	2			2	2		1		1		
Corporate raiding (Article 226-1)	2	2	2	2	1		1									
Commercial bribery (Article 231)	4	10	2	7	1	6		6	1		1	1	1	1		
Abuse of office (Article 307)	577	728	581375	644	197	510	178	402	82	108	82	181	16	180	16	40
Abuse of power and official authority (Article 308)	185	207	148	158	66	109	63	99	3	10	54	95	54	95	6	8
Bribe taking (Article 311)	457	396	418	316	348	326	344	324	4	2	12	14	12	14	1	1
Bribe giving (Article 312)	123	205	121	192	81	160	72	148	9	12	7	16	7	16	2	2
Intermediation in bribery (Article 313)	37	57	35	29	16	47	11	39	5	8	1	2	1	2		

Data on corruption offences detected by the Financial Police in the priority areas in 2012-2013 (data of the Financial Police Agency)

Priority Areas	Number of registered offences		Offenders identified		Criminal cases completed in pre-trial process		Criminal cases submitted for trial		Dismissed on rehabilitating grounds		Number of convicted offenders		Amount of compensation for damage in completed prosecution cases (in KZT ,000)		Offences by public officials	
	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013	2012	2013
<b>Public procurement</b>	371	495	200	303	191	359	154	290	9	19	55	102	154283	3177508	49	58
<b>Tax authorities</b>	72	49	49	60	79	66	61	64	0	0	21	25	500	320	5	2
<b>Road police</b>	55	78	37	48	40	47	33	44	1	2	17	23	0	50	3	1
<b>Customs</b>	39	41	24	34	9	39	4	27	3	4	2	23	0	54714	3	3
<b>Land matters</b>	97	92	46	66	84	73	83	66	4	2	23	32	6471286	6338835	2	3

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Other annexes are available in Russian.